

a criminal defendant is competent to stand trial and then simply rubber-stamping the clinician's opinion. Neither strategy is successful because each avoids facing the hard questions and impedes legal evolution and progress. Professor Feldman concludes, and I agree, that the law does not err by using science too little, as is commonly claimed. Rather, it errs by using it too much, because the law is insecure about its resources and capacities to do justice.

A fascinating question is why so many enthusiasts seem to have extravagant expectations about the contribution of neuroscience to law, especially criminal law. Here is my speculation about the source. Many people intensely dislike the concept and practice of retributive justice, thinking that they are prescientific and harsh. Their hope is that the new neuroscience will convince the law at last that determinism is true, no offender is genuinely responsible, and the only logical conclusion is that the law should adopt a consequentially based prediction/prevention system of social control guided by the knowledge of the neuroscientist-kings who will finally have supplanted the platonic philosopher-kings. Then, they believe, criminal justice will be kinder, fairer, and more rational. They do not recognize, however, that most

of the draconian innovations in criminal law that have led to so much incarceration, such as recidivist enhancements, mandatory minimum sentences, and the crack/powder cocaine sentencing disparities, were all driven by consequential concerns for deterrence and incapacitation. Moreover, as C. S. Lewis recognized long ago, such a scheme is disrespectful and dehumanizing. Finally, there is nothing inherently harsh about retributivism. It is a theory of justice that may be applied toughly or tenderly.

On a more modest level, many advocates think that neuroscience may not revolutionize criminal justice, but neuroscience will demonstrate that many more offenders should be excused and do not deserve the harsh punishments imposed by the United States criminal justice system. Four decades ago, our criminal justice system would have been using psychodynamic psychology for the same purpose. More recently, genetics has been employed in a similar manner. The impulse, however, is clear: jettison desert, or at least mitigate judgments of desert. As will be shown below, however, these advocates often adopt an untenable theory of mitigation or excuse that quickly collapses into the nihilistic conclusion that no one is really criminally responsible. ■

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Michael J. Zimmer, L'67

## You Never Know Where Your Career Will Take You

This past spring, Michael J. Zimmer, L'67, delivered remarks at an end-of-year dinner as the *Marquette Law Review* marked the completion of its work on Volume 98. Zimmer had served as editor-in-chief of Volume 50 of the *Law Review*. At the time of these remarks, he served as professor of law at Loyola University Chicago. Professor Zimmer passed away this fall.

**T**hanks for inviting me back. Forty-eight years ago, in this very room here in the University Club, I was hosting the banquet celebrating Volume 50 of the *Marquette Law Review*.

I want to talk about four points: my time at the Law School, my excellent legal education, a message to the rising 3L members of the Law Review, and my words of so-called wisdom for the graduating 3Ls.

First: My time at the Law School. The 1960s were tumultuous, and some of that tumult came into the Law School. Our increasingly long hair—I had some

then—and our informal attire were not well received by the powers that be. One faculty member called me “Shirtman” because I no longer wore a coat and tie to class. More serious was the involvement of some of my classmates in the civil rights movement in Milwaukee. My classmate, law review member, friend, ▶▶



and now-deceased judge of the U.S. Court of Appeals for the Seventh Circuit, Terry Evans, helped organize law students to be involved in a “teach-in” as part of a boycott over the race segregation of the Milwaukee Public Schools. The administration of the Law School posted a notice on *the* law school bulletin board, saying that involvement in the boycott would raise issues with the character and fitness committee of the bar. Needless to say, that notice had the indirect effect of bolstering my class in joining in the boycott.

My second point: My excellent legal education. Most of us have insecurities, and one way they show themselves is self-doubt about whether we can compete out there in the real world. Out in that world I discovered that I could compete with the graduates of those “fancy pants” law schools.

First-year faculty, excellent if not without some idiosyncratic behaviors that we laughed at over beers in our favorite bars (bars that I fear no longer exist), included Dean Seitz and Professors Aiken, Ghiardi, and Winters. A special shout-out for Bob O’Connell, who passed last year. He taught us Contracts, but, just as importantly, he helped us develop sensitivity to our individual senses of justice—liberal or conservative, Republican or Democrat. After the first year, Leo “the Lion” Leary terrified all of us, but I found behind that gruff exterior a warm and funny person when he was advisor and I was editor-in-chief.

Classmates taught me much of what I learned about law, lawyering, and living a happy life. I am sure that is still true for all of you. My law school friends are still my friends, and I look forward to brunch tomorrow with some of them. We will yet again have the chance to laugh over life in the law school trenches. I hope that you and your classmates are still caring enough to cross that great divide between 2L and 3L classes so that you happily help each other, as when, for example, a 2L lends class notes to a 3L whose notes went missing. Now, I suppose, this happens when someone’s laptop crashes or gets drowned by Starbucks just as exams approach.

More seriously, I know that the Law School was excellent then and is much better now. Don’t believe the naysayers that law students are not “practice ready.” I know that you are better prepared than any class that preceded you.

My third point is directed at the rising 3L members: Give it your all! It is worth it because the best is yet to come. I know that, at some point this past year, you wondered if the grunt work you were expected to do was worth it. It is! Developing our research and writing skills is surely important. Having our writing edited by others and, in turn, editing the work of others really are the way most of us learn how to write.

“Thinking like a lawyer” has been described many times and ways. My hard work as a 2L helped me make big leaps when I was a 3L. For me, deep and broad thinking is the most important skill that law review helps develop. I am also convinced that seeing a problem and potential solutions for it from many different facets—like appreciating a fine diamond—is the essence of “thinking like a lawyer.” When solving a problem, particularly a legal problem, the lawyer who thinks the deepest is much more likely not only to win for her client but also to solve the problem in the most socially useful way.

Finally, my fourth point, for the graduating 3Ls: Congratulations! Light at the end of the law school tunnel is at hand and, if you stay in Wisconsin, without even the bar exam speed bump that most law graduates face everywhere else. As an aside, it is for me heartening that recently, instead of bashing the diploma privilege, there is some initial talk elsewhere about channeling Wisconsin instead, and seriously studying whether the bar exam adds anything useful other than income for the bar review courses.

Back to you 3Ls, I want to start with an anecdote. A few years ago, I had the wonderful experience of “co-teaching” comparative constitutional law with Justice Ruth Bader Ginsburg in Loyola University’s summer program in Rome. As you might imagine, this was a tremendous experience for me and the students.

“*Look for work that interests you—that advances your values—and is work that needs to be done to make the world a better place.*”

I want to focus on a talk given by her husband, Professor Marty Ginsburg. In fact, this talk channels his “You Never Know How Things Will Turn Out.” Marty first described how future Justices Sandra Day O’Connor and Ginsburg, who were first in their classes at Stanford and Columbia, could not get law jobs because they were women. That discrimination was lamentable. But, Marty went on to say, what would have happened if there had been no sex discrimination back then? To quote Marty, these two would be “fat, wealthy, and retired sitting on a Florida beach,” just like the men who were second in their respective law school classes.

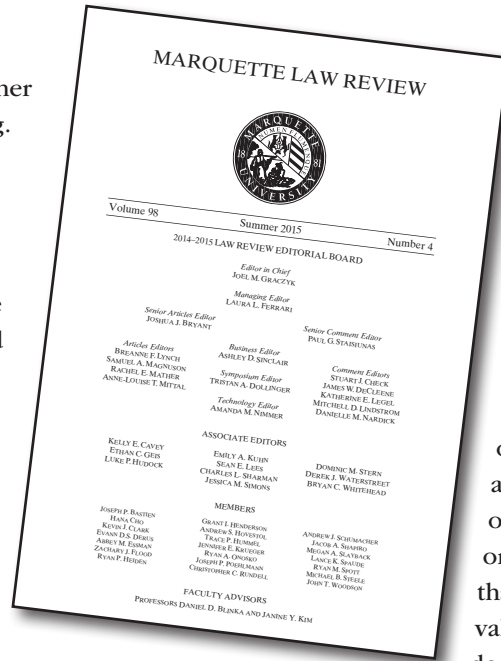
Where would they be now if they had not been the victims of discrimination? So you never know.

Getting your first law job after graduating is a tremendous challenge, but it won’t be your last. When I started practice, my senior partner told me, “Mike, this is a place where you can stay your whole life.” I doubt that that is said any more, but, if someone said it, no one would believe it. Like much of life, the practice of law is now much more volatile than it was back in the dim mists of the past.

That being true, what is the first thing you do when you land that first job after graduation? Update your résumé. Your job may not last, no matter how hard and effectively you work. So, like a Boy Scout, be prepared. Other opportunities will present themselves, and you need to be ready. Keep your head up for those opportunities, so you don’t miss them. Many of my lawyer friends have ended up taking career paths they did not even know existed, or maybe didn’t exist, when they were in law school.

How do you evaluate these opportunities? For me, the key to professional happiness is to do work that is interesting—work that is important—and to do it with good people. Don’t squander all the resources that you, your family, the Law School, and our culture have invested in you by being unhappy in your work.

That is, of course, easy to say, but how do you discover what will make you happy? Luck plays a part, but good luck is the result of hard work, so that you are more likely to be at the right place at the right time



when that opportunity seems to appear out of nowhere. To be ready, you must whistle past the graveyard of insecurity and self-doubt. You are well prepared to make important decisions.

How do you evaluate the opportunities that present themselves? It sounds loopy, but don’t just ask what you want out of life: rather, figure out what life is asking from you. Valuing just what others value is taking a great chance on being unhappy. Look for work that interests you—that advances your values—and is work that needs to be done to make the world a better place.

Here is my litmus test: Imagine you have kids. About what kind of work, and with whom, would you be happy to talk to your kids when you got home from work? Don’t expect the answer to be that the work you do must be world smashing; it can go largely unnoticed by the world at large but still move the world and humankind in it in good directions. For example, small-town lawyers can be very happy—involved in everything, contributing to a healthy society—even though they know that making it to the top 0.1 percent of the wealthy is very unlikely.

Let me show you, from some examples of the students I have been fortunate enough to teach, that you never know what can happen to make you happy and productive. I started teaching at the University of South Carolina. A student complained that he should not be required to take Torts because he only wanted to do transactional work, not litigation. Years later, he became the chief judge of the Fourth Circuit. Somewhere in between there was a tremendous change of career path. When I was teaching at Seton Hall, a student was upset because the constitutional criminal procedure materials—the Fourth and Fifth Amendments—no longer were taught in the basic Constitutional Law course, and he only wanted to be a prosecutor and then a white-collar defense lawyer. Years later, I discovered he had become the CEO of Lexis/Nexis . . . another big change in career path. Finally, there is my former student, Chris Christie. Who knows where his career path will take him?

I want to finish with a final example. At a reception for new American Law Institute members, someone

came up who looked vaguely familiar. After all these years teaching, this happens a lot. She told me she that she had been a Con Law student of mine at Seton Hall, had clerked for a federal judge, then practiced at a big firm in New Jersey, and, finally, went “in house” at a pharmaceutical company. Then, she decided that her personal and professional happiness required her to address her gender identity. She took steps to express that identity in her

personal and professional life. Kevin revealed herself as Christine. She now heads a public interest firm dealing with sexual identity. If Christine has children, I am sure she is proud to tell them the story of her personal and professional life that led her to happiness

Thank you. Congratulations for continuing the excellence of the Law Review, started long before me. I hope that it continues forever. Best of luck for the future happiness of all of you, personally and professionally. ■

Joseph D. Kearney

## The Wisconsin Supreme Court: Can We Help?

This past summer, Dean Joseph D. Kearney delivered the keynote address at the Western District of Wisconsin Bar Association’s annual meeting.



Let me begin by thanking Matt Duchemin for the invitation and introduction. It is always good to see a former student become a leader in the legal profession.

In the interests of time, I want to get right into my topic, with only the briefest prefatory

comment. I spoke to this group early in my deanship (a long time ago, that would be). On that occasion I thought that I should apologize—that is, that one speaking to a federal court bar association about the state supreme court should justify this. Not so today. For has not the U.S. District Court for the Western District of Wisconsin recently become where one expects to go even for legal *decisions* about our state supreme court? That wry comment aside, be assured that I am not here to critique the pending litigation.

I am here to talk about the Wisconsin Supreme Court. It needs our help. I do not mean that the court is not functioning. Most fundamentally, it grants petitions for review, and it issues opinions. To be sure, it does these things better, or more persuasively, in some instances than others. But such an eternal truth

might be noted also of speeches (keynote addresses, even). Besides, for the proposition that the court is functioning reasonably well, let me note that every one of the seven justices this year has had a Marquette law student as an intern in his or her chambers. We are immensely grateful for this frequent contribution by each of the justices to legal education. In short, much at the Wisconsin Supreme Court, without occasioning headlines, is proceeding in an appropriate course.

Yet it is not to go out on a limb to say that the court needs help. No one can reasonably maintain that today’s court enjoys the basic collegiality that not only is a happy incident to, but is an important enabling component of, a law-declaring appellate court. And the effects of this go beyond particular cases.

Let me pause to note that perhaps a dearth of collegiality has existed for some time. I have noticed the justices’ practice in dissent of routinely referring to an opinion of the court as that of “the majority.” I think it essentially disrespectful for a dissent routinely to refer to an opinion speaking for four (or even six) justices as that of the “majority.” It is an opinion of *the court*. The constant characterization in a concurrence or dissent of the court’s opinion as a mere “majority” opinion is to imply mere policy preferences or a force of will by the court, as opposed to a declaration of the law. In some brief research a year ago, I was surprised to discover that this rhetoric seems to be something of