

# MARQUETTE LAWYER

FALL 2019

## LAWYERING AT THE SPEED OF CHANGE

How Technology Is Changing  
Business Law *plus*

**Losing Labels, Reaching Potential**  
Northwestern Mutual's Ray Manista, L'90,  
on shifting course in order to grow

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Lee Rosenthal on Holmes—  
and Ambition and Aspiration Today

Denno and Triggiano on How  
Courts Handle Childhood Trauma

From Z(iegler) to A(brahamson), with Twerski,  
Sykes, Sherry, Rofes, McChrystal, Klitzke,  
Geske, Evers—and Even Some Yeats and  
Dwyane Wade—in Between



## The Company We Keep

Someone once remarked to me that you cannot have too many friends. I entirely agree with that sentiment. Marquette University Law School provides powerful evidence of this.

Some of our friends you can meet in this issue of the *Marquette Lawyer*. One is Ray Manista, L'90, a leader at Northwestern Mutual, longtime member of the Law School's advisory board, and now a trustee of Marquette University; a profile (pp. 14–17) of Ray and his wife, Dawne, complements the cover story. And that story, "Practicing Business Law at the Speed of Change," draws on the insights and experience of leaders in the practice, many of them longtime friends of the Law School (pp. 4–13).

Often, the influence of our friends on us is not publicly visible. For example, the cover story itself was inspired by a strategic planning session led by a great friend of the Law School: Donald W. Layden, Jr., L'82. As chair of the advisory board, Don has encouraged the Law School's attention to the trajectory and pace of change in the profession, including that prompted by technology. I am grateful for his leadership and friendship.

We welcome new friends. Lee H. Rosenthal was already a prominent federal judge but new to us in her visit here last spring. She engaged and animated the Marquette Law School community, and her Hallows Lecture attracted new friends to us, as you can see among the reactions to the lecture (pp. 18–37). Judge Rosenthal had been warmly recommended to us by old friends—past lecturers here. Deborah W. Denno of Fordham University School of Law is also someone new to us who enriched our community this past academic year, as is evident in this issue (pp. 44–49).

We enjoy a special friendship with our alumni. Whether in the class notes or profiles (pp. 58–61) or in the alumni awards (pp. 38–43), you, too, can get to know some of them. We are so grateful for their contributions through the profession, their service in the community, their examples to our students and those of us engaged in the daily life of the Law School.

Marquette Law School has had no more generous friend than Ray Eckstein, L'49, and his wife, Kay, herself a Marquette alumna (Speech '49). Kay passed away in June 2017, as noted in a previous issue of this magazine, and so now also has Ray, this past April. The Ecksteins provided the lead gift for our new home, opened in 2010, and Ray and Kay Eckstein Hall continues to shape Marquette University Law School. The building is extraordinary in so many ways—including its ability to foster a rich and expanding network of friendships and collaboration. We remain grateful and will continue to remember and honor Ray and Kay Eckstein.

Joseph D. Kearney  
*Dean and Professor of Law*



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**Marquette University  
Law School**  
Eckstein Hall  
P.O. Box 1881  
Milwaukee, WI 53201-1881  
Phone: (414) 288-7090  
Fax: (414) 288-6403  
law.marquette.edu

EDITOR:  
Alan J. Borsuk  
DESIGN:  
Douglas Frohmader  
Andy Haas Schneider  
COPY EDITOR:  
Amy Bauman

COVER: photo by  
John Nienhuis,  
illustration by  
Stephanie Dalton Cowan  
PHOTOGRAPHY:  
Mike Gryniec  
John Nienhuis

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**MARQUETTE**  
UNIVERSITY  

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**LAW SCHOOL**





# PRACTICING BUSINESS LAW **AT THE SPEED OF CHANGE**

How technology is changing the practice of business law.

BY ALAN J. BORSUK AND DAVID A. STRIFLING

Justin P. Webb, L'14, began the continuing legal education session with a question: "How many of you think you understand what blockchain is?" About 75 people had gathered in the classroom at Marquette Law School for the one-hour, lunchtime program on June 6, 2019.

No hands went up.

That spoke to the reason the people had come. They shared a strong sense of the need to understand—or at least have some grasp of—the rapidly changing world of technology as it affects legal practice. And the attorneys present knew that they weren't at that point, especially when it came to matters such as the often-heard but challenging term *blockchain*.

Webb, of Godfrey & Kahn in Milwaukee, explained in broad terms that blockchain is a sort of cyber spreadsheet or business ledger that many parties can access at the same time. As applied to the cryptocurrency market (Bitcoin and so on), it means that there is no central clearinghouse or bank. Blockchain technology has many other potential applications, or "use cases," as Webb called them: "smart contracts" that are fulfilled in real time as transactions occur, real estate dealings, even tamper-proof records of financial transactions, just to name a few. But blockchain is in an early stage. "I'm still waiting to see really good implementation of it," Webb said.

Do lawyers need to understand the technical details of blockchain, artificial intelligence, and data analytics? Maybe not. But are they wise to have some grasp of how technology and other forces are changing or will change daily life for attorneys who provide counsel to businesses, either through law practices or on an in-house basis?

Yes, in many cases. As is true in so many other economic and social sectors, automation is reshaping the practice of business law. It is changing the way clients and attorneys communicate, what clients want or need from attorneys, what is most valued by clients when it comes to legal services—and it is changing businesses themselves, which lawyers also need to understand.

Smart lawyers and firms know that they need to stay on top of all of this because tech-driven change keeps coming, and coming fast.

What is now the state of high tech's impact on the practice of law, and what lies ahead? In what other important respects is legal work for businesses changing? How have the daily routines of serving clients changed in a world so filled with computerized tools?



We asked questions such as these of the heads of several large firms, in-house lawyers for major corporations, lawyers who are tech-savvy and at earlier stages of their careers, and some general experts. While it is impossible in these early days to draw any firm conclusions about the future of the practice, here are a few observations about what has changed and some perspectives on lessons already gleaned from lawyering at the speed of change.

### **“We’re All Living Transformation”**

Milwaukee-based Northwestern Mutual is going through a large-scale transition, focusing increasingly on helping people with comprehensive financial planning that combines digital tools and a human advisor, a move beyond its traditional life insurance identity. And when it comes to finances, people want things that can be almost contradictory, whether that’s easy access online to their information at the same time as maximum data security, or personal relationships with people at the company coupled with 24/7 availability of the latest in technological tools for managing money.

What does this say about the roles of lawyers within the company? A great deal, says Ray Manista, L’90, chief legal officer at Northwestern Mutual. Manista also plays a major role in corporate planning.

“We’re all living transformation,” Manista says. “The way that you lawyer has to change dramatically.” Corporate planning cycles used to be measured in years. Now they are measured in months or weeks. “It’s test, learn, modify,” says Manista. Northwestern Mutual expects its in-house lawyers—and its outside counsel—to deeply understand the company’s plans and goals, Manista says. Agility and efficiency are prized in every role, including that of lawyers. Lawyers have to understand

where developments are headed and to anticipate legal issues. “The clients may not know when to call you,” Manista says. “As an advisor, you can’t wait for the client to call.”

Instead, today’s lawyers must anticipate problems and offer potential solutions to clients rather than adhere to older, process-driven models, when clients and lawyers might not connect until an issue was ripe or a dispute was in full bloom. “It’s not about ‘Yes’ or ‘No’ any longer,” Manista says. Lawyers and clients must work together more closely than ever iterating through problems.

Under that model, despite the onrushing advent of technologies that may change legal practice, Manista is confident that “lawyers don’t become extinct at all.” No machine can do what a good lawyer does. “The foundational principles and concepts don’t change dramatically, but the context in which you need to apply them does.”

When it comes to technological change, Manista recognizes that the business sector is well ahead of the law in areas such as privacy, data usage, information sharing, and blockchain. “Lawyers need to be conversant” with these developments to address client needs, he says, even if the changes aren’t immediately incorporated into a law department’s operations.

*(See page 14 for a story profiling Manista.)*

### **Preparing Practice-Ready Lawyers for a Changing World**

“Lawyers have always been problem solvers,” says Nadelle E. Grossman, professor of law at Marquette University. But now more than ever, law school graduates must be ready to hit the ground running. Employers expect new lawyers to graduate with a practical skill set, not just doctrinal knowledge.



“Marquette Law School is rising to the challenge,” Grossman says. The Law School’s faculty members are using a variety of different pedagogies to better prepare students, including simulation-based classes and integrating traditional doctrine and theory into problem-solving scenarios.

For example, in Grossman’s Business Planning course, students begin with a client’s request to set up a new business entity. Throughout the semester, they must then navigate a variety of intensely practical issues associated with the transaction. These include choosing a business-entity structure, developing equity-compensation plans, protecting intellectual property, and complying with securities regulations. The course is entirely team based and emphasizes soft-skills development in addition to understanding doctrine, Grossman says. The class forces students to be “forward looking, anticipating and planning to avoid any issues that may arise,” she says.

In a number of other courses, students use virtual “clicker” systems to give immediate feedback to professors. “It’s a new era of formative assessment,” Grossman says, allowing students to immediately evaluate their understanding of the material while faculty can gauge student progress.

Grossman, who came to the Law School in 2007 after eight years of corporate practice at a large Houston firm, is a firm believer in this form of pedagogy. She has even authored a newly published national contracts textbook, *Contracts in Context* (with Eric Zacks), which is problem based, as opposed to using the traditional case method. And her recent appointment as the Law School’s associate dean for academic affairs gives her a broad perspective.

For example, she notes that students also can enroll in Marquette Law School’s Law and Entrepreneurship Clinic, now

in its sixth year and directed by Professor Nathan Hammons. The clinic immerses students in the representation of real business clients who have been selected based on need, in keeping with Marquette’s Jesuit mission. Grossman noted that the clinic gives students the opportunity, while under Hammons’s expert supervision, to work on issues that businesses face in getting started, dealing with regulatory and compliance issues, and operating soundly. “We’re letting students experience what practice is really like,” she says. “It’s very consistent with the thrust of Marquette University’s strategic plan, ‘Beyond Boundaries.’”

## Back to the Future

*Holistic.* That’s a word that Jay Rothman says lawyers serving business clients should keep in mind. The chairman and CEO of Foley & Lardner, an 1,100-lawyer firm based in Milwaukee, is not talking about personal health care. He’s talking about how lawyers need to understand the full range of a client’s business—strategy, changing business dynamics, internal factors, what competitors are doing. Rothman says that lawyers increasingly have to help clients “look around the corner” at what is ahead and to ask clients, “How can I help you?”

The world of business law went through a period of increasing specialization, when many lawyers had relatively narrow focuses for their work, Rothman says. In the business climate of today, including the effects of changing technology, the pendulum has swung back toward attorneys who are capable and committed to serving clients in broad ways. Rothman calls it a “back to the future” aspect of change in serving corporations. To be sure, good overall service to clients was never out of fashion. “The great lawyers have always had that broader vision of their clients,” he says.

Some things lawyers did for clients aren't needed in a higher-tech world. Rothman gave an example of lawyers going through dozens of boxes of documents to get ready for a deposition. Such things often can be done now using computerized tools. "We are aggressively trying to look at how we can apply AI," or artificial intelligence, in such work, Rothman says. Foley contracts to use AI to develop the first drafts of patent applications, he relates, adding that the tools for doing this are only going to get better.

Foley is working hard to find ways to use data for more-predictive purposes, Rothman says. That means compiling data on the outcomes of litigation so that clients can be advised about what has happened in situations similar to theirs or what percentage of contracts involving similar situations have particular provisions.

Training of lawyers within the firm has also become more tech oriented, including development of "gamification"—software that leads participants into taking part in scenarios that are intended to make training more realistic and more interesting.

### **"It's the Immediacy of What Needs to Be Done"**

"We are in the service business," says Nic Wahl, president and managing partner of Godfrey & Kahn. The biggest change in the current (and future) environment for serving business clients is the emphasis on speed. "It's the immediacy of what needs to be done," Wahl says. In prior days, when a client had a question or need, you often had two or three days to respond, he recalls. "Now they want to know in 10 minutes." He may not have been speaking literally—certainly not of every instance—but in an electronic world, clients desire and believe themselves to need quick responses and decisions. Who is to say that they are wrong?

A second change for businesses is the growing governmental and consumer focus on privacy policies and data protection, both of which often raise legal questions and call for the expertise of lawyers. Wahl's firm, headquartered in Milwaukee, helps clients develop protocols for what happens when there is a breach of protected data, and it can coach businesses through responses to such breaches. "Usually, we're going to be the first phone call" if something goes wrong, Wahl says.

Godfrey & Kahn is among the generally larger firms that have developed cybersecurity and data protection groups. Wahl points to Justin Webb, who presented the blockchain seminar at Marquette Law School, as an example of the kind of person the firm is looking for. Webb worked in data security before deciding to go to law school.

### **"We Constantly Feel Like We're Always Going"**

That sense of immediacy comes down to the level of individual lawyers in big ways. Kristen Hardy, L'14, says she wakes up in the morning, and one of the first things she does is look at her phone. On vacation? She has her phone with her.

Hardy is an in-house attorney for Briggs & Stratton, a Milwaukee-area based company with customers around the globe. This means that issues requiring her attention can come up just about any time. "We constantly feel like we're always going," says Hardy.

Nicole Willette, L'11, is an in-house lawyer for Franklin Energy, which provides energy-efficiency services to clients, many of them utility companies, throughout the United States and Canada. The company is based in Port Washington, Wis. Given the nearly constant presence of your phone and your computer, "you are always on," she says.

Willette's and Hardy's practices and workdays are heavily shaped by technology—but not the cutting-edge aspects such as blockchain. What technology gets the most use by Willette? Microsoft Office Suite, she says, including options for long-distance sharing of screens with coworkers and clients. And Hardy? She says she counts on Microsoft OneNote to get a lot of her work done—and, without doubt, on email.

But both see the impact of technological innovation changing their businesses and how they do their work. A lot of mundane work that used to be done by lawyers, such as checking documents and searching records of prior work, is being done electronically.

Both Hardy and Willette say a big thing they like about their jobs is that they are able to get involved in discussions and decisions within their companies that go beyond strictly defined legal work—in other words, the kind of strategizing and problem solving that experts say is increasingly a valuable role for lawyers.

Still at early points in their careers, both see that the computer world has already changed the businesses they work for, and that there is more to come. "We're getting a front row seat on how things are changing," Hardy says.

### **The Fast-Developing Push for Privacy and Data Protection**

Mindi Giftos says that she had a credit card compromised recently. The good news was that the card company notified her quickly of a suspicious charge, and the card was promptly cancelled. That's a sign of an improving picture for awareness and response to data breaches. But it's also a sign of how common and urgent those breaches are.

Giftos is managing partner of the Husch Blackwell office in Madison, Wis., and her practice focuses on an array of big things happening as technology changes both the business world and the world of lawyers who counsel businesses. Blockchain, data security, the "internet of things"—Giftos is involved with each of these. She says that lawyers in general need to have a handle on what these things mean for the present and future of their practices.

"Every company now, without exception, is handling personally sensitive data," Giftos says. She is called on frequently to help clients who need to navigate data breaches such as the one she was caught in.



For a lawyer serving the needs of business clients, “all of the classic things are still there,” Giftos says, such as what needs to be done to close a deal properly. “On top of that, there’s another layer now that companies need to consider,” namely privacy. “I do think there’s a real shift in thinking for both companies and consumers around privacy,” she says. “There’s a sea change. In the next decade or so, there will be a lot more developments involving protections around privacy and security.”

And there are tech-connected changes in how a law firm can provide services to clients. For example, Giftos says, Husch Blackwell offers higher-education clients tech-oriented help in complying with the Clery Act, a federal law that requires colleges to disclose security policies and data on crime. The technology speeds up the process of meeting clients’ needs, Giftos says, but clients still want lawyers involved and not just automated services.

Giftos strongly advocates for lawyers and firms of all sizes doing whatever they can to stay up on developing technology changes that are going to be as “disruptive,” she predicts, as the rise of the internet. They’re coming more quickly than many law firms realize. Do lawyers really need to understand more about blockchain, for example? “It is coming. It is here; it’s going to be used more and more because there are significant benefits to it. If you don’t understand the basics of it, you’re falling behind.”

## The Tech World Enters the Courtroom

A generation ago, a courtroom during a trial was a place where electronic gadgets were unknown and, in fact, generally would have been prohibited. Randall D. Crocker, L’79, who was president and CEO of von Briesen & Roper, based in Milwaukee, participated in numerous trials during his career. [As this issue was going to press, the death of Crocker was announced by the firm. See page 59.]

What changed over the years in the courtroom? Crocker said computer screens became widely used. Generally, there is one big screen serving the whole room, and the judge, witnesses, and attorneys for the parties have their own screens. The court reporter is providing a real-time transcript, using computerized equipment. Exhibits are often presented both on paper and electronically. Documents may have electronically marked highlights. Passages can be blown up to give them more visual impact. “You see very effective use of video depositions,” Crocker said. “You see video and audio excerpts used in opening and closing arguments.” In general, you see technologically advanced presentation.

“It’s very effective,” Crocker said. “It’s more vivid, it’s very real time, it focuses on the specific issue that a lawyer wants the jury or court to hear about.” And it hasn’t been hard for lawyers to become adept at using these tools. “It’s natural; it’s how we review documents now,” Crocker said.

That said, he emphasized that “lawyers’ traditional skill sets continue to be valuable.” Knowing how to be a good lawyer

adds a lot more than technology can add. “The key continues to be that relationship of trust and responsibility between a lawyer and a client, and I think that’s a very effective tool for getting good results,” Crocker said.

### No Immunity from Societal Changes

“Disruption is clearly coming to the legal industry,” says Jerry Janzer, L’82, CEO of the Milwaukee-based firm of Reinhart Boerner Van Deuren. “The only question is how fast it will happen.” Janzer likens the changes coming to legal practice to the broader disruptions that have brought our society into the digital age, citing the transformation wrought by smartphones as an example. “The idea that lawyers are somehow immune to the changes fostered by technology is naïve,” Janzer says. Even traditionally risk-averse lawyers and law firms “are going to have to continue to evolve.”

Reinhart has begun exploring artificial intelligence tools in a variety of practice areas and contexts, such as creating the first drafts of deal documents, but Janzer believes that automation will never supplant a lawyer’s good judgment or ability to “read” her opponent’s objectives. Instead, the firm has found avenues to integrate technology into legal operations. For example, it uses data analytics based on past work to help estimate the legal cost of a particular transaction or a piece of litigation. Reinhart, like many large firms, also now employs dedicated legal-operations professionals, sometimes known as legal project managers, to create efficiencies in the practice. Janzer also sees a future in which “virtual” law firms made up of individual lawyers in different locations become a market force due to the relative ease with which today’s lawyers can work remotely.

Janzer notes that many young lawyers are “digital natives,” having grown up in a technology-rich environment. This will help in keeping abreast of the changes coming to the practice, and in staying competitive in the legal industry. But he also cautions that substantive knowledge of the law and traditional lawyering skills such as personal communication and legal writing shouldn’t be lost in the transition.

### Translating Information Output to Strategic Advice

“The access to information is so much broader than it was even 5 to 10 years ago,” according to David Krutz, managing partner of Michael Best & Friedrich. Information management systems are creating and analyzing data about expected transactional and litigation outcomes in all areas of practice. Harnessing such “big data” to benefit both law firms and their clients has been the biggest change in the practice over the past five years, Krutz says. Looking ahead, some attorneys may become “assemblers of information,” primarily collecting and reporting the results from data and artificial intelligence analysis. But the real leaders in the law will be those who can translate that information into “practical, strategic, and business advice to a client.”

In the past, business clients perhaps were better at formulating and executing “long-term visions,” Krutz says, while lawyers operated in the here-and-now of deal closings and litigation deadlines. Even now, thinking 5 to 10 years ahead is not always top-of-mind for lawyers, he observes, especially when attorneys trained to see risk are assessing the downsides of new technologies. This makes some





attorneys more reactive than proactive. “Sometimes law firms aren’t at the cutting edge,” he says, and this might frustrate younger attorneys who have grown up in a technologically advanced world.

But there’s a bright side: “That’s an opportunity for younger attorneys to lead,” he says. In recent years, Michael Best, whose largest office is in Milwaukee, has launched a digital technology group and now also employs engineers, accountants, and experts in digital technology. Krutz is hopeful that blockchain presents a “real opportunity” for law firms to connect clients with new use cases even as they simultaneously explore the legal issues associated with the new technologies.

## The Closing of a Closing Era

A closing used to mean a lot of people gathered around a large table in a large conference room, with reams of paper all around, often with large accordion-like folders to organize all the papers each party was to get.

“Now that’s done rarely,” says Peter Faust, L’94, head of the corporate group of the Milwaukee firm of O’Neil, Cannon, Hollman, DeJong & Laing. Much of his work involves clients buying or selling businesses.

Instead, everything is done electronically and at distances that span the country, if not the globe. There are still times when a real signature is needed, such as on promissory notes, Faust says, but almost all documents can be signed via computer also. “Everything is done remotely,” he says.

On the positive side, the rise of electronic closing means you can be more nimble in making adjustments, even up to

the last minute. And the electronic trail left is more reliable for spotting changes and problems. It keeps all involved on their toes, Faust says.

On the negative side, there were benefits to having everyone in a room together. And closings “don’t have the same kind of celebratory feeling they used to.”

Thomas J. Kammerait, chair of the business succession planning section at von Briesen & Roper in Milwaukee, adds one more aspect: “It’s very easy to add hundreds of things as attachments [to contracts or closing documents] these days that might not have been added in the past.” In prior times, there might have been 10 or 15 additions to the main document. Now, Kammerait says, there might be 40 or 50. The power of computers makes it easy to add such things as additional tax documents, lease papers, or financial paperwork. For lawyers, that means “everybody’s got to pay attention. . . . There are bigger fish swimming under the bridge.”

Faust says that one aspect of electronic closing seems to have lagged behind others. Money transfers can take hours or until the next day. He expects that this will change.

Does anyone write checks any more as part of closings? Faust laughs. Very rarely. That may be a good thing: He says he was part of a transaction where a young lawyer was asked to write a check and simply didn’t know how—having never written one before.

What lies in the future for technology in the kind of practice he has? Faust does not expect law firms to be the leaders on that. Clients will set the pace. “If clients are doing it, we have to do it,” he says. “It’s going to be led by the clients, no doubt.”





## Leveling the Playing Field

Technology allows attorneys to work from anywhere at any time. In some ways, it has “leveled the playing field” between larger and smaller firms, according to Adam Brookman, president of Boyle Fredrickson, a midsize Milwaukee law firm focused on intellectual property practice. Jim Boyle, L’84, one of the firm’s founders, agreed with Brookman that in the past larger firms enjoyed tremendous resource advantages such as maintaining their own law libraries and, later, access to specialized databases or research instruments. Now that similar tools are more commonly available online, small and midsize firms are better able to compete.

No matter the size of the firm or how much technology changes the practice, one thing will remain constant: the special connection between a lawyer and her client. “This practice of law is still built on trust and relationships,” says Brookman, “and technology doesn’t make that go away.” Brookman believes that law students and less-experienced attorneys still need to focus on professional skills, legal writing, and client relations. “Those things haven’t changed, and I don’t see them ever changing,” Brookman says. In fact, technology can interfere with the personal connections historically established between lawyers and their clients.

## Career-Long Advantage for Innovators

“Lawyers are not trained to be innovators,” says Ken Grady, an adjunct professor and research fellow associated with the Center for Legal Innovation at Michigan State University College of Law in Lansing, Mich. That has to change.

Grady draws a distinction between the revolutionary use of technologies such as artificial intelligence and blockchain in the broader marketplace and their less-advanced (or nonexistent) use within law practice itself—mostly to automate fairly routine tasks such as document review. “Blockchain has gotten a huge amount of attention, but its applications are still fairly limited” in legal practice, Grady says. Grady believes that this presents opportunities for lawyers who understand something of the use cases because of the new substantive legal questions that those uses entail.

Grady believes that the law has largely been a stable profession without an innovative bent. For the most part, law firms are still dominated by older models of billing and practice. But clients are beginning to push for law firms to become more efficient and innovative. “While the legal profession has been agonizingly slow to change,” he says, “it is changing—and the rate of change is accelerating.”

“These things will affect the practice of every student coming out of every law school, and not in an insignificant way,” Grady says. Those who are able to understand and adapt to change will have a significant advantage over those who are ignorant of it.

## Giving Law Students a Leg Up on Understanding Change

José Lazaro, a third-year student at Marquette Law School, maintains that lawyers and law firms can be good innovators, and he’s not waiting for graduation to make his point. As a second-year student, Lazaro established a Cryptocurrency and

Blockchain Law Society at the Law School to help fill what he perceives to be a growing demand among students. In the broader picture, he suggests, some individual law firms and lawyers, particularly those from his generation and those in technology-friendly practice groups, are showing more agility in adapting to the changing tech world.

“Blockchain can be used for dozens and dozens of applications,” Lazaro says, from sharing and storing information and real estate records to assisting with financial transactions. Law students should understand the fundamentals of blockchain and related technologies, he believes: “Even if we can’t become experts, we should be well versed” in the technology to work with future clients. Doing so will make students much better prepared to compete at graduation, he believes. Lazaro is careful to note that blockchain may not be the right technology for every use case, and sometimes it is used as a marketing ploy.

### Wanted: Lawyers Who Can Embrace Technology

Legal recruiters have also recognized a demand for a new kind of lawyer. Soon, new technology will “permeate every aspect of legal practice,” says Brian Burlant, managing director at the legal recruiting firm of Major, Lindsey & Africa, in New York City. Many lawyers are averse to innovation. “Clients just won’t accept that any longer,” he says. In the near future, the use of artificial intelligence and data analytics may give rise to increased efficiencies and predictability in the outcome of litigation and other disputes, Burlant says. New lawyers who are able to use these tools effectively will have an advantage over peers who cannot. But despite this oncoming revolution, Burlant echoes a common theme: in what is becoming an impersonal age, the relationships between lawyers and their clients are more important than ever.

### Staying Connected in the Age of Technology

What about the relationships *among* lawyers?

Technological change has had many positive effects on legal practice: greater efficiencies, reduced need for lawyers to perform rote tasks, and better remote-work options, just to name a few. But sometimes those benefits come at the expense of face-to-face human interactions and connections. As a result, Quarles & Brady has launched a “connectedness initiative,” says Kevin Long, L’92, co-managing partner of the firm’s Milwaukee office. It includes making sure that the firm’s attorneys are interacting on a personal basis with each other and with others in their communities. “We need to do that more intentionally now,” Long says.

The same is true of the firm’s relationships with its clients. “It’s not just about being a legal service provider anymore,” says Katya Zelenovskiy, L’08, also co-managing partner of Quarles’s Milwaukee office. “You become more integrated, more connected with clients by being part of their

businesses.” Clients want lawyers to focus less on delivering perfect legal advice after lengthy study and more on becoming an integral part of day-to-day business operations. This means that technology will never put good lawyers out of a job, she says. Clients want strategic business advice and analysis that machines can never provide, making lawyers more valuable than ever.

“Technology will continue to change,” Long says, “but the attributes of a successful business counselor remain constant: curiosity, understanding your client’s challenges, and caring about solving problems.”

### Yes, Speed; But Yes, Great Professional Service

Joseph E. Tierney IV comes from a long line of Milwaukee lawyers. He remembers visiting his father’s firm when he was young. The lawyers used state-of-the-art technology: mimeograph machines and copiers that could produce a few sheets a minute.

“I always talk about it as how much the velocity of practice has changed,” says Tierney, president of Davis | Kuelthau, a Milwaukee-based firm. “Clients and everyone else expect your law practice to move very quickly. Sometimes that’s good because it helps business get done and it brings focus. But other times, you’re practicing law too quickly. It’s just too fast. I think the law should be more thoughtful.”

Is there a way to counter the demand for speed and quick answers? “Part of me says that’s just the way things are now,” Tierney says. “But if you have really good relationships with clients, you can tell them, ‘Look, if you give me until next week, I can give you better answers than I can give you today.’”

But don’t expect that to be the case often, Tierney says. “As much as technology has changed in my lifetime, it’s going to change even more. The technology requirements on lawyers are just going to skyrocket.” Coming issues and coming technology “are going to force lawyers to be almost as technologically proficient as they are legally proficient.”

But there is a *but* that points to much more than technological proficiency. The changes, Tierney says, can—and will—call for high-quality human services that lawyers can provide. “It’s going to focus us more on what we can provide that’s unique,” such as the judgment and wisdom to help resolve disputes, to bring deals to a close, to know whom to talk to, and how to talk, in order to help a client. At the same time that a high-tech future is a certainty, there is going to be need for “a return all the way to the beginning” of what a good lawyer provides.

His advice for lawyers just starting careers? Put yourself in “an environment that embraces learning and continuous development.” ■

*Alan J. Borsuk is senior fellow in law and public policy, and David A. Strifling serves as director of the water law and policy initiative, both at Marquette University.*

# LOSING LABELS, REACHING POTENTIAL

Northwestern Mutual's Ray Manista knows how to shift course in order to grow.

BY ALAN J. BORSUK

Labels can be empowering, Ray Manista says. They also can be limiting. Sometimes people apply labels to you. Sometimes you apply them to yourself.

Some labels have fit Manista well throughout his career. *Principled. Hard working. Good at whatever job he's had. A family man. Community minded. A sports fan.*

But two times when Manista changed labels—largely ones he had put on himself—tell you a lot about his career and character.

Manista graduated from Marquette Law School in 1990. Eight years later, he was a partner in a respected Milwaukee law firm. *Partner* was an attractive label, a career goal for Manista. But he changed it, joining Northwestern Mutual, the large financial services company based in Milwaukee.

At Northwestern Mutual, Manista did well as a corporate attorney. But three years into work as a litigator, he was offered a chance to get involved in broader corporate issues. He took it.

New label, new success. Today, Manista is part of the company's senior leadership team. He carries several titles: executive vice president – chief legal officer, chief compliance officer, and secretary of the corporation. He plays an important role in strategic decisions as Northwestern Mutual changes core aspects of its business to respond to what customers need and want. He was recently given the additional duty of accountability for the company's foundation and philanthropy.

"To be truly effective, I had to lose the labels," Manista says. "The way I see myself and what I can do has changed a lot over the years. The labels thing has been a powerful learning experience for me. Lose the labels and then explore to see what your full potential is."

## The Road to Marquette

Manista grew up in a small town in northwestern Indiana, not far from Gary and Valparaiso. His parents, he says, were very generous people. "I'm an adopted kid," he says, and so is his sister. And his parents often brought foster children into the home. Manista says he used to think he wasn't really exposed to diversity until he came to Marquette University, but, looking back, he was involved in a fair amount of it as a youngster.

His parents were high school graduates who worked in the steel mills in the 1950s. Where Manista grew up, he says, you were either a steel worker or a farmer.

He went to Boone Grove High School, a small school southwest of Valparaiso. As he was nearing graduation, he started dating a girl three years younger than he—young enough that she says she needed permission from her parents to start dating. But they liked Ray. (OK, skip ahead: Things worked out well. Ray and Dawne Manista have been married for more than 30 years.)

Manista wanted to become the first in his family to go to college. Something in Chicago sounded like a good idea, but a history teacher at his high school suggested he check out Marquette. He and his father came to Milwaukee.

"I was sold on that first day," he says. He liked the combination of a smaller university community in an urban setting. And, he admits, he liked it that when they pulled up behind Gesu Church on their arrival on a Saturday morning, beer trucks were parked all around, setting up for an event known then as The Block Party.

"I had a wonderful experience at Marquette" as an undergrad, Manista recalls. His class choices focused on political science and urban affairs, and he was learning a lot



**“There was expectation, expectation that you be there, that you be there and be prepared, that you be there and be prepared and be willing to stand up [in front of] others . . . .”**

Ray Manista

Ray Manista calls his law school years “quite formative.” He says, “These were professors who were really concerned about helping you realize your full potential and pushing you to become your best.”

“There was expectation, expectation that you be there, that you be there and be prepared, that you be there and be prepared and be willing to stand up [in front of] others . . . . I think that that discipline, and the bent toward not just learning the substance of the law but the practical application, were distinguishing things that served me well.”

Upon graduating from law school in

1990, Manista joined the Milwaukee firm of Godfrey & Kahn as a litigator. He was, among other things, a hard worker. Dawne Manista recalls a year in which he worked at least part of every day except nine. He loved the work, he loved the firm—“to this day, I think the world of it”—and he made partner.

### **The Road to Northwestern Mutual**

But then “I decided to leave Godfrey & Kahn, which in many ways, makes no sense,” Manista says. “I saw it actually wasn’t all that I wanted.” Dawne Manista said family concerns were a factor. Ray wanted to be more involved with Dawne and their children.

Ray had a couple of friends who had moved from private practice to Northwestern Mutual. At first, he didn’t take them up on the suggestion that he look into working there. Then he decided to consider it.

of new things. A big plus was that students had a lot of access to professors.

Dawne (Radice) Manista wanted to become a physical therapist, and Marquette offered a very good program. Plus, by the time she was choosing a college, the relationship between Dawne and Ray had gotten deeper. “I felt we grew up together,” says Dawne. So Marquette it was. She would become a physical therapist and worked in the field, full-time and part-time, for many years.

When Ray got his bachelor’s degree and wanted to go to law school, another decision had to be made. Ray and Dawne were on their way to getting married and wanted to have a family, so the city they would be in, as well as the law school, was a factor. They considered several options in the Midwest. But they liked Milwaukee, and they liked Marquette. Decision made. They got married while Ray was in law school.

“Seven meetings later, I accepted the job,” Manista recalls. “It seemed like the hardest decision I ever had to make. Rolling forward: It should have been the easiest decision I ever had to make. . . . This is an incredible place.”

Manista came to Northwestern Mutual as an assistant general counsel and a commercial litigator. But, as he recounts that period, he returns to his thoughts on how people are labeled and label themselves.

“When you went to family parties, you were the lawyer. What did you read? The law. Whom did you interact with? Lawyers. That was in many respects the way that people labeled you, and it was my own sense of self in many ways. It was something I was very proud of, and something that one should be proud of.”

But he had broader interests as well. “Three years in [at Northwestern Mutual], I had an opportunity to go try something different, outside of law. It was a very difficult mental hurdle to get over, because it was corporate strategy. It had to do with strategic planning and corporate market research and things like balanced scorecards and technology implementation. . . .

“I had to get over my own sense of who I was and what I was capable of. In many ways, law firms put you into teams and into categories. You are a bankruptcy lawyer, you’re an ERISA lawyer—go market that. I was a commercial litigator; that’s what I did.

“But now I had the opportunity to do something very different. I made the transition, I learned that many of the things you learned in law school about solving problems, about making lemonade out of lemons as a litigator, those things apply in business, those skills apply on the business side.

“And I learned that to be truly effective, I really needed to lose the labels that were either placed on me or that I placed on myself in terms of my own capability. . . . A smart person put in the right context with the right kind of effort can do a lot of good things.”

## The Road to Top Ranks

Manista did a lot of good things, as his rise within Northwestern Mutual demonstrates. He climbed through several positions on the business side, developing himself as a leader in corporate planning and in specific areas such as helping oversee implementation of rapidly changing technology within the company.

In 2008, he was asked to be general counsel of the corporation, succeeding Robert J. Berdan, L’75. He had some reluctance because he liked working on the business side. But it was a flattering offer, and he was assured by firm leaders that they wanted a business-minded general counsel. “I would never have had that opportunity if I had not broken from the label and gone out into the business in the first place,” he observes.

Manista was general counsel for more than nine years, even as he added several other titles. He now is the company’s chief legal officer, which means that he oversees all of the company’s legal, government relations, and compliance operations, involving more than 250 professionals.

Throughout his career, Manista says, his strengths have included bringing people together, helping them make common cause as a team, and encouraging others to grow in their careers—just as he was encouraged as a young lawyer by others. Summing up what he does, Manista says, “My role has always been to connect dots.” He adds, “What motivates me more than ever . . . is the opportunity to help make sense of change, to bring people in the company forward . . . .”

Manista has become increasingly involved in seeing that the dots come in lots of different colors, shapes, and sizes and with lots of different qualities. He is a strong advocate for increasing diversity of all kinds in the workforce, both within Northwestern Mutual and beyond. He said Marquette helped move him “out of the little shell I had lived in.” His Marquette years included volunteering at the House of Peace and at St. Leo’s Catholic School, both places near the Marquette campus serving many low-income people.

Now, he says, diversity is not a matter only of helping low-income people. Diversity is important to corporations that need to attract talent, need to connect with diverse populations, and need to benefit from involvement of people with different points of view.

Manista says white business executives should be allies of building diversity, and he’s worked on that himself as a convener and participant in workforce and leadership development. This includes involvement with African-American and Hispanic groups, women’s groups, and groups advocating for gay and lesbian people.

Northwestern Mutual has tremendous opportunity to attract diverse talent, he says, and it’s right and necessary to do so. With pride, he shows a photo of nine Northwestern Mutual vice presidents, all women and all originally or currently members of the legal department.

“I feel I have been blessed to be able to have the opportunity to do new things,” Manista says. “I think of myself as a business leader first and a lawyer second, and that’s on purpose.”

## Taking a 360-Degree Perspective

Michael G. Carter, executive vice president and chief financial and risk officer of Northwestern Mutual, describes Manista as someone who is good at focusing on what is important. “He really learns and understands the details; he’s really good at looking at an issue from a 360-degree perspective,” Carter says. Carter, himself a lawyer, says Manista still has the title as chief legal officer and is respected for his skills as a lawyer, “but he’s viewed here as much more than a lawyer.”



Ray and Dawne Manista

And to view Manista as a whole, you certainly also need to view him as a family person. Not only at home, but in church, at cultural events and sports events, or in many other ways, he and Dawne are involved in much together, often oriented toward their children or friends. Their oldest child, Tyler, 26, works in accounting in Boston. Sydney, 23, is an engineer in the same city. And Jarred, 18, is in musical theater.

Ray Manista says Jarred's path offers an additional lesson in empowering people to pursue their dreams and potential. Tyler and Sydney, the two older children, largely have followed paths Ray calls "linear"—high school, college, career, and so on.

Things are shaping up differently for Jarred. Ray says Jarred "came out of the womb dancing." He has been in love with dance and theater his whole life—and there's evidence that he's good at it. Jarred left Dominican High School in the Milwaukee suburb of Whitefish Bay a few weeks earlier than scheduled (yes, he graduated) to join a production of "West Side Story" by the Lyric Opera of Chicago during the summer of 2019. And he is deferring the start of college because he has joined the cast of a different production of "West Side Story" as the play returns to Broadway this fall.

It's Jarred's dream; it's the label Jarred wants for himself now. "I'm OK with it," Ray says. "I think it's going to be an interesting run."

In large part due to Jarred's interest, Ray and Dawne have become involved in the arts and theater community in

Milwaukee and beyond. Education is also a big interest. Ray is a longtime member of the Marquette Law School Advisory Board. He became a member of the Marquette University Board of Trustees in 2017. And he has served on the board of the Milwaukee College Prep charter school network.

And the Manistas are strongly committed Marquette basketball fans. Very strongly. Well, Dawne says, maybe they've eased up a bit in recent years—they try not to take wins and losses quite as emotionally these days. But it's still a huge interest. "We've had fun," Dawne says of being so involved as fans.

Northwestern Mutual's Carter says, "Ray is like a Marquette University billboard, just the way he leads his life—family, faith, parish, both he and his wife. And he loves Marquette." Carter, not a Marquette alumnus, adds, "If you look at what Marquette is all about and you look at how he turned out, I think that's a tribute to the university."

The world is changing quickly. The business world is changing. What is required of good lawyers in a business setting is changing. The technology of it all, the speed of it all, the things people are seeking in their personal and professional lives—they're all changing.

The work world around Ray Manista is, as he puts it, a totally emerging space. "Transformation is afoot," he says.

Yet, even as he changes, Manista is consistent in important respects: He's deeply involved in the transformation, and he's doing all he can to make the change good for all. ■



# AMBITION AND ASPIRATION

## LIVING GREATLY IN THE LAW

BY JUDGE LEE H. ROSENTHAL

It is a great pleasure to be here, and I thank Dean Joseph Kearney and the faculty for the honor. Visiting Marquette University brings the particular pleasure of being in a law school committed to the Jesuit ideals of education, including *cura personalis*, care of the entire person. That is in keeping with what I want to talk about. I was intimidated when I looked at the glittery roster of prior Hallows Lecturers, and I am moved by the presence of so many distinguished judges and lawyers. I did not want to be in the position of the woman who left a dinner party apologizing for dominating the conversation. “Don’t worry,” replied her host, like mine today a renowned law school dean. “You didn’t say anything.”

It has been almost 150 years since the most famous observations on what I hope to say something about today. In the 1880s, Oliver Wendell Holmes, Jr., spoke and wrote about what we should be ambitious for, and what we should aspire to, as law students, as lawyers, as law teachers, and as judges. Although it is hard to overstate how much practicing, teaching, and deciding legal disputes have changed from 1880 to 2019, his words and question remain fresh. What does it mean today to have ambition and aspiration to “live greatly in the law”?

Justice Holmes approached this question in a context far different from the experiences most of us in this room share—informed by what he had seen and endured as a soldier in the Civil War; by his studies of law and philosophy, religion, and history; and by his work as a lawyer, scholar, and judge. Holmes nonetheless asked what sounds like the right question for us to ask now. He called it the “main question”: “How can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers’ arts, the mannerless conflicts over often sordid interests, make out a life?” Is it ambition, or some other driver, that can provide the best direction for a good and satisfying life in the law?

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**Lee H. Rosenthal** is chief judge of the U.S. District Court for the Southern District of Texas, based in Houston. She is a national figure in the judiciary, having served as chair of the Judicial Conference Committee on Rules of Practice and Procedure, to which Chief Justice John Roberts appointed her, and chair of the Advisory Committee on the Federal Rules of Civil Procedure, by appointment of Chief Justice William H. Rehnquist. Judge Rosenthal received her undergraduate and law degrees from the University of Chicago, began her career as a law clerk to Chief Judge John R. Brown of the Fifth Circuit, and practiced law in Houston before her appointment to the federal bench in 1992. This is an edited text of the E. Harold Hallows Lecture that Judge Rosenthal delivered at Marquette Law School on March 29, 2019.

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The key is to see the general beyond the particular, to search for the “remoter and more general aspects of the law.” This is what allows the law student, lawyer, law professor, and judge to “connect [their] subject with the universe and catch . . . a hint of the universal law.”

This talk looks at how to define ambition and aspiration in this context, and the roles that they might play in different stages and aspects of our professional lives. Through examples of judicial opinions, the ambitious aspects of judging are compared to the aspirational. The same questions will in turn be applied to law students, law professors, and lawyers, to ask how, in 2019, ambition and aspiration can help make out a life—to help us live greatly—in the law.

## AMBITION AND ASPIRATION

What is ambition? Ambition, as I think Holmes used it, matches my understanding. It is the desire for external validations that you already know you want. For law students, it can be ambition to win the approval of parents, or professors. For lawyers, to win the approval of more-senior associates, partners, and clients—those with power to promote and reward. For academics, it can be to win the approval of those hiring, making decisions to publish, to promote, to grant tenure, and perhaps to confer that oh-so-coveted named chair. For judges, it can be the desire for appointment or nomination; then, high rankings in bar polls; being cited and affirmed; and reelection, retention, or promotion. Ambition for all but sitting judges can include the desire to make money, to accumulate wealth, not just to attain financial security. For all, ambition includes the desire to have a secure reputation for excellence and influence in the profession. We all have ambition. We all need it. It got you all where you are; it made Dean Kearney “Dean”; it made me “Judge.”

Is ambition enough for a satisfying and gratifying life in law? Holmes didn’t think so. He recognized the economic realities of the profession, and he did not denigrate the “wish to make a living and to succeed.” He recognized that “we all want those things.” But he also saw that financial success was not enough. “[H]appiness cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars,” he said. “An intellect great enough to win the prize needs other food beside success.” Holmes thought that there was something more to the study and the practice of law, and that it is the something more that lets one studying law, practicing law, teaching law, or judging legal disputes to “live greatly in the law as elsewhere.”

Holmes gave us only a general description of what the “something more” might be. Inadequately summarized, it seems to amount to striving to see the broader principles and ideas in the quotidian facts and problems of specific matters, disputes, or cases. The key is to see the general beyond the particular, to search for the “remoter and more general aspects of the law.” This is what allows the law student, lawyer, law professor, and judge to “connect [their] subject with the universe and catch . . . a hint of the universal law.” To do this requires “complex and intense intellectual efforts,” but it is those efforts, and the insights they bring, that provide the hope of personal fulfillment. Holmes explained that “[j]urisprudence, as I look at it, is simply law in its most generalized part. Every effort to reduce a case to a rule is an effort of jurisprudence, although the name as used in English is confined to the broadest rules and most fundamental conceptions. One mark of a great lawyer is that he sees the application of the broadest rules.” And Holmes’s rhetoric, in various speeches and writings, went beyond lofty. Viewed in this way, in “the law . . . as in a magic mirror, we see reflected, not only our own lives, but the lives of all men that have ever been! When I think of this magic theme, my eyes dazzle.”

Interestingly, Holmes did not prescribe going out to do good as the best way to achieve the “something more,” although he acknowledged there is nothing wrong with efforts to improve social justice. But he found “altruistic and cynically selfish talk” to be “[a]bout equally unreal.” And pro bono work, no less than other work, has its tedium, stresses, and its mannerless conflicts over what can be sordid interests, and it, too, requires the practice of some of the “shopkeepers’ arts.” Like other legal work, pro bono matters do not routinely require the lawyer or professor or judge to look beyond the specifics to find the connections to the larger principles, to where the “something more” may live.

I think that the search for this “something more” is aspiration, and it is different from ambition. I credit the philosopher Agnes Callard of the University of Chicago for her articulation of aspiration, which is both enlightening and illuminating. Aspiration is a distinctive form of purposeful action directed at acquiring new values, and these values are not abstract, but deeply practical and active. Ambition, by contrast, does not seek to acquire a new value or the knowledge necessary to do so. Ambition tries to acquire >>

## JUDICIAL ASPIRATION AND SITUATIONAL AND INSTITUTIONAL HUMILITY

by Diane S. Sykes

It's entirely fitting that Judge Lee Rosenthal delivered this thoughtful lecture at Marquette Law School. The idea that lawyers and judges should be aspirational—that they should search for “something more” than “the quotidian facts and problems of specific matters, disputes, or cases”—has a religious parallel in the concept of *magis* in Ignatian spirituality. So her message was bound to find fertile ground at a Jesuit law school that takes its mission seriously. And it did.

Judge Rosenthal's theme is the distinction between *ambition* and *aspiration* in the study and practice of law, in legal scholarship, and in judging. She defines *ambition* as the desire “to acquire what we already value” and *aspiration* as “purposeful action directed at acquiring new values.” Within that broad framework, she focuses on one aspect of ambition: “the desire for external validations that you already know you want,” most notably recognition, promotion, and material reward. She contrasts it with a conception of aspiration that in the abstract describes a process of personal growth characterized by constant and self-conscious striving toward new values or understandings. When made more concrete, however, *aspiration* (as she uses the term) seems to be a higher form of ambition—one driven by the desire to hold to our core values—coupled with the practice of *humility*. As applied to judging—her domain and mine—she explains the dichotomy between ambition and aspiration by using three cases with particular contemporary political and legal salience. Each one illustrates the virtue of *judicial humility*.

Two aspects of judicial humility are at play in Judge Rosenthal's case studies. One is situational humility, which requires the judge to consider what he does not know about the case at hand. Her first two examples measure this aspect of judicial humility by its absence. How can the concurring Fifth Circuit judge be so certain that the district court was motivated by antireligious animus? Why does the Ninth Circuit panel so confidently declare a new legal rule in a deeply unsettled area of the law and so blithely rely on its own factual assumptions instead of deferring to the findings of the district judge, made from her superior vantage point in the trial courtroom?

The second dimension of judicial humility is institutional. In its most basic form, the judge's role is to correctly apply the relevant legal rule to the established facts in accordance with accepted procedures. Institutional humility requires sensitivity to the constitutional constraints on the judicial role and the norms of our hierarchical judicial system. Appellate judges should refrain from ascribing improper motives to their district court colleagues. All judges should guard against the temptation to overread loosely related precedents in order to constitutionalize a preferred answer to a sensitive social question, thus removing it from the democratic process. Institutional humility confines the judge to his core competencies.

Judge Rosenthal's third case—the concurring opinion in the Sixth Circuit's Affordable Care Act case—is meant to illustrate aspirational judging at its finest. The opinion is indeed a powerful example of Judge Jeffrey Sutton's principled jurisprudence. It also highlights the virtue of judicial humility, both situational and institutional. At the same time, it reflects a loftier form of ambition operating as a check on the lower form. Judge Sutton's commitment to rule-of-law norms isn't new to him; it's central to his conception of the judicial role. It's not evolutionary; it's his fixed compass. He took the politically unpopular course precisely *because* fidelity to the rule of law is deeply entrenched among his core values, not because he was seeking new understandings about the law or the judicial role in administering it. He has firm convictions about the normative constraints on the judiciary in our system of self-government, and his commitment to following those principles prevailed over any more self-interested ambitions.

Judge Rosenthal delivered a uniquely inspirational Hallows Lecture, and her uplifting message has enriched the entire Marquette Law School community.

*Diane S. Sykes, L'84, is a judge of the U.S. Court of Appeals for the Seventh Circuit. She served as a justice of the Wisconsin Supreme Court from 1999 to 2004.*



## RESPONSE

## DOING THE RIGHT THING

by Darren Bush

It is quite daunting to discuss a thoughtful tome written by a respected judge, particularly one as senior and intellectually acute as Judge Lee Rosenthal. It is even more daunting to limit that discussion to approximately 600 words, a shorter amount than is usually required for a law professor to say “hello.” For those reasons, I shall limit my remarks to some caveats concerning Judge Rosenthal’s discussion of the judicial goals of ambition and aspiration.



Judge Rosenthal summons the spirit of Justice Oliver Wendell Holmes to argue that judges seek (and perhaps *should* seek) the twin goals of ambition and aspiration. Ambition, according to Judge Rosenthal, is “the desire for external validations that you already know you want.” For judges, that could mean a variety of goals: appointment, reelection, promotion, wealth, and being well thought of within the legal community. Citing Justice Holmes, Judge Rosenthal believes that ambition is healthy: It gets us where we are: judge, lawyer, dean, or the best job in the world, law professor.

Yet I am inclined to be wary of ambition as a laudable goal. While judges subjected to the whims of the voting public must take greater care in external validation or else lose their jobs, ambition always comes at a cost. For lifelong appointees, I think the interest in becoming well known, popular, and well thought of can (though not necessarily will) be in conflict with the ultimate goals of law.

As an example, consider some of the Supreme Court cases commonly thought to be the worst decisions of all time: *Korematsu v. United States* (1944), *Dred Scott v. Sandford* (1857), *Buck v. Bell* (1927), *Plessy v. Ferguson* (1896), and *Citizens United v. Federal Election Commission* (2010) all come to mind. In each decision, I imagine that the Court held fast to contemporaneous notions of right and wrong, notions that history has shown to lead to disastrous results.

Worse, the search for external validation is Sisyphean, a matter that my coauthor and I explored last year with respect to the law professoriate (50 *Loy. U. Chi. L.J.* 327). As a famous television show, *Northern Exposure*, once lamented, “You’re dealing with the demon of external validation. You can’t beat external validation. You want to know why? Because it feels sooo good.” In other words, external validation is like a drug, and once a goal is achieved, then other goals will be required to get the next “hit.” Those “hits” cannot come from everyone: Judging leaves at least one party unhappy. And maybe on good days, it leaves both sides unhappy.

A judge making decisions in search of external validation could instead favor a party or follow perhaps-misguided views of public opinion. And some Supreme Court decisions run contrary to the goal of external validation from the masses. Seeking to protect those who are “exceptionally affected” or “discrete and insular minorities” comes to mind, to use the familiar terms from the Supreme Court’s decision in *Bi-Metallic Investment Co. v. State Board of Equalization* (1915) and, of course, its footnote 4 in *United States v. Carolene Products Co.* (1938). Justice Holmes suggested, and Judge Rosenthal concurs, that ambition is insufficient. I am in agreement.

The aspirational goal is trickier. Judge Rosenthal proclaims that “[o]nly when we judges are aspirational do we deserve, and are we likely to get and to keep, ‘the consent of the governed.’” The problem is that consent of the governed assumes a more cohesive electorate. While judicial appointments have always been political, they are increasingly so. And, in my opinion, as judges become more tethered to the aspirational goals of their respective political football teams, the less likely that society will be better off.

While Judge Rosenthal cites Justice Holmes, I turn to another handy reference: Judge Learned Hand. In “The Contribution of an Independent Judiciary to Civilization,” Judge Hand stated that “a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.” This is the greatest concern I have about the judiciary. The politicization of the judiciary will ultimately lead to the ruin of the independent judiciary.

Instead, I would love to have a judiciary filled with a diverse group of humble, independent thinkers such as Judge Rosenthal. I fear that is not the direction we are heading. As it seems now, the goals of ambition and aspiration will blend into a unitary goal that “our side must win.” Over the long run, this assures that no one wins.

*Darren Bush is the Leonard B. Rosenberg Professor at the University of Houston Law Center.*

what we already value—whether money, praise, publication, tenure, or promotion. Ambition helps propel us down a path we already want to travel. It does not help us explore a new path or go to a new place. In her book, *Aspiration: The Agency of Becoming* (2018), Callard describes aspiration as a “form of agency in which one acts upon oneself to create a self with substantively new values by allowing oneself to be guided by the very self one is bringing into being.” It can be an aspiration to expand understanding or knowledge into a new area. It can be an aspiration to become a more effective counselor, a gifted teacher, a wise judge. This is not because it will bring material reward or external praise but, rather, because it will change oneself.

A law student whose final target is money, the approval of her parents, or social status would not count as an aspirant; these targets are marks of “ambition,” not aspiration. The ambitious law student does not seek to acquire a value: even before entering law school, she knows that she values wealth, her parents’ or teachers’ approval, and professional or social status. She does not hope that law school will teach her the value of these things. She hopes that law school will help her satisfy these values that she already has.

Nor can our law student be aspirational by generally hoping to help people or to improve social justice, because she does not have a firm grip on what she would be realizing. Aiming at this goal with such limited knowledge of the goal is a matter of trying to learn what that goal amounts to. The aspirational law student first comes into contact with, and aims at, the value by learning about it. This learning can change what she values. The experienced lawyer, by contrast, knowing that she is entering a conference room or court with a client who has difficult legal choices to make, can better possess the relevant aim. She may think to herself, “I want to help this client make a good decision without telling her what to do, but by ensuring that she understands how others in similar situations have fared and what alternatives she has, with what benefits and disadvantages.”

We aspire by doing things, and the things we do change us so that we are able to do the same things, or things of that kind, better and better. As aspirants, we try to see the world through another person’s eyes, especially through the eyes of the person who has the value we aspire to acquire. In aspiration, it is this created self, the self with the desired values,

that can make intelligible the path this person wants his or her life to take.

The word *aspiration* is sometimes used to describe any kind of hope or wish or long-term goal to bring about some result. This is not aspiration in my sense. Aspiration is not merely a vague hope or wish, although it often begins that way. It is, as Callard puts it, “rational, purposive value-acquisition.” In order to value something, we must engage with it in a way that takes time, effort, and practice. Given our limits, we cannot devote ourselves to valuing all of the things we see as valuable, personally or professionally. How to choose? And how can we have time and energy to be both ambitious and aspirational?

## THE CONTEXT: JUSTICE HOLMES’S OWN PATH

It is useful first to look at the context that started this set of questions, the life and background of the lawyer, professor, and judge who framed the topic before us. I will draw substantially on the biography by Professor G. Edward White to do so. Holmes was born in Boston in 1841 and lived until two days short of his 94th birthday. His father, Oliver Wendell Holmes, Sr., was a physician, a professor of medicine at Harvard, and an author of novels, verse, and humorous essays. Holmes grew up in a literary, and prosperous, family. He attended private schools in Boston and then, like his father, Harvard. He was not overly impressed with the Harvard of that time, finding the curriculum stultifying. He was already a gifted writer and found satisfaction as a senior editor of the *Harvard Magazine* and as the author of many essays. His graduation was in some doubt; after the faculty publicly admonished him for “disrespect” toward a professor, Holmes decamped to train for the Civil War. His unit was not immediately sent to the front, so Holmes returned to Cambridge to get his college degree, in June 1861.

Holmes saw his first military action in October 1861. Within the first hour of battle, he was severely wounded in the chest. He took months to recover. On his return in September 1862, he was promptly wounded again and, while recovering, fell victim to a common soldier’s ailment—severe dysentery. He recovered in time to be in Virginia at the Battle of Chancellorsville in May 1863, where he was again wounded. He finally returned as a staff officer, out of the infantry line of fire. He joined because of a ▶▶

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**Ambition can be on both ends of the political spectrum; it is not more on the left or the right. I want to give you an example of judging that might show ambition at work. I want also to give examples that may demonstrate how judges may use aspiration, which we also share, to better understand and even improve the law.**

sense of duty toward the antislavery cause, but he left the Union Army when his three-year enlistment expired. Holmes apparently, and justifiably, felt that he had done his duty—and that he had survived one battle too many to continue tempting fate.

Holmes went back to Boston, decided to study law, and entered Harvard Law School in 1864. He was admitted to the Massachusetts bar in 1867. By the 1870s, his peers were writing that Holmes “knows more law than anyone in Boston of our time, and works harder at it than anyone.”

For the next 14 years, Holmes practiced law in Boston. He appears to have been fully aware of the realities of private practice. He noted in his diary when he was admitted to the bar that, on his first day as a lawyer, “[t]he rush of clients postponed on account of weather.” Although Holmes extolled the possibility of living greatly in the practice of law, his happiest time in practice was in the activities close to legal scholarship, such as drafting briefs and arguing cases. And, in not too much time, his focus shifted to scholarship.

Holmes’s most famous work, *The Common Law*, published in 1881, grew out of a series of 12 lectures trying to explain the fundamentals of American law. Holmes questioned the historical underpinnings of much of Anglo-American jurisprudence. The work contains Holmes’s most famous quotation, “The life of the law has not been logic: it has been experience.” Holmes had come to believe that even outdated and seemingly illogical legal doctrines

survive because they find new utility. Old legal forms are adapted to new social conditions.

Shortly after publishing *The Common Law*, Holmes took a teaching job at Harvard Law School. But after teaching only one semester, he resigned to accept an appointment to the Supreme Judicial Court of Massachusetts, the state’s highest court. Holmes’s departure from Harvard caused some consternation, as he was one of only five full-time professors and an endowment had been specially raised to fund his professorship. Why leave the academy, and so abruptly? Holmes had quickly concluded that his opportunity for generalization—moving from the specific to the universal, from the meaningless details to the animating principles—inside the academy was small. “[T]he day would soon come,” he wrote, “when one felt that the only remaining problems were ones of detail.” He was concerned that he could not be a great scholar of law within the legal academy, and at age 40, he did not think he had enough time to go into another field, achieve the recognition he was ambitious for, and still make a living.

He ended by expressing dismissive feelings about the legal academy. It was a “half life,” a “withdrawal from the fight in order to utter smart things that cost you nothing except the thinking them from a cloister.” He also had ambivalent feelings about the practice of law. On the basis of 14 years of practice, he acknowledged that it may be “unhappy, often seems mean, and always >>

## RESPONSE

## AMBITION AND ASPIRATION— AND CELEBRITY

by **Suzanna Sherry**

Judge Lee Rosenthal has done a masterful job of explaining how we ought to live our lives in the law (and how we ought not to). Her warnings about the consequences of ambition without aspiration—especially for judges—are timely and troubling. While most district court and court of appeals judges exemplify Judge Rosenthal’s description of how aspiration tames ambition, many Supreme Court justices seem to be becoming overly ambitious.



One might think that Supreme Court justices would be the judges most likely to follow their aspirations rather than their ambitions. They have reached the pinnacle of their careers, what Judge Rosenthal calls the brass ring. What more could they be ambitious for?

In a word, celebrity. Supreme Court justices of all political stripes are writing books and going on book tours, appearing on television and in movies, and giving speeches not just about law but about politics and religion. As Professor Richard L. Hasen has put it, some justices have become “rock star Justices, drawing adoring crowds who celebrate [them like] teenagers meeting Beyoncé.”

What’s even worse is that the justices are seeking not generalized fame but adulation within particular ideological niches. We have Federalist Society justices and American Constitution Society justices. Many justices use their books and public speeches to telegraph their views on controversial constitutional issues. Each justice is, in short, playing to his or her fan base.

This is a new and dangerous development. As recently as two decades ago, justices worked in relative obscurity. They were more aspirational than ambitious, seeking to better understand and implement the law. They were, in other words, like most district court and court of appeals judges today. Not perfect, to be sure, but to the extent that they were concerned about their own reputations, they viewed those as resting primarily on the reputation of the Supreme Court as an institution. Now the Court seems less an institution than a collection of individual celebrities, competing for the attention of their adoring fans.

The consequences of this ambition to achieve celebrity status are bad for both the Court and the country. When justices play to their political base, they create the appearance—and, eventually, perhaps, a reality—that judicial decision-making is primarily ideological. As Judge Rosenthal points out, judges who are ambitious without aspiration are also all too sure of themselves. So the justices, both in their judicial opinions and in their extracurricular activities, present their one-sided views as the only correct ones. They are dismissive, sometimes to the point of incivility, of their colleagues’ views. Between the celebrity, the certainty, and the incivility, ambitious behavior by the justices is likely to convince the public that judges are just politicians in black robes. If so, the Court’s legitimacy will suffer. And if the Court loses its legitimacy, the country loses its greatest protection against governmental overreaching and majority tyranny.

What can we do about it? We should stop treating the justices like celebrities and start treating them like lawyers and judges. We should shout from the rooftops (or at least from the pages of law-related publications such as this one) that justices who play to their base are betraying their role and their principles. And, like Judge Rosenthal, we should take every opportunity to explain how to practice law aspirationally and to praise and thank those judges who do so. Thank you, Judge Rosenthal, for both telling us and showing us how to be a good judge.

*Suzanna Sherry is the Herman O. Loewenstein Professor of Law at Vanderbilt University.*

## RESPONSE

## AGAINST DOCILITY

by Chad M. Oldfather

Judge Lee Rosenthal does us a great service by connecting the thought of Professor Agnes Callard with that of Justice Oliver Wendell Holmes, Jr. While the judge naturally focuses on the implications of this connection for the judicial role, she encourages students, lawyers, and professors to ponder it as well. I accept her invitation.

Aspiration, in Callard's conception, involves a quest for betterment—one that entails a leap of faith. The aspirant seeks to possess a new set of values, whose nature she cannot fully appreciate until she has acquired them. She strives to learn to appreciate, say, classical music, believing that it will enrich her life in some not-fully-anticipated way. She looks to better herself through education. But, as Callard notes in her recent book, *Aspiration: The Agency of Becoming* (2018), "until I am educated I do not really know what an education is or why it is important."

Aspiration stands in contrast to ambition, by which one might seek an education simply as a way to make money or achieve status. Both Judge Rosenthal and Professor Callard suggest that ambition's motivations, without more, make for thin gruel. As the writer George Saunders reminds us, "'Succeeding,' whatever that might mean to you, is hard, and the need to do so constantly renews itself (success is like a mountain that keeps growing ahead of you as you hike it)." True nourishment requires an effort to become something more than one is.

All of this appears in Holmes's work. The notion of "liv[ing] greatly in the law," with which Judge Rosenthal opens, appears in a Holmes speech entitled "The Profession of the Law." To Holmes, living greatly in the law involves a leap of faith: "No man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen—to dig by the divining rod for springs which he may never reach." It is a species of aspiration. External recognition may or may not come, but the quest is its own reward.

A few pages later in the same volume of Holmes's work appears a speech titled "The Use of Law Schools." Even in 1886, it turns out, there were complaints—by those Holmes calls "the impatient"—that law school should provide more practical training. He is skeptical, suggesting that legal education's best aim is to encourage an attitude that, again, corresponds to Callard's conception of aspiration. Here is Holmes:

"Education, other than self-education, lies mainly in the shaping of men's interests and aims. If you convince a man that another way of looking at things is more profound, another form of pleasure more subtle than that to which he has been accustomed—if you make him really see it—the very nature of man is such that he will desire the profounder thought and the subtler joy."

Holmes no doubt overclaims by suggesting that law schools cannot meaningfully provide practical education. But he is surely correct in highlighting the limits of what can be taught relative to the vastness of what must be learned: "no teaching which a man receives from others at all approaches in importance what he does for himself, and . . . one who simply has been a docile pupil has got but a very little way."

All of this rings true. Looking back over my own life in the law, I write this with a deeper appreciation of the values to which I aspired than I could ever have imagined when I began. I get more today out of reading Callard and Holmes (and Rosenthal) than was possible for my younger self. Reaching this point took work—and leaps of faith. Looking ahead, I aim to continue to dig for springs I may never reach, and to heed Callard's (and Holmes's) injunction that "[t]urning ambition into aspiration is one of the job descriptions of any teacher."

*Chad M. Oldfather is professor of law at Marquette University.*



challenges your power to idealize the brute fact—but it hardens the fibre and I think is more likely to make more of a man [or woman] of one who turns it to success.” For Holmes, as summed up by Professor White, “Not to engage in ‘the practical struggle for life’ is to choose the ‘less manly course’; to engage in the world of affairs with success is to become ‘more of a man.’” But what did he think it would be like to be a judge? More like a businessperson, engaged in a “practical struggle for life”? Or more like the academic and only aspect of practice he really liked—writing briefs and arguing them? Or, to use his word, was the bench “merely” enough?

Off our hero went to find out. He served on the Massachusetts Supreme Judicial Court for 20 years, becoming its chief justice. He loved the legal research and what he called the “writing up” of cases, and he found the work easy, which amazes me. But Holmes was never accused of modesty, especially about his superiority to his fellow judges. Holmes said of his colleagues that they “are apt to be naïve, simple-minded men, and they need . . . education in the obvious—to learn to transcend [their] own convictions and to leave room for much that we hold dear to be done away with . . . by the orderly change of law.”

Though Holmes was happy on the Massachusetts Supreme Judicial Court, he wanted greater fame and challenge. He was a famously, and obviously, ambitious man. In 1902, Holmes was appointed by President Theodore Roosevelt to the United States Supreme Court. Holmes was often at odds with his fellow justices and wrote eloquent dissents, often joined by Justice Louis Brandeis. In many instances, their views became the majority opinion in a few years’ time. Holmes resigned due to ill health in 1932, at age 90, after serving on the Supreme Court for 30 years. He died in 1935.

In his time, Holmes was considered a “liberal” because he wrote opinions reinforcing the right of free speech and the right of labor to organize, but he was what we might call “conservative” in personal-injury cases. He was a champion of “judicial restraint,” deferring to the judgment of the legislature in most policy matters. That put him on what we now clearly view as the wrong side of some issues. He upheld with enthusiasm sterilization of the disabled, famously saying that “[t]hree generations of imbeciles are enough” and noting that “establishing the constitutionality of a law permitting the sterilization of imbeciles . . .

gave me pleasure.” He opposed women’s right to vote, stating that it would take “more than the 19th Amendment to convince me that there are no differences between men and women.” But his personal biases did not often find expression in his judicial opinions. “I loathed most of the things I decided in favor of,” he wrote. His justification was hardly self-deprecating: “[I]f my fellow citizens want to go to Hell I will help them. It’s my job.”

Holmes embodied both ambition and aspiration. He hungered for external recognition. He was hypersensitive to criticism, and he never achieved the external recognition he craved. Approaching age 68, on the Supreme Court, he wrote, “I have not as much recognition as I should like.” He extolled the joys of thinking about the law, but his own experience of those joys was apparently diluted by what he saw as the lack of attention to “what one [read ‘Holmes’] thinks most important.” As Professor White has observed, Holmes’s life was colored by his fear of “powerlessness” and his intense “power-seeking.” He was ultimately powerless to achieve his ambition of ensuring that others would adequately appreciate the quality of his achievements. That’s a big problem with the dependence on external validation that characterizes ambition. The goals of professional recognition and eminence—position, advancement, wealth, and reputation—are determined by others and are beyond our own power to control. But Holmes also aspired to understand the fundamentals of the law, to figure out if studying jurisprudence, history, and philosophy would show that law was the record of the struggles for supremacy among powerful interests or of gradual efforts to improve the rationality of judicial decision-making. He wanted to replace vague moral-sounding phrases and instead figure out what does, or should, make for liability, fault, or guilt, and what remedies or punishments do or should follow. He was both ambitious and aspirational.

Learning from the combination, I want to look at ambition and aspiration first in the world I know best—the world of judges and judging. All judges I know have both. The difference between a judge who bases reasoning or result, or both, primarily on ambition, and one who rules based primarily on aspiration, when they point different ways, is a useful way of examining two related parts of judging. Both are important. The first helps measure the quality of judicial performance. And the second helps explain the relationship of judicial independence and judicial accountability. ▶▶

**As Professor White has observed, Holmes’s life was colored by his fear of “powerlessness” and his intense “power-seeking.” He was ultimately powerless to achieve his ambition of ensuring that others would adequately appreciate the quality of his achievements. That’s a big problem with the dependence on external validation that characterizes ambition.**

One negative type of ambition in a judge, as Judge Carolyn Dineen King, an esteemed Fifth Circuit judge, noted in 2007 in her own Hallows Lecture, is to rule with one eye on the obituary and retirement announcements, and one eye on judicial promotion and vacancy lists.

## THE AMBITIOUS JUDGE AND THE ASPIRATIONAL JUDGE

There are many ways to be ambitious as a judge, and some, if not most, of them can be found in all of us. One is to want recognition as a jurist of distinction or impact, as someone who is developing the law in ways he or she hopes will be recognized as novel, creative, and even profound. This part of a judge may count ambition as realized by the number of citations the judge's opinions receive, whether in other decisions, law review articles, or treatises, or by the number and kinds of requests to give speeches in law schools, conferences, or symposia.

Another way is to be ambitious for promotion. This aspect of a judge may count ambition as realized by achieving a nomination to be an appellate judge from the trial court, or by the state or federal brass ring: a nomination to the Supreme Court. One negative type of ambition in a judge, as Judge Carolyn Dineen King, an esteemed Fifth Circuit judge, noted in 2007 in her own Hallows Lecture, is to rule with one eye on the obituary and retirement announcements, and one eye on judicial promotion and vacancy lists.\*

A third way is to seek the satisfaction that one deeply committed to an overarching political, philosophical, or moral set of beliefs might get from opportunities to reach results that will entrench or expand these beliefs. I count this as ambition in a negative sense when the judge strives for this preferred outcome where the facts, or law, or both, do not justify it. I count this as aspiration—even if serendipitous, an unintended good deed—when the facts, the law, and the context converge with the judge's preferred outcome, and that preference is based on a sincerely held belief that it, and it alone, is the right outcome in the larger and more fundamental framework.

All of these aspects are present to some degree in all judges. Ambition can be on both ends of the political spectrum; it is not more on the left or the right. I want to give you an example of judging that might show ambition at work. I want also to give examples that may demonstrate how judges may use aspiration, which we also share, to better understand and even improve the law.

\* See Carolyn Dineen King, "Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts," 90 *Marq. L. Rev.* 765, 776–77 (2007); *Marq. Lawyer*, Summer 2008, at 48, 55. – Ed.

It is no accident that some of these cases involve difficult and sensitive issues, topics such as abortion, sexual orientation, and the extent of civil and constitutional protections. These cases require judgments that challenge any judge. Before I begin, please let me be clear that I am not commenting on the merits, but only on the judges' rhetoric and approaches in their opinions, to try to explore the roles of ambition and aspiration.

One example is from *Whole Woman's Health v. Smith* (2018). In this case, Texas had enacted new regulations for disposing of fetal remains; these required third-party vendors to bury or scatter the ashes of embryonic or fetal tissue. Several Texas-licensed abortion providers challenged the regulations in a suit under 42 U.S.C. § 1983, seeking an injunction on the ground that the required method was so expensive as to unduly burden the rights of women seeking abortions. The case was before a highly experienced district judge. The judge had granted a preliminary injunction against the state regulations, finding both vagueness and burdensomeness. Texas appealed, and the Texas legislature passed similar legislation, which the plaintiffs again moved to enjoin. After entering a preliminary injunction, the judge set a bench trial date. The judge ordered some discovery from the Texas Conference of Catholic Bishops in preparation for the trial. The conference took an interlocutory appeal from the discovery order. The Fifth Circuit panel majority found that, in ordering the discovery, the district court had abused its discretion in a number of ways, including violating the conference's First Amendment rights.

I want to focus on the concurrence in the Fifth Circuit. In this concurring opinion, one of the two members of the panel majority wrote again, and separately, both to agree with himself to reverse the district judge, and to accuse—not too strong a word—the district judge of compelling the discovery “to retaliate against people of faith for not only believing in the sanctity of life—but also for wanting to do something about it.” In other words, the district judge must have been motivated by animus, by personal prejudice, against religion and against those who opposed abortions for religious reasons.

The third and dissenting panel member did not let this go quietly. In an elegant opinion, the dissent took the majority to task for ignoring the limits on appellate-court review and the usual rule against any interlocutory review of discovery orders. The dissent then took on the concurrence's



accusation that the district judge had been biased in his discovery management:

“Even more troubling are the potshots directed at the district court, and the concurring opinion then piles on. That the pecking order of the system allows appellate judges’ view of the law to ultimately prevail should be satisfaction enough for us. While vigorous disagreement about the law is part of the judicial function, there is no need to go beyond the identification of legal error by questioning the motives of our district court brethren. That is especially true when the legal issue is one that the majority opinion concedes is novel, and when the ill motives are pure conjecture. What is one of the sins of the trial court according to the majority opinion? Working and issuing orders on a weekend.

“Our district court colleagues deserve most of the credit for the federal judiciary being the shining light that it is. They work under greater docket pressures, with greater time constraints, yet with fewer resources. And unlike appellate judges on a divided panel who can trade barbs back and forth, a district judge has no opportunity to respond to personal attacks in an appellate opinion. They deserve our respect and collegiality even when, or especially when, they err as we all do at times. Among the exemplary group of trial judges who serve our circuit, the one handling this case stands out: with over three

decades of service, he is now essentially working for free as a senior judge, and volunteering to travel thousands of miles outside the district of his appointment to help with the heavy docket in the Western District of Texas. Speculating that malice is behind his decisions seeking to expedite a high profile case with a rapidly approaching trial date is not the award he is due.”

The dissent is by an aspirational judge. The dissent stresses the institutional and precedential constraints, not evident in the concurrence. This opinion seeks to strengthen the integrity and respect that judges earn by being aspirational, not ambitious. District judges everywhere stood up and cheered. Fortunately, aspirational appellate-court defenders of aspirational lower-court judges are not often needed. It is reassuring to see one willing to take on the burden, because that is what it is.

Another example shows that the ambitious side of judging covers both ends of the political spectrum. In *SmithKline Beecham Corp. v. Abbott Laboratories* (2014), the Ninth Circuit held that the Equal Protection Clause forbids a party from striking a juror based on the juror’s sexual orientation. The court concluded that heightened scrutiny applies to equal protection claims involving sexual orientation under the Supreme Court’s decision in *United States v. Windsor* (2013) and based on a history of discrimination demonstrating the need for this ▶▶

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heightened scrutiny. The lower court, according to the appellate court, had therefore erred in not applying *Batson v. Kentucky* (1986), which held unconstitutional using a venire member's race to exercise a peremptory strike and keep that member off the jury. The appellate court opinion has a feature characteristic of using ambition to reach a particular result, in that the appellate court challenged the district court judge's finding without acknowledging the unsettled nature of the law in this area and of the assumptions used in finding a *Batson* violation.

Let's set forth the particulars. During voir dire, a venire member referred to his "partner" and used the male pronoun in reference to the partner several times. The defense attorney did not ask questions about whether this venire member could be a fair and impartial juror, but peremptorily struck the juror. Opposing counsel raised a *Batson* challenge, which the district judge rejected because it was unclear whether *Batson* applied to sexual orientation. The judge explained that "there is no way for us to know who is gay and who isn't here," but she also noted that if the party struck other venire members based on apparent sexual orientation, the ruling might change. In its opinion, the Ninth Circuit immediately proceeded to the *Batson* analysis and found a prima facie case of discrimination and a failure by the striking lawyer to provide an explanation. The result: a *Batson* violation.

But the Supreme Court's opinion in *Windsor* was not as clear on heightened scrutiny as the Ninth Circuit opinion suggested. The appellate court at bottom disagreed with the district court's findings, including those findings ordinarily afforded considerable deference. I would call the district judge's ruling in that case aspirational in the cautious approach to this novel legal question and the frank acknowledgment of the murkiness of the law in this developing area. The judge was willing to state on the record her deep uncertainty about this area of the law. Cases showing ambition often show judges stating with complete confidence a particular interpretation of facts or reading of the law that many would find debatable. The judge here knew what she did not know, and she had the honesty to say it. The appellate majority, by contrast, was confident.

This recognition of uncertainty, of indeterminacy, and of limited knowledge—all this is a sign of aspiration. Judge Learned Hand said it most

**Learned Hand explains this spirit of liberty as "the spirit which is not too sure that it is right." The spirit of ambition, unalloyed by aspiration, is either sure that it is right, or uncaring. Judge Hand's spirit of liberty is "the spirit which seeks to understand the minds of other men and women."**

eloquently, in remarks known as the "Spirit of Liberty" speech. This speech, given in 1944, during the Second World War, is a one-page poem about what is perhaps the law's most fundamental aspiration—to the spirit of liberty, the freedom from oppression, the freedom to be ourselves. Learned Hand explains this spirit of liberty as "the spirit which is not too sure that it is right." The spirit of ambition, unalloyed by aspiration, is either sure that it is right, or uncaring. Judge Hand's spirit of liberty is "the spirit which seeks to understand the minds of other men and women." Aspiration seeks to do this; ambition without aspiration either assumes that it knows the minds of others or, worse, does not care.

I do not mean to end on a note of pessimism about the judiciary. Instead, I will conclude with a salute to an aspirational judge's opinion. In *Thomas More Law Center v. Obama*, in pages 27 to 53 of a 64-page ruling, this Sixth Circuit judge broke a one-to-one tie on the three-judge panel. One panel member had maintained that the Affordable Care Act represents a valid exercise of congressional power under the Commerce Clause of the Constitution. Another member reached the opposite conclusion. The tie-breaking, aspirational judge broke ranks with fellow conservative jurists and, on Commerce Clause grounds, endorsed the constitutionality of the law against the facial pre-enforcement challenge.

No matter where you stand on the Affordable Care Act as policy or law, the tie-breaking judge gifted us, on many levels, with a remarkable piece of judicial writing. The opinion was both legally cautious and definitely nonpolitical. It defies pigeonholing as "liberal" or "conservative." It was thorough, careful, and based on coherent, workable principles of institutional integrity and soundness.

Why does this balanced, technical exposition shine as the work of an aspirational judge? For this reason: When this judge wrote it, he was on every short list for a Republican president's Supreme Court nomination. He is brilliant, highly respected, and schooled in the classrooms of Justice Scalia and other "conservative," textualist judges; he is a former Hallows Lecturer.\* When this judge voted to reject the constitutional challenge to the Affordable Care Act, I assume he knew that he would likely be off or way down on the list. And that is just what happened. This is judicial courage along the lines shown decades ago by trial judges such as ▶▶

\* See Jeffrey S. Sutton, "Barnette, Frankfurter, and Judicial Review," 96 *Marq. L. Rev.* 133 (2012); *Marq. Lawyer*, Fall 2012, at 13. – Ed.

## STRUCTURED REFLECTION AND THE ROLE OF OUR INSTITUTIONS

by Nancy Joseph

Judge Lee Rosenthal's appeal to live a life in the law tempered by aspiration rather than ambition invites us, as law students, lawyers, academics, and judges, to reflect on what sustains and fulfills us for a life in the law. This response comments on the importance of having structured forums for such reflections and the role of our institutions in creating such opportunities for reflection.

Pausing to reflect on our aspirations, or, in my view, on what sustains and fulfills us, is valuable in all professions, but our profession may have a greater need than average. A number of surveys raise concerns about dissatisfaction among lawyers, and some literature documents an alarmingly disproportionate rate of depression among us. A good way to start addressing this is to pause from the pressures of deadlines, clients, billable hours, and dockets, in order to consider the more fundamental questions. Engaging in this type of reflection can be done throughout our careers to focus and to recalibrate and, when needed, to align our values with our conduct and career choices.

In recent years, the Federal Judicial Center, the educational arm of the federal judiciary, has recognized the need for judges to pause and reflect and has begun to offer mid-career seminars for federal judges. Mid-career seminars give judges the opportunity to reflect on that "something more," as Judge Rosenthal would phrase it—the aspiration that goes beyond ambition. During a two-and-a-half-day seminar, judges in small groups discuss: What are the paradigms of judging, both historically and currently? What do we see as our role? What makes a good judge? What sustains us in our daily work and careers? The seminar thus invites an inward look, not at our ambitions, but at our aspirations as individual judges and for the judiciary.

Having completed my first eight-year appointment as a U.S. magistrate judge, I recently attended my first such mid-career seminar. I was not sure that I welcomed the implications of "mid-career," but afterward I was grateful for the opportunity to pause and reflect, to "check" myself. While I may have been able to do this mid-career assessment on my own, it was uniquely beneficial in a structured environment with other mid-career judges and with the guidance of academics, judges, and lawyers who have thought and written about issues particularly relevant to judges in mid-career. These include the complexities of judging, emerging technologies affecting judging, and coping strategies.

Of course, reflecting on self-improvement cannot be fully accomplished by attending seminars. Each individual has the primary responsibility to do the ongoing work of probing her aspirations. But our institutions—law schools, firms, bar associations—also have a role to play, as they are the conveyors of our values as a profession. In this regard, it strikes me as important that the Federal Judicial Center, including by extension the federal judiciary, has affirmed the importance of such reflective work by putting resources into this type of seminar. But what about law students? What opportunities do they have to step away from the pressures of grades, making law review, finding internships and clerkships, job searches, and student debt, to reflect on who they aspire to be? What about the practitioner? What opportunities exist for the practicing attorney not just to acquire new skills or updates on the law, but also to reflect on whether her ambitions and aspirations are aligned? The structured opportunity to reflect on and refuel our aspirations should not be a luxury afforded only to federal judges. Our institutions should create structured opportunities for all of us to engage the question of what sustains and fulfills us in a life in the law.

*Nancy Joseph is a United States magistrate judge for the Eastern District of Wisconsin and previously served as an assistant federal defender in Milwaukee.*



## RESPONSE

## AMBITION'S FOIL: THE JOY OF LEARNING

by Anna Fodor

Upon hearing the subject of Chief Judge Lee Rosenthal's Hallows Lecture, I was excited for the Marquette Law School community, particularly our students, to hear about a different facet of the legal profession, beyond the usual fare of theory, precedent, and policy. I did not, however, foresee the clarity with which it would permit me to see my own path in the law. Before Judge Rosenthal's lecture, I had not imagined aspiration—in the judge's sense of the word—as ambition's natural counterpart. Ambition, I knew. The need for external validation, which Judge Rosenthal (rightly, in my estimation) identifies as the driving force behind ambition, runs rampant in law schools and practice.\*

When, after a clerkship, I decided not to return to private practice but instead to use my law degree to work with students, I did so as an answer to a question posed by a loved one: "Why are you letting ambition guide you?" I couldn't quite answer the question. Even though I deeply enjoyed certain parts of my work—homing in on a novel ambiguity or discovering that magical precedent that cracks a case wide open—I always had one eye on the next brass ring. It became clear that something had to change, that I wanted to change. Still, the decision to leave traditional practice was not an easy one. On forms and in introductions, I would no longer be an attorney. Ambition asked: "Would anything else be enough?"

It would, and then some, but not for the reason I had first assumed. Initially, I thought that by leaving the fancy title behind, I was following "my passion," trite as it may sound. And, well, that's not *untrue*. I had always wanted to work with students; it's part of the reason I avoided even the thought of law school until several years after college. But "working with students" was just a vague, amorphous idea. It got me to my position at Marquette Law School, but it does not define the value I derive from it. I do not wake up every morning, birds chirping, sun shining through my window, and raise my arms, exclaiming: "I get to work with students today!" Rather, it's the individual law students with whom I get to work, the research on learning in law school that I get to apply to our academic success program, the efforts to prepare students for practice with compassion and rigor, the class content that I get to treat as a mini-scholarly inquiry while asking my students to open their minds and come along for the ride—this is what fuels me. I get to do this work—to interact with individuals and ideas—then apply the knowledge gained, evaluate my success, rethink my application, and do it all over again the next day. In essence, I get to learn. That is why this is more than enough.

Before confronting Judge Rosenthal's lecture, however, I don't think I was able to put that into words. I thought that the antidote to unadulterated ambition was the following of that sincerest interest, be it in the courtroom, the boardroom, the classroom, or elsewhere. In fact, that is only the beginning. Ambition's real foil, the joy of it all, can be found in the learning. This is aspiration's driving force. And it can be found, truly, in so many different roles, sectors, and practices in the law.

I thank the good judge for the lesson. I will do my best to pass it along.

*Anna Fodor is assistant dean of students and a member of the part-time faculty at Marquette University Law School.*



\* For more on this subject, Professor Lawrence S. Krieger of Florida State University has done impressive work identifying and addressing the link between the increase in students' focus on extrinsic motivations once they begin law school and the decline in well-being among law students and, eventually, lawyers.

Judge Frank Johnson in Alabama and appellate judges such as Elbert Tuttle and John Minor Wisdom in the Fifth Circuit, who enforced desegregation rulings despite shunning in their communities, crosses burned on their front yards, and other personal attacks. The tie-breaking judge in the Sixth Circuit Affordable Care Act case worked hard to be careful, precise, and respectful of institutional integrity, despite a high and known personal cost. An ambitious judge might, I think, have been tempted to reach a different result. This judge reached past ambition to aspiration.

## FOR LAW STUDENTS, PRACTITIONERS, ACADEMICS, AND JUDGES

Justice Holmes lit this fire. Does it provide warmth or light today? How can we, in our different roles and work in the law, aspire to aspiration and use ambition to help? What might this look like on the ground for a law student, a lawyer in practice, a scholar and teacher, or a judge?

First, the law student. Ambition will help you have the driving force to get good grades; a coveted position on a journal, on moot court, as a research assistant or judicial intern; a judicial clerkship; a desired summer job; a permanent offer. These all depend on external validation. These can be so difficult and consuming to achieve that they seem enough. But they don't let you answer the

**The tie-breaking judge in the Sixth Circuit Affordable Care Act case worked hard to be careful, precise, and respectful of institutional integrity, despite a high and known personal cost. An ambitious judge might, I think, have been tempted to reach a different result. This judge reached past ambition to aspiration.**

Holmes questions. What do I aspire to in becoming a lawyer? What am I learning to value, through a rational and purposive process of working to learn and care about something new, something more than I came to law school already valuing?

Some may find new and great value in doing good work in the law, meaning pro bono work. That may be all or part of the answer, though Holmes was skeptical. In law school, this goal is perhaps more likely to contribute to learning a new value because it allows the law student to see some of the broader principles that animate Anglo-American common law, an essential quality of aspiration. But there can be still more to aspiration than a hope, or even a plan, to work for a notion of public good.

Let me give you an example. When I chaired the Judicial Conference's Advisory Committee on the Federal Rules of Civil Procedure, we held public hearings on proposed amendments to the rules. Some of the amendments were controversial. One of the witnesses to testify at one such hearing was a law student. He emanated excitement and enthusiasm. He described how he loved civil procedure and the civil rules. This is not the way most law students, or lawyers, describe this part of the curriculum or the practice. This student had come to see American civil procedure as a set of answers to a set of fundamental questions that every civil justice system must answer. Who gets access to the court system? (Pleading sufficiency.) Who gets what information to pursue a claim or a defense, and how? (Discovery.) Who gets the public resource of a judge, or a jury, in a trial? (Motions, summary ▶▶



**So my unsolicited advice for the law student who aspires to aspiration? Push yourself to learn new values beyond what brought you to law school in the first place. Look beyond grades and jobs and other external validations. Take doctrinal courses that will school you in the law's basic principles, the building blocks, the larger questions the law grapples with.**

disposition, or trial.) And who pays lawyers for all this? These are universal and permanent questions. The student had come to see the civil rules in this framework, as one solution, with rules for pleadings, pretrial information-exchange and motions, and trial. Simple. Elegant. And, again, universal in some ways. Seeing these overarching connections made civil procedure and the procedural rules come alive to this student. I also still feel that way.

So my unsolicited advice for the law student who aspires to aspiration? Push yourself to learn new values beyond what brought you to law school in the first place. Look beyond grades and jobs and other external validations. Take doctrinal courses that will school you in the law's basic principles, the building blocks, the larger questions the law grapples with. Don't just take a bunch of super-specialized esoteric electives that will get you out the door with a diploma and a crazy-quilt of disassociated information. Learn the basic vocabulary and language of the law—not its jargon, but the words used to express basic, fundamental concepts that connect the particular subjects and problems to the larger framework that created them in the first place. Learn to write clearly about legal subjects in a way that helps you think about them clearly. In short, focus on learning the institutions of our system of law. These will allow you to learn what values you want to work to learn, and they can be the stuff of aspiration; this will add meaning to the products of ambition.

For the practicing lawyer, what does aspiration look like? In some ways, it looks the same as for a law student, although that can seem harder to achieve in the face of the daily demands of the “shopkeepers’ arts.” But there are many ways to aspire in the practice. One way is not only to look to the larger framework to identify, analyze, and answer specific assigned questions or do specific assigned tasks, but also to develop a lawyer's skills, whether as a trial or transactional lawyer. Skills are portable. Skills are the mother of internal confidence in one's own competence. The value of developing the skills of a fine craftsman in the practice of law can be an aspiration, or it can at least support aspiration. And it can also support the ambitious pursuit of external recognition and success.

For the academic, ambition is perhaps most evident in the focus on publications, promotion, and tenure. I worry that ambition, not aspiration, accounts for some of the esoteric, hyper-specialized subjects of these publications. And I worry

about the broad, sometimes seemingly reflexive, academic hostility to justices and lower-court judges appointed by a president of a certain political party, about an incentive to take this position because it is popular in the academy and perceived as enhancing the likelihood of publication. I worry about the divide between the academy and the bench. We are natural allies. We are united in having the luxury of the ultimate aspiration: of having the duty only to be right, fair, and just, free of any duty of advocating for a client's interest. And with both the academy and judiciary under what can feel like a siege, I urge that both aspire to understand one another and speak to, and if possible for, each other's concerns and fears.

And what is aspiration for judges? Here, I can speak with almost three decades of experience. A judge who appears ambitious to the extent of excluding aspiration can lend credibility to the perception of judges as politicians in robes. Of course, most of our cases have nothing political, at least in the partisan sense, about them. But there are cases that do intrude into vigorous and divisive public policy and political debates and fuel this perception.

Reasonable minds can, and certainly do, disagree legitimately about many issues. If an ambitious judge is one willing to reach a particular result, or follow a particular approach, even if the record and law do not support it, this can weaken the primary constraints on judges—the constraints that keep us from reaching a result we might personally prefer, but that the facts, and the law applied to those facts, do not support. These constraints include the specific facts and the record of each case and the precedents that bind or limit the court. Ambition of this sort can undermine these sources of judicial constraint and accountability. Judges without accountability can be unmoored and unchecked. Judicial independence is vital, but without the constraints that are important to accountability, ambitious independence may be accurately viewed as political.

As one thoughtful academic, Stephen Burbank, has recently reminded us, we cannot have judicial independence without judicial accountability. Nor can we have accountability without independence. An accountable judiciary without the aspiration to be independent from seeking the external validation of praise or favor from those politically aligned is weak. An ambitious judiciary without the accountability that the constraints of aspiration ▶▶

## EMBRACING CHANGE

by Anne Berleman Kearney

I love the practice of law. That love of practice began when I started, almost 30 years ago, and continues today. It has motivated me to teach law students—to work with people who seek the same thing. Part of what I say to law students is this: Your career is likely to take a path with unexpected twists and turns, and that is OK. In fact, embrace it: Those changes of direction will provide opportunities to be a lawyer in a new way—in a new subject area or in another part of the legal process or with a new set of clients. Those opportunities assist in the building of your portfolio or, if you will, your legal skill set.



In my career, I have made some deliberate moves to build my legal skill set. After several years of practice at a plaintiff-side litigation firm in Chicago, I decided that I lacked sufficient mastery of legal writing. So I took a position in the appellate division at the City of Chicago's corporation counsel's office. I traded in a menu of motions for a steady diet of appeals. Writing briefs offered an opportunity to immerse myself in legal writing practice. Fortunately for me, that practice also came with a team of curious colleagues who, through formal case conferences and routine kibitzing, collaborated on formulating legal theory and strategy. That practice also came with supervisors whose editing helped me improve my writing. Once my legal writing skills were better developed, I began teaching legal writing as an adjunct professor at Loyola University Chicago's law school. As any professor can tell you, I learned as much as my students did from the experience. And I drew on their enthusiasm for the law.

When my husband and I moved to Milwaukee, I continued teaching as an adjunct professor at Marquette University Law School. Dean Howard B. Eisenberg appointed me to teach pretrial practice, which enabled me to blend my trial-level litigation past with my appellate knowledge of procedure, including, of course, preservation of error. I continued to build on these skills through a litigation practice with a large law firm, Foley & Lardner. There I worked with some excellent lawyers whose insights on the law, dedication to pro bono work, and mentoring of attorneys left a strong impression.

To balance legal practice and raising a family, I left big-firm practice for the flexibility of my own firm. I did not give up challenging legal issues, pro bono work, or skill building. To the contrary, I became a more well-rounded attorney who now could educate students about the nuts and bolts of legal practice, from checking conflicts to drafting engagement letters to client management. This, too, was skill building. Working as a solo practitioner also gave me the opportunity to try criminal law advocacy. I was not after mastery, but I acquired what I wanted, which was an informed sense of the weightiness and some of the challenges of being a criminal defense attorney—and a belief that in my small way, perhaps, I had contributed to the justness of the system.

Last year, after 17 years as a solo practitioner, it was time for a new challenge. I hoped to bring together the skills developed over a legal career. I wanted to work with colleagues who were interested in the law. I sought the opportunity to combine pretrial, trial, and appellate practice. And my hope was to work as a supervisor, so that I could mentor attorneys, assist in their skill building, and pass along the lessons of those who had supervised me—not least through editing. I also realized that I wanted to work in government again, to experience the different approach and commitment required when the government is the client.

Fortunately for me, the right position opened up with the Milwaukee County Office of Corporation Counsel. Now, each day offers a new substantive legal area, a thorny factual or procedural problem, as seems to be a given in government work (and perhaps the law more generally), or the possibility of developing strategy and providing education to head off litigation. In short, this work offers the opportunities that I urge on law students: opportunities to learn to work with impressive people, to continue enhancing a legal skill set, and to further a love of legal practice. I have set aside for now my teaching as an adjunct professor, but Marquette Law School's extraordinary supervised field placement program gives me teaching responsibility with our office's law student interns.

All of this is one way of telling my story in the law. I am certain that you will find some ambition in it—but also, I would like to think, some aspiration.

*Anne Berleman Kearney is deputy corporation counsel of Milwaukee County and served, from 1999 to 2018, as an adjunct professor of law at Marquette University.*

## RESPONSE

## WORK WITH STUDENTS SEEKING TO BUILD SATISFYING LIVES IN THE LAW

by Peter K. Rofes

*In aspiration, it is this created self . . . that can make intelligible the path this person wants his or her life to take.*

These words with which Judge Lee Rosenthal has graced our community resonate with wisdom. With depth. And, especially for those invested in becoming lawyers, with urgency.

Late in the lecture, Judge Rosenthal sprinkles some breadcrumbs as to the implications of her message for lawyers and soon-to-be lawyers. For legal educators, the path on which these breadcrumbs have been strewn ought to be explored, pursued, and extended. Promptly.

Three decades ago, once I had gotten my feet under me as a law professor, an uncomfortable feeling began to creep in. The gap between what lawyers do and what we in mainstream legal education require of law students started to trouble and even bewilder me. The gap between the (professional *and* personal) challenges lawyers encounter—in the workplace *and* away from it; in dealing with clients, colleagues, decision makers, friends, and loved ones; in carving out a career filled with meaning while grappling with the limits of time—and the tool kit that law school aims to provide lawyers struck me as, well, vast. Awareness of this gap blossomed into an obsession. Learning about the strides other professions had made in tackling the analogous challenge provided both fuel and a sense of the daunting task ahead.

Out of this emerged a new understanding of my central function as a law professor at the distinctive place that is Marquette Law School—and a new classroom experience that has enabled me to serve my Marquette law students in ways more valuable than my past efforts. To oversimplify, the upper-level elective workshop, Lawyers & Life, requires each student (1) to construct, share, and justify her individual vision of professional and personal success and (2) to craft strategies that maximize the prospects for arriving at that success.

As to (1): The course begins by inviting each student to confront—and share with the class—core questions that include:

- Who are you?
- To what do you aspire, personally and professionally? Why exactly do you aspire to these things?
- Where would you like to situate yourself on the professional landscape 5, 10, 20 years after law school? Why?

It likewise requires students to undertake a challenge from which mainstream legal education tends to keep a safe distance: to identify, explore, and justify the values that especially matter to them with respect to the careers, workplaces, and lives they will be constructing. Do you prefer teamwork, the interdependent aspects of lawyering, or the more autonomous, go-it-alone dimensions? Where do, say, money, prestige, time with family, opportunities for creativity, and community service fit in your hierarchy of values?

As to (2): Students receive twin assignments. One is to examine and reflect upon the student's distinctive professional tool kit. Among the questions for each student to confront and probe:

- What are the strengths and weaknesses currently found there?
- How do these strengths and weaknesses mesh with your professional aspirations?
- Have you identified ways to develop and refine the particular skills/traits/sensibilities that will be indispensable to achieving your unique vision of professional success?

The other invites the student to identify two lawyers anywhere whose professional paths she, in some respect, would like to emulate. It prompts the student to reach out to these lawyers and connect repeatedly with them as the semester unfolds, so as to glean lessons from each.

The course then introduces students to five clusters of professional skills absent from the curriculum of American legal education. These skills can separate the mediocre lawyer from the good one, the good one from the outstanding one: emotional intelligence, resilience, listening, humility, and warding off or coping with burnout. Each skill features a burgeoning literature. Here the class's experience, assisted by experts, compels students to address questions such as (1) how each one can raise emotional intelligence so as to navigate the challenges and relationships lawyers confront; (2) how to become a more effective listener and thus garner the appreciation that flows from invested listening; and (3) how humility (or the lack of it) shapes reputation and career.

Judge Rosenthal nails it: Aspiration matters, indeed providing the "something more." For legal educators, this means guiding our students through a mix of thinking and doing, of reflection and self-assessment gained through action. It means, above all else, prompting each of tomorrow's lawyers to grapple today with three questions: *Who*—as a lawyer and a person—do I aim to become? *Why* do I seek this? *How* can I begin to chart a course that will enable me to be faithful to this aim? A law school—especially one committed to caring for the individual person—should help the lawyers it molds to confront these questions.

*Peter K. Rofes is professor of law at Marquette University.*



provide can be unmoored. Judicial independence unchecked can look like ambition. What checks it most? Aspiration. Only when we judges are aspirational do we deserve, and are we likely to get and to keep, “the consent of the governed,” which (as related by his biographer, Professor Polly J. Price) Richard Arnold, a wonderful court of appeals judge and nearly a Supreme Court justice, identified as the key to the judiciary’s legitimacy and therefore its independence.

When, as now, Congress does not act to resolve recurring, foreseeable, and controversial issues, leaving them inevitably to arise in the courts, it is more challenging to be, and be perceived as, independent and accountable—that is, aspirational. Congress’s reluctance to use its policy-making authority at least licenses—and sometimes requires—courts to resolve issues left unaddressed by democratically accountable policy makers. But that does not make those decisions undemocratic. Nor does it make the judges deciding the issue unaccountable. The judges are constrained—by precedent, by the facts and record, and by concerns for institutional integrity and independence.

My best lessons in aspirational judging came from my work on the rules committees and at the American Law Institute. The group effort to wrestle with the large issues, like those identified by the enthusiastic student, to improve the quality of how a justice system answers the questions those large issues present, is among the most gratifying work

I have done as a judge. It can be, and is, done by judges, lawyers, and academics working together, and law students can participate. One of the reporters to the civil rules committee, and a great judge, law professor, and writer, Benjamin Kaplan, said it best and with the honest acknowledgment of what could not be done: “No one, I suppose, expects of a Rule that it shall solve its problems fully and forever. Indeed, if the problems are real ones, they can never be solved. We are merely under the duty of trying continually to solve them.” Meeting that duty is, for me, the stuff of aspiration.

So for law students, academics, lawyers, and judges, Justice Holmes generally got it right. We should look for the larger themes, the larger questions, the acquisition of skills and competence to understand what those questions are, to give meaning to the specific problems we are all asked to help resolve.

So, at the end of the day, aspiration and ambition may meet. They seem to have done so for Justice Holmes. And for me, after 28 years as a judge? I am ambitious, and I aspire, to work on interesting and important issues, with people whom I respect and admire because of how and what they aspire to be and do. Being here, working with Dean Kearney, fits that bill. So I thank him, and all of you, for the chance to think about why I love my work—my aspiration—and to share my hope that you love your work as well, and that you bring aspiration to all you do. ■



# FOUR MODELS OF WHAT IT A MARQUETTE

At Marquette Law School's annual alumni awards event on April 3, 2019, at Eckstein Hall, Dean Joseph D. Kearney referred to the four recipients as "anomalies." In fact, he applied that term to all of the several hundred people who attended the program.

"There is no requirement that *anyone* remain involved with his or her law school, years after graduation," Kearney said. He said that he was happy to label the alumni being honored as "anomalies" who didn't float on the ebbing tide that, as time passes, carries many lawyers far away from connections to the law school from which they graduated.

The four award recipients have followed diverse career paths, each with great success. But the bond they still feel to Marquette Law School—and the ways they continue to show this—brought them together. In the words of Marquette University's President Michael R. Lovell in introducing the event, the awards "honor what makes Marquette great—that is, our graduates and the work that they do, going out to change the world." Here are edited excerpts from the presentations given about each of the recipients and the recipients' acceptance speeches.

## ALUMNA OF THE YEAR JUSTICE ANNETTE ZIEGLER, L'89

### From Dean Joseph D. Kearney

The Honorable Annette Kingsland Ziegler arrived to law school and the legal profession largely without *direct* examples: In particular, she had no lawyers in her family. At the same time, she brought parts of her upbringing to the endeavor: Among other things, a job in the hardware store that her parents owned outside Grand Rapids, Michigan, gave her both considerable experience in working with people and an appreciation of the value of hard work. Perhaps reflecting both of those things, when Annette Kingsland attended nearby Hope College in Holland, Michigan, her primary areas of study were psychology and business administration.

Here we come to a demonstration of how a great university such as Marquette can enrich a state in lasting ways. Upon applying to law schools, Justice Ziegler visited Marquette University and Milwaukee for the first time. She felt an immediate connection. During the ensuing three years of law school, she was proved correct in her assessment of the fit between herself and Marquette.

Asked in connection with this award to identify "a faculty member who had a positive effect on you," Justice Ziegler answered, "There were so many." One example is no longer with us: Professor Jim Ghiardi. Two others are retired: Professor Jack

# MEANS TO BE THE LAWYER



Justice Annette Ziegler with her husband, J.J.

Kircher, whose Socratic method she recalls, and Professor Christine Wiseman, of whom the justice has said, “The room would resonate with her intense love of the law and pursuit of justice.” Others are very much part of the Law School today, 30 years on: “Professors Tom Hammer and Dan Blinka have an ability to make the law come to life.”

Of course, it is what Annette Ziegler has *done*, with the Marquette law degree, that prompts tonight’s recognition. She appreciated the opportunity in private practice, at the firm now known as O’Neil, Cannon, Hollman, DeJong & Laing, where she spent several years before beginning a career, truly, in public service. This began with work as a prosecutor, first as a special prosecutor for Milwaukee County and then as an assistant United States attorney. Governor Tommy

Thompson appointed her to the Washington County Circuit Court in 1997, whereupon she was duly elected and reelected. She was then elected to an open seat on the Wisconsin Supreme Court in 2007, in a contested race. For a striking fact—indeed, one without any analogue during her now 12 years on the court, which have brought eight other elections—her 2017 statewide reelection campaign was uncontested. That is powerful testimony about the estimation of Justice Ziegler within the legal community and the state of Wisconsin more generally.

Justice Ziegler has authored scores of opinions setting forth the law of Wisconsin on topics ranging from lower-profile ones (insurance or underinsured-motorist law, for example) to matters (such as criminal or constitutional law) more likely to find their way into the news.

I want to mention some things that you cannot look up in the law books. Some of it is civic service of a less-prominent sort than tenure on the Wisconsin Supreme Court. In Justice Ziegler’s case, this may be—depending on the moment—continuing education programs for lawyers or other judges, for an example that one of her colleagues on the court particularly noted in a nomination letter, or it may involve service outside the legal profession, especially in her adoptive Washington County. Or it may be her exceptional support, in a variety of forms, of Marquette University Law School. Whether it is service on the Law School Advisory Board, or frequent visits here to Eckstein Hall (and, previously, Sensenbrenner Hall) for moot court programs and the like, or much less public ways that she has supported my efforts as dean, Annette Ziegler does not merely espouse through her words but also demonstrates through her actions the importance that she places on our work. I speak for the Marquette Law School community when I say how grateful we are for that.

There is an especially consistent theme here. It is reflected in one of Justice Ziegler’s favorite quotes—I know this because I have heard her share it with our new graduates at the annual bar-admission ceremonies. It is sometimes attributed to Thomas Edison: “Opportunity is missed by most people because it is dressed in overalls and looks like work.” I know from both objective and inside sources—including Marquette lawyers who have served as her law clerks—just how hard Justice

## ALUMNI AWARDS

Ziegler works to serve the people of Wisconsin. Of course, if your baseline is experience in a job under the watchful eye of your parents in the store that was their livelihood, that explains a lot.

### From Justice Annette Ziegler

I really am deeply honored and humbled to be here on this stage with these other award recipients. If you think about it, a girl who grew up sweeping the floors in her parents' hardware store, sitting here at Marquette on the stage getting this award—I find that frankly amazing.

This award really doesn't belong to me as much as it does to the people who have influenced me—especially my parents, in no small measure. They did teach me the meaning of a hard day's work, an honest day's work, trust, honesty, ethics, integrity. I grew up in a faithful household where you had to do the right thing. My parents would love to be here; I know they would. They've been married 68 years. Dad passed away last year around Christmas time. And Mom can't travel the way she used to, but I know they're here in spirit.

On a lighter note, the other day I came across an old *Saturday Night Live* skit with Father Guido Sarducci. He was offering what he called a five-minute education. His thought was that, five years after graduation, most people retain very little from what they've learned, as with, say, Spanish. At the end of the skit, he said, "I'm actually thinking about starting a one-minute law school." And I thought to myself, you know, that might be kind of the case for a lot of lawyers from a lot of law schools five years out. They don't have a lot of tools in the toolbox, not a lot of memories. But that's not the way it is for a Marquette lawyer.

We learn a lot more. We learn about serving our community. We learn about service above ourselves. You know, there's this phrase, "experiential learning," that's really popular now, but Marquette's been doing experiential learning since pretty much the beginning of time, I

think, with its clinical opportunities and the teachers and the professors and the way they go about things.

It's nothing new for Marquette.

And a Marquette lawyer leaves here with not just a profession. Really, a Marquette lawyer, I think, leaves here with a calling, a calling to serve.

This award really is for nothing that I have singularly done. I really think that it's a lot more about the people out there, the people in our class, the professors who taught us, the great lawyers with whom I've worked, the judges with whom I served on the trial bench for a decade, and my colleagues on the Wisconsin Supreme Court now.

Finally, I would say, as others have said, awards are really nice, and having an important job is really great. But the most important thing is family. Some could not be here. Bernie Ziegler, my late father-in-law, and Peg, my mother-in-law, have been amazingly supportive over the years. My stepdaughter, Keller, is in Arizona, raising three children under 10 and running a business. Laura Sommer, my niece, who used to work for Marquette, and her husband, Grant, came today. My husband is here, J. J., and I couldn't do any of this without you, honey; I just couldn't. That's all there is to it. It's one thing to have a good, supportive, kind family, but some days the robe is really heavy. And when you come home to a good family and you can check it at the door, it makes everything better. Charlie and Drew, who I know would love to be here, are our two sons.

This award is due to all of you more than me. So I hope you take a piece of it with you today. But I'm going to close with one quote that the dean didn't mention, and that's from Maya Angelou. It's one of my favorites. She would say, "people will forget what you said, people will forget what you did, but people will never forget how you made them feel." And you make me feel really great today. Thank you. ■

## LIFETIME ACHIEVEMENT PROFESSOR AARON

### From Dean Kearney

Aaron Twerski calls Brooklyn, New York, his home. That is reasonable enough: He has taught in the New York area for decades—primarily at Brooklyn Law School, for more than 30 years, where he serves today as the Irwin and Jill Cohen Professor of Law. And he spent more than a decade and a half on the faculty of the nearby Hofstra University School of Law, including his tenure as dean.

At the same time, and for an admitted bit of conjecture, I believe that Professor Twerski considers Milwaukee to be his home as well. Marquette University Law School must be part of the reason for this: A member of our Class of 1965, he thrived as a student here. Indeed, it was here that he determined—early on, as I understand—that to be a law professor was his future. This he accomplished with remarkable alacrity: Upon graduation, and after a year in Washington, D.C., as a trial attorney in the honors program of the United States Department of Justice and one year as a teaching fellow at Harvard Law School, he was *Professor* Twerski by 1967. This was at Duquesne University, in Pittsburgh, where he served for four years before moving to New York.

The Marquette University law degree is not the only reason that we here feel such pride in Professor Twerski. He is a native Milwaukeean. It is here that his father, Jacob, was—and his brother, Michel, is—the rabbi of the Beth Jehudah congregation on Milwaukee's west side.

Professor Twerski's primary home, for our purposes, is the law school classroom and the legal academy—and not just the particular school at which he happens to be teaching. This man is a giant in that most important realm: the law of torts. His articles, probing, examining, dissecting, and assessing

## EVENT D. TWERSKI, L'65

tort doctrines, have appeared in the law reviews at Columbia, Cornell, Georgetown, Hastings, Marquette, Michigan, NYU, Pepperdine, University of Southern California, Vanderbilt, Washington University, and Yale (I arbitrarily limited myself to a dozen, which in this instance I could multiply more than six-fold, and carefully listed them in alphabetical order, although it is a nice thing that *Yale* comes last). These various academic articles, together with a number of books, are a lifetime's work for most people, I would say.

Yet I do not believe that they even rank as Professor Twerski's primary contribution to the legal academy and profession. For he also served as co-reporter, along with Professor James Henderson of Cornell University, of the *Restatement (Third) of Torts: Products Liability*. The restatements, initiatives of the American Law Institute, are monumental projects—requiring of the reporters immense scholarship and not much less political skill. As much as its predecessors—indeed, perhaps even more so, given the increased fragmentation and divisions in views of substantive law in recent decades, as in so many other spheres of life—the Third Restatement of Torts is a towering accomplishment.

I expect that this affords some window into the estimation and repute in which the legal academy and profession hold Professor Twerski. Quite apart from my having adduced *evidence* to support the characterization, you may see it supported by the *judgments* of others: In 2016 the Association of American Law Schools presented Professor Twerski with the William L. Prosser Award, which recognizes outstanding contributions in scholarship, teaching, and service in the area of torts and compensation systems. This followed the American Bar Association's honoring Professor



Rabbi Aaron Twerski is joined at the alumni awards event by family members from Milwaukee. From left: Rabbi Dovid Kossowsky, principal of Yeshiva Elementary School; Rabbi Sholem Horowitz; Rabbi Michel Twerski, leader of Congregation Beth Jehudah and Aaron Twerski's twin brother; Rabbi Aaron Twerski; Rabbi Benzion Twerski of Congregation Beth Jehudah and Michel Twerski's son; and Rabbi Chaim Twerski of Congregation Beth Jehudah and Benzion Twerski's son.

Twerski, in 2009, with the Robert B. McKay Award, which recognizes a law professor in the fields of tort and insurance law who is committed to the advancement of justice, scholarship, and the legal profession.

Nor should there be any misimpression that his expertise is simply academic. To give only a leading example, Professor Twerski was appointed as a special master in the federal 9/11 cases concerning the injuries suffered by those involved in the cleanup of the World Trade Center site after the attack on the United States. There is a host of civic and other activities in service of communities of which he is part. Suffice it to say that they are as extensive and impressive as you would expect of someone with Professor Twerski's intellect and humanity.

Professor Aaron Twerski, for a lifetime of teaching, scholarship, and service in the law and, if I may, for your unsurpassed representation of the Marquette University mission of excellence, faith, leadership, and service, it is a great and humbling privilege for me to ask you to please accept the Law School's Lifetime Achievement Award.

### From Professor Aaron Twerski

I owe a whole lot to Marquette Law School. Not only was I mentored here by two giants in the profession, Professors Jim Ghiardi and Ray J. Aiken, but I have a story to tell. When I graduated law school, someone who looked like me was not going to get hired. Marquette stood behind me.

When I was at the Department of Justice, I received a call from Harvard Law School asking me to come for an interview. How did that happen? An adjunct professor at Marquette, Bill Kiernan, who is no longer alive, taught Conflicts of Law. It was the time when New York decided *Babcock v. Jackson*, and it was the rage. I sat there in the front row of his class and shook my head once or twice—or throughout the semester—and he would say, "Twerski, what's wrong?" And I would tell him.

He reminded me of a great Talmud teacher that I had, Rabbi Menahem Sacks of Chicago, when I was a youngster. I would ask a question, and he would say, "Twerski, you're 100 percent right. But I'll show you where you're wrong." And that's what Bill Kiernan did with me.

In any event, unbeknownst to me, Bill Kiernan wrote to Harvard, saying, "You ought to look into this fellow." And that was the start of my teaching career. I would not have been able to make it in a teaching career if not for what Bill Kiernan did without even telling me that he was doing it. So I am indebted to Marquette Law School in a way that I cannot even begin to express.

I have lots of family here, and many from the Milwaukee community of my brother, Rabbi Michel Twerski, are here. I'm grateful to them for showing their support.

Marquette Law School is a great place. ■

# THE HOWARD B. EISENBERG SERVICE AWARD

## LISETTE KHALIL, L'07

### From Dean Kearney

This award remembers my great predecessor, whose service to the larger society and the profession would be *legendary* except for the fact that it actually happened, even within the memory of many of us (Dean Eisenberg died in 2002). To be sure, the Marquette Law School tradition of service well antedates Dean Eisenberg. It is a timeless aspect of our mission.

Lisette Khalil's professional activity comes not in the courtroom or so much in the legal profession per se as it does in the larger civil society—in the world of nonprofit leadership. She serves as operations director of the Wisconsin Women's Health Foundation in Madison. Her work involves helping create innovative programs to provide health education and direct services to women and families across the state. The description sometimes sounds rather general or high level: For example, Lisette frequently is asked to sit on steering committees and planning groups that shape state health goals and public health initiatives. In this, we will not doubt that her pre-law-school background, which includes a master's degree in public health, helps her see the big picture.

Yet Lisette is a *lawyer*. So it will not surprise you that her work is attentive to—or more accurately, grounded in—the *particulars*, or the details. Competition for funding in the health sector insists on evidence-based practices. To be successful, this requires someone who will patiently sift through and compile the evidence. Yet the lawyer's activity involves not just such patience and care. It entails *art* in presenting the evidence. Lisette

attributes much of her affinity for grant writing to her law school education—more specifically, to her first-year legal writing classes. The ability to write concise, persuasive arguments, responsive to specific questions, has been a central component of her success in a highly competitive sphere.

In all of this, Lisette is, in the words of one of her nominators, thoughtful, strategic, creative, and driven. Her skills include the ability to process information quickly, summarize facts, and lead conversations. This last aspect of her activities speaks to the emotional intelligence—as it is sometimes called—upon which Lisette draws in her work. One of her nominators pointed not just to the talented colleagues whom Lisette has hired but to her *support* of them—resulting in low turnover and, more substantively, better reporting and data analysis for the Wisconsin Women's Health Foundation's funders and improved opportunities with its partners. Some of her previous positions have helped Lisette develop these abilities—including her work while in law school addressing family violence, as a specialist at Catholic Charities Child and Family Ministries, and her service here in Milwaukee, for two years, upon graduation as executive director of Centro Legal por Derechos Humanos.

Lisette, your work for the Wisconsin Women's Health Foundation, part of your leadership in the increasingly important world of nonprofit organizations, has distinguished you, even as it has symbolized for us the extraordinary service skills and opportunities available to lawyers and recalled to our minds the contributions of my predecessor as dean.



Lisette Khalil, with her husband, John

### From Lisette Khalil

Being recognized for service work in any capacity would be a true honor, but being recognized by Marquette is especially meaningful. I've always appreciated how Marquette and the Jesuit tradition are able to interconnect faith and service, and that's what made me feel welcome here when I was a student. That is also what makes this recognition very meaningful but also overwhelming.

I need to thank my fantastic colleagues and friends and mentors who took the time to be here. I think we all know that none of us works in a vacuum, and any impact that I've been able to have is directly related to the incredible caliber of people who've been surrounding me both professionally and personally for the last 20 years.

And then, last, I need to thank my family. Some of you may know that I get to live in a house with three awesome guys. My husband, John, is here, and our oldest son, Jack, is here. Our youngest, Charlie, wanted to come, but he's five, and Jack wisely advised to the contrary. But all three of them, even Charlie, have been incredibly supportive and understanding and genuinely helpful. I couldn't do this work if they weren't on my team. ■

# THE CHARLES W. MENTKOWSKI SPORTS LAW ALUMNUS OF THE YEAR AARON HERNANDEZ, L'13

## From Dean Kearney

No program at Marquette University Law School attracts students from across the country more than the sports law program. Aaron Hernandez was such a student. He came to us in 2010 from El Paso, Texas, by way of Notre Dame, where he had graduated with high honors. We sent him back to Indiana upon graduation, but as a Marquette lawyer, and to Indianapolis, as I shall describe.

In his years as a student here, Aaron made the most of our possibilities, not only completing the sports law certificate but also serving as a research assistant to two of our professors writing in the field. It has been six years since he graduated, and yet sometimes I forget this, so frequent a presence is he here. Within the past week, for example—just this past Friday—I almost bumped into Aaron on the fourth floor here. He was back in town, yet again, this time to talk to admitted students—individuals on the other end of the law school process, people considering in the first instance whether to join us as Marquette law students. That sort of effort is a significant contribution to the school.

Yet it is Aaron's work at the NCAA in Indianapolis over the past six years to which we primarily point this evening. He focuses on enforcement in football development. On its face, that involves close attention to dense rules and regulations, and no doubt that is true. Nonetheless, like the law more generally, this activity is a human endeavor. When he is on the road—as he very often is—Aaron meets with “sources” of information. That is to say, he meets with *people* who, to put it

in Aaron's terms, “reach out to me for help.” “That help can be needed for a variety of reasons,” he has told us: “They are being harmed by a recruiter, their son is being treated wrongly, their family member has been physically harmed. . . .” This is difficult work but gratifying: “I never could have imagined,” Aaron has said, “how many ways I could help people when I started this job, and helping these people keeps me motivated to conduct my business at the highest level every day.”

This is, of course, what lawyers do, most basically: they help people. Sometimes it is to solve problems; other times, more affirmatively, it is to help realize opportunities. The latter is certainly what Aaron does so often with Marquette law students: For a particular example, along with Professor Paul Anderson, Aaron has led the development of an extensive internship program with the NCAA, in which Marquette law students take, well, a disproportionate part. Aaron is a dispassionate professional; he *equally* is an unapologetic partisan for his successors as Marquette law students. Such alumni loyalty makes a significant difference to the Law School.



Aaron Hernandez

Charles W. Mentkowski, whom we remember by this award, took great pride in the sports law program, the geographic and other diversity that it fostered for his alma mater, and he was a great supporter of it. Aaron Hernandez, your work at the NCAA is a leading example of what the Marquette lawyer can do to advance the appropriate interests of student-athletes and their families in the arena of college sports, and we admire the energy and professionalism that you bring to it.

## From Aaron Hernandez

I have a wonderful group of people right here up in front, and I just want to thank you all so much for coming. Bobby Ollman, Adam DeJulio, Lizzie and Ryan Payne. There are a bunch of Marquette alums here, by the way—Donny and Katie Jankowski, it's a big honor to have them with me. Jake Augustine is here. So is my mother, Yvette Hernandez, from El Paso, Texas—she is celebrating her third year of remission from breast cancer.

In the mafia we have going on right here, we have Paul Anderson—thank you so much for your leadership, Professor Anderson; Professor Vada Lindsey, for all the work that you've done in recent years for the National Sports Law Institute; and Professor Matt Mitten, for your leadership also. Associate Dean Christine Wilczynski-Vogel and Dean Kearney, thank you so much for hosting this wonderful event. We have absolutely, bar none, the best sports law institute, not in the country, but in the world, and I will always continue to be a very, very partisan Marquette lawyer. Thank you all so much for coming. “We are Marquette!” ■



# TRAUMA:

## Can the Criminal Justice System Stay Up-to-Date with Its Impact?

BY ALAN J. BORSUK

Scientific knowledge about the adverse impact that childhood trauma can have on adults is getting stronger. Public awareness of trauma-related issues has grown. Is the criminal justice system keeping up?

“Unfortunately, it’s not,” Deborah W. Denno, a national expert on the role of trauma in criminal cases, answered when Mike Gousha, Marquette Law School’s distinguished fellow in law and public policy, posed the question.

“On the one hand, I’ve been impressed in looking at . . . how accepting courts are of new scientific evidence,” Denno said. “On the other hand, I don’t think judges—many judges—still quite get this. They’re so used to looking at a very traumatized pool of individuals that I think they . . . get just sick of it, in a way, number one.

“Number two, I think sometimes attorneys have trouble . . . investigating and presenting this kind of evidence. It can be very difficult even for me to read a case about some of these individuals and what they’ve been through. I think it’s comparably difficult for attorneys to do these kinds of investigations.

“But lastly, attorneys aren’t always going to have the opportunity to educate themselves on the latest cutting-edge techniques that they could learn about on behalf of their clients.”

Overall, “the legal system is really behind the times,” Denno said. “Attorneys need to be better educated. . . . I think for the most part, attorneys just don’t see how this could play a role when, in fact, in our day-to-day lives, it is increasingly imperative for attorneys, judges, the entire legal system, to get on board when we’re starting to talk about the brain and human behavior.”

Denno is a leading figure nationally among those who favor considering the impact of trauma in deciding what to do with both children and adults in the criminal justice system. She is the Arthur A. McGivney Professor and Founding Director of the Neuroscience and Law Center at Fordham University

**“I think for the most part, attorneys just don’t see how this could play a role when, in fact, in our day-to-day lives, it is increasingly imperative for attorneys, judges, the entire legal system, to get on board when we’re starting to talk about the brain and human behavior.”**

Deborah W. Denno



School of Law. She has both a J.D. and a Ph.D. from the University of Pennsylvania.

She visited Marquette on November 15, 2018, to deliver the Barrock Lecture on Criminal Law (see excerpt following this article). In conjunction with that visit, Denno and Milwaukee County Circuit Court Judge Mary E. Triggiano took part in an “On the Issues with Mike Gousha” program about the impact of childhood trauma on the legal system. Triggiano has championed efforts in the Milwaukee area to educate people in the criminal justice system on trauma awareness.

Triggiano was somewhat more positive in her assessment of whether things are changing for the better, at least when it comes to the criminal justice system in Milwaukee. She has been a leader in offering people in just about every role in the system educational opportunities for understanding and responding to trauma-related issues.

“We’re being very persistent in trying to get everyone speaking the same language and thinking the same way about the prevalence of trauma and what we can do,” Triggiano said. “I do think . . . that the judges and the district attorneys and the public defenders and the guardians ad litem and the private bar attorneys who work in the problem-solving courts are changing the paradigm. They’re making that shift that requires taking what we know to be true about trauma and actually putting it to work in practice.”

Denno told Gousha and an audience of about 200 that her interest in trauma “really started quite some time ago when I was doing my Ph.D. dissertation on a group of children who were born in Philadelphia, low-income children, for whom a lot of data were collected, biological and sociological data, [and] they were visited by social workers every six months. I started reading about what the social workers were saying about the children and was really shocked by the degree of trauma. This was a sample collected in the late ’50s and early ’60s, and I think, at the time, people didn’t

realize how much trauma these children were being exposed to, not even the social workers. It seemed like decades later that we could see that.”

Triggiano’s interest was triggered by what she called an “aha moment” about 12 years ago when she was a judge at children’s court in Milwaukee County. “I was a judge for all of about two years, and I had a 15-year-old on my caseload,” she said, referring to him as “Cory.” “Cory came to me because he was charged and found delinquent of possession of marijuana and theft. He presented with green hair and piercings and was very quiet and didn’t say much.

“I put him on probation, and he repeatedly came back to me [in that context], and we would talk about his issues. . . . But he was doing quite well. Hair color came back, no piercings. He was back in school. He had a job. He had a girlfriend. About three months later, I got the call, and I found out that he had committed a brutal homicide.

“He was back in my courtroom, and what we had found out was that he had been posing nude in front of an older gentleman for money so that he could buy drugs. What Cory recounted was that he had an episode where this guy wanted to force sex, and he didn’t want that. Cory didn’t want that at all, and what Cory said is he became enraged, and he killed him. As a judge, we kind of say to ourselves, ‘You know, what did we miss? How could we have prevented something like this?’”

Denno and Triggiano each said that, from what they had learned, they became persuaded of two related things. One is that trauma during childhood often becomes an important root of criminal conduct in later years. The other, a logical corollary, is that understanding this can help the criminal justice system—from the first points of contact with a person to the time of sentencing—

become more effective in helping people and preventing further crimes.

But both also said the impact of trauma does not mean that victims and the general public should not be protected or that perpetrators should escape from the consequences of their actions.

Triggiano said, “I think we’re, number one, suggesting that we take universal precautions—that we just assume people have been impacted by trauma when they come into the system. We’re starting as far back as when there’s a police interaction. How can we be trauma smart, or trauma respectful, to the person who might be in front of us so that we can get better results? . . .

“For instance, I had a 14-year-old girl in my court. She was charged with delinquency . . . . She [then] was on probation. Most often, she wouldn’t show up, so I would issue a warrant for her arrest. We’d get her in. The cycle would continue. Most often in court, we spend probably about 15 minutes on a case; right? We don’t have a lot of time because we have a lot of cases.

“She would come in. The first thing the district attorney would say was all the things that went wrong, what she did. She ran away. She didn’t go to school. She didn’t go to therapy. The next person would say the same thing, and the next person, the same thing. I had an opportunity to watch her reaction to our discussion. Most judges probably would think, ‘Ah, she’s rolling her eyes’; right? ‘She is not paying any attention to us.’ [But] she wasn’t rolling her eyes. She was actually protecting herself by disassociating. The only thing I could see was the whites of her eyes for about a minute and a half.

“I stopped, and I said, ‘Look. We’re going to start over. We’re going to do a do-over.’ What I knew to be true was that she loved track. So we started talking about track, and everyone went around the



room and said one good thing about what she had done before she came into my court. . . . Because we did that, she showed up for court every time after that.”

Triggiano said that little things such as that can help. She quoted Tim Grove, senior leader in trauma-informed case initiatives for SaintA, a nonprofit social service agency based in Milwaukee, who calls such actions “swinging at the right piñata.” Triggiano and Grove taught a course at the Law School last year, Problem-Solving Justice and the Neuroscience of Trauma.

Triggiano said, “If we have [people] in front of us, and we don’t really know what’s causing their behavior, we may steer them into the wrong program. We may put them in jail because we don’t understand their behavior. We may do a variety of things that are disrespectful, I suppose you could say, to their trauma and the impact of trauma in their lives.

“If we are trauma smart, and if we understand that that behavior has, at its core, the trauma in their lives, like we do in our drug treatment courts where we understand that maybe drug use is a symptom or substance use disorders are symptoms of underlying trauma, we’re able to be smart enough to steer them into the right programming . . . so that we’re not spinning our wheels and seeing them come in over and over and over again.”

Denno said she views the impact of trauma on three levels.

“The first part is something called the event, the traumatic event. . . . It could be some kind of sexual abuse or some kind of physical abuse.

“The next is how the person experiences that event subjectively. [He or she] might experience something right away and react accordingly, or it may be something that festers over a period of years and comes out later on, either in killing somebody else or in doing something else.

“The last thing is the effects of that event. What is it that it is doing to someone’s brain, even if it’s physical abuse or sexual abuse? It can have all sorts of brain changes that we know about that could start influencing that individual’s behavior, and it becomes sort of a cycle. Your behavior starts changing because your brain is changing, and then, you, yourself, start to engage in aggressive or hostile behavior, and you may end up killing somebody. . . .

“Because this can start so long ago, so many years, you could have a defendant who’s in his mid-20s or something and the abuse started when

**“We know that early matters and if we can get to these kids and, in particular, babies, when their brains are developing at the highest rate and have an ounce of prevention—look at all that we can salvage from a standpoint of dollars, resources, and just human beings.”**

Judge Mary E. Triggiano



they were born. I’ve looked at cases where it starts immediately with some sort of brain injury at birth and then just continues on. It really is a cycle that perpetuates itself.”

Triggiano emphasized the importance of responding early to trauma issues in children. “We know that *early* matters and if we can get to these kids and, in particular, babies, when their brains are developing at the highest rate and have an ounce of prevention—look at all that we can salvage from a standpoint of dollars, resources, and just human beings.”

An audience member at the event in the Law School’s Lubar Center, saying that she was a prosecutor, asked Denno and Triggiano how she should handle information about the trauma-related background of defendants. She said, “I’m not somebody who’s going to bring that up to the judge and say, ‘But, your Honor, look. This is perhaps why [that person] acted this way’ as part of asking for a lighter sentence.”

Triggiano responded, “This information should never be used as a path for disregarding public safety or accountability. But it should be an opportunity to inform us—so how you create your sentencing recommendation, what the judge takes in in terms of what they know to be true, within the parameters of accountability and public safety. People with horrific childhoods who commit horrific crimes may end up in prison, or there may be another path that we can create for them because we know more about how to help them.”

Denno said, “We all have to compartmentalize a very dangerous person . . . and also recognize that they can be dangerous or commit a future act again. But also, that is reminding me, the United States is one of the most punitive countries in the world, certainly one of the most punitive in the Western world, and that none of these people benefit from further incarceration.”

Denno added, “This notion of having the prosecution and the defense, these two adversaries, as the way the criminal justice system has always operated may no longer make as much sense at it used to. It would be great if prosecutors could wisely recognize somebody’s background and at least mention it to the courts because I think it is the courts’ responsibility—ultimately, they’re the ones doing the sentencing—to be aware of these people’s backgrounds and for the courts to take the responsibility for the kinds of decisions that they’re making.” ■

## Advice for Attorneys with Trauma-Impacted Clients

This is an edited excerpt from “How Courts in Criminal Cases Respond to Childhood Trauma,” which will appear in the *Marquette Law Review* (winter 2019). The article was written by Deborah W. Denno, the Arthur A. McGivney Professor and Founding Director of the Neuroscience and Law Center at Fordham University School of Law. It is based on the Barrock Lecture on Criminal Law that Denno delivered at Marquette Law School in fall 2018.

While courts often accept evidence of childhood trauma in mitigation arguments, this outcome does not imply that such evidence will successfully mitigate or lessen a defendant’s sentence. In fact, in most cases in the neuroscience study that I led, the court or jury found that this evidence was outweighed by aggravating factors, affirming the defendant’s sentence.

In general, if childhood trauma evidence is found to be vague, remote, or irrelevant, courts are likely to reject it for the purposes of mitigating a sentence. In *Adanandus v. Johnson* (W.D. Tex. 1996), for example, the defendant argued that his childhood medical records describing head injuries should be included as mitigating evidence. The court, however, was not convinced that the records were relevant since they did not establish that the defendant’s criminal conduct was attributable to the injuries.

In addition, courts often assume that defendants have personal responsibility, even if this assumption contradicts psychological and medical knowledge about the consequences of child abuse. For example, in two cases discussed in another study, *Elledge v. Dugger* (Fla. 1993) and *State v. Steffen* (Ohio 1987), the courts discounted the long-term effects of physical abuse on the defendants when their siblings, who had experienced the same abuse, appeared to be unaffected.

That said, defense attorneys should be fulfilling their constitutional duty to thoroughly investigate the defendant’s background and family history. Since the Supreme Court of the United States has repeatedly stated that this evidence is relevant mitigating evidence during capital proceedings, there is no excuse for an attorney to not be acquainted with the evidence if it exists.

Defense attorneys also need to effectively communicate with their clients about the importance of presenting such evidence. Some defendants are wary of presenting evidence of their past, out of fear of embarrassment. In these

situations, attorneys need to stress that presenting evidence of the defendant’s history may lessen the sentence, a reality that can possibly outweigh a defendant’s fears.

Attorneys and judges should seek education regarding the effects of trauma and how trauma can impact adult behavior and cognition. This knowledge should also be conveyed to juries to allow them to make informed decisions when it comes to convictions and sentencing.

Not only should attorneys investigate and present this evidence, but it also is vital that they draw connections between childhood trauma and the defendant’s offenses and criminal behavior. If juries are made aware of such connections, they will be able to better understand the defendant’s actions and decision-making processes.

*Blue v. Cockrell* (5th Cir. 2002) exemplifies a circumstance where the attorney did make a connection between the defendant’s history of trauma and the offense committed in his presentation of mitigating evidence. Michael Lynn Blue was convicted of the robbery and murder of a cab driver in Texas and was sentenced to death. Blue confessed to hitting the man’s head with a claw hammer and taking his wallet. His accomplice shot the victim in the head twice, and the two then burglarized the man’s house.

At trial, Blue’s attorney presented evidence of his childhood, including the physical and sexual abuse he endured, his mental disability, and his antisocial personality disorder. On appeal, Blue claimed that the instructions the jury received prevented the jurors from fully considering this mitigating evidence. In order to determine the validity of Blue’s claim and whether additional instruction was needed, the court had to decide if the evidence presented was relevant.

The Fifth Circuit found that the severity of the mitigating evidence, as well as the fact that Blue’s attorney showed a definite nexus between the evidence and the criminal conduct, qualified



the evidence as highly relevant. Thus, the court concluded that an additional instruction was needed to allow the jury to fully consider this nexus. Ultimately, the court affirmed the district court's grant of relief on Blue's federal habeas corpus petition.

This essay has provided other examples of when attorneys successfully make connections between childhood trauma evidence and the crimes their clients have committed. While this essay has also considered in detail the challenges that attorneys face in their attempts to present such evidence and sew such threads, the increasing availability of research on this topic demonstrates the existence of strong and convincing patterns if attorneys decide to avail themselves of it and courts decide to accept it.

The introduction of childhood trauma evidence is an important part of a defense attorney's representation of a criminal defendant. An attorney's failure to uphold the duty to investigate and present this evidence to a judge or jury could have detrimental effects on the defendant's case and could result in the client's receiving a death penalty.

Childhood trauma evidence is most compelling when a nexus is shown between the trauma and the criminal behavior. An attorney who understands the long-term effects of childhood trauma will be better equipped to make such connections.

The increasing sophistication of research indicating associations among defendants' childhood trauma and their later cognitive and behavioral problems may not be sufficiently used or recognized in criminal court cases by either judges or attorneys. While capital cases allow for the introduction of a broad array of mitigating evidence, the strength of some of that evidence may be dampened by the standards for claims of ineffective assistance of counsel, which are highly deferential to attorney discretion. Yet, increasingly, attorneys' "strategic decisions" and courts' acceptance of them may reflect more of a willful blind eye to scientific advances than a protection of the decisions that attorneys in fact make in criminal cases each day. ■

## Marquette University and Marquette Law School INITIATIVES ON THE IMPACT OF TRAUMA ON CHILDREN AND ADULTS

### 2017

The Law School's Lubar Center for Public Policy Research and Civic Education supported the work of John Schmid of the *Milwaukee Journal Sentinel* in researching and writing a series of stories titled **A Time to Heal**. The series has played a central role in increasing understanding in the Milwaukee region of long-term results of childhood trauma.

### November 29, 2017

**What K–12 Students Need: Striking a Balance Between Social-Emotional and Academic Learning**, a conference presented by the Law School and the College of Education and featuring national and local experts.

### 2018

The Law School offers a new course for upper-level students, **Problem-Solving Justice and the Neuroscience of Trauma**, taught by Tim Grove, senior leader in trauma-informed care at SaintA, a social-services agency in Milwaukee, and Mary Triggiano, judge of the Milwaukee County Circuit Court.

### October 4, 2018

**Racial Inequality, Poverty, and the Criminal Justice System**, a conference keynoted by Bruce Western of Columbia University, a prominent expert on what happens to people after release from incarceration.

### November 9, 2018

**The Power of Restorative Justice in Healing Trauma in Our Community**, a conference focused in large part on the impact of trauma on people in law enforcement.

### November 15, 2018

The Barrock Lecture on Criminal Law and the "On the Issues with Mike Gousha" program, featuring Deborah W. Denno, focused on increased understanding of the impact of trauma on children and adults.

### March 22, 2019

**Youth Mental Health Challenges and Schools**, a conference sponsored by the Law School, the College of Education, and the *Milwaukee Journal Sentinel*.

### October 7–8, 2019

Over the past year, Marquette President Michael R. Lovell and his wife, Amy Lovell, have led an effort, **Scaling Wellness in Milwaukee (SWIM)**, which has brought together leaders of numerous organizations involved in youth and adult services in Milwaukee, with the goal of increasing overall coordination and effectiveness. The 2019 Summit on Poverty and SWIM Conference was hosted in October by Marquette University and the Social Development Commission at the Wisconsin Center in downtown Milwaukee.

Hon. Tony Evers

# GRADUATION CEREMONY REMARKS

This past spring, the Law School welcomed Tony Evers, governor of Wisconsin, as the speaker at its annual Hooding Ceremony, in the tradition of a number of past governors. Governor Evers delivered the following address to the Law School's graduates at the Milwaukee Theatre.

Thank you very much, Dean Kearney, faculty, alumni, proud parents, spouses, family members, and soon-to-be graduates—welcome and thank you so much. It's not every day that one gets to give a law school commencement address, so I am especially honored to be here to celebrate with you tonight.

When Dean Kearney reached out and asked me to speak, he made me promise that I wouldn't say anything favorable about . . . the Chicago Cubs. I'll tell you, that was about the easiest thing I've ever had to agree to in my life. But beyond that, it took me a while to figure out exactly what I *did* want to say tonight. These speeches are supposed to be inspiring, with highfalutin messages and takeaways as you close a chapter and start new exciting journeys.

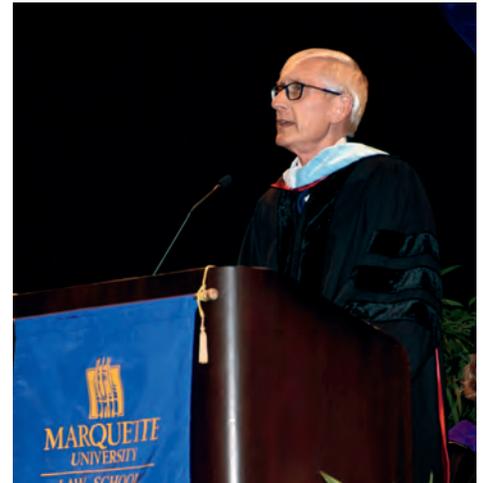
And so I thought, what the heck, maybe I'll start by asking some of my staff what they remember about speeches given at their law school graduations—

key insights that they may have taken away, things that may have inspired them. Well, go figure: Not a single one of them could remember anything from the commencement address. Some of them couldn't even remember who *gave* the commencement address at their graduation.

So after that failed mission, I decided to count on my son, Nick, a Marquette Law School graduate. I said, "Nick, your commencement ceremony was a big deal. It propelled you into the work you do today. Who was your guest speaker, and what did he or she talk about?"

"No clue," was his answer.

So the good news is I'll try to do my best to send you on your way today with some wisdom—but if you don't remember a thing I say today, tomorrow, maybe next week, or a few months from now, or years down the road, I will know not to take it personally.



Governor Tony Evers

I do have a couple pitches for you—a couple of important pitches. As recipients of the world-famous Jesuit mission around social justice, I believe that all of you have some extraordinary opportunities related to this important mission, even though most of it will be uncompensated. I recently read an article by Thomas Friedman in *The New York Times*. He wrote about the importance of “leaders without authority” in community life. These are regular folks who live in communities across the state or the nation: business leaders, entrepreneurs, people who are philanthropists, or just regular folks who are ready to lead their community toward embracing diversity, inclusion, and problem solving, even if the formal leaders, the elected officials, don't. These leaders without authority check their party politics at the door and focus only on what works. Your generation of legal professionals has a once-in-a-lifetime opportunity to lead both economic and societal change, not reliant on the state or federal government. That's the first pitch.

The second pitch is this: As recipients of the moral compass provided by you at Marquette, I'd like you to take an active role in the effort to reform the criminal justice system. This issue, this revolution, is beginning now and will impact us all for the rest of our lives, and the conversation is at the local and state and

national levels. And for good reasons; folks, you know this: Our criminal justice system is struggling—some say it's broken. We have far too many nonviolent people—mostly poor, or of color, or both—incarcerated in our prisons.

We have abandoned rehabilitation, training, and treatment, and replaced it with incarceration. Reentry programs struggle under the weight of the system, and frankly, in my opinion, we have forgotten what the word *redemption* means. The good news is, odd fellows such as Kim Kardashian and Donald Trump have successfully led the efforts around the federal reform effort. Now is the time to take that on locally. Whether you are practicing criminal law, or estate planning, or nonprofit work, or focusing on corporate tax planning like my son, I encourage you to be “leaders without authority” on this issue.

This is a generational opportunity, folks. I am challenging your generation of lawyers to take this on as part of your profession, part of your spare time as “leaders without authority” and, in particular, as part of your Marquette University social justice background. So those are my two “asks.” Not simple, but important.

So you think about the big picture. As students, you've spent the past three years, maybe more, finding out in excruciating, painstaking detail that the law and justice are complicated, to say the least. You've spent countless hours navigating the nuance of law, working to understand the vast gray areas that exist between black letters on a page, and possibly resenting, but hopefully also learning to appreciate, the process it takes to get to an anticlimactic “maybe.”

But to me, the concepts of law and justice can be boiled down to something pretty simple. It's a notion that we all agree on, to be bound by a set of rules. Sometimes, when a person doesn't follow those rules and another person suffers, someone has to hold the rule breaker accountable. And when a person doesn't break the rules, someone has to make sure that that person doesn't suffer a punishment. And when a person suffers because the rules aren't fair, someone has to fix the rules until they are fair. And the “someone” in all this—that's where you come in.

As political theorist Judith Shklar wrote, “[W]hen we can alleviate suffering, whatever its cause, it's passively unjust to stand by and do

nothing.” As soon-to-be attorneys and lawyers, this is the time for change for which you are now responsible. Starting today: never stand by and do nothing when there is more you can do; do good; and alleviate the suffering of others. That's it. That's the speech. Thanks so much for inviting me. ■

Joseph D. Kearney

## American Inns of Court Award

Each year, in participating federal circuits, the American Inns of Court Professionalism Award is presented to “a lawyer or judge whose life and practice display sterling character and unquestioned integrity, coupled with ongoing dedication to the highest standards of the legal profession and the rule of law.” Thomas L. Shriner, Jr., a past recipient, presented the award for the Seventh Circuit to Dean Joseph D. Kearney on May 6, 2019. The occasion was the annual dinner of the court's Judicial Conference, this year in Milwaukee at the Pfister Hotel, whose keynote was a conversation among Chief Judge Diane P. Wood, U.S. District Judge Gary S. Feinerman, and current and former Supreme Court Justices Brett Kavanaugh and Anthony M. Kennedy. Here is the text of Dean Kearney's remarks.

Thank you, Tom. Let me begin by expressing my gratitude to all involved in the Seventh Circuit Bar Association for organizing this year's conference. It is most impressive. It's also a particular honor to be recognized alongside tonight's pro bono award recipients. I very much look forward to those presentations.



Taylor Brisco, Khatija Choudhry, Ash Castro, and Anna Gage at the Hooding Ceremony



Joseph D. Kearney

My own recognition reflects the support that I receive as dean. Some of it comes from places that you might naturally expect though cannot always assume. Marquette University's president, Mike Lovell, and senior leadership team afford us the resources and discretion that the Law School needs to advance the mission of the university. My faculty colleagues and other fellow employees form the constant center of the institution. So many of our alumni—Marquette lawyers—are generous in innumerable ways. Our students—future Marquette lawyers—directly perform the pro bono work that has become associated with the Law School. And Anne Berleman Kearney, a superior

lawyer, has supported the school as a longtime part-time faculty member. She was appointed by my predecessor, Dean Howard B. Eisenberg, as I like to note, although, as a native Chicagoan, I would not have been above nepotism—if it had been necessary.

Yet our support, our lifeblood, comes not only from Marquette employees, alumni, and students (and my wife). Marquette Law School gains strength from *every lawyer and judge* whose efforts have coalesced with ours across this region. And there are so many. Take, for example, the Seventh Circuit itself, going beyond the engagement of our alumni, such as our great friend, Judge Diane Sykes, and, in their own lifetimes, Judges Jack Coffey and Terry Evans. Richard Cudahy, though not a graduate, supported us with full-time teaching in the 1960s and, in the years shortly before his death in 2015, with both philanthropy and scholarly engagement. In between, for a smaller point but one of interest to me, Judge Cudahy wrote a letter supporting my tenure as a professor. Judge Mike Brennan also is not our alum, but he may as well be, as the son of a Marquette lawyer and a former part-time faculty member himself, among numerous other connections.

There's no need for me otherwise to go beyond Marquette lawyers, whether in Milwaukee, such as Milwaukee County Circuit Court Chief Judge Maxine Aldridge White, or elsewhere in Wisconsin, such as the Eastern District's

Chief Judge William Griesbach—no need, that is, to give examples such as Judge Sarah Evans Barker, who has been a repeat visitor, or to note that Justice Elena Kagan, then-Judge Brett Kavanaugh, and Judge Paul Watford, among many others, have been with us, for substantive purposes. Our greatest interest is closest at hand: the attorneys and judges in this region—some Marquette lawyers, many not—who teach as part-time faculty, volunteer alongside students in the Marquette Volunteer Legal Clinics, or join us in our many lectures, conferences, and other programs.

Our school's primary work is to educate law students, and we are better at it because we serve as a gathering place for the profession in Eckstein Hall, in our work in the community, in the pages of the *Marquette Lawyer* magazine. We are not alone as a convener. Bar associations such as this impressive organization and the American Inns of Court also gather together lawyers and, often, law students, for both formal programs and ancillary gatherings.

You and we help weave the fabric of the profession. Such common-ground institutions have begun to fray in some other parts of society, there can be no doubt: journalism is an obvious example of a sphere where this is true. Perhaps there is some inevitability about this. "Things fall apart," the Irish poet memorably wrote 100 years ago. "The centre cannot hold." Yet we ought not assume this; in fact, to serve a society founded and grounded in the rule of law, our profession has a constant *duty to prove*—to make—that statement *false*. Experience teaches that we are better able to do our bit if we come together in great civic institutions such as our profession's schools and associations.

In short, your work and gathering inspire me. Thank you for inviting me to be with you this evening and for this recognition of the work of all who are Marquette University Law School. I am most grateful. ■

**"Things fall apart," the Irish poet memorably wrote 100 years ago. "The centre cannot hold." Yet we ought not assume this; in fact, to serve a society founded and grounded in the rule of law, our profession has a constant *duty to prove*—to make—that statement *false*.**

Joseph D. Kearney

# Celebrating Professor Michael McChrystal

The end of this past academic year included a faculty gathering. In his remarks on the occasion, Dean Joseph D. Kearney noted some changes that the Law School had seen over the course of the year. The following excerpt of his remarks speaks to one of them.

Let me close with the most important change. This year saw Mike McChrystal teaching his final class at the Law School. He took the title “emeritus” a year or more ago, but he taught through the fall. In the great Marquette Law School tradition, his final class was Torts.

You all appreciate that I have been Mike’s student: That is, Mike has steered me in a lot of directions over the years that I’ve been dean. The most famous among them seems to me to have been adequately summed up when I introduced Mike to Ray Eckstein as the guy “who got me into all this trouble” (and Ray Eckstein to Mike as “the guy who got me out of all this trouble”). Mike’s the one as well who wrote me when Mike Gousha announced his departure from WTMJ, one of the city’s television news stations, and told me that we should hire him. Mike M. asked whether I knew Mike G., to which I said, “No. Do you?” His answer was, likewise, “No.” It was an inauspicious beginning, but we figured it out. Mike McChrystal’s also the one who, after my successfully avoiding for quite some time Mike Gousha’s too-subtle suggestions that we should create a poll, suggested that I should get serious about it. Most

years I think that, too, to have been good counsel. There are other examples—less prominent, perhaps, but truly too numerous to mention.

I was curious yesterday as to when this all began. I knew it not to have been until I became dean, but how quickly thereupon did I fall under Mike’s influence, I wondered. I did a little research last night, and apparently it did not take long: Here is part of an email that I received from Mike in the first hour of my first workday as dean. (So this is July 1, 2003.) Among other things, it said, “Please count on me to contribute in any way you think desirable, and please don’t interpret my lack of

aggression in seeking you out to express my views as either a lack of interest or a lack of views.”

Lack of aggression? I think that to be true, but only because Mike is not so much aggressive as he is *artful*. In fact, the very next sentence of the note (admittedly, a new paragraph, but even so, it’s the next sentence) said the following: “By the way, we should quickly move to provide *some* desk outlets in *every* classroom, lest we continue to discourage laptop use and interfere with student learning.” I fell for it. That very day, working into the evening, I sent Carol Dufek, our building manager, a note, asking, “Can you give



Professor Michael K. McChrystal teaching Torts (2017)

**I once asked Mike how he could get an entire semester out of a course—Torts—that could be reduced to four words (*duty, breach, causation, damages*) and perhaps even one (*reasonableness*). I thought it almost a showstopper of a point. Without blinking or hesitating, Mike simply said, “It takes great art, Joe. Great art.”**

me a report on our classrooms and the extent to which they have desk outlets into which computers can be plugged?”

Mike’s strategy was to engage me on so many fronts that I could scarcely keep up. The next morning—so we’re only on July 2, 2003, but I promise not to take you through every ensuing

day of the past 16 years—I received a note from Mike. He reminded me that he had previously buttonholed me on the stairs and that, the next day, Keith Sellen, director of the Office of Lawyer Regulation, would be visiting his class and that we’d all be having lunch together. I still remember that

lunch (and Keith Sellen is still the OLR director, which I’ll take as some evidence that I haven’t stayed in office too long). Nonetheless, I might have still saved myself, more generally, but I see that I made a crucial mistake at the end of that first week. On July 6, I said to Mike by email, “Thanks for suggesting (and arranging) lunch with Keith Sellen. It was a good idea. [And here’s where the real mistake comes in.] Keep ’em coming.”

By July 11, we were exchanging documents about space in the Law School. But Mike was not just about facilities or teaching even in that two-week span. He began designing a colloquium that the Law School might (and ultimately did) host concerning tax policy in Wisconsin—a sort of forerunner to our public policy initiative, one might say, looking back. He left just enough uncertainty in his notes to me that (again, looking back, with the benefit of hindsight) I might be drawn into engaging with him on the substance of the matter.

I come back to the artfulness of it all. I once asked Mike how he could get an entire semester out of a course—Torts—that could be reduced to four words (*duty, breach, causation, damages*) and perhaps even one (*reasonableness*). I thought it almost a showstopper of a point. Without blinking or hesitating, Mike simply said, “It takes great art, Joe. Great art.” What does one say to that? And is there any art that one might invoke in response?



Professor McChrystal, a key player in the Eckstein Hall project, stands near the construction site in 2008.

In that last regard: I had occasion last week to say a few words at an event where Justice Anthony Kennedy was part of the keynote conversation later in the program. I made an observation about the fraying of our society and drew upon a poem written a century ago, with the line, “Things fall apart; the centre cannot hold,” attributing it simply to “the Irish poet.” Justice Kennedy, rather deftly, later referred to my remarks, correctly attributing the quotation to W. B. Yeats, and made a point of his own by quoting later lines in the poem: “The best lack all conviction, while the worst / Are full of passionate intensity.” It seemed to me good judgment, in the context, that neither of us used the line in between, “Mere anarchy is loosed upon the world,” but let’s leave that aside.

I mention this now because I associate Mike somewhat with Yeats. Mike’s grandfather came from Ireland—indeed, from County Sligo, “under Ben Bulben,” as they say (and he taught history at Marquette University, in fact, but that’s another story). So I wondered this weekend what line of Yeats might seem most appropriate *this* evening. There are so many. For example, given Mike’s unreasonable affection for Traverse City, Michigan, and his house there, perhaps it’s “The Lake Isle of Innisfree.” You know the opening lines: “I will arise and go now, and go to Innisfree, / And a small cabin build there, of clay and wattle made.” Yet, in fact, as much time as Mike might spend up north, he’s already demonstrated this semester that he’s scarcely leaving us, with respect to strategic and budget planning, counseling on university politics, and much else. So that also ruled out Yeats’s question, which I might have asked self-pityingly, “Who will go drive with Fergus now . . . ?” Some might think of our collaboration, as is said in “Easter 1916,” “A terrible beauty is born,” but that would be the rare person on the faculty, I hope. “The Circus Animals’ Desertion” almost certainly would have been a bad gambit. “That is no country for old men” seemed in poor taste, even if it was counterbalanced by the more accurate title of another poem, “Men Improve with the Years.”

The possibilities are almost endless, but ultimately, and rather simply, I settled on the two closing lines from one of

Yeats’s very late poems, “The Municipal Gallery Revisited.” It’s a wonderful poem, with Yeats walking through the municipal gallery and looking at portraits of people whom he had known in bygone times. Lady Gregory, Hugh Lane, J. M. Synge—they’re all there. You may imagine the poet sitting in front of the paintings. In any event, here’s the final stanza (with my emphasis):

“And here’s John Synge himself, that rooted man,  
‘Forgetting human words,’ a grave deep face.  
You that would judge me, do not judge alone  
This book or that, come to this hallowed place  
Where my friends’ portraits hang and look thereon;  
Ireland’s history in their lineaments trace;  
*Think where man’s glory most begins and ends,  
And say my glory was I had such friends.*”

I think that to be case with Mike and, truly, with all of you more generally.

Lest I end on an oversentimental note, let me present something to Mike. We will want him to think of us even when he’s not in Eckstein Hall. So, as on some past occasions with retiring faculty, we have a framed set of photographs of the three homes of Marquette University Law School: Mackie Mansion, Sensenbrenner Hall, and Eckstein Hall. Typically we note the years of service, beginning and end, but that seemed doubly inadvisable here. There’s the small matter of no one’s really knowing how Mike went from assistant to the dean, upon graduation, in 1975, to a member of the faculty (although we may be sure that that, too, took “great art,” perhaps even more than any other of his accomplishments). And there’s also the fact, to reiterate an important point, that we really don’t think Mike to be going away. So, if I may, the plaque reads, “Presented in 2019 to Professor Michael K. McChrystal / By His Faculty Colleagues and Dean Joseph D. Kearney / With Gratitude for Many Decades of Service.” Immense thanks to Mike for what’s come and gone and what’s yet to come, and thanks to all of you for being here this evening. ■

**. . . I introduced Mike to Ray Eckstein as the guy “who got me into all this trouble” (and Ray Eckstein to Mike as “the guy who got me out of all this trouble”).**

Ramon A. Klitzke II

# Remembering Professor Klitzke

Ramon Klitzke, professor emeritus, passed away last semester, at age 90. His longtime service on the Marquette Law School faculty, as well as his life story more generally, should be memorialized. Toward that end, we print here one of the eulogies given at his funeral service at St. John's Lutheran Church, in Brookfield, Wis., on April 5, 2019. This one was from his son, Ramon Klitzke II, a Marquette lawyer, class of 1980, and now a patent lawyer in Portland, Ore.

On behalf of my mom, Doris Klitzke, and the rest of the family, we thank you all for coming today to help us remember and celebrate my dad's life. So many of you have done so much to support my mom and dad these past few years. It was comforting for Ann, Al, and me to know that our parents had an extended family of friends to provide support here in Waukesha the last few years.

My dad was a remarkable man, who achieved far more than anyone could have expected. Born in 1928, he was adopted as an infant in Chicago by Hugo and Ethyl Klitzke. They named him "Ramon," spelled unconventionally, after Ramon Novarro, a Mexican-born silent film star in the 1920s, whom the movie studio promoted as "The Latin Lover." I have a feeling that it was my grandmother, Ethyl, who chose the name.

My grandfather, Hugo, was a meat cutter in the Chicago meatpacking industry. He put his long johns on every day and spent most of his day in the freezer, butchering beef. Ethyl was a part-time telephone operator. Hugo

and Ethyl lived in a modest blue-collar neighborhood, hardly on the nice side of the tracks.

Growing up, my dad experienced the rougher side of Chicago. As a teenager, he worked as a stock boy in a liquor store that was robbed at gunpoint, and he witnessed the owner of the store pistol-whipped after trying to kill the lights to thwart the robbery. Dad set pins at a bowling alley frequented by hard-drinking drunkards who backed down to nobody; he found one of them dead in the back alley one night when he went to empty the trash. At his high school, it was necessary for boys to pledge fealty to one of the local gangs to survive. When he couldn't avoid participating in the gang's periodic rumbles with other gangs, he would try to hang around on the fringe of the melee and away from the "real action." Though disquieting to say the least, this was his Chicago in the 1940s.

Yet Dad still managed to stay mostly out of trouble in high school because he was an excellent athlete in several sports, including being quarterback of the football team and diving on the swim team. At this point in his life and with parents of modest means, he wasn't exactly on a college track.

Lucky for my dad, a college diving coach at Illinois Institute of Technology convinced him to attend. While there, my dad became president of the junior class and captain of the swimming team, graduating with a bachelor's of science degree in engineering. After college, he served in the army during the Korean War, worked as a safety engineer in Indiana to pay off his college scholarship, dove for the Indianapolis



Professor Ramon Klitzke

Athletic Club, and went to law school in the evening at Indiana University while working full time during the day.

At the athletic club in Indianapolis, he met the love of his life, my mother, who was a star swimmer from Michigan and an even more accomplished athlete than my dad. She caught his attention because, when swimming training laps in the pool, she would stop and wait for him to complete his dive. Logical minds might surmise that her interest was more about self-preservation and avoiding one of the divers landing on her from above.

Mom and Dad married in Indianapolis and, after Dad's graduation from law school, moved to New York City. There, Dad worked as a patent attorney for Union Carbide by day and ambitiously

**For the adopted son of a Chicago meat cutter and part-time telephone operator, my dad's life is an impressive journey, made possible by his hard work and ambition to better himself and by my mom's being by his side to support him.**

## Dad loved nature—perhaps his deep appreciation came from his upbringing in the asphalt world of Chicago. Many of his stories and poems feature pine trees, mountains, flowers, lakes, and wildlife.

pursued his master of law degree at New York University School of Law in the evening. And, of course, he continued to compete in diving. With two rambunctious small boys (mostly my brother, Al, I'm sure), my mother somehow managed to survive the Big Apple while Dad was patent lawyering, studying for law degree number two, and diving.

Dad graduated from NYU with his LL.M. degree and accepted a position as a law professor at Texas Southern University in Houston. Seven years later, he came to Marquette University, where he became a tenured law professor for almost 30 years and, upon retiring, was honored with the status of "professor emeritus."

For the adopted son of a Chicago meat cutter and part-time telephone operator, my dad's life is an impressive journey, made possible by his hard work and ambition to better himself and by my mom's being by his side to support him.

Dad loved and cherished his family. He loved teaching primarily because he enjoyed the engaging academic interactions with his law students, but he also appreciated the flexibility he had in the summer to travel and spend time with family. He said many times how my mother was the best thing that ever happened to him. Dad would say that they made a great team. He also was incredibly proud not only of my mother's many swimming and other accomplishments but also the accomplishments of his grandchildren, Michael, Julia, Joanna, Alyssa, and Connor.

Dad not only wrote many scholarly articles about many legal topics, relied upon by the Federal Circuit, for example, but in retirement he also wrote many short stories and poems. Many were inspired by his life experiences, and he even managed to win a few local and state awards for his writings.

Dad loved nature—perhaps his deep appreciation came from his upbringing in the asphalt world of Chicago. Many of his stories and poems feature pine trees, mountains, flowers, lakes, and wildlife. He was most at peace at my parents'

cabin in northern Wisconsin. I see vividly the same passion for nature and outdoors shared by his grandchildren in their lives.

Although it is not about nature, I want to close by reading one of his poems, from 1997, called "Year's Closeout."

Maybe Dad's poem is a message for all of us. Dad has reached his "year's end." But for the rest of us, we are starting a new year, with an opportunity to look forward and not behind us, and a chance to "balance life's books." ■

### YEAR'S CLOSEOUT

Bookkeeper Time  
closes the account.

Too late now  
to correct mistakes  
rectify oversights  
snatch back blunders.

Better to plan  
for challenges  
opportunities  
openings.

Better to look  
ahead than back.

The year's end  
is a year's beginning,  
a fresh year of days,  
a new inventory of hours.

Another chance  
to balance life's books.

# CLASS NOTES



James G. DeJong



Daniel D. Daubert



Maxine A. White



R. L. McNeely



Brent D. Nistler



Kimberley Cy Motley

**60 Franklyn M. Gimbel** was awarded the Big Pi Award, the lifetime achievement award of Pi Lambda Phi Fraternity.

**70 Thomas P. Krukowski** moved his practice to Thomas P. Krukowski s.c. In addition to practicing employment and labor law, he continues to offer programs, seminars, and webinars.

**72 Michael F. Hupy** received the Albert Nelson Marquis Lifetime Achievement Award, presented by the Marquis Who's Who Publications Board.

**78 James G. DeJong** of O'Neil, Cannon, Hollman, DeJong & Laing, based in Milwaukee, received the 2019 Carroll University Distinguished Alumnus Award.

**80 Daniel D. Daubert** has joined Reinhart Boerner Van Deuren's new consumer finance team. Daubert is a shareholder in Reinhart's corporate law practice.

**85 Maxine A. White**, chief judge of the Milwaukee County Circuit Court, received the Ida B. Platt Award at the Cook County Bar Association's 2019–2020 Installation of Officers and Awards Banquet.

**93 Mary J. Koshollek** was awarded the 2019 Law Librarians Association of Wisconsin Distinguished Service Award. She is director of information and records service for Godfrey & Kahn in Milwaukee.

**94 R. L. McNeely** is chair of the Felmers O. Chaney Advocacy Board. Together with other charter members of the Community Coalition for Quality Policing in Milwaukee, the board was presented the League of United Latin American Citizens (LULAC) Wisconsin "Partner in Change" Award at LULAC's national convention in Milwaukee this past June.

**97 Stacy L. Alvarez** joined Westbury Bank as vice-president, commercial relationship manager.

**99 Steven M. Cain** is a newly elected judge of the Ozaukee County Circuit Court. He and his wife, **Heather (Mager) Cain, L'00**, live in Cedarburg, Wis.

**Jessica Fredrickson** is senior office manager for the Milwaukee County Office of Corporation Counsel.

**Brent D. Nistler** joined the Milwaukee office of Hansen Reynolds as a partner. He focuses his practice on business, real estate, and probate litigation as well as complex criminal defense.

**00 Robert R. Gagan** joined Conway Olejniczak & Jerry, in Green Bay. His practice centers on corporate and municipal law as well as commercial litigation. He was a co-founder of the Brown County Free Legal Clinic and served as president of the State Bar of Wisconsin in 2014–2015.

**01 Brad L. F. Hoeschen** was promoted to vice president, North Central Division Agency Manager and Underwriting Counsel, for Old Republic National Title Insurance Co. He is in charge of Old Republic's agency and underwriting operations in Minnesota, Wisconsin, North Dakota, and South Dakota.

**03 Kimberley Cy Motley**, who has done legal work in Afghanistan and elsewhere, has written a book, *Lawless: A Lawyer's Unrelenting Fight for Justice in One of the World's Most Dangerous Places*, published by Allen & Unwin Book Publishers.

**Tara R. Devine** was elected secretary of the Lake County (Ill.) Bar Association. She also was named to the Lawdragon 500 Leading Plaintiff Consumer Lawyers guide for 2019. She is a partner at the personal injury law firm Salvi, Schostok & Pritchard.

**05 Annie L. Owens** has joined Georgetown University Law Center's Institute for Constitutional Advocacy and Protection as senior counsel.

**Laura M. Lyons** joined Dean Health Plan as a staff attorney. She also is president of the Wisconsin Association of Worker's Compensation Attorneys.

Three Marquette lawyers have been promoted to shareholder in von Briesen & Roper's Milwaukee office:

**Andrew J. Christman, L'12**, with a practice focusing on toxic tort, product liability, and commercial litigation

**Kevin M. Fetherston, L'11**, practicing in general tort, business and commercial, and professional liability litigation

**J. Ryan Maloney, L'07**, focusing on business and commercial, professional liability, and product liability and insurance litigation.

Also, **Daniel J. Balk III, L'17**, was named an associate in the health law section in the firm's Milwaukee office.

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



Claire E. Hartley



Emily M. Chilson



Kate M. Marlin



Lauren E. Raupp



Karla M. Nettleton



Danielle E. Marocchi

**08** **Yatin K. Patel** led a successful effort to secure approval to develop a four-story hotel that will feature a corner plaza and a coffee shop in Palo Alto, Calif.

**Melissa J. Papaleo** joined the Milwaukee firm of Halling & Cayo. Her practice focuses on civil disputes, business litigation, insurance defense, and securities litigation.

**09** **Claire E. Hartley** has become a shareholder at Buelow Vetter Buikema Olson & Vliet, based in Waukesha, Wis. Her practice focuses on representing school districts, municipalities, and private employers in labor and employment law matters.

**10** **Ryann H. Beck** was named a partner of Andrus Intellectual Property Law in Milwaukee.

**11** **Emily M. Chilson** was named a partner of Andrus Intellectual Property Law in Milwaukee.

**12** **Kate M. Marlin** joined Old Republic Title as assistant vice president, Wisconsin Underwriting Counsel. She also serves on the board of directors and as Education Committee co-chair for the Wisconsin Land Title Association.

**Jaclyn C. Kallie** has become an associate with Gimbel, Reilly, Guerin, & Brown in Milwaukee.

**Rachel T. Bernstein** is a compliance manager in the hospital services group of DaVita in Denver, Colo.

**13** **Lauren E. Raupp** joined MacGillis Wiemer, in Wauwatosa, Wis., as an associate focusing on personal injury work.

**15** **John M. Calewarts** has joined Conway Olejniczak & Jerry, based in Green Bay. His practice focuses on general corporate law, franchisees, and tax/succession. He is also a CPA.

**17** **Karla M. Nettleton** joined the tax practice of Reinhart Boerner Van Deuren in Milwaukee.

**Lauren L. Otte** joined Becker, Hickey & Poster in Milwaukee. Her practice includes divorce, custody, and related family law matters, Title 19, elder law, guardianship, estate planning, and special needs planning.

**18** **Danielle E. Marocchi** joined the litigation practice at Reinhart Boerner Van Deuren in Milwaukee.

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

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



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### Von Briesen & Roper CEO Crocker Dies Unexpectedly

**Randall Crocker, L'79**, president and CEO of von Briesen & Roper, died unexpectedly this fall as this issue was going to press. Crocker was a leader in legal and civic life in Milwaukee and beyond, including extensive involvement as an alum of Marquette Law School. Crocker, who was 64, led von Briesen & Roper from 2004 until his death. Under his leadership, the Milwaukee-based firm grew from 162 employees to more than 350 in nine offices in Wisconsin. "I admired Randy Crocker, both for his leadership of von Briesen & Roper and much more generally," said Dean Joseph D. Kearney. "His energy and enthusiasm, his innovation, his engagement went well beyond even his firm or this school. We at Marquette Law School extend our condolences to his family and colleagues." In addition to his involvement with the Law School, Crocker was a leader in civic efforts in Milwaukee, including the Discovery World Museum and several arts organizations.



KATHERINE MALONEY PERHACH, L'00

## Reaching a Defining Moment

Family, schools, and colleagues lead Katie Perhach to the federal bench.

**F**ifty years ago, John Maloney became the first member of his family to graduate from Marquette University. Three years later, he graduated from Marquette Law School. And in the half century since 1969, members of the Maloney family and their spouses have received 34 Marquette degrees, including 8 from the Law School.

A special, but bittersweet, chapter in the rich history of the Maloney family and its accomplishments in the legal world began this year with the appointment of Katherine “Katie” Maloney Perhach, L’00, as a bankruptcy judge for the U.S. District Court for the Eastern District of Wisconsin.

The bittersweet aspect is that, at age 70 and after a distinguished legal career, John Maloney died on June 30, 2018. Katie Perhach interviewed for the bankruptcy court three days before her father’s death. His wife, Perhach’s mother, Jerrilyn Maloney, died in 2010.

That added poignancy to the joy at the August 2019 investiture ceremony, which was attended by a large number of judges, lawyers, friends—and, you may be sure, family members.

Perhach was a lawyer at Quarles & Brady before joining the federal bench. One of the speakers at the investiture was Kevin Long, co-managing partner of the firm’s Milwaukee office. In his remarks, Long called Perhach “one of those people who are very good at almost everything.” He praised her legal abilities but added, “Even outside strictly legal analysis, if you have a very difficult financial problem, an engineering issue, or technical issue, after a very short period of time, Judge Perhach will understand it, frame it appropriately, and explain it to others in a way that helps solve the problem.”

Long said, “As high as her IQ is, her EQ—her emotional quotient—is even higher. She is great at reading the room. She is able to build rapport with just about anyone. . . . Judge Perhach is unafraid of hard issues. She challenged the firm to be better, whether it be on topics of diversity and inclusion, training, building a team-first culture, or simply improving our performance.”

In her remarks, Perhach recalled her start as a student at Marquette Law School. She said, “It is my understanding that long before my time, the dean of the Law School used to tell incoming students at orientation, ‘Look to your left; look to your right. One of those people won’t be here at the end of the semester.’ The Law School had become a kinder, gentler place by the time I enrolled, so Dean Howard Eisenberg modified that by saying, ‘Look to your left; look to your right. You just might wind up married to the person you are sitting next to.’ I am so glad that I chose the seat that I did.” She married Brian Perhach, who now is an attorney in Milwaukee. The couple have three children.

Perhach said she recently served on a panel for the United Way of Greater Milwaukee and Waukesha County. One of the questions panelists were asked was what defining moments in their lives put them on the path to where they are now. “I have continued to reflect on that question ever since I sat on that panel,” she said. She described some of those moments.

Her list began with attending Pius XI High School on Milwaukee’s west side. “The values that are part of a Pius education instilled in me a strong desire to want to help people who are less fortunate than I am, and to make a difference in the greater Milwaukee community.”

Her undergraduate education at Marquette was next: “Marquette has instilled in each one of us a thirst for knowledge, the desire to help those less fortunate, and the ability to make a difference in the lives of others.”

Her law school experience (and meeting Brian) and the couple’s three children followed on the list.

Next was her experience doing pro bono work. Perhach said, “Dean Eisenberg once said, ‘I believe with all my heart that as members of the bar, and as graduates of a Jesuit law school, you have a moral and professional responsibility to provide direct legal assistance to those who cannot pay you.’ It has been such an honor and privilege to do legal work for people in our community who do not have the means to hire a lawyer, whether that has meant providing free legal advice at the Marquette Volunteer Legal Clinic at the United Community Center, obtaining guardianships for families with special-needs children about to turn 18, obtaining restraining orders for victims of domestic violence, obtaining guardianship for a woman who was told she was ‘too poor’ to raise her deceased sister’s daughter, building a reading room at a Milwaukee public school with [former Green Bay Packer] Ha-Ha Clinton Dix, or advocating for people with developmental disabilities on the Wisconsin Board for People with Developmental Disabilities.”

Working at Quarles & Brady was the next defining moment, and she generously praised people who work at the firm, both lawyers and support staff.

Last on the list was her investiture as a judge.

In thanking a long list of people who have supported her and boosted her in many ways, Perhach ended with thanks to her late parents. “Quite simply, I wouldn’t be the person I am today without them and their love for me. That’s one of the amazing things about love—it transcends even death,” she said. But up in Heaven? “They are, however, most definitely telling anyone who will listen up in Heaven about what is going on down here today. I have no doubt that even the angels are tired of listening.” ■



Dwyane Wade, second from left, walks on the Marquette campus with Tamara Johnson, third from left, when he visited her during her time as an undergraduate.

**TAMARA JOHNSON, L'17**

## **A Super “Thank You” to a Superstar** **Tamara Johnson expresses her gratitude to** **Dwyane Wade, benefactor**

**A** decade ago, Tamara Johnson was a high school senior in the small community of Pojoaque, New Mexico, near Santa Fe. She was active in the local Boys & Girls Club and applied through the club for a college scholarship. That led to an offer for a full scholarship at an institution she had never heard of: Marquette University. The offer was a result of a partnership between the Boys & Girls Club, Marquette, and NBA superstar Dwyane Wade, a former Marquette basketball star.

Johnson said “Yes” immediately. “This was the opportunity of a lifetime,” she said. How did it work out? “It was the best thing I have ever done. It is one of my greatest blessings.” Wade took a strong personal interest in her and other Marquette students who have received scholarships he funded. He visited her each of her undergraduate years.

Johnson got her undergraduate degree in 2014 and enrolled at Marquette Law School, where she benefited from some other scholarships. She graduated in 2017 and is back in Santa Fe, practicing family law.

And she got a chance several months ago to thank Wade in a special way. As he approached the end of his NBA career, Wade was honored at arenas across the country. Budweiser did something different: It brought Wade to the nearly empty and dark arena of his home team, the Miami Heat, and surprised him with visits from five people who have benefited from Wade’s personal kindnesses.

“It was always my dream that I would get the chance to go to college, but we just didn’t have the money,” Johnson told Wade as one of the speakers at the ceremony. “Without you and your full-tuition scholarship, none of this would have been possible. . . . You’ve completely changed the course of my life.”

She presented Wade with a cap and gown and the tassels from both her undergraduate and law school graduations.

The moving tribute is available through an online search using “Dwyane Wade tribute.” ■



## REFLECTING UPON AN **EXTRAORDINARY CAREER ON THE WISCONSIN SUPREME COURT**

**RETIRING WISCONSIN SUPREME COURT JUSTICE SHIRLEY S. ABRAHAMSON** was saluted in the capitol in Madison on June 18, 2019, in a ceremony hosted by Marquette Law School, the University of Wisconsin Law School, and the State Bar of Wisconsin.

Abrahamson was the first woman to serve on the state's highest court, and her 43-year tenure was the longest of any justice in Wisconsin history. In a video message closing the ceremony, U.S. Supreme Court Justice Ruth Bader Ginsburg said, "Among jurists I have encountered in the United States and abroad, Shirley Abrahamson is the very best."

Two of Abrahamson's former colleagues were speakers at the ceremony: Janine P. Geske, retired distinguished professor of law and a current trustee at Marquette University, and Diane S. Sykes, a judge of the U.S. Court of Appeals for the Seventh Circuit. Both are Marquette lawyers who served on the Wisconsin Supreme Court. Here are edited texts of their remarks.

## “The Hardest-Working and Smartest Person I Ever Met”

**Janine P. Geske, L’75**, served as distinguished professor at Marquette Law School from 1998 until her retirement in 2014; she remains involved in the school’s Restorative Justice Initiative. Geske served on the Wisconsin Supreme Court from 1993 to 1998, where Abrahamson was a colleague and (beginning in 1996) chief justice.

This is really a great honor for me. Of course, to reduce to five minutes Shirley Abrahamson’s life—it can’t be done, and you all know it. And you all hold in your hearts stories of how Shirley Abrahamson affected your lives, your courts, your counties, your institutions. I am going to give a few highlights as we pay honor together.

Shirley grew up in New York and New Jersey (she denies the New Jersey part), the daughter of Polish Jewish immigrants who had barely finished high school. When she was four, she announced that she wanted to be president. (I wish she’d pursued that.) At six, she decided that she wanted to be a lawyer. And so she set upon a lifelong journey of study and success. She graduated from New York University, *magna cum laude*, in 1953. At age 19, she undertook her legal education at Indiana University, where she graduated first—and the only woman—in her class.

I cannot talk about Shirley without mentioning her husband, Dr. Seymour Abrahamson, who was so much of her support through her trailblazing career. They had met at camp in New York and started married life together in Indiana. Seymour passed away three years ago, after 63 years of an incredible marriage, but he’s here today, and we know that he’s celebrating with all of us. Despite his own significant and internationally acclaimed career in genetics, he adored and admired every one of Shirley’s accomplishments.

Shirley and Seymour moved here to Madison: At the University of Wisconsin, she worked and obtained her S.J.D. in legal history, and Seymour

had a postdoctorate fellowship. Gordon Sinykin and James E. Doyle of LaFollette & Sinykin soon hired Shirley Abrahamson as the firm’s first female attorney. She became a name partner and practiced law for 14 years, while in her spare time becoming the first tenured female faculty member at the U.W. law school.

In 1976, Abrahamson, at the age of 42, was appointed to the Wisconsin Supreme Court by Governor Patrick Lucey, where she would be the first woman to serve on that court.

Before she was sworn in, I first met Shirley in June 1976 at the state bar convention in Lake Geneva, Wisconsin. I remember because I was a young Legal Aid Society lawyer, nine months pregnant and looking for role models. I recall the thrill of meeting that warm and engaging woman who would soon be our first woman on the supreme court. She has subsequently inspired thousands of young girls and women to follow a path to becoming lawyers and, in many cases, judges.

Wisconsin voters elected her to a 10-year term on the court in 1979. She won reelection in 1989 and became the court’s first female chief justice in 1996. She again won reelection in 1999 and in 2009. During her time as chief, the supreme court instituted many innovative programs, found new sources of funding, engaged citizens and other governmental authorities in the court’s work, and became, truly, a national example of modern-day judging.

Shirley has been awarded 16 honorary-doctorate degrees and many other distinctions. During her tenure as chief justice, she was elected “chief of

**She has subsequently inspired thousands of young girls and women to follow a path to becoming lawyers and, in many cases, judges.**

Janine P. Geske





**She has remarkable leadership skills and an incredible imagination as to how to make the justice system better and more responsive to all involved.**

Janine P. Geske

the chiefs” (that is, chief of the national Conference of Chief Justices), served as chair of the board of directors of the National Center for State Courts, and was a member of groups from the board of directors of New York University School of Law’s Institute of Judicial Administration to the Council of the American Law Institute. She was chair of the National Institute of Justice’s National Commission on the Future of DNA Evidence, established by the attorney general of the United States, and she has served on many, many state bar committees.

There are real reasons for all of the awards, the honors, the service. I have always described Shirley as follows: She is the hardest-working and smartest person I ever met. She is brilliant. She has remarkable leadership skills and an incredible imagination as to how to make the justice system better and more responsive to all involved.

Shirley is the longest-serving justice in Wisconsin history, and let me be clear about this: she has given with her whole being to caring about the law and providing justice for each of those 43 years. She cares about the poor, victims, and criminal defendants; those who do not speak English; those who are veterans; those who have lived traumatic lives; domestic-violence survivors; those with mental disabilities; and pro se litigants. She always was looking for ways to shape our trial courts to be more sensitive to those issues while providing a just system for all. She set up many community-based committees and task forces to take on these issues. In 2013, there were 150 court-related programs in our Wisconsin courts. One of them I particularly enjoyed was the Court with Class program—a wonderful educational experience for students and their teachers.

Let me tell you a couple of last stories because they so epitomize Shirley Abrahamson. Shirley has

loved to talk about law and the courts to any group, regardless of how small it was or where in the state it was located. Some of you may recall some of her early speeches to the community. They were titled “Tootsie the Goldfish.” Tootsie the Goldfish lived in an apartment. And Shirley would pose to the community groups the problem of a lease that said “no pets”—and a case coming to the Wisconsin Supreme Court to decide whether Tootsie was a pet. People would understand how they had to think about judging. And then Shirley—as only Shirley could—turned her talk into a learned article about Tootsie the Goldfish.

And if that weren’t enough, here’s a final story: At one point she decided—of all people, the chief justice, well respected in the state—to sit as a judge in small claims court in Milwaukee. Now, some of us have sat in small claims court in Milwaukee, but Shirley had never sat in any trial court, not to mention small claims. But she had the courage and humility to do this. She did it with grace and modesty (“Where are these regs to which you refer?”). And then, having had the experience, what did she do? She turned it into a first-rate Hallows Lecture at Marquette Law School. If you want to know what it’s like to serve on small claims court, you can read it.\*

Then she went to the American Law Institute—a scholarly group that studies and helps change the law, most of whose members do not spend their days in courtrooms—and she got up as the luncheon speaker. She gave a speech about small claims court in Milwaukee County, receiving a standing ovation.

That is Shirley Abrahamson. She experiences. She learns. She teaches. She inspires.

\* See *Marq. Lawyer*, Summer 2004, at 38–41. – Ed.

## An Unwavering Commitment to Law, to Context, and to Vibrant State Courts

**Diane S. Sykes, L'84**, serves as a judge on the U.S. Court of Appeals for the Seventh Circuit. Before her appointment to the appeals court in 2004 by President George W. Bush, Sykes served on the Wisconsin Supreme Court for five years while Shirley Abrahamson was the chief justice.

It's good to be back in the capitol, and it was indeed my privilege to serve with Justice Abrahamson on the court. She was the chief justice during my tenure, and she warmly welcomed me when I arrived in 1999. That warmth, and the spirit of shared commitment to the important work of the court, continued throughout our time together, and for that I am grateful.

I'm grateful as well for all the times Justice Abrahamson challenged me on my opinions, although that's easier to say now than back then, especially when I was on the receiving end of a long memo from her—often late at night—meticulously dissecting something I had just written. We agreed on many cases, disagreed on some, and the strength of her work always made mine better.

So it's an honor to be here today to help celebrate Justice Abrahamson's extraordinary 43 years of service on the Wisconsin Supreme Court. My assignment is to capture her most important contributions to the law—in 10 minutes or less. Needless to say, that cannot be done. Her work ethic is legendary, as is her high standard of excellence in legal scholarship. She has authored 530 majority opinions, 490 dissents, and 325 concurrences—and that's not counting the current term. She's written dozens of law review articles and given countless speeches and lectures. It's impossible even to summarize such a prolific and illustrious judicial career in so short a time. So I offer a few thoughts—modest and necessarily quite general, but I believe that they will give us a sense of her extraordinary contributions.

Let's get our bearings by trying to describe the essence of Justice Abrahamson's approach to deciding cases. Judges often reject labels and resist association with comprehensive theories of legal interpretation, and Justice Abrahamson is no different. But we can find an anchoring statement of her general philosophy of judging in a pair of speeches she gave in the 1990s, when she had been on the court for about 15 years. Both were commentaries on the judicial thought of the

renowned Justice Benjamin Cardozo, who served on the United States Supreme Court for just six short years in the 1930s but had come to prominence during his earlier service as a judge of New York's highest court.

In 1921, then-Judge Cardozo gave a series of lectures at Yale Law School that were promptly published in a slim volume titled *The Nature of the Judicial Process*. It became an instant classic, and Cardozo is widely admired for charting a middle course between legal formalism, which hews closely to the text of the written law and the black-letter elements of the common law, and the ascendant legal realism of the twentieth century, which rejected these traditional forms of legal reasoning. Justice Abrahamson told her audience that she had read Cardozo's lectures in law school, and then again in 1976 just before taking her seat on the Wisconsin Supreme Court, and then again in the 1990s. At each reading, she said, she “found new merit in Cardozo's description of decision-making.”

In the first of these speeches, Justice Abrahamson endorsed Cardozo's view (and I'm quoting her now) that “the law calls for the balancing of stability and progress; liberty and constraint; promotion of individual rights and protection of the public interest; and adherence to general rules and dispensation of individualized equity.” In the second speech she went further, revealing a deep admiration for Cardozo's approach to judging, which she described as achieving a proper balance between the imperative of judicial *detachment*—meaning impartiality, lack of prejudice, and fidelity to the law—and the need for judicial *compassion* and understanding.

She synthesized that philosophy in this way. First, she said judges must of course be “detached in the sense that they must place their allegiance to the rule of law and the judicial institution above their personal considerations or predilections.” At the same time, she said, “the judge must be interested in and concerned about the lives of the litigants who appear before her.” She warned that “[a] judge

**I'm grateful as well for all the times Justice Abrahamson challenged me on my opinions, although that's easier to say now than back then, especially when I was on the receiving end of a long memo from her—often late at night—meticulously dissecting something I had just written.**

Diane S. Sykes



**She aims to arrive at the best interpretation of the statute, considering the practical realities of its application to real people in real-world circumstances.**

Diane S. Sykes

who is disengaged from the real world cannot fully grasp how her courtroom decisions will play out in that world.” Here is the heart of the matter, in her own words:

“When the judicial process transforms either judges or those who appear before them into abstractions rather than individuals, the rule of law becomes a mindless law of rules—an amalgam of regulations without rhyme, reason or relation to the people whose aspirations the law should reflect.

“Judging requires more than such a mechanical application of pure reason to legal problems. To be sure, legal principles and logic necessarily influence the outcome of every case. But though they alone will determine many cases, in other cases they will not suffice. Principles may admit of more than one interpretation, conflicting principles may apply, or the application of principles to the facts may be unclear. In cases such as these, the blindfolded judge who is blind to the real world in which the parties live is blind indeed, bereft of a basis on which to make an intelligent, let alone fair, decision.”

With that eloquent articulation of her philosophy of judging now in place, we can take a brisk walk through some illustrative cases. A Westlaw search of Justice Abrahamson’s most frequently cited cases brings up opinions across a wide spectrum of subjects, including constitutional law, statutory interpretation, tort law, criminal procedure, evidence law, and insurance law. (Don’t worry: I’m not going to talk about insurance law.)

But let’s take a quick look at a few examples from this group of her most-cited cases. Near the top is *Cook v. Cook* (1997), an institutionally important case in which the court had to decide whether the court of appeals has the power to overrule its own decisions. Justice Abrahamson began by considering the constitutional and statutory provisions that created the court of appeals, divided it into four districts, and allocated the appellate power between the court of appeals and the supreme court. She focused on the purposes behind this division of power—a common mode of analysis for her. She explained that the court of appeals is a unitary court—not four separate courts—and then identified the shared and distinct functions of the court of appeals and the supreme court, and the policy

consequences of a decision one way or the other. Here’s her conclusion:

“If the court of appeals is to be a unitary court, it must speak with a unified voice. If the constitution and statutes were interpreted to allow it to overrule, modify or withdraw language from its prior published decisions, its unified voice would become fractured, threatening the principles of predictability, certainty and finality relied upon by litigants, counsel and the circuit courts. . . .

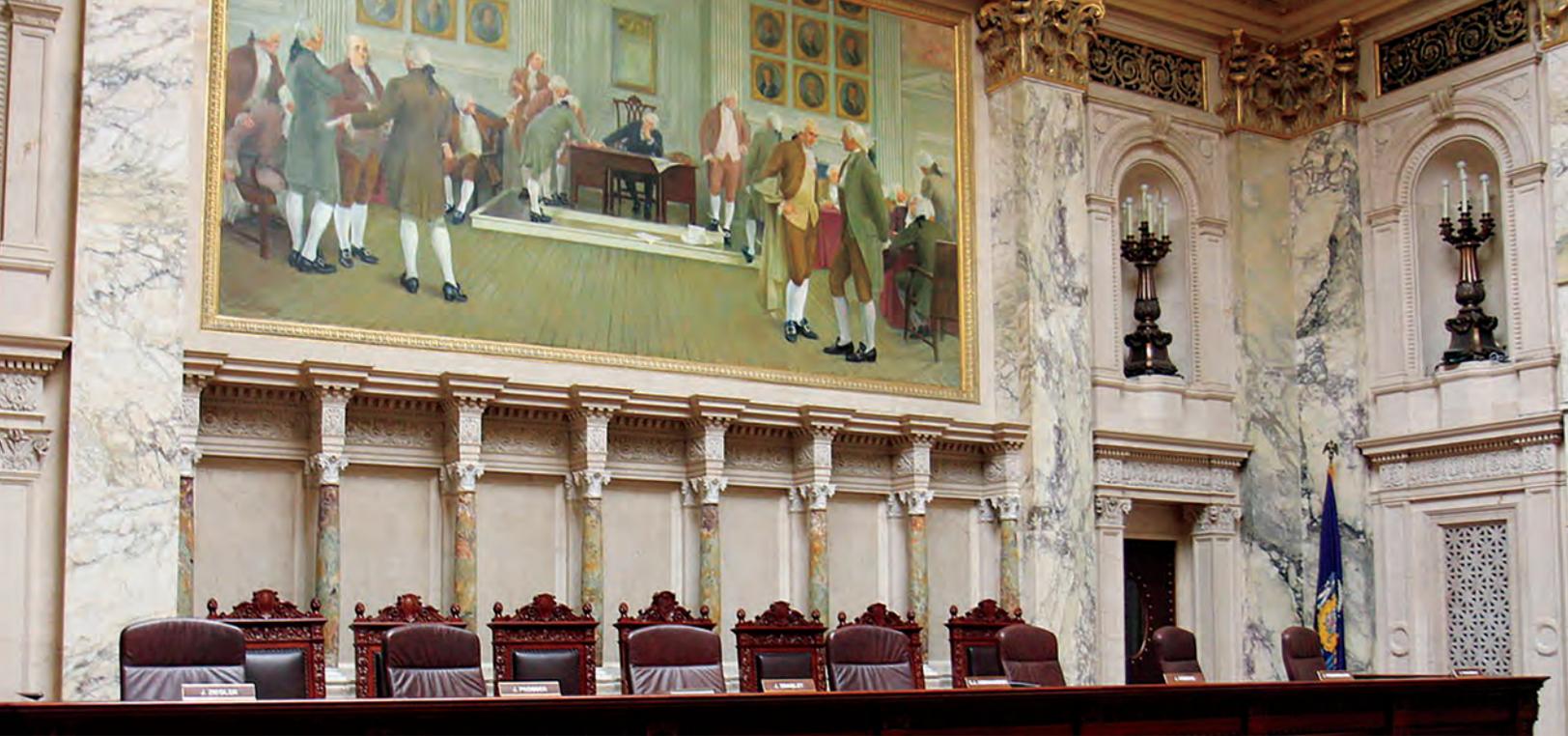
“[Accordingly,] only the supreme court, the highest court of the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals.”

Moving now to the common law, Justice Abrahamson played a major role in the court’s evolution of tort and contract remedies to address the changing needs of modern society. Her common-law opinions can fairly be characterized as adapting the rules of liability, with an emphasis on remedial flexibility, to ensure a remedy for tort and contract injuries. A good example is *Ollerman v. O’Rourke Co.* (1980). There she traced the evolution of the law of misrepresentation and established new rules, based on modern transactional realities, for when *silence*—the omission of a material fact—is actionable as a misrepresentation.

Some other common-law opinions by Justice Abrahamson: *Wangen v. Ford Motor Co.* (1980) addressed the question whether punitive damages should be recoverable in product-liability cases. After an exhaustive study of precedent, policy, and the academic literature, Justice Abrahamson held for the court that punitive damages are recoverable and set a standard for proving them up. *Bowen v. Lumbermens Mutual Casualty Co.* (1994) established an analytical framework for tort claims of negligent infliction of emotional distress. *Watts v. Watts* (1987) addressed the vexing question whether the law provides any remedy for property disputes between unmarried cohabiting couples who break up. Spoiler alert: It does, and Shirley explained why and how.

Justice Abrahamson’s criminal-law opinions are characterized by scrupulous attention to procedural fairness and vigilant enforcement of the constitutional rights of the accused. A sample:

- *State v. Dean* (1981) explains why polygraph evidence is unreliable and categorically inadmissible in Wisconsin courts.



Wisconsin Supreme Court photo provided by Creative Commons

- *State v. Knight* (1992) establishes a framework for vindicating the defendant's Sixth Amendment right to effective assistance of appellate counsel.
- *State v. Sullivan* (1998) establishes a rigorous standard for admissibility of other-acts evidence against the accused.
- *State v. Santiago* (1996) provides a method for resolving Miranda claims by non-English-speaking defendants who maintain that they did not voluntarily waive their right to counsel.
- *State v. Tye* (2001) holds that the constitutional requirement of an oath or affirmation in a warrant application is a matter of substance, not mere form, and is so essential that its absence cannot be excused by the good-faith exception.

This smattering of cases cannot even begin to scratch the surface of Justice Abrahamson's lifetime of work. But I must close now, and I will do so with two points about her contributions to legal interpretation more generally.

First, a few words about Justice Abrahamson and statutory interpretation. She served for decades before the textualist revolution and gave powerful voice to the resistance when textualism arrived. Her approach to reading statutes is perhaps best characterized as "holistic." She herself describes it as "comprehensive," which I suppose makes my own textualist approach "non-comprehensive," and that sounds pretty terrible. In reality, our disagreements about interpretive method were always in good faith, and on statutory interpretation in particular, I

think it's helpful to recall the influence of Justice Cardozo on her thinking. Justice Abrahamson's "comprehensive" approach starts with the language of the statute but also considers "all relevant evidence of legislative intent." She aims to arrive at the best interpretation of the statute, considering the practical realities of its application to real people in real-world circumstances.

And finally, Justice Abrahamson is rightly credited for her prominent role in the movement to reinvigorate state constitutional law—in particular, state constitutional protection of individual rights. Known as the "New Federalism," this school of thought reminds us that the state supreme courts may interpret their state constitutions to provide greater protection than the federal constitution. Justice Abrahamson's scholarly work in this field has been nationally influential, even if it has not quite gained a strong foothold in our state—yet.

But she never wavered. So I leave you with one of her favorite passages from Wisconsin caselaw on this subject, one that inspired her and formed the foundation of her deep commitment to state constitutionalism. It's a quote from Justice Abram Smith in the 1855 case of *Bashford v. Barstow*. He wrote this of the Wisconsin Constitution: "The people then made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs—let us construe, and stand by ours."

Thank you, Shirley, for your truly extraordinary lifetime of service to Wisconsin law and the people of this state. ■

**... Justice Abrahamson is rightly credited for her prominent role in the movement to reinvigorate state constitutional law—in particular, state constitutional protection of individual rights.**

Diane S. Sykes

## WISCONSIN VOTERS IN THE NATIONAL SPOTLIGHT

✓ *“Many analysts point to Wisconsin as the single state upon which the election could turn.”*

Dan Balz, *Washington Post* chief correspondent covering national politics, August 31, 2019

## THE MARQUETTE LAW SCHOOL POLL IN THE NATIONAL SPOTLIGHT

✓ *“The gold-standard poll of Wisconsin finds . . .”*

Mark Murray, senior political editor for *NBC News*, September 4, 2019

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