

# MARQUETTE LAWYER

SUMMER 2020

## THE WASHINGTON ISSUE

A Groundbreaking National Poll  
About the U.S. Supreme Court

American Ambassadors:  
Comparing Professionals  
to Political Allies

Marquette Lawyers  
Make Their Marks in D.C.

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COVID-19 and Distance Learning

Concerning Trends in  
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50th Anniversary of Marquette's  
Educational Opportunity Program



Washington Lawyers Kristina Sese, L'11, Brandon Casey, L'09, and Annie Owens, L'05



## A Most Instructive Semester

“We are all prisoners of our past,” Justice Antonin Scalia once said to me. “Some of us are just more aware of it than others.” This is unquestionably true, but part of our past is the development of an ability to adapt to changing circumstances. So, upon the arrival of the COVID-19 crisis this past March, my colleagues and I leaned on familiar ways—and we changed. The substantive result at Marquette Law School was impressive.

In my case, some of both the old and the new involved communication. Once we decided that classes were going online (being in spring break gave us important additional days for the transition), I had to communicate with faculty and students. An informative email—a staple of my professional pursuits for the better part of two decades, it has seemed to me—was the obvious route. Events developed quickly, as you will recall from your own experiences, and for almost a week, such emails communicating new information were necessary daily.



Yet emails could not do it all. Imagine the surprise of some of us when I became persuaded to make my first YouTube video. The production value was not high—it was recorded on an iPhone in my basement—but the message to graduating students about the process of bar admission seemed better delivered “in person.” The fact that the Wisconsin Supreme Court and Board of Bar Examiners had given us good news may

have pushed me in that direction. Without suggesting that I got a lot of retweets (wait, that’s a different medium, which I’ve yet to embrace), I made another video the next day, this time for newly admitted students, whom we were unable to welcome as visitors in Eckstein Hall. In the video, I invited each of our admitted students to call me, and a number of them did.

A bit of the old and the new could be seen in my Advanced Civil Procedure class as well. Tom Shriner, my co-teacher, and I proceeded synchronously, as we learned to say. We met with the class every Monday and Wednesday at 9 a.m., as we have for 15 years, though now via Microsoft Teams. It proved to be scarcely more difficult for Tom and me to interrupt one another online than it had been in person. The new? Engendering class discussion, or at any rate questions, became both harder and easier. Students were more reluctant to engage in a back-and-forth or to break into the conversation than they would have been to raise a hand in a classroom.

Yet the “meeting chat” function enabled students to ask questions or exchange relevant information in real time. It was not a model of best practices for distance learning, and I did not match the skill of a number of creative faculty colleagues, but we made it through. Importantly, what we had found sufficient for ourselves the first week did not satisfy us as time went on. We sought to learn and improve.

Perhaps this effort—to strive, to seek, to find, and not to yield, if I may borrow Tennyson’s words—is what changed least of all. I have occasionally written to students about the importance of habits. Here’s what I said in my beginning-of-semester letter to them this past January:

Whether or not it is your intention to do so, this coming semester, in your earliest days in the legal profession, you will be developing habits that, for better or worse, will help form you long after the word “future” has been dropped from the description of you as a “Marquette lawyer.” These habits involve your approach to reading the law, the sorts of conversations that you have with friends and colleagues in the profession, whether you make productive use of small openings in your day and schedule, and the extent to which you have interests—a life—beyond the legal profession. Relying on no perfection of my own but repeating the same advice that I give myself, I encourage you to make them *good* habits.

I then closed the letter with this simple exhortation: “Let’s make this a great semester together.”

We did not meet that standard in all respects. The relocation of classes online, the requirement of new technologies, and the closure of Eckstein Hall were only part of the challenge for some members of our community. Isolation, medical concerns for themselves or their loved ones, and uncertainty about the future weighed on many of our students. At the same time, as I said to them in one of my emails, my colleagues and I could still see their mutual care and concern for one another. “You Are Marquette,” I told them, even in these difficult and distant times. I am so proud and grateful for many things these past several months, but none professionally more than the way our students supported one another. In that sense, it *was* a great semester.

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Throughout this time, we moved forward on schedule with this issue of the *Marquette Lawyer*. We hope that you enjoy it.

Joseph D. Kearney  
*Dean and Professor of Law*

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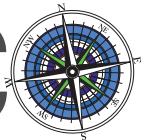
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# CHANGING COURSE



Teamwork and dedication are keys to navigating a tough spring while staying true to Marquette Law School's purpose.

## *Suddenly, so much changed.*

But when it came to sailing the ship of Marquette Law School forward, some important things did not change. You can list the Law School among the academic institutions that turned the unprecedented and deeply concerning time beginning midway through the Spring 2020 semester into an innovative and generally successful time of keeping education going.

Even as the coronavirus pandemic emptied Eckstein Hall, starting on March 16, it simultaneously filled faculty and student lives with a range of ways to continue their courses as best as possible. For many, the notion of distance learning was new. And the array of tools was also largely new—Microsoft Teams, Zoom, TWEN, Marquette's D2L system, YouTube, and others.

What wasn't new was the willingness to join together, find creative solutions, and push forward. If anything, that willingness was enhanced by the unprecedented circumstances.

And the most important thing that did not change: A commitment to teach and learn, in many cases using the same (albeit adjusted) approaches that Marquette Law School is known for—the Socratic method and simulated experiences, for example.

It was harder to move forward with one of Marquette Law School's other strengths—placements of students in workplaces where they gain valuable legal experience and skills. So much of the legal system came to a halt. But even in this, creative solutions were found.

"We started out in complete uncertainty, and everyone kind of banded together to come up with a plan," said Anna Fodor, assistant dean of students. "Even within the first week of our remote learning environment, we started to see classes pick up steam. Students overwhelmingly got on board."

The changeover to distance learning was not without glitches, from major logistical challenges involving how to accomplish so much in such little time to minor learning-curve problems, such as one professor who accidentally erased 45 minutes of a presentation he was recording. And almost everyone missed the in-class climate, the face-to-face interaction between teachers and students and

among students, and the whole atmosphere of being in the extraordinary space of Eckstein Hall.

But the Law School moved forward. "We didn't have a choice," said Nadelle Grossman, professor of law and associate dean for academic affairs. That may have been the case as a formal matter, but Grossman was impressed with the creative and energetic spirit with which faculty and students embraced the challenge. As the point person for curricular matters, Grossman would know.

In a post on the Law School's faculty blog, Professor Lisa A. Mazzie wrote, "Law School professors have found myriad ways to use [Microsoft] Teams: they've been able to share their PowerPoints; demonstrate online researching in legal databases; create discussion rooms; and post notes, questions, and other files. Some professors record their classes and then post them, others go 'live'; still others combine both methods."

"We've learned how to mute and unmute our mics, use the chat bar, and even create spontaneous polls," Mazzie wrote.

"Naturally, there's always one person who's ahead of the curve," Mazzie wrote. "For us, that person is Professor Chad Oldfather." He told Mazzie he used GarageBand, a website, "to put together 'some really basic (and basically bad) theme music for Con Law classes.'"

Mazzie wrote, "It's not just that we've moved to online teaching and learning. It's also that we've had to adjust our teaching or learning from a new environment: home. On the positive side, teaching and learning from home reduces the commute, minimizes the parking hassles, and shortens the time needed to 'get to class.' As Jazmin Ramirez Bailon, a 2L, said, 'I can wake up five minutes before class and be right on time.'

"But for many, teaching and learning from home is the biggest obstacle of all. Matthew Rademacher, 1L, lamented, 'I've come to learn that working from home isn't the dream come true I had always thought it was. [Before,] I had a system worked out to keep me organized and on track, but that went out the window when we switched to online, so it's been more of a struggle to try to get everything done and learn what I think I'm supposed to be learning.'"



Fodor said some students had spouses and children who also were at home, creating competing needs both for computers and related equipment and for a parent's attention.

Mazzie described how Jay McDivitt, a 2L, found himself "sitting here in my jammies, listening to a recorded lecture about Law and Religion through my headphones, cuddled up with my also pajama-clad 11-year-old daughter, who is identifying polygons on her iPad, and my nearly 8-year-old son, who is reading a book about farts—because he's 7."

Professor Jake Carpenter told Mazzie that his home office has been taken over by his three children, so he set up a temporary office in his basement. He said that to find quiet time in his house when he could record lectures, he needed to work between 11 p.m. and 2 a.m., "when the house is finally quiet."

And Fodor and others also made it a priority to help some students deal with issues such as the stress of the pandemic's impact.

Joshua Hernandez, a 1L from Texas, said his classwork was moving forward, although there were frustrations getting used to the many changes. Taking part in pro bono work is important to Hernandez. He was involved with the Milwaukee Justice Center, a decade-old initiative of Marquette Law School, the Milwaukee County Clerk of Court, and the Milwaukee Bar Association to assist low-income people with civil issues. Hernandez wrote, "It was a somber feeling leaving the Milwaukee Justice Center on Friday, March 13, knowing that I most likely would not be back anytime soon.

"That is why I was so eager to jump at the opportunity to provide any pro bono service possible when Dean Schultz [Angela Schultz, the Law School's assistant dean for public service] reached out on Wednesday, March 18." Hernandez joined in assisting attorneys in providing free answers to people's legal questions online. He subsequently joined a program to provide online help to people involved in divorce proceedings.

Mazzie wrote, "Probably the biggest winners of the move to teaching and learning from home are dogs, cats, guinea pigs, birds, fish, and bearded dragons. Their people. Are. Home. More than one student has lovingly complained about their new study buddies."

"Yet, despite the challenges, a spirit of togetherness infuses our online Law School environment," Mazzie wrote. "Across the board, there are examples of all of us helping each other."

Zach Lowe, a 2L, told Mazzie, "The best thing that I have seen . . . is the interaction between the students and the professors. I am not talking about the material we have been learning, but just the general sense of mutual understanding and unity toward the common goal of successfully completing the rest of the Spring 2020 semester."

Many professors have found ways to connect with their students outside of "class." Professor David Strifling invited his students to a "virtual lunch," where they "informally swapped stories about quarantine and met each other's families and pets." Professor Kali Murray changed her weekly kaffeeklatsch sessions with her Property students to weekly Happy Quarantine Half Hours.

Oldfather told Mazzie, "[I]t's striking to me how quickly the extraordinary becomes the new normal, which in turn becomes just normal. Although I've certainly had to rethink how I approach the material I'm teaching in light of the changed medium by which I'm teaching it, it's already started to seem like 'just what I do.'"

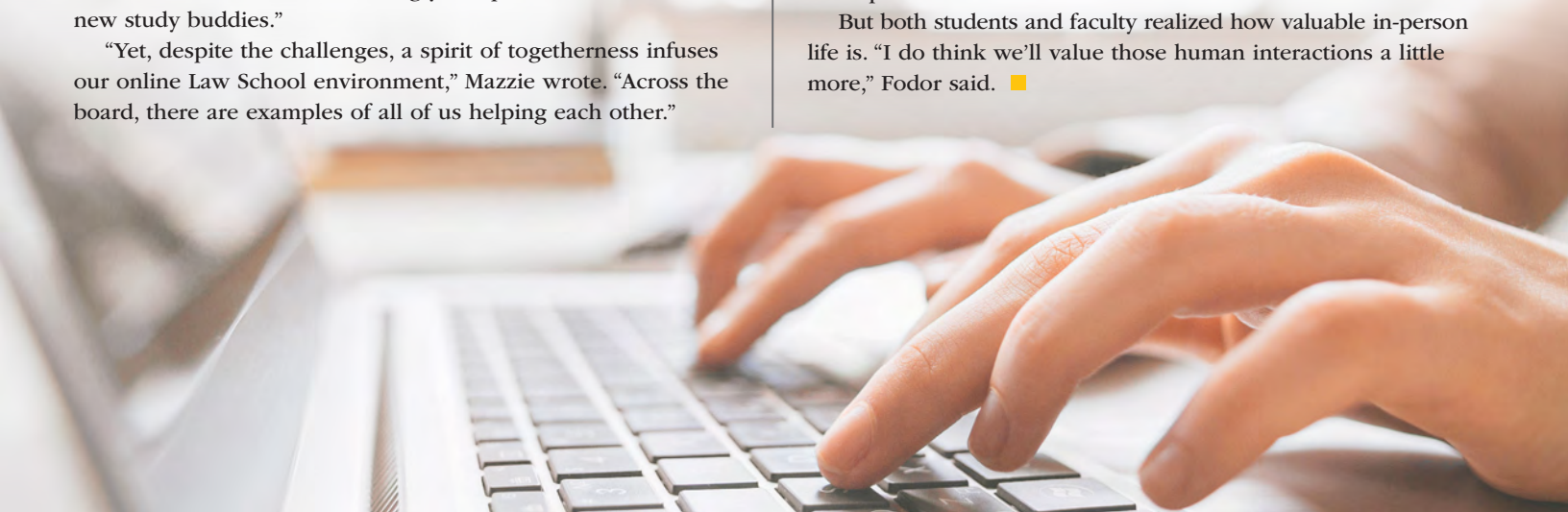
As much as the course of learning moved forward, there was no question that this was not the normal way of doing things. Among the responses to that reality: A temporary grading scale was implemented for the semester in which the traditional A to F scale was replaced. Students were given grades of P for "Pass" as the general grade for receiving academic credit for a course; NP for "No pass" for work that did not receive academic credit (F under the usual scale); and H for "Honors" for those with high performance. None of the grades were to be used in computing overall grade point averages.

Another change of importance ensured that new graduates could continue to be admitted to the Wisconsin bar immediately via the diploma privilege. The Wisconsin Supreme Court approved changes in its practices to waive the traditional day-after-graduation proceedings, in which candidates take the attorney's oath in person at the Supreme Court and then sign the roll of attorneys.

What will be different for the Law School when the stay-at-home regimen is lifted?

Fodor said, "We've learned we can adapt." The Law School showed "the ability to grow, and change, and recognize that we are capable of it."

But both students and faculty realized how valuable in-person life is. "I do think we'll value those human interactions a little more," Fodor said. ■



# A Favorable Court Opinion, *but Not Unanimous*

Marquette Law School Poll finds greater nationwide confidence in the Supreme Court than in the political branches, but substantial interest in structural change.

by Alan J. Borsuk



Illustrations by Robert Neubecker

In the polarized and impassioned proceedings that led to the impeachment of President Donald Trump by the House of Representatives and his acquittal by the Senate, who emerged with some dignity?

Chief Justice John G. Roberts, Jr.—and with him, one might suggest, the Supreme Court and the judiciary.

Consider this a metaphor for the findings of a nationwide Marquette Law School Poll finding that people overall had higher opinions of the Supreme Court than of the presidency or Congress. The poll also found a prevailing assessment of the Court as moderate to somewhat conservative and the justices to be motivated primarily by the law and not politics.

The poll was conducted in September 2019 and thus before and altogether separately from the subsequent impeachment proceedings. But the image of Roberts presiding in a level-headed fashion during the Senate trial, largely not responding to prodding from both the right and the left, symbolized views of the Court. The poll found public opinion to be moderately but generally positive.

Marquette Law School released the poll's results in a conference at Eckstein Hall on October 21, 2019. Charles Franklin, professor of law and public policy and director of the poll, said that while the general public has somewhat limited understanding of the Supreme Court and its workings, public opinion about the Court's work does matter.

"I think the core of the issue, for me, is that the real work of the Court is inaccessible to those not trained in the law," Franklin said in introducing the conference. "Yet a republic rests on the consent and, to some degree, the understanding, rather than blind faith, of the public. And so, odd as it may seem, the public does get to judge the judges. . . . A republic needs citizens who are satisfied with the outcomes."

A total of 1,423 adults were interviewed for the poll, from September 3 to 11, 2019. The margin of error for the results was +/-3.6 percentage points.

#### HIGHLIGHTS OF THE POLL'S FINDINGS:

- While there was broad support for the institution across the political spectrum, political conservatives held more favorable views of the Court than liberals did.
- Majorities supported some decisions or potential decisions involving abortion, gay rights, and bans on semiautomatic rifles that are generally labeled liberal; at the same time, majorities favored decisions or potential decisions of the Court, including a right to possess firearms and allowance of public funds to support students in religious schools, that are generally regarded as conservative.
- Awareness of the individual justices was fairly low. Only 34 percent of those polled offered an opinion on at least five of the nine justices, and 28 percent had no opinion on any of them.
- A majority of the public put a higher priority on decisions that have "a fair outcome" than on decisions that follow the law "even if seemingly unfair" (56 percent to 44 percent).
- A majority (57 percent) said that they support the Court's using "evolving" interpretations of the U.S. Constitution rather than interpretations based solely on the intent of the Constitution's framers.

Speaking at the Eckstein Hall conference, Professor Lawrence Baum of The Ohio State University praised the Marquette Law School Poll concerning the Court. "It is the deepest and broadest analysis of public opinion on the Supreme Court that anyone has done," he said. "And that's of great value simply for our understanding of the Supreme Court and its relationship to the public."

Here is a more-detailed look at the poll results and perspectives that were offered at the Eckstein Hall conference.



## Higher Opinions of the Court Than of Other Branches

A textbook approach might suggest that a president and members of Congress, all elected by voters and serving limited terms, would have a stronger connection with the general public than would Supreme Court justices, who are appointed by presidents and serve unlimited terms.

“If you think of citizen control over the Congress or over the presidency, the direct use of the ballot is surely a greater control than the indirect method of controlling the courts,” Marquette Law School’s Franklin said. “And yet, people don’t see those elected bodies as the ones they have the most confidence in.” Confidence is higher, though not exceptionally so, in the Court.

Overall, the poll found that 37 percent of people nationwide said they had high confidence (a “great deal” or “quite a lot”) in the Supreme Court. Another 43 percent had “some” confidence in the Court, while 20 percent had none or very little.

For the presidency, 28 percent had high confidence, 25 percent some confidence, and 47 percent low confidence. And with Congress, 10 percent had high confidence, 40 percent had some confidence, and 51 percent had low confidence. Franklin quipped at the conference, “I grew up in Alabama, and we were always happy for Mississippi, because it gave us someone to look down on. You might say that of the Court” compared to the Congress or the presidency.

In a separate question, people were asked which of the three branches of government they trust the most. The Supreme Court was the answer of 57 percent, with 22 percent saying Congress and 21 percent the presidency.

Carl Hulse, chief Washington correspondent for *The New York Times*, said at the conference in Milwaukee, “The poor Congress—they always come off so bad in those polls. [That] helped them [the justices] keep a standing above the other branches of government, which has been great. It’s upheld their credibility and legitimacy.” Hulse is author of the recent book, *Confirmation Bias: Inside Washington’s War over the Supreme Court, from Scalia’s Death to Justice Kavanaugh*.

Thomas L. Shriner, Jr., a partner at Foley & Lardner and adjunct professor at Marquette Law School, said, “It’s a good thing to have one of the branches of our government be legitimate, right? Particularly when the other two seem intent on destroying themselves, from the point of view of legitimacy.”

Which of the three branches of government is trusted most?

The Supreme Court

57%

Congress

22%

President

21%

Baum, whose work includes the recent book *The Company They Keep: How Partisan Divisions Came to the Supreme Court* (with Neal Devins), said, “It seems to me, for the most part, that what the public tells us in surveys suggests the Court is not in any particular danger, that there’s a fairly deep reservoir of support for the Court that stands up even during times we might expect the Court to be fragile.”

Not surprisingly, given the current makeup of the Court and recent appointments, the poll found more positive opinions among Republicans and conservatives than among Democrats and liberals. Among those identifying themselves as Republicans, 54 percent had high confidence in the Court. Among Democrats, the figure was only 23 percent. Confidence was higher among those saying they were “very conservative” (52 percent of whom said they had confidence) or “conservative” (46 percent of this group reported confidence) than among those identifying as “very liberal” (31 percent of whom reported confidence) or “liberal” (33 percent of this group).

The large majority of people saw the Court as a relatively middle-of-the-road institution when it comes to ideology. Franklin said that from the positions taken in some political settings, one would think that opinion tends to run toward strong views that the Court is very conservative or (more so in the past) very liberal.

“The public, though, doesn’t see things quite in such stark terms,” Franklin said. He showed results of questions on how conservative or liberal the Court is. “I think the thing that leaps out of this is how few people see an extreme court.” Among respondents, only 6 percent called the Court “extremely conservative” and 3 percent called it “extremely liberal.”

“It’s not simply that people pick the middle of the scale without any further meaning, but it is that whether it’s a centrist Court, as 50 percent see, or a bit conservative, as 33 percent see,” most respondents see a court that stays “in a sort of middle that tilts a bit to the right currently,” said Franklin.

An additional result: Matching results on questions about how much people pay attention to the work of the Court with questions about people’s confidence in the Court found that, in general, the more people know, the more confidence they have. Franklin said, “You might imagine insiders being quite jaundiced, but it’s actually just the opposite. Those who are following and are paying attention generally are pretty confident about what they see, rather than doubtful.”



## Substantial Support for Fundamental Structural Changes

The somewhat positive opinions of the Court do not mean that people are satisfied with the way it operates. Several experts who spoke at the conference were struck by levels of support for fundamental changes in the nature of the Supreme Court, including the setting of term limits for justices and increases in the number of justices. For example, 34 percent of those polled strongly favored setting a fixed term for justices, and another 38 percent favored this idea, which comes to more than two-thirds of those polled.

*The New York Times'* Hulse said, "The majority support for term limits really jumped out at me. That was my big thing when I looked at [the poll]. That tells me that the Court has a problem." He suggested that sentiment for term limits has increased in the light of confirmation fights in recent years and the political wrangling over whether to give Judge Merrick B. Garland a hearing before the Senate after President Barack Obama nominated him for the Court in 2016.

**72%**  
Favored or strongly favored setting a fixed term for justices.

Professor Tara Leigh Grove, the Mills E. Godwin, Jr., Professor of Law and Cabell Research Professor at William and Mary Law School, said, "For me, the most striking number in [the] survey was that 43 percent of Americans now favor or strongly favor packing the United States Supreme Court. I cannot emphasize enough what a sea change that is in the way that people think about Court packing."

Grove, author of a recent essay in the *Harvard Law Review* titled "The Supreme Court's Legitimacy Dilemma," said, "That suggests some not-so-good things for what many of us call the Supreme Court's sociological legitimacy. . . . Without sociological legitimacy, the Supreme Court can't do much of what it does."

Grove cited the way Democratic presidential candidate Al Gore accepted the decision of the Court against him in *Bush v. Gore*, the case that ended legal disputes over who won the 2000 presidential election. "In our society so far, losers view the Supreme Court as a legitimate source of authority, and that's what allowed the Supreme Court to function. But what happens to the Supreme



**“It is the deepest and broadest analysis of public opinion on the Supreme Court that anyone has done.”**

Professor Lawrence Baum

Court’s sociological legitimacy when one group, if this happens, becomes the consistent loser in the most high-profile Supreme Court decisions? I think that is what people are concerned about today. . . .

“Well, one possibility is that if a single political party takes over in 2021, if there would actually be Court packing. . . . [I]t would not stop there, because once that becomes an accessible form of changing Supreme Court decisions, it’s likely that the next political party would also change the number of the Supreme Court justices to go from 9 to 12 to 16 and so on. So that’s not a pretty picture for the Supreme Court. . . . I want to suggest to you that efforts to save the Supreme Court by structurally reforming it are most likely to do the very opposite.”

### **Does Public Opinion Affect Decisions of the Court?**

There was general agreement among speakers at the conference that justices generally do not tailor their opinions to fit public opinion—but that the Court is also not oblivious to public sentiment.

Baum said, “To me, it’s pretty far-fetched to imagine that justices systematically respond to the public in ideological terms. . . .

“Now another possibility gets more attention, and I think deservedly gets more attention. This is that the justices respond selectively to their perceptions of the public—that maybe in the great majority of cases, their perception of public opinion doesn’t matter. But there are those occasional cases in which they perceive that the public is strongly on one side. They feel like, well, maybe we shouldn’t take a position that runs so counter to the views of the public, because, ultimately, doing that kind of thing might erode our legitimacy. . . .

“Maybe [a] justice stands in the ideological center of the Court [and so] would be in particularly good position to determine what the Court does,” Baum continued. “And maybe the justice has a special concern with the public image of the Court, as a chief justice might. So, in fact, we are in a time where it seems to me a little more plausible than it usually is that at least one justice is willing to respond to public opinion.

“And as you’re well aware, there’s at least a widespread perception, correctly or incorrectly, that Chief Justice Roberts has done that twice: first, in his decisive vote to uphold the Affordable Care Act or, more specifically, the individual mandate in 2012 and, second, his decisive vote in the census case on the inclusion of a citizenship question in June 2019.”

### **Putting the Law First**

Robert Barnes, who covers the Court for the *Washington Post*, said at the conference that some people thought the 2000 decision in *Bush v. Gore* “would be seen as the end of the Court as a neutral arbiter. And in fact, it wasn’t that way at all. Their approval went up a little bit after that. And I think that there still is this belief out there that . . . the Court will try to decide things fairly and that the Court’s decisions deserve respect. Now maybe they will decide something that is going to break that, but we haven’t seen it yet.”

Peter D. Keisler, a co-leader of the Supreme Court and appellate practice group at Sidley Austin in Washington, D.C., has extensive experience in the U.S. Department of Justice, including a period as acting attorney general in 2007. He told conference attendees that it was “fascinating that you had a 64 percent to 32 percent breakdown with people believing the Court cares mainly about the law versus mainly about politics.

“I think the question is, where does that come from? Because it’s not intuitive in a country where there’s a whole lot of cynicism about institutions generally and government institutions in particular, and where, if you talk about the Court, most of the public rhetoric is not defending the Court. You have the president speaking often in very political terms about judges and justices. You have a Senate where roughly half of the Senate will pronounce any nominee unqualified and unsuited for the Court.

“So where do people draw this faith from, because it’s not really in the air around them? And I do wonder whether the current chief justice’s focus on the legitimacy of the Court has been a contributor to that.”

Keisler recalled when he was a Supreme Court clerk (to Justice Anthony M. Kennedy), during the chief justiceship of William H. Rehnquist. Rehnquist, Keisler said, “didn’t think about how the public thought about the Court. The current chief justice does, and it’s not just a recent thing. I mean, from his first days on that court, [Roberts] said he wanted the Court to function more like a court—not just an aggregation of nine individuals who vote and reason in a particular way and then you add them up and see who has the majority.

“I don’t believe—it’s not my perception—that he or anyone else [of the justices] has been switching their vote on the outcome of cases in order to



protect the Court's legitimacy. But there are softer ways for a chief justice or other members of the Court to try to be stewards of the public perception of the Court's neutrality."

Judge Diane S. Sykes, L'84, of the United States Court of Appeals for the Seventh Circuit, spoke along similar lines. "I have to first announce disagreement with [any] premise that the Court changes its voting behavior based on concerns about legitimacy," she said. "I don't perceive that that happens very often if at all." She said that, in the poll overall, "those who held the Court in high trust, esteem, and confidence saw it to a greater degree as being mainly a legal institution doing mostly law, and not politics by another means."

Tom Shriner also downplayed the idea that Supreme Court decisions were shaped by public opinion, but he expressed a related concern. "The only kind of perception I've ever had that sometimes federal judges are not as independent as they ought to be doesn't come in the Supreme Court. It comes in the lower courts where some judges are looking for promotion and don't want to annoy the appointing authority." But he said that this was not a big problem overall.

## Opinions of Individual Justices

The poll asked people to rate the individual justices. Poll director Franklin said that, generally, the question is "just a head scratcher for the public."

Two-thirds of people offered no opinion of a majority of members of the Court, and no justice drew opinions from more than 60 percent of those polled.

Justice Stephen Breyer was the least well-known, with 5 percent of people saying they had an unfavorable opinion of him, 11 percent a favorable opinion, and 84 percent having no opinion. Seventy percent or more had no opinion of Justices Elena Kagan, Samuel Alito, and Neil Gorsuch. Even Roberts, the chief justice since 2005, drew no opinion from 66 percent of people, with

**Justices Ruth Bader Ginsburg and Brett Kavanaugh had the highest levels of recognition.**

**Justice Ginsburg**

**41%**

Favorable opinion

**17%**

Unfavorable opinion

**Justice Kavanaugh**

**26%**

Favorable opinion

**32%**

Unfavorable opinion

favorable opinions from 25 percent and unfavorable opinions from 9 percent.

Justices Ruth Bader Ginsburg and Brett Kavanaugh had the highest levels of recognition. For Ginsburg, who has become a high-profile hero to many liberals, especially women, 41 percent said they had a favorable opinion, 17 percent unfavorable, and 41 percent no opinion. For Kavanaugh, 26 percent stated a favorable opinion, 32 percent an unfavorable one, and 42 percent no opinion. Kavanaugh, whose confirmation hearings the previous year created great controversy, was the only justice with higher unfavorable than favorable totals.

Franklin said that even elected officials often have high rates of unfamiliarity, "but with the Court, that's especially strong." He said, "Justice Roberts is, in many ways, the most interesting. If he is the swing justice, he is also sort of the median justice in familiarity and recognition, and party [affiliation of those who were polled] plays almost no role whatsoever in how people perceive him in favorable or unfavorable terms, though ideology does structure that some, with conservatives more favorable."

The prominence of some justices drew concern from several speakers at the conference.

Professor Chad Oldfather of Marquette Law School, who moderated a number of the discussions, said, "It was no surprise to me that Justice Ginsburg was the most widely known, and what that relates to

is a phenomenon that some legal scholars have noticed and remarked, I would say generally unfavorably, upon over the last several years, which is the notion of the celebrity justice. . . . That we have now this world in which Justice Ginsburg has somehow become the Notorious RBG."

Baum said Justice Sonia Sotomayor also has sought celebrity, "but not in a way that really has anything to do with what she does as a justice." He had less concern about her prominence than about Ginsburg's, which he feared might lead to perceptions of her trying to please those who admire her.

Baum added, "I have to confess, my favorite justice

## The low profile of most Supreme Court justices

The Marquette Law School Poll asked people about their awareness and perception of each of the nine justices of the Supreme Court. "Unable to rate" was the majority answer for all but three of them.

JUSTICES	Unfavorable	Unable to rate	Favorable
Breyer	5%	84%	11%
Kagan	7	78	15
Alito	8	78	15
Gorsuch	12	70	18
Roberts	9	66	25
Sotomayor	11	59	30
Thomas	23	49	28
Kavanaugh	32	42	26
Ginsburg	17	41	41

## Views on past decisions

The Marquette Law School Poll gave brief summaries of various past decisions by the Court and asked for the public's opinions; the full summaries can be found online.

	Strongly Oppose	Oppose	Favor	Strongly Favor	Don't Know
Race as factor in admissions	57%	21%	11%	4%	7%
Corporate political spending	53	22	11	3	10
Permitting employers to exclude birth control coverage	44	19	13	14	10
Upholding travel ban for several mostly-Muslim countries	33	16	19	23	10
Not reviewing partisan gerrymanders	26	19	15	11	29
Recognizing right to same-sex marriage	23	13	20	36	9
Recognizing right to own firearm	11	13	27	40	8

is [former] Justice David Souter, who never said anything to anybody and wanted nobody to recognize him.”

Grove said, “I also think Justice Sotomayor has gone out of her way to reach people who don’t normally think about the Supreme Court, including on *Sesame Street*. So my kids enjoy that. And I enjoy saying, ‘Hey, there’s a justice of the Supreme Court. There’s something relevant to what Mommy does for a living.’ And I think that’s powerful.”

Grove said she had mixed emotions about Ginsburg’s celebrity. “It’s hard for me to imagine it’s healthy for any one person to be going out and getting that kind of fame. On the other hand, I wonder, should we really judge [her], because if any one of us were in our 80s and we could fill an entire football stadium with people because of what we had done in the law . . . I mean, that’s pretty cool.

“I might prefer that all the justices live in a bubble—I kind of do—and just think deep thoughts. But I think it’s hard to begrudge someone for enjoying [the attention] in her 80s.”

One question in the poll asked whether more of the justices were appointed by Republican or Democratic presidents. Describing the responses, Franklin said, “First of all, there’s a lot of uncertainty. Four percent are sure that Democrats control the majority, 19 percent are sure the Republicans do.

But that leaves an awful lot of people in these two middle categories who think erroneously it’s probably the Democrats at 25 percent,” while 50 percent say probably the Republicans. The correct answer is that Republican presidents have appointed five of the current justices and Democrats four.

## Opinion on Supreme Court Issues

If large numbers of people don’t have opinions on the individual justices, they do have opinions on some of the major issues addressed in Supreme Court decisions or potentially to be addressed in upcoming decisions. Franklin said that the issues that people use to orient themselves in their political lives in general are often the issues they use in assessing the work of the Supreme Court. That includes abortion, health care, gun rights, gay rights, and affirmative action. “The upshot is that people are making sense of the Court in the terminology, the language, that they’re used to,” Franklin said.

The poll asked people their opinions on 14 cases involving controversial subjects or pending subjects.

In some instances, the majority public opinion could be labeled as being on the liberal side. In others, it was on the conservative side. In some respects, the public was in line with the Court’s rulings, while in others it was in disagreement.



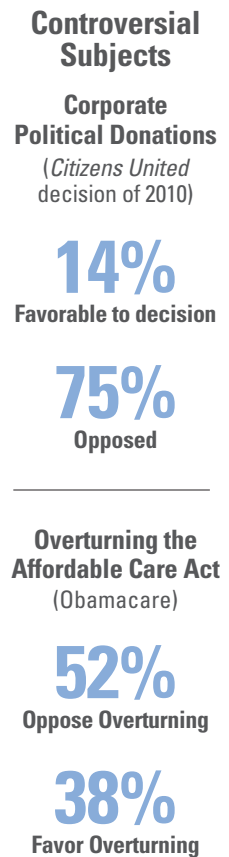


**SEVERAL EXAMPLES:**

**Corporate political donations** (the *Citizens United* decision of 2010). Franklin said that the decision, involving political donations by corporations, drew some of the strongest public disagreement. “This is a very unpopular decision, with only 3 percent strongly in favor and 11 percent somewhat in favor,” he said. “And then you get a total of 75 percent opposed to one degree or another, with some pretty intense opposition.”

**Use of race in college admissions.** Seventy-eight percent strongly opposed or opposed such policies, although the Supreme Court has allowed the policies to continue, with some limits. Franklin said, “This is actually a good example of the Court adopting a position where the public disagrees, [and] staying with that position for decades.”

**Allowing private businesses** to not offer employees coverage for prescription birth control because of the owners’ religious objections. “There’s a lot of opposition to that decision,” which the Court issued in 2014, Franklin said. Sixty-three percent strongly opposed or opposed the Court’s decision, while 24 percent strongly favored or favored it.



**Allowing private possession of firearms** (the *Heller* decision of 2008). “Sixty-seven percent support that decision for personal possession of a firearm,” Franklin said. “It’s opposed by just 24 percent.”

**Abortion rights.** The poll asked people their opinion on whether the Court should strike down the 1973 *Roe v. Wade* decision on abortion. In line with other polls, the result was 61 percent strongly opposing or opposing overturning *Roe* and 29 percent favoring or strongly favoring such overruling.

**Overturning the Affordable Care Act (Obamacare).** Franklin said, “Folks are not in love with Obamacare, but they are not very happy with the idea of overturning it at this point.” In this poll, 52 percent strongly opposed or opposed overturning the law, while 38 percent strongly favored or favored doing so. “There’s still a partisan divide over this,” Franklin said, with Democrats more opposed to overturning the ACA and Republicans more in favor of doing so. (The Supreme Court announced in March that it would hear a case from Texas seeking to overturn the law.)

**Looking forward to possible decisions**

The Marquette Law School Poll gave brief summaries of various possible future decisions by the Court and asked for the public’s opinions; the full summaries can be found online.

	Strongly Oppose	Oppose	Favor	Strongly Favor	Don’t Know
<b>Overturn <i>Roe v. Wade</i></b>	47%	14%	13%	16%	9%
<b>Permit a business to deny service to gay people</b>	40	17	15	19	9
<b>End DACA</b>	37	16	20	17	9
<b>Rule that banning semiautomatic rifles is unconstitutional</b>	36	17	14	25	8
<b>Strike down Affordable Care Act</b>	35	17	15	23	10
<b>Interpret existing statutes as disallowing LGBTQ-based employment discrimination</b>	18	12	22	39	9
<b>Permit use of public funds for religious school students</b>	17	16	31	22	14





## The Law Versus Fairness—Empathy at the Top of Judicial Traits

Which is more important, a decision that leads to “a fair outcome” or one that follows the law even if it is “seemingly unfair”? The poll found that 56 percent of the public favored fairness and 44 percent favored adherence to the law.

Asked about the debate between those who say the original meaning of provisions of the Constitution should control decisions and those who say the meaning of constitutional provisions can evolve over time, a majority (57 percent) said the meaning can evolve and 43 percent favored sticking to the original meaning.

As for the traits a Supreme Court justice should have, empathy drew the most support, with 69 percent saying that it was very important. Sixty-five percent said good judgment was very important, 44 percent said respect for precedent was very important, and 43 percent said judicial philosophy was important.

## The Long-term View

Foley & Lardner’s Shriner expressed dismay with the state of the course of appointments and confirmations involving justices, with “overly political, brazenly political appointment followed by the expected attack by almost the majority of the Senate on whoever is being put forward, and then going out to see what you can find out about their past and

### Interpreting Law

Fairness versus adherence to the law

**56%**

Favored fairness

**44%**

Favored adherence to the law

Original meaning versus meaning can evolve

**57%**

Support meaning can evolve

**43%**

Support retaining original meaning

dragging them through the mud. I mean, it hurts the institution to have that kind of stuff going on.

“But you can’t avoid it because that’s one of the protections in the Constitution, too, that you’ve got to get somebody appointed, and that person has to get a majority of votes in the Senate to become a judge. That isn’t going to change, and, you know, we’ve survived that.” Shriner pointed to a number of related historical examples, including Congress’s increasing the size of the Court during President Abraham Lincoln’s tenure and reducing it during President Andrew Johnson’s. “We’ve survived that for 230 years. And I don’t see any real indication that we’re not going to survive it.” ■

*The Marquette Law School Poll surveying opinions about the U.S. Supreme Court was conducted September 3–11, 2019, surveying 1,423 adults nationwide, with a margin of error of +/-3.6 percentage points. Interviews were conducted by the National Opinion Research Center (NORC) using its AmeriSpeak Panel, a national probability sample, with all surveys conducted online. The detailed methodology statement, complete survey instrument, topline results, and crosstabs are available at <https://law.marquette.edu/poll/2019/10/21/detailed-results-of-the-supreme-court-poll-september-3-13-2019/>.*







# Many Career Paths, ALL IN ONE CITY

By Alan J. Borsuk

Beating Apple head-to-head on a legal matter. Negotiating international treaties for all of the American military bases in Italy. Sorting out how to create high-speed maglev train service between Washington, D.C., and New York City. Heading a national consortium aimed at improving health care. Assessing whether chemical reactions on moons of Jupiter are pertinent to a patent application. Prosecuting prisoners held on terrorism charges at the Guantánamo Bay detention camp.

And just plain helping people while making successful legal careers.

## What does it mean to be a Washington lawyer?

**ANNIE OWENS**, L'05, realizes that some people react negatively to the term “Washington lawyer.” But to her, it means making “a career dedicated to public service and bettering the country.”

**TOM SCHENDT**, L'85, says, “For me, a Washington lawyer is a person who is focused and very directed toward politics and what’s going on, whether it’s regulatory or litigation. You know what is happening. You have to be on the edge—you don’t read about it; you experience it.” To be a success, “you have to be on your toes, you have to lean forward, you have to be opening up stuff as it comes off the presses. That’s what it means to be a Washington lawyer.”

“There’s more opportunity to do different things here than there is probably anywhere else in the country or the world,” says **D. JEFFREY HIRSCHBERG**, L'71.

“There is a whole list of things that you can do that nobody ever thinks about. A law degree is a leg up and an open pass to do some of that.”

**JOEL TEITELBAUM**, L'96, says, “What makes D.C. special, a destination place, and also so transient is that there are things that you can do and experience here as a lawyer that you just really can’t do in most other places.”

**KRISTINA SESEK**, L'11, says, “To come to D.C., you have to be passionate about it. It’s a very expensive city, and when you first move here as a young lawyer, you’re not making very much money. But if you really want to do it, you can make it work.”

In Washington, **BRANDON CASEY**, L'09, says, “everyone is a lawyer.” Carrying that title “either means nothing or it means it’s on you to prove yourself.” Dozens of Marquette lawyers are doing the latter, proving themselves in a wide range of substantial and successful ways.

As part of this Washington-themed issue of the *Marquette Lawyer*, we talked with 16 Marquette lawyers who now make Washington, D.C., their home. We spoke with them about their careers, their daily lives, and their insights on the high-pressure world of Washington. Several of them are involved in work that definitely could be called political. Several felt that they are not political at all. The range of their experiences is wide.

The lawyers we spoke with are by no means the only Marquette lawyers doing well in Washington. They aren’t even all of the ones we set out to meet, given the realities of scheduling and logistics, and we may feature others in subsequent issues of the *Marquette Lawyer*. But we had interesting conversations. Feel free to listen in on some of those conversations in the pages that follow.

Illustrations by Stephanie Dalton Cowan



# The Hill People

**A**NNIE OWENS says she always wanted to work in policy and government in Washington, D.C. Brandon Casey relates he got “the political bug” a bit later—while a Marquette undergrad learning at the university’s Les Aspin Center for Government. And Kristina Sesek calls it “unexpected” that, after law school, she got a position in Washington and, in 2019, came to work in the U.S. Senate.

Government and politics are probably the first thing that comes to mind when you think of working as a lawyer in Washington. So, while that’s actually only one part of a big universe of legal work in the nation’s capital (as we will see in subsequent entries), we start with these three Marquette lawyers. Each is making a significant career operating in the milieu of “the Hill,” where Congress is located.

## AT THE HEART OF THE “CHAOS,” AND LOVING IT

**BRANDON CASEY** has a great office. It’s spacious and wood paneled, with a large desk, a table, stuffed chairs, and other elements that give it a feeling of aged elegance. Casey, L’09, settles into the big chair in front of his desk, facing away from the desk itself. The chair is flanked by other chairs where people sit when they come to talk to him.

Sounds pretty cushy?

Definitely not. As we talk, staff members rush in to ask a question or peek in the door to see if Casey can be interrupted. The desk phone rings. His smartphone buzzes. A television monitor keeps bringing the news of a hectic day.

Some of that news—and, on some days, a lot of it—is coming from right outside Casey’s office. He is chief of staff for the House Ways and Means Committee, which means that he heads up a staff of 55, serving Rep. Richard Neal (D-Massachusetts), chair of the committee. The committee handles all revenue bills and for generations has been regarded as one of the most powerful committees in Congress.

Health care policy, the United States–Mexico–Canada Agreement on trade, and a wealth of other big issues have been before the committee in recent sessions, which means they cross Casey’s desk. Often, you’ll find him on the floor of the House of Representatives or in the large committee room across the hall from Casey’s office. The committee room was the location of a number of the hearings that led to the impeachment of President Donald Trump, although Casey and the Ways and Means Committee were not directly involved.

A typical work week for Casey? “Chaos,” he says with a laugh. But does he like the job? “I love it.”

Casey grew up in a single-parent home on the South Side of Chicago, with limited means and no history of family members going to college. He went to a public high school and, thanks to a guidance counselor’s involvement, enrolled at Marquette University. He majored in history and criminology and thought about becoming a lawyer specializing in criminal cases.

While spending a semester at Marquette’s Les Aspin Center for Government in Washington, Casey did an internship in the office of Rep. Bobby Rush, a Democrat from Chicago. “I caught the political bug,” he says.

He continued at Marquette, enrolling in the Law School. “I took Professor Patricia Bradford’s tax law class and fell in love with tax law,” he says. “It’s like putting together an IKEA bookcase,” by which he means that if you follow the instructions carefully, it works out. Professor Vada Waters Lindsey showed him what he calls “another side of tax law,” namely how demanding it is. “Professor Lindsey is very exacting,” Casey recalls.

He came to Capitol Hill straight from law school. “I fashioned myself as a tax lawyer,” he says. He interned

on the staff of one member of Congress and then worked for three years as tax counsel for Rep. Allyson Schwartz (D-Pennsylvania). In 2013, he moved to Neal's staff, where he was legislative director for six years. Neal was the ranking Democrat on the Ways and Means Committee, and when Democrats gained the majority in the House in the 2018 election, Neal became chair. He named Casey to the committee's top administrative position.

In a press release issued at the time, Neal said, "Brandon has provided me with critical advice and insight. . . . From tax policy to trade issues, Brandon has gained a wealth of knowledge here in the House of Representatives."

Instead of calling himself a tax lawyer, Casey now labels himself "a facilitator" who oversees everything that comes along. "I'm probably not the world's biggest expert on anything," he says. "When you're staff director, it's sort of letting others shine."

Whether you're in the minority or majority is "night and day in the House," Casey says. He was in the minority for eight years. These days, "things are looking up."

There are big differences in policy positions between Republicans and Democrats in Congress, of course. But Casey says he aims to have professional relationships with the Republicans on Ways and Means and their staff members. "Ways and Means prides itself on at least being civil," he says. "You can be adversarial without being a jerk."

Did law school help prepare him for his current job? He says law school taught him critical thinking and triage. It helped develop skills he applies now to figuring out what someone really wants. And the Socratic method of learning, a hallmark of legal education in which students can be called on at any time to discuss an issue, is valuable in a place where you're always "on call." Casey says "the scariest thing you'll ever do" is to answer a question on the spot from House Speaker Nancy Pelosi.

Casey puts in long days, especially in the middle of the week when Congress does most of its business. It's not unusual for a workday to start at 7 a.m. and end at 11 p.m. He and his wife have three young children, and he is committed to spending time with the kids, especially on weekends. He generally drives the oldest, who is four years old, to school as one way to spend time with her.

At 36 and with more than a decade of work in Congress, Casey calls himself "sort of a dinosaur" among the generally younger aides on Capitol Hill who work several years and then move on.

What's ahead for him? A position such as the one he has now was a goal for him. He says, "This job has been fantastic, and I'd love to keep doing it as long as possible."

"Ways and Means prides itself on at least being civil. You can be adversarial without being a jerk."

Brandon Casey



## “AN UNEXPECTED JOURNEY” TO WORKING FOR THE U.S. SENATE

**KRISTINA SESEK** says she is “a Wisconsin girl through and through,” so she didn’t want to move to Washington, D.C. But what she calls a series of “unexpected” turns brought her to the nation’s capital. They were fortunate turns—she has thrived in D.C. and now works on the staff of the U.S. Senate. Sesek got her bachelor’s degree from Carroll College in Waukesha, Wis., and went on to Marquette Law School, graduating in 2011.

“After law school, I was doing temporary document review in Wisconsin. I had a friend, the executive director of the Republican Party of Wisconsin at the time, who said, ‘I need a counsel; would you like to come interview?’ I had no desire to get into politics. It wasn’t even on my radar. I honestly wanted to practice business law in Wisconsin, but the job opportunity came up. I said ‘O.K., I’d rather not do doc review anymore; this sounds great.’ So I wound up at the Republican Party of Wisconsin. I started the day after people started circulating the recall petitions against Governor Scott Walker and stayed through the 2012 presidential election.

“Through connections I met during the campaign, I wound up coming to D.C. This was another thing not on my radar. I had no desire to live or work here, but people kept telling me to ‘look in D.C.; they’re looking for really good lawyers there.’ I ended up at the U.S. Chamber of Commerce, working on civil-justice-related policy at its Institute for Legal Reform.

“I switched jobs in February 2019 and am now at the Senate Judiciary Committee, working on crime and national security policy—another unexpected turn.”

### And how’s the new job going?

“It’s great. It’s busy. It is a whole host of new issues that I have not thought about since

law school, if ever, and it’s kind of an exciting time. I really like it. I work for Chairman Lindsey Graham. So South Carolina is now something of a second home.”

### What does the term “Washington lawyer” mean to you?

“I think you’re exposed to some of the most brilliant minds in the country, and it’s kind of a hodgepodge of folks from everywhere around the country in one spot. So you get a variety of ideas, input, different ways they think about the law and were taught. As a younger lawyer, I’ve had the opportunity to be exposed to some of those people, talk to them, listen to their ideas. I think it’s very special.

“People think that being a lawyer in the kind of work I’m doing is a little more contentious than it is, at least in the policy-making process. I work across the aisle with Democrats probably more than with some of my Republican colleagues who work for the Senate Judiciary Committee, because we’re constantly going back and forth and exchanging ideas and negotiating different pieces of a bill or whom to call as witnesses for a hearing, anything like that. It is unique, because you don’t have just one case against an individual—you see your ‘opposing counsel’ day in, day out, on a whole variety of issues, so you have to maintain a pretty civil and cordial relationship.”

### What’s a typical day like?

“To give an example, today we had a hearing at ten o’clock this morning, so in the days leading up to that, we were writing a very large policy memo on the issue. It gets distributed to all the chief counsel on our side of the aisle, who read it to prep for the hearing. I write all of those on the crime and national security issues. It includes writing questions for our boss to potentially ask, writing an opening statement for him to potentially use.

“Other days, it involves meeting with people, from constituents from South Carolina to advocacy groups from all over the country. I meet with police organizations; I meet with criminal justice reform advocates; I meet with folks who are on both sides of the marijuana debate because I deal with the illicit-drug portfolio. It’s a great range of work.”

“It’s great. It’s busy. It is a whole host of new issues that I have not thought about since law school, if ever, and it’s kind of an exciting time.”

Kristina Sesek







## THRIVING AT THE INTERSECTION OF LAW AND POLICY

“My mother will tell you it’s no surprise I ended up in Washington,” Annie Owens says.

Since childhood, she has had a great interest in politics, policy, and government. (And sports—she was involved in athletics herself, and her father was general manager of the minor league baseball team in her hometown of Louisville, Ky.)

Owens, L’05, says there’s no better place to be than Washington for what motivates her. “Every day you see the confluence of all of it,” she says. A Washington legal career, for her, means moving in and out of government, “working at the intersection of law and policy.” Owens has moved through a series of jobs at that intersection. How’s it turning out? “So far, it’s been very rewarding and interesting.”

She agrees that some people attach negative connotations to the term “Washington lawyer.” Not Owens. She hopes that it describes “a career dedicated to public service and bettering the country.” And she is aiming to have such a career. “It’s gratifying to use my law degree to be able to help people and benefit the country.”

But back to sports, because that played a role in how she got from Louisville to Marquette Law School and Milwaukee, which got her on the path to Washington, D.C.

Owens went to Brown University in Providence, R.I., for her undergraduate degree. She wanted to go to law school somewhere within a day’s drive of Louisville. Milwaukee met that standard, if only barely, and Marquette’s sports law program attracted her.

But a constitutional law class Owens took as a first-year student sparked a love for the subject that continues to this day. It led Owens to gain an affinity for constitutional law and separation-of-powers doctrine.

After her 1L year, she got a summer internship in the Washington office of then-senator Herb Kohl from Wisconsin. Owens returned to D.C. in the summer after her 2L year to work for a large private law firm, Wilmer Cutler Pickering Hale & Dorr (now WilmerHale). Even there, all of the cases she worked on had substantial government and policy aspects.

After completing law school, Owens headed south instead of east, moving to Houston to clerk for Judge Carolyn Dineen King of the U.S. Court of Appeals for the Fifth Circuit.

Then to Washington: Owens won a prestigious Bristow Fellowship to work for a year in the Solicitor General’s Office of the U.S. Department of Justice. “You really learn how Supreme Court cases work,” she says. Paul D. Clement was the solicitor general at the time, and Owens says that she learned a lot from him.

After that, it was back to WilmerHale, where she worked in the appellate and Supreme Court litigation group for five years.

In November 2013, she joined the Office of Legal Counsel

in the Justice Department. The office, with a staff of about 20 attorneys at the time, advises the White House and executive agencies on the legality of actions and orders. She says that it was a “constitutional-law heavy” job—which was just what she liked. It began a formative time for her career. “That was a pretty fascinating three years that I ended up spending there.”

With the end of the Obama administration, Owens left the Justice Department to join the staff of the Senate Judiciary Committee, working for the ranking Democrat on the committee, Sen. Dianne Feinstein of California. She worked initially on the nominations team, including preparing materials for the Democratic caucus on the nomination of Neil Gorsuch to the Supreme Court. She was promoted to senior counsel and ran the oversight group focusing on questions such as executive versus congressional power and executive privilege.

But, after two years, she told herself, “Time for something else.” In 2019, she joined the Institute for Constitutional Advocacy and Protection at Georgetown University Law Center. Owens says that there are 10 people who work for the center, which

“My mother will tell you it’s no surprise I ended up in Washington.”

Annie Owens

engages in a mix of traditional civil rights litigation and challenges to executive-branch policies, including immigration matters. She is currently on a team of attorneys representing the House Judiciary Committee in its lawsuit seeking to enforce its subpoena against former White House counsel Don McGahn.

How does she make her way amid so many lawyers in Washington? “I just try to keep my head down and work hard,” she says. She recalls some of the things that Marquette Law School Dean Joseph D. Kearney said when she was in courses he taught: You need to be careful and pay attention—and “you have to win the easy ones.”

And does she like what she’s doing currently? “I do,” Owens says. “It all sort of checks that box”—the one that has carried a label since her childhood, saying she’s at the heart of where law, policy, and politics shape the course of the nation.





## A MENU OF FULFILLING CAREER PATHS

We invited a few Marquette lawyers who have made their careers in Washington to dinner one evening at a restaurant in D.C. The lively conversation included descriptions of their work, both the routine elements and the highlights. In the following pieces, three who were at the dinner (Joel Teitelbaum, Creighton Macy, and D. Jeffrey Hirschberg) talk about their work. Two who could not make it, Lynne Hallbrooks and Tom Schendt, were interviewed later.

### BRINGING TOGETHER LAW AND HEALTH POLICY

**JOEL TEITELBAUM, L'96,** is a professor at George Washington University. He is director of the Hirsh Health Law and Policy Program and the co-principal investigator of the National Center for Medical-Legal Partnership, both based at the university, which is located in the nation's capital. He has taught undergraduate, law, and graduate courses on health care law, health care civil rights, public health law, minority health policy, and long-term care law and policy. He has written numerous academic pieces and lectured at universities across the country. In 2016, he was named the first lawyer to serve on the U.S. Department of Health and Human Services Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives. Teitelbaum also is an advisor to the American Bar Association's Coordinating Committee on Veterans Benefits and Services and a board member of the American Bar Association's Health & Human Rights Initiative.



"I'm a native of the north shore of Milwaukee. I attended Nicolet High School and then went to Madison for undergrad. I took a couple years off after college and got my master's degree in traveling and bartending and the like. I had known for a long time that I wanted to go to law school, and after two years of being away from school, I was ready. I was more than happy to look at Marquette. I was very happy to be there.

"While I was in law school at Marquette, I took the health law course, and it was as if all of my interests suddenly came together—my interest in health and health care, my interest in civil rights, my interest in law. So, after law school, I didn't end up in D.C. by mistake; I came here intentionally. I got my LL.M. from George Washington University in health law because there was a woman here who is sort of a national star in health law, and I wanted to learn from her. She hired me right out of the LL.M. program into the very large research center at the university that she was operating at the time, and I joined the faculty a year later. So I've been on the faculty of GW since 1998.

"A typical workday for me? I have flexibility in my job, and I don't wear just one hat. I have the traditional roles of an academic, including teaching and advising students, and

I run the joint degree program between the law school and the university's school of public health. For 11 years, I was vice chair of academics of the Department of Health Policy and Management, one of the larger departments on campus. We started the department from scratch, really, and so I was exposed to this world of academic programming. I really liked that administrator role, although I eventually gave it up to focus on teaching, research, and policy. There is never a lack of professional interests to engage me."

### SETTING OUT TO PRACTICE CRIMINAL LAW, ENDING UP INVOLVED AROUND THE WORLD

**D. JEFFREY HIRSCHBERG, L'71,** grew up in Oshkosh, Wis. He enrolled in Marquette Law School "because I wanted to practice criminal law in a big city," namely, Milwaukee. And he did so for a while, including serving as an assistant U.S. attorney. In 1975, then-U.S. attorney general Edward H. Levi asked Hirschberg to work in Washington for the U.S. Department of Justice on wiretapping lawsuits filed against the Nixon administration. Hirschberg has had a wide-ranging career since then, involving time in private practice, a stint as a vice chairman of Ernst & Young in New York, and extensive engagement in government and private nonprofit organizations promoting democracy internationally. His extensive work in eastern Europe included three years in Russia defending a company there from a hostile takeover by another Russian company. Most recently, he has been vice chairman of Northeast Maglev, a private venture aiming to build high-speed rail service (involving magnetic-levitation technology) between Washington, D.C., and New York City.



#### On being a Washington lawyer:

"There's more opportunity to do different things here than there is probably anywhere else in the country or the world, whether it's politics or law or business, or all three of these. In Washington, if someone asks you to do something and you





do a good job, all of a sudden you're asked to do something else. You didn't have any clue growing up that you'd ever do any of this kind of stuff. I mean, I thought I was going to practice criminal defense law in Milwaukee. I thought I'd be doing murder, rape, and armed robbery trials. It just turned out completely different."

### A typical day for you?

"There's no such thing. What I'm doing now [involving magnetic-levitation train transportation] is the intersection of law, policy, politics, and money. A day for me is trying to get something done positively on a project development basis, connecting with leaders, dealing with the federal government, the Japanese government, five states, the District of Columbia. It's project management. It was easier when I was a federal prosecutor. It was easier when I was a partner at a major law firm, because you're singularly focused. It started becoming more complex when I was a vice chairman of Ernst & Young, back in the mid-1990s. The only thing typical about my days now is that I get into the office at seven o'clock in the morning."

### His career:

"I have been fortunate. I haven't been bored—I haven't been bored the last 50 years."

### Advice to law students?

"I'd say, what is it that you think you want to do? Then put yourself in a place where you can have the most expansive set of possibilities, wherever that is. There's an entire universe of opportunities out there."

## IMMERSED IN ANTITRUST WORK—AND IN KEEPING THE TRAINS RUNNING

**CREIGHTON MACY**, '08, is a native of Portland, Ore., and received his bachelor's degree from Marquette University. During this time, he was also a student-athlete and co-captain of the men's tennis team. For law school, he again chose Marquette because of his interest in sports law. But he clerked in the summer after his 1L year for a firm in San Francisco and was assigned to work on an antitrust case. He found the work interesting and quickly decided to head in that direction. Shortly after completing law school, he started work in the U.S. Department of Justice's antitrust division. Macy has been an antitrust lawyer for the government or in private practice in Washington since then. He is currently chair of the North America antitrust and competition practice for Baker



McKenzie, a large multinational firm. Previously, he was the chief of staff and senior counsel at the Department of Justice's antitrust division.

"My practice is a Washington-focused practice. I started in the antitrust division as a trial attorney, which was an incredible place to begin a career. I then went to a law firm to work in its antitrust practice. Part of the reason why I joined private practice was because a highly respected and well-known former DOJ antitrust division leader recruited me. I worked with her, among others, very closely at that law firm for several years. Then she left to join the Obama administration. Several years later, when she was taking the position as the head of the antitrust division, she called me and said, 'Do you want to be my chief of staff and senior counsel?' So I immediately said, 'Yes, when can I start?' When the Obama administration ended, I joined Baker McKenzie. At this point, I had served in the antitrust division in both career and political capacities. This kind of experience is perhaps unique to Washington. Many friends whom I met at the Department of Justice are still there; others are in private practice or in-house."

### What's a typical day like for you?

"On typical days, I'm thinking about our team and how we can ensure our clients the best results. I'm also thinking about the pipeline of client matters that we have. We're fortunate to be extraordinarily busy right now. So I work on the types of matters that we have, the types of matters that we're pitching for, and then work with the team to consider how it impacts the future of our practice and how to achieve success for our clients. Most of my day is on the phone, either corresponding with clients, managing the team, preparing for external presentations, or speaking with my non-antitrust Baker colleagues. A lot of it is ensuring that there are many trains and then keeping them running as effectively and efficiently as possible.

"I feel very fortunate that I enjoy my work and that it interests me. I get a front-row seat to learn about many different businesses and industries, and that is what attracted me to being an antitrust lawyer at the outset of my career. I am also grateful to have made close friends at the firm or the Department of Justice along the way."

### Was it ever an issue that you didn't have an Ivy League background or graduate from a D.C. law school?

"No. I've worked with plenty of people from all types of law schools, and I've always seen a tremendous respect for Marquette here. There are significant opportunities here, and there are large numbers of Marquette lawyers in Washington who are really excelling and making a difference. I am a very proud two-time Marquette graduate, and the Law School prepared me well to be a successful lawyer."



## “I ALWAYS LIKE MY JOBS”

“My thought was I would come to Washington for a couple years and then go somewhere else,” **LYNNE HALBROOKS** says. “I just never left.”

A good reason for Halbrooks to stay: Washington has provided a chain of good opportunities for her. “There are so many different positions available and agencies and things that can be done by lawyers here,” she says. “Each job I took was better than the last job.”

When Halbrooks, L’88, was heading toward graduation from the University of Minnesota Duluth and was considering law school, an advisor suggested she look at Marquette. She agreed, and she loved law school and Milwaukee more generally. After graduation, she returned to Minnesota as a clerk with the state supreme court, after which it was back to Milwaukee to work for a private firm. She left that to join the U.S. attorney’s office, which opened the door to working for the Justice Department in Washington, including several years with the executive office for U.S. attorneys.

After a dozen years with the Justice Department, someone told her that the U.S. Senate’s Office of the Sergeant at Arms was hiring a general counsel. She got the job.

What does the sergeant at arms do? Halbrooks rattles off a list of things that called for involvement. “We did protocol, security, parking, the capitol maintenance crews, the hair salon, information technology, the infrastructure of the Senate.” As general counsel, she was involved in processing legal claims against the Senate, an investigation into a breach of a computer system, and even a bankruptcy issue when the company that supplied some carpeting to the Senate went broke. Plus ethics advice, employment issues, and discrimination concerns. Even arrangements for the state funerals of Presidents Ronald Reagan and Gerald Ford.

“The work was wonderful,” Halbrooks says. “I learned the Senate without being in the partisan mess of it all.”

But another big opportunity came up: Halbrooks was recommended for the position of inspector general for Iraq for the Department of Defense. That led to her being named deputy inspector general for the Defense Department, which led to two years as acting inspector general. “That was an amazing chance to have an impact on the department,” she says. She worked on audits and investigations of many aspects of defense spending, including fraud and waste. Some of the investigations made front-page news, and Halbrooks testified before congressional committees twice. “It was a huge leadership challenge,” but very rewarding, she says.



The work allowed her to see the scope and breadth of what military leaders do, which she calls “awe-inspiring.” It created an appreciation that she didn’t have before.

Overall, Halbrooks worked for the government for 24 years and says, “I really got to experience the best of government service.”

In 2015, she decided to move to the private sector, joining the international firm Holland & Knight. Three years later, a corporate client, Caliburn International, hired her as compliance manager and deputy general counsel. The firm does extensive work as a contractor with the federal government, including defense-related work overseas.

Halbrooks says that working for Caliburn International marks the first time she has worked for a private business. It is “energizing to be learning something new at this stage of my career,” she says. “It’s wonderful; I love it—I always like my jobs.”

## “WE DON’T PRACTICE LAW. WE SOLVE PROBLEMS . . .”

**TOM SCHENDT**, L’85, might have been set for life. He had strong roots in Milwaukee, and he was, as he puts it, “a 4M’er,” first graduating from Marquette High School, then receiving undergraduate and master’s degrees from Marquette University (the latter in business administration), and finishing his education at Marquette Law School.

With those degrees in hand, he started working at Reinhart Boerner Van Deuren, a large law firm in downtown Milwaukee. “I loved that firm. It was exciting—it was fantastic,” he says.

Then, in 1988, Schendt gave it up. He wanted something new and wanted to try living somewhere else. He got a good job offer to work in Washington for the Internal Revenue Service.

“I loved it, and I made enough money to survive,” he says. But after several years, he moved on from the IRS, when he was offered a partnership in the Washington office of the international law firm Alston & Bird. This time, he stayed put: Schendt’s been with Alston since 1994. He is the longest-serving lawyer in the D.C. office.

Schendt has developed a practice as a tax and employee-benefits advisor to some of the largest corporations in America. As he puts it, “We don’t practice law. We solve problems that large employers have.” Law is part of it, “but then you come in with other skills.” He credits his Marquette experience, including his law school classes, with teaching him a lot about those skills as well as the law. “Marquette







taught me to listen as opposed to speak,” Schendt says. “You have to listen to what the client wants. After that, you have an ability to respond. So many attorneys speak and never listen. It’s just foolish.”

Schendt says he plans his work carefully, often looking a year ahead. For one thing, he is involved in board meetings of huge corporations, sometimes leading parts of the meetings, all of which means travel around the country. A board meeting can require two weeks or so of preparation. A typical day means a lot of contact with corporate leaders, often helping them chart a path to major business decisions.

“You never know what’s going to happen,” Schendt says. On the day he spoke with us, he had a morning phone call with a corporate leader who was concerned that the Alston & Bird attorney whom the company had worked with on day-to-day matters had left the firm. “This is a large client, a good client,” Schendt says. “How do I make sure that they feel assured that we will be with them? . . . We want them to have an open channel to us if they’re not satisfied.”

What are the best experiences he’s had? He gives two answers. One was when he was working with the IRS and a

case of his was argued before the U.S. Supreme Court. The other was the first time he made a presentation at a board meeting of a very large financial institution. The meeting was at the top of a tall office building. “I’m almost up to the clouds, and there’s a secretary with white cotton gloves on, and she welcomes us. I walk in, and it’s a huge, gorgeous room, 15-foot ceilings, mahogany paneling.” He presented findings of a corporate investigation, and it went well. “I said to myself, ‘Remember this day.’ It was a pivotal day in my life.”

He says, “What did I learn from that? I learned to be ready for opportunities because they will present themselves, and you never know what will carry you forward to another path and then another path and another path.”

He adds, “Every time I went and did something, I found that my roots in Milwaukee—but especially at Marquette—really became a stronghold for conversations and connecting with people.” Schendt says, “I preach to people now, ‘Don’t lose your basic roots. Washington people come and go, but your ethics, your beliefs, your basic law grounding will continue.’”

## WHETHER IN ARMY GREEN, NAVY BLUE, CAREERS BRING BIG OPPORTUNITIES AND ACCOMPLISHMENTS

**Y**ou get the feeling that Lawrence Morris, L'82, and Robert Blazewick, L'87, could talk for hours about the things they have done during long careers as military lawyers, and that you'd want to keep listening the whole time. You think, as your conversation with them unfolds, that they are old friends. But when they sat down at a table in Morris's office at The Catholic University of America in Washington, where he works now, it was the first time they had met.

Yet they traveled similar career paths. After Morris talked about his career, Blazewick prefaced his story by saying that it was much the same, "just navy blue instead of army green."

Each of them moved a lot for career reasons, within the United States and overseas. Both were given big responsibilities, starting early in their careers. Both liked most of their assignments. Each lives in Washington now but isn't sure about being called a Washington lawyer because that wasn't where he spent most of his career.

**LARRY MORRIS** worked as a part-time reporter at the *Milwaukee Journal* while he was an undergraduate and then a law student at Marquette, and he expected to make journalism his career. When he graduated from Marquette Law School, he began four years of active duty with the Army to fulfill a condition of his undergraduate ROTC scholarship. He says that he never exactly decided to make the Army a long-term career choice—he just liked the assignments he was given and stayed in the service for more than 30 years. "Some of the things we sell as an army are really true," he says.



Morris lists places where he worked—Belgium, Oklahoma, Germany, elsewhere. During his assignment as a prosecutor in Germany, he tried cases "all day, every day—it was addicting almost." He went on to serve as chair of the criminal law department of the Army's law school in Charlottesville, Va., then chief lawyer for the 10th Mountain Division in New York state.

He was assigned to work in what he called a satellite office of the Pentagon, focusing on army criminal law policy, and then was named chief of criminal law. After the September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon, Morris says, "I was detailed to put together a team to come up with what became the president's military order that he signed in November 2001 to try these terrorists through military commissions that had not been used since World War II."

Morris became general counsel at West Point and then chief defense counsel for the Army. He was working in Iraq when the Army's chief prosecutor for the terrorism suspects being held at the base at Guantánamo Bay, Cuba, quit amid controversy. Morris was assigned to take over, and he did that job for almost two years, based in Washington but traveling often to Guantánamo.

The prosecutions have been highly controversial. What is his perspective now on his Guantánamo service? "I am grateful to have had the opportunity to do it," he says. He says that mistakes were made early in the process, which built in "frailties." But overall, "it's a legally defensible process," he says. "Certainly the most just, defense-friendly war crimes tribunal in history."

Morris retired from the Army eight years ago. An adjunct professor he had at Marquette Law School had become a leading scholar and litigator in the field of religious liberty. Through their continuing relationship, Morris became aware that the position of general counsel was vacant at The Catholic University of America, in D.C. The first person who interviewed him for the position was Jane Sullivan Roberts, wife of Chief Justice John G. Roberts, Jr. She pointed out that he had no experience as a general counsel. He answered that both the Army and Catholic University were mission-based organizations and he was good at mission-based work. He got the job. Six years later, he was named chief of staff and counselor to the president of the university.

His brief perspective on his military career? "There are great enriching parts of it."

What does a lawyer on an aircraft carrier do? Some of everything, says **ROB BLAZEWICK**. He was in the Navy and a year out of law school when he was assigned duty on the USS *Abraham Lincoln*. A ship that size is like a floating city of 5,000, Blazewick says, and the two lawyers on board did everything from helping sailors with debt and divorce matters to military justice.







Blazewick loved his year on the *Lincoln*, and it paved the way to a long career as a navy lawyer. Stops included Washington, where he worked on claims cases; Naples, Italy, as senior defense counsel for the European region; and Newport, R.I., where Blazewick got a master's degree at the Naval War College, followed by teaching there.

After the 1991 war with Iraq, Blazewick was sent to sea as a battle group adjutant ("that was a terrific job," he says) and then returned to Naples as staff judge advocate and general counsel for the Navy's European region. "I started to specialize at that point in international negotiations," he says. After a couple years in Naples, he transferred back to Washington as head of the Navy's appellate defense division.

Next: Hawaii, where for three years he was in charge of prosecutors and served as the general counsel for the mid-Pacific region of the Navy. Then he worked with the Army at the George Marshall Center in Germany ("It was heaven").

Subsequently the Navy offered him a position as a judge for the Navy's southeast circuit, based in Jacksonville, Fla.

In 2016, he retired from that position. But not exactly. Blazewick continues to work, now living in the Washington area again and serving as chief administrative counsel for the Defense Office of Hearings and Appeals. What does that office do? "We do all the security clearance litigation" for all branches of military, as well as for civilians and contractors, including some who work for the State Department or other agencies.

When he was a law student, Blazewick signed up for a course in international law, taught by Professor Michael Waxman. He took it largely because it fit into his schedule. "I thought it would be nothing I was interested in, and I remember sitting there thinking, 'This is really interesting.'" His subsequent career across the world would keep that thought underscored all along the way.



## AWAY FROM THE SPOTLIGHT, A SATISFYING SPECIALTY THRIVES

**D**o you think of politics, lobbying, and making big waves when you think of Washington lawyers? Yes, there is that world. But there is far more to the legal scene in the nation's capital—and to the opportunities for lawyers in the area—than that.

A good example: Patent and trademark work. A significant number of Marquette Law School graduates have found good and satisfying careers in these intellectual property fields. While many such alumni practice in Milwaukee, Minneapolis, Chicago, or elsewhere across the country, we concentrate here on Marquette lawyers in Alexandria, Va. The city, across the Potomac River from D.C., is headquarters of the U.S. Patent and Trademark Office (PTO). We invited several Marquette law alumni to talk with us in the offices of Ted Breiner, L'79, and Mary Breiner, L'82, a brother and sister who have a private intellectual property practice in Alexandria.

Let's first introduce the participants and then listen to some of what they say about their work.



**XHENETA ADEMI**, L'15, grew up in Albania and other European countries before moving to the United States as a teenager. Her family runs a restaurant in Manitowoc, Wisconsin. She developed an interest in intellectual property law while at Marquette Law School.



**MARY BREINER** and **TED BREINER** have strong roots in Wisconsin. They were born in Racine, where their father was a chemist and patent agent. He moved to the Washington area, where he became a patent attorney and opened a law practice focused on patent and trademark matters. Both Ted and Mary got undergraduate and law degrees from Marquette and then joined the practice their father started.



**JUSTIN PATS**, L'06, is originally from Maryland and received an undergraduate degree at Columbia University. He wanted to go to law school and had an interest in intellectual property (IP) law. He heard that Marquette had a good IP program. This led to what he calls three good years in law school. His goal was to return to the Washington area, and the PTO gave him a good opportunity as an examiner. He moved up to a supervisory job and is currently a lawyer with the office's Patent Trial and Appeal Board.



**COLLEEN RAPHAEL**, L'04, got bachelor's degrees from Notre Dame, where she majored in physics, and from Indiana University South Bend, where she majored in chemistry. A master's in chemistry from the University of Wisconsin-Madison followed. Next: Marquette Law School. Her first position after graduation was at a law firm in California's Silicon Valley. In 2010, she was offered a position in the PTO in Alexandria, and, given her background, she joined the electric chemistry division, where her specialty is applications that involve chemical reactions.



**ANDREW RHIM**, L'97, is a native of the Washington suburb of Bethesda, Maryland. While at Marquette Law School, he took what he calls a "fantastic" course on unfair competition and trademark law. It got him headed toward a career as a trademark-examining attorney with the government.



### Is there something about being a Washington lawyer that's special or different or particularly attractive to any of you?

**RHIM:** "It just seems that if you're starting out in Washington, you kind of can get your feet wet; you can get a first job maybe a little easier. You have a large legal community, so you have more opportunity, in some ways, just because of the size of the community."

**TED BREINER:** "The intellectual property bar is very small, compared to the larger bar. We're a pretty small group of specialized people in the Washington area. I don't know if we consider ourselves Washington lawyers. The focus of lawyers in the Alexandria Bar Association is the Alexandria courts. So, instead, we're either in the Federal Circuit Bar Association or the American Intellectual Property Law Association, and they have their meetings all around the country. So I don't consider myself a Washington lawyer."

**PATS:** "I echo Ted's comment. I view myself more as a lawyer in the intellectual property community. I feel sometimes that 'Washington lawyer' is kind of a label that maybe originates from outside of Washington, that everybody is kind of politically motivated in everything they do. Intellectual property for all intents and purposes is apolitical, at least for us. I mean, we only have, I think, one political appointee in the whole agency."

### Have you learned more science in order to do your work?

**RHIM:** "In a lot of ways, we have, because a lot of applications that come to the PTO involve technical things that you may not be aware of. So a lot of the time you're on Google, you're researching, you're doing factual and legal research to figure out what those goods and services are, and kind of educating yourself. I've learned so much more on this job about other products and services, especially about science and technology, than I ever would have imagined starting out."

**ADEMI:** "Right. And that's my favorite part. Because we're not very specialized, one day you're reading about a cancer drug, the next day it's software, while the next day it may be smart clothing."

**RHIM:** "And the next day it's cryptocurrency."

**ADEMI:** "Exactly."

### So what do you like about your jobs?

**RAPHAEL:** "What I like about my job is that I get to see the newest technology. I get to see the cutting-edge stuff. In some instances, I'll look at an application. I might think, 'I don't believe I've seen that in the patent literature. I'm going to have to go search the non-patent literature, go search the journal articles, to see what the academics are publishing.' Then again, sometimes I have to go back fairly far. For instance, people have been using ultraviolet light for chemical reactions for a long time, and back in the late 1950s, early '60s, people were using Cobalt-60 as a source of radiation. So, the thing is, I get to see both that very cutting-edge stuff, and then I also have to keep in mind that our scientific ancestors were not stupid and they did a lot more than a lot of people give them credit for. So I have two charts of the electromagnetic spectrum up in my office; I have one chart that is very modern, and then I have one chart from the 1940s or so."

**MARY BREINER:** "What Colleen says is right: You get to see the spectrum of the old to the new. You see how things have changed, but also how sometimes the old contains the concept."

**PATS:** "My job requires a lot of legal analysis and writing, and I enjoy both of those. And I work on electrical technology appeals, so I see a lot of interesting inventions as well."

**MARY BREINER:** "One of the things that makes it so interesting is that technology always keeps it new. The law of application is different because the facts are always different with the technology. I do a lot of initial patent investigation, both for patentability and right-to-practice clearance. You get to see the spectrum of the old to the new and to see how things have changed."



### What's a typical day like for you?

**ADEMI:** "I'm tempted to say that my day is just clicking buttons on a computer all day, trying to catch up. I can click a button and get ten new cases. I probably work on ten different cases every day, and then people are always calling—attorneys from the outside, or pro se's, without attorneys, who may think that just because we denied their trademark, now they have to shut down their entire business. They're freaking out, so you have to babysit them a little, but we can't give them legal advice. And then they get surprised that I work for the government and we're nice, we come to the phone."

### What's the most interesting or significant thing you have worked on, at least to this point?

**RHIM:** "I battled Apple. At the board, yes. They tried to register a downloadable app for music—downloadable music software. It was this little app, this orange box with, like, a music staff. And there was already a registered mark, very similar designs. They kept going back and forth, back and forth. And finally, they went up to the board, and my view won. That was fun."

**RAPHAEL:** "I had a case where the claims involved basically taking ice with oxygen bubbles in it, and exposing it to UV light, and the UV light would then create ozone. And the claims were written so broadly that I was advised, well, 'Go look for this as a process of nature.' And sure enough, I found in an astrophysics journal article that out on the moons of Jupiter, ice is getting exposed to ultraviolet light. So I was able to make the 'process of nature' rejection over something occurring in the outer reaches of the solar system."

**TED BREINER:** "What I like best probably is the counseling side and, hopefully, to counsel a client the right way, whether it's getting the patent, whether it's getting the trademark, and then hopefully you tell them something's open, that you can get it. And I echo everything else everybody has said here. It changes daily, and, whether it's patent or trademark, it's an exciting area of law to be in. I don't think I've woken up a day that I didn't want to come to work."

### Would you have advice for our current law school students as they start picking their own career path as to whether they should come to Washington or get into IP?

**ADEMI:** "I would say 'Yes,' and I think this is something that needs to be said and heard more at the Law School. We have a really good IP program, and I feel like there are a lot of people who want to do IP, like me, but don't have the background that they may think they need. So I think students just need to know that there are opportunities out here. I think a lot of people don't know that this job exists. I applied to perhaps a hundred jobs in Chicago. I was set on Chicago. I applied for one job here."

### And has that worked out better for you, do you think?

**ADEMI:** "Well, absolutely."

**RAPHAEL:** "I know that for some of the design-patent examiners and the design patents, you actually don't need the science or engineering degree as much as you need a fine arts background. So if people have a fine arts background and they would be interested in the patent examining, they should go ahead and look into it."

**PATS:** "There's nothing stopping you if you're really interested in IP from getting a master's in a technical discipline, if you want to take the patent bar, etc. For Marquette undergraduate students, before you even get to law school, it's important to know about intellectual property, to know about the patent office, know about patents, trademarks, etc., what's out there. So then you can choose your path accordingly. There are more and more opportunities now for litigators who do not have technical backgrounds."

**TED BREINER:** "If you want to go into IP and you have the right background, you're going to get a job offer, I think. I think anybody is. And what Justin said is exactly right. If you know you want to be a lawyer, but you're not sure what kind of lawyer you want to be, in your undergraduate years, you better take some technical background. . . . If you know you want to be a lawyer when you're starting as an undergraduate, then make sure you get the science, because then the opportunity's huge."





## BEST MOMENTS, from the Simple to the Grand

**We asked our discussants to name a particularly memorable accomplishment or a day that especially sticks out during their career to date in Washington, D.C. A few of the answers:**

**JOEL TEITELBAUM:** “Not long after the Affordable Care Act was passed, we were funded by the nation’s largest health foundation to run a project that a colleague and I co-directed. Basically, we’re talking about the Affordable Care Act, a 2,000-page statute, which to date has spun off probably upward of 20,000 pages of regulations. And we were tasked with—in the early days, months, and first few years of implementation—basically writing about the key implementation issues for an incredibly broad audience. You’re talking about folks who know very little about the law’s details but for whom the Affordable Care Act will be a wonderful event. You’re talking about policy makers and scholars and others. So we were playing the role of helping folks understand the implementation of this incredibly complex statute and its implementing regulations. It’s a very D.C. type of situation, but it’s also a fairly memorable one.”

**ROBERT BLAZEWICK:** “Negotiating the basing agreements for all the U.S. military bases in Italy—and there’s a lot more to it than that. . . . There was a muddle of agreements. You’re dealing with multiple cultures. We worked on this for years. After six years, we came to ‘Yes,’ and now we have unified basing agreements throughout Italy. It seems like a small thing, but it was a big deal.”

**JEFF HIRSCHBERG:** “February ‘96, four of us from the Center for Democracy were over in Strasbourg, France, helping the Russians get admitted to the Council of Europe. In order to get admitted to the Council of Europe, you have to subject yourself to the European Court of Human Rights. And that night, we were having a retirement party for Miguel Martinez, from Spain, who was completing his three-year term as the president of the Council of Europe. There were 5 Americans and 12 Europeans. Miguel was an elegant man, always wore a beautiful suit, white on a white shirt, and no tie. . . . At the end of the dinner, Miguel requested that we all stand up. We held hands and sang ‘We Shall Overcome.’ So, when someone asks me what I’ve done in politics and the law and my kids ask me, ‘Why do you subject yourself to this misery?’ I tell them basically it’s for moments like that. They don’t come along very often, but when they come along, they’re basically worth everything.”

**KRISTINA SESEK:** “In 2018, while working at the U.S. Chamber of Commerce, I had the opportunity to lobby in Wisconsin on a comprehensive civil litigation reform package that was signed into law. Wisconsin Act 235 deals with a variety of issues from class actions to the disclosure of third-party litigation funders. Getting to work on these issues in my home state was a very special experience.”

**CREIGHTON MACY:** “I’d say probably the first time I ever got to pick up the phone and say I am a trial attorney with the Department of Justice’s antitrust division. Or to give a presentation, or put my name on a brief, and say I work for the United States Department of Justice. Those were incredibly special moments, and I was very proud to be able to say those words each time I said them.” ■







# THE PROFESSIONALS *versus* THE POLITICAL ALLIES

Marquette Law School professor's extensive analysis probes the qualifications of America's ambassadors.

A federal Freedom of Information Act request by **Professor Ryan Scoville** yielded a trove of previously unreleased data on the qualifications of 1,900 people who were appointed to be American ambassadors, starting with the administration of President Ronald Reagan and continuing through the first two years of the administration of President Donald Trump. The information allowed Marquette's Scoville to shed light on previously unanswered questions about the qualifications of ambassadors, especially those who are not career diplomats.

The result was "Unqualified Ambassadors," an article by Scoville published in the *Duke Law Journal* in 2019. In the article, Scoville, who teaches and writes about U.S. foreign relations law and international law, describes the constitutional background related to appointing ambassadors, historical practices related to appointments, and the information he gathered about contemporary practices and controversies around ambassadorial appointments. He also analyzes options for steps that could be taken, particularly by Congress, to increase the overall quality and professionalism of the nation's ambassadors.

The following are lightly edited excerpts from Scoville's *Duke Law Journal* piece.

## The Rise of Ambassadorships as Rewards for Support

United States presidents often reward financial donors and other political supporters with nominations for ambassadorships to foreign states. Because these nominees tend to come from outside the ranks of the State Department's professional diplomatic corps, their selection is typically justified to the public by reference to other indicia of merit, such as philanthropic work and success in industry. Campaign contributions are brushed aside as tangential. Personal connections to the president are framed as the auspicious portents of access and influence. A career in the Foreign Service is deemed unnecessary and even counterproductive.

Consider a few examples. At least 8 of President Trump's first 15 appointments to bilateral ambassadorships (i.e., ones to foreign states as opposed to international organizations) were financial donors. This group includes New York Jets owner Robert Wood Johnson IV, who personally contributed more than \$450,000 to support the Trump campaign and is now ambassador to the United Kingdom. In 2013, President Barack Obama nominated Colleen Bell, a producer for the daytime television series *The Bold and the Beautiful*, as ambassador to Hungary. President George W. Bush nominated five donors whose most significant credential was ownership of a Major League Baseball team. President

**At least 8 of President Trump's first 15 appointments to bilateral ambassadorships . . . were financial donors.**



George H. W. Bush selected as ambassador to Barbados a financial contributor who lacked not only diplomatic experience, but also a college degree and an employment history. And in 1981, President Reagan chose his personal friend John Gavin as ambassador to Mexico. Gavin spoke Spanish and had previously served as an adviser to the secretary general of the Organization of American States, but he was a Hollywood actor by trade. He played character Sam Loomis in Alfred Hitchcock's *Psycho* and was a debonair, tuxedo-and-mahogany sort of character in rum commercials for Bacardi.

Cases such as these occur against a constitutional backdrop that many view as settled. Article II provides that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors,” and it is generally accepted that this language confers broad discretion: The president enjoys wide latitude in selecting a nominee, and the Senate is comparably free to choose whether to advise and consent. The principal restraints are instead political. As the Founders saw it, the exclusivity of the president’s power to nominate and commission would render him primarily responsible for, and thus help to deter, poor selections, and the Senate’s power to confirm would necessitate nominations with broad appeal. Meanwhile, each senator’s presumed desire for reelection would incentivize publicly defensible votes in the confirmation process. By this logic, constitutionality is a simple question of procedural regularity, and those who make it through the process are likely to satisfy basic standards of fitness.

And yet, ambassadorial appointments are a perennial source of controversy. The central question is whether it is optimal for the president and the Senate to exercise the discretion Article II confers by appointing financial donors and other affiliates of the president from outside the State Department’s professional diplomatic corps (“political appointees”), rather than Foreign Service officers (“career appointees”). . . .

This article reveals multiple dimensions of the appointments process that have long been opaque. Using a novel dataset based on a trove of previously unavailable documents that I obtained from the State Department through requests and litigation under the Freedom of Information Act (“FOIA”), the article systematically reveals the professional qualifications and campaign contributions of more than 1,900 ambassadorial nominees spanning the Ronald

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Reagan, George H. W. Bush, Bill Clinton, George W. Bush, and Barack Obama administrations, along with the first two years of Donald Trump. In doing so, the article sheds new light on the relative and absolute merits of political and career nominees, the bilateral relationships that may have benefited or suffered most under modern appointments practice, and trends across several administrations.

### **Four Conclusions About Political Versus Career Ambassadors**

Under the Foreign Service Act of 1980, the president must provide to the Senate Foreign Relations Committee a “certificate of demonstrated competency” of nominees for ambassadorships. The certificates for the 1,900 appointees in my dataset support several significant conclusions regarding the modern practice of ambassadorial appointments.

First, as a group, career nominees have been substantially more qualified than political nominees under all the dominant metrics of competence: they have possessed stronger language abilities and had more experience in and involving receiving states and regions, foreign policy, and organizational leadership. The only metric under which career nominees have been less attractive to nominating presidents is financial; Foreign Service officers contributed far less money to presidential campaigns than their counterparts. These facts—summarized in the table on p. 39—are consistent with the suspicion that political appointments are often rewards for financial assistance, irrespective of other considerations of merit. From this perspective, common attempts to highlight donor credentials appear as post hoc justifications for a practice that is fundamentally nonmeritocratic.

Second, even though career ambassadors are extremely well qualified in both an absolute and a relative sense, it is at least conceivable that there is room for improvement. In the first two years under President Trump, 36 percent of career ambassadors had no aptitude in the receiving state’s principal language, 77 percent had no prior experience in the receiving state, and 16 percent lacked prior experience in the region. In view of this evidence, critics of political appointments might strengthen their case by exploring ways to further optimize the State Department’s training and assignment policies for Foreign Service officers.

Third, the data suggest that federal appointments practice has systematically disserved some states and



regions. Western European states and major allies such as Australia, Canada, and Japan have received an overwhelming majority of relatively unqualified donors and bundlers. Language deficiencies have been particularly common among ambassadors to states in Eastern Europe, the Middle East, and East Asia. Lack of regional experience has been comparatively common among ambassadors to Europe, where the United States now confronts a series of challenges, including Russian nationalism; the rise of illiberal governments and populist movements; and significant disagreements over trade, the Iran nuclear agreement, climate change, and the North Atlantic Treaty Organization (NATO). To the extent that credentials stand as reliable predictors of performance, these patterns indicate areas in which U.S. ambassadors have been least effective.

Finally, as a group, political nominees have in several ways become materially less qualified over time. Compared to those nominated under Presidents Reagan and George H. W. Bush, the typical political nominee in recent years has possessed less experience in the receiving state, significantly weaker language skills, and much less experience in the region of the receiving state, foreign policy, and organizational leadership. Moreover, the gap between the credentials of the typical career nominee and the typical political nominee has grown under virtually all of these measures. In short, if the preference for career

nominees was justified at the enactment of the 1980 law, it appears to be even more so now. The conjunction of this development and the steep rise in the average size of campaign contributions among political nominees indicates the possibility that the increasing cost of presidential elections is indirectly degrading the quality of U.S. diplomatic representation overseas by shifting the relative weight of credentials and contributions as influences on the appointments process.

### Policy Implications

The findings carry important implications for the way in which the president and the Senate exercise their powers under the Appointments Clause.

Most immediately, the evidence changes the context in which debates about ambassadorial appointments occur. A long-standing dearth of systematic data collection forced critics of political appointments to rely on anecdotal evidence of underqualification and incompetence. This rhetorical strategy always left room for an obvious retort: even if some political appointees are unqualified, many are fit for office. But the collected evidence changes the dynamic by rendering incontrovertible a view that was previously impressionistic: political ambassadors are, as a group, significantly less qualified than career appointees under several metrics that Congress has deemed particularly important. By demonstrating as much, the research confirms that the occasional press

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reports on the underqualification of donor nominees are representative of broader trends.

In turn, the evidence is consistent with the possibility that a form of plutocratic corruption broadly infects ambassadorial appointments in the United States. In 1974, President Richard Nixon's personal attorney, Herbert Kalmbach, pleaded guilty to promising a European ambassadorship to J. Fife Symington in return for a \$100,000 contribution to the election campaigns of Nixon and a collection of Senate Republicans. The Senate Watergate Committee's final report highlighted this conviction along with "over \$1.8 million in presidential campaign contributions" from 54 noncareer ambassadors in recommending strict limits on federal campaign contributions. Congress later enacted these limits as amendments to the Federal Election Campaign Act of 1971, but it is hard to avoid the impression that quid pro quo corruption continues to shape official practice. Surely it is no coincidence that relatively unqualified financial supporters have received the vast majority of appointments to attractive destinations for global tourism.

The evidence also suggests the complicity of the Senate. Diplomatic historian Elmer Plischke found that fewer than 3 percent of ambassadorial nominations from 1789 to 1975 failed to result in an appointment. In more recent decades, the Senate has at times rejected or otherwise ended nominations. For instance, George Tsunis, an Obama donor and pick for ambassador to Norway, had to withdraw his nomination in 2014 in light of a disastrous confirmation hearing and considerable Senate opposition. But such cases remain at roughly 3 percent of all nominations in recent decades, with only minimal variation from one administration to the next and no signs of closer scrutiny for political nominees. The evidence of eroding qualifications among those nominees raises questions about the wisdom of such deference.

The findings further suggest that the various legislative efforts to dissuade the president from nominating comparatively unqualified political supporters have not succeeded. Recall that, since 1980, federal law has explicitly stated that campaign contributions should not play a role in appointments, that nominees should generally demonstrate language abilities and country expertise, and that the president should normally fill ambassadorships with career members of the Foreign Service. Given the absence of certificates of demonstrated competency

prior to 1980, it is unclear whether this law effected an improvement over earlier practice. It is quite clear, however, that little improved from 1980 to 2018. If anything, the trends reported above suggest that the Foreign Service Act of 1980 has only become less effective over time, particularly during the past decade. The most recent evidence from the Trump administration underscores this conclusion.

There are two plausible consequences, neither salutary. First, the United States may encounter greater difficulty executing foreign relations. Lacking important qualifications now more than any other time in recent memory, political appointees may very well find it harder to communicate with foreign officials, know less about the politics and culture of receiving states and regions, and exhibit a diminished ability to navigate federal bureaucracy and lead embassy personnel. Important insights and opportunities will be missed. Gaffes will occur. Resources will be misused. Morale problems will intensify. And so forth. On a retail basis, none of these problems are overwhelming. But in aggregate and over time, they could materially disserve U.S. bilateral relationships.

Second, the eroding credentials of the donor class might contribute to the marginalization of diplomacy itself. By standard accounts, a substantial militarization of U.S. foreign policy commenced shortly after the Cold War and accelerated following the terrorist attacks of September 11, 2001. Rather than invest in diplomacy and civilian capacity to manage foreign affairs, successive administrations and Congresses have allocated vast new resources and functions to the armed forces. Thus, the Defense Department now plays a significant role in a wide range of traditionally civilian domains, such as development assistance. Similarly, in a move that is likely to further mitigate a traditional advantage of the Foreign Service, the Army is now requiring a growing number of military units to develop regional expertise—including cultural and linguistic knowledge—in order to strengthen relationships with foreign partners and better respond to future crises. Rosa Brooks has suggested that these developments are generating a self-perpetuating shift toward higher levels of militarization: as U.S. forces acquire new resources and skills to carry out new functions, civilian capacity atrophies, which in turn makes it easier to justify the allocation of even more resources to the military.

Trends in ambassadorial qualifications might reflect and contribute to this phenomenon. Given the

growing number of relatively unqualified political donors in senior diplomatic posts, it should come as no surprise if Washington begins to place more trust in nondiplomatic perspectives and solutions. With respect to Western Europe, for example, one can only imagine that it is difficult for political ambassadors—former daytime television producers, actors, businesspersons, and socialites—to prevail over senior NATO officers in the event of disagreement. The plausible effect is not only a marginalization of civil diplomacy, but also a diminished capacity even to imagine nonmilitary solutions to national security problems. In these ways, the evidence presented above might strengthen the argument for reform.

To be sure, few would argue that a career in the Foreign Service is a strict prerequisite to an effective ambassadorship. A nominee might have acquired an aptitude for leadership, negotiation, and intercultural communication, among other skills, without ever working for the federal government, much less the State Department, and history offers plenty of examples of successful noncareer appointees. To name just a few, Shirley Temple Black, Mike Mansfield, Edwin Reischauer, John Sherman Cooper, and Averell Harriman all came from outside the Foreign Service and earned considerable plaudits for their work.

At the same time, there is evidence that political appointees exhibit a stronger tendency to underperform. Analyzing data compiled from nearly 200 embassy-inspection reports published by the

State Department's Office of Inspector General, a recent study by Evan Haglund found that "politically appointed ambassadors perform worse generally than career diplomats, with a 10 percent reduction in performance score on average for political appointees compared to careerists." Haglund also found that political appointees are associated with a significant reduction in the quality of an embassy's political and economic reporting. These findings align with more general statistical evidence that federal programs administered by political appointees "get systematically lower [performance] grades than careerist-administered programs even when we control for differences among programs, substantial variation in management environment, and the policy content of programs themselves."

Anecdotal evidence corroborates the point. Several of President Trump's political appointees, for example, have violated traditional diplomatic protocols or committed public gaffes that have hindered bilateral relations, even while comparable indiscretions seem harder to find among his career appointees. One inspector general's report concluded that a political appointee to The Bahamas and major financial donor to President Obama presided over "an extended period of dysfunctional leadership and mismanagement, which . . . caused problems throughout the embassy." Another report concluded that a donor who became ambassador to Denmark ran the embassy in a way that created accountability and communication issues, in

**[T]he eroding credentials of the donor class might contribute to the marginalization of diplomacy itself. . . . [I]n a move that is likely to further mitigate a traditional advantage of the Foreign Service, the Army is now requiring a growing number of military units to develop regional expertise . . . .**

### Comparing career and political nominees for ambassadorships

Metric	Career	Political	Difference (percentage point)
Contributions — % of nominees	5%	73%	+68 p.p.
Contributions — average value	\$33	\$84,850	\$84,817
Knowledge of principal language — % of nominees	66%	56%	-10 p.p.
Knowledge of any relevant language — % of nominees	80%	65%	-15 p.p.
Experience in state — % of nominees	15%	8%	-7 p.p.
Experience in or involving state — % of nominees	19%	12%	-7 p.p.
Experience in region — % of nominees	82%	15%	-67 p.p.
Experience in or involving region — % of nominees	86%	24%	-62 p.p.
Foreign policy experience — % of nominees	100%	48%	-52 p.p.
Leadership experience — % of nominees	96%	76%	-20 p.p.



addition to gaps in strategic planning. Still another found that Ambassador Cynthia Stroum—a political appointee to Luxembourg—caused numerous problems during her tenure. Many of these were “linked to . . . an abusive management style,” but there was also a “chronic communications problem between the front office and the rest of the mission” due to Stroum’s lack of coordination and lack of confidence in her staff, which led to a “near total absence of regular guidance and advance planning.”

Why would political nominees tend to underperform in these ways? One potential explanation points to their general inferiority in language ability and experience in the receiving state, region, foreign policy, and organizational leadership. Under this possibility, the qualifications discussed elsewhere in this article predict performance in office, and the gradual erosion of those qualifications among political nominees in recent decades has produced an increasingly deleterious effect on performance outcomes. If this hypothesis is correct, the solution is to nominate more individuals who possess the qualifications discussed and to devote greater resources to training that enhances those qualifications among nominees who are deficient.

Unfortunately, there is close to zero empirical evidence on the specific traits that predict performance in office, and the limited evidence

that exists is mixed: On the one hand, Haglund finds that an ambassador’s language ability correlates positively with his or her ability to facilitate interagency coordination. On the other hand, Haglund does not test for the effects of experience in the receiving state, foreign policy, or organizational leadership; he does not examine the effects of changes in qualifications over time; and he finds that regional experience has no effect on overall performance. Meanwhile, no other research has attempted to measure performance outcomes.

Such an empirical record leaves room for a second possibility: political nominees underperform because they are inferior in ways that Congress has not specifically addressed. Under this possibility, political nominees are inferior not because they tend to lack experience in the receiving state or foreign policy but, rather, because of other potential tendencies, such as a comparative lack of interest in international affairs, diplomacy, or public service. If this hypothesis is correct, the evidence collected in this article is largely unrelated to the performance deficit, and Congress needs to reconsider the factors that it has emphasized in the Foreign Service Act of 1980 and deliberations over individual nominees. Additional empirical research is needed to further elucidate whether and why political appointees tend to underperform. ■



## No Debate About Scoville's Sharp Focus on Foreign-Relations Law

When Ryan Scoville was a student at a high school just outside Boise, Idaho, he got involved in competitive debate. As he puts it, the debate team became his life. "The other team members and I attended tournaments across the country, spent summers at debate camps, and immersed ourselves in an incredibly diverse collection of ideas. We probably didn't understand half of what we were talking about, but I loved it." And the debate question on which his team focused one year involved American foreign policy toward China.

"That was the point where I really became interested in foreign affairs," Scoville says.

The high school also had a strong program in foreign languages, which enabled him to sign up for three years of courses in Japanese. This further encouraged his interest in foreign countries and U.S. interactions with the rest of the world.



Ryan Scoville

Jump the story ahead a couple decades, and you'll find Scoville on the faculty of Marquette Law School, still with a strong interest in American foreign policy, which is bringing him a rising profile as a legal scholar. And you'll find him teaching courses on U.S. foreign relations law and international law, as well as general-curriculum subjects such as civil procedure.

### How Did Scoville Get from a High School Debate Team in Idaho to Eckstein Hall?

After attending Brigham Young University in Provo, Utah, where he graduated as valedictorian, Scoville attended Stanford Law School. Upon completing his education, he served as a law clerk for Judge Neil V. Wake of the U.S. District Court for the District of Arizona and then for Judge Milan D. Smith, Jr., of the U.S. Court of Appeals for the Ninth Circuit. He also worked for two years on transnational litigation in the Denver and Tokyo offices of Morrison & Foerster.

But Scoville had hoped to become a law professor ever since law school, so he seized the opportunity when he received an offer to join the Marquette law faculty in 2011. Scoville is a very well-regarded teacher, according to Dean Joseph D. Kearney, who says, "Our students have expressed their wry admiration for his focus in the classroom: He is impossible to get off topic." There's a professional lesson in that, of course.

In his research, Scoville focuses primarily on foreign-relations law, including the domestic law that regulates U.S. diplomatic activity. Scoville says that he likes using "nontraditional" sources and methods for legal research, such as interviews with government officials and Freedom of Information Act (FOIA) requests to federal agencies. For example, the data involved in the preceding excerpt from a *Duke Law Journal* piece on the qualifications of U.S. ambassadors stem from a FOIA request to the State Department. It took him about five years to get the information, which came in the form of thousands of records requiring review and analysis.

Scoville says that he tries to avoid politics in his scholarship. He is "more concerned with discovery and the production of knowledge." He likes "the pursuit of interesting questions" and thinks that "historical and empirical inquiry, for example, is interesting and worthwhile regardless of the political implications of the results."

"I think back to my debate experience as the primary explanation for why I'm doing what I'm doing today," Scoville says. He sees many parallels between engaging in debate and being a lawyer. Both are known for the need to gather and present evidence, for the use of adversarial formats, and for verdicts that come from judges.

To add to that, both require the kind of intellectual curiosity, rigor, and just plain smarts that Scoville brings to his work. ■





# IT'S AN UNSETTLING DAY IN THE NEIGHBORHOODS

**Two trends—the end of residency requirements for city employees and a surge of homes owned by people from outside the city—are altering the fabric of Milwaukee’s residential life**

BY MIKE GOUSHA AND JOHN D. JOHNSON

This was supposed to be the summer Milwaukee reintroduced itself to the world. The Democratic National Convention was coming to town in July, bringing with it tens of thousands of visitors, national and international media among them. But by mid-April, the novel coronavirus had made holding a huge public event a much iffier proposition. The convention had been rescheduled for August, and it was uncertain what it would look like or how many would attend. Milwaukee’s coming-out party was likely to be overshadowed by the pandemic’s impact.

If it’s a more muted event, there will be less talk about Milwaukee’s renaissance, about how an older industrial city has reinvented itself. It’s a compelling comeback story: nearly \$3 billion in downtown development since 2010; an additional 7,000 downtown housing units during the same period, bringing the total number to 33,000; and neighborhoods such as Walker’s Point, Bay View, and Washington Heights joining the Third Ward in an exciting urban revival.

Yet there also will be less spotlight on the less upbeat parts of the tale of modern-day Milwaukee. Some neighborhoods are still waiting for *their* comeback. They continue to wrestle with higher rates of crime and poverty. Milwaukee is also being tested by two specific trends that threaten to erode not just the city’s tax base but also its sense of community:

- No longer bound by a residency requirement, thousands of people—municipal employees and their largely middle-class families—have moved out of the city.
- Analysis of city data by the Milwaukee Area Project of Marquette University Law School’s Lubar Center for Public Policy Research and Civic Education shows an exponential increase in the number of residential units now owned and rented by landlords who live outside the city, together with a significant decrease in the number of owner-occupied properties.

This article examines each of these trends impacting Milwaukee—especially its residential neighborhoods.

## THE IMPACT OF ENDING THE RESIDENCY RULE

For 75 years, city of Milwaukee employees were required to live in Milwaukee as a condition of employment. But in June 2013, the Wisconsin legislature approved an end to local residency requirements for all municipalities in the state. The unions representing Milwaukee police and firefighters praised the new law. The city

challenged the law in court but lost. In June 2016, the Wisconsin Supreme Court, by a 5–2 majority, rejected Milwaukee’s argument that the state constitution’s municipal home-rule provision permitted it to enforce its residency requirement.

A spokesman for then-Governor Scott Walker praised the decision, calling it “a big win for individual freedom.” Milwaukee Mayor Tom Barrett called it a “sad day.” Barrett, citing the experiences of other cities where residency requirements had ended, had argued that no longer requiring

**“The mood in the country, as it pertains to law enforcement, has changed in the last six years. And I am concerned if our police officers are viewed as an occupying force.”**

Milwaukee Mayor  
Tom Barrett





**“Sure, the house is sold. But it’s not the same. I want police officers in the neighborhood. I want firefighters in the neighborhood. I want teachers in the neighborhood. Where’s your commitment to the city?”**

Milwaukee Ald.  
Mark Borkowski

residency would have profound, negative consequences for Milwaukee. Was he right?

The most recent city data, from February 2020, suggest that Barrett had reason to be concerned. They show that 29 percent of the city’s 6,383 employees now live outside the city. That works out to 1,860 individuals. That number does not include the employees’ families.

Just 18 percent of what are known as general city employees—those who don’t work in public safety jobs—live outside Milwaukee. But far greater numbers of “sworn personnel”—police and firefighters—have left the city or chosen not to live in it.

Milwaukee Police Lieutenant Erik Gulbrandson moved from Milwaukee to Waukesha County four years ago. A 24-year veteran of the department, Gulbrandson and his wife had lived in a single-family home near Alverno College on Milwaukee’s south side for 17 years. He said they loved their neighbors. But they wanted to make life simpler, so they began looking for a condominium. First, they considered downtown. Gulbrandson said prices and taxes were discouraging, and, in the meantime, his wife got a new job that takes her to Madison regularly. So they bought a small, new condo in the Pewaukee/Sussex area.

“It’s convenient for her travel,” Gulbrandson said. “It’s good for us for where we’re at in both of our lives.”

Gulbrandson is hardly alone. As of February 2020, 47 percent of police officers, or 854 individuals, and 47 percent of firefighters, or 315

individuals, lived outside the city. And the trend shows no sign of abating. Among police officers under the age of 40, more than half now reside outside Milwaukee.

“Unfortunately, I was pretty accurate as to what my prediction would be,” Barrett said. “We have seen a large number of sworn personnel leave the city and a low percentage of new hires move into the city.”

“It has been detrimental and will be detrimental to the future of the city,” Alderman Michael Murphy echoed. Murphy is a former Common Council president and an outspoken critic of the decision to end the residency requirement. “I’m guessing it’ll probably approach 70 to 75 percent [nonresident public safety officers] in another 5 to 10 years,” Murphy said.

But Republican Assembly Speaker Robin Vos, who supported ending the residency requirement, said the city’s thinking on residency is “archaic.”

“I think in general it’s been a great thing for the employees, who are now able to choose for themselves and their families where it’s best to live,” Vos said. “I would think, if Milwaukee got outside of its old way of thinking, that this is now a huge opportunity to attract the best and the brightest.”

The exodus of city employees from Milwaukee has been a boon to neighboring suburbs. City data show Franklin, Oak Creek, Muskego, Greenfield, New Berlin, Brookfield, and Menomonee Falls to be among the most popular destinations for former city residents. That’s in part because, under the

new state law, sworn officers may be required to live within 15 miles of the city. But you can find general city employees as far away as Cedar Grove in Sheboygan County and Williams Bay in Walworth County.

The end of residency has disproportionately affected some neighborhoods in Milwaukee. For years, three aldermanic districts—the 11th on the southwest side, the 13th on the far south side, and the 5th on the far west side—have been home to large numbers of city employees, especially police and firefighters. The three districts have some of the city’s highest median residential-property values and owner-occupancy rates, as well as the lowest crime rates.

Alderman Mark Borkowski represents the 11th district, which has approximately 40,000 residents. As of early 2018, the latest period with numbers available, city data showed that 295 city employees as well as their families had left the district and moved out of the city.

“That’s sobering to me,” Borkowski said, “and it’s sad.”

Borkowski said property values haven’t changed much in his aldermanic district. Crime rates remain among the city’s lowest, and he added, “I’ve got a lot of nice neighborhoods.”

But he said that the end of residency has changed something larger: the district’s sense of community.

“Sure, the house is sold. But it’s not the same,” Borkowski said. “I want police officers in the neighborhood. I want firefighters in the neighborhood. I want teachers in the neighborhood. Where’s your commitment to the city?”

While one police department veteran called that comment insulting, Gulbrandson said he could understand Borkowski’s perspective. But he said he hasn’t turned his back on the city.

“The city is where the great restaurants are,” Gulbrandson said. “The city is where the nightlife is. We come to the festivals. We spend our money in the city. We just don’t pay our property taxes in the city.”

“I’ve never meant for it to be a slap in anyone else’s face. It was purely for personal reasons for my wife and me.”

Some neighborhoods have weathered the initial fallout from the end of residency better than others. Pat Yahle is president of the Enderis Park Neighborhood Association. She’s lived in her

northwest-side home near 72nd and Locust for the last 22 years.

She hears the occasional grumble about fewer city services or unruly behavior at the neighborhood park. But Yahle said she hasn’t seen an exodus of city employees. “I’m not seeing houses go up for sale like mad or people looking to leave,” she said.

“They want to be here,” Yahle said of her neighbors. “Residency was not the reason they came. They came for the house value, the neighborhood events, the joy and pride we have as neighbors.”

But just west of Enderis Park, in the 5th aldermanic district, Alderwoman Nikiya Dodd said she’s concerned about an increase in rental properties in neighborhoods that long boasted strong homeowner occupancy.

“Some neighbors have shared their concerns about the neighborhood changing around them, and how this may affect the value of their homes,” Dodd said.

The city’s predicament has been compounded by the loss of residents employed by the Milwaukee Public Schools (MPS). The district also had a residency requirement, which it formally eliminated in July 2013 after the legislature acted. As of mid-2019, MPS had 9,471 full-time employees. Almost a quarter—2,184—lived outside the city. Combining the city and MPS numbers, and figuring an average household size of 2.4 individuals, that would translate to a loss of roughly 9,500 residents.

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State Assembly Speaker  
Robin Vos





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Milwaukee Police Lt. Erik Gulbrandson, who moved out of the city

In fact, the full impact of the end of residency may have yet to be felt. The city is facing a huge increase in its pension obligations. These are expected to climb from \$70 million to at least \$160 million a year by 2023.

“We’ll be approaching in pension obligations almost the same amount of money we collect in property taxes,” Murphy said. “It’s not sustainable.”

To meet those obligations, Barrett says that the city will have to look at serious changes to its pension system. Among them: negotiating new collective bargaining agreements with the unions that represent police and firefighters. But with more public safety officers living outside the city, Barrett wonders what incentive they would have to bargain.

“I’m concerned about our ability to get these voluntary agreements . . . because of the detachment they [police and firefighters] have, based on the fact it does not have an effect on their property taxes.”

The other concern for Barrett and some city leaders about the end of residency is not dollar driven. It’s about relationships—more specifically, the one between city residents and police officers who no longer live in the city.

“The mood in the country, as it pertains to law enforcement, has changed in the last six years,” Barrett said. “And I am concerned if our police officers are viewed as an occupying force.”

But Inspector Terrence Gordon, commander of the Milwaukee Police Department’s criminal investigation bureau, said that police haven’t

noticed a change in the way they’re viewed by city residents.

“They don’t care where the officer lives,” Gordon said. “They just want somebody who can help them with their problem and get there quickly. I personally haven’t noticed much of a changing dynamic. Our officers are just as engaged as they’ve ever been.”

Gordon grew up in Milwaukee. He was the training director of the city’s police academy from 2013 to 2016. He said he’s seen no difference in the quality of recruits since the residency rule was eliminated. But he has seen one change. Despite efforts to recruit more minorities, Gordon, who is African American, said that the department’s rank and file have become less diverse. Today, nearly two-thirds of Milwaukee police officers are white. And many of them now live outside the majority-minority city where they work.

We asked the leader of the union that represents Milwaukee police officers why more of his members were choosing to live outside the city, and whether that would affect relations between police and city residents.

“The state changed the residency law in 2013,” Milwaukee Police Association President Shawn Lauda responded. “Instead of discussing a law change from seven years ago, I believe a much more important story would be to ask the mayor how the city is going to live up to its obligation to keep its citizens safe after cutting 60 more police officer positions [in the 2020 city budget].”

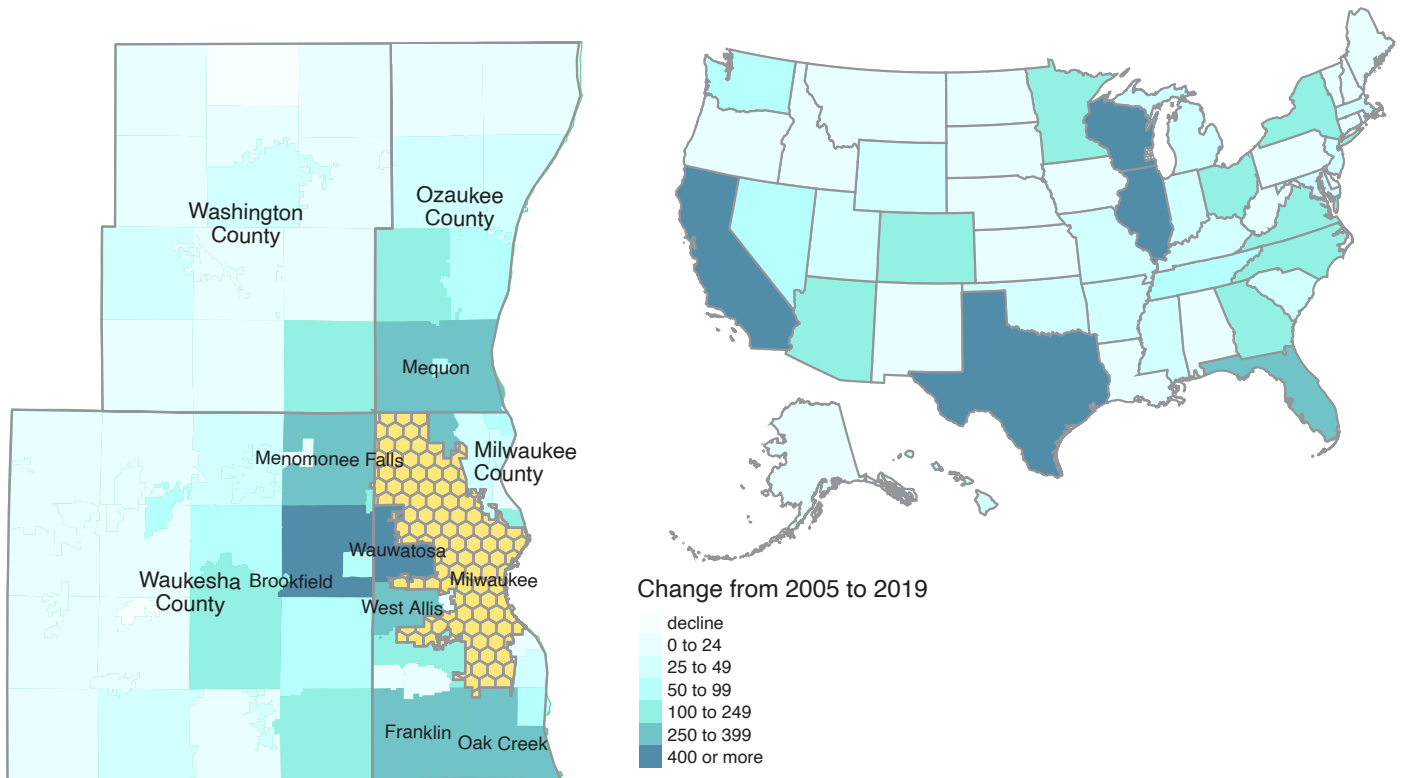
Reversing the trend of city employees leaving Milwaukee won’t be easy. City officials tout their big-city amenities, housing stock, and a variety of education options. But the suburbs generally offer solid public schools, lower property taxes, more land, and lower crime rates. So, Milwaukee is trying something new. It’s boosting the pay of city employees by 3 percent if they live in or move into the city. It’s willing to make the same offer to the unions representing police and firefighters.

The incentive-pay idea faces two questions. First, is it legal? City of Milwaukee officials say that a similar incentive pay exists in neighboring West Allis, which offers employees who live in their city an additional 2 percent in pay. But the second and bigger question may be whether a 3 percent pay increase is enough to persuade Milwaukee employees to live in the city where they work.

“That’s a really good question,” Barrett said. “We’ll see.”



## Growth in Number of Milwaukee Properties Owned by Entities Outside the City



These maps show the change in ownership of residential properties in the City of Milwaukee by entities outside the city. The darker the colors, the larger the increase in non-Milwaukee ownership of city property.

## THE SHARP INCREASE IN MILWAUKEE HOMES OWNED BY NON-MILWAUKEEANS

If the end of the residency requirement has left a mark on the city, so has the Great Recession of more than a decade ago. When the housing market collapsed, the city experienced a tidal wave of foreclosures. Residential-property values plummeted. They didn't bottom out until 2016.

Since then, median values in most aldermanic districts have been starting to rebound. While most remain well below their pre-recession peaks, they are gradually returning to more-historical norms.

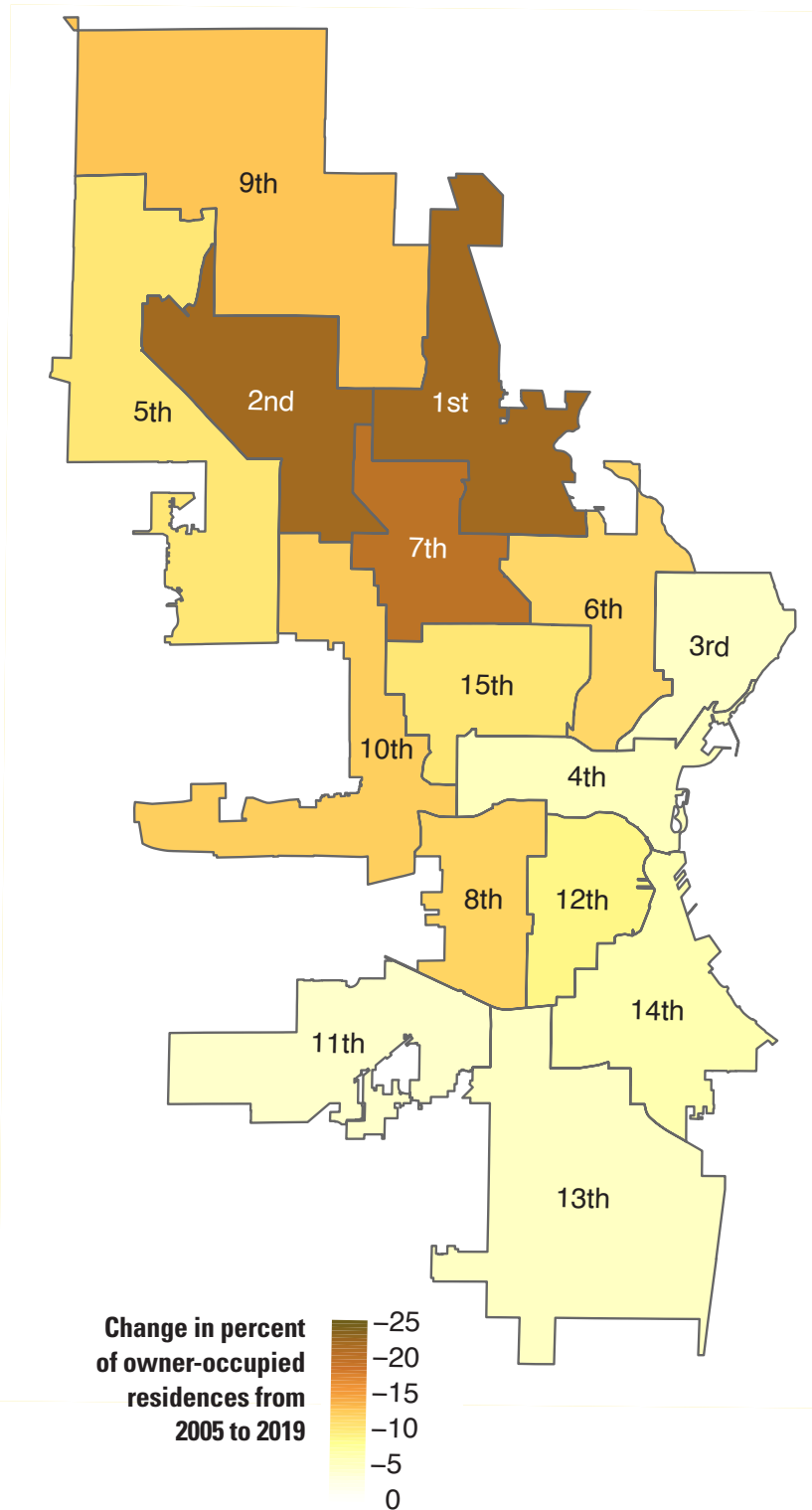
But Milwaukee's housing market has changed in important ways. For one, the city has seen a dramatic decline in residential properties that are occupied by their owners. And the city has seen a transfer of hundreds of millions of dollars in housing wealth. Simply put, thousands of residential properties in Milwaukee are no longer owned by city residents. They're owned by individuals and companies with mailing addresses in the suburbs, other parts of Wisconsin, or out of state altogether. Those properties are most likely to be rented.

We compiled and analyzed publicly available data from 1990 to 2019. We started by looking at owner-occupancy rates for residential properties in Milwaukee. Owner occupancy was determined by comparing the address of the property with the owner's address.

**[T]he number of landlords residing outside the city has exploded. Half of all rented properties are now owned by someone outside Milwaukee. From 2005 to 2019, the number of properties owned by suburbanites grew by 70 percent, from nearly 7,700 properties to more than 13,000.**



## Owner-Occupancy in Aldermanic Wards



We defined residential properties as single-family homes, duplexes, triplexes, four-unit dwellings, and condominiums. They constituted 70 percent of all housing units in Milwaukee in 2019. We excluded larger, commercial apartment buildings from the analysis. We considered houses to be “rentals” when they aren’t owner-occupied.

Using this definition, we determined that in 2019, Milwaukee had 87,700 single-family homes, 33,400 duplexes, 11,200 condos, and 2,600 triplexes or four-unit dwellings.

During the 1990s and early 2000s, the share of owner-occupied residential properties in Milwaukee remained steady. But the Great Recession proved to be a great disrupter. In 2005, at the market’s peak and just before the recession, the city recorded 107,000 owner-occupied properties. By 2019, that number had fallen to 93,000. In 2005, 80 percent of the residences were owner-occupied. By 2019, that number had declined to 69 percent.

Owner-occupancy rates have fallen for every housing type. They were down 12 percent each for single-family homes and duplexes. They were down 10 percent for triplexes and four-unit dwellings. Owner occupancy of condos fell by 9 percent.

The trend is generally citywide but is much more pronounced on the north and west sides of Milwaukee, in the 1st, 2nd, and 7th aldermanic districts.

In the 1st district, the owner-occupancy rate fell from 78 percent in 2005 to 56 percent in 2019.

In the 2nd district, owner occupancy fell from 87 percent to 65 percent during the same period.

In the 7th district, owner occupancy fell from 74 percent to 54 percent.

By contrast, owner occupancy in the 3rd district (east side), 4th district (downtown), 11th district (southwest), and 13th district (far south) all declined by just 5 percent.

As that pattern suggests, the housing crisis and the Great Recession hurt minority communities most. Home ownership fell 5.5 percent in mostly-white census tracts but declined by 10.3 percent in mostly-Latino tracts and 16.6 percent in mostly-black census tracts.

So we know more city residents are renting. But who owns the properties they're living in? A review of the data provides two answers.

First, the number of landlords owning multiple properties in Milwaukee dramatically increased. The popularity of limited liability corporations (LLCs) has skyrocketed from a negligible number of properties owned in the early 1990s to more than 13,000 in 2019. LLC ownership is concentrated in single-family homes and duplexes. It quadrupled from 2005 to 2019.

Second, the number of landlords residing outside the city has exploded. Half of all rented properties are now owned by someone outside Milwaukee. From 2005 to 2019, the number of properties owned by suburbanites grew by 70 percent, from nearly 7,700 properties to more than 13,000.

During that same period, residential properties owned by someone who lives in Wisconsin but not in Milwaukee or its suburbs grew from just under 1,000 to nearly 2,300.

But perhaps the most significant development in the city's housing market in the last 15 years involved out-of-state investors. Landlords with addresses outside Wisconsin quadrupled their holdings in the last 15 years, from 1,300 properties to more than 5,800.

The change in ownership of residential properties in Milwaukee has resulted in an enormous transfer of family-housing wealth to out-of-state individuals and businesses. Landlords with Illinois addresses now own more than 1,600 residential properties in the city of Milwaukee. Landlords in California own 1,400 units. Texas landlords own nearly 700. Keep in mind that none of these figures includes large apartment buildings.

In all, out-of-state-landlords now own more than \$580 million in residential properties in the city of Milwaukee. That number grew by \$396 million in just the last 15 years.

A recent story in the publication *CityLab* noted that more than 12 million single-family homes are currently being rented in the United States. Following the housing collapse, attitudes toward home ownership changed. Some individuals can't afford to buy a home. Others no longer see owning a home as part of a strategy to create personal wealth. The trend away from owner occupancy is not simply a Milwaukee phenomenon.

But what's happening in Milwaukee raises interesting questions.

- What will be the long-term impact on neighborhoods that see an exodus of city employees?
- Is the decline in owner-occupancy rates in Milwaukee—especially on the north and west sides—a long-term trend?
- Will the number of residential properties owned by people who don't live in the city—or the state—continue to grow?
- What does the trend away from owner-occupancy mean for Milwaukee residents, who once used their homes to build long-term wealth?

The answers to those questions will be important. For decades, Milwaukee was a city of strong, cohesive neighborhoods, its citizens bound in part by something they had in common: the investment in their home.

Today, that sense of community—the mettle of Milwaukee, really—is being tested. While parts of the city enjoy a welcome renaissance, other neighborhoods are experiencing a different, more concerning kind of change: the departure of middle-class city employees and their families and a huge transfer of housing wealth from city residents to individuals and businesses that view Milwaukee as a rental-market opportunity, not as a place to live. ■

**Owner-occupancy rates have fallen for every housing type. They were down 12 percent each for single-family homes and duplexes. They were down 10 percent for triplexes and four-unit dwellings. Owner occupancy of condos fell by 9 percent.**



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Mark P. McKenna

# Putting the Brakes on Shifting Definitions of Trademarks

Mark P. McKenna is the John P. Murphy Professor of Law at the University of Notre Dame. This piece offers a condensed and edited selection of passages from Marquette Law School's 2019 Nies Lecture on Intellectual Property, which McKenna delivered. The full text of the lecture, which was titled "The Rise of Property and Decline of Equity in Trademark Law," appears in volume 23, issue 2, of the *Marquette Intellectual Property Law Review*.

There has been a lot of discussion in the literature about the ways trademark law has come to treat trademarks as property. Many scholars who have written about this "propertization" have described it as a shift from consumer to producer protection. Once upon a time, the story goes, trademark law aimed to protect consumers against confusion. It gave producers a cause of action against others who used similar marks in ways that would confuse consumers—but it did so only because the producers happened to be well situated and highly motivated to vindicate consumer interests. A number of modern doctrines (many of which allow claims based on much

more attenuated forms of confusion or do not require evidence of confusion at all) reflect a problematic shift away from those consumer interests and toward protection of producer property interests.

I have written a lot about this narrative over the course of my career: I think it is overly simplistic and, in some ways, wrong. Trademark law has always protected marks as property and always significantly for the purpose of protecting producers. What *has* changed is that modern law conceives of the property interests much more broadly than it once did. So the important shift in trademark law was not one from a system focused exclusively on consumer



Mark P. McKenna

interests to one focused on producers, or from no-property to property; it was a shift in terms of the nature of the property interest protected.

But even that revised narrative misses some important things about trademark law's evolution because it is insufficiently attentive to significant changes in the doctrinal structure of trademark law over the course of the last century—specifically, with respect to the relationship between trademark law and the broader law of unfair competition. Changes in that relationship, I will argue, *did* work a meaningful change in the "propertization" of trademark law. Relatedly, and necessarily, these same changes deemphasized legal rules that focused on the defendant's conduct (rather than the plaintiff's ownership interest).

## The *Abercrombie* Decision: A Mashup of Concepts

As anyone who has taken a trademark class knows, the Second Circuit's 1976 decision in *Abercrombie & Fitch Co. v. Hunting World, Inc.* is the most black-letter of all the black-letter trademark law. In fact, if you were going to teach only one case in the entire course, it would almost certainly be *Abercrombie*.

What *Abercrombie* teaches is that the way we determine whether a claimed indicator is a trademark is by placing it in a category along a spectrum (generic, descriptive, suggestive, arbitrary, or fanciful). The placement of a term determines whether it qualifies as a trademark automatically, whether the term qualifies only with additional evidence (secondary meaning), or whether it is disqualified.

What's notable for our purposes here is that the *Abercrombie* spectrum serves as a way to determine whether a term is treated as a trademark or gets no protection. And the spectrum is a mashup of trademark and unfair competition concepts. Indicators now placed in categories at the top end of the spectrum are those that we once simply would have called trademarks. We now call those terms "inherently distinctive," and they are automatically protectable simply by virtue of the classification. Other categories, however, consist of indicators that were, by definition, not *trademarks*. Such as descriptive words. Those terms—like MILWAUKEE'S BEST—now potentially qualify as trademarks. We just ask their proponents for proof

that the terms actually do indicate source and, if the proponents can make that showing, we pretend they are the same as old-time technical trademarks. Conditions for relief in the face of not owning a trademark have been transformed into requirements for proving trademark status.

This transformation has been so complete that the Supreme Court accepted in *Two Pesos v. Taco Cabana, Inc.* (1992), a case about the design of a Mexican restaurant, and *Qualitex Co. v. Jacobson Products Co.* (1995), a case about the color of a dry-cleaning press pad, that trademark subject matter is now defined *entirely* functionally: it consists of "anything at all that is capable of carrying [source-related] meaning."

And when anything can be a trademark, there is no real need for a residual doctrine that provides relief for use of things that are not trademarks. If something does not qualify as a trademark, there is a reason—and the reason has to do with its lack of capacity to identify source, not its ontological status as color, shape, fragrance, word, or sign.

## The Way Consequences Show Up

The consequences of assimilating unfair competition into trademark law were largely unconsidered, and they continue to surface in some of the most challenging modern cases. Here I want to highlight the way these changes have increased emphasis on property concepts and decreased emphasis on equity—or, if you like, on tort concepts.

In the former system I have described, the major cut between trademark and unfair competition was whether the plaintiff had a valid (technical) trademark. Trademark law proper was therefore primarily concerned with questions of validity (whether the plaintiff had a property interest in a trademark).

Because only indicators that unambiguously indicated source qualified as trademarks, trademark cases necessarily involved indicators that competitors had no legitimate explanation for using. And trademark owners could assert claims against direct competitors. As a result, once the plaintiff established ownership of a valid mark (which registration established as a *prima facie* matter),



**[W]hen anything can be a trademark, there is no real need for a residual doctrine that provides relief for use of things that are not trademarks. If something does not qualify as a trademark, there is a reason—and the reason has to do with its lack of capacity to identify source, not its ontological status as color, shape, fragrance, word, or sign.**



the only thing left to determine was whether the defendant was using the same or a sufficiently similar mark. Complicated infringement doctrines were unnecessary.

Unfair competition was at the opposite end of the spectrum. Those cases by definition did not involve a property interest, so in determining whether any remedy should be given, courts were not concerned with identifying the thing the plaintiff owned. They were instead focused on the defendant's *conduct*. Specifically, courts in unfair competition asked whether, despite the plaintiff's lack of a property interest in a trademark, it should nevertheless get relief because the defendant was behaving badly in trying to steal the plaintiff's customers. The doctrine was thick in equitable considerations; the plaintiff had to prove intent to pass off, or at least the defendant's conduct was calculated to have that effect.

Because modern law has eviscerated trademark law's subject-matter limitations and accepted that anything

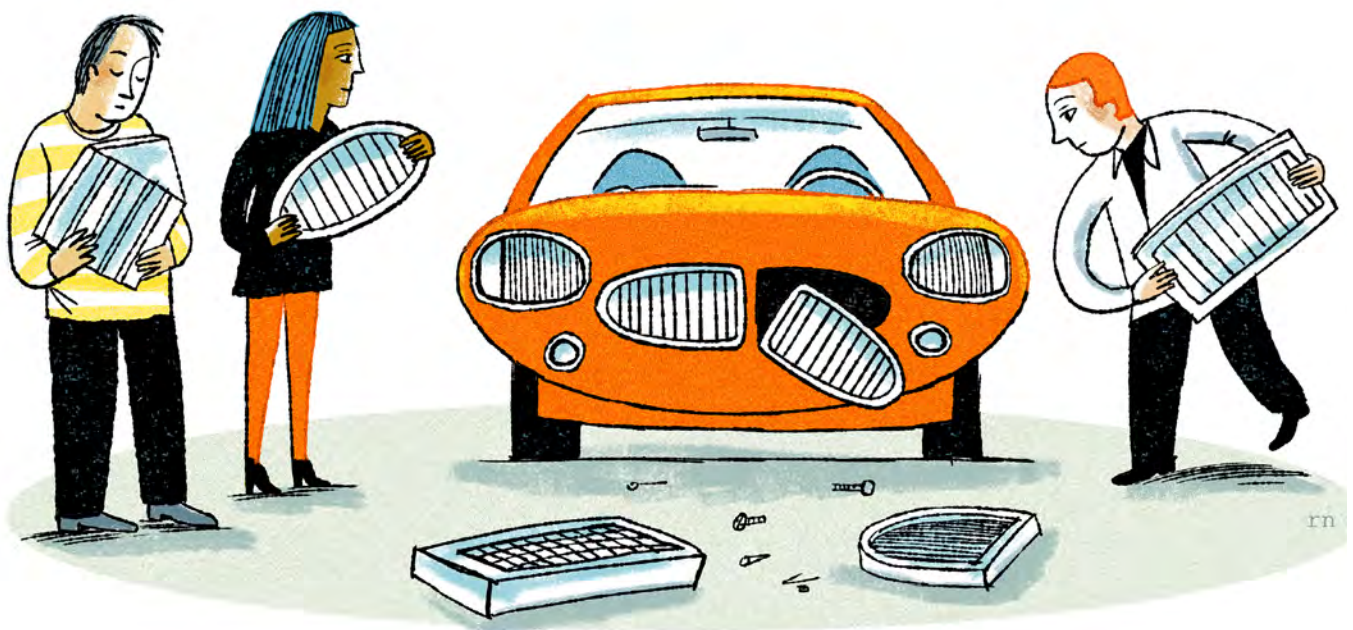
capable of identifying source can be a trademark, it has transformed cases that once would have been entirely about the defendant's conduct into cases that are largely—perhaps even overwhelmingly—about ownership. It has, to put it differently, shifted the balance of property and equity substantially in the direction of property. That has had a number of negative consequences.

### An Example of the Impact: Aftermarket Auto Parts

Conflation of trademark and unfair competition law has also led courts to separate trademark cases into fairly formal validity and infringement phases. That is, of course, a doctrinal divide that did not meaningfully exist in the former regime. Trademark infringement cases were heavily (indeed, nearly exclusively) focused on whether the claimed indicator was a trademark (infringement being fairly straightforward once that was determined). Unfair competition cases, by contrast, had no “validity” phase and were entirely about liability.

Separating “validity” and “infringement” doctrines has made litigation considerably more complex and costlier. For one thing, it has exacerbated courts' difficulty in managing the scope of rights because it encourages claimants to treat their rights “like a nose of wax, which may be turned and twisted in any direction,” depending on the issue. Plaintiffs describe their marks narrowly for purposes of validity so as to differentiate them from features used by others and to avoid functionality objections. But then they ignore those limitations for purposes of infringement. Defendants, quite naturally, do the opposite. Courts often have difficulty managing these variations because they lack a doctrinal structure by which to identify the claimed mark for all purposes in the litigation.

At the same time, courts' overly rigid distinction between validity and infringement doctrines has caused them to struggle with certain kinds of arguments—even though they are persuasive and connected to



## Plaintiffs describe their marks narrowly for purposes of validity so as to differentiate them from features used by others and to avoid functionality objections. But then they ignore those limitations for purposes of infringement. Defendants, quite naturally, do the opposite.

trademark policies—because those arguments do not seem to arise in the “right” place in the case.

Take, for example, certain invocations of functionality doctrine. Manufacturers have in recent years taken to registering the designs of various auto parts as trademarks (things like front grilles). Sometimes they register the shapes of these parts with emblem or logo designs incorporated into them, but often they simply claim the designs themselves or with the space for the logo shown in dotted lines. And customs has begun seizing shipments of replacement auto parts that resemble the registered designs but are made by companies other than the mark owners or their licensees.

This is a new development. There has been a robust market for aftermarket auto parts for many years—a market that has, until recently, been regarded as entirely legitimate. Owners want to repair their damaged vehicles, and they want to repair them in a way that restores their original design to the greatest extent possible. They do not want to put a grille on their Jeep that does not match the original. And aftermarket-parts companies have, for a considerable time, supplied parts that allow the owners to restore their vehicles in just that way—and at lower cost than if the owners had to purchase the parts from the original equipment manufacturers (OEMs).

In fact, many insurance companies will *only* pay (or at least will only pay in full) for aftermarket parts. And in

a number of states, those insurance companies are legally obligated to use parts of like kind and quality to the OEM parts—which they obviously cannot do if the aftermarket parts look different from those sold by the OEMs.

Given these market dynamics, one might think the aftermarket-parts companies would have powerful functionality arguments in these contexts. According to the Supreme Court, features are functional—and therefore cannot serve as trademarks—when they are “essential to the use or purpose of the device” with which they are used, or the features “affect the cost or quality of the device.” The designs of these replacement parts could hardly be more “essential to the use or purpose” of the parts, and they clearly affect the “cost or quality” of the parts.

The features seem functional even if we consider competitive need—which we are supposed to do only in a subset of functionality cases. Exclusive use of the designs of auto parts would give the OEMs a significant—indeed, decisive—competitive advantage (because no one would be able to compete with them for replacement parts).

As a result, no matter how one approaches the question, all signs point to functionality in this context, and therefore to the legitimacy of the aftermarket parts. But when these seizures have been challenged, customs has rejected the functionality arguments. Why? Because courts understand functionality to be

exclusively a question of validity. And when those parts are incorporated into a new vehicle, courts think the designs seem to indicate source, and they do not seem to be essential to the use or purpose of the car or to affect competition among car manufacturers. Other companies can and do make grilles with different designs, and there does not seem to be a lack of competition among sellers of cars.

The argument about the functionality of the designs of auto parts is context-specific—it is an argument that those designs have a function when *they are used for replacement parts*, not that the designs cannot serve as trademarks under any circumstances. And courts do not recognize context-specific arguments as being validity arguments. Because the argument does not fit the validity pattern courts expect, they do not know how to deal with it.

### What to Do

So this is the part where I am supposed to provide some grand solution to the problems I have identified. And given the tenor of what I have said so far, it probably seems as if I would argue that we would be better off if we just went back to the way things were—redefining trademark subject matter in the limited terms we once used and reinvigorating unfair competition as a distinct doctrine.

And though I might think that result would, in fact, be better (spoiler alert: I do), I am more realistic than that. We are so far down this road that we



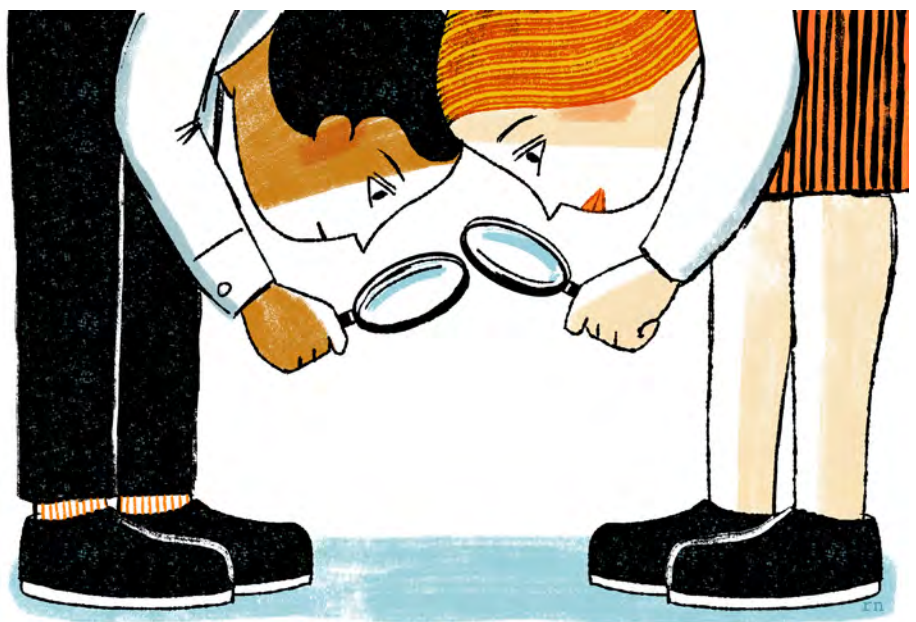
**[F]or example, when Skechers sues Easy Spirit claiming that Easy Spirit’s black-and-white slip-on shoes look too much like Skechers’s GO WALK tennis shoes, rather than litigating over which features of the GO WALK shoes Skechers owns, we would instead focus on whether consumers would think that the defendant was selling its black shoes *as Skechers* . . . .**

are not going to go back to the way things once were. Still, there are a few things we can and should do.

First, we should consider limited rollbacks in places where it makes sense. One obvious candidate is trade dress, and particularly product configuration, which I think is particularly ill-suited to trademark treatment. A number of the most serious and difficult problems in trademark law are a result of trying to accommodate this subject matter, and we would better respect the boundaries with other areas of intellectual property by returning to a system that denied protection for product features as such, subject to a more limited set of unfair competition remedies where real passing off was at risk. So, for example, when Skechers sues Easy Spirit claiming that Easy Spirit’s black-and-white slip-on shoes look too much like Skechers’s GO WALK tennis shoes, rather than litigating over which features of the GO WALK shoes Skechers owns, we would instead focus on whether consumers would think that the defendant was selling its black shoes *as Skechers* and consider ordering changes—perhaps in name or packaging or other materials—to make the actual source of the shoes clear.

Second, even short of completely reinstating unfair competition rules, courts could be more aware of what has happened and be less rigid about the validity/infringement divide. They could understand better the origins of defensive doctrines and be more willing to treat them like true affirmative defenses. They could rediscover equitable discretion (indeed, the statute still tells them to do so!).

Finally, and more generally, we need to give some serious thought to the role of unfair competition going forward. Right now, unfair competition is largely a zombie doctrine. Plaintiffs invoke unfair competition in the shadow of their trademark infringement claims—ostensibly as some kind of backup claim. And they are emboldened in doing so by comments from the Supreme Court that Section 43(a) is not a complete codification of common-law unfair competition. ■



Andrea Kupfer Schneider

# It Takes More Than a Hammer

Professor Andrea Kupfer Schneider has been a member of the Marquette University Law School faculty since 1996. She is director of the Law School's Dispute Resolution Program and, as of this past year, of the University's Institute for Women's Leadership. This excerpt is from the introduction and conclusion to Schneider's 2019 article titled "What's Sex Got to Do with It: Questioning Research on Gender & Negotiation." The full article, including footnotes, appeared in the spring 2019 issue of the *Nevada Law Journal*.



Andrea Kupfer Schneider

Negotiation scholars and teachers often talk about negotiation skills through the metaphor of tools in the toolbox. Teachers want to make sure that students have a variety of tools, and we push our students to recognize the importance of each, even quoting the old cliché that “[i]f the only tool you have is a hammer, it is tempting to treat everything as if it were a nail.”

Negotiation scholarship primarily studies the hammer, the skill of assertiveness in negotiation. In fact, the majority of empirical negotiation studies take this even further—studying only the hammer and imagining only a single opportunity to hit the nail on the head. Based on those studies, we make conclusions that if one chooses not to use the hammer at all or does not hold it as well as another, one is not a good builder. And negotiation scholars' advice is also too often focused only on this hammer—how to swing it harder, how to position your hands, the angle of the swing, and so forth. If we were teaching a class on building a home, we would recognize the need to ensure that our construction crew had skills with other tools as well. Yet, the studies of negotiation skills fail to acknowledge this fact.

This gap is particularly notable when examining gender and negotiation. The vast majority of articles examining gender and negotiation focus on assertiveness—the hammer—and how women need to pick it up, swing harder, or hold it differently. Women's supposed lack of assertiveness has been used to explain the pay gap between the salaries of women and men along with a whole host of other inequities. This story falls short primarily because our research falls short. And when our research falls short—when we are only researching and emphasizing a part of the skills that are needed to be effective—this does a disservice to all negotiators.

In some of the most high-profile and high-stress negotiations, the recognition that more than assertiveness is needed was a hard-won lesson. Since the 1990s, the training of both the Federal Bureau of Investigation and the New York Police Department hostage-negotiation teams reflects the understanding that even alpha personalities in typically alpha jobs need to expand their negotiation toolbox. Their intensive negotiation trainings focus on how to read others, how to build rapport, and how to listen to others. The need to learn more than

assertiveness, of course, permeates most negotiation textbooks and popular advice books as well. Yet our empirical research—particularly on these other skills in negotiation—is lacking.

First, researchers focus on assertiveness, a typically masculine trait and only one of several important negotiation skills. Therefore, we assume that both men and women need only to master that skill, to the detriment of the mastery of any other negotiation skills. Second, assertiveness has become the only regularly tested negotiation skill as it is easily quantified. By failing to study the impact of any other skills—including skills that women might be better at than men—the practice-to-theory-to-practice cycle is hijacked by this narrow focus. Third, we tend to study negotiation in one-shot interactions with distributive outcomes. Far less often do we study the possibility of integrative outcomes. Even when we set up studies that focus on repeated interactions, they are often limited to prisoner's-dilemma or dictator-game scenarios—highly stylized and unrealistic structures. This means that women are not recognized for the skills at which they might be inherently better, and it also means that we are failing men



**[N]egotiation scholars' advice is also too often focused only on this hammer—how to swing it harder, how to position your hands, the angle of the swing, and so forth. If we were teaching a class on building a home, we would recognize the need to ensure that our construction crew had skills with other tools as well.**

by not highlighting opportunities for growth and improvement.

This article attempts to fill in the picture of the skills necessary for effective negotiation by examining the existing negotiation and gender literature discussing traits and skills related to negotiation and the gender literature of those traits outside of the negotiation context. Importantly, this article outlines what we know—and what is still missing—in terms of research on negotiation skills and research on gender differences in these skills. Understanding this gap is the first step toward recognizing what we should be studying and testing in the future.

Any article that discusses male and female traits in negotiation is likely getting it wrong, at least as it applies to some part of the population. The studies cited throughout this article refer only to men and women (or boys and girls), with little distinction of whether that was the gender at birth, with little understanding of gender fluidity, or with little attention to how each person might take on masculine or feminine traits.

In addition, as we study gender differences in negotiation, this article does not pretend to make conclusions about whether these behaviors are biological or socialized—nature or nurture. Some of the studies cited do focus on that issue—and in those cases, a parenthetical will note that when citing the study. Most of the studies, however, report on behaviors exhibited by negotiators without claiming that

this behavior is inherently biological or one stemming from socialization.

Finally, the studies this article discusses are, by and large, studies of U.S. and Western men and women and often conducted on adolescent or college-age adults. One must assume that studies of other populations, other ethnicities, and other ages might reveal other differences.

We can imagine that other factors could determine negotiation behavior more than gender—birth order, where one lives now, where one was raised, family or cultural expectations, professional training, political leanings, level of experience, and so on. Yet these other factors are rarely studied in detail the way that gender has been over the last 40 years. Why is there such a focus on negotiation differences between women and men? Perhaps we study this because gender differences are the most salient to us (think of how popular gender reveal parties have become!); perhaps it is because changing gender roles are so important to us; perhaps it is because gender is the easiest to sort; perhaps it is because it is the difference that fascinates us the most. In any case, we actually do not know if other, unstudied, factors would have far more impact among negotiators.

Furthermore, in any study of behavioral differences, people fall along a bell curve of behavior. Perhaps, for example, some negotiators from Asian cultures would view direct eye contact toward a superior as troubling, but many others—along the sides of the bell

curve—would not. And we never know in advance whether our counterpart falls in the middle or on the ends of the bell curve. Frankly, we often do not even know that about ourselves. So it is important to recognize that the negotiation studies discussed herein and the generalities that come from them might, or might not, apply to any given negotiator. They are conclusions drawn from generalizations about negotiators who fall in the middle of that bell curve of behavior, whatever the particular behavior is that is being measured.

Moreover, some of the studies often cited for examples of gender difference are more than 40 years old. That should give us pause about assuming that any or all of these conclusions still apply. These historic studies are noted, and the reader is encouraged to be aware of when and how these studies were conducted. One should question if certain assumptions might have changed about male and female behavior since these studies were conducted.

This article will examine five negotiation skills—social intuition, empathy, ethicality, flexibility, and assertiveness—each of which has been shown to make negotiators more effective and to add importantly to each negotiator's toolbox. Each section will outline how the skill is generally defined in negotiation literature, what gender-differences research has been done under each category, and then where future research might be needed. Particularly, this article will note how much more research is needed in all of

these other skills to help negotiators learn the specific behaviors that can increase effectiveness. Back to our toolbox analogy, it would be helpful to have studies on what type of wrench is most useful or how to best turn a screwdriver, in addition to the numerous studies done on hammering. In each of these sections when I review differences that have been found in studies, there is clearly the caveat that these differences are only what has been found or what has been studied and that, as with all studies, the article is limited by the limitations of the studies themselves.

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There are (at least) three things that are wrong with research on women and negotiation. The first is that we study gender differences in negotiation and assume that these differences—as opposed to any other professional, cultural, age, or experiential difference—are determinative of differences in negotiation behavior.

These stereotypes may or may not apply to any one of us in particular. Our behaviors in negotiation likely fall along a range from “masculine” to “feminine” that may or may not actually match our gender. If we examined negotiation behaviors using other lenses—professional training, experience, family and culture, geography, or birth order, just to name a few—we would likely find similar ranges of behaviors. In other words, none of these studies show that gender is determinative of any single individual’s skill sets. (And this is yet another whole area calling out for more research.)

A second lesson that should resonate through this article is that assertiveness is only one negotiation skill—out of at least five—that makes one effective. We have studied one important skill, but it is only one of at least five, and there is no reason to think that results about this skill extend to the other four. Indeed, available research suggests the

opposite. Since it has been relatively easy to study in the lab and in one-shot negotiations, that is what we study. (We only study the hammer and assume one swing.) And, as women have been historically socialized against being assertive (with resulting backlash if the appropriate boundaries are crossed), it is not surprising that women are then seen as less effective in those types of studies. And more-recent studies even show the limit of assuming that women lack assertiveness. Nonetheless, if it is the only skill one studies, it appears to be the only one that counts. And this ignores the other skills—particularly social intuition, empathy, and ethicality—in which women appear to excel. Women are typically better able to decode body language, tone, and facial expressions. Women are better able to read smiles and better able to read eye contact. Women are also better able to read emotion through these nonverbal cues.

This leads to the third lesson—focusing solely on assertiveness is not only doing a disservice to women, but it also harms any negotiators who assume that modulating their level of assertiveness is the only thing it takes in order to be effective. Both business literature and negotiation literature are consistent in noting that these other skills discussed in the article are exactly the types of skills the best leaders will possess. The studies in each of these skill sets should help us determine what skills we have and what we are lacking. Since empirical work often focuses on micro-skills—ability to read emotion from the eyes, how to listen more carefully, when to make an offer—these studies can highlight exactly what we need to consider in order to change behavior to be more effective in negotiation. Further research into all of these skills in the context of negotiation is needed.

Only when we fix the research—only when we study more than the hammer—can we really trust that the lessons we draw are accurate and appropriate fixes for each of us individually. ■







## MARQUETTE’S EOP MAY BE **JUDGED** A SUCCESS, **BUT MORE IS NEEDED**

For **Brittany Grayson, L’11**, Marquette University’s Educational Opportunity Program (EOP) meant “immediate family, unconditional family, unconditional family forever.”

**Joe Donald, L’88**, says that EOP, as it is popularly called, changed the trajectory of his life.

But at a program at Marquette’s Alumni Memorial Union in February, marking the fiftieth anniversary of EOP, Donald followed his praise by saying, “I’m concerned because I don’t think we’re so much further from where we were in 1969.” That comment drew audience applause.

Yes, the story of EOP is one of success and achievement for a long list of Marquette students, the large majority of them low-income, minority, and the first in their families to go to college. Two examples are Grayson, now a Milwaukee County circuit judge, and Donald, now a Wisconsin Court of Appeals judge. Both got undergraduate degrees at Marquette and then graduated from Marquette Law School.

But the success of EOP is paired with a lot of concern for the overall picture of how many young people who fit EOP’s mission are making it to and through college. That’s the case at Marquette. It’s the case nationwide.

One of the speakers at the EOP celebration was Maureen Hoyler, L’79. She was involved in the founding of EOP and then in expanding its work from Marquette to more than 1,000 campuses nationwide through an organization, the Council for Opportunity in Education, which provides support services and advocacy for programs such as EOP. Hoyler has been president of the council since 2013.

Before an audience of about 150, Hoyler said opportunities for low-income students to attend Marquette had not expanded over the years as much as they should have. “We have to figure out a way [to change] that,” she said.

“**[I]mmediate family, unconditional family, unconditional family forever.**”

—Brittany Grayson on what the EOP meant to her

Sande Robinson, who was associate director of the EOP from 1974 to 2010, acknowledges the need for broader success. But she sees the positive side. In an interview, she said that the vision of Arnold Mitchem, a key figure in the history of the program, was to create a corps of African-American leaders in Milwaukee. “Darn if that hasn’t happened,” she said. “We’ve done a lot of good.”

Robinson named some of the most prominent EOP alumni. Gwen Moore, who has represented Milwaukee in the U.S. House of Representatives since 2005, was one of the first participants. Ashanti Hamilton, former president of the Milwaukee Common Council; Willie Hines, another former president of the Milwaukee Common Council; Milwaukee County circuit judges Pedro Colón and Carl Ashley—all these and others were part of EOP in their Marquette days.

Judge Donald and Judge Grayson both gave credit to the EOP in recent investiture ceremonies when they began new judicial duties.

### Joe Donald: “I Have Had Tremendous Good Fortune”

Joe Donald’s family lived in the Merrill Park neighborhood of Milwaukee when he was young. His mother provided child care and domestic work for one of Milwaukee’s most prominent families, the Cudahys. Joe Donald and his siblings would accompany her sometimes in going from their low-income neighborhood to the Cudahy house on Lake Drive. “It was like going to a completely different world,” he recalled.

While Donald was in high school, the family lived in the coach house adjacent to the Cudahy home. He attended and graduated from Shorewood High School. He became friends with children from families that were much more well-to-do, some of whom remain friends to this day, and he got to know some of the people who were then Milwaukee’s most influential business and civic leaders because he did yard work at their homes. The result was a series of connections that helped him at important points in his life.

On the positive side, Donald said, “I met some amazing people who took an interest in me.” He said that his family, his teachers, and people he got to know wanted a good future for him. “It felt like people were expecting something of me,” he said.

But that came with stresses for him, especially as someone who was often the only black youth in a school or social setting. “I always had to be sure I was being completely respectful,” he said. He knew he couldn’t do what other kids could do. “Many times, you’re confronted with being the representative of the race. It was a lot of pressure on a kid.”

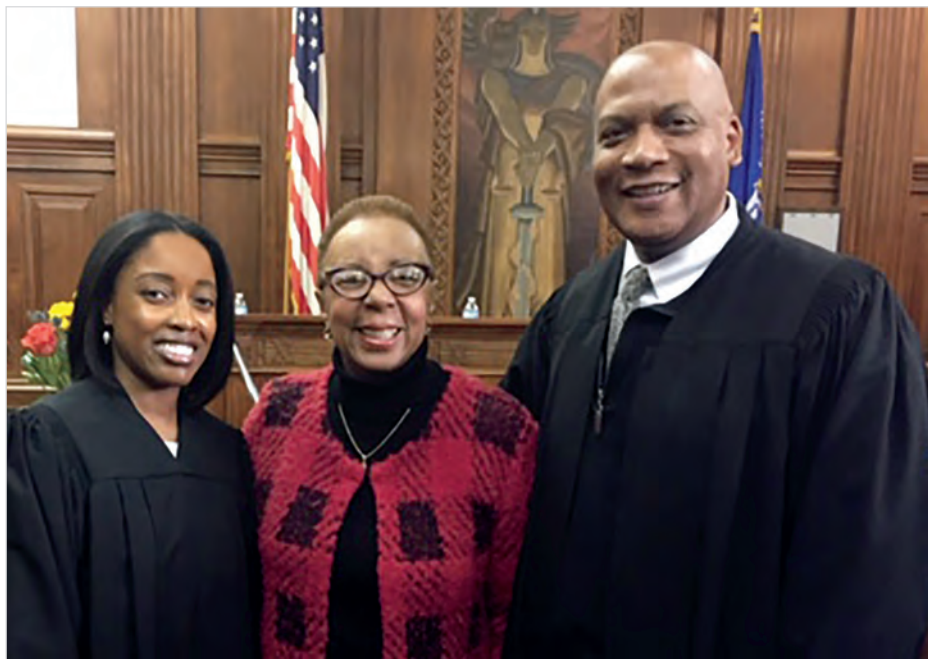
Overall, though, “my whole life, I have had tremendous good fortune,” Donald says.

When Donald was enrolling at Marquette, his sister told him to join EOP. He did. His advisor was Howard Fuller, who went on to become one of Milwaukee’s most influential education leaders. “I’m still tasting shoe leather from Howard’s kick” figuratively to his rear end, Donald said at the EOP anniversary program. “It changed the trajectory of my life.” He said the EOP gave him support on all fronts.

Graduation from college was followed by a move to Boston, where he worked in the business world, then a return to Milwaukee to go to Marquette Law School, a job as a clerk for a long-time Milwaukee judge, Victor Manian, and a position in the Milwaukee city attorney’s office. In

**[T]he vision of Arnold Mitchem, a key figure in the history of [EOP], was to create a corps of African-American leaders in Milwaukee. “Darn if that hasn’t happened. We’ve done a lot of good.”**

—Sande Robinson



Brittany Grayson, Sande Robinson, and Joe Donald

**“It changed the trajectory of my life.”**

—Joe Donald  
on the influence of EOP

1996, Donald, then 37, was appointed by Gov. Tommy Thompson to be a circuit judge.

Through advocacy for creating a drug court and other steps, Donald said he tried to convey to people who came before him as a judge the message that the deck wasn't stacked against them. Now, he said, “when I read briefs, I actually see the people, and I know what they're going through.” He added, “I've seen how people of privilege are treated and how people without are treated.”

Donald is reading a lot of briefs these days. In 2019, Gov. Tony Evers appointed him to the Wisconsin Court of Appeals in Milwaukee.

Now 61, Donald describes himself as a kid who grew up in the central city with a lot of self-doubt and few dreams of big things. “I couldn't be happier” with the way things have turned out.

**Brittany Grayson: Jumping Hurdles, Literally and Figuratively**

The Marquette EOP offered an opportunity to Brittany Grayson that might seem surprising: her first real chance to develop friendships at school with other students of color.

Grayson grew up with her mother, her grandmother, and a cousin in a townhouse in the Milwaukee suburb of Brookfield. She went to St. John Vianney Catholic School in Brookfield and Catholic Memorial High School in nearby Waukesha. Both were close to all white. Grayson remembers a boy in kindergarten cutting in front of her at a water fountain and calling her by a racial epithet. “At the time, I didn't even know what it meant,” she said, “but I would develop a really thick skin.”

She has jumped a lot of hurdles since then—including actual hurdles as a track star in high school. Her name is still on the list of the fastest times in hurdle events in Wisconsin high school history.

But, she said, “By the time I got to Marquette, I was comfortable being in spaces where I was one of the few.” That made it all the more important that EOP staff and students became “like family to me.”

“It was my first experience being surrounded by other kids of color,” she said. The EOP office was a gathering place for students in the program, and the staff went to “extraordinary lengths” to make sure students, including her, stayed on track in school.

During her senior year in college, Grayson got a part-time job at the Chudnow Law Offices, then located just a few blocks from campus. Dan Chudnow became a friend and mentor to her. That helped pave her path to the Law School. “I found it challenging,” she said. But she stuck with it.

Participation as a law student in the Law School's mediation clinic and Restorative Justice Initiative, both led by Professor Janine Geske, was a turning point for Grayson. She said that she learned from the great empathy Geske showed people. “That put the humanity side in the law,” Grayson said.

Grayson worked for six-plus years as an assistant district attorney for Milwaukee County. In 2019, she was appointed by Gov. Evers to be a circuit judge in Milwaukee.

Now 34, Grayson is serving in the juvenile courts. Being on the bench “definitely feels surreal.” At the same time, she said, “it feels right—this is what I'm supposed to be doing.” She added, “I've always felt a big sense of responsibility to give back.”

**More Is Needed, Speakers Say**

Federal funding is available nationally for students in programs such as EOP, but getting additional funding from universities themselves has become harder amid current realities, Hoyler said at the EOP celebration.

Donald said that it was important to him when he was a student that there was funding to support living on campus. He advocated a return to a level of funding that would permit that approach and enable more students to participate. He said he was convinced there are a lot of kids out there now like he was then, with the same potential for success.

Hoyler called for a doubling of black enrollment at Marquette and strengthening the connections between the campus and the African-American and Latino communities in Milwaukee.

Donald told the audience, “I think if we do take that stand, we can do something.” ■



# CLASS NOTES



Molly J. Jasmer



Julie A. Seno



Booker T. Coleman, Jr.

**66 Louis J. Andrew, Jr.**, received the George Becker Business Spirit Award from Marian University, in Fond du Lac, Wis.

**82 Donald W. Layden, Jr.**, a member of the company's board, was named executive chairman and CEO of USA Technologies, based in Malvern, Pa.

**84 Phil R. O'Brien**, a shareholder in Reinhart Boerner Van Deuren, has been named to the national board of directors for the American Cancer Society Cancer Action Network (ACS CAN), the advocacy arm of the American Cancer Society.

**85 Maxine A. White** was named by Gov. Tony Evers to the Wisconsin Court of Appeals (District I in Milwaukee). She previously was chief judge of the Milwaukee County Circuit Court.

Six Marquette lawyers were named officers of the board of directors of the Wisconsin Association of African-American Lawyers:

**Makda Fessahaye**, L'14, president

**Kristen D. Hardy**, L'14, past president

**Derek A. Hawkins**, L'13, treasurer

**Danielle D. White**, L'11, financial secretary

**Asia J. Patterson**, L'19, internal communications director

**Ashley A. Smith**, L'18, external communications director

Four Marquette Law School graduates have joined Reinhart Boerner Van Deuren, Milwaukee:

**Brady L. Brown**, L'19, in the corporate law practice

**Brett M. Erdmann**, L'19, in the trusts and estates practice

**Brooklyn A. Kemp**, L'19, in the real estate practice

**Daniel G. Murphy**, L'16, in the litigation practice

**88 Joe Donald**, previously a judge of the Milwaukee County Circuit Court, was named by Gov. Tony Evers to a seat on the Wisconsin Court of Appeals (District I in Milwaukee) and subsequently elected to a six-year term.

**Barbara Finigan Fitzgerald** was elected chairwoman of the board of directors for Catholic Memorial School of West Roxbury, Mass. She is the first woman to hold the position for the all-boys school.

**93 Timothy S. Trecek** of Habush Habush & Rottier obtained a verdict of \$38.1 million against Hyundai Motor Company on behalf of a client in an injury case in the Racine County Circuit Court.

**94 Heather L. MacDougall** was named vice president, worldwide, workplace health and safety, at Amazon, Inc.

The Milwaukee Mental Health Task Force recognized an adjunct professor and two Marquette lawyers for outstanding leadership and mental health advocacy: Deputy District Attorney (and Professor) **Jeffrey J. Altenburg**; Deputy Public Defender, Regional Attorney Manager, **Paige A. Styler**, L'92; and Assistant District Attorney **Kelly Hedge**, L'96.

**97 Molly J. Jasmer** has joined Grady, Hayes & Neary, based in Waukesha, Wis. She previously served both in private practice and as a juvenile court prosecutor for Waukesha County.

**00 Kathryn M. Statz** has been named director of gender equity/Title IX coordinator at DePaul University in Chicago.

**02 Julie A. Seno** has been named a shareholder in Davis|Kuelthau, Milwaukee. She is part of the firm's commercial finance, corporate, and real estate teams.

**03 Milton L. Childs** was named by Gov. Tony Evers as a Milwaukee County Circuit Court judge and then elected to a six-year term. Childs was previously a managing attorney with Wisconsin's Office of the Public Defender.

**Sherry D. Coley** was appointed as a member of the board of directors of Davis|Kuelthau, in Milwaukee. She is part of the firm's commercial and intellectual property litigation practice.

**04 Robert W. Habich** has been appointed as a member of the board of directors of Davis|Kuelthau, in Milwaukee. He is a commercial real estate and corporate attorney.

Three Marquette lawyers have joined Davis|Kuelthau in its Milwaukee office:

**Ethan C. Geis**, L'15, in the corporate and real estate litigation team

**Katherine M. Hampel**, L'19, in the corporate and real estate litigation team

**Anne V. O'Meara**, L'19, in the corporate and litigation team

**05 Mark A. Dodds** has received a degree of doctor of science (economics and business administration) from the University of Jyväskylä (Finland). He is a professor of sport law and sport marketing at the State University of New York, College at Cortland.

**Stephanie H. Vavra** has joined the intellectual property practice at Quarles & Brady in Milwaukee.

**06 Booker T. Coleman, Jr.**, was promoted to counsel with Ulmer & Berne's Chicago office. His practice is primarily focused on business and financial services litigation.

**08 Creighton J. Macy**, in Washington, D.C., was named chair of North America antitrust and competition practice at Baker McKenzie.

**09 Stacy A. Alexejun** has been named a partner at Quarles & Brady Milwaukee.

**Thomas C. Kamenick** has formed a firm, the Wisconsin Transparency Project, which focuses on open-government laws. He was previously with the Wisconsin Institute for Law & Liberty.

REYNA MORALES, L'97

## Peace of Mind from Serving Those in the Toughest Situations

**R**eyna Morales says people sometimes ask her how she sleeps at night.

She spends many of her days as an attorney speaking with people who have done horrible things. It comes with the job of being a public defender in Milwaukee and generally handling “high-level” cases.

What doesn't necessarily come with the job is the degree to which Morales connects with her clients. She says that some of her clients who won't open up to anyone else, including doctors and therapists, open up to her. “It's what you exude,” she says. In her case, that includes a willingness to “just be there for other people.” This means showing compassion and a willingness to listen, along with providing legal representation.

“No matter what horrible thing you've done, you're still a human being, and one person should have your back,” Morales says. “Who am I to judge? I'm no one.”

She acknowledges the extremes of what some of the people she defends have done. So, given what she deals with, how does she sleep at night? “Like a baby,” she says.

For one thing, she believes the work is “absolutely” valuable. “Even if they're horrible cases . . . , we have the attorneys who will accept them, holding our heads up high,” Morales says.

Perhaps a second motivation comes from what Morales was exposed to during her childhood. She grew up in Guatemala during a long-running civil war. The level of violence was high. Her house was shot up; the priest of the church across the street was kidnapped, tortured, and

murdered; and sometimes bodies could be seen lying along roads. Such experiences leave, as she puts it, “an impression.”

When Morales was 16, her family moved to Long Island, N.Y. At that point, she did not speak English, but she adjusted successfully. She went to college at the State University of New York at Binghamton. After graduating, she took a year off, hoping to find a job as a social worker, which proved not to be easy.

Morales's intersection with Marquette Law School began when she attended a career fair on the Binghamton campus and the Law School had a table. She was interested and, without visiting Milwaukee, applied. A successful law school experience followed, and, shortly after being admitted to the bar, she was hired by the state's Office of the Public Defender.

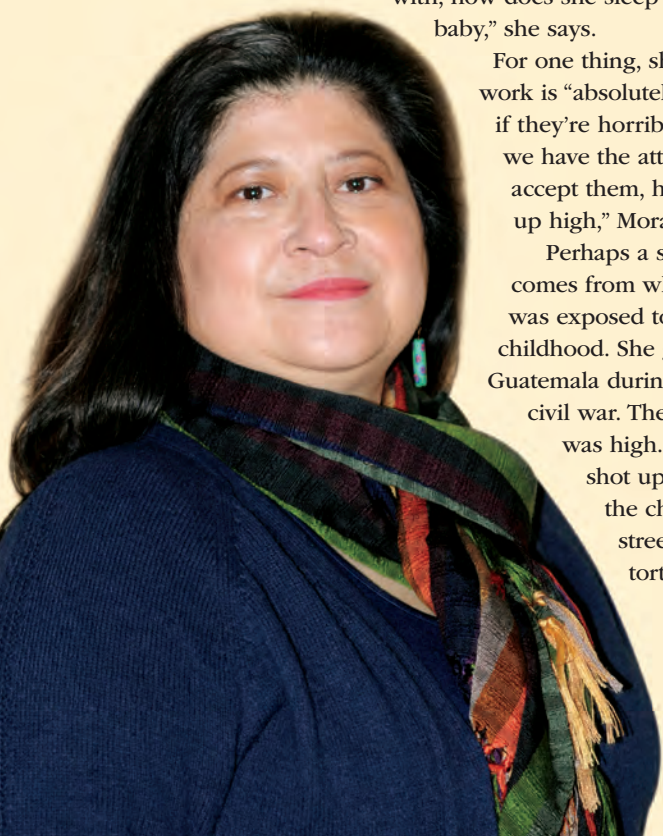
She worked in the Racine office from 1997 to 2006 before being assigned to the trial office in Milwaukee. “If there's a type of charge for which someone could be placed in custody, I've handled it,” Morales says.

Another reason for the compassion she feels for clients is the prevalence among them of mental illness. Other than the provision of prescribed medications, treatment is minimal in jail or prison. In society as a whole, there is far more need for mental treatment than what is available. And while there has been some improvement in services or awareness related to mental health in recent years, Morales says, “We're just beginning to pick at the iceberg and becoming more aware that we need to address this. It is affecting everybody.”

Morales does not have simple answers but says that mental health needs to be given higher priority and more resources.

As for herself, one thing she can do is keep doing her work, offering legal representation—and personal attention—to clients.

“You should have compassion for any human being, no matter what they do,” Morales says. ■





**John Paul (JP) H. Croak** **Christopher M. Hayden** **Emily I. Lonergan**

**10 Marvin C. Bynum II** was made a shareholder in Godfrey & Kahn, Milwaukee. His practice focuses on commercial real estate transactions.

**11 William T. Crowley** has been named a commissioner of the City of Milwaukee Equal Rights Commission by Mayor Tom Barrett.

**Brittany C. Grayson**, who was previously an assistant district attorney in Milwaukee County, was named by Gov. Tony Evers to be a judge of the Milwaukee County Circuit Court and subsequently elected to a six-year term.

**Emily I. Lonergan** was named by Gov. Tony Evers as a judge of the Outagamie County Circuit Court and then elected to a six-year term. Lonergan previously was an attorney with Peterson, Berk & Cross in Appleton and with Gimbel, Reilly, Guerin & Brown in Milwaukee.

**Kristina M. Seseck** was named counsel to the U.S. Senate Judiciary Committee, which is chaired by Sen. Lindsey Graham (R.-S.C.).

**Nathaniel J. Wojan** married Noël M. Zettler on October 12, 2019, in Wausau, Wis. They live in Appleton, Wis.

Five Marquette lawyers have joined Godfrey & Kahn in Milwaukee:

**Khatija M. Choudhry**, L'19, in the corporate practice group

**Sara E. Flaherty**, L'19, in the data privacy and cybersecurity practice

**Margaret L. Johnson**, L'19, in the investment management practice group

**Kelly E. Lewandowski**, L'19, in the corporate practice group

**Yamilett M. Lopez**, L'19, in the corporate practice group

The *Milwaukee Business Journal* honored three Marquette lawyers in its selection of top corporate counsel lawyers in the Milwaukee region:

**Anne F. B. Dorn**, L'05, of Direct Supply, best assistant general counsel

**Joshua M. Erickson**, L'98, WEC Energy Group, top corporate counsel mentor

**Kristen D. Hardy**, L'14, Briggs & Stratton, top corporate counsel rising star

Employment data for recent classes are available at [law.marquette.edu/career-planning/welcome](http://law.marquette.edu/career-planning/welcome).

The State Bar of Wisconsin honored **Angela Schultz**, assistant dean for public service at Marquette Law School, and **Mary Ferwerda**, L'11, of the Milwaukee Justice Center, as legal innovators. They developed an experiential learning activity called "Lost in the Law." The role-playing game educates participants about the complex circumstances facing lower-income Wisconsinites in navigating the civil justice system.

**12 James N. Law** was elected a shareholder in Reinhart Boerner Van Deuren. He is in the firm's litigation practice in Milwaukee.

**13 John Paul (JP) H. Croak** joined Husch Blackwell as an associate in its Madison office. He is a member of the firm's real estate, development, and construction group.

**Aaron Hernandez** was named director of the sports law and business program at Arizona State University.

**Justin P. Webb** was named a shareholder of Godfrey & Kahn, Milwaukee. His practice focuses on data privacy and cybersecurity.

**Kathryn K. Westfall** was inducted into Harvard University's Varsity Club Hall of Fame. She played soccer for the school.

**15 Christopher J. Kradle** has joined Baker Vicchiollo in Edina, Minn., in a trusts and estates practice.

**Thomas R. Knight** became a partner with Andrus Intellectual Property Law, Milwaukee.

**16 Molly R. Madonia** was promoted to associate counsel at Milwaukee World Festival, Inc., the organization that produces Summerfest.

**17 Katie L. Czapanskiy** was named a staff attorney in the refugee representation program of Human Rights First in Los Angeles, Cal.

**Christopher M. Hayden** has joined the civil litigation and real estate team of Gimbel, Reilly, Guerin & Brown, Milwaukee.

**SHARE SUGGESTIONS FOR CLASS NOTES WITH CHRISTINE.WV@MARQUETTE.EDU.**

We are especially interested in accomplishments that do not recur annually. Personal matters such as weddings and birth or adoption announcements are welcome. We update postings of class notes weekly at [law.marquette.edu](http://law.marquette.edu).





# QUICK LEARNERS

**Like almost everybody on Earth, Marquette Law School faced tumultuous circumstances during the Spring 2020 semester. How did we respond?**

**With determination. Creativity. Commitment to moving forward. Positive energy. Hard work—a lot of it. Cooperation. Dedication to learning.**

The Law School community—students, faculty, staff, and the entire university—never wavered in the goal of completing the semester with the fullest possible success in educating future Marquette lawyers. Indeed, some are no longer “future.” Members of the graduating class were admitted to the bar the day after graduation, as usual, though this time remotely.

Along the way, distance learning? We put the emphasis on learning and solved the distance issues. That meant implementing quick answers to many big questions, involving technology, experiential learning and clinics, administering exams, and, of course, grading, to name only a few. But we succeeded. Our full commitment to rigorous and well-structured education shone through.

We all hope no one will ever have a semester like this one again. But we know, with even stronger evidence than before, that the efforts of everyone at Marquette Law School will always be built on the same qualities and commitments that we showed in these difficult times.

**We extend our best wishes to each of our friends and readers for their continued health and safety.**



**MARQUETTE**  
UNIVERSITY

LAW SCHOOL