

# MARQUETTE LAWYER

FALL 2022



State Public Defender  
Kelli S. Thompson, L'96

## “UNLESS COUNSEL IS PROVIDED”

Insights into the  
Strengths and Stresses  
of Wisconsin’s Public  
Defender System

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Tom Merrill’s “Major Questions”  
on *West Virginia v. EPA* and  
the Future of *Chevron*

Oldfather on Separation  
of Powers in Wisconsin

Silbey on the Digital Age’s  
Challenge to Intellectual Property

Eve Runyon—Insights from  
a Pro Bono Pro



## Letting Time Hang Heavy on Our Hands

Several years ago, I noticed a guest column, in the *New York Times* or the like, by the author of a successful new book. The headline promised an essay describing how the author had “procrastinated her way” to writing a best-seller. I took it that the column would describe the diversions, side conversations, interruptions, detours taken, apparent self-indulgences embraced, and numerous other seemingly inapt or collateral things that, looking back, the writer now regarded as important parts of her journey to success.

Admittedly, some of my account is conjectural, as in fact I did not read the article. Perhaps I meant to do so but procrastinated. More likely, I regarded myself as too busy with work to pause to read the column itself.

In any event, the matter is on my mind as we have resumed this year some of the more discretionary or, in a sense, ancillary events at the Law School. During the COVID disruptions, there were fewer outside-the-classroom exchanges—from unplanned conversations after class to distinguished lectures—at Marquette University Law School.

Engaging in these things may be not so much to procrastinate as to be more open to collateral opportunities. Yet under either construction, we are involved in something other than the pressing task at hand. In this general regard, I recently came upon a quotation from John Butler Yeats, father of the poet and an artist himself, explaining his view that happiness and growth are possible “only when time hangs heavy on our hands.”

Whether that it is true generally, I believe it to be the case in terms of appreciating a great law magazine such as the *Marquette Lawyer*. One



would find it hard (I should think) to bill the time spent in reading the magazine or even to think that reading it is a very efficient way of becoming more accomplished in one’s own practice.

At the same time, there is no doubt that we might all learn a good deal from reading this latest issue of the *Marquette Lawyer*. The topics covered are varied and examined in some depth. The exploration of the challenging work of public defenders in Wisconsin (pp. 4–23), which may be regarded as a case study, offers both glimpses into their daily work and insights into the larger system. As a reader, you will draw your own conclusions, if any, but I myself do not hesitate to say that I emerge with reinforced great admiration for the work of public defenders.

The 2022 Nies Lecture on Intellectual Property (pp. 24–33), by Professor Jessica Silbey of Boston University, is a thoughtful take, based on empirical work,

of what might be encompassed, in the modern, digital age, within Congress’s constitutional power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” To say that Professor Silbey offers, as progress, something different from the traditional take of intellectual property legal doctrine scarcely requires a spoiler alert.

There are matters beyond these. The separate pieces (spanning pp. 34–47) of Marquette University’s Professor Chad M. Oldfather and Columbia University’s Professor Thomas W. Merrill engage with the law of different sovereigns (Wisconsin and the United States, respectively) but share a broadly similar substantive focus (on separation of powers) and, one may say, a carefully provocative bent. And the excerpts (pp. 48–54) of our annual Posner Pro Bono Exchange, between the Law School’s Mike Gousha and Eve Runyon, president and CEO of the Pro Bono Institute in Washington, D.C., are informative and inspiring.

Would it be an indulgence to read these things? Perhaps. Would it aid or abet—or, if you prefer, would it help—you in procrastinating? I cannot say, as I do not know what reading this magazine might take you away from (just as I do not know where it might eventually lead you). Would you learn things about the law and society? Unquestionably yes. Whatever your motivation, I respectfully invite you to let time hang heavy on your hands, if you will, and to spend some of it, with us, in these pages.

Joseph D. Kearney  
Dean and Professor of Law

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State Public Defender Kelli S. Thompson leaves the state public defender's office in Shawano, Wis., after meeting with staff members.

# “UNLESS COUNSEL IS PROVIDED”

**Life on the job with five Wisconsin public defenders shows the rewards and value of the work, amid stresses and complexities that have grown.**

By Alan J. Borsuk and Tom Kertscher

In the Bible story of Gideon, told in the book of Judges, the Jews are threatened by a much larger force of Midianites. God instructs Gideon, a military leader and judge, to take 300 soldiers and give them each a trumpet (in Hebrew, a *shofar*) and a torch. They approach the Midianite camp in the night, light the torches, and blow the trumpets. Fearing that the attackers are a larger and more fearsome force than in fact is the case, the Midianites flee.

And so Gideon’s trumpet became a symbol of small, even under-resourced efforts to take on the numerous and powerful in the cause of justice.

In January 1962, the Supreme Court of the United States received a handwritten petition from a long-time petty criminal named Clarence Earl Gideon. He had asked for but been denied a lawyer while being tried for breaking and entering a pool room in Panama City, Fla. He was given a sentence of five years, the fifth time he was being sent to prison.

Gideon wanted the Court to rule that he had been

entitled to a lawyer. That would require overturning a 1942 decision, *Betts v. Brady*, holding that defendants were entitled to a lawyer only in a small number of more serious instances.

The odds are always against the Court’s agreeing to consider any petition—to say nothing of one from an indigent person, without a lawyer, seeking to overturn a precedent. But the U.S. Supreme Court took the case.

In March 1963, it issued a unanimous opinion in *Gideon v. Wainwright*, ruling under the Sixth and Fourteenth Amendments to the U.S. Constitution that people who can’t afford lawyers are entitled to legal representation in criminal matters. Justice Hugo L. Black wrote for the Court that “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”

Nearly six decades later, Gideon’s trumpet—as it was called in the title of a 1964 book by Anthony Lewis—continues to sound across America.

There are big challenges to how the instrument is played. Public defenders assume key roles in the range of criminal law cases involving people who do not have the resources to hire an attorney. But the public defender system is stressed—underfunded, understaffed, close to overwhelmed by the tide of cases, facing larger societal forces, and sometimes confronting political headwinds.

It depends on lawyers who remain dedicated, even idealistic, about the work, who believe that Gideon’s trumpet is an essential instrument in a harmonious society, one in which notes consonant with criminal justice are sounded. This article profiles five of the lawyers in Wisconsin’s public defender orchestra; numerous other examples could be adduced, even just from the ranks of Marquette lawyers.

“... reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”

Justice Hugo L. Black, for the Court, in *Gideon v. Wainwright* (1963)

Photos by Gary Porter





**Kelli Thompson listens during a meeting with members of the public defender's office in Shawano, Wis.**

### **Kelli Thompson: A boss who works in the trenches**

On a day not long ago, someone calling the state public defender's office that serves two less-populated counties in Wisconsin found the phone answered by an attorney who was, in fact, an expert. The attorney was so well trained and experienced that she is the head of the entire public defender operation in Wisconsin—with 378 staff attorneys, a total of 615 staff, 40 offices around the state, and an annual budget of \$113.5 million.

“I probably did a terrible job, and they'll probably never ask me again,” jokes Kelli S. Thompson, L'96. “But you know what? I did intake in two different counties, and I talked to clients all day.”

As the leader of public defenders statewide, Thompson felt that the small staff in those counties needed a half day to focus on ways to do their work more effectively. And as part of her no-job-is-too-menial approach, Thompson knew that someone had to answer the phones. The options were few in the understaffed public defenders' realm.

“The staff were so grateful because they got to do something that they never, ever get to do, and that was all to be together for half a day at a meeting, and that meant a lot to them,” Thompson says. “So, if I can do that, great.”

Thompson didn't expect to become involved with court work when she was a law student, but she signed up to work in Marquette Law School's public defender clinic. She loved the work and became a public defender after completing law school. She left after several years for other

positions but eventually returned. In 2011, the state public defender board selected her to be the state public defender—that is, to lead the statewide operation. She remains tirelessly dedicated to the job.

A reporter for this journal recently observed a typical day for her. Thompson was at the office from 7:45 a.m. until 6 p.m. By late afternoon, in lieu of coffee and seemingly in lieu of food, Thompson had sipped her way through at least four cans and bottles of Diet Mountain Dew.

As she was nearly every day through the COVID-19 shutdowns, Thompson was on duty in a fairly nondescript downtown Madison state office building, across from a newer and more impressive-looking state office building named the Tommy G. Thompson Center. Yes, the longest-serving governor in state history, a Republican, is Thompson's father. Colleagues say that her lineage is a non-issue at work. “She's always just Kelli,” one person says.

A \$113,048-per-year administrator, much of Thompson's day is spent in meetings. But what she shoehorns in later in the afternoon might be more revealing about the condition of her agency.

The meetings are about keeping all the balls in the air. On this day, the trial division director in the public defender's office, who doubles as its top recruiter, spends 20 minutes via Zoom updating Thompson about staffing. Applications for attorney positions “are way, way down, and they have been way down for a while now,” the director reports. Thompson notes later that when she took over the agency in 2011, “we'd have hundreds of applicants for one job.”

For 45 minutes, the appellate division director briefs Thompson in-person on friend-of-the-court briefs that the office is filing, including one in a Marsy's Law (victims' rights) case before the Wisconsin Supreme Court. There follow 15-minute in-person meetings with the agency's administrative services director and with its information technology director, giving updates on automating the downloading and management of bodycam videos of police officers and on improving the sometimes-lousy Wi-Fi in the Milwaukee County Courthouse.

Another 15 minutes on Zoom follow, with the Milwaukee-based deputy trial division director. In addition to supervising trial attorneys, that director is handling, by Zoom, the intake calendar in the Ashland County Circuit Court—some 350 miles to the northwest, about as far from Milwaukee as you can get in Wisconsin. The director is also preparing

“I know what it's like to stand out at Stanley [prison] and, because of a shortage of staff, wait to see a client; I never want to forget that part of it. I think that's so very important.”

Kelli Thompson

to go to court herself as a lawyer in a homicide trial in Milwaukee.

All of Thompson's "lieutenants" speak freely, seemingly at ease with telling the boss whatever is on their minds. Another key aide, legislative liaison Adam Plotkin, is in Thompson's office nearly the entire day, keeping her on task.

All of this is aimed at keeping the agency charged with representing indigent criminal defendants running effectively. Yet is it meeting the mark? As of July 1, 2022, an average of 165 cases were open for every public defender in Wisconsin. And the number of private attorneys taking appointments involving cases that public defenders can't handle has dropped by one-third in two years. Partly as a result, some new criminal defendants can wait in jail, unrepresented, for weeks while the public defender's office makes hundreds of calls before a private attorney is found to take a case. (See sidebar on page 15.)

In an effort to address some of the excess, Thompson herself picks up tasks that even the greenest attorneys could handle—and she also takes on more difficult cases with the aim of freeing up time for attorneys who are grappling with more than 100 cases at a time.

On this day, at 3:18 p.m., Thompson is on Zoom doing intake court for a county in central Wisconsin. For a criminal defendant, especially one being held in jail, an initial appearance is important, since a judge will decide on bail. But for an attorney, intake is elementary work. Thompson appears separately for two individuals who have drug-related cases; cash bail is set at \$500 for one and \$250 for the other. In another case, the prosecutor tells the judge that the defendant likely broke his mother's nose in a domestic abuse incident. Thompson requests a signature bond or a low cash bond, noting the defendant is scheduled to start chemotherapy in several days for testicular cancer that has spread to his lymph nodes. The judge goes with the prosecutor's recommendation, setting bail at \$5,000. Twenty-seven minutes pass before Thompson's intake work is done.

Thompson also has a regular caseload—about a dozen clients, including three who are in prison. She takes those cases knowing that prison clients are more difficult for assistant public defenders, who carry far heavier caseloads, to visit in person. To see one client at the state prison in Stanley, 180 miles northwest of Madison, means six hours of driving roundtrip. And taking cases means any number of other commitments, including hours of

phone calls for Thompson over the Memorial Day weekend.

Thompson is firm about balancing her administrative duties with attorney tasks. "Having a connection with clients, I think, makes me better at my job," she says. "If times were normal, I probably would not be handling a lot of prison cases; I'd work on a couple homicide cases. But we have a shortage of staff, we have so many clients who are so desperate, we have a shortage of private bar attorneys, we have clogged court systems, and if my little bit can make a difference in some of these rural counties, it's worth it."

Thompson also recognizes that this part of her work earns her credibility with her lawyers and with the legislature. "The staff are more willing to talk to me about issues if they see I'm in it with them, which makes a big difference. The work makes sure I never forget who our clients are," she says. "It can be very difficult to go up to the Capitol and try and explain something if I've been so far removed. I know what it's like to stand out at Stanley [prison] and, because of a shortage of staff, wait to see a client; I never want to forget that part of it. I think that's so very important."

A framed quote on the wall over Thompson's left shoulder is from *Just Mercy: A Story of Justice and Redemption*, a book by public interest lawyer Bryan Stevenson: "The true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned."

In the moments between meetings and phone calls, Thompson expresses pride in her staff, who show such dedication. "I think public defenders and defense attorneys are the most important players in the criminal justice system because they stand next to the individuals accused of a crime with the threat of losing their liberty, their family, in many respects their lives," Thompson says. "Public defenders get to tell their story and advocate for the right outcome in their individual cases. The government essentially has all the power, and public defenders get to try and level that playing field just a little bit by standing up for the individual."

But how much stamina is there?

"There isn't anyone who doesn't just step forward and say, 'Sure, I can take more,'" she says. "But I'll tell you, our emails go until midnight. You say, 'You can't work on the weekends,' and everyone works on the weekends. And that's my biggest concern for young staff. It's one thing for me and the people up here to make that decision.

"If times were normal, I probably would not be handling a lot of prison cases; I'd work on a couple homicide cases. But we have a shortage of staff, we have so many clients who are so desperate, we have a shortage of private bar attorneys, we have clogged court systems . . ."

Kelli Thompson

So many of our young staff work all seven days of the week. Those offices are running all weekend long because they have trials constantly.

“We have one attorney, she had 14 trials set in Milwaukee County. You can’t do 14 trials in one week; you can do one. But she had to prepare. So, they’re working around the clock. And these are people who are public defenders. They are committed. This is all they ever wanted to do, and I’m losing them. That’s my biggest fear—that they are burning out because of the workload. And I don’t see a slowdown in that.

“People don’t mind working hard if there was ever a break,” Thompson says. “There’s never a break. I just need my attorneys to breathe, and none of them are breathing.”

### Luis Gutierrez: “People want to be heard”

By 7 a.m. on a Wednesday, Luis Gutierrez, L’20, has eaten breakfast and is reviewing case files at the kitchen counter in his apartment in downtown Milwaukee. It’s the same one-bedroom loft he called home as a law student. Gutierrez is preparing for appearances later that morning. “I just don’t want to miss things,” Gutierrez explains.

But with a caseload of 100 to 120 clients, and a total of 120 to 150 cases, even a disciplined attorney striving for order must know when to relent. “When you’re within your first year working in the public defender’s office, you don’t have a routine; every day is completely different,” Gutierrez says. “As much as you want to be in control, you’re not in control.



Luis Gutierrez in the public defender’s office in Waukesha.

The best thing you can do for yourself is to do the best you can.”

Gutierrez grew up in Miami Springs, Fla., near Miami International Airport, the son of political exiles from Cuba. Now he is an assistant public defender mainly handling misdemeanor criminal cases in Waukesha County Circuit Court, about 20 miles west of downtown Milwaukee.

On this Wednesday, he has several clients scheduled to appear in courtroom SC-G020. Gutierrez is 30 years old; the presiding judge has 22 years on the bench. What’s it like to be an early-career public defender? Sit in on some of Gutierrez’s cases on this day and you get a look at the nitty-gritty of the legal process and the role a defense attorney plays.

Gutierrez’s first client is charged with third-offense operating a vehicle while intoxicated, a misdemeanor. Court begins late, at 9:17 a.m. The woman is not present, but her voice is heard over a microphone: “I don’t know how to use Zoom.” She is appearing by telephone.

“You’re going to have to learn,” the judge instructs. He grants Gutierrez’s request for a court date 60 days out for a plea and sentencing. It’s easy to see how caseloads grow as cases elongate: A five-minute

hearing to schedule another hearing 60 days out is a common occurrence; that’s how Gutierrez’s next case this morning goes, too.

After a few more cases and a couple of short recesses, Gutierrez is back at the defense counsel table just after 11 a.m. He’s accompanied by a large man charged with resisting an officer in Brookfield, a suburb in Waukesha County, just west of Milwaukee.

The man, wearing a suit and tie, admits that he and his brother, who have a history of feuding, got into an argument during a Memorial Day family gathering at a cemetery. Police were called, and the man was tasered. “I know I wasn’t thinking straight; I did resist,” he tells the judge.

“I sense you’re an intense gentleman,” the judge replies. “I’m satisfied you’re a person of good character.”

The prosecutor recommends a fine, and the judge agrees, setting it at \$100. No jail time is a relief, but, with fees and court costs, the total tab for the man, who works in the gig economy, is \$443. The judge gives him 60 days to pay.

Outside of court, Gutierrez reflects on the hearing: “This was entirely a family dispute between two brothers, and cops got involved, and this is what leads us to where we are today.”

... part of what’s going to make me a better attorney moving forward is listening to my clients and fighting for them and representing them in the way that they want to be represented.”

Luis Gutierrez



His court appearances complete, Gutierrez checks his phone and finds he has missed calls from eight clients. It's 11:40 a.m. He goes into a conference room next to the courtroom and starts calling them back. It's time to play the roles not only of defense attorney but also, to a necessary extent to do the job, of friend and counselor.

Gutierrez talks to one woman who lives far from the county and has been charged with three misdemeanors: theft of less than \$50 of items from a grocery store, along with possession of a controlled substance and drug paraphernalia. The woman doesn't drive. No, Gutierrez tells her, she can't make a payment to get rid of her arrest warrant, and, no, she can't appear by Zoom. Yes, she could get locked up if she has even a minor run-in with police.

"I don't want to go to jail," she says. A friend can drive her to Waukesha for a court date, she agrees.

Next, Gutierrez talks with a man dealing with a second offense for operating a vehicle while intoxicated. Gutierrez tells him that the court has been informed that he recently tested positive for marijuana. Staying clean was a condition of bail for him. The man also relates that he just tested positive for COVID-19. Gutierrez says he'll probably represent the man in a pending misdemeanor battery case also. "He's a good guy; he's had a rough couple of months," Gutierrez says.

Legal strategy is the focus of the next call-back. Should the client proceed to trial on misdemeanor domestic violence charges involving his girlfriend? The girlfriend has told the court she won't testify, but the prosecutor has given no indication that he'll offer a plea deal. The client is agitated, and Gutierrez needs to show compassion but also to center the client.

The client sounds firm that he won't plead guilty. But the mood shifts when he and Gutierrez are in court the next day. The man pleads guilty to one misdemeanor. A conviction and a fine, but no jail, no probation, and there's closure of the case. "He left court happy," Gutierrez says.

Gutierrez knows he's still on the lower rungs of the ladder. "I'm still very young and very naïve," he says, "but part of what's going to make me a better attorney moving forward is listening to my clients and fighting for them and representing them in the way that they want to be represented."

By early afternoon, it is time to head back to the office to return calls to more than half a

## Caseloads Double for Public Defenders in Wisconsin

The number of open cases for public defenders in Wisconsin more than doubled in five years. The table shows the number of open felony, misdemeanor, juvenile, family, and commitment cases per authorized attorney position.

Date	# open cases	Per attorney position
July 1, 2017	28,808	77
July 1, 2018	30,337	81
July 1, 2019	32,906	88
July 1, 2020	40,130	107
July 1, 2021	51,868	138
July 1, 2022	62,081	165

## Turnover Doubled

Turnover among attorneys in the Wisconsin State Public Defender's Office essentially doubled after the start of the COVID pandemic. About 10 percent of the attorneys left during the fiscal year ending June 30, 2020; the rate exceeded 20 percent during the year ending June 30, 2022. ("FTEs" in the table refers to "full-time equivalents.")

FY	Departing FTEs	#FTEs	Turnover
2018	41.0	374.2	10.96%
2019	42.8	374.2	11.44%
2020	36.8	374.2	9.83%
2021	67.0	374.2	17.90%
2022	77.0	377.7	20.39%

## Public Defender Pay

The starting pay for an assistant state public defender in Wisconsin is \$54,912 per year. The national median entry-level salary for public defenders is \$59,700, according to the NALP/PSJD 2022 *Public Service Attorney Salary Survey Report*.

The table below shows the average pay for an assistant public defender in Wisconsin during the past five years. Of course, the *average* depends on who is in the pool, and it is likely that much of the increase from 2017 to 2021 derives from departures of junior attorneys, with lower-than-average salaries. Cf. the immediately preceding table concerning turnover.

FY	Annual
2017	\$68,494
2018	\$71,510
2019	\$74,339
2020	\$73,986
2021	\$82,514

Source: Wisconsin State Public Defender's Office

# WORKLOAD AND STAFF SHORTAGES ARE BIGGEST CONCERNS IN FOLLOWING PUBLIC DEFENSE SYSTEM PRINCIPLES

What are the goals and duties of public defenders and the systems that have developed in the states, since the U.S. Supreme Court's landmark 1963 ruling in *Gideon v. Wainwright*, in order to ensure legal representation for all defendants in criminal cases who cannot afford to hire an attorney? And how does Wisconsin measure up?

A good summary of the goals and duties comes from a 2002 report from the American Bar Association on public defender systems. It included what was titled "Ten Principles of a Public Defense Delivery System." Here (to the left) are the principles, verbatim:

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment as soon as feasible after a client's arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel's workload is controlled to permit the rendering of quality representation.
6. Defense counsel's ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

Wisconsin's adherence to the principles is generally regarded as adequate to good. A big sore spot is the workload of public defenders. The average number of cases for each public defender in the state has risen in recent years, as has the total number of cases being handled through the public defender system. There are also increasing impacts from changes in the work itself. This includes time-consuming obligations in many cases to review video recordings from body cameras, dashboard cameras, and surveillance cameras—modern phenomena, especially in their prevalence.

Asked for comment on Wisconsin's record in meeting the standards, State Public Defender Kelli Thompson said, "As we periodically review the Wisconsin system's adherence to the principles, I'm frequently reminded that despite all of our challenges, Wisconsin has a system that incorporates the themes of the principles from political separation to quality of representation. We operate a nationally recognized training program (Principle 9) and have supervisors monitoring the quality and effectiveness of attorneys (Principle 10)."

The declining number of private-practice lawyers who will take public defender cases is a growing issue, in light of the principles, which prominently set forth "the active participation of the private bar" as an essential part of "the public defense delivery system." The pay for such attorneys has been increased in recent years but, at \$70 an hour, remains lower than the rate for other appointments in the legal system.

dozen other clients. Phone calls, Gutierrez estimates, take up the largest share of his time. "People want to be heard," he says. "It's important that you give them, as their attorney, an ear so that they can air out either their grievances or their comments or concerns. And they do also have a lot of questions." Eventually, all the calls are returned. Some files are packed up to bring home to review for the next morning.

## Rick Jones: Seeing clients as potential butterflies

For one thing in Rick Jones's childhood, there was Perry Mason on television. Jones says he would watch the show where Mason—handsome, intense, and dressed in great suits—would find ways in each episode to show his client was not guilty, and smart legal work would prove it. "Yeah, I want to do that," Jones recalls thinking.

For another—and more real-life—thing, there was Jones's uncle, a police officer in Racine, Wis., where Jones grew up. The uncle was a role model for Jones and many other Black people in Racine. But, Jones says, his uncle was accused of involvement in an incident in which money was stolen. The accusation was false, and his uncle was exonerated, but it ruined the uncle's life. Jones says he decided then that he wanted to do what he could to make sure that this didn't happen to others.

Then there was Jones's mother, a single parent who raised Jones and Jones's sister. His mother had serious health problems, and the family went on welfare. But she gave her children love and guidance. She told them, "School is your way out."

Jones says, "We believed her,



and she was right.” The three of them remain close, talking on the phone, if not in person, almost every day.

And add in that Jones was tall, athletic, and a good basketball player. After graduating from high school in Racine, he was given an academic scholarship to the University of Wisconsin–Eau Claire. After three semesters, he transferred to Beloit College, where he thought he would get more playing time. What he says he also got were professors and coaches who challenged him academically and socially, urging him to focus on what his best role in life could be. Beloit College was “one of the greatest places on my journey,” Jones says.

That led him to Marquette Law School. He says it took some time for him to “get comfortable” in law school, but he came to regard it as a great experience. “I loved my professors at Marquette,” he says. He graduated in 1989. He worked for Marquette University for two years and, in 1991, joined Wisconsin’s public defender’s office. He left in 2004 to become the pastor of a church in Madison, Wis. (Jones has a master’s in divinity from Northern Baptist Theological Seminary in Lombard, Ill.)

In 2013, he returned to work as a public defender. In his life, he says, God is his first love, his family is second, and then comes basketball and being a public defender and everything else. He continues to run a basketball mentoring program for boys and girls—mostly high school juniors—in Madison.

Based in Madison, Jones specializes in cases involving people who have served sentences for sexually violent



**Rick Jones at his desk in the main offices of the state public defender system, a block from the state Capitol in Madison.**

crimes and who, under Wisconsin law, can be committed through civil proceedings to continued confinement indefinitely. He takes those cases and other major cases such as homicides all around Wisconsin, in large part because there is a shortage of public defenders statewide with experience in such cases.

The work means he deals with a lot of people who many would assume are unsavory. Jones disagrees, not only because he believes strongly that all defendants deserve a strong presentation of their story in legal proceedings but also because he likes a lot of his clients. Building relationships with them is a key to how he does his job. He puts it this way: He was once reading on the back deck of his house. A butterfly landed near him, and then several more. They were “absolutely beautiful,” he says. He got interested in learning more about the life cycle of butterflies. He was particularly interested in the way

they go through metamorphoses from caterpillars.

Many of his clients go through their own metamorphoses, he says. Jones often tells judges that the person sitting next to him in court is not the same as the person who offended. “Sex offenders can change, and the numbers back me up,” Jones says.

In any case, he says of his clients, “I don’t judge. I just fight. Everyone is entitled to justice.”

Jones says he begins most days as early as 4:30 a.m. with up to an hour of reading the Bible and prayer. Then, using an iPad, he catches up on what is going on in the world and reads legal documents related to his cases. “That’s when I create my theories for my cases,” he says—theories of how to tell a client’s story, how to respond to what prosecutors are expected to do, and how to make sure he has a full grasp of what is called for by the law. He says he never goes into a case without a theory.

Then he gets ready to go to his office in downtown Madison

“I don’t judge.  
I just fight.  
Everyone is  
entitled to justice.”

Rick Jones

or wherever his schedule takes him. During a day in the office, he says, he spends much of his time reading whatever he thinks is relevant to a case. He calls himself “obsessive” about knowing the details of a client’s story and the relevant law. These days, the work also involves viewing sometimes lengthy surveillance video records. And then there are court appearances, status conferences, motion hearings, trials. And “a decent amount of client time.”

“You can’t tell a story unless you know a story,” Jones says. He often talks to his clients by phone or by Zoom. He also visits them in prison. He says his goal is to know the client as a person, and to build bonds with the person. “We’re a team together,” he says. “It’s our job to tell your story, to take your story and package it . . . and then sell your story” to judges, juries, or prosecutors.

It’s frequently an uphill battle. In a recent motions hearing, Jones’s client was a Black man charged with murdering a woman in central Wisconsin. There had been comments in news stories from media outlets and in social media that brought race and politics into describing the case. Jones moved for the trial to be held somewhere other than in the nearly all-white county or for the jury to be selected from elsewhere. Jones says it was relevant that he and the defendant were the only Black people involved in the hearing on the motions.

The judge didn’t accept Jones’s arguments. He doubted the publicity had reached the attention of many people in that county and was confident that an impartial jury could be picked through the jury selection process. He said that there had been other cases in the county involving “dark-skinned people.” Motions denied.

Jones says he promises clients that he will work hard for them, not that they will win. The American dream, he says, is that the doors of justice are open to everyone. But, he says, the doors don’t swing the same way for everyone. He has “a belief that justice ought to look the same for everybody,” but it’s not always easy to get that.

“One of the greatest documents ever written is the United States Constitution,” he says. “It promises liberty and justice to all. . . . We’re the defenders of justice.”

And the work is not easy and not for everyone. Finding people to work as public defenders has become harder and harder. There has been increased politicization of the justice system, Jones

says. Pay and workload are factors that make it harder to draw people to jobs such as his. “I don’t remember a time when we had such a struggle getting lawyers,” he says.

Now 59, he remains committed to the work and passionate about it. He says, “I’m still fiery.”

### Jade Hall: Aiming to do “the most good” as a lawyer

Before she arrives at the Milwaukee County Courthouse early in the workday, Jade (pronounced juh-DAY) Hall, L’19, has already put in an hour of work at home, writing a motion for an upcoming case. The courthouse is where the 28-year-old assistant state public defender spends most of her day.

Hall’s first court appearance this day is a preliminary hearing for a young woman who is charged with attempted robbery of a business. Like Hall, the defendant is a young Black woman. The defendant is irritated that she has had to return to court for a repeat of her preliminary hearing because the charges against her have been amended.

Before the proceedings start, Hall lets the young woman vent to her. “Someone has to be the punching bag, and it can’t be the judge,” Hall explains afterward. A police detective’s testimony dominates the 30-minute hearing, which results in the woman’s case being bound over for trial. The testimony paints a picture of the defendant at a turning point. On one hand, the woman, then a teenager, was charged with entering the business and handing the attendant a note with a demand for cash; according to the detective, she wanted to “impress a male.” On the other hand, the woman, who rocks back and forth throughout the hearing, was unarmed and has no other adult criminal record. How this case turns out seems pivotal to her future.

“I think we’re all really one bad day away from being in the same place,” Hall says afterward. This isn’t a cliché to Hall. She grew up in Milwaukee’s central city, less than two miles from the young woman’s home, places many poor Black people don’t rise up from.

“I’ll call it an infection,” Hall recalls of the environment. “It feels as though no one else wants you to do better; if they’re not doing okay, then you can’t be. So, most of my childhood, it was, ‘I don’t want to raise a family in this; I don’t want to have someone else experience what I experienced.’” She says, “The feeling was like,

“ . . . I did not want to have to worry about whether or not someone has paid me in order for me to file a certain motion, or in order for me to feel like I’m justified in doing what I’m supposed to do as an attorney, or having to choose between being ethical and holding back because I don’t feel as though I’ve been rewarded enough for doing my job.”

Jade Hall



'I can't be better or do better because no one else has'—like, 'I haven't gotten out, so why should you?' That for me was very toxic."

Hall succeeded in doing better. She knew in elementary school that she wanted to be a lawyer, in high school that she wanted to be a defense attorney—after seeing family members helped by defense attorneys—and, at Marquette Law School, that she wanted to be a public defender. "I realized this is where I could do the most good," she says. "I'm not going to get paid the greatest, no; but I also knew that [in private practice] I would be more focused on the money than I would be on the client. And that's me—there are some people who may not feel that way. But for me, I did not want to have to worry about whether or not someone has paid me in order for me to file a certain motion, or in order for me to feel like I'm justified in doing what I'm supposed to do as an attorney, or having to choose between being ethical and holding back because I don't feel as though I've been rewarded enough for doing my job."

How big a workload is Hall handling at this point? She points to a list of clients 146 rows long. Some of the clients have more than one case, so the total is actually higher. Reading just partway down one column, the list becomes numbing: Felony, felony, felony, felony, misdemeanor, misdemeanor, misdemeanor, felony, misdemeanor traffic, felony, felony, felony, felony.

"I actually thought it was more," Hall says, surprised the total wasn't closer to 200. Her caseload neared 300 when the court system virtually ground



to a halt during pandemic shutdowns. She's confident that, if given a name, she more than likely could remember the key facts of that client's case, since she typically has a client's case for a year or more.

But can you effectively represent so many people?

"You can," Hall insists, "but you also can't expect to be only 9 to 5." That means taking files home for work in the evening, or early morning, in addition to days that can feel as if you're simply chasing from one courtroom to another.

Before the pandemic, Hall would log as many as 13,000 steps a day making court appearances in the courthouse as well as in two adjacent buildings. These days, with judges still holding many proceedings via Zoom, she might take 5,000 steps.

Following the hearing for the young woman in the robbery case, other cases are lined up. After a short hearing in which a judge refuses to lower the \$500 bail for one of Hall's clients who's in jail, it's time to dash to another courtroom. Running is part of Hall's job, but so is

waiting; this time it's 25 minutes before the judge is ready to hear an operating-while-intoxicated fourth-offense case. The judge decides to ease restrictions for Hall's 44-year-old client, which means fewer trips to downtown Milwaukee to meet with the agency that is monitoring his bail conditions. Wearing a cast on his right arm and a medical boot on his right foot, he's grateful.

Hall goes back to her office in the nearby Milwaukee State Office Building to change into her "non-court shoes" to walk to lunch, then it's back into heels before returning to the courthouse. There's disappointment following a 30-minute hearing in which she fails to persuade a judge to throw out evidence against her client, a man who was parking his car with no license plate, near one of Hall's childhood neighborhoods. He was approached by two bicycle officers who said they then saw drugs and a gun inside the car, leading to the charges. The judge ruled that the way the officers questioned the defendant and searched his vehicle was proper. Afterward, the man is

**Jade Hall visits a Milwaukee neighborhood where she grew up.**

But can you effectively represent so many people?

"You can," Hall insists, "but you also can't expect to be only 9 to 5."

dejected: the case is more than a year old. The suppression motion and the hearing only delayed the case more. “I almost feel like I’m making it worse,” Hall says, as her client walks away.

There aren’t more than a few minutes for regrets. Hall’s client for the final court appearance of the day is a young resident of Milwaukee’s south side. According to the charges against him, the man was refused service in a bar on the lower east side. He left and returned with a gun. He fired several shots into the air and into the ground outside the bar, later telling an officer he was too “blackout drunk” to remember what had happened.

The man had no prior criminal record. He may have been fortunate to be charged with five misdemeanors but no felonies. He decided to plead no contest to two of the misdemeanors and is hoping that the judge won’t put him behind bars. “There are a lot of things that could have gone extremely wrong,” the prosecutor says. Hall counters by saying that the defendant is in alcohol treatment and has taken responsibility for the incident and that “I really don’t see this happening again.”

The judge begins sternly. “To go get a gun and come back is just completely out of line,” he tells the man. “It’s just unacceptable. And then to fire that gun.” But the judge spares the man any jail time, so long as he follows conditions of his sentence, including continuing treatment.

For the client and for Hall, that’s a win.

### Thomas Reed: Idealist and problem solver

Tom Reed was, is, and surely always will be a student of people

“Justice is not a possession; it is a thing that you do. You need to do it every day.”

Thomas Reed



Thomas Reed in the downtown Milwaukee offices for state public defenders.

and society. That shaped what he studied when he was an undergraduate at Northwestern University in Evanston, Ill. It shaped the areas of law that he was drawn to as a student at Cornell University’s law school in Ithaca, N.Y.

And it has shaped his career in a big way. “It was an intellectual path that led me here,” he says. “Here” is the public defenders’ offices in the Wisconsin state government office building in downtown Milwaukee. Reed began working as a public defender in Milwaukee in 1982 and has headed the office, with about 50 attorneys and 100 employees, since 2000.

Reed is many things. He is a bureaucrat whose long days are filled with meetings upon

meetings and a steady stream of big and little problems that he is responsible for solving. He is a leader, one of the central figures dealing with the big challenges of keeping the court system in Milwaukee functioning and (Reed hopes) serving people better.

He is an intellectual and idealist—cerebral, almost straight-laced, but motivated by ambitious visions for how the justice system can help more people stabilize their lives and stay on the right side of the law, making communities as a whole safer.

He is a believer in following the rules of the system. But rules, he says, are only as good as how much people adhere to the spirit of them. You can have great legal rules, but courts and the system as a whole need to have justice

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# DELAYS IN APPOINTING DEFENSE ATTORNEYS RAISE CONCERNS

In some ways, across Wisconsin, the overall picture of appointing attorneys in criminal cases to represent defendants who qualify for free legal representation has improved in recent years. At the same time, delays are the most pressing general issue facing the public defender system.

According to the Wisconsin State Public Defender’s Office, the average time it takes to assign a defense attorney to a case following the filing of charges was 13 days in 2019. It was 11 days in 2021, and, in the first five months of 2022, it was 7 days. State law calls for a preliminary hearing—where a defendant is entitled to be represented by an attorney—to be held within 10 days.

Within the time period of these years, the percentage of cases in which an attorney was appointed within 10 days has varied from 81 percent to 86 percent. That means that in about one in six cases across Wisconsin, the defendant does not have an attorney within the time set by law. And with about 140,000 cases annually coming into the public defender system, this means that thousands of defendants are not receiving representation promptly. And in some cases, representation is not being secured for periods of weeks or even months.

Up to a point, judges will generally go along with delays in assigning an attorney to a defendant, if representatives of the State Public Defender’s Office say they haven’t been able to find an attorney. Too many cases, too few attorneys, is the simple explanation.

State Public Defender Kelli Thompson says that the problem of finding attorneys to take cases has intensified statewide and affects both rural and urban areas. In some rural areas, almost no private lawyers are willing to take “public defender cases,” while in places such as Milwaukee, the number of private attorneys who will take such cases has declined by more than a third in recent years.

“No place in Wisconsin is untouched by this,” Thompson says. In September 2022, the public defender’s office submitted a state budget request for 2023–2025 that includes a raise of approximately 30 percent for the lowest-paid (starting) staff attorneys, an additional 65 staff support positions, and an increase in pay for private bar attorneys who take cases from \$70 an hour to \$125 per hour for in-court work and \$100 per hour for out-of-court work.

A legal challenge based on delays in naming attorneys also has been mounted. On August 23, 2022, a lawsuit was filed in Brown County Circuit Court on behalf of eight people who, the suit says, had experienced delays in receiving legal representation in criminal cases pending against them. The suit names Governor Tony Evers, State Public Defender Kelli Thompson, and the members of the Wisconsin Public Defender Board as defendants.

Characterizing the situation as a “constitutional crisis,” the complaint alleges that Wisconsin “consistently takes longer than

14 days to provide counsel” to indigent criminal defendants. “[T]here are at least hundreds—if not thousands—of people charged with criminal offenses in Wisconsin waiting for the assistance of an attorney,” the complaint alleges. “For many of these defendants, it will be months before they receive counsel.” Voluminous records attached to the complaint list instances of delays from across Wisconsin.

The complaint asks the court to certify a class of current and future indigent defendants who have not received or do not receive appointed counsel within 14 days after their initial appearances. The requested relief includes an order requiring the defendants to immediately appoint counsel for the class members or, “if timely appointment of counsel is not feasible,” to enter an order “dismissing the class members’ [criminal] cases with prejudice.” The lawsuit appears intended in part to increase public or political attention to the issue.

The Wisconsin Supreme Court recently passed up one opportunity to rule in a case of delay. In 2018, Nhia Lee, 45, unable to pay \$25,000 bail, spent his first 101 days in jail in Marathon County without a lawyer, after being charged with felony drug possession and identity theft. Once appointed, his lawyer filed a motion to dismiss, arguing that the delay had violated Lee’s Sixth Amendment rights. The state appeals court ordered that the charges be dismissed without prejudice, but the state petitioned for review of the ruling in the Wisconsin Supreme Court. After initially agreeing to hear the case, the court changed its mind in May 2022, dismissing the case from its docket by a 5–2 vote. ■

## Delays in Appointing Public Defenders

This chart shows that delays in appointing attorneys have declined overall statewide from an average of 13 days in 2019 to 7 days in the first five months of 2022. The percentage of cases where an attorney is appointed within 10 days has varied during these years, from a low of 81 percent to a high of 86 percent. The situation varies from county to county, but delays are common across the state, as the chart shows through a list of seven of Wisconsin’s 72 counties (almost all of which have their own circuit court).

Location	2019	2019	2020	2020	2021	2021	2022	2022
	Average Days	% Appt w/in 10 days	Average Days	% Appt w/in 10 days	Average Days	% Appt w/in 10 days	Average Days	% Appt w/in 10 days
Statewide	13	83%	9	86%	11	81%	7	83%
Ashland	11	87%	16	86%	11	79%	5	81%
Brown	31	62%	23	73%	22	70%	9	80%
Eau Claire	2	96%	1	97%	5	87%	6	77%
Grant	4	90%	6	88%	6	91%	4	87%
Kenosha	5	79%	9	81%	13	71%	5	84%
Marathon	9	70%	9	80%	15	72%	9	78%
Milwaukee	16	79%	15	78%	21	61%	16	67%

Source: Wisconsin State Public Defender’s Office

“We’re not just about doing cases. We have to be a voice for a more rational criminal justice system.”

Thomas Reed

in their hearts. “Justice is not a possession; it is a thing that you do,” he says, adding, “You need to do it every day.”

What does it mean for him to do it every day? Consider a log he kept of a recent workday:

He is at work by 7:15 a.m., a few minutes earlier than usual. This day, there is a 7:45 a.m. meeting of a committee, chaired by Milwaukee County Circuit Court Chief Judge Mary Triggiano, of leaders of law enforcement agencies, the county jail, the House of Correction, children’s court, and others. The group meets regularly to assess the functioning of the justice system as a whole system and to coordinate responses to problems. The discussion covers how many people are being held in the several incarceration facilities serving Milwaukee County and staffing issues at those facilities. Also on the agenda: How to move ahead with using \$16 million in federal pandemic-response money to reduce backlogs and delays in the whole system.

By 8:30, Reed is handling one of his more troubling current duties: appearing before various judges to tell them that the public defender’s office hasn’t come up with an attorney yet to represent defendants who are in jail and awaiting proceedings before the judges. The goal of speedy trials and prompt assignment of defense lawyers yields frequently to the facts that the full-time public defender staff is stretched thin and that the number of private attorneys willing to take public defender cases has declined.

At 9:45, there is a conference call with leaders of the state public defender’s office. Like the early morning meeting, a central subject is how to use pandemic funds to help with backlogged cases. Staffing needs also are discussed.

At 11:15, Reed meets with Wisconsin State Capitol Police representatives about security procedures in the office building where the public defenders have their offices.

At 12:25 p.m., it’s a monthly meeting with key players involved in setting bail for incarcerated people awaiting trial. Crowding in the jail and other facilities and heavy caseloads mean increased pressure to release people from jail. In general, people are entitled to be released on bail if they are not considered to be a threat to others. But deciding whom to release and on what terms is important—as well as politically sensitive, indeed sometimes even explosive. Reed has been a leading advocate of using “risk assessment” protocols to assess individuals. Like other aspects of the system,

those protocols have strong advocates and strong critics.

Reed personally handles the defense of a small number of people, generally involving defendants who have serious mental problems or are difficult to deal with. At 2 p.m., he has a phone call with a client at a state prison who has refused to cooperate with attorneys and wants to represent himself (generally a constitutional right but not usually exercised). Judges have found the person incapable of that and have asked Reed to try to convince the defendant to accept an attorney’s representation.

At 2:30, it’s a conversation with a former judge who is now in private practice and is willing to represent some people in criminal proceedings.

A two-hour meeting of the Milwaukee Mental Health Task Force starts at 3 p.m. This is a consortium of agency leaders and advocates involved in mental health services. Many of the people represented by public defenders have mental health needs, and the issue is important to Reed. He is on the steering committee of the task force.

And throughout the day, there is a stream of conversations and calls with staff members, clients, family members of clients, and others about most anything—from minor procedural issues to big decisions about handling particular cases to complaints of all kinds and personal crises for both employees and defendants. In general, if there’s a problem in the Milwaukee operation, broadly conceived, it ends up before Reed, either directly or through his assistant or leaders of the several teams of public defenders in the office.

Reed says a central part of his job is “managing relationships”—relationships involving staff members, clients, other parts of government, and the community as a whole. “I call it the foreign policy around the public defender’s office,” he says.

At 5:45 p.m., more than 10 hours after the workday starts, Reed leaves the office. It’s a fairly typical day—and he has worked like this for 40 years.

Reed says “the most compelling and interesting work” for him is advocating for what he calls a rational criminal justice system and improvements in the performance of the system as a whole. That puts him in the thick of some issues such as advocating for bail reform and treatment courts that aim to help people with problems such as drug addiction.

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# “EVERYONE FEELS IT” WHEN THE PUBLIC DEFENDER SYSTEM STRUGGLES

**A**s chief judge of the Milwaukee County Circuit Court, Mary Triggiano faces a lot of challenges in leading the operation of all 47 judges and 23 court commissioners. This is not to mention that, especially since the COVID pandemic began, her title might equally well be “chief coordinator of everything that needs to be done to keep the judicial system going.”

Restrictions on access to courts because of pandemic rules, implementation of major changes in technology (many of them on a rushed basis), ballooning backlogs of cases, controversies over issues such as bail policies, and staff shortages in many parts of the system—Triggiano deals with all of them.

And the shortage of public defenders and private attorneys willing to represent criminal defendants who can't afford lawyers? This is among her biggest concerns.

“We're this one big ecosystem,” Triggiano says. “When one part of the system is down or struggling, everyone else feels it. And that is really true when it comes to the public defender's office.”

From the start of any case, someone facing criminal charges is entitled to an attorney. This means that all such defendants need a public defender if, like thousands of people each year, they can't afford to hire their own attorney. “If you don't have that [representation] at the start, it certainly has led to significant delays in moving a case forward to completion,” Triggiano says. “Part of our backlog right now is because of the inability to timely appoint counsel in these criminal matters.”

That is especially true in complex cases, where more challenging and extensive legal work is required, she says. That's one reason there have recently been about 170 people incarcerated in Milwaukee County while awaiting proceedings related to homicide charges.

Milwaukee County has received \$16 million in federal pandemic relief money to increase efforts to reduce backlogs of cases. Triggiano says that much of it is going to the district attorney's office and to the Wisconsin State Public Defender's Office to hire additional lawyers and support staff. But, she says, it is one thing to have funding for additional



**Mary Triggiano, chief judge of the Milwaukee County Circuit Court, says, “Part of our backlog right now is because of the inability to timely appoint counsel in these criminal matters.”**

positions, and it is another thing to find people to fill them.

Overall, though, some positions have been filled, the system is working better, and the backlog of cases is declining from high levels at the start of 2022.

“We've made incremental progress, though not the progress we wanted,” she says.

The district attorney's staff has had high turnover and shortages, Triggiano says, but the situation with public defenders is more challenging. In both situations, principal factors are pay that is low compared to other available positions for lawyers and workloads that are large and increasing.

Particularly comparing public defender caseloads to several years ago, Triggiano says, “You're doing a lot more work for the same pay. On some level, that's more crushing.”

And, she says, private bar lawyers who take appointments from the public defender's office are paid \$70 an hour, which in many instances is not enough to cover the lawyer's overhead. Triggiano says that if a judge makes the appointment, the lawyers get \$100 an hour—and if they take a case in federal court, it is higher. It will take legislative action to change factors such as these, Triggiano says.

There are still lawyers who want the jobs, in large part because of their desire to serve people who truly need help and because of their overall sense of serving justice in the system. “You've got to want to do public defender work,” Triggiano says. ■

Why is the word *justice* repeated? Among interpretations by Biblical scholars, two stand out: The word is repeated to emphasize the importance of justice. And the word is repeated to teach that not only should a person pursue justice, but the pursuit itself needs to be done in just ways.

“I’d like to go out of business,” Reed says. He grants that this sounds “naïve and almost ridiculous,” but he is driven by the goal of using criminal proceedings less and solution-oriented programs more. When he started as a public defender, there were no treatment courts or diversion programs. Many people were just cycling through the system repeatedly, he says. Now there are such programs, which means there has been some progress, in Reed’s estimation. But heavy caseloads, the great stresses on the justice system, and broad public fears about crime and safety show there is a long way to go.

“We’re not just about doing cases,” Reed says. “We have to be a voice for a more rational criminal justice system.”

Reed says there is an intersection between public safety issues and public health issues. Better public health, including wide availability of mental treatment, would reduce crime, he says. He has been deeply involved in efforts to make changes in the system, including work in Milwaukee County supported by major foundations such as the John D. and Catherine T. MacArthur Foundation.

The stresses on the public defender’s office—and on the lawyers themselves—have increased in recent years. “The job has become more difficult for staff, for a variety of reasons,” Reed says. One reason that many people might not realize is how time consuming it is to conduct “electronic discovery” involving surveillance videos. And, Reed says, the criminal justice system as a whole has unstable staffing and also staff shortages. There are a lot of prosecutors and judges with limited experience, and staff shortages in multiple facets of the system (among court reporters, for example) can slow up work. “It’s just harder to get to the bottom” of what a case involves, Reed says.

Compared to the past, there are more turnover among public defenders and fewer applicants for jobs. And there are 35 percent fewer private lawyers than several years ago who are willing to take public defender cases. Overall, Reed says, “it’s just a math problem”—more cases, fewer lawyers to take them.

The impact of the COVID pandemic has intensified the issues, including the impact of working conditions in the Milwaukee County Courthouse and case backlogs that boomed during the height of the pandemic and have not returned to the preceding levels, let alone diminished.

A longtime and important part of Reed’s

efforts to encourage lawyers to join in the work is his service as an adjunct professor at Marquette Law School, where he oversees the public defender clinic that gives students work experience in the field. But, in line with other trends related to staffing, student interest in the clinic has declined in recent years. Reed and others involved in the program hope to be able to reverse that trend.

Reed remains eager to promote the value and satisfactions of work as a public defender. He talks up the reasons to consider taking these jobs. And he does what he can to maintain the morale of those who already do the work, including everything from efforts to reduce work-related stress to encouraging birthday parties for staff members. He is concerned that, with limited resources, too often those doing the work get “a half a loaf” when it comes to what they really need. But dedication and commitment still run strong. Reed says there is an old saying that “nothing great is accomplished without high spirits.”

### “Justice, justice shalt thou pursue”

When Howard B. Eisenberg was dean of Marquette Law School from 1995 until his death in 2002, a poster hung in his office with the Biblical verse, “Justice, justice shalt thou pursue.” It comes from the book of Deuteronomy.

Eisenberg was dedicated to the work of public defenders in Wisconsin and nationwide. He was a public defender, he led public defenders, and he was one of the key figures in creating the public defender system Wisconsin uses to this day. He was, in many ways, a public defender all his life.

What does it mean to live by the words that Eisenberg kept so nearby? Why is the word *justice* repeated? Among interpretations by Biblical scholars, two stand out: The word is repeated to emphasize the importance of justice. And the word is repeated to teach that not only should a person pursue justice, but the pursuit itself needs to be done in just ways.

Eisenberg surely knew—and lived according to—both interpretations. Neither he, nor the five public defenders profiled here, nor their colleagues, past, present, and future, are perfect in their embrace of these words. But for all the challenges, stresses, and ups and downs, they know the ideals and why they themselves are doing this work. ■



# BOARD CHAIR DESCRIBES CHALLENGES FOR THOSE DOING “NOBLE WORK”

It's been almost half a century since James M. Brennan first got involved with the work of public defenders in Wisconsin. In 1973, he was a student at Marquette Law School and took part in the school's now-longstanding public defender's clinic. The program allows interested students, as part of their upper-level curriculum, to work alongside attorneys representing people involved in criminal proceedings who are unable to afford a lawyer.

Brennan never lost his interest in serving low-income people, both with their legal problems and with other needs, and he has an unusually long-term perspective on the development of public defender services in Wisconsin across the decades. Most recently, since 2003, he has been a member of the legislatively created board that oversees the Wisconsin State Public Defender's Office, serving as chair of the board since early 2021.

How would he describe public defender services across Wisconsin now? “The state of the system is spotty,” he says.

Brennan names three problems: First, in rural areas, there is difficulty finding attorneys who will take cases. This can leave defendants waiting in jail for weeks while dozens of attorneys are contacted. Second, an important leg on which the system stands—involvement of the private bar in representing some clients statewide—has weakened. The pay for private attorneys was increased in 2020 from \$40 an hour—then the lowest in the nation—to \$70 an hour; this has helped to some degree but not solved the problem. And third, the impact of the COVID pandemic “has really thrown the whole system into a tizzy and has caused a backlog.”

“Of course, we could use more staff,” Brennan adds. The caseloads for public defenders statewide have grown in recent years—something that concerns Brennan. “Quality and caseload interact very closely,” he says.

But in the broad picture, public defender work has improved over the decades, and the system serves many people well, Brennan says. Furthermore, legislative support for public defenders has been more stable than it once was, although issues including salaries and the number of positions remain.

Brennan says that when he had his initial involvement with the system, the statewide public defender office dealt only with appellate cases, and attorneys serving at the local level were appointed on a county-by-county



**James Brennan, chair of the Wisconsin Public Defender Board, says public defenders are committed to their work and loyal to their clients, but the stresses on the overall system mean quality in the broad picture is “spotty.”**

basis by judges. The quality of the appointment process was uneven. By 1977, Brennan recalls, the statewide office had been created. Since then, appointments have been handled through an administrative process and not by judges. The effectiveness, quality, and stability of the work improved in following years.

Brennan never practiced as a public defender, but his work always involved service to people in need. He was a lawyer for the Legal Aid Society of Milwaukee for 31 years, most of the time as chief staff attorney. That meant his practice involved civil litigation, not criminal matters. In 2007, he became Family and Children's Ministries director of Catholic Charities of the Archdiocese of Milwaukee, followed by several years as the organization's executive director. He is also a past president of the State Bar of Wisconsin.

In 2012, he retired from full-time work. He and his wife live in Ashland County in far northern Wisconsin. Among his current interests, he has qualified as a “master naturalist” at Copper Falls State Park.

Despite the current stresses on the system, Brennan remains enthusiastic about public defender work and the people doing it. “Most of our attorneys are extraordinarily committed and absolutely loyal to their clients,” he says. They are doing “the noble work of being a lawyer, the good work of being a lawyer, which is representing the marginalized and the indigent.” ■

# HOWARD B. EISENBERG: DEAN AT MARQUETTE LAW SCHOOL 1995–2002



Howard B. Eisenberg in the 1970s. “Representing the clients, seeking justice—nothing else was as important. Everything that he did in those years fostered that outcome,” wrote Ronald L. Brandt.

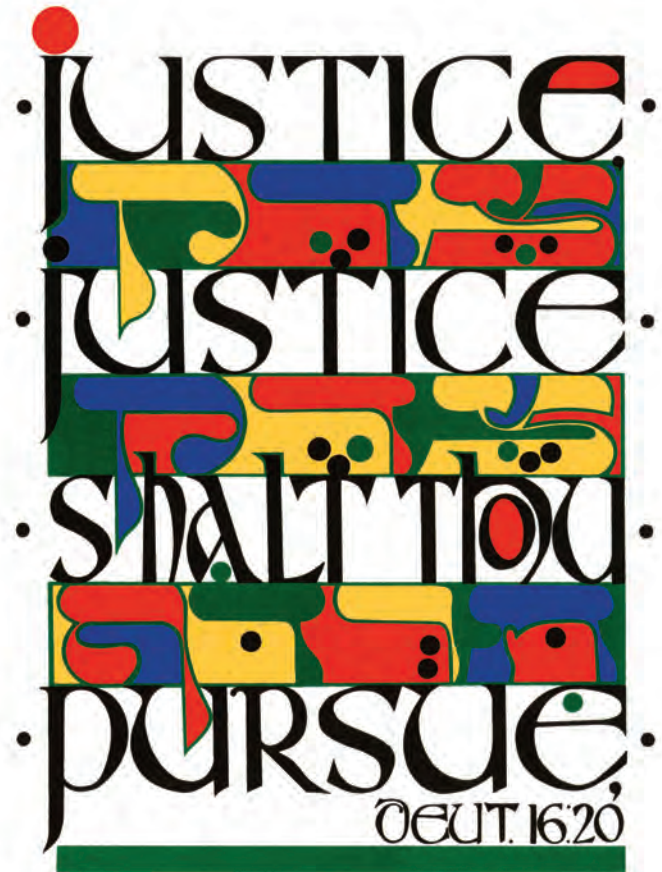
**“But in a very real and tangible way, Howard never stopped being a public defender.”**

Howard B. Eisenberg held academic positions at several law schools and was dean of Marquette Law School from 1995 until his death in 2002 at age 55. Earlier in his career, he was a public defender and a leader in improving and expanding the role of public defenders in Wisconsin and nationwide. The work of public defenders always remained close to his heart. Following his death, a special issue of the *Marquette Law Review* later that year included remembrances or tributes to Eisenberg from many who worked with him or were close to him.

The full memorial issue is available online (86 Marq. L. Rev. 203–400) and covers Eisenberg’s entire career. Here, in light of the focus of the cover story of this *Marquette Lawyer*, we print below lightly edited contributions to the issue by three of Eisenberg’s colleagues during his time as the state public defender; the first entry appears in full (save footnotes), and the latter two are excerpts.

**By Ronald L. Brandt**

**A**fter graduating from the University of Wisconsin Law School in June 1972, I was hired as an assistant state public defender by James H. McDermott, who had been the state public defender for many years. He had manned the office alone until hiring Howard Eisenberg as an assistant state public defender in 1972, following Howard’s graduation from UW and his clerkship at the Wisconsin Supreme Court. I had known



A framed illustration identical to this hung in the office of Dean Howard B. Eisenberg at Marquette University Law School from 1995 until his death in 2002. The Biblical quotation is from the book of Deuteronomy (see page 18 of the previous article). The artwork is by Mordechai Rosenstein and appears here by special permission.

Further information about the print is available at [rosensteinarts.com](http://rosensteinarts.com).



Howard by reputation only—a brilliant, hard-working law student who was head and shoulders above everybody else. Quite frankly, I was amazed that Jim hired me when he could attract lawyers of Howard’s caliber. Three days after I started work, Jim informed me that he was resigning to take a position in the attorney general’s office.

I am not sure if my memory is correct, but my recollection is that Howard and I had done nothing but exchange handshakes at that point. I do remember that in those first three days Howard wrote a brief, argued a case before the Wisconsin Supreme Court, and made a trip to the Wisconsin state prison. My biggest accomplishment in those three days was to find the law library. At that point, I believed my career as an assistant state public defender was waning.

Within a few days, Howard was named acting state public defender, while the court selected Jim’s successor. That afternoon, Howard came into my office, and we had our first real conversation. If it is possible to be businesslike and casual at the same time, Howard mastered it. He simply sat down and told me that my job was safe and that he was eager to work with me. He then assigned almost all of Jim’s caseload to me, along with my first case to be argued before the supreme court, in the October 1972 session. From that moment, I knew that I would be challenged in ways that I had never conceived. A few weeks later, the court appointed Howard to be the state public defender.

It wasn’t Howard’s assurance of job security that struck me. Rather, it was his confidence that I was up to the task and his genuine desire to include me in a new adventure. For the next six months, Howard and I were the only full-time appellate defenders in Wisconsin. And I knew that I was probably the luckiest young lawyer in Wisconsin. I was working one-on-one with a person whom I and everybody else knew to be a brilliant, passionate lawyer who was dedicated to providing the best possible legal representation for every indigent client he represented. And he was prolific, writing brief after brief, many involving complex legal issues, at a speed that boggled my imagination. Howard could read a trial transcript, review the exhibits, and prepare a brief in an afternoon. He would visit a prison, see a half-dozen or more clients in the morning, find time to write a dozen clients (typing the letters himself), and

be home for dinner by 6:00 p.m. At first, I could not believe the pace—then I found myself drawn into it. Our work never seemed to end, but the satisfaction from it never diminished. Howard loved his job, which was infectious.

We often rode to the prisons together, either to Waupun or Green Bay, to see clients. During those long trips, we often talked about why we had become public defenders. Fundamental to Howard was making sure that each client got no less than all the process due and guaranteed by the Fourteenth Amendment. Guilt or innocence, while important, was not our focus. Was the case done right? If not, was the client’s case prejudiced? Was the error serious enough to warrant a new trial? What could we do to make the justice system work better? Indeed, if the system fails the poorest, then how can it function effectively at all?

And so we worked. The supreme court appointed us to more and more cases, and by February 1973, Howard hired a second assistant. At about the same time, both the United States Supreme Court and the Wisconsin Supreme Court determined that due process protections attached to probation/parole revocation proceedings. Howard believed that our task as appellate defenders included responsibility for providing representation in those actions, and, by 1974, our caseload was skyrocketing, which led to expansion of the state public defender’s office. Howard convinced the Wisconsin Supreme Court to increase our budget to allow hiring five more assistants and to open a branch office in Milwaukee in 1975. For the next two years, I supervised the Milwaukee office, working with two other assistants.

Our experience as appellate defenders led Howard to the conclusion that the lack of statewide resources and of a uniform method of appointing counsel created a wide disparity in the quality of appointed-counsel services throughout the state. Feeling that even well-intentioned judges failed to provide counsel to all who might be eligible, Howard believed that the power to appoint lawyers for indigent defendants should not be in the hands of the courts but, rather, with an independent public defender, whose responsibility should include devising standards by which eligibility would be determined and matching a client’s needs with an experienced lawyer, whether public defender or appointed private counsel. It was



“If it is possible to be businesslike and casual at the same time, Howard mastered it.”

Ronald L. Brandt

“Howard Eisenberg provided us all with a different model: one of consuming generosity, self-sacrifice, and devoted public service. He was a man of incredible energy [and] an acute sense of justice . . . .”

Robert J. Paul

a vision that was the culmination of the many conversations we had on so many trips to the prisons from 1972 to 1975.

Quite honestly, I told Howard that his utopian vision would never become reality. Why would the court system give up its power to appoint counsel? The public defender's constituency hardly had the lobbying power to persuade the legislature to follow that course. As only Howard could do, he acknowledged my concerns, drafted the legislation, shepherded the bill through the legislature, and obtained Governor Patrick J. Lucey's signature to it. By 1977, the blueprint for a revolution in indigent legal services in Wisconsin was in place. Howard's passion for justice, his ability to bridge the economic issues associated with such an all-encompassing law, and his commitment to the poor were the sole reasons that Wisconsin became the first state to have a completely independent public defender system dedicated to providing the best possible representation. No other person could have persuaded the court, the legislature, and the governor to adopt such a system.

After the legislation passed, Howard asked me to assume responsibility for setting up the trial division. From 1977 through 1978, we opened more than 30 offices throughout Wisconsin, took over existing county-funded public defender programs, and established a system with more than 100 lawyers, which handled more than 50,000 cases annually. Looking back, it seems incomprehensible to me that, in six years, Howard took a small, two-person appellate program and catapulted the state public defender's office to a multimillion-dollar program dedicated to making certain that the wheels of justice turned properly, and that all who were eligible obtained the best possible legal representation.

Those six years defined what Howard was all about. Despite the crushing burden of creating a vibrant, dedicated agency, Howard carried a full caseload, as did each of the lawyers he selected to assist him in fulfilling this vision. His purpose was not to create another state bureaucracy. Resting upon the laurels of a statewide program did not interest him. Representing the clients, seeking justice—nothing else was as important. Everything that he did in those years fostered that outcome. He developed a better way of providing legal services to the indigent defendant. It was fair, and it leveled the playing field. It is a testament to his character that by the time he was 30, Howard had redefined

the manner in which public defender services were provided in Wisconsin. That this public defender system continues to provide those services throughout the state 25 years later demonstrates the wisdom of his vision.

I cannot adequately express what it meant to work so closely with Howard in those years and all that I learned from him. Even though we were the same age, Howard was my mentor. The years passed so quickly, but the experience defined my career and my life. Every employee of the state public defender was a member of Howard's extended family. As he did with me, Howard nurtured all who shared his path, leading by example. He wanted us to share that path and to love the challenge as much as he did. He demanded nothing less than one's best effort and a commitment to justice. He challenged by assigning difficult tasks. He never criticized; rather, he taught. He always carried a caseload. And so many are much better for all he did. I know that I am a better person and a better lawyer for sharing his path in those years.

## Setting an Example with Self-Sacrifice and Wit

By Robert J. Paul

Everyone has at least one “Howard story.” It is significant in itself that this is so. Among those mentioned was one that displayed Howard's very keen sense and appreciation for the right of every person accused of a crime to a vigorous defense. He never lost sense of who his client was or how each was entitled to his or her own independent counsel. Prior to 1978, when there was only a public defender appellate unit, Howard carried a caseload of about 70 to 80 open appellate cases in addition to his administrative responsibilities and work with the legislature. At that time, the court of appeals did not exist and all appellate work (except county court appeals to circuit courts) was in the state supreme court. With his caseload, in argument week, Howard might have six cases scheduled for oral argument. One day, as he was midway through his second argument, one of the justices interrupted him to say, “Mr. Eisenberg, isn't the argument you are making on behalf of this client just the opposite of the argument you made in the last case?” Without skipping a beat, Howard rejoined, “Oh, that was the other Howard Eisenberg!”



Doing criminal defense appellate work means losing, a lot. But this never seemed to get Howard down. It was another bright facet of Howard's personality that he leavened his work representing some of society's most dangerous individuals with the light touch of his wit. Occasionally, in talks he gave to various criminal defense, bar, and student groups back then, he would begin by saying, "I'm Howard Eisenberg, state public defender, which the Supreme Court thinks is Latin for 'Judgment Affirmed.'"

....

In this age when accumulation of wealth or power is its own sufficient end, when basic civil rights and the rule of law are officially trampled and political meanness seems even more rampant, Howard Eisenberg provided us all with a different model: one of consuming generosity, self-sacrifice, and devoted public service. He was a man of incredible energy, an acute sense of justice, and while he occasionally preached ("Do well and do good!") and, I'm sure, lectured in class, he mostly led by example, by doing.

## "Howard Believed Lawyers Have a Higher Calling . . ."

By Jack E. Schairer

**H**oward Eisenberg was an amazing man. I will remember Howard most warmly for his extraordinary energy, remarkable spirit, and devotion to family, and for his unwavering and tireless commitment to helping those who are among society's most helpless and hopeless: indigent criminal defendants.

Howard's exuberance for the sometimes Sisyphean aspects of public defender work could be both inspiring and intimidating. Howard was a self-described appellate junkie. His legendary work ethic, legal brilliance, and compassionate manner with clients at times left you feeling as though you should be doing a little more and doing it better. And usually you did. Working with Howard invariably caused you to become not only a better professional, a better lawyer, but also a better person.

....

It is not unusual for attorneys of Howard's caliber who work in defender agencies to stay for a few years and then move on in pursuit of greater prestige or treasure. Howard did move on to be executive director at the National Legal

Aid and Defender Association, director of clinical education at Southern Illinois University School of Law, dean of the University of Arkansas at Little Rock Law School, and, of course, dean of Marquette University Law School. But in a very real and tangible way, Howard never stopped being a public defender. While each of these jobs no doubt brought enormous challenges and demands, Howard always maintained a caseload representing indigent criminal defendants, pro bono. By the time Howard returned to Wisconsin in 1995, his state public defender statute had been changed, eliminating the agency's authority to litigate prison-conditions issues on behalf of inmates. Howard filled the void with his pro bono work representing individual inmates who asked for his help and by playing a key role in a class-action suit challenging, as cruel and unusual punishment, conditions at Wisconsin's "supermax" prison in Boscobel.

After Howard's passing, a speech he had given on several occasions titled "What's a Nice Jewish Boy Like Me Doing in a Place Like This?" that addressed his thoughts on spirituality and the legal profession received press attention. In it, Howard took the legal profession to task for its general state of incivility and took lawyers to task for trying to win cases by being personally offensive, snide, unreasonable, and unpleasant to deal with. Howard believed lawyers have a higher calling to pursue ultimate good for society. His view of *cura personalis* meant that the Golden Rule is operative even in law offices. He urged students and lawyers, as a start, simply to be nicer, to treat people, all people, better. I can tell you this was not, as is often the case, the product of someone's looking back over his career with perhaps some regret and urging others to learn from his experience and take a better path. Howard was always this way.

Howard, somewhat incongruously for a public defender, particularly in the early 1970s, seemed as though he were the kind of person who had been born wearing a jacket and tie. His demeanor in the office was generally formal, but he also had a humorous side. One of his secretaries who still works in his old Madison appellate office relates that Howard dictated prodigious amounts of legal work and would often end each document on the tape by signing off with a fictitious name. In one instance the secretary typed exactly what Howard dictated. He signed it and, much to the secretary's horror, put it in the mail for filing, unknowingly, as "State Public Rhinoceros, Howard B. Eisenberg." ■

"His legendary work ethic, legal brilliance, and compassionate manner with clients at times left you feeling as though you should be doing a little more and doing it better. And usually you did."

Jack E. Schairer







# Questions of INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES in the Digital Age

By Jessica Silbey

First, I want to start with my sincerest thanks to everyone at Marquette University Law School for inviting me here to give this lecture. I was supposed to be here two years ago, in March 2020, but the pandemic hit the nation, and you will recall life then. It was a scary time with a lot of uncertainty and disappointments. And then came the isolation the pandemic created for so many people, which was also hard to endure. But as that isolation lifts, and we get back to normal, events like this—where we can be together face-to-face talking about cutting-edge legal issues—become even more special. For this reason especially, I am so very happy to be here to share my thoughts on a topic I have been thinking about for a long time.

Part of my excitement, too, is because of how much I admire the scholarly work of your intellectual property faculty, including Professors Kali Murray and Bruce Boyden, whose research has influenced my own. I am proud to be their colleague from afar.

My talk today will focus on the changing nature of intellectual property in the digital age. In a lecture named after the distinguished jurist Helen Wilson Nies, whose decades of service to the profession and to intellectual property law are noteworthy, I hope to honor that reputation by describing new trends in the field and proposing a path forward.

My talk includes drawing on my forthcoming book, *Against Progress: Intellectual Property and*



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**Jessica Silbey** is professor of law and the Yanakakis Research Scholar at Boston University School of Law. On April 6, 2022, Professor Silbey delivered Marquette Law School's annual Nies Lecture on Intellectual Property. The lecture remembers the late Helen Wilson Nies, judge of the U.S. Court of Appeals for the Federal Circuit from 1982 to 1996 (chief judge 1990–1994). This is a lightly edited version of Professor Silbey's Nies Lecture; a longer version will appear later this academic year in the *Marquette Intellectual Property and Innovation Law Review*.

Illustrations by Robert Neubecker

What is the “progress” toward which IP aims? And can we or should we define “progress” in terms of real people and their everyday creative and innovative practices?

*Fundamental Values in the Internet Age* (Stanford University Press 2022). The title takes its subject from the “progress clause” of the U.S. Constitution, which gives to Congress the power to grant limited-time exclusive rights to authors and inventors in order to promote the progress of science and the useful arts: “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .”

This project, like so many academic projects, is a continuation of prior work—my 2015 book, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property*. In that book, I sought to understand from the creators and innovators how intellectual property works or does not work for them in their everyday lives. Is the right of exclusivity an incentive to produce? Is it something on which they rely to earn their living? Do they think about IP at all? Does it get in their way? That book was based on 50 in-person long-form interviews and on qualitative research sampling and interview methods. The findings were mixed and complex. But, in general, I found that IP does not work in the way the formal legal doctrine and theory say it does. It is not the proverbial carrot-at-the-end-of-a-stick for creators and innovators that incentivizes production and dissemination of creative and innovative work. *The Eureka Myth* explained that IP’s aims of incentivizing production and facilitating markets in creative and innovative work is in fact profoundly misaligned with the experience of creators and innovators doing and making the work every day. I will leave curious readers to grab a copy of the book to learn what in fact motivates creativity and innovation and whether IP helps creators and innovators do their work and keep doing it. This talk is not about *The Eureka Myth* but about what I learned next.

Writing *The Eureka Myth* had me scratching my head, asking: What is the “progress” toward which IP aims? And can we or should we define “progress” in terms of real people and their everyday creative and innovative practices? This question is an open one for many reasons.

The first reason is that the Constitution is notoriously ambiguous, often by design, with its words and phrases intentionally capacious in order that the governing document can “be adapted to the various crises of human affairs” over time, as Chief Justice John Marshall would say in *McCulloch*

*v. Maryland* (1819). What “progress” meant in 1789 can and maybe should be different from what it might mean today.

Second, the history of the “progress clause” is notably thin. Those who have devoted significant time to its history conclude that the language is largely inconclusive.

Third, the legal history of intellectual property regulation since 1789 demonstrates themes and patterns related to sociopolitical and cultural shifts that respond to changes in technology and production, assist the growth of certain industries, and attend to certain powerful stakeholders. In other words, the “progress” promoted by IP laws may be situational and historically contingent.

And so this project asks about what “progress” means for our current time in order to identify a trend that I believe is worth thinking more about, given the growing centrality of IP in our digital age.

## Twentieth-Century Progress

During the 20th century, we assumed that IP’s goal of “promoting progress” meant simply “more”: more patented inventions and more copyrighted works. Although federal trademark law is authorized under the commerce clause and is primarily in the nature of anti-competition regulation, it is also IP. And trademark likewise serves a progressive function—incentivizing the flow of goods and services, encouraging the investment in goodwill, and promoting competition in the marketplace. As with patents and copyrights, we might think “more trademarks are better”: more differentiation, more source identification, more branding, more competition.

We see this “progress as more” narrative flourishing during the 20th century with the broadening of IP’s scope in terms of subject matter, rights, remedies, and duration. For example, the early copyright laws protected only maps, charts, and books. The “progress of science” was reasonably understood to be promoting the knowledge of our world. But in a series of statutory amendments, copyright scope grew to include art reproductions, technical drawings, translations, photographs, film, advertising, manufacturing labels, and sound recordings. The Supreme Court accelerated this expansion in the 1903 case of *Bleistein v. Donaldson Lithographing Co.* The decision extended copyright to a poster advertising a circus, stating that it would be a “dangerous undertaking for persons trained only to the law to constitute themselves the final



judges of the worth of pictorial illustrations.” This inaugurated what we call the “nondiscrimination principle” in copyright law, in which aesthetic judgment is left to the market. Now, 120 years later, copyright subject matter is so broad and the originality threshold so low, that copyright covers everything from everyday Instagram photographs to shampoo labels.

And whereas the early copyrights in maps, charts, and books lasted only 14 years from publication, that length extended from 28 to 56 years, in the first half of the 20th century, and to the author’s life plus 50 years, midcentury. The Copyright Term Extension Act in 1998 added *another* 20 years, so that today a copyrighted work lasts 70 years after the author dies.

In patent law, a similar expansion has occurred. Although patent law has not much grown in the length of its exclusive grant the way copyright has, its subject matter scope has profoundly broadened. Originally, patent law was aimed at agricultural tools, fiber and leather work, improvements to stoves and printing technology. These were signature inventions for the early U.S. economy. The industrial revolution gave way to new machines as inventions. And then, famously, in 1980, the Supreme Court held that “anything under the sun that is made by man” can be protected as long as the invention is novel, nonobvious, and useful. Since the 1980s, patentable subject matter has broadened to include business methods, parts and improvements of inventions (rather than whole machines), and even genetic material, such as modified human DNA, giving rise to new social movements around food justice and access to health care.

Trademark, too, has been expanding over time. We tend to think of trademarks in a traditional sense, as words and symbols, or other textual devices to signal the source of the good or service. But now trademark protection includes trade packaging and trade dress—the look and feel of the object (such as the shape of the thermostat or a grill). Trademarks can include single colors, like robin-egg blue for a Tiffany box. They can include sounds (like MGM’s lion’s roar) and smells (like that of Play-Doh). The trademark statute was amended mid-20th century to extend protection to anything that can serve a source-designating function, without regard to the nature of the mark. And commercial entities have taken that broad language to heart. At the end of the 20th century, the Supreme Court upheld trade dress protection for a Mexican restaurant described as a “festive



eating atmosphere.” There are very few limitations on trademark subject matter today.

What kind of story is this whose plot is growth and accumulation? It is a story that begins optimistically focusing on economic investment and opportunity and that is driven by the idea of a free market: accumulate lots of IP and the market will distribute it fairly and efficiently. It was born on the eve of the roaring 1920s and hit its growth spurt in the 1950s to 1970s, when we inaugurated a new Trademark Act, Patent Act, and Copyright Act, which laws were then interpreted generously by courts. In the backdrop is the midcentury growth in the United States of manufacturing and scientific discovery, advertising, and entertainment industries. The 20th-century expansion of IP appears as an exuberant race to maximize the benefits of a consumerist society, amplifying values such as choice, individuality, abundance, and opportunity. By the 1980s, with the arrival of the personal computer revolution, it is fair to say that IP law was doing exactly what people thought it should: promoting progress as capital growth and dreams of wealth and comfort for businesses, certainly, and for many individuals as well.

The internet and the digital revolution disrupted that trajectory. The transformation of civil society in the digital age, it turns out, is an existential threat to IP laws, which aim to control making, innovating, and distribution except by authorized manufacturers. IP law’s exclusive rights of control over making and using are an exception to everyday freedom in the digital age. The internet and the creativity



and innovation it has enabled have, as defining characteristics, generativity and copying by all. Routing around roadblocks that IP erects (or tries to) is one primary way the internet and its users both work and play.

Now, lest we think this has no precedent, before the internet were inventions such as the copy machine, the tape recorder, and the VCR. And these also were threats to IP law. These devices were almost sued out of existence, so fearful were we that their copying technology would make books, music, and movies disappear because they could so easily be pirated.

But instead, in narrow court decisions, these devices were allowed to survive, and with them came new business models, new technologies, new copying machines, and new inventions for making and innovating—such as movie rental companies and, later, streaming services, handheld digital record-and-play devices, peer-to-peer file sharing platforms, e-commerce platforms selling new and used goods, and 3D printers and makerspaces. These also were considered threats to IP's protections of patented technologies, copyrighted works, and trademarked goods and to the incumbent institutions that are sustained by them.

Yet as with the copy machine, which became essential to education, research, and business, we cannot live without the internet. It is here to stay. The internet may be an existential threat to IP, but it won't stop us from right-clicking, copying, and sending a photo over email or Twitter—which may be copyright infringement. It won't stop us from repairing our cell phone, computer, or car, which could

be patent infringement. And it won't stop us from commenting on, or making art out of, famous brand names, trademark infringement though it may be.

All of this behavior, which is inevitable in the digital age—which some would call a kind of progress but which also makes us all into pirates—challenges the rules of IP law and causes legal chaos. And that causes me to wonder if IP, as historically understood and justified, is set to change dramatically in our 21st century. It causes me to wonder if *what IP is for today* is changing.

In addition to the internet's ubiquity now, there are several reasons, it seems to me, that the stage is set for this change. First, since the mid-1990s, the United States Supreme Court has decided intellectual property cases at a rate that is more than double that in previous decades. The highest national court is a tone setter, selecting content and focusing the debate among legal elites that reverberates to national media and the public. The Supreme Court is a narrator of national values, interpreting federal and state law in light of the U.S. Constitution and its general, democratic, and procedural values. When it interprets and applies IP laws as frequently as it does today, it is shaping those IP laws in terms of national values and practices. And, thus, it reshapes what IP is and how it works.

Second, intellectual property law was previously a domain of technicians, a legal specialty that was isolated in practice and in law schools. Now, intellectual property law is a central part of legal education, with law schools building intellectual property and technology law centers to highlight the importance of the field in contemporary legal practice. It is such a prevalent legal field that it is not only in law schools but also in business schools, graduate science and humanities programs, and undergraduate schools.

Third, the mainstreaming of intellectual property leads it from an obscure corner of the law to a public consciousness that even teenagers acquire, transfiguring copyrights, patents, and trademarks into subjects of everyday importance. Today it is unexceptional to read about intellectual property law in news headlines or for intellectual property to be the subject of popular television shows.

This mainstreaming of IP—or what I have elsewhere called its “domestication”—affects the popular conceptions of creativity and innovation and thus the demands made on the law that regulates both. New stories debating intellectual property's

justifiable scope proliferate. Instead of the dominant 20th-century theories of IP as being about markets and money to incentivize creators and innovators, which is a kind of democratization, those stories now are being domesticated by fundamental values that structure democracy but may not be subject to the whim of its majority. The mainstreaming of IP has brought out its fundamental constitutional values—values such as equality, privacy, distributive justice, and institutional inclusivity. These, I argue, are the new anchors of IP law.

## Digital-Age Progress

My data for analyzing this question come from two sources: a compendium of hundreds of court cases dating from the 1980s and from a set of 100 long-form interviews I conducted over 10 years. Let me begin with some examples from court cases.

### Equality: The Case of the Monkey Selfie

The first case is about Naruto, a macaque monkey from Indonesia, who took a picture of herself using a camera set up in the jungle by nature photographer David Slater. That is, it's a case about a monkey selfie. Slater set up the camera and encouraged the troop of monkeys to play with the equipment because for weeks he couldn't get a closeup that he liked. But, after his setting up the camera and its luring the curious animals to the machine, many of the monkeys ended up taking many close-ups and selfies. Slater published these photos and sought to license them. But then the organization called the People for the Ethical Treatment of Animals (PETA) sued him, arguing that the monkey and not the man was the author of the photo.

Every time I speak about this case, the audience erupts in laughter. And, of course, there *is* something humorous about this. But it wasn't a joke. This lawsuit demanded substantial time and effort from several federal courts, and a lot of money was spent on both sides. The hard-fought goal—which at first seems like it shouldn't be so hard—was to convince a federal court of appeals (and eventually also the Copyright Office) that only humans can be authors. But why is that so obvious? PETA brought this suit to assert the dignity of the animal in the way authorship provides: as an expression of will in the world. PETA asserted not that monkeys are human, but that they should have some basic rights like humans.

Even outside the animal rights context, this is not

absurd. Nothing under U.S. law prevents children from being copyright authors. Corporations, too, can be authors. Capacity and a human body are not necessary prerequisites. Can artificially intelligent machines be authors? Not yet. But that is being actively debated. As I describe these debates in my forthcoming book, they are about much more than whether PETA will secure copyright royalties for Naruto and her endangered community. The case debated what it means to be treated equally and with dignity, not only under copyright law, but generally, and especially today, when the planet's natural resources are growing scarce, and when empathy, cooperation, and mutuality are necessary to survive.

### Privacy: The Cases of the Defrauded Actress, the Wedding Engagement, and the Boston Break-Up

The next case is about privacy—bodily privacy, as it happens. The case concerns Cindy Lee Garcia, who auditioned for and performed a small part in a film she was told was called *Desert Warriors*. Her performance was five seconds, and she had only a few lines. She was paid and went home. Months later, the filmmaker posted the film on YouTube, but Garcia's voice had been dubbed over with hateful anti-Muslim slurs. On YouTube, the film had the title *Innocence of Muslims*, and it was no longer an action film but a despicable screed against Islam. The film was viewed millions of times and seen all over the world. Cindy Garcia received death threats and had to hire personal security.

When Garcia asked YouTube to take the film offline, YouTube refused because she wasn't the copyright owner; the filmmaker was. And this is true. An actor's performance in a film does not create an independent copyright. The filmmaker is the author of the whole film, and therefore the film's owner. Moreover, film authorship most often excludes all the other people who contributed to the film, including actors, set designers, and lighting experts, among many others. The only way to get the video offline was to allege copyright ownership, which Garcia could not. This case went up on appeal twice because the issues were so dramatic and the equities so concerning. The filmmaker was outside the jurisdiction of the United States. And YouTube (Google) stood by its policy that only copyright authors as owners had control. Google prevailed.

This case is not really about copyright, though. It's about Garcia's bodily autonomy, her privacy as a person invaded by the misrepresentation and fraud perpetrated by the filmmaker. It's also about the

Slater published these photos and sought to license them. But then the organization called People for the Ethical Treatment of Animals (PETA) sued him, arguing that the monkey and not the man was the author of the photo.



But when the couple and the photographer sued, alleging copyright infringement (but really an invasion of their privacy, their right to control the representation of themselves to the public, and their defense of marriage equality), courts were listening.

exacerbation of that privacy invasion by platforms, such as YouTube, Twitter, Google, Facebook, Amazon, whose policies prioritize efficiency and growth over other values.

IP and privacy are often at odds. IP aims to disseminate knowledge and useful inventions. Privacy aims for seclusion and control over identity, one's things and effects, one's life choices. Some copyright cases, such as those in which the estates of famous authors (e.g., James Joyce and Willa Cather) sue to prevent the publication of private letters and unfinished manuscripts, might seem properly within the scope of both copyright and privacy. These are cases about papers, effects, and private thoughts that were left undisseminated. And we know that privacy in the United States extends to our papers and other things, and to our private spaces (e.g., our homes, cars)—that is the Fourth Amendment's promise. So using copyright to prevent the publication of these kinds of literary works may make sense, and the authors' estates often prevail, much to the consternation of literary historians and scholars. But they are nonetheless uncomfortable copyright cases because copyright is supposed to promote the progress of science, not to protect the privacy of public figures whose heirs wish to hide their writings as long as the copyright lasts (which is a long time).

But what about cases, like *Hill v. Public Advocate*, a 2014 federal court case in Colorado, in which the claim of privacy is over a public photograph? In this case, a photographer makes a photo of a couple's engagement, here two men, and posts it to her website with their permission. Then an anti-marriage-equality group scrapes the photo from the website and reprints it for some of its campaign literature criticizing same-sex marriage. How should this case come out? Using someone else's published work to criticize its message is usually permitted under copyright fair use as a form of free speech under the First Amendment. But when the couple and the photographer sued, alleging copyright infringement (but really an invasion of their privacy, their right to control the representation of themselves to the public, and their defense of marriage equality), courts were listening. This case got so far toward trial that the defendant settled and took down the photo from its campaign website. We may be sympathetic to the couple and the photographer—at least I am—but this is a blow to free speech. And this is not the usual copyright case, which worries about market substitution and lost revenue.

This is a case about misappropriating someone's identity, which is squarely a privacy concern, not typically a copyright concern under U.S. law.

Now for something a little different: the use of trademark law to protect associational autonomy and privacy. *Scholz v. Goudreau* was a dispute among members of the 1970s rock band Boston. The band Boston was known for such hits as "More Than a Feeling" and "Peace of Mind." After breaking up in 1981, the former band members fought over who could continue to use the name "Boston" in reference to themselves. The issue was lawful use of the trademark "Boston" without confusing audiences about who was and was not a "founding" or "former" band member. Tom Scholz and other Boston band members sued Barry Goudreau, their former bandmate and guitarist, to prevent Goudreau from describing himself as an "original founding Boston member." And the plaintiffs harnessed trademark law to do it. Negotiations and the lawsuit lasted decades.

Plaintiffs sought to limit Goudreau to the designation of "formerly of the band Boston" and to prevent him from using the term "founding Boston member." The plaintiffs alleged that the phrase "founding Boston member" would confuse the public as a "false designation of origin" and a "false or misleading description of fact." These are words in the trademark statute, to be sure, but they are most often used to combat false advertising and consumer confusion in the marketplace for goods and services. Trademark law is not usually used to negotiate band breakups.

This unusual trademark case went to trial, and Goudreau won the ability to designate himself as he pleased. In August 2018, a federal appellate court affirmed the jury verdict. But the dispute spanned three decades and cost hundreds of thousands of dollars, confirming that intellectual property is an imperfect but alluring framework in which to negotiate the terms of affective relations, a dimension of privacy law today.

#### Distributive Justice: The Case of the Seed Saver

Finally, maybe you heard about Farmer Bowman from Indiana and his soybean seeds? Vernon Bowman (aged 83) was sued by Monsanto, the seed giant. Monsanto had a patent on a special soybean seed that was "Round-Up Ready"—plant it and fertilize it with Round-Up® fertilizer, and your soybeans will be resistant to crop-destroying diseases. Bowman was a fan of Monsanto and had been buying its seed for years.

Buying the seed came with a license to use the patented seed (just as buying your cell phone comes with a license to use the patented technology within it). Farmer Bowman was allowed to use the seed as seed (to plant it and grow soybeans to sell as food). Like many farmers, he planted the seed to sell the majority of the soybeans as food, yes, but *also* to use some of the resulting soybeans as seeds for the risky late-season crop. Planting the patented seeds, which he had purchased, produced soybeans for sale and *other soybeans to plant as seeds*—seeds that contained the patented invention. The very act of farming was a form of patent infringement, making a copy of the invention, which Monsanto permitted *once* to plant and sell as soybean, but not *again* to replant as seed. The late-season soybean crop was always risky, and investing in more seed would increase the expense. Saving seed from the first crop was something that farmers had been doing, well, for forever. What Monsanto's lawsuit accomplished was to interrupt that timeless practice with a claim of 21st-century patent supremacy.

Bowman's claim against Monsanto went like this: "I've paid you for the seed and its invention once already. You got the benefit of the bargain, as all patentees do. No one else can sell Monsanto seed. But that is not what I'm doing. I'm just using the seed I lawfully purchased."

In response, Monsanto said that by growing soybean to plant as seed and not merely as soybeans to eat or sell as food, the farmer was making unlawful copies of Monsanto's patented invention and using them beyond the limited authorization. Bowman had replaced Monsanto's seed with his own, and therefore cut into Monsanto's rightful monopoly.

The only way out of this debate is to realize it's a patent case that is really about distributive justice. It is an argument about the rightful reach of the patent monopoly and about when, frankly, enough sales are enough. On the one side is a giant agribusiness whose soybeans seeds are used for more than 90 percent of U.S. soybean acres. On the other side, there is Farmer Bowman, struggling to make a living.

Bowman lost the case. The Supreme Court said there is no exception to the patent monopoly even for inventions that regenerate themselves naturally. And yet the arguments that Monsanto's gross and imbalanced rewards profoundly interfere with age-old sustainable and frugal practices among farmers resonated with enough people that a movement has

started to "free the seeds" and diversify agriculture.

*Bowman* is an example of one of the many IP cases that concern distributive justice and its relationship to human flourishing. And thus, I argue, it forms a pattern of legal action that indicates a turning tide in the purpose of intellectual property in contemporary culture.

### **Institutional Resiliency: Flaws in the System and Focus on the Commonweal**

Let us move to my interview data. In interviews with everyday creators and innovators, their business managers and lawyers, I heard similar themes and more. Specifically, when I asked creators and innovators what they would do to change the IP system to facilitate their work—what "progress" means to them—most described a system that is deeply out-of-balance and plagued by civility breakdown and incumbency biases. To most everyday creators and innovators, IP does not promote progress but rather thwarts it.

And so these everyday creators and innovators tend to live by other rules, adapted for their own practice. One of those rules, in fact, is that most artists and scientists I interviewed are much more generous than the IP system provides. They are content with many forms of copying and borrowing that the IP system would not permit (that is, that would be considered infringement). So, for example, a singer-songwriter explains:

A total copy rip-off, you know, not so great. But if someone's just taking parts, I mean, and being influenced by it, that's totally great—or inspired in some way by it . . . It's all this big pool, and we're throwing stuff into it. So if someone is being inspired to write something by it, or stealing an image, that's unavoidable.

In other words, everyday creators and innovators seek to do their own work and to enable others to do their work as well. For them, the benchmark is a kind of mutual flourishing, not a winner take all. I heard this refrain repeatedly.

A basic understanding of everyday creators and innovators is that most creativity and innovation are expected to be built from others' work, that copying is essential to creativity and innovation. For example, a long-time IP lawyer for technology clients said to me:

A software programmer . . . would consider [it] malpractice in their field to create a program from scratch if there's a perfectly good set of algorithms . . . laying around that they could use. You know: "It's tried, proven; we know this thing is bug free. Of course we want to use that one."

[W]hen I asked creators and innovators what they would do to change the IP system to facilitate their work—what "progress" means to them—most described a system that is deeply out-of-balance and plagued by civility breakdown and incumbency biases. To most everyday creators, IP does not promote progress but rather thwarts it.

We had hoped the information age would spread democracy not demagoguery. Instead, it has undermined the modernist story of progress with its narrow, numerical, market-based metrics, exposing competing claims to the common good and to justice.

Because copying and borrowing are essential to the work being done, everyday creators and innovators often ignore intellectual property rules that restrict borrowing and sharing. These accounts describe a much more tolerant, more generous regime in which the public domain is richer and bigger. This resonates with the original purpose and structure of the Constitution's progress clause, underscoring its role in the production and dissemination of fundamental knowledge, with a much narrower scope and duration for intellectual property exclusivity.

Thus, overly aggressive assertions of IP really bother everyday creators. I know this because they describe others' claims of exclusivity as norm-breaking—violent and uncivil—suggesting a breakdown in the rules of community engagement. For example, an internet entrepreneur said to me:

... the companies that I work for, we all file patents. And we are pretty cynical about it . . . . We don't think these patents are really necessarily going to ever be worth anything . . . except in this whole morass that is people wagging sticks at each other and saying, "I am going to sue you over your patents."

In a similar vein, a company executive described to me the threat of patent litigation as a "shakedown" beginning with "unsophisticated small companies that don't have a lot of patent experience." "They [plaintiffs] really identify the weak links in the chain [and] . . . go after them" as a strategy. Later in that interview, the CEO told me that whoever has the "bigger stick" or can withstand the "squeezing" will "survive" the threats. Some creators and copyright defendants describe "coercive" contracting situations, in which the more powerful party takes you "hostage" like a "feudal lord," exerting control because of "rapacious" tendencies to protect their incumbent position and minimize their own risks.

These are stories about how winners are foreseeable (as capitalized incumbents and intermediaries) and how the system doesn't seem fair or open to all. They are accounts about how threats generate unjust order. To everyday creators and innovators, therefore, IP strictly enforced is more like a rule of law for the powerful than a rule of law for the many. And this makes the system seem illegitimate. This is a story of institutional breakdown and precarity, the opposite of what we'd hope the rule of law promotes, which, among other values, is institutional inclusivity and resiliency.

While these harms may sound individualized,

they are not. These are complaints about systemic dysfunction and a breakdown in the organizational integrity of IP. In the interview accounts about what is wrong with IP today, I did not hear about zero-sum contests in which for one person to win, another person has to lose. Instead, the analysis of how IP optimally works depicts an interrelated, system-level analysis. Despite the importance of being called an author or inventor for many creators and innovators, they nonetheless appreciate the structural mechanisms through which their creativity and innovation flourish or are thwarted. And they appear to appreciate that these structures of interactive, interdependent relations constitute IP as a system in need of reform.

Many of these descriptions contain images of power imbalances related to size and influence rather than to quality of the work done or value produced for society. They describe how financial rewards are not distributed proportionately based on the work's quality or on who is doing the work. Instead, those who get ahead in this system are not those who made the work but, rather, intermediaries or lucky acquirers. For example, a film producer described frustration with platforms and databases, containing photographs, that hold creators and filmmakers hostage for essential raw material. She says:

It is rare that the person [who] actually took the photograph still owns it and holds it and is selling you the rights. Extremely rare. Most common, it's collectors or historical societies often who have been given the material for free . . . who are insisting on getting paid for it to be used. I can understand paying for copying costs, and paying for processing, but oftentimes the pay goes way beyond that as a moneymaking venue.

A different filmmaker describes how she is not disappointed in

... necessarily the rules [of copyright], although those are difficult. What's disappointing is that people control access to those images, so that even if they don't own the copyright, or they cannot legally restrict the copyright, if they own the image, they can restrict your making a copy of it [because they have physical control], . . . and hold you hostage for inordinate amounts of money.

Thus, another harmful effect of a precarious legal system with these characteristics is that the products are slower to arrive and may be more costly to make, and their quality may be compromised.











# SEPARATION OF POWERS IN FLUX

## IN BOTH WISCONSIN AND WASHINGTON

Two legal scholars offer perspectives on court decisions and trends that are bringing momentous shifts in the allocation of governmental authority at both the state and federal levels.

**T**he legal ground is shifting in the law of the separation of powers. Decisions by both the Supreme Court of the United States and the Wisconsin Supreme Court reflect and constitute important, even controversial, changes. The following pages present two sets of intelligent and accessible insights by distinguished professors into these legal developments.

The first is a question-and-answer session with Chad M. Oldfather, professor of law at Marquette University. The topic is his developing scholarship on separation of powers under the Wisconsin constitution, with particular emphasis on the approach of the Wisconsin Supreme Court. The touchstone is his new article, “Some Observations on Separation of Powers and the Wisconsin Constitution,” 105 Marq. L. Rev. 845 (2022).

The second is a recent series of guest posts on the Volokh Conspiracy blog by Thomas W. Merrill, the Charles Evans Hughes Professor of Law at Columbia University and a friend of Marquette Law School. The five-part series engages critically

with the U.S. Supreme Court’s decision this past summer in *West Virginia v. EPA*, holding unlawful an innovative approach by the federal agency to addressing the question of climate change.

The reasons for our presenting the two sets of entries include, most generally, that developments in federal law (the subject of the Merrill entries) often have a pull on state law (Oldfather’s topic).

Considerably more specifically: Both Oldfather and Merrill identify and criticize recent judicial justifications for upsetting decisions made by the other branches. Oldfather’s research quite directly takes on separation-of-powers questions under the Wisconsin constitution. Merrill’s approach addresses the future of the *Chevron* doctrine involving judicial deference in the administrative-agency context and the question whether Congress may become subject to a revival of the nondelegation doctrine.

In short, this latest work of both professors, while likely to produce spirited rejoinders, certainly merits attention and consideration.



## “THE POTENTIAL FOR UNINTENDED CONSEQUENCES . . . IS HUGE.”

**Chad Oldfather, professor of law at Marquette University, talks about his ongoing work analyzing the Wisconsin Supreme Court’s decisions on separation of powers.**

State constitutions attract less attention than they deserve, in the view of Chad M. Oldfather, professor of law at Marquette University. So he has expanded his teaching and research—which already included federal constitutional law and judging and the judicial process—to include the Wisconsin constitution and its interpretation by the state’s highest court. The *Marquette Lawyer* caught up with Professor Oldfather about this recent work.

***Tell us a bit about your latest project, a newly published article in the Marquette Law Review, called “Some Observations on Separation of Powers and the Wisconsin Constitution.”***

There’s a bit of an origin story here, so let me start with that. State constitutional law has been understudied, not just in Wisconsin, but everywhere. There’ve been some law professors doing very good work in the field for quite a while, but most of the attention in the academy has gone to federal constitutional law. In fact, most law schools haven’t had a class on state con law. This in turn has meant, as Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit has pointed out, that the profession as a whole hasn’t paid enough attention to state constitutions.

I first started thinking about teaching state con law—adding such a course to my roster—in 2014. That ended up not happening until 2020, and, by that point, my motivations included not just a general sense that the subject

had been overlooked, but also a belief that trends at the U.S. Supreme Court suggested that a lot of the action would be shifting to state courts and state constitutions. And, of course, over the years, there have been a lot of significant cases under the Wisconsin constitution.

It matters also that the Wisconsin Supreme Court lately has been changing—with a majority of the seven justices having taken office since 2016, but changing otherwise as well. Suffice it to say here that, as someone who presents at conferences around the country attended by not just other professors but also state appellate court judges, I have gotten a lot of questions about the court. So I wanted to learn more.

***So, the project itself?***

Sure. The title, “Some Observations on Separation of Powers and the Wisconsin Constitution,” is, for better or worse, an accurate one. Most law review articles explore a specific topic. There’s a thesis, there are arguments developed in support of that thesis, and so on. This one meanders, even lingering in places because they seem interesting. You could think of it as kind of a travelogue, an account of visiting a place and offering up observations, questions, and commentary on what I saw. There are many more incomplete thoughts than in a typical article.

***How’d that come to be?***

It’s mostly a product of two factors. One is that I may have an inside track with the *Marquette Law Review*. So I didn’t feel constrained to meet all the conventional expectations about what a law review article should look like.



Professor Chad M. Oldfather

Another is how I approached the project overall. Typically when I start a new project, I have a fairly specific question in mind. Often that will be about something that puzzles me. A relatively recent one was “Why is there never talk of giving precedential effect to the methodological choices U.S. Supreme Court justices make in interpreting the Constitution?” Another was “Why is it that appellate courts always review questions of law *de novo*?” Things like that.

For this one, I decided that I would try to read everything the Wisconsin Supreme Court has ever written about separation of powers under the state constitution. And that I would do it with the same mindset as the bear who went over the mountain—to see what I could see. My hope was to add value by virtue of the perspective I enjoy as a full-time student of the law. I’m not an advocate for a particular client or cause, I don’t have to answer a question presented in a specific factual context, and I’m not constrained by a budget or short deadlines.

***How did it go?***

Well, attacking a project like this one turns out to be a very tall order in a couple of ways. One is the sheer amount of material involved. I started out by running a Westlaw search in

the Wisconsin Supreme Court database for the phrase “separation of powers,” which turned up a lot of opinions. And then when I started reading them, it became apparent that what I’d done wasn’t enough. At some level, every exercise of the power of judicial review is about separation of powers. Some more than others, of course. But it ends up being enough opinions that if you print them out and start stacking them up on your dining room table, not everyone is going to be happy about it. And that’s after excluding the ones that are only incidentally about separation of powers.

And so, anyway, as I sat there at my dining room table, reading through all these opinions, I kept track of what I was seeing and did my best to identify trends and inconsistencies and so forth. A lot ended up on the cutting room floor, though no doubt some of it will prove to be useful in future work.

***Any examples of what got left out that come readily to mind?***

Sure. One obvious thing is that today’s opinions are much, much longer. Things started to pick up not long after the court of appeals was created in 1978. But the trend toward greater length has continued. The opinions are considerably longer. That is, of course, hardly to say that they’re better.

***One of the things you included in this initial article relates to interpretation of the state constitution.***

Yes—and the story turns out to be more complex than most of the court’s opinions let on. The court in the state’s early decades was very pluralistic in its methodologies. It didn’t regard the task of interpreting the state constitution as following a single path, or as an endeavor in which only one approach is legitimate. As much as anything, the justices acted like common-law judges.

And it’s not that the court lacked examples of alternatives. Thomas Cooley’s *Constitutional Limitations*, first published in 1868, was unquestionably the leading treatise on

state constitutional law. Cooley’s aim was to describe prevailing practices, and he outlines an approach that looks like a rough version of originalism. The Wisconsin justices cited Cooley for some things, but they didn’t follow his general approach. These days the court often invokes a framework that’s somewhat akin to Cooley’s approach, but it didn’t adopt that until the mid-1970s, and its emergence then appears to have been almost by happenstance.

But that’s not all. The court has an entirely different approach when it’s dealing with separation-of-powers questions—and still another when interpreting provisions in the state constitution’s Declaration of Rights. All of which is at least broadly consistent with the pluralism of the earlier years.

Another thing that’s notable—and this is hardly unique to Wisconsin—is that the court frequently draws on the U.S. Constitution, and cases interpreting it, in its efforts to discern the meaning of the Wisconsin constitution. That, it seems to me and to an awful lot of other people who’ve thought about state constitutions, is problematic. For one thing, it’s not even clear that state constitutions are the same sort of document as the federal constitution. They might be more like statutes, they might be less like statutes, they might be something else altogether. That can have implications for interpretation. But even setting that aside, there are critical differences.

***Could you elaborate on those differences?***

Start with the legislative power. A state legislature has the police power. Certainly, Congress’s power is broad, but there are limits. So right off the bat, there’s this different and larger legislative power in Wisconsin.

And then the executive branch in many states, including Wisconsin, is, as some describe it, “unbundled.” There are more executive officers identified in the state constitution than just the governor (or president), and more of

them selected by the people.

The judiciary, too, is different. The scope of its jurisdiction is broader, and members of the judiciary are elected. One of the big theoretical issues in federal constitutional law is what Alexander Bickel famously called the “countermajoritarian difficulty”—the fact that judicial review in the federal system entails unelected judges overturning the work of the people’s elected representatives. That’s not present here, at least not in the same way.

I haven’t worked my way through how that should cash out in terms of a differing conception of the judicial power. The fact that the justices have a popular mandate to exercise their power doesn’t tell us what the nature of that power is. But one thing that seems clear is that it’s inadvisable (I’m using a mild word) to draw any kind of easy analogies with the federal judicial power.

Taken together, all of this calls into question the idea that one can derive conclusions about how power is separated at the state level from how it’s done at the federal level.

***My sense is that you have more to say about the differences.***

You’re right. There’s also the fact that the two documents were drafted six decades apart, and in very different contexts. The drafters of the U.S. Constitution were coming out of a British system in which the notion of a constitution did not necessarily entail a written document. A half-century-plus can make a tremendous difference in terms of social priorities, the general sense of how government ought to work, and so on. Even the same words could have different implications.

As an academic, all of this suggests to me that there’s a lot of interesting work to be done. If I were on the court, I’d take it all as a reason to tread carefully and with a great deal of humility.

***But you don’t see the court doing that?***

I don’t. One of the things I do in





“... it’s not even clear that state constitutions are the same sort of document as the federal constitution.”

the article is briefly to survey some of the more prominent recent decisions concerning separation of powers. A few things seem clear from those cases. One is the truth of Justice Robert Jackson’s observation in *Youngstown*, or the *Steel Seizure Case*, that “the opinions of judges . . . often suffer the infirmity of confusing the issue of a power’s validity with the cause it is invoked to promote.” Which leads, he continued in that 1952 concurrence, to an emphasis on short-term results over a longer view of what makes sense as a matter of constitutional government.

That looks to be exactly where the Wisconsin Supreme Court is at. It’s hard to imagine these cases coming out the same way were the partisan affiliations or affinities of the branches switched. Even if that’s not the reality, it’s the perception. Part of the blame for that can be placed at the feet of the media, including some who ought to know better. But most of it belongs with the court.

#### **How so?**

I’ve already mentioned some of the reasons. But there’s more. Some of the justices recently have had big ideas about how things should be when it comes to separation of powers, which are some distance from how things are and have been. Some of those ideas, if implemented, would work fundamental changes on the structure of state government. But those ideas don’t seem

to have a basis in anything directly connected to the Wisconsin constitution.

Or at least the justices propounding the ideas haven’t made the effort to make that connection. What they provide instead is general references to some of the political philosophy underlying the U.S. Constitution, or citations of separate opinions of justices on the U.S. Supreme Court, which aren’t even binding authority as statements of federal constitutional law.

So there’s this kind of castle-in-the-sky vision of what government should be, which then gets dropped, bit by bit, into a landscape or edifice that’s been built in a very different way. The potential for unintended consequences—at least assuming the justices are willing to adhere consistently to the principles they articulate—is huge. The logic of reinvigorating the nondelegation doctrine with respect to administrative agencies, for example, creates the possibility that some of the ways in which the legislature goes about its work through committees would also be problematic. That’s among the examples that I take up in the article.

#### **More here, too?**

Yes. In fact, probably the biggest thing is the tone of the opinions. There’s a boldness to some of them that’s, shall we say, unmerited. And also unhelpful. No doubt they’re good reads to people who already agree with them. But

they confidently assert as *established* all sorts of propositions of the sort I just mentioned that are in fact highly contestable. I don’t think I’m going too far out on a limb in suggesting that judicial opinions ought to be judicious, particularly in a world that’s as fractured as ours.

More than that, the justices routinely accuse one another of activism, partisanship, and being result-oriented. As I’ve suggested, those charges almost certainly have some basis. But for the justices themselves to make those allegations, and as frequently as they do, seems unlikely to have any effect but to perpetuate the impression of dysfunction that, fairly or not (in the nature of impressions), the court has exhibited for some time now. It’s hard to advance the rule of law with some of this rhetoric.

#### **So what’s the solution?**

Group dynamics can be hard to change, especially when change comes one member at a time. So there are no easy solutions. But it will be a good start if the profession—and the academy—will begin to pay closer attention and, more than that, to convey the message that we expect something better from the justices, not just when they are on the bench but also when they campaign for it (and when others campaign for them). It’ll take time, and it won’t always be comfortable. But it would be worth the effort. ■



# MAJOR QUESTIONS ABOUT *WEST VIRGINIA V. EPA*— AND THE FUTURE OF THE *CHEVRON* DOCTRINE

In a series of guest posts at the Volokh Conspiracy blog, a noted scholar of administrative law critically engages with the Supreme Court's approach to reviewing challenges to the authority of federal administrative agencies.

By Thomas W. Merrill, Charles Evans Hughes Professor of Law, Columbia University

## 1. *WEST VIRGINIA V. EPA*: AN ADVISORY OPINION?

Deciding the case might have been squarable with Article III, but not the way Supreme Court went about it.

*West Virginia v. EPA*, decided on June 30, 2022, will long be remembered as the decision in which the U.S. Supreme Court officially endorsed the “major questions doctrine,” as Jonathan Adler has noted on this blog. In this series of five guest blog posts, I will get to that in due course.

But the briefs and the oral argument were also concerned with whether the case was justiciable. The government argued that West Virginia and the coal producers had no standing, that the case was moot, and that the Court was being asked to render an advisory opinion. The majority opinion by Chief Justice John G. Roberts, Jr., spent little time in swatting these arguments aside, and Justice Elena Kagan's dissent showed little interest in them—although at one point she casually referred to the Court's decision as an “advisory opinion.”

It is tempting to dismiss these threshold issues as technicalities and to move on to the main controversy. But I think that the government was right that the Court was being asked to offer an advisory opinion and that this is in fact what the Court did.

And the advisory nature of the decision is more than a technicality. It undermines the Roberts Court's efforts (which have been substantial if not

entirely consistent) to insist on strict observance of Article III limits on federal courts. More importantly, the advisory nature of the opinion decisively shaped the way the Court characterized the major questions doctrine. As we shall see in a later post, the Court framed the major questions doctrine as an abstract exercise in political science, detached from the ordinary role of courts as interpreters of controlling legal texts.

To understand the justiciability aspect of the case, it is necessary briefly to recap the sequence of decisions. In 2015, the Obama Environmental Protection Agency announced something called the Clean Power Plan (CPP), its most ambitious initiative to reduce greenhouse gas emissions. The CPP set new limits on carbon dioxide emissions from existing fossil-fueled power plants. The plan was highly innovative because the limits were based on what individual plants would discharge if they were linked in a grid with other power sources emitting lower amounts of CO<sub>2</sub>, such as generating facilities powered by natural gas, solar, or wind.

In effect, the Obama administration's objective in the CPP was to force existing plants to enter into cap-and-trade systems that would favor renewables and discourage the use of fossil fuels. This became known in the litigation as a “generation shifting” control strategy, as opposed to more traditional strategies based on technological measures at individual plants, such as installing scrubbers.



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The CPP was challenged in court, and in an unusual move, it was stayed by the Supreme Court in 2016 before any of the challenges produced a final judgment. In 2019, the Trump administration formally repealed the CPP, based on its legal conclusion that generation shifting was not permitted by the relevant provision of the Clean Air Act. The Trump EPA simultaneously issued a new plan for regulating emissions of CO<sub>2</sub> from existing fossil-fueled power plants, called the Affordable Clean Energy rule (or ACE). This set new, and comparatively modest, limits on emissions by existing plants, based on the use of more efficient combustion devices.

A coalition of blue states and (interestingly) electric utility companies filed a massive review proceeding in the U.S. Court of Appeals for the D.C. Circuit, challenging ACE. One day before the inauguration of President Joseph Biden, a divided panel of the D.C. Circuit struck down the Trump plan. The bulk of the court's nearly 150-page majority opinion consisted of a labored analysis explaining how the repealed

CPP could be squared with the language of the act. The bottom line was that since generation shifting as imposed by the CPP was legally permissible, the Trump EPA erred in concluding that it had been impermissible. The ACE plan was accordingly reversed and remanded to the EPA.

After the decision was rendered, the D.C. Circuit clarified, in response to a motion by the Biden administration, that its mandate did not mean that the CPP was reinstated. Indeed, the court's conclusion would seem to be required by principles of administrative law: In *Burlington Northern, Inc. v. United States* (1982), the Supreme Court held that when an agency issues sequential decisions, reversal by a court of a later decision does not automatically reinstate an earlier one.

In this posture, West Virginia and its coal-producing allies petitioned the Supreme Court to review the D.C. Circuit's decision. The solicitor general opposed the request, arguing that the petitioners lacked standing since they were no longer subject to any form of CO<sub>2</sub> emissions controls—the CPP having been stayed and repealed and the ACE rule having been vacated and remanded. The Court nevertheless granted certiorari.

In my assessment, West Virginia clearly had standing to ask the Supreme Court to review and reverse the D.C. Circuit's decision invalidating the Trump plan. The ACE rule imposed rather modest limits on coal-burning power plants, and West Virginia could plausibly argue that these limits would be relatively easy for it to administer and enforce. Given that the states have frontline responsibility to implement emissions limits on existing sources, this was a sufficient interest to give West Virginia a tangible stake in the perpetuation of the ACE plan.

For the same reason, I do not think that the question of the legality of the ACE plan was moot. If the Supreme Court reversed the D.C. Circuit, the ACE plan would remain in effect, and this

would have different legal consequences relative to a world in which there were no EPA standard in place for existing fossil-fueled power plants.

The briefing and argument nevertheless made clear that what West Virginia and its allies really wanted was a decision from the Supreme Court that the Obama administration's CPP—or something like it—was not legally permissible.

*That* was a request for an advisory opinion. The CPP had never been put in effect and was long dead. The particular form of generation shifting the CPP sought to mandate was of no continuing legal consequence.

Of course, any sophisticated observer of the Washington scene could predict that the Biden administration was likely to put something similar to CPP in place. Or perhaps not. There are a variety of moves the Biden administration could take to hasten the demise of coal-burning power plants. At this point, it is completely unknown what form future regulation will take.

In any event, the critical legal point is that no generation-shifting plan for existing power plants was in effect when the Court rendered its decision. There being no actual plan to review, the Court's ruling that such a plan would be beyond the power of the EPA was an advisory opinion.

One could perhaps argue that the D.C. Circuit's conclusion that the CPP was legally permissible was critical to its judgment that the Trump administration erred in concluding it was impermissible, and hence for its decision to reverse and remand ACE to the EPA. This, in turn, might justify a decision by the Supreme Court dissecting the D.C. Circuit's reasons for concluding that the Trump EPA had adopted an overly narrow interpretation of the EPA's authority, and either accepting or rejecting those reasons.

But this defense against the charge of an advisory opinion is not available, as the Court did not engage

with the D.C. Circuit's analysis of the statute. Instead, it held that any form of generation shifting—at least with respect to greenhouse gas emissions from existing power plants—was beyond the delegated power of the EPA. This was effectively an advisory opinion about the long-defunct CPP—or any future plan that entails similar characteristics.

The Court was telling the Biden administration what it could not do in the future; it was not adjudicating the legality of anything of current significance. This can perhaps be explained by the fact that the D.C. Circuit had rendered such an elaborate advisory opinion that the CPP was permissible. But federal courts review “judgments, not opinions,” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984), and the only judgment before the Court was the one overturning the Trump administration ACE plan.

So much for federal courts being limited to deciding actual “cases” or “controversies.”

## 2. WEST VIRGINIA V. EPA: WAS “MAJOR QUESTIONS” NECESSARY?

**A correct interpretation of the statute at issue—Section 111(d) of the Clean Air Act—does not give the EPA the authority to issue the sort of regulations at issue in the case.**

The Supreme Court held in *West Virginia v. EPA* that the federal agency did not have authority to adopt what amounted to a cap-and-trade system for existing fossil-fueled power plants because this raised a “major question,” of “economic and political significance,” as to which Congress had not clearly delegated authority to the EPA. But a close reading of the relevant statute, Section 111 of the Clean Air Act, indicates that the EPA has *no authority* to issue legally binding emissions standards for existing stationary sources—period.

So the Court did not have to create



a novel legal doctrine to limit the authority of the Biden administration to adopt something like the Clean Power Plan. It could have reached the same result simply by paying close attention to the language of the statute that purportedly granted such authority. This second of five guest blog posts on the Supreme Court's decision makes this case (the first one suggested that the decision was an advisory opinion).

We need to know a bit about the statute. When Congress adopted the modern form of the Clean Air Act in 1970, the central regulatory mechanism was a classic exercise in cooperative federalism. The act required the EPA, in Section 109, to promulgate National Ambient Air Quality Standards (NAAQS), setting forth permissible limits on the ambient concentration of certain key air pollutants. Once these NAAQS were established, the states were required, under Section 110, to develop state implementation plans (SIPs), setting forth a strategy for achieving the federal standards.

The federal agency was directed to review the SIPs to make sure that they were adequate, and if a state utterly failed to promulgate an adequate SIP, the EPA could step in and promulgate a plan for the state. But the core idea was that the federal government would set the air quality standards and the states would have substantial discretionary authority to develop a regulatory plan to meet these standards, taking into account the circumstances of each state.

The Clean Air Act also gave the EPA authority to set *direct* control standards on sources in a number of situations, including emissions standards for hazardous air pollutants and for mobile sources such as automobiles. And, of relevance to the issue in *West Virginia*, Congress gave the EPA authority, in Section 111, to establish direct controls on certain categories of *new* stationary sources discharging pollutants that can endanger public health and welfare.

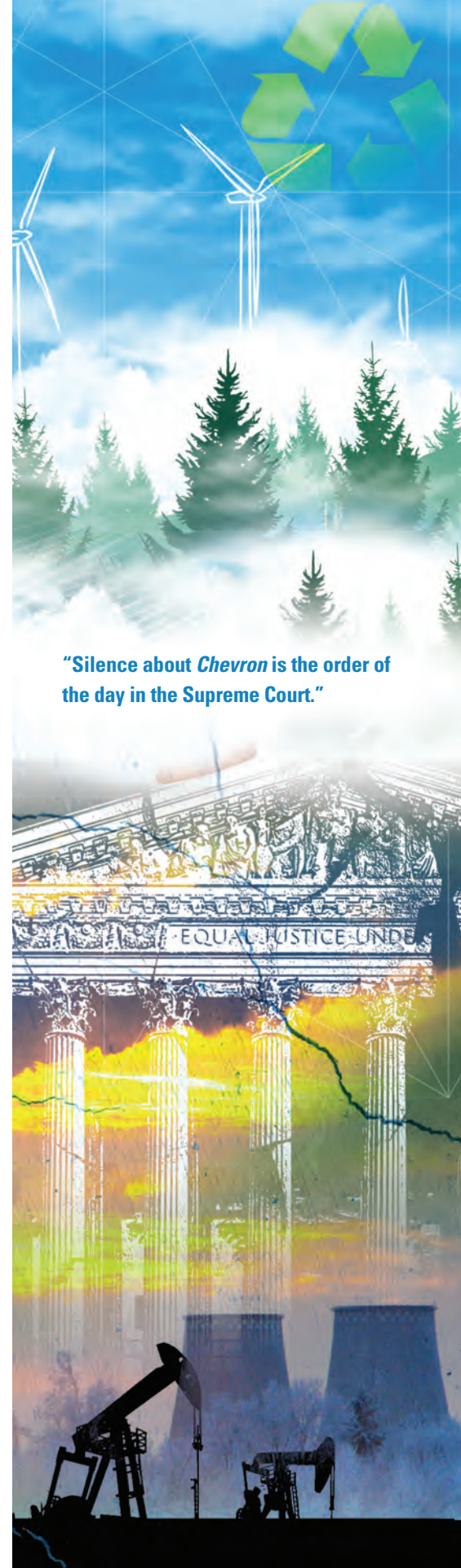
Having instructed the EPA to

establish the NAAQS and having authorized the EPA to create direct emissions standards for hazardous pollutants and mobile sources, why did Congress also give the EPA authority to regulate *new* stationary sources? The answer is grounded in industrial policy rather than environmental policy.

Many members of Congress were concerned that states with relatively clean air would use the discretion they enjoyed in establishing SIPs to set relatively lax environmental standards, in an effort to induce industry to relocate to the state. To prevent this outflow of industry from dirty air states to clean air states, Congress directed the EPA to establish mandatory emissions standards for new stationary sources of air pollution that would apply everywhere in the nation. Since new sources would have to comply with these standards anywhere, there would be no incentive to relocate for environmental reasons.

A glance at Section 111 confirms that the overwhelming focus is on new sources. The section is titled “Standards of Performance for New Stationary Sources,” and most subsections deal exclusively with new and modified sources. Only one subsection—Section 111(d)—addresses existing stationary sources. Indeed, it is a bit of a puzzle as to why existing sources were mentioned at all in Section 111. Until the Obama administration adopted the Clean Power Plan, subsection (d) rested in unremarked obscurity.

In any event, the key point for present purposes is that the EPA is given very different authority to regulate new stationary sources as opposed to existing sources. Under Section 111(b) (1)(B), which applies to new sources, the EPA is instructed to “promulgate” (and periodically revise) “standards of performance” for new sources. The statute expressly requires that these EPA-promulgated standards be developed using notice-and-comment rulemaking, which is required under



**“Silence about *Chevron* is the order of the day in the Supreme Court.”**



the Administrative Procedure Act (APA) when agencies issue legally binding legislative rules.

In contrast, under Section 111(d), the EPA is instructed to “prescribe regulations which shall establish a procedure similar to that provided by [Section 110] under which each State shall submit to the Administrator a plan which . . . establishes standards of performance for any existing source for any air pollutant [subject to exceptions].” Note that, under subsection (d), it is the states, not the EPA, that “establis[h]” the “standards of performance.” The EPA’s authority is to establish procedural regulations about the manner in which the states are to submit to the EPA the standards they are establishing.

There is no mention of notice-and-comment rulemaking in Section 111(d). Procedural regulations are exempt from notice-and-comment under the APA. But substantive regulations having the force of law generally are not. All of this confirms that the EPA was not given authority to issue binding nationwide standards in this context.

Note, too, that subsection (d) expressly analogizes the state standards for existing sources to the SIPs that the states establish under Section 110. As with the SIPs, the EPA is instructed to review the state standards to see if they are “satisfactory,” and if a state utterly defaults, the EPA is given authority to prescribe a federal standard in the state for existing stationary sources. But the EPA’s authority is limited to reviewing the specific plans developed by each state, and it can override these plans only on a finding that a specific state plan is unsatisfactory.

The conclusion is inescapable that the EPA has no delegated authority to issue legally binding rules that establish, on a nationwide basis, standards of performance for existing stationary sources. This straightforward reading of the statute provides an ample basis for concluding that the Obama EPA had no authority to issue the Clean Power Plan.

For that matter, the Trump EPA had no authority to issue the Affordable Clean Energy rule either.

In the regulatory proceedings developing the CPP, the Obama EPA offered only one statutory argument in support of its authority to impose a binding standard of performance on all existing power plants. The act, in its current incarnation in Section 111(a)(1), defines “standard of performance” to mean the “best system of emission reduction” (BSER) that “the Administrator [of the EPA] determines has been adequately demonstrated.” The same term—“standard of performance”—appears in both section 111(b)(1)(B), delegating authority to the EPA to “promulgate” standards for new sources, and in section 111(d), directing the states to submit plans establishing standards of performance for existing sources.

But the determination by the EPA that a standard has been “adequately demonstrated” can be made *ex post*, when the EPA reviews the standards set by each state, as well as *ex ante*, in the federal agency’s promulgating national standards for new sources. There is no language in the statute suggesting that the EPA must determine which standards of performance have been adequately demonstrated *in advance* of the exercise of authority by states to establish standards of performance for existing sources, let alone for its making such standards legally binding.

Although the EPA has no authority to issue binding regulations setting emissions standards for existing sources, presumably it has the authority to issue guidance documents (“general statements of policy”) setting forth its advice to the states about how to regulate existing sources. But if the EPA followed a practice of disapproving state plans for failure to conform to the EPA’s advice, the agency would be vulnerable to having a court characterize its advice as a binding rule that it has no statutory authority to make.

There is no mention in *West Virginia* of the EPA’s delegation deficit under Section 111(d). Quite to the contrary, Chief Justice John G. Roberts, Jr., in setting forth the statutory and regulatory background of the case, completely endorsed the EPA’s view of its authority under section 111(d):

Although the States set the actual rules governing existing power plants, EPA itself still retains the primary regulatory role in Section 111(d). The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved. It does so by again determining, as when setting the new source rules, “the best system of emission reduction . . . that has been adequately demonstrated for [existing covered] facilities.” The States then submit plans containing the emissions restrictions that they intend to adopt and enforce in order not to exceed the permissible level of pollution established by EPA.

(Citations of regulations omitted.)

This passage will be quoted with glee by the EPA in any future controversy over its authority to issue binding nationwide regulations on existing sources of pollution. This is highly ironic. In its eagerness to adopt the “major questions” doctrine designed to limit the type of regulation that agencies can adopt without clear congressional approval, the Court ratifies a conception of the EPA’s authority over existing sources that is not supported by a careful reading of the statute.

All of which suggests the desirability, to which I will return in the last entry (after the forthcoming third and fourth posts), of a court’s carefully considering the actual authority delegated to agencies, as opposed to ruminating about “major questions.”

### 3. WEST VIRGINIA V. EPA: WHAT WOULD HAVE BEEN THE RESULT UNDER THE CHEVRON DOCTRINE?

The Court did not engage with the deference doctrine directly (as opposed to simply creating an exception to it). How, in fact, would the case have been decided under *Chevron*?

The Supreme Court's June 2022 decision in *West Virginia v. EPA* will be remembered for its endorsement of the "major questions doctrine." The new doctrine, as would have been obvious to all participating justices, is designed to function as an exception to the *Chevron* doctrine, so named for *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984).

By contrast, this would not be apparent to the casual reader, since *Chevron* was never mentioned by Chief Justice John G. Roberts, Jr., in his opinion for the Court, or in the enthusiastic concurrence by Justice Neil M. Gorsuch. Justice Elena Kagan mentioned it in passing in dissent, but not to suggest that the Court should have reviewed the matter under *Chevron*.

Silence about *Chevron* is the order of the day in the Supreme Court. The Court last applied the doctrine in 2016, and it appears that the Court cannot decide what to do about it, although it still gets invoked with some frequency in the lower courts.

In order to assess the significance of the major questions exception, it will be useful to consider how the case would have been decided under the *Chevron* doctrine, as it came to be understood by the Court in the run up to *West Virginia*. After all, one cannot fairly judge an exception without understanding the doctrine from which the exception is carved out. This is my purpose in this third blog post in this five-post guest series.

As detailed in my recent book, *The Chevron Doctrine: Its Rise and Fall*,

and *the Future of the Administrative State* (Harvard University Press 2022), the *Chevron* doctrine has undergone significant revision over its almost 40-year life span. In its classical formulation, the doctrine was understood to require courts to accept reasonable agency interpretations of ambiguities in the statutes the agency administers. The Court narrowed the doctrine in *United States v. Mead Corporation* (2001): the agency must act with the "force of law" in order to be eligible for *Chevron* deference, as opposed to some lesser degree of deference.

But then the Court, in *City of Arlington v. FCC* (2013), adopted a restrictive interpretation of *Mead* that effectively expanded the *Chevron* doctrine. The Court held in *Arlington* that it is not necessary to identify a delegation of power to act with the force of law with respect to the specific statutory provision in question; it is enough that Congress has in general terms authorized the agency to act with the force of law. In fact, *Arlington* went even further, holding that *Chevron* applies to an agency's interpretation of the scope of its authority, as opposed to merely interpretations of statutory terms that clearly fall within the agency's delegated powers. Chief Justice Roberts dissented from both propositions, which may help explain his adoption of the major questions doctrine in *West Virginia*.

If we take *City of Arlington* as the Court's last (i.e., most recent) word on the *Chevron* doctrine, it seems that a reviewing court should accept either the Obama administration's Clean Power Plan or the Trump administration's Affordable Clean Energy rule as a permissible interpretation of Section 111(d) of the Clean Air Act.

Let's start with the Obama administration's CPP. Under *Arlington*, it would not matter that Congress delegated authority to the EPA to act with the force of law with respect to new stationary sources of air pollution

but not with respect to existing stationary sources (see the second post in this series). All that would be required to trigger *Chevron* deference is that Congress delegated authority to the EPA to act with the force of law somewhere in the Clean Air Act, as of course it did with respect to new sources. And the fact that the CPP expanded the EPA authority over existing power plants in an unprecedented fashion would not matter, so long as one could point to ambiguities in the statute that could be interpreted to support this.

As the tortured D.C. Circuit decision that became *West Virginia* reveals, it is possible to interpret the statutory definition of standard of performance—the "best system of emission reduction"—to authorize a standard based on requiring individual plants to participate in a cap-and-trade system. After all, a cap-and-trade approach is a "system," and none of the other factors that the states are directed to consider with respect to existing plants (such as "cost" and the remaining "useful life" of a plant) explicitly precludes such an approach.

But as the old saw goes, what is sauce for the goose is sauce for the gander. The Trump administration's Affordable Clean Energy rule, or ACE, should also pass muster under the *Chevron* doctrine, as interpreted in *Arlington*.

Again, *Arlington* requires that the reviewing court wave away any objections based on the EPA's lack of rulemaking authority over existing sources, or objections based on the implications of that interpretation for the scope of agency authority. So the question would boil down to whether the Trump administration's interpretation of "best system of emission reduction" was itself permissible.

The Trump EPA explained that emission standards under Section 111 had always been based on available

technology that could be adopted at the site of each individual source—inside the “fence line” of the plant was the expression adopted. Invoking the idea that historical practice often contains embedded wisdom, the Trump EPA concluded that the statute should be interpreted as requiring a standard set in the tried-and-true fashion. This, too, seems like an interpretation within the bounds of reason, and it, too, should be upheld under *Chevron*.

The fact that the *Chevron* doctrine, as it stood after 2013, would support either the Obama or the Trump approaches to regulating carbon emissions from existing fossil-fueled power plants highlights an important weakness in the doctrine. In an era when Congress frequently fails to legislate on important policy questions, *Chevron* can generate significant regulatory instability as policy shifts from one presidential administration to another.

Thus, we have witnessed climate change policy oscillating between skepticism (Bush 43) to enthusiasm (Obama) back to skepticism (Trump) and once more to enthusiasm (Biden). This makes it difficult to gain traction on the issue and for the relevant actors to engage in long-range planning, which is absolutely vital in the electric power industry.

Similar shifts have occurred with respect to so-called “net neutrality” requirements for internet service providers, federal authority over the filling of wetlands, and the provision of information about abortion providers by family-planning clinics. In each case, regular shifts in policy as the Executive changes hands have been abetted by the *Chevron* doctrine.

The fact that the *Chevron* doctrine, as interpreted by *Arlington*, would allow the EPA to launch a transformation of the electric power industry without any authorization from Congress points to a more serious concern. As my new book argues, *Chevron* has played a role in facilitating a major shift in power from

Congress to the administrative state. Since the Constitution contemplates that Congress will enact laws laying down federal policy and the Executive will assure that the laws are faithfully executed, this represents a troubling distortion of the plan of government reflected in the founding document.

Whether the major questions doctrine represents a workable corrective to this trend is the subject of my fourth and next blog post.

#### 4. WEST VIRGINIA V. EPA: QUESTIONS ABOUT “MAJOR QUESTIONS”

**The major questions doctrine inverts the *Chevron* doctrine, is indeterminate, and, as a practical matter, will encourage courts to engage in something more akin to political punditry than law.**

*West Virginia v. EPA* is clearly designed to impose new limits on federal agencies insofar as they seek to rewrite the scope of their authority. The Supreme Court’s attention to the scope of agency authority is welcome. As noted in the immediately prior post (the third in this five-post guest series), the Court held in *City of Arlington v. FCC* (2013) that federal courts must give *Chevron* deference to an agency’s interpretation of the scope of its authority. This would effectively give agencies the power to determine the dimensions of their regulatory mandate unless it is clear that Congress has not conferred authority on the agency to act.

*West Virginia* turns this *Chevron* doctrine principle on its head: At least with respect to “major questions,” an agency will be presumed to have no authority to act unless the court finds that Congress “clearly” has conferred authority on the agency to decide the matter in question.

*West Virginia* thus establishes a “two-step” standard of review very different from the “two-step” standard commonly associated with *Chevron*. As formulated in *West Virginia*, a court is supposed to

ask, first, whether the agency is seeking to regulate in a manner that presents a “major question” of “economic and political significance.” If the answer is “Yes,” the court asks, second, whether there is a “clear statement” by Congress conferring such authority. In the absence of a clear statement, the agency will be held to have exceeded the scope of its authority. (*West Virginia* does not say what happens if the answer to the first question is that the question is “minor.”)

Before considering the workability of the major questions doctrine, it is worth asking whether, as Justice Neil M. Gorsuch suggested in his concurring opinion, *West Virginia* is a way station on the road to the revival of the nondelegation doctrine, i.e., the idea that under the Constitution only Congress has the power to legislate. It helps here to distinguish between two nondelegation doctrines.

One such doctrine says that Congress may not delegate too much discretion to nonlegislative actors such as agencies because this would constitute a delegation of legislative power. This is the source of the requirement (which has proved to be very difficult to enforce) that Congress must include in any delegation an “intelligible principle” for an agency or other delegate to follow.

The major questions doctrine does not enforce the nondelegation principle in this sense. It is essentially contradictory to say that Congress cannot delegate too much discretion to an agency unless Congress does so clearly.

The other nondelegation doctrine says that only Congress has authority to delegate power to act with the force of law to agencies or other nonlegislative actors. In other words, an agency—or for that matter the president—has no inherent authority to regulate unless this power has been conferred by Congress. This principle has proved to be much easier to enforce—indeed, it



is enforced every time a court strikes down an agency action for violating a clear limitation found in the statute under which the agency operates.

*West Virginia's* major questions doctrine is designed to reinforce this second version of nondelegation. It is imperative to enforce this version of nondelegation in *some* way if the separation of powers and the principle of legislative supremacy are to continue to have any meaning. And there is nothing contradictory about saying that an agency has no authority to act unless the power to do so has been clearly delegated by Congress.

The more telling objection to the major questions doctrine, as the doctrine is articulated in *West Virginia*, is that it either will prove unworkable or—worse—will invite judges to overturn agency initiatives based on reasons other than the court's best judgment about what Congress has actually authorized the agency to do.

The major questions doctrine did not come out of nowhere. But in the Court's previous decisions that made some reference to "major questions," the idea was advanced in the context of a careful exercise in statutory interpretation. The Court took a close look at the agency's statute and concluded that the agency was either exceeding, or declining to exercise, authority conferred by Congress. Then, as a kind of afterthought or rhetorical flourish, the Court would observe that it was unlikely that Congress ever imagined the agency's taking the step it was proposing to take—given the "economic and political significance" of the agency action.

But in *West Virginia*, the inquiry into whether the question is "major" comes first, and the examination of the statute is limited to searching for a "clear statement" authorizing such action. The ultimate reason for this, as I suggested in the first blog post, is that the Obama administration's Clean Power Plan was not before the Court, and there

was no Biden plan yet in existence. Consequently, the Court was forced to opine in the abstract about whether "generation shifting" or a standard based on a cap-and-trade system was a "major question."

This is essentially to ask the federal courts to engage in a kind of political punditry. In determining whether something is a "major question," the factors mentioned by the Chief Justice, and by Justice Gorsuch in his concurring opinion, include such things as whether the matter is politically controversial, whether large numbers of dollars are involved, whether large numbers of people are affected, whether Congress has sought and failed to legislate on the matter, whether the question takes away authority from state governments, and whether the agency action is unprecedented or departs from settled agency practice.

There are several problems with this approach. One is the extreme indeterminacy of the inquiry—something that is endemic to any inquiry that posits a large number of variables of no specified weight. The net effect is a kind of all-things-considered test that confers enormous discretion on a court to decide whether the agency does or does not have authority over the relevant issue.

A related problem is what is meant by a "clear statement" from Congress conferring the required authority. Does this mean that authority must be conferred in the text of the statute? Or can it be "clear" based on the context? And just how "clear" is clear?

Another problem is how lower courts will respond to the major questions doctrine. Some lower court judges will undoubtedly regard the new doctrine as an invitation to overturn agency rules they do not like, by declaring the question "major." Other judges will just as surely disagree. The new doctrine thus raises the prospect of all sorts of confusion and conflicts in the circuits breaking out, which the Supreme Court

does not have the decisional capacity to sort out.

Finally, the major questions doctrine ignores the most important insight of the *Chevron* doctrine. Justice John Paul Stevens pointed out in *Chevron* that when statutory interpretation ultimately turns on a policy dispute, agencies have two big advantages over courts: agencies are accountable to elected officials and thus indirectly to the people, and they have more experience with the statute in question and the problems it is designed to solve.

In theory, the major questions doctrine means that really important policy questions should be decided by Congress, which, of course, is as it should be.

But what we face all too often today is a question of the second best. Yes, Congress is the *best* choice for resolving controversial policy questions. But if Congress does not want to face the music, what is the second-best choice: an agency or a court? The major questions doctrine portends a world in which the most consequential questions—the most controversial and those implicating the most significant conflicting interests—will be made by unelected courts having no expertise. This is, let us say, a questionable allocation of authority over regulatory policy.

My fifth and final post will discuss the best way to preserve the separation-of-powers principle of legislative supremacy, while preserving the understanding that courts are charged with interpreting the law rather than meddling in policy. It is to require courts to determine in each case, as a matter of independent judgment, whether Congress has *actually delegated* authority to the agency to decide a particular question.

To be sure, careful interpretation of the statute requires more work by judges. No presumptions, no clear-statement shortcuts. But a central reason why we have federal courts,

and give their judges life tenure, is to answer such difficult questions.

## 5. WEST VIRGINIA V. EPA: GETTING TO ACTUAL DELEGATION

**The Court should assimilate the “major questions” doctrine of *West Virginia v. EPA* and earlier precedents—including *Chevron* and what came even before that—to an approach that asks whether Congress has made an actual delegation. Only this will serve the relevant separation-of-powers principle.**

Both the *Chevron* doctrine and *West Virginia v. EPA* are based on ideas about the delegation of interpretive authority from Congress to administrative agencies. *Chevron* introduced the idea of “implicit” delegations, and the doctrine spawned by it eventually held that any ambiguity in an agency statute is an implicit delegation. *West Virginia* is effectively an unacknowledged carve out. Without the majority’s mentioning *Chevron*, the case posits that when a “major question” is involved, a delegation must take the form of a clear statement; presumably, only express delegations or something close to this will count.

Both positions are extreme. The idea that any ambiguity is a delegation transfers too much power to the administrative state. The view that only express delegations will do for major questions concentrates too much power in reviewing courts.

The better position, as I have suggested in *The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State* (Harvard University Press 2022), is that courts should condition any strong form of deference to agency interpretations on a finding that Congress has *actually delegated* authority to the agency to resolve the issue. This means more than finding ambiguity; courts must carefully interpret the statute and conclude that Congress left a gap for the agency to fill.

But it does not mean the delegation must be express; the delegation can be implicit but actual. For example, when Congress delegated authority to the EPA to promulgate emissions standards for new stationary sources (by the agency’s determining the “best system of emissions reduction”), this was an implicit but actual delegation to the agency to interpret the meaning of “best system” for that purpose (Section 111(b)(1)(B) of the Clean Air Act).

There are multiple reinforcing reasons for requiring courts to find an actual delegation before deferring in a strong sense to an agency’s interpretations. This was the universal assumption before *Chevron*. See, e.g., *Social Security Bd. v. Nierotko* (1946) (“An agency may not finally decide the limits of its statutory power. That is a judicial function.”). It is required by the Administrative Procedure Act. See 5 U.S.C. § 706(2)(C) (authorizing courts to set aside agency action “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”). It is, as I argue in chapter 3 of *The Chevron Doctrine*, most likely what Justice John Paul Stevens had in mind in *Chevron* when he concluded that Congress had left a gap in the Clean Air Act about the meaning of “stationary source” and implicitly delegated authority to the EPA to fill that gap.

Importantly, independent judicial judgment about the existence of an actual delegation is critical to preserving the separation-of-powers principle, reaffirmed in *West Virginia*, that (in the words of that decision) “[a]gencies have only those powers given to them by Congress.”

Tasking courts with determining, as a matter of independent judgment, that there has been an actual delegation to the agency requires courts to do something as to which they have a comparative advantage: statutory interpretation. There is no simple test for identifying the limits of agency authority, no escape from a court’s

examining all relevant aspects of the statutory language, structure, purpose, and the evolution of the statute over time.

Sweeping presumptions, such as *any ambiguity = delegation* or *any major question = no delegation*, will only disserve the underlying separation-of-powers principle, which is that Congress has exclusive authority to decide the scope of agency authority.

This does not mean that courts must proceed in a purely ad hoc or unguided fashion. As I discuss in the new book (chapter 11), it is possible to identify a number of rule-like principles here. Express delegations, when they exist, should be enforced according to their terms. Issues as to which some other entity exercises decisional authority should not qualify as a delegation to the agency. Agencies have no delegated authority to override incontrovertible statutory limits, as when the EPA sought to interpret “250 tons” of air pollutant to mean “100,000 tons.” See *Utility Air Regulatory Group v. EPA* (U.S. 2014).

There are also situations that should qualify as “red flags,” requiring courts to engage in a more searching examination of the scope of agency authority. One is when an agency adopts an interpretation that deviates from the settled understanding of the scope of its authority, as when the FDA decided that it had authority to regulate tobacco products after consistently disclaiming such power. *FDA v. Brown & Williamson Tobacco Corp.* (U.S. 2000). Another is when an agency adopts an interpretation that sharply expands or contracts the scope of its authority, as when the FCC decided that its authority to “modify” tariff-filing requirements permitted it to deregulate much of the long-distance telephone industry. *MCI v. AT&T* (U.S. 1994).

These sorts of red flags should not be regarded as rule-like constraints on agency authority, but they should alert courts to the need to engage in closer scrutiny of the statute in





“... it would be desirable if the Court, in some future encounter with a question about the scope of agency authority, did not proceed as if *West Virginia* established a hard-edged clear statement rule ...”

order to determine if the agency is either overstepping the bounds of its delegated authority or abdicating a type of function it is expected to perform.

The appropriate use of these red flags brings us back to *West Virginia* and the major questions doctrine. Decisions such as *Brown & Williamson*, *MCI v. AT&T*, and *Utility Air* were precedents heavily relied upon by Chief Justice John G. Roberts, Jr., in support of recognizing a major questions doctrine. The crucial difference, however, is that in these previous decisions, observations about the “economic and political significance” of the agency interpretation, or its potential for “radical or fundamental change,” or its “unprecedented” nature were offered in the course of the Court’s exercise of traditional statutory interpretation to determine the scope of the agency’s authority.

The provenance of the major

questions idea gives rise to hope that *West Virginia* can be assimilated to the complex of norms about statutory interpretation—which is to say, to the world of conventional interpretation, as displayed in the precedents upon which *West Virginia* draws.

To be more specific, it would be desirable if the Court, in some future encounter with a question about the scope of agency authority, did not proceed as if *West Virginia* established a hard-edged clear statement rule, requiring first an abstract determination (based on multiple factors of uncertain weight) whether the question is “major” and, if so, then demanding a clear statement from Congress authorizing the agency to address the issue.

It would be better to treat *West Virginia* as requiring, in every case, that the agency possesses actual delegated authority over a question before the court will defer to its interpretation. And the circumstances

that led the Supreme Court to deem the question in *West Virginia* “major” should be cited as ones that *alert* the reviewing court to the need for a particularly careful examination of the agency’s claim of authority.

We live in a perilous world in which the rule of law is vulnerable to being crushed in a universal game of political “hardball.” The *Chevron* doctrine was a notable attempt to distinguish the realm of “law” from that of “policy,” and to define the role of the courts as being the enforcers of law, with agencies given primacy in the realm of policy.

Over time, as I set forth at length in my book, the *Chevron* doctrine proved to have a number of shortcomings. But the Court, in its efforts to define something better, needs to tread cautiously, lest it make the ideal of the rule of law, and the courts’ role in enforcing it, more difficult to attain than ever before. ■



# INSIGHT FROM A PRO BONO PRO

**The Pro Bono Institute's Eve Runyon tells Marquette law students they can and should make helping others a career goal.**

**E**ve Runyon has been president and CEO of the Pro Bono Institute (PBI) since 2016. She received a bachelor's degree from the University of Virginia and a law degree from Yale University. The institute is a Washington, D.C.-based nonprofit that supports pro bono efforts of major law firms and in-house legal departments. Runyon spoke with Mike Gousha, senior advisor in law and public policy at Marquette Law School, for the Posner Pro Bono Exchange in the Lubar Center of Eckstein Hall on April 22, 2022. The annual event honors the contributions of the Gene and Ruth Posner Foundation in support of Marquette Law School's public service work and introduces the Pro Bono Society Induction Ceremony, where this past year 139 Marquette law students were recognized for their work. This is an excerpted and lightly edited transcript of the Posner Exchange between Gousha and Runyon.



Eve Runyon in Marquette Law School's Lubar Center.

**Gousha:** When did you know you wanted to be a lawyer?

**Runyon:** My parents met and—a normal love story—fell in love. They decided they wanted to get married and have a family. But there was a hiccup, and the hiccup was that my father is white and my mother is Black.

At the time that they met, it was illegal for interracial couples to marry. The *Loving* case [*Loving v. Virginia* (U.S. 1967)], which I'm sure you all studied in law school, was decided two months prior to their marriage. So there was a very real understanding for me growing up that the law was something that was extremely powerful and extremely important. It probably wasn't until

college that I decided I, too, wanted to be a lawyer, but there were lots of things that were relevant to me and that influenced me in coming to that decision.

**Gousha:** When you were in law school, how actively involved were you in the idea of pro bono, the idea of volunteerism?

**Runyon:** One of the reasons I chose my law school was that you were able to participate in a clinic in your first year. And I thought that that was amazing, that I would be able to practice and provide legal services at such a young stage in my development. At the time, I wasn't doing pro bono work, but I was working very diligently in the clinic,

and that was probably the most fantastic experience that I had in law school.

**Gousha: What did you learn?**

**Runyon:** The importance of service, the impact that you can have in individual lives, the impact that your experience can have on how you think about things more broadly. My clinic was a disabilities rights clinic, and we worked primarily with children who had special ed needs. We were working to solidify IEPs [individualized educational plans] and make sure that the children had appropriate accommodations in school. But we also looked at the bigger picture, and we did some policy work.

**Gousha: Your first job was with Skadden, Arps, Slate, Meagher & Flom, representing major electric, gas, and pipeline companies. It may not seem on the surface that this provided a direct connection to the next part of your life.**

**Runyon:** I was an energy lawyer. I did a lot of work involving FERC, the Federal Energy Regulatory Commission. I worked on a deal to build liquefied natural gas facilities. I worked on rate cases. That had nothing to do with pro bono, but I was at a firm that fundamentally believed in pro bono. And so, while I had a billable practice that was focused on all things energy, I also had a very active pro bono practice. It was one of the reasons why I selected the firm, and it was one of the reasons why my experience at the firm was so positive.

**Gousha: You did different things in pro bono while you were at the firm. Describe for us what those were.**

**Runyon:** I purposely chose different types of pro bono experiences because I wanted to make sure that I was challenged and wanted to make sure that I was learning. We talk about the value of pro bono as an opportunity for professional development, and I really wanted to make use of that and to experiment with my legal practice.

My first case was a death penalty case, and I was able to work on that full-time. My firm said, “Put your billable work aside for a couple of months and work on this death penalty case,” and I did that. I did a lot of family law and landlord/tenant cases—so, your traditional poverty bread-and-butter legal aid cases.

In the District of Columbia at the time that I was at Skadden, they were trying to figure out how they could more effectively provide services to tenants in landlord/tenant court, and so they were creating a self-help center. I worked with the Access to Justice Commission in D.C., which was building out the self-help center. I was doing all the first drafts of the template motions that people would be able to use.

I also spent time working on an employment discrimination case that was assigned to my firm by the district court.

So, lots of really very different, exciting things that were challenging, meaningful, and satisfied my desire to learn, and satisfied my desire to give back.

**Gousha: The death penalty case—what was it like working on that?**

**Runyon:** That was hard. To this day, I’m not sure how to talk about that case because we were not successful; our client

was executed. It was a difficult experience, but it was one that I am extremely grateful for having worked on. I actually worked on the case when I was a summer associate at Skadden and then, when I returned to the firm, I was assigned to it as a first-year associate, and I worked very closely with the partner, who had had a number of death penalty cases and had been successful in the past. I came on right at the end stages of the representation, and what I did on the project was unbelievable. I was writing first drafts of motions and briefs that were filed before the U.S. Supreme Court and before the Virginia Supreme Court. I was the investigator on the case, and so we were gathering affidavits from people who were involved in the case years before. I was traveling around Virginia, getting people to sign affidavits, which was really sort of exciting and different for a first-year associate at a big law firm. We filed for a new trial in the state court in Virginia. It was a really fantastic experience, but it was a difficult experience as a young lawyer and as a pro bono lawyer.

**Gousha: Did the outcome of the case change the way you felt about the law?**

**Runyon:** No. I think it made me understand how important pro bono is. There were things that the client wanted us to do as his lawyers that were important for him. He understood what potentially was going to happen and what did happen, and he had a lot of regret. There were things that we were able to do to give him sort of agency, to give him peace. Even though the end result was that he was executed, we were able to sort of go with



him on that journey in a way that brought him some comfort, and that was extremely meaningful.

## Meeting markers on the path to becoming “a good lawyer”

**Gousha:** You had a wealth of experiences at Skadden. When did you know that something else was in store for you as your career unfolded?

**Runyon:** I knew even before going to Skadden that ultimately I would end up in public interest. I didn’t know whether I was going to go to a nonprofit organization or whether I’d work for government, the State Department or DOJ . . . , but I knew that I wanted to end up doing public interest work. I chose the firm because I wanted the experience, I wanted the training ground, I wanted to be a good lawyer and go to a place that was going to teach me how to be a good lawyer. And I thought, “I’ll be here for three or four years and then I’ll move on and go do what it is that I’ve always dreamed of doing.” It ended up being seven years, and that was fine.

**Gousha:** It happens.

**Runyon:** Oh, it happens. One of the things that was great about my firm—and a number of firms have similar programs—is that in my fourth year, they loaned me to the local Legal Aid, and for seven months, I was a staff attorney at Legal Aid. And I loved it. When I returned to the firm after my fourth year, I realized, “Okay, I really should start thinking about what I want to do next.” And I was very practical about it. . . .

There were things that I had decided you need in order to be a good lawyer, and there were experiences that I thought were important to have. I need to have taken a deposition, and I need to have negotiated a settlement, and I need to have argued a motion, and I need to have gone to a hearing. I had this checklist, and, in my seventh year, I had checked everything off. I felt like I had accomplished everything I needed to accomplish, and now I was a good lawyer and I could go off and be a good public interest lawyer.

**Gousha:** So how did you end up at the Pro Bono Institute?

**Runyon:** That was actually just luck. I knew it was time for me to look elsewhere, and I just started looking around and asking friends, “What do you do?” and “What’s your practice like?” . . . I just happened to see an ad for this position as a pro bono consultant, and I thought, “Well, that sounds amazing.” . . .

One of the things that I really enjoyed was not only were we providing services to individuals, but we were then taking that knowledge to seek policy change, recognizing that, as lawyers, we can bring about large-scale change. By being a pro bono consultant, not only was I focused on individual services, but I was focused on resources that would bring thousands of people to pro bono. I was exponentially increasing the power of pro bono, and that just sounded like an amazing opportunity.

## Trying to close a chasm: The work of the Pro Bono Institute

**Gousha:** Help people better understand the mission of the Pro Bono Institute.

**Runyon:** Our mission is to improve access to justice through pro bono legal services. I’m sure that as pro bono champions, as you all are, you’re very well aware that 86 percent of the civil legal needs of low-income individuals don’t get met. So there is a huge gap—there is a chasm—in access to justice. The Pro Bono Institute’s mission is to help address this through pro bono legal services and, in particular, by working with major law firms and with the legal departments of companies in the United States and around the globe. That is what we were created to do.

When we were formed more than 25 years ago, pro bono practice at major law firms in particular was very individualized. People would follow their passions. They would go and take on landlord/tenant cases or immigration cases. But it wasn’t organized, and firms weren’t dedicating resources toward pro bono work. There wasn’t internal infrastructure within the firm that would allow volunteers to easily sign up and find opportunities.

And so that’s really what PBI was focused on doing—to help firms create infrastructure and use their resources in a way that would bring efficiency to how legal services are being developed or delivered on a volunteer basis. We then expanded our mission to include legal departments of companies.

**Gousha:** You feel like you're making good progress on all of those fronts?

**Runyon:** Yes. When we started, there were, I'd say, maybe five or so major law firms in the United States that had a full-time pro bono counsel. This is someone at the firm whose responsibility is to organize pro bono for the firm. And now there are hundreds. And it's a reflection of how institutionalized pro bono has become at law firms across the U.S. and how much it is a part of the value that law firms have.

On the company side, a very similar story: When we first started Corporate Pro Bono, which is the project that I directed, focused on companies, pro bono was very individualized. The notion that a lawyer at a company—a lawyer at Microsoft or Harley Davidson or Clorox—is doing pro bono seemed outrageous. To the extent that it was happening, it was someone who was really passionate about it and was working at their local or area legal aid organization.

We started working with companies the same way we had been working with law firms, to help them create infrastructure so that more lawyers can get involved and make the delivery of services more efficient. Now we've worked with thousands of companies.

The Pro Bono Institute has "challenge programs": we have one for law firms and one for companies. Law firms that have signed up for the challenge are committing either 3 percent or 5 percent of their total billable hours to pro bono, and they are giving their lawyers credit for their pro bono work, just like they're giving them credit

for their billable work. We have over 130 of the largest law firms that have signed up for that challenge. On the company side, since lawyers at companies don't track hours, that's not a useful metric. We use participation as our metric. Companies that are signing up for our challenge are committing that more than half of their legal staff will engage in pro bono. We've had over 190 of the largest companies sign up for that challenge.

**Gousha:** As the leader of the institute, where do you see the most pressing needs in the access-to-justice discussion, and have those changed since you've assumed that role?

**Runyon:** To some extent, it's changed. Unfortunately, there isn't one need that we can point to and say collectively as a community, "We should focus on *this*, and this is going to solve the access-to-justice gap." Right now, what we're seeing are the challenges of crises. There are the things that we are reading about every day in the news that are heartbreaking and where we, as lawyers, can have a role in bringing about change and helping individuals in need.

You have the refugee crisis, whether you're talking about in Ukraine or in Afghanistan. You have the immigration crisis, whether you're talking about at the border, or dreamers or DACA. You have the crisis that's related to the pandemic, which has exacerbated legal needs that already existed and created new needs. This includes food insecurity and large numbers of nonprofit organizations and small businesses that were struggling to stay open. You have the crisis

related to the awakening around racial justice after the murder of George Floyd, and you have natural disasters. We now have at least three times the number of natural disasters each year that we had 10 years ago—whether it's fires or floods or tornadoes or hurricanes, all of this is happening time and time and time again.

And so, you have all those things that require our attention, where we as lawyers can play a significant role. And then you have the crisis related to poverty, and the crisis related to access to justice, and those things have been persistent and, unfortunately, they haven't changed. Whether you're talking about housing and eviction and the lack of affordable housing or you're talking about domestic violence or the need for benefits—these are things that have always existed, unfortunately.

**Gousha:** The federal government has helped fund some of these efforts, but the funding, for a period of time, was certainly not what you and others would have hoped for. Are these kinds of efforts being adequately funded by the nation's government?

**Runyon:** They're not. The Legal Services Corporation was receiving in the 1980s \$300-plus million a year from Congress. As we know, the Legal Services Corporation is the largest federal funder of legal aid organizations across the United States. Right now, the level of funding is at \$600 million, and that reflects an increase in funding received last year. The Legal Services Corporation was able to

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demonstrate that, because of the pandemic, the need for civil legal aid was increased exponentially. But it is still not enough to address the need.

## Teaming up to pursue more impact

**Gousha:** I thought it might be good for the students and their families in the room and the folks who care about them to hear about an individual project. So you did something called the Collaborative Justice Project in Minnesota. Tell us about that effort.

**Runyon:** Sure. So the work that we do at PBI can be lumped into three buckets. There are the individual services that we're providing to law firms and to companies. A law firm will contact us and say, "We want to be more efficient in how we're delivering pro bono services; we want to host a strategic planning session for our managing partner and our executive team, so that we can better impact the communities in which we have offices." PBI works directly with firms and with companies to provide individual services.

Then there's work to enhance the industry as a whole, where we have initiatives like our challenge program and trainings and conferences that we host, designed to elevate best practices so that we collectively can be more effective and efficient in how we deliver pro bono services.

The last thing that we do—this speaks to the collaborative justice project—is to support efforts to be creative and innovative in how we think about access to justice and how we bring about change,

how we can be more effective, how we can address persistent problems, how we can bring about policy change.

The Collaborative Justice Project is something that we launched in Minnesota. It's based on something that we were seeing happen in the philanthropic community called "collective impact." It's this idea that if you really want to address a persistent problem and make a difference, then you need to bring together representatives from different sectors of the community and come up with one plan. Instead of having people work in isolation and work on different efforts, collectively you develop one plan and focus your resources toward that plan.

That's exactly what we did in Minnesota. It's a collective impact project that is focused on reentry (from incarceration) and on trying to reduce recidivism. The folks in Minnesota selected the focus of the project. The law firms, companies, and other stakeholders felt that reentry was an important topic and that they could produce meaningful change in the community by focusing on reentry.

The project involves more than just lawyers because, as wonderful as we are, we cannot solve things by ourselves. So you have lawyers from law firms and companies, but you also have the Minnesota Department of Corrections, the Bureau of Prisons, Minnesota's U.S. Probation and Pretrial Services, Minnesota's federal reentry court, nonprofit organizations that are on the ground day-in, day-out, that are providing services to individuals who are returning to the community from state and federal facilities, and more.

So you have this collection of people who are working together. Some of the services that we provide are focused on people while they're incarcerated, recognizing that reentry starts well before a person is released. This programming focuses on developing prosocial behavior and other resources that people need while they're incarcerated. We have another effort focused on what happens after you're released. We spend a lot of time trying to identify keys to success—employment, housing, family reunification. We have an effort that's specifically focused on providing pro bono services addressing persistent civil legal needs that individuals are facing—not having a driver's license, not having identification, having outrageous child support debt, trying to reunify with kids. And then we have an effort that's focused on policy and advocacy.

There's a theme in what I've done throughout my career: recognizing that providing services to individuals is unbelievably meaningful. It's also unbelievably meaningful to take that knowledge, that understanding, and apply it to the system as a whole. So we're also working to change some of the policies in Minnesota, so that we're not just impacting individuals, but impacting all.

**Gousha:** Do you see measurables from that effort already? Are you making progress based on the activities you're undertaking in Minnesota?

**Runyon:** We are. Minnesota's federal reentry court—and there is a reentry court here in Wisconsin as well—serves

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Eve Runyon

individuals who are high risk. The recidivism rate for that community is around 76 percent. For those in the program, it has dropped to around 38 percent.

**Gousha: Big difference.**

**Runyon:** Yes. We can't take credit for all of that because we are not the only partner in Minnesota's reentry court, but we are part of the equation.

**Gousha: I'm wondering if you could do something in Wisconsin. Is that possible?**

**Runyon:** Absolutely. Actually, we were investigating bringing the project to Wisconsin right before the pandemic hit, and, of course, we had to pause because of that. There are a few things that made Wisconsin really attractive with regard to this project. One, there is a federal correctional facility, Oxford. Two, there is a federal reentry court here in Milwaukee. Three, there is a community that is committed to pro bono legal services. And those were the three ingredients that we had in Minnesota. We very much were interested in bringing the project here. Hopefully, we can return to those conversations once things turn a bit more back to normal.

## The pro bono pandemic boom

**Gousha: Speaking of the pandemic, I think what's really great about today is we're recognizing the efforts of so many students who did this work during a pandemic. How did the pandemic affect the work that your organization does?**

**Runyon:** I think, like everyone, it turned everything upside down. The day that everything shut down was the day before we were hosting a national conference. We had to shut that down and had to figure out how to move all of our programming to Zoom. More importantly, we had to think about how it impacted the law firms and companies that were providing pro bono services. They had to figure out how they could do that virtually, moving their clinics and moving their other programs to a virtual environment. There was a lot of change, a lot of anxiety, and a lot of long nights.

I think what we're seeing now is collectively the legal community trying to figure out what worked well and what didn't, and in what instances we can continue to provide services remotely and in what instances do we really need to be in person. You're seeing law firms and companies having these conversations. The courts are having these conversations, as are other really important key players, trying to think through what did we learn, how can we be more effective and efficient moving forward.

For example, many of the legal aid organizations realized that in domestic violence cases, where it's really important to have that personal connection with your client to understand what type of situation that individual may be in, virtual is not the best way to provide services because you're not able to assess how dangerous that situation may be. But in other instances—for example, landlord/tenant—it's actually great to do things virtually and not to have people travel down to the courthouse. You actually had

more people participating—and so you had fewer things that were happening by default—because the parties were actually showing up.

**Gousha: Did you see any change in the commitment of people to pro bono because of the pandemic?**

**Runyon:** We did. As I mentioned, we have the Law Firm Pro Bono Challenge initiative. The law firms that are signing up for it are committing 3 percent or 5 percent of their billable hours to pro bono. We have been surveying our law firms since we launched the challenge. We've been able to track law firm pro bono engagement from year to year. We had reached five million hours per year that were being devoted by our law firm challenge signatories, which is amazing. When we first launched the challenge, it was less than a million hours. We've seen more and more lawyers getting involved, giving back, and providing services. We saw a huge increase in the number of hours that people were devoting to pro bono that first year of the pandemic. It was really quite inspiring. And this was at a time when we had no clue what we were doing, didn't know if we could actually do clinics remotely, didn't know how we were going to contact our clients and let them know that we're still providing services.

The legal aid organizations were hugely impacted by the pandemic. Not only was there the challenge of trying to provide services to your clients, but there's a challenge in that you are fundamentally an under-resourced organization. You

"WE'VE SEEN MORE AND MORE LAWYERS GETTING INVOLVED, GIVING BACK, AND PROVIDING SERVICES. WE SAW A HUGE INCREASE IN THE NUMBER OF HOURS THAT PEOPLE WERE DEVOTING TO PRO BONO THAT FIRST YEAR OF THE PANDEMIC. IT WAS REALLY QUITE INSPIRING."

Eve Runyon

don't have laptops to give your staff when you're requiring them all to go home and do work. One of the things the Legal Services Corporation did was to make sure that they received increased funding specifically so that they could give legal aid organizations the money that they needed to address the technology gap that they had. All of these challenges existed that first year of the pandemic, yet the hours in pro bono went through the roof.

### "It is our duty to give back"

**Gousha:** I'll give you a moment or two to talk about your advice for law students as they continue on with their careers.

**Runyon:** So, two things. One, Ruth Bader Ginsburg was quoted at the start of the program, by Josh Gimbel, and she was an amazing justice. We had the pleasure at PBI of having her come and speak to our lawyers a number of times. She was very inspirational and shared her belief that we as a profession have an obligation to give back. Regardless of what you do as a lawyer, whether you're a corporate lawyer, whether you're a public interest lawyer, we have a unique skill, and it is our duty to give back to those who are underserved. The wonderful thing that I've seen in my job at PBI is that no matter what you're interested in, no matter what community you wish to serve, no matter what you think the barriers are to pro bono, there is an opportunity that is right for you, that will be meaningful to you, and that will be life-changing for the individual that you're serving. That's the first bit of advice that I'd give.

The other speaks to my career path. I started off at a big corporate law firm, doing really fascinating energy work, and ended up as a public interest lawyer. What you do in your first year of practice may not be what you're doing in your fifth year of practice or your tenth year of practice. And that's fantastic because this is a journey. I would encourage you to always seek to learn and to challenge yourselves and to look for new opportunities to grow, to be proactive about your career. No one's going to care more about your career than you are, so be proactive. Pro bono is a great way for you to grow as a lawyer. I would encourage you to look for those opportunities. ■



Don Manzullo



Susan A. Hansen



Annette K. Corrigan

**60 Franklyn M. Gimbel** received the Witness to History Award from the Milwaukee County Historical Society.

**70 Don Manzullo** has published a memoir, *Do Nice Guys Run for Congress? How an Obscure, Country Lawyer Kept His Faith, Beat the Establishment, and Survived Twenty Years in Congress* (WestBow Press 2022).

**74 William C. Gleisner, III**, received the President's Award from the State Bar of Wisconsin in recognition of his dedication to the work of the Wisconsin Judicial Council for the past 14 years and for his continued contributions to the state bar and the legal profession.

**77 John E. Kosobucki** received the Meritorious Civilian Service Award and medal from the Department of Defense, Office of the Inspector General, in ceremonies at the Mark Center, Alexandria, Va., in July 2022. Kosobucki serves as a senior official investigator conducting noncriminal investigations of senior Department of Defense officials.

**81 Susan A. Hansen** of Hansen & Hildebrand received the Lifetime Achievement Award from the Milwaukee Bar Association.

**85 Kathy L. Nusslock** received the Nathan A. Fishbach Founder's Award from the Eastern District of Wisconsin Bar Association.

**David C. Samacki** published *The Essence of Writing Persuasive Trial Briefs: Big Ideas for Mastering Mediation, Arbitration & Trial Briefs* (2022). The short, practical book is available in both e-book and paperback.

**Maxine A. White** published an article, "Final Thought—U.S. Supreme Court Justice Ketanji Brown Jackson Represents All Americans," in the June 2022 *Wisconsin Lawyer* magazine.

**86 Michael J. Cohen**, of Meissner Tierney Fisher & Nichols, received the Distinguished Service Award from the Milwaukee Bar Association.

**89 Annette K. Corrigan** has joined Lavelle Law, in Schaumburg, Ill. She is a trustee of the College of DuPage in Glen Ellyn, Ill.

**Sonja Trom Eayrs** joined Fox Rothschild in Minneapolis, Minn., as a partner in the family law department.

**92 Diane M. Donohoo** received a Racine County Sheriff's Office certificate of appreciation for her work on the cold-case homicide trial of Linda Laroche.

**95 Derek C. Mosley** received the Robert H. Friebert Social Justice Award from the Milwaukee Jewish Federation.





Derek C. Mosley



Frank C. DeGuire, Jr.



Thomas J. Watson



Christopher R. Smith



Raphael F. Ramos



Mercedes M. de la Rosa

**97 Frank C. DeGuire, Jr.**, has joined Quarles & Brady in Milwaukee as a partner. His practice focuses on business and corporate law and public finance.

**98 Kurt Dykstra** was named president and CEO of Independent Colleges of Indiana, based in Indianapolis.

**02 Thomas J. Watson** was named president and CEO of Wisconsin Lawyers Mutual Insurance Company in Madison, Wis. He has been with the company since 2005.

**03 Tara R. Devine**, managing partner of Salvi, Schostok & Pritchard's office in Lake County, Ill., is president of the Lake County Bar Association.

**04 Christopher R. Smith** joined von Briesen & Roper as a shareholder in the Milwaukee office. His practice focuses on real estate development, eminent domain, and property tax.

**06 Jeffrey R. Ruidl** was promoted to senior vice president at Hammes Partners, a real estate private equity firm, in Milwaukee.

**07 Malinda J. Eskra**, a Reinhart Boerner Van Deuren shareholder in Milwaukee, was elected to the board of governors for the Seventh Circuit Bar Association.

**Susan M. Roth** was named a court commissioner for the Milwaukee County Circuit Court.

**08 Raphael F. Ramos** was featured in the *Milwaukee Journal Sentinel* for his work at Legal Action of Wisconsin's Eviction Defense Project. A national report examining innovative volunteer eviction defense programs has identified the project as a model for the country.

**09 Stephen P. Boyett** has been promoted to equity partner at DuFour Conapinski Ha, in Irvine, Calif. His practice encompasses a range of corporate and real estate matters.

**Christina A. Katt** has joined Buelow Vetter Buikema Olson & Vliet, in Waukesha, Wis.

**John G. Long** is a partner and member of the sports, entertainment, and media practice group at Lewis Brisbois, in the firm's Houston, Texas, office.

**11 Peter B. Baran** is associate athletic director for compliance at the University of Wisconsin–Milwaukee.

**Laurie C. Frey** was named director, risk management, at Madison Square Garden Entertainment Corp.

**Sarah J. Knutson** was named partner at McCarty Law in Appleton, Wis. Her practice concentrates on corporate and business transactions, with a focus on mergers and acquisitions.

**12 Tim Bucher** was promoted to associate general counsel, corporate, at Kohl's, Inc.

**Emily A. Constantine** joined Husch Blackwell as senior counsel, focusing on government contracts counseling and litigation. Based in Milwaukee, she is a member of the firm's technology, manufacturing, and transportation industry groups.

**Sabrina R. Gilman** has been promoted to General Counsel, Europe, at Emerson.

**Sarah A. Padove** was named manager of baseball and softball development at Major League Baseball, in New York City.

**15 Derek J. Waterstreet** became a shareholder at von Briesen & Roper in Milwaukee.

**16 Anne E. Flinchum** joined Ruder Ware in the firm's Green Bay office. She handles a wide range of litigation matters for business and nonprofit clients.

**Ryan P. Heiden** and **Trace P. Hummel** became shareholders at von Briesen & Roper in Milwaukee.

**18 Ioua Alen Marcyn B. Lagazo** was promoted to senior counsel at CNH Industrial in the Chicago area.

**Rachel L. Scott** is a tax attorney at ArentFox Schiff in Chicago.

**Brandon J. Talbert** is director of compliance services at the University of Nevada, Reno.

**19 Jake T. Armellani** was named contract manager of Prime Video Sports, Amazon, in Seattle, Wash.

**20 Gerard A. Donnel** has been named associate director of compliance for University of Tennessee Athletics, in Knoxville, Tenn.

**Mercedes M. de la Rosa** is an attorney at MWH Law Group in Milwaukee.

**21 Zach J. Lowe** is assistant athletic director, compliance, at Central Michigan University, in Mount Pleasant, Mich.

**Ashley T. Madsen** joined Godfrey & Kahn, Milwaukee, as an associate.

**Breanna M. Moe** is trademark staff attorney at LZ Legal Services, South Carolina.

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

# HELP! I NEED SOMEBODY.

**If The Beatles had enrolled in law school, there is a good chance that that's what they would have sung at some point during their first year. Finding your way in law school can be a challenge.**

## **HELP! NOT JUST ANYBODY.**

At Marquette Law School, the students, faculty, and administration strive to respond to the call. Upper-level students serve as peer mentors through a wide array of student organizations and key initiatives such as the Academic Success and Marquette Law Mentorship programs. Assistant Dean of Students Anna Fodor and staff throughout the Law School meet regularly with students, one-on-one, to offer guidance and support. The faculty is committed to being accessible beyond the classroom and to building personal relationships with our students. And Eckstein Hall, the Law School's beautiful home, is a place where you can feel comfortable and welcome, even on those hard days' nights.

While thrilling and inspiring, the start of your legal education can also be daunting. At Marquette Law School, our students do not go it alone. *Cura personalis* might not be part of any band's lyrics, but it sings to us.

