

MARQUETTE LAWYER

FALL 2023

JEFFREY NORMAN WANTS YOUR TRUST

Milwaukee's Police Chief, a Marquette Lawyer,
Brings a Distinctive Approach to His Work

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Complexity and Contradiction

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Drawing on—Even Dwelling in—the Past

I spend a good deal of my time, figuratively speaking, in Sensenbrenner Hall, the home of the Law School from 1924 until 2010. Sensenbrenner Hall was a modest place in most respects, yet solid in the way that old academic buildings often are, and I never have doubted its longtime suitability, its success, as a place for serious study. The reason for my own dwelling on it still is that, even from our impressive newer quarters, much of my work as dean involves engagement with Marquette lawyers who received their legal education in Sensenbrenner Hall.

So naturally I remember and reflect. For example, I was deeply impressed this past June when Dean H. Dietrich took the oath as president of the State Bar of Wisconsin. He noted in his inaugural address that he was the fourth member of Marquette Law School's Class of 1977 to do so, succeeding as state bar president his classmates John R. Decker, 1990–1991, Steven R. Sorenson, 1997–1998, and Patricia K. Ballman, 2002–2003. And when a nonlawyer friend in Florida recently left the Law School a seven-figure scholarship bequest, it was explicitly a tribute to her late father's estimation of his Marquette Law School education in the 1940s—and the opportunities that it provided for a successful career for him and, thus, particular educational opportunities for his daughter.

Those of us in the law regularly look to the past. I have come to tell our graduates in our commencement ceremony that “memory is especially important in our profession,” and I quite embrace the explication by Judge Gerard E. Lynch, in his deeply learned Hallows Lecture in this magazine issue, that in our legal system “[t]he past . . . is never entirely past.” Those largely are substantive observations about the law, not some mere atmospheric, and it is not a statement that all of our memories or legacies are happy ones.



Aerial view of 11th St. and Wisconsin Ave., Milwaukee, 1935, looking southwest (law school building, later named Sensenbrenner Hall, at corner).

In his Hallows Lecture, an annual event named after a Wisconsin Supreme Court Chief Justice who served on our faculty (1930–1958) before taking the bench and becoming known for developments in the law, Judge Lynch was discussing legal doctrine. Similarly (in terms of the connection to doctrine), the docket for our first-year students once again, as in every fall since 1892, has included Torts and Contracts, albeit with rather evolved syllabi. The abiding presence of such legal foundations, wherever one studies, is not a weakness but a strength of our form of education.

Sensenbrenner Hall still stands, now as the home of Marquette University's history department and the dean's office of the Klingler College of Arts and Sciences. The 1968 and 1984 additions are gone, as are separate buildings that once stood to the south, as shown in the photograph from 1935 accompanying this column. Those included what we long knew as O'Hara Hall, home of the university president's office from 1939 until 2010, and the buildings, including several

private residences, on Tory Hill, visible in the upper left-hand corner of the photograph.

In that latter area, of course, today stands Eckstein Hall, our home since 2010, widely praised for its design. Its exterior is, as promised during the planning more than a decade and a half ago, noble, bold, harmonious, dramatic, confident, slightly willful, and, in a word, great. Its interior, also as promised, is not only open to the community but also conducive to a sense of community.

When we moved from the one building to the other, we carried with us the Marquette University mission—succinctly stated as Excellence, Faith, Leadership, and Service—and we carved the words over the fireplace in Eckstein Hall's Aitken Reading Room as a visible commitment. Some of the forms whereby we serve that mission have changed in the last 13 years, or earlier, but the mission has not. It is timeless—even placeless.

Joseph D. Kearney
Dean and Professor of Law

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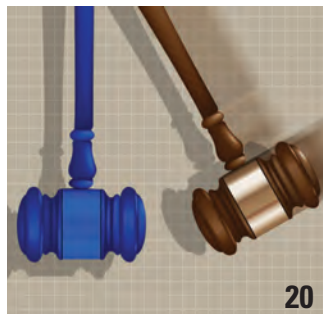
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MARQUETTE
UNIVERSITY

LAW SCHOOL

Of Administrative Powers and Patents—and New Positions on the Marquette Law Faculty

For Christine Chabot, the roots of her academic and research interests go back to Alexander Hamilton and the founders of the American political system.

For Jason Reinecke, the roots of his interests in the law go back to his undergraduate years when he had the idea for creating a phone app that would help people stay safe while walking alone.

For both of them, their roots have grown into thriving careers that have led them to appointments to the Marquette Law School faculty.

Chabot, a native of Iowa, received her undergraduate degree from Northwestern University and her law degree from the University of Notre Dame. Her career has included working for a large law firm in Chicago, clerking for Judge Jane R. Roth of the U.S. Court of Appeals for the Third Circuit in Wilmington, Delaware, and 11 years as a distinguished professor in residence at Loyola University Chicago School of Law.

She developed an interest in administrative law and, in recent years, focused specifically on the history of how much power the U.S. Constitution permits Congress to grant to federal agencies to make spending decisions. It is now an issue in a case pending before the U.S. Supreme Court. While some argue for stronger limits on what agencies can do, Chabot maintains that the historical record, going back to the first Congress of the United States, supports the legislative authority to give agencies latitude. Her new law journal article on the subject, titled “The Founders’ Purse,” will appear in the *Virginia Law Review* in 2024.

“Research is important to me,” Chabot said, and the opportunity both to develop in that sphere and to expand her teaching portfolio was a sufficient draw to attract her and her family to move from the Chicago suburbs to Milwaukee so that she might join Marquette as associate professor of law. She is teaching

Administrative Law in the fall 2023 semester, and her future courses will include Constitutional Law.

Reinecke grew up in Verona, Wisconsin. While he was an undergraduate student at the University of Wisconsin–Madison, he had the idea for creating a phone app. That led to wanting to launch a start-up business, which led to beginning to learn about patent law. In short, the startup never got going (“the main reason was that we didn’t have any money”), but his interest in patent law grew.

He pursued his interest in patent law as a student at Stanford Law School and in two years with a law firm in Washington, D.C. He also clerked for Judge Sharon Prost, then the chief judge of the U.S. Court of Appeals for the Federal Circuit, and returned to Stanford for a fellowship.

In addition to the appeal of the Marquette Law School position as assistant professor of law, the move to Milwaukee brings Reinecke and his wife, also a lawyer, closer to his family in Wisconsin. He is teaching Torts in the fall semester and looking forward also to teaching in the patent law area, joining Professors Bruce E. Boyden and Kali N. Murray in the Law School’s intellectual property program. He said that he has been impressed with the engagement of Marquette law students. “It’s a privilege to help with someone else’s progress and growth,” Reinecke said. ■



Jason Reinecke and Christine Chabot have joined the Marquette Law School faculty.

International Nonprofit Leader Tells Law Students to “Always Gut Check”

Maha Jweied has had opportunities, she acknowledges, including George Washington University for her undergraduate degree, Columbia University for law school, and subsequent positions in federal agencies and in nonprofit work.

She hopes that she has used the opportunities to serve others. Speaking at Marquette Law School on April 28, 2023, Jweied urged students to stay committed to performing pro bono work and to doing the determined (and sometimes lucky) work of finding jobs that match their long-term goals. Her own path has been shaped by those commitments, and along the way she has kept an eye out for opportunities, made financial sacrifices at times, dealt with career twists such as an agency's closing, and taken opportunities as she has seen them.

Jweied was the featured speaker at the Law School's Posner Pro Bono Exchange. The annual event, presented as part of the school's Pro Bono Society Induction Ceremony, recognized 106 Marquette law students who had done at least 50 hours of pro bono work while in school. That included 17 first-year students, 40 second-year students, and 49 third-year students. About a quarter of the entire group did at least 120 hours of pro bono work, and a number of other second- and third-year students had been inducted into the Pro Bono Society in their earlier years in law school.

Jweied, based in Washington, D.C., is now CEO of a nonprofit organization: the Responsible Business Initiative for Justice. The international organization characterizes its efforts as designed to champion fairness, equality, and effectiveness across systems of punishment and incarceration.

In a conversation with Derek Mosley, director of Marquette Law School's Lubar Center for Public Policy Research and



Maha Jweied, with Marquette Law School's Derek Mosley (background), speaks at the Law School's Posner Pro Bono Exchange.

Civic Education, Jweied described her career path from law school graduation in 2003 to her current position. Her jobs included work for the U.S. Civil Rights Commission and for an international tribunal located in The Hague, Netherlands. This helped her underscore one of her pieces of advice for Marquette law students: Understand that a career is long and likely to have multiple steps, even as you pursue long-term goals.

For Jweied, her first job after law school was with a large law firm in Washington, D.C., where she had grown up. Beyond the conventional duties of a young lawyer at such a firm, she got involved in the firm's pro bono work. For Jweied, that meant involvement in a case involving a juvenile who had been sentenced to death for his role in a murder. (The U.S. Supreme Court subsequently held the death penalty for juveniles to be unconstitutional.)

Jweied said, “The firm was wonderful, in that it trained me immensely.” And the lawyers with whom she worked had integrity. Among the things that she

learned: “It didn't matter what kind of lawyer you are: you can be proud of who you are and what you're doing on a day-to-day basis.”

Today, younger people and many businesses are standing up for creating a more just world, in Jweied's estimation. The Responsible Business Initiative for Justice, which she leads, focuses on issues such as death-penalty practices and giving opportunities to people with criminal records to get jobs. The initiative often partners with locally led campaigns and offers advice also on the business aspects of a campaign.

Jweied summed up her advice by urging the students to “guard your integrity, guard your name.” She added, “Always gut check” whether what you're doing is right.

The event included recognition of the Gene and Ruth Posner Foundation's longtime generous support of Marquette Law School's pro bono efforts. Two of the Posners' grandchildren—Todd Gimbel, L'87, and Josh Gimbel—helped introduce the event. ■

"We're Here Now"

A decade after its creation, the Summer Youth Institute is leading "alums" to Eckstein Hall classrooms.

In 2014, Leonardo Espinoza Jimenez was a seventh-grade student in the Milwaukee Public Schools, at Wedgewood Park International School, when he heard about the Summer Youth Institute, an initiative of Marquette University Law School and the Eastern District of Wisconsin Bar Association.

The program offered young people an introduction to the world of the law, including attending sessions with judges and lawyers, working with mentors, and participating in mock trials, oral presentations, and field trips to courtrooms and law firms.

"I want to join the youth summer program because I desire a better future and here I would gain early information on how to go to college and how it would be to be a lawyer," Espinoza Jimenez wrote almost a decade ago in the essay that was part of his Summer Youth Institute application. "I know the law is one of the longest and most expensive careers, but I wouldn't care because no matter how hard it is, I will try my best and I will never give up," he wrote. "I am ready for the challenge ahead."

How did things work out for him? "We're here now," he said with a smile as he sat at a table in Marquette Law School's Eckstein Hall. He is a first-year student at the Law School.

Espinoza Jimenez is one of four current Marquette Law School students who got an early boost toward careers in the law by taking part in the Summer Youth Institute. One of the institute's goals has been to encourage low-income

and minority students, years before they graduate high school, to start on paths toward succeeding in college and beyond; the journeys may or may not eventually take them to careers in the law. The four students are evidence that for some participants the program, which began in 2013, does lead to the law.

For Kate Rodriguez, it is "a full-circle moment" to be a first-year law student at Marquette. She said, "I can't believe it's been eight years" since she took part in the institute while she was a student at Carmen High School of Science and Technology on Milwaukee's south side.

She went on to graduate from Marquette University and, after working for a year counseling students at Cristo Rey Jesuit High School, also on Milwaukee's south side, she is now facing the challenges of being a first-year law student. "I got cold-called on my first day," she said, referring to the practice of calling on students without prior notice to answer questions in class. She was satisfied with her response, she said, and she said she is staying on top of the rigors of law school.

Rodriguez said she has stayed in touch over the years with some of the mentors and students she met in the Summer Youth Institute. She has also been a youth leader in Mexican ethnic cultural activities, especially dance, and was named Ms. Mexican Fiesta Ambassador at the festival on Milwaukee's Summerfest grounds in August 2023.

In 2013, Lisa Xiong was a student at the Hmong American Peace Academy, a charter school on Milwaukee's northwest side, when she joined the inaugural cohort of Summer Youth Institute participants. In her application essay, she said that she liked to watch crime shows on television and was interested in being either a detective or a lawyer. She said the high level of crime in the neighborhood where she lived and the way she had

seen low-income people treated motivated her. "I want to help innocent people," she wrote then.

In the years since, she has graduated from high school and from the University of Wisconsin-Madison. She worked for two years, including a position in child protective services in Racine County, just south of Milwaukee. She dropped the idea of being a detective, but she is now a second-year law student.

Like several of the other students, Xiong's strongest memory of her summer institute experience was from making an oral presentation in front of others, including judges. She remembers "just being so scared to be there." But the judges were very supportive, and the experience boosted her confidence.

This summer, Xiong was back participating in the Summer Youth Institute, this time as a law student volunteer, working with the new students as they navigated the program.

What led Jonathan Contreras to want to be a lawyer? "The Summer Youth Institute," he answered. A career as an attorney was already on his mind. "I was thinking about law school for that long," he said, recalling his interests nine years ago. At that time, he had completed eighth grade at Jesuit Nativity School on Milwaukee's south side and was enrolling as a freshman at Marquette University High School.

In his application essay, Contreras wrote, "I want to challenge myself. I want to become an exceptional leader that helps out those who are in need, and I want to strengthen my relationship with God. . . . I want to lead a successful life and become a man of fortitude, skills, and perseverance."

He went on to graduate from Marquette High and from St. Norbert College in De Pere, Wisconsin. He took a year away from schooling, working as a paralegal at the Legal Aid Society of



Kate Rodriguez, Lisa Xiong, Leonardo Espinoza Jimenez, and Jonathan Contreras in Eckstein Hall in September 2023.

Milwaukee and in a legal clinic at the United Community Center in Milwaukee. Now, Contreras is a first-year student at Marquette Law School. He said he still stands by the ideals he set out in his Summer Youth Institute application. He has stayed involved with the institute and was a speaker at the program's concluding ceremony this past August.

The institute enrolls about 15 to 25 students each summer, not counting an enrollment dip during the COVID pandemic, which also saw one year of the program being provided online. Participation is free. Students spend seven days, over two weeks, following an energetic schedule of programs and events at the Law School and in the community.

The institute is the realization of a dream for Nancy Joseph, a federal magistrate judge in Milwaukee since 2010. She went to legal community leaders, including Marquette Law School Dean Joseph D. Kearney, with the idea for what she initially called a law camp for students in middle or high school.

Judge Joseph, a Rutgers Law School graduate, said that she had heard of similar programs in other cities, and she thought that Milwaukee would benefit

from such an effort. She wanted it based at Eckstein Hall. "I thought it was really important to have ours at the Law School, to really open the door to physically have the students at the Law School, so they could envision themselves one day being law students at Marquette or any other institution," she said.

And so it came to pass, sponsored by the Law School and the Eastern District of Wisconsin Bar Association but with active support from judges, lawyers, law firms, and even in-house counsel offices in Milwaukee.

Joseph said, "I think it has been a great success for a couple of reasons. Exhibit A would be the four students that you are profiling. Many, if not all, are first-generation college students, who are now first-generation law students."

The judge has stayed in touch with many summer institute alums. She said that overall, they are doing well, even if they are not pursuing law careers, and they say that the Summer Youth Institute encouraged them to envision themselves in professional positions.

But the students who are now at Marquette Law School are particularly of interest to her. "I love them," Joseph

said. "They're just four awesome young people."

She named each one and described the paths they had taken to reach law school. For example, Lisa Xiong, Joseph said, did an internship in the federal clerk of court's office. Joseph said Xiong was shy when she started in that position and she set a goal for herself of learning to speak up among adults. Now Joseph sees Xiong blossoming as a second-year law student, including Xiong's role this past summer as a Summer Youth Institute coach. "That was really, really awesome," Joseph said.

Joseph has been a mentor to several of the four students, going back to their time in the summer program. Leonardo Espinoza Jimenez was an intern in the federal probation office, Joseph said, and he has grown in confidence while achieving academic success.

The institute remains small, by design, but the signs of success have grown over a decade. And in Judge Joseph's eyes, nothing says that better than the students who are at Marquette Law School. "I'm just so excited that we have these four students and we're seeing this pipeline come to life," Joseph said. ■



CHIEF NORMAN WANTS YOUR TRUST

Jeffrey Norman, a Milwaukee native and Marquette lawyer, emphasizes collaboration and community partnership in his distinctive approach to his challenging job as Milwaukee Police Chief.

BY ALAN J. BORSUK

How different is Jeffrey Norman, L'02, from his predecessors as Milwaukee's police chief? A lot.

The way he answered a question during an *On the Issues* program in Marquette Law School's Eckstein Hall on June 1, 2023, underscored the difference. Derek Mosley, director of the Law School's Lubar Center for Public Policy Research and Civic Education, asked Norman what he would characterize as the police department's most pressing need.

More officers? Bigger budgets? You'd expect answers like those.

Norman's answer to the question? "I've said it time and time again," Norman said. "It's *trust*. . . . It's trust that we are doing the right things for the right reasons for you all."

Norman told the audience of about 200, "We have a different culture in the Milwaukee Police Department." It's a culture in which Norman wants the police and the community as a whole to join in efforts to improve Milwaukee and deal with problems, rather than

having the police stand as a separate force, as has been the history of the department.

It's an ambitious undertaking, given the history—and in some cases still the reality—of relations between Milwaukee police and many city residents, especially in Black and Hispanic neighborhoods. Norman knows those places. They are the kind of places in which he grew up himself. He is a Milwaukeean through and through: North Division High School Class of 1992, University of Wisconsin–Milwaukee Class of 1996, Milwaukee Police Department member for almost all the years since.

So who is Jeffrey Norman, and what are his aims for the complex and demanding job he undertook, first as acting chief in 2020 and then with the full title in 2021? Norman sat down with Alan J. Borsuk, senior fellow in law and public policy at Marquette Law School, for a conversation about his strategies and goals, as well as his personal story. This is an edited and condensed version of the interview.

“THE FOUNDATION SHOULD BE COLLABORATION”

In broad terms, how would you describe your philosophy of policing? So many approaches have come and gone nationwide over the years, such as policing ideas or slogans like “no broken windows.” What’s your own approach?

Collaboration. You hit the nail right on the head in regard to the ebbs and flows of strategies. One day, it’s “no broken windows.” Next day, it’s “intelligence-led policing.” The next day it’s “SAR”—scan, assess, respond. Those are different blocks to build on. But they should not be the *foundation*. The foundation should be collaboration, which equals relationships.

There is always going to be some shortcoming—something that, as a police agency, you cannot provide. But what’s needed can be enhanced or supported by others [outside the department] with expertise, whether it’s government or business or community action or residents. And that’s where I think we’re really going to see the work of a police department grow exponentially.

I came up through a department that was very singular, very solo, not only from a standpoint of silos within the department, but also silos outside of the department. And that just was leading to futility. You’re banging your head against the wall and expecting a different result.

You come up with a problem; the police department says we’ve got the solution. Come on, really? You know the Superman thinking—that there is no problem that we cannot solve. There was a lot of strain and a lot of frustration within the rank and file because there would be a leader saying this and then just giving it to the worker bees to get it done. We [police leadership] really did not truly appreciate all the other resources that could possibly be tapped into to have some true impact, sustainable impact.

So what did that look like? We’d go into a situation, and we’d do whatever we did—you know, probably ruffle a couple feathers, whatnot, and get a couple of people happy and a couple of people angry—and then we’d leave, and the problem is right back again.

So I would say that the true crime strategy of 21st-century policing is collaboration and relationships. And that builds trust. We have to understand this, especially in urban communities.

When you’re dealing with a diverse population, being able to be respected, approachable, to have the level of communication with people that you

need, it’s a marathon. It’s not a sprint. It’s not a one-hit wonder, where you show up to a certain community event and you think you’re all good. The work requires continuing nurturing, continuing planting, continuing growing. And it is something that is better to do with a team of people rather than thinking you’re the only one doing that type of work.

But I see a lot of great things coming out of our collaborations. I see a lot of great things as a department, as a city. I believe that we will only truly be impactful as law enforcement across the nation by understanding the power in “we” and “us” and “team.”

Trust is a really important word to you.

It is.

Expand on that. What does it mean?

Someone has a good idea of what is fair and just and says the police should run with it. I say, “How did we become the only ones able to put forth the effort and work of something that does have some value, some substance?”

But a lot of times, I don’t think there is that level of trust from the community. Across a lot of our major metropolitan cities, we have a challenge in that we have trust in many parts of our community, some trust in others, and, in some parts, we have none. It is important for us to work on all three of those because, as an organization, we’re information driven. As much as we might have the CSI stuff—a footprint here, a fingerprint there—overall success requires being able to work with residents, to work with stakeholders, to really get brain juices flowing, to get to true solutions.

The game changer in regard to us being truly effective is to continue to build trust, so that people look at us as partners or people who can truly be relied on, rather than as an occupying force or as someone just coming in to mess up things a little bit and leave. So that we’re walking with each other.

I can see that we are turning a tide in many parts of our community. But there’s so much trauma.

Long ago, I was a Milwaukee Journal reporter who covered Harold Breier, the police chief from 1964 to 1984. There were very few Black officers, and, for many years, none was assigned to the then predominantly white south side.

There are a lot of different opinions about that time. Within the Black and brown communities, there are a lot of very serious opinions about that. But I would say that it is important for us to own it. And to understand that we need to continue to be intentional about building from that. But we also

“So I would say that the true crime strategy of 21st-century policing is collaboration and relationships. And that builds trust. We have to understand this, especially in urban communities.”

need to understand that, as easy as or as hard as it is to gain, trust is easy to lose. So for me, I'm always on a building-trust pathway to ensure that I have the model for the organization I believe in.

We're a little more than three years past the killing of George Floyd in Minneapolis. The streets in Milwaukee and just about everywhere else in the country were filled then with people who were really angry at the police.

Yes.

What's the state of trust or community relations in Milwaukee now?

I'm not going to name-drop, but there are some people who were at one point on the front lines, yelling and screaming at the police, and now I'm at events where they are Facebooking live, holding their arms around my shoulders. If that doesn't say something about where we're at now since that horrible moment . . . We are in a better place than where we used to be. But we still have work to do. I believe that we have a lot of trust and respect in a lot of corners that we didn't have before. But we all know it's still a very fine line. We always—unfortunately, after one mistake, one mess up—can lose that. And that's why it's so important for us to continue to build bridges and to nurture and continue that.

And it's not just my role, it's the role of everyone in the department. Everyone's role is to engage our community, to build sustainable neighborhoods. You know, it's not just the role of the person facing that press conference. It's the frontline officer, the frontline supervisor, the shift commanders, I'd even say the non-sworn side of the department. We're all team members. You know, it is important for us to all embrace that. And if you do not feel that way, well, then there are a lot of other opportunities out there in this grand old world that will be more than willing to take you.

A CHILDHOOD OF FRIENDS, FUN—AND BUMPER RAILS

You grew up near North 6th Street and Capitol Drive. What sticks out from your childhood years?

We were close. We were over at each other's homes during my adolescent and teen years. Summertime was always filled with some outdoor sports games, whether basketball, football, boxing, playing over at each other's homes, sharing meals. It was a truly memorable moment when a kid could be a kid.



But we still had rules. Pop didn't want us riding our bikes off the block. You could do the old circle [around the block], you could visit friends on the block, but there was what we could call bumper rails. When the lights went on, you were expected to be home. This assured that anyone we were hanging around with got the approval of the household. It was definitely not a free-for-all. You could be a kid, to a point. I can say I definitely have fond memories of that.

[Norman went to two Milwaukee public elementary schools. Then, using Wisconsin's program allowing enrollment in public schools in other districts, his parents sent him to two schools in Wauwatosa, a municipality just west of the city. His parents divorced during his middle school years, and his father wanted his son in a Milwaukee high school. Norman enrolled in North Division High School.]

There weren't a lot of success stories coming out of North Division.

That's correct.

What made you more successful?

You had kids walking the hallways; you had fights. But for me, that was partly an opportunity. I developed close relationships with some teachers because I was a student who wanted to learn. Not to say I was the only student, but I felt like it. With regard to engagement with an instructor, there was a lot of personal attention. They were appreciative that I was engaged.

I was at the library every day. By the time I graduated, the librarian had counted up how many books I had read. Over the course of maybe three years, I had read over 1,500 books. It was definitely a connected relationship with the administration and the instructors. There were definitely a lot of great memories about my experience at North Division. I wouldn't change it for the world.

My parents were determined that I was going to go to college. My father was like, "You're smart; you're going to college." My father had challenges in regard to education; my mother had challenges in regard to education. But they had expectations for me.

How might more North Division students, either then or now, become engaged with school life? How would you complete this sentence: "If I were principal of North Division, I would . . .?"

Do as much as I can to acknowledge the students and see them. I think a lot of kids are invisible because of certain behaviors. . . . It was easy for teachers to gravitate toward me because I was receptive and engaged. Sometimes, especially when you deal with so many kids who give you challenges, it is appealing to go off into a corner. But I saw so much untapped talent. . . . As a student, as a peer, you see them, and they show a little bit more vulnerability. In front of adults, they'll put up a shell.

Among kids now, I see so much hope and potential. The kids are hungry—man, they want to believe, they want to have something to grab on to and to say, "Life has to be better than this."

So if you were asked to give the commencement address at North Division High School, what would you tell the students now?

For anyone to believe in you, you need to believe in yourself. For anyone to love you, you need to love yourself. You need to understand that you have purpose, that you have the ability to accomplish what you put your mind to, but it starts with you.

LEARNING THE VALUE OF MENTORS

[One big asset for Norman has been his willingness to benefit from the mentoring and help of others. That was true in high school, in his early years in the Milwaukee Police Department, and while he was a student at Marquette Law School. He gives a prime example from his time at the University of Wisconsin–Milwaukee when he was helped particularly by Stan Stojkovic, a professor of criminal justice and criminology in the Helen Bader

School of Social Work at UWM and a nationally known expert in his field.]

College was hard. I was the first child in my family to go to college, so I didn't have a pathway for what was expected. One of the things I messed up on was thinking that just because I'm intelligent, that was all it takes. You have to put your nose to the grindstone.

I was on an academic scholarship from the Milwaukee Metropolitan Association of Commerce. I learned the hard way—about my flippant thinking that this was going to be a cakewalk. I partied that first semester. Seeing the grades I received that first semester, I said to myself, "I'm going to lose my scholarship." Scared the crap out of me. So I learned the hard way what it takes to succeed.

But I really started to enjoy my college experience. I joined a fraternity. And I was an acolyte of Stan Stojkovic. At that time, he was a dean. He was my instructor once I got into the criminal justice program, and we've been friends ever since. That guy has been by my side my entire police journey. I'd show up for his office hours. Professor Stojkovic would say, "Why are you here? You got an A on the exam." But I would say, "I can do better." He was a great instructor, very engaging.

CHOOSING A POLICE CAREER: "IT JUST SPOKE TO ME"

You told me once that when you were a kid and you and your friends played cops and robbers, you always wanted to be one of the cops.

That's true.

What appealed to you about that side of the equation?

Two things. I've always loved doing community work. But also, there's a part where you like law and order. It just spoke to me. It's almost like telling somebody, "Why do you like chicken?" I just like chicken. The profession is something that just speaks to me.

When we played cops and robbers, I played the cop. I'm the first generation, the only individual in my family, who got into law enforcement. It's not like I come from a long history of "my grandfather was, my great-great grandfather was . . ." It was just appealing to me because it's active. I didn't want to do the social worker thing, but I still wanted to help those in need—but also to hold people accountable who are doing wrong. All these different aspects of the particular profession spoke to me.

I was good in math, I did well in accounting. “Oh, you should become an accountant,” some said. I was like, “I don’t want to be an accountant.” Granted, I could do the work because I know how to study and put my nose to the grindstone. But it’s not enough just to be good at something. Or not enough to say, “It’s a very cool job, and you make a lot of money.” I see a lot of people I know who are just miserable. They have all the money in the world and all the things that they can acquire, but they don’t really have substance or a feeling of accomplishment. I tell kids all the time, “Do what speaks to you. Align your career or what your aspirations are to what is your core. You’ve got to really align yourself with your north star.” This is my north star.

LEARNING FROM THE COMMUNITY

My final semester at UWM, I actually was already in the police academy. I thank Dean Stojkovic; he allowed me to do some independent studies so I wouldn’t be overwhelmed because, as we all know, the police academy is full-time, 8 to 4, Monday through Friday. So I was able to transition with my last semester. . . .

I was 22 coming into the academy. At 22, you still have a lot to learn about the world. Even though I had the book smarts and I had some street smarts and I had the athletic smarts, I didn’t have the worldly smarts—just life and experience, especially dealing with people from all walks of life, all ages. So that was a big learning curve at that point.

When I started working on the streets, I loved it. I just ate it up. I had two phenomenal field training officers. I worked every hour, every minute. I was single. I had no family.

Did you consider anything other than the Milwaukee Police Department?

Actually, I had applied to a bunch of different departments, and I was in line to be hired by some of the small suburban departments. But I thought to myself: One, I’m born and raised in Milwaukee. Two, the opportunities are endless. And three, to move up in a small department, either somebody has to retire or quit. There’s more opportunity in a big department.

Early on, you served on the south side. You learned about some of Milwaukee that, growing up on the north side, you didn’t know much about.

Yes.

What did you learn?

There was a lot of diversity in regard to the culture and the food. As a 22-year-old, I learned from

the engagements that I had with people and the community. When I was growing up, the only time we went to the south side was to 16th and National where we had our family dentist. You know, going to the south side was truly eye opening for me. I love to learn. It was a great experience.

But there were also some of the darker sides of society that I was exposed to on the south side. There were times when I was disappointed about some of our interactions as human beings. I remember that once I was assigned to a squad with another African American officer, and we responded to a call for service. A Caucasian male came to the door and said, “I don’t want Black officers at my door.” He said, “I don’t need your help.” And we told him, “Well, if you want police help, this is it. If not, then this is it.” He said he’d rather handle whatever he wanted without our involvement. This is in the 1990s, man. We ain’t talking about the ’50s or ’60s or ’40s. This was the ’90s. These types of experiences—it just kind of disappoints you.

But you have to find ways to rise above that and look at it from the standpoint that you can only control your own behavior. You cannot control all those you know. We were respectful. But, again, disappointed because it’s just like, “Come on. You know you need help. You’re really going to be worried about our gender, race, or creed?”

What does the diversity of Milwaukee mean to the way law enforcement works now?

Well, first, being a service-oriented organization, we’re here to serve. Diversity to an organization such as ours is something to reflect, to understand, to engage, to lean into. It’s important that we have all walks of life within our organization to give the best and most efficient, effective service to those whom we serve.

You have to aim to make the final product the best service to any particular group, organization, neighborhood, stakeholder. Diversity offers a lot of opportunity. I think it keeps life interesting. If we’re all one make and model, it gets a little bit boring.

But there are challenges. We have ongoing engagement with all parts of the community, and there is an ongoing life-learning process. We should be embracing that. Too often, I think, especially in regard to our particular profession, we think too often that we’ve always been doing things this way or we’ve been there, done that. As a department that is service oriented, we should be always improving.

“For anyone to believe in you, you need to believe in yourself. For anyone to love you, you need to love yourself. You need to understand that you have purpose, that you have the ability to accomplish what you put your mind to, but it starts with you.”

ENROLLING AT MARQUETTE LAW SCHOOL

You had been a police officer for several years when you decided to go to law school. What prompted that decision?

The real reason? Frustration. I had a couple of challenging things on the job. I said, I'm going to change my career. It's funny. I was a young guy and, you know, you encounter "Get your stamps in a book, son" type of behavior that suggests you should be seen but not heard. It kills some of your spirit when you have aspirations. I had a bad experience with a colleague. I was allowing bad experiences to dictate my future.

So I decided I'm going to get my law degree and become a corporate lawyer. But that was just a pie-in-the-sky idea of mine. It was all about wanting prestige and money by doing acquisitions or contracts. I had no *desire* to do that.

As I was going through that, I was thinking, "What else would speak to me that was still aligned with me being in law enforcement?" So I wanted to get into the prosecutor's office. So that was behind my desire to change careers. I would say this: Going to law school part-time while working full-time as a cop—I wouldn't put anybody through that experience. That was one of the most challenging parts of my life.

One of the people I remember who was extremely effective and made law school palatable

was Jane Casper [now retired assistant dean for students]. She was, oh, my goodness, a wonderful person. Truly a resource. If anyone was the mother of Marquette Law School, it was Jane Casper. I am so blessed and thankful not only that I acquired my law degree but that I attended Marquette. Marquette had a part-time program that was really, truly designed for individuals such as me. That really drew me, and I'm so thankful for that.

So law school worked out for you?

Oh, absolutely. Absolutely. I tell people, when you learn the law, you learn a different language. The law touches every aspect, every profession. It touches virtually everything. Having that degree has been extremely helpful. I'm big here [in the police department] when it comes to looking at contracts and looking at documents, and also thinking in a risk-management mindset.

You have kept your law license current, although you're not practicing now. Is it helpful to you to this day to have a law degree?

Absolutely. Hands down. Especially as you rise in the ranks and deal with a department our size and all the things that we have to interact with. Absolutely.

A YEAR AS A PROSECUTOR

You worked as an assistant district attorney for a year. Was that a good experience?

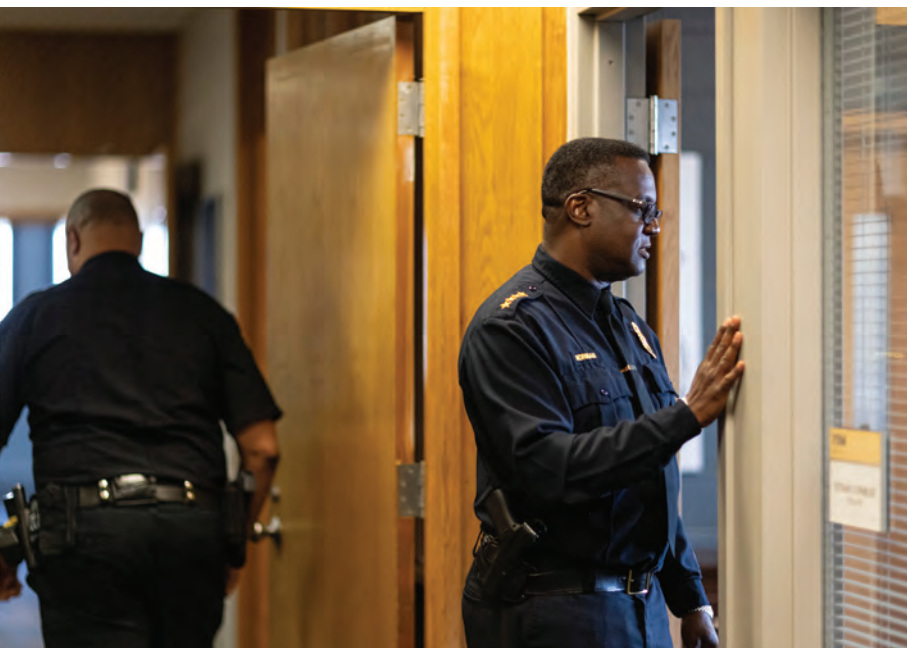
Excellent experience. And I worked for a very honorable, respected man. [Longtime District Attorney] E. Michael McCann was everything that people saw him to be. What sold me was that when I was interviewed, he said, "You're the prosecutor. You make the decisions. I trust that you will do right in regard to that particular power." I was like, "My man."

I got my litigation teeth, jury trials, bench trials, motion hearings. I got a chance also to see another side of the law being practiced, seeing how police did the first part, but seeing really what "beyond a reasonable doubt" means.

Relationships that were built back then are still nurtured to this day. It was wonderful. I was feeling good about my experience in the DA's office. But I wasn't feeling fulfilled. I went back to the police department.

You never got back to the idea of becoming a corporate lawyer.

Ha. That was a hoop dream. . . . A lot of that was emotion, and not thinking it through, and not being in alignment with your core, your north star. That was a lot of frustration.



THE CRISIS OF BAD DRIVING

If I talk to my neighbors and ask what's the biggest problem at the moment—

Can I fill it in? Reckless driving.

The answer is reckless driving. Absolutely. I tell people I am more afraid of crossing the street than I am of someone breaking into my house. Are we making progress on this?

I would say from a statistical standpoint, yes. From a perception standpoint, no. There are tangible things being done that help—more roundabouts, narrowing streets.

Those weird concrete block things that stick out from the curb.

Yeah. Weird block things. So that's a traffic-calming method, that's an engineering thing.

I'm wondering if they're going to work.

They're called curb extensions, and they stop people from doing what we call baselining or driving to the right around you. It narrows the street so they can't go anywhere. Now, have some people driven into them? I'll say this: that car has now been taken out of the context of being in the hands of a reckless driver. I mean, it's sad that you have to see those examples sometimes.

There is no foolproof strategy. As a department, are we better than what we used to be? From a statistical standpoint, I say yes. Now, do we still have a lot of work to do? Absolutely—because you still have people who are running red lights.

And we have enforcement successes. I mean, more than 300 cars towed. We're going after people who are not responsible with a vehicle, and we are taking their vehicles away. And many of them, unfortunately, they're not going to get them back because you've got to either produce your insurance or do other things to get it back. Our traffic enforcement is robust; our crashes are down. Costs from reckless driving are down.

But I'll never tell someone, especially you as a resident, that what you see or what you believe is not your reality or the truth, because unfortunately, you do still see examples out there. I see it as well as anybody else.

Why do people drive like that, kids especially?

Oh, my goodness. You make me feel like I'm some type of guru. Like I sit on a mountain. I would say because they don't care. Selfishness. There is a lack of the respect for what we expect out of each other. A lot of things that social media did to us have taken away a lot of our societal mores. You just say what you want to say. The things that we're

seeing that people are doing now [on social media], people are idolizing it. . . . That's reflected sometimes in behaviors in workplaces, it is reflected on our streets.

There is no one group who is really responsible for reckless driving. It can range from grandparents to people who never had a license. How do I know? Because I've stopped them. I've seen delivery drivers do illegal turns and drive at high-risk speed, people who work for the post office. It's mind boggling. But we did not get to this overnight. You know what it was? You worked in the media. What was media reporting like back when you were starting out in the 1970s? What was television like? There were certain things you couldn't say. Now it's almost like anything goes. So we're surprised? There was a sinister, gradual decline of behaviors, starting with idolizing selfishness. And now it's come to fruition. And I believe that [the pandemic in] 2020 sped it along. The mental anguish and everything else really let the floodgates go.

KIDS, GUNS, AND VIOLENCE

As we're sitting here, in the last 48 hours, there have been four kids shot in the city, two of them fatally. What's going on out there, especially with kids?

So I'm no guru and I wish I could have all the answers. We have a mixture of challenges. For one, during the COVID pandemic, everyone wasn't blessed to be like my family where my kids were still able to be engaged in activities. Many of the city's kids were left to their own devices. We underestimated the impact on mental health and the trauma.

In addition, the chickens have come home to roost in regard to the accessibility of social media with a lot of the harmful images. You see that playing out now in the streets. The arguments, they're just turning very violent very quickly. You mix that with the reality that we have a lot of firearms in our community—and this is not an NRA [National Rifle Association] thing, I don't want to go down the road about constitutionality. I'm talking about having more responsible gun ownership. Children who are in possession of firearms, especially handguns, got them illegally. They didn't go to Cabela's; they didn't go to Dunham's.

So you are dealing with a situation of a perfect storm. Guns being taken out of vehicles, guns left unattended in homes, or guns that were in possession of an adult but just left in front of kids. So that is one angle.

“I tell people, when you learn the law, you learn a different language. The law touches every aspect, every profession. It touches virtually everything. Having that degree has been extremely helpful.”

“I’d really love to see law enforcement get out of the business of dealing with some of our societal ills when a different approach is more warranted. The unfortunate thing is this conundrum of, yeah, we should take it away from the police, but then it comes back to who’s going to do it?”

We’re seeing more accidental shootings. We’re seeing negligence. But also, we see kids where we talk about the mental anguish, trauma, utilizing these weapons of destruction to settle scores.

The number-one known motive for our shootings and homicides is “argument/conflict,” meaning that there was some sort of conflict that was resolved with a firearm. There is nothing new about kids fighting. What is new is that they are using without any particular hesitation—we all know the impulsiveness of children—weapons of destruction that change not only the lives of those they shoot, but their own.

So we have a lot of different issues at hand. Go back to our violent crime plan. We understand there are different levels in a comprehensive approach. One, there should be a lot of work on prevention. There should be a lot of work in education. Locking up the weapons—you know, there are gun locks provided through so many different organizations. Responsible gun ownership. Don’t leave your weapons unattended in vehicles.

But part of this is that there needs to be accountability. We cannot allow those behaviors to go unaddressed. There is accountability for parents and their kids who are engaging in behaviors beyond the curfew or carrying weapons.

We are being thoughtful in how we approach this. It’s not as easy as some people say to just lock them all up. One, we don’t have the capacity. Two, that’s not a very good use of the community resources. Three, we’re not being innovative or imaginative in looking at what are root causes.

The Milwaukee Police Department is part of so many initiatives. We try to look at root causes—poverty or homelessness or education. There are collaborative approaches with the state Department of Health and Human Services, the district attorney’s office, the Milwaukee Fire Department, the city’s Office of Violence Prevention, and more. There are so many opportunities out there, and we really need to be part of the discussion.

These issues with our young ones didn’t happen overnight. And I know that there is the urgency coming from the public. There is urgency on my part. But we need to be able to use all our resources and engage so many more than just law enforcement and our elected officials.

[Norman described an event hosted by Bader Philanthropies, Inc., where youths who spoke emphasized that they wanted mentors and adults who will be positive forces in their lives.]

I used to mentor before I became a father. I understood that there is a balancing act of seeing kids through some of these crises and emergencies. But now that I have children, I’ve got to be their mentor first until they have graduated college.

If all of us just took our responsibility on, that would help. It’s good that people say, “I donate to this” or “I donate to that.” Donate your time. Donate your experience and wisdom. Be the change.

THE POLICE AND MENTAL HEALTH ISSUES

A few years ago, when Ed Flynn was the chief, he spoke at the Law School. One of his themes was: Somebody’s got a mental crisis, somebody’s got a drug crisis, somebody’s got a domestic crisis? “Call the cops,” seems to be the constant answer. Everybody calls cops for everything, he said. The police are asked to do too much. Let’s start with mental health. Are the police being asked to do too much?

Those words are famous because they still hold true today. But sometimes we [police leaders] aren’t totally honest in that conversation. We took on too much. We did not tell the truth. We, the police, were part of creating that superhuman, super-strength persona that allowed this to become a monster that is too unwieldy.

Yes, there are a lot of mental health issues in our community. Again, I can only talk anecdotally. I know that there are some great efforts, but some of them are being overwhelmed. I don’t feel that we don’t have enough resources. I feel that we don’t have a lot of collaboration with those resources—that there are silos and that there are best practices that we could still capitalize on.

I’d really love to see law enforcement get out of the business of dealing with some of our societal ills when a different approach is more warranted. The unfortunate thing is this conundrum of, “yeah, we should take it away from the police,” but then it comes back to “who’s going to do it?”

We’re the only organization, besides our medical field partners or fire department partners, that is on duty 24/7, 365 days a year, holidays included. And that is where the challenge comes in. We have a lot of good-idea fairies in the world, but that falls short of being a solution, because even when we tried to expand what we were doing, we had a challenge of finding therapists to go with the officers on the later evenings. We’re not talking about overnight. I’m talking about later

evenings. Because some of us in the world think that the work that we do, especially with societal ills, is “Monday through Friday, weekends off, and don’t talk to me about holidays.” Unfortunately, the challenges that we deal with, for which many of us as officers have sacrificed being at home (I worked 19 years late shift), are that we understand that this is the responsibility of us for being part of this profession.

DRUG ABUSE, A COMPLICATED CONUNDRUM

Drugs. What’s the police role in dealing with this?

It is so complicated. From the enforcement aspect of it, it means holding people accountable for those who are in the business of dispensing illegal drugs or even legal drugs illegally, disrupting those particular types of businesses. But, unfortunately, we’re asked to do so much. Now we’re carrying Narcan. We’re seeing so many, I would say, strategies being used, but the fentanyl that is being dispensed in our community kills—and it’s pretty good at it.

And so you’re just kind of thinking to yourself like, “What is going on? Is there something deeper than what we’re seeing with the dispensing of drugs?” Drugs have unfortunate attachments to some things that are difficult to track, such as bitcoin. The dealers are being very savvy with regard to the financial aspect of it.

I know that we have a great relationship with other law enforcement. We all know drugs come across borders beyond not just states, but also countries. Our collaboration as law enforcement agencies helps us be just as or even more savvy than those who are not only trafficking but dispensing.

But there is a part where we have to deal with, again, underlying causes. What happened in 2020 did a real job on us. People now use drugs even more to deal with their anxiety, deal with mental health. So it’s almost interconnected to depression.

We still do drug enforcement. But the violence in the community is very consuming. Drug violence, that’s some of it. Our biggest issue from an enforcement aspect is the “argument/conflict” violence, which is very hard to wrap your head around. That becomes a little bit consuming when it comes to drug enforcement because you use a lot of resources dealing with firearms. When you have a homicide or nonfatal shooting, that is a resource drain.

There’s still a lot of enforcement going on. We

have things that we are working on, collaborating to disrupt the drug trafficking organizations and those who are flooding our respective communities. But it’s a juggling act in regard to the different priorities that you have to put forth as an organization, especially with the finite resources that you have.

BEING THE CHIEF

The four stars on your shoulders and the stripes on your sleeves—were they a goal from early on? Did you think you’d be the chief?

Yes. I knew I was going to be chief somewhere. My goal was to be chief here, but I knew I was going to be chief somewhere. Some people think, “Oh, you fell into it.” I say, “Check my résumé; look at the courses I’ve taken.” At a time when I was a lieutenant, at the time I was a captain, taking courses to hone my skills and to know what’s expected. It led up to this particular point—being an individual coming into the position, eyes wide open, rather than, “Oh, I didn’t expect this.”

I am not afraid. I ask questions. I talk to people who’ve been there, done that, to find out, “What were the things that you liked?” or “What should I do?” If you are really into your profession or you’re really into your work, you should be able to talk about the skill sets, knowledge, and abilities you need until the sun comes up. So I did a lot of research and did a lot of classes, just to ensure that I got all the experience I could possibly get before being in the top spot.

So you like the job?

I love the job. Absolutely. And when I stop loving it, I will be gone. When this is not a labor of love any more, Jeffrey Norman can exit, stage left.

One of the things you said in the program at the Law School this past June was that people shouldn’t hold against you some of the things your predecessors did and that it’s a different department now. What’s the difference between you and some of your predecessors?

Well, I can’t put my finger on anything that I can say is different between myself and my predecessors. But I know who I am, and I know what I bring to the table. And I know that it is important to be able to have not only the book smarts but also the community smarts. It is important to have the history of being engaged in all parts of the community.

I hope people see me as a genuine servant leader. That it is not about me. I understand my role as the face of the department. But the work

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that is really being done is by a lot of people who are more intelligent and who are more expert at some subjects than I am.

I eat this for breakfast, lunch, and dinner. Sometimes I work seven days a week, sometimes I can put in a good 12 or 14 hours a day. It does come with challenges. And I do have a wife and kids, so I pull them into a lot of my engagement.

I can talk about the technical sides of this work or the budget and finances. I have a master’s in public administration, so those things are not a fear to me. One of the things really important to me is to treat this department like a Fortune 500 company. You know, with the budget that we are responsible for, we should be responsible fiduciary agents of the public’s trust and money.

But, overall, I’m a people person. I hope when people look at me they see that they get the best of both worlds. You get the guy who can talk about stats and look at a crime plan, working on micro areas, pinpointing particular locations of incidents. But there is more to our job than just a dot or number. When I look at the dots, I see residents, I see faith-based institutions, I see businesses. So you get the best of both worlds in one package.

MORALE AMONG THE RANK AND FILE

How would you assess the morale of the department at this point? Police, by definition, every day see the worst of what’s going on around here. And it wears on people sometimes.

We do climate surveys, and we have engaged with what we call the influencers. So we talk to individuals who are in formal and informal positions to get feedback. Do we have our challenges? Absolutely. There’s a lot of feedback to us about what they like to see. But anecdotally I think that they [the officers as a whole] are okay. I’m not going to sit here and say they’re extremely happy. But there have been a lot of takeaways that we were able to get from our rank and file, and we’ve put things into motion. We had an issue with our firearms [officers thought their guns were not safe to use], and I was able to address that as a team quite quickly—I mean, a turnaround of more than 1,600 firearms within a short amount of time. Then we had an incident in one of our stations [a man firing a gun]. It had been talked about before, to get bullet-resistant glass. Our team was able to get this done.

But every day, you’ve got to keep on working on this, showing that we’re being attentive, that

we’re being responsive. I always say that we can do more. As much as we communicate, they always say the leadership style is communicate, communicate, communicate, and when you think you have communicated enough, you have to communicate some more.

Does the department have the resources to do its job?

I will say this: we work with what we have. We always could use more. But it’s important to understand that we have to also prove that we are responsible with what we do have. I know that’s a complicated answer to a short question. I know that we have done a lot of things to make ourselves more efficient, more effective.

We ask ourselves, “Do we always need officers to respond to a particular call for service [such as small thefts where reports are needed for insurance purposes]?” It’s a win-win to handle those online or by people filing reports at district stations, where you don’t have to wait for a squad to respond.

To leave aside a number of its other aspects, the new state budget included provisions strengthening the resources of the Milwaukee Police Department.

It is a blessing to be able to have more resources. But I do understand that it is a challenge in regard to dealing with a department our size or a budget our size. I’ve always said this: We will deal with whatever budget is bestowed upon us and work our best to deliver the services the public expects.

THE MILWAUKEE GUY

You are a lifetime Milwaukee guy. What do you like about Milwaukee?

What’s there not to like? So I will tell you, first of all, what I love. It’s funny, when my in-laws visit from California, they say it’s so green. Our cost of living is reasonable. We have a wonderful city and a wonderful lake. It’s a little nerdy, but I think a fresh body of water is a serious thing. Absolutely. There are so many things. I’m a theater guy; I love going to the Rep or the Next Act Theater. The food scene is wonderful, and there is so much diversity in our community. There are so many different cultures reflected in our festivals every year. The cost of living is reasonable, regarding the type of home you can own and the type of area where you can live.

I learned early as an officer to become a tourist in my own city. Especially when people ask like, “Where can you get this?” or “Where can you get that?” I will have to admit I have scaled back a little

bit because it's harder to be out there in public now than when I was just Joe Schmoe.

What would you change about Milwaukee?

People's attitude about our city. Sometimes you need to visit somewhere else to appreciate what you have. Our city has a lot to offer. There's a little bit of everything. Now, I'll say this, the weather is something else. We have a tendency to hold on to old urban legends or things that are not beneficial for a city that has so much potential.

There are certainly parts of the city, shall we say, where that theme doesn't resonate.

That's true.

Opportunity is not the same. Education attainment is not the same. The quality of life. Stability in housing. Food.

That's true. But my challenge is: show me a metropolitan city of our size or bigger that doesn't have those inequities. And that's not to say that it makes it okay. It says that this is something that we have to continue to look for in those who are talented enough to lead us out of those issues. How do we engage other resources to be able to deal with those issues? Courageous leadership is not a normal thing. Being able to understand how to activate other resources, there's a level of relationship-building humility that goes along with that.

It's not one particular administration's or person's responsibility to get us out of the mire. There's a lot of complicated reasons why those particular issues go on. And I will say that we as a public need to demand more—and demand more than just words, but also actions.

Demand more from government?

From all of us. If people had the energy, the engagement that they have in holding our [the police department's] feet to the fire, when it came to everyone else, you'd see a different world.

I am understanding of the responsibility of our service. But there are also a lot of other challenges. Why are you talking to me about them? Law enforcement is our wheelhouse. When we start doing other things, it's like, I love that passion, but somebody else deserves that. And it seems that, in my own perception, other entities get passes.

HARLEYS AND PELOTONS

Do you still ride your Harley?

I do love my Harley. Still ride my Harley. It is a wonderful pastime. Unfortunately, you have to have the time. When I do have time, the priority is between my children, my wife, traveling. [Norman's



wife is a physician affiliated with the Medical College of Wisconsin and Froedtert Hospital. The couple has two teenage children, "both smart as a whip," as he puts it.]

You know, there is a lot of sacrifice for this particular position that a lot of people don't even know or are aware of. It's not for me to ask for any sympathy or empathy, but working 14 hours a day or working 9 to 10 days straight, it's commonplace. And there is a part where, if you don't understand what this particular role expects of you and don't step up to that plate, it could eat you alive.

But I am blessed to have a wonderful family life. I do have a life outside of this profession and this organization. And it helps balance me. I work out every day—six days a week actually. I do have Sabbath on Sunday. And I also get in eight to nine hours of sleep daily, making sure that the rejuvenation is real.

What kind of workouts do you like to do?

Peloton. You get to pick your different instructions. It's wonderful. My wife actually bought it for herself, and I took it over.

"MEET US HALFWAY"

"Give us the benefit of the doubt," Norman said to the audience at the program on June 1 in the Law School's Lubar Center, as he described his approach to increasing safety in the city.

"It's a partnership," he said. "Our hand is out. Meet us halfway."

Norman literally extended his hand. He spoke with a passion that led Milwaukee County Sheriff Denita Ball, sitting next to him, to say, with a laugh, "All right, Rev."

Has anyone ever called a Milwaukee police chief "Rev" before, especially in public? Not likely. But has any Milwaukee police chief preached to the city like this before? Definitely not. Which leads to asking: Can Norman move enough people to say, "Amen"? ■



Complexity & Contradiction in American Law

BY GERARD E. LYNCH

My remarks this evening will make some very practical observations about the functioning of the federal courts. I hope that they will also shed some light on a more theoretical issue in jurisprudence: the prospects for a unified theory of judicial methodology, and the possible value of some amount of incoherence in the American legal system.

I. Why There Can Be No Grand Unified Theory

Ronald Dworkin's *Taking Rights Seriously*, published in 1977 but based on preceding articles, was one of the most influential books on jurisprudence of the latter 20th century. It certainly had a profound impact on my thinking, as a young lawyer, about how courts should decide hard cases.

In recent years, I have revisited my initial infatuation with Dworkin's theories in light of my experience over a long career as a law professor, lawyer, and judge. A few years ago, in the Madison Lecture at New York University, I questioned Dworkin's argument that there are objectively correct answers to even hard legal questions, concluding that H. L. A. Hart had the better of their disagreement and that some legal questions do not have clearly right answers and are left to judges to resolve based on their own best judgment. Today I want to begin by addressing a sub-issue in that thesis—questioning Dworkin's analysis of how judges should approach hard cases and reach right answers—as a springboard to introduce some thoughts about whether a certain degree of incoherence and inconsistency in law might actually be a good thing.

If you believe that there are definitive right answers to difficult legal questions, you have to provide a methodology for reaching those right answers. Dworkin's signature move in his early writings was the suggestion that the ideal judge, whom he dubbed "Hercules," should formulate a view as to the overall structure of the law, in order to "construct a scheme of abstract and concrete principles that provides a coherent justification for all common-law precedents and, so far as these



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This is a lightly edited version of the E. Harold Hallows Lecture delivered by Judge Lynch at Marquette University Law School on March 7, 2023. A version also will appear in the *Marquette Law Review* this coming winter.

are to be justified on principle, constitutional and statutory provisions as well.” The best answer to a hard question is the one that best fits that scheme. As many pointed out and as Dworkin conceded, that approach would not lead to predictable or objectively determinate answers. The number of data points necessary to construct such a grand theory of American law was sufficiently large and diverse that different judges, depending on their own policy or political preferences or values, would necessarily construct different grand structures. Dworkin also recognized, as was more or less conceded by naming his ideal judge Hercules, that the task of bringing together all of the breadth of American law was beyond the reach of a mere mortal. Most judges wouldn’t be up to the job.

My argument is a more radical version of those concessions. It’s not just that there are competing, shall we say, liberal and conservative (and no doubt any number of other) versions of the grand structure of American law, so that we won’t all agree on what the structure really is, or that it will be hard work to devise one’s own theory of that grand scheme. My contention instead is that, almost self-evidently, there just is no “there” there at all—that there isn’t and can’t be a single overall vision that fits together all of American law, even if we are allowed, as Dworkin allowed Hercules, to discard at least some data points as outliers.

How can I suggest that this is almost self-evidently true? The body of American law, both in general and in most specific categories of substantive and procedural law, is the product of both temporal and spatial divergence. The totality of American law consists of an accretion of rules and principles embedded in the law as it has evolved over time, through different theories and approaches to legal decision-making characteristic of legal thinking in different eras, and comprising divergent traditions that have evolved separately in different states or regions.

First, the temporal. It is clear from our history that law and legal philosophy change fairly dramatically over time. At various times in our history, judges, lawmakers, and legal philosophers faced different sorts of problems and had different background notions about how to solve problems, as well as different understandings of the world and of the law.

Our methods of legal education tend to obscure this truth. Casebooks serve up snippets of old

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Supreme Court opinions, selected to some degree based on contemporary understandings of what was important and lasting about the holdings of the selected cases, and including only reasoning that supports the part of the holding that remains relevant today. Few law students are assigned to read the entire text of all of the opinions of the justices in, say, the 1857 *Dred Scott* case. If you do read them, you will encounter a different legal landscape. It’s not only that today’s reader is shocked by the overtly racist assumptions that underlie the majority’s ruling. Justice Benjamin Curtis’s dissent calls out the majority on those assumptions in a way that resonates with present-day values as much as the majority opinion offends them.

But more fundamentally, none of the opinions reads like a contemporary Supreme Court opinion. Yes, the opinions address, in various ways, constitutional text, opinions attributed to the Framers, and prior judicial opinions. But consider the dearth of footnotes. That is superficially striking: the pages look different from those of today’s U.S. Reports. Yet I think it is also symbolic of profound differences in method. The 19th-century Court was much more comfortable with ipse dixit and with discursive reasoning from commonly assumed truths about our history and that of England and even of ancient civilizations. The contemporary style of opinions drafted by law clerks trained in elite law schools (and edited and finalized by justices most of whom were once Supreme Court law clerks trained in such schools) is quite different. That difference of style indicates a difference in the basic assumptions about how a court should reach its results.

It would be interesting to track such changes of judicial reasoning systematically, from the time of John Marshall through the pre- and post-Civil War eras, to the heyday of *Lochner* in the Gilded Age, through the New Deal Court and its post-World War II fragmentation and reassembly in the time of Earl Warren, to the Scalian originalist/textualist formalism of the present. But the point is the familiar one that the past is another country—indeed, a series of different countries evolving into each other. We can’t readily assume that the data points plucked from that sequence will arrange themselves into any coherent framework.

Another feature of the legal landscape contributes to this problem. The past, for a legal system that values consistency and looks to precedent, is never entirely past. We may have



overruled *Dred Scott* and forgotten a host of other precedents no longer deemed relevant, but each of the different waves of legal thinking has left its residue on the growing fields of law. To some extent, the cases from the 19th or 20th century that continue to be cited with any frequency today may be ones that have stood the test of time and continue to resonate with contemporary values. But that's not entirely so, especially when we recede from the major landmarks of constitutional law and consider more mundane topics of law. The law of property and of conflicts of laws, and the principles of substantive criminal law, to take just a few examples, are studded with specific rules that continue to be applied just because they are there, judges, lawyers, and even affected citizens are used to them, and they work well enough—even though they may not be the rules that would be dictated by contemporary frameworks of legal thinking. When new ideas or methods of legal analysis achieve widespread acceptance, those ideas may guide judges deciding the cases that come before them, but the case-by-case evolution of the law does not permit a wholesale revision of the entire body of law that has accumulated over the centuries. Many rules will survive, notwithstanding that they were and remain premised on earlier ways of thinking.

Take one example almost at random, familiar to all lawyers from their first-year course in Civil Procedure. The law of *in personam* jurisdiction got a major shake-up from the New Deal Court in 1945 in *International Shoe*, when the Court turned away from traditional rules grounding a court's jurisdiction to render judgments in "their de facto power over the defendant's person," given the defendant's presence within the territorial jurisdiction of the court, and toward a regime that asked whether the defendant had sufficient contacts with the forum state that a lawsuit there was consistent with "traditional notions of fair play and substantial justice." But even after

almost 50 years of cases applying the standards produced by that revolution in thinking, the Supreme Court in *Burnham v. Superior Court* (1990) adhered to the traditional rule permitting a state court to gain jurisdiction over a nonresident defendant by serving process on him while passing through that state, even where the claim had nothing to do with that state. That rule cannot easily be squared with the new philosophy, and derives from an earlier way of conceptualizing *in personam* jurisdiction. The rule may have been a dinosaur, ill adapted to the new environment, but it was still alive, too familiar to be discarded.

And for the last generation or so, as in *Daimler AG v. Bauman* (2014), the Court has taken up a newer way of thinking about the territorial limits of state jurisdiction to curtail the application of general jurisdiction, rejecting an analysis that law students of my generation were taught was a logical corollary of *International Shoe*. In 1972, a civil procedure student would have gotten an A for writing that, under *International Shoe*, a company that consistently did a high volume of business in a particular state would be subject to general jurisdiction there—but today that turns out not to be so.

The result is a set of rules that coexist but are hard to reconcile according to any single theory. They are best explained as rules that represent the residuum of at least three different legal philosophies that have prevailed at different times in our history.

When such a broad shift in philosophies occurs, some specific rules may be ripe for challenge, and the perception that we are doing something very wrong may well be a part of the impetus to rethinking how we analyze problems. But we don't typically bulldoze the structure of existing practice and rebuild according to the new approach; rather, we fix, on an ad hoc basis, the problems that seem most egregious. The rest of the ramshackle structure of the

law, inherited from earlier generations and their very different types of jurisprudence, continues to stand.

That is all the more true of statutory law. Title 18 of the U.S. Code is somewhat ironically called the federal criminal code. The irony is that it is not a code at all in the sense popularized in the 1960s by the American Law Institute's Model Penal Code: an integrated structure with a "general part" containing definitions and basic principles, which are then implemented in specific criminal prohibitions and penalties defined to address particular types of wrongdoing. Rather, Title 18 is a hodgepodge of criminal statutes, some of them dating all the way back to the earliest Congresses and others more modern in conception.

Again, you can see the differences right on the page. Pull a criminal statute from the early 21st century, and you see a pattern of complex subdivisions and carefully worded statutes that aim (not always successfully) to appeal to the textualist brain of modern judges. But then look at the older laws that define traditional crimes such as murder and assault (when committed within the various geographical and conceptual domains subject to federal legislative jurisdiction). Now you see something quite different: laws that cannot be parsed as clearly defining conduct in precise terms. Instead, they invoke broad concepts derived from the common law of crimes. It would not do to read them as if the specific words were designed to tell a naïve reader exactly what elements define the crime. Rather, the words evoke common-law concepts that require some familiarity with Blackstone or with judicially created definitions of crimes current before the United States existed. Yet both types of statutes coexist in the same "code," along with others drafted in eras with different expectations about how courts would read statutes.

There is a Whiggish way of reading this history that suggests a teleological development of the law, sometimes invoking Martin Luther King's famous

suggestion that the "arc of the moral universe is long, but it bends toward justice." It's worth remembering, though, that King was speaking from a specifically Christian teleology, which *ultimately* will resolve in God's just judgment. He did not mean, and it does not seem to be true, that the arc of *human* history bends inevitably in some particular direction. And contemporary Americans who all may believe, or hope, that history is bending toward justice can and do disagree radically about what a just world would look like.

Even if one might hope, or have faith, that the very long arc of history trends in a particular direction, that isn't a lesson that can be empirically validated over the shorter term of two and a half centuries of American law. More characteristic are cycles and eddies (even a consistent metaphor seems impossible). Movement that seems headed in a particular direction and then suddenly reverses seems more characteristic.

For example, the advance of human liberty that culminated in an end to slavery rapidly devolved into a period of reaction and inequality, featuring lynchings and Jim Crow laws in states that formerly authorized slavery. That regime was upheld by the Supreme Court, in the face of constitutional amendments and Reconstruction-era statutes, and lasted for the better (or more accurately worse) part of a century.

But the reign of Jim Crow was in turn followed by a long period of liberal political ascendancy and judicial creativity that has been characterized as a Second Reconstruction. That regime looked dominant and irreversible for a couple of generations, only to be followed by a period of stasis and retrenchment that now seems headed into a period of conservative activism pushing to uproot laws and practices designed to advance the interests of the descendants of slaves.

Reversal of that trend seems as unlikely now as the reversal of the progressive jurisprudence of the 1950s and 1960s might have seemed as late

as the 1970s. But whatever side of that pendulum seems to you to represent a proper idea of justice, history suggests that many more oscillations can be expected before, if ever, a just and stable result is achieved.

And of course that is just to look at the high-level constitutional jurisprudence of the Supreme Court, which preoccupies American legal philosophy as practiced by thinkers such as Dworkin. Even at that level, trends in separation of powers and federalism or states' rights probably follow a somewhat different path, which does not correlate perfectly with liberal vs. conservative politics: both liberals and conservatives seem to value judicial restraint or states' rights according more to which branches of the federal government they control than to any consistent principles for allocating executive versus legislative power, defining the proper role of an unelected judiciary, or determining the extent of federal power over local matters. And the picture with respect to trends in the dominance of statutory and regulatory law, modes of statutory interpretation, attitudes toward litigation reflected in rules of civil procedure, and what remains of the common-law fields of property, tort, and contract may roughly follow rightward and leftward movements in politics and constitutional law, but these are all subject to their own vagaries and more specific evolving notions of law that only roughly correlate with those movements. Organizing the various legal rules that emerge from changing trends in so many different fields of law into some overarching coherent theory of the principles animating American law seems a hopeless task.

Second, geography matters as well as history. Dworkin didn't really expect judges to construct a coherent principled structure of *American* law, as opposed to the law of the particular jurisdiction, federal or state, New York or Wisconsin, within which the particular judge sat. After all, the United States is composed of at least 51 sovereign entities, each

entitled to diverge and develop its own body of law, within very broad limits set by the provisions of the Bill of Rights that bind state governments and by a handful of other constitutional rules.

Projects that aim to state common-law rules representing American law, most notably the Restatements issued by the American Law Institute (ALI), thus face a challenging task. Many black-letter principles derived from case law are common to all or the great majority of states, which after all share many aspects of a common Anglo-American legal culture. But on the hard calls, divergence is common, and the ALI has a hard time identifying what to present as even heavily caveated black letter. Sometimes there are clear majority and minority positions. But sometimes too few states have expressly ruled on a particular aspect of a rule—can we say that there is a majority rule when five states have clear holdings in one direction and three take the opposite position? What if a traditional common-law rule has been overturned in a majority of states that have addressed the issue in relatively recent times (however “recent” is defined), but many others have not had occasion to reconsider an older precedent?

And of course statutory rules, being subject to more rapid wholesale change in response to the politics of the moment, are even more likely to diverge. What, if anything, can be said to represent fundamental principles underlying the American legal system if we try to draw those principles out

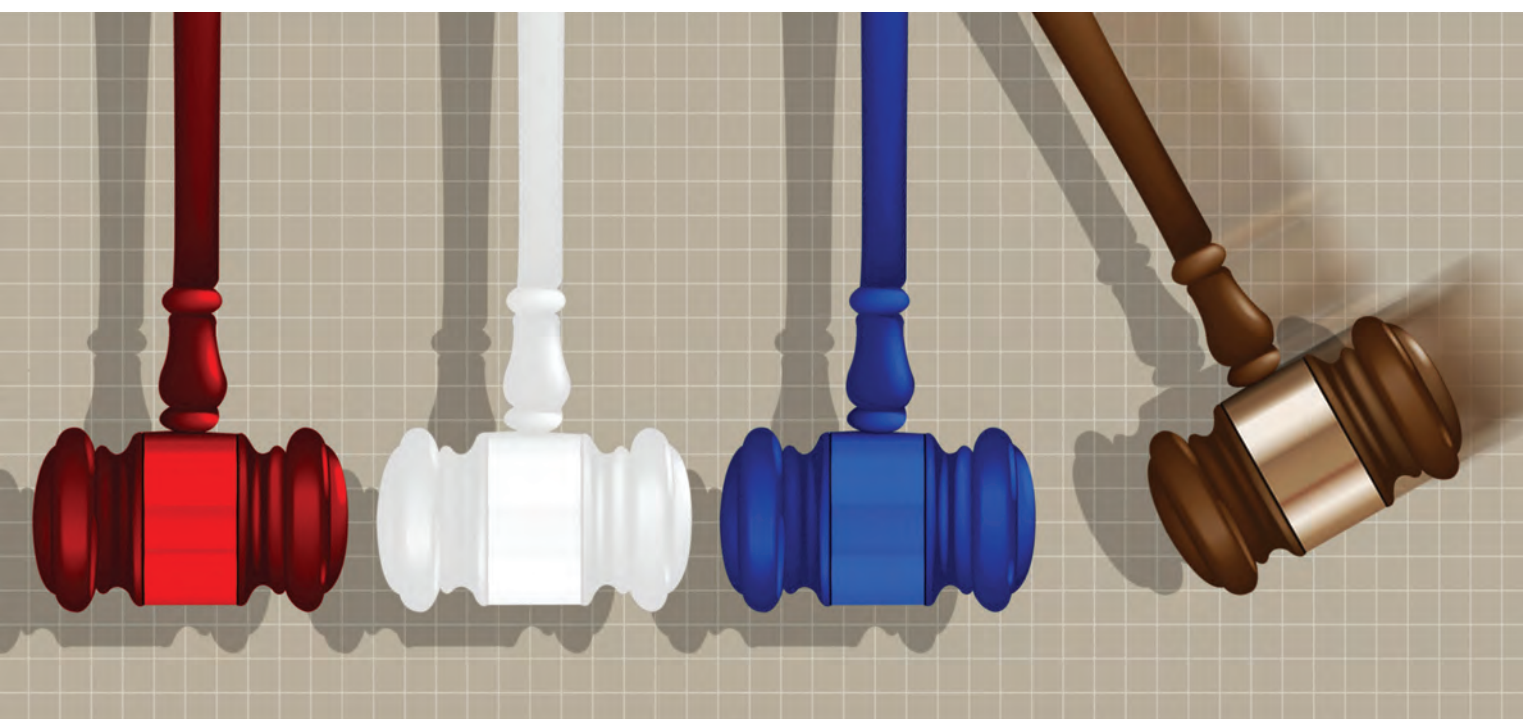
Pull a criminal statute from the early 21st century, and you see a pattern of complex subdivisions and carefully worded statutes that aim (not always successfully) to appeal to the textualist brain of modern judges.

of such a wide range of rules on different topics? Perhaps there are a few, but they would be at too high a level of generality to help in resolving a seriously controversial question of law that arose for the first time in a given court.

That diversity of rules across states influences even the development of federal law. Conceptually, the United States is a separate sovereign that geographically overlaps the territory of the states constituting it but that operates independently within its assigned spheres, as distinct from New York or Wisconsin as New York and Wisconsin are distinct from each other. But that Madisonian conception appears much fuzzier in practical operation. The federal appellate courts are organized into regional circuits, whose judges are almost always selected from the particular states within each circuit and can be expected to share the cultural and political predilections of their regions and the legal assumptions drawn from the laws of the states in which they have practiced law or judged.

In a world in which the Supreme Court now hears as few as 60 cases per year out of the many thousands decided in the courts of appeals, it is not surprising that uniformity on questions of federal law can be elusive. And if that is true at the level of formal legal rules, it is probably even more true on matters of practice, or matters confided to the discretion of trial judges.

Consider the period from 1987 to 2005, during which federal sentencing was supposedly



constrained by mandatory nationwide guidelines. Sentences in different circuits and even different districts within circuits varied considerably, as judges exercised their limited discretion more aggressively, and in different directions. Rates of departure from the guidelines differed systematically, often influenced by the disparity between nationwide rules set for the federal sovereignty and the sentences customary under local law for similar conduct. The Madisonian underpinning of the sentencing guideline system was the belief that it was unjust for a federal convict in New York to get a very different sentence from someone convicted of the same federal crime in Texas. But there is a different horizontal equity concern when someone who commits a crime that could be prosecuted in state or in federal court in either state faces a very different sentence depending on whether the officer making the arrest brings the case to a state or federal prosecutor. It is not surprising that federal judges, observing that the sentences they were obligated to impose differed significantly from those being imposed in the state courthouse across the street, might have been more moved by this latter type of disparity, leading to regional divergence in adherence to the guidelines. That tendency is all the more pronounced now that the guidelines are no longer mandatory.

II. Is the Absence of a Coherent Theory a Bug or a Feature?

Given all this temporal and geographic diversity in American law, I don't see how a judge could fashion a truly persuasive argument that the judge's preferred solution to a hard case should be accepted because of its congruence with some overarching grand unified theory of the underlying principles of American law; the theory would almost certainly be at least as controversial as the answer it supposedly supports. But recall: I am already on record as believing that no formal principle can dictate a convincing, neutral answer in the small but important category of truly hard cases, in which the result is not dictated by the clear meaning of the controlling statutory text or a convincing similarity of the case to a controlling precedent.

So my point tonight is not primarily to further criticize a small subpart of Dworkin's argument. I'm not here as a legal philosopher in any event. I stress the succeeding historical waves of differing principles and philosophies that have shaped all branches of American law, each leaving behind

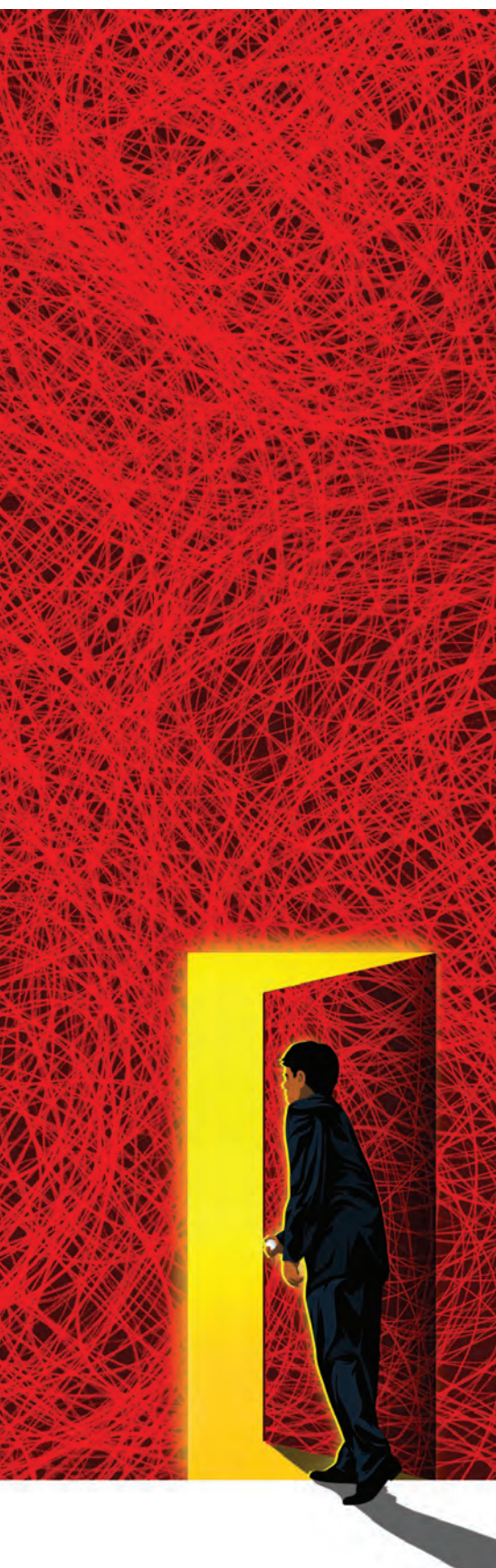
I wish to suggest some ways in which those divergent pieces of the puzzle, which defeat any effort to form a single jurisprudence encompassing them all, constitute not a bug of our system, but rather a feature.

some residue of particular rules, and the different regional experiences that have shaped divergent traditions across states, even within federal law, for a different reason. I wish to suggest some ways in which those divergent pieces of the puzzle, which defeat any effort to form a single jurisprudence encompassing them all, constitute not a bug of our system, but rather a feature.

Don't misunderstand. I tried to be clear in my Madison Lecture that I was speaking of a category of cases, large in absolute number and in salience but quite small in proportion to the total range of legal questions that could be asked, to which there is no objectively or formally correct answer. That does not mean that there is no right answer to any legal question. To the contrary, most legal questions do have objectively correct answers, answers that are so clearly correct that no one would think to litigate them. Similarly I agree that clear and definitive rules of law governing particular issues are highly desirable, and generally achievable. If hard cases cannot be resolved according to some overarching philosophy, it is nevertheless a good thing that hard cases be resolved—because then, in a world ruled by precedent, once the highest court of a particular jurisdiction has decided the issue, the formerly hard case becomes an easy one. Fairness and predictability, important goals of the legal system, are furthered by definitive legal resolution.

But what counts here is a definitive resolution of a particular recurring legal problem, and not an overarching coherence of different rules in different areas of law according to a dominant, universal jurisprudential system. Take, for example, a small issue that the American Law Institute is grappling with in formulating a Third Restatement of Conflict of Laws. The question is whether the validity of a restraint on alienation—say, the stipulation by the donor of a painting to a museum that the museum may never deaccession the painting—is controlled by the law of the domicile of the donor, or of the state where the museum is situated, or of the state where the donative instrument was executed. Different states answer this question in different ways, just as they differ on the substantive issue of the validity of the restraint.

For the most part, it is more important, even in a single state, that this specific legal rule be settled than whether the way it is settled is derived from the same underlying theory of choice of law that determines what law applies where conflicts arise in family law or tort law. Clarity of rule as to the



particular issue is important; consistency of the deep principles of decision-making or the abstract theory that led to the resolution of each rule, possibly in different centuries, may not be.

Indeed, the search for consistency may be unsettling to stability, as the history of choice-of-law rules in the late 20th century showed. Then a new theory, widely adopted by judges and embraced by the 1971 Second Restatement of Conflict of Laws as helpful in resolving some particularly difficult problems, called various widely settled rules into question, resulting in great uncertainty. The Third Restatement, currently being drafted, seems destined to reassert a number of simpler rules, some more traditional and others derived from the patterns of results in cases decided under the “modern” theory, because the effort to achieve theoretical consistency led to more turmoil than was good for the law.

So what I want to do is to reflect on some possible advantages of the lack of uniformity and principled consistency within American law, which have been stimulated by my long-evolving encounter with the difficulties in deciding hard cases according to Dworkin’s, or indeed anyone else’s, theory of how to go about my job.

III. The Unique Attributes of the Different Federal Courts and Their Relationship to Legal Complexity

In order to understand some of those advantages and disadvantages, I think it will be helpful to descend from the heights of legal philosophy to speak about some very mundane and practical institutional features of the organization of the federal court system. The structure of that system is well known to all lawyers. But I’d like to discuss the ways in which the differences between the selection, experiences, and functions of judges at the different levels of court help generate diversity of results and inconsistent principles and methodologies in the understanding of federal law in particular.

As you all know, there are three levels of federal courts: the trial-level district courts, the intermediate courts of appeals, and the Supreme Court of the United States. All three levels are charged with applying federal (and often state) law fairly and impartially, to resolve all manner of disputes. The judges on all three levels of court enjoy life tenure, after being appointed by the president with the advice and consent of the Senate. So one might think that judges at all three levels will tend to be the same types of people doing the same general job in more or less the same way. But there are profound differences in the process by which the judges at each level are selected, the functions they perform in administering our legal system, the procedures they follow, and the daily experience of judges serving at each level.

A. The Supreme Court

When most ordinary people are asked what they think of the federal courts, when political pundits discuss the role of the courts in our government, and even when law professors devise theories of jurisprudence, they all seem to focus disproportionately on the distinctive role of the Supreme Court. In recent years, that Court has been hearing on the merits no more than about 70 cases annually—and probably no more than around half of them involve the major constitutional issues of great political and social interest that dominate the front pages. Examples at the most extreme level of controversy and public concern would be cases in 2022 such as *Dobbs*, which overturned the constitutional right to abortion announced nearly 50 years earlier in *Roe v. Wade*, and *Bruen*, which invalidated New York’s century-old law requiring a special license to carry a firearm outside a home or business. How the Supreme Court decides cases like these has a huge impact on public perceptions of the court system in general, as well as on the selection of judges both for that Court and for the federal courts in general.

But the Supreme Court, especially when acting in these especially salient cases, is anything but typical of the federal courts in general.

Critically, the justices, by the certiorari procedure, get to choose what cases they will decide, and they choose them based on the issues they present. A high proportion of the Supreme Court's cases will have at least some political salience, and almost all of them are difficult, sometimes extremely so, since the job of the Court is to resolve issues on which lower courts disagree and cases as to which the statutory or constitutional texts or the existing Supreme Court precedents do not give clear guidance. On those cases that are hardest and most politically fraught, the results are likely to be less predictable by reference to established law, but often quite predictable on the basis of the jurisprudential proclivities of a majority of the justices. The Supreme Court always sits en banc. That is, all nine justices hear and decide every case. A five- or six-member bloc with similar values and similar approaches to deciding cases will win every time.

For many years now, the process by which the members of that Court are nominated and confirmed has drawn intense public scrutiny, including nationally televised confirmation hearings and highly contentious political debates focused on how the nominees are likely to vote on issues that are expected to come before the Court. It may be hard for younger lawyers to grasp the fact that in the 1950s, President Dwight D. Eisenhower's nomination of justices such as Earl Warren and William J. Brennan received little public attention and resulted in Senate confirmation by overwhelming majorities after fairly perfunctory hearings.

Because the justices can be expected to serve for a very long time, vacancies are rare, and they arise on no predictable schedule. Not every president gets to appoint even one justice: among one-term presidents, Jimmy Carter did not have a single appointment, while

Donald Trump had three. Presidents are personally involved in the selection process, and candidates for appointment are intensely vetted with an eye to how they would be likely to vote on issues that can be expected to arise within the immediate future that might have an impact on the political fortunes of the president and his party.

Increasingly, presidents nominate to the Court younger candidates than was once the norm, seeking to maximize the length of their service on the Court, and candidates who, because of their track record as judges or law professors, have taken positions on legal issues that can help predict their views on anticipated cases. Although a few justices have retired from the Court for personal reasons while still healthy and able, the public and the political commentators seem to expect justices either to serve out their full lifetime tenure or—as suggested by the widespread criticism of the otherwise lionized Justice Ruth Bader Ginsburg for doing just that—to time their retirements to the political convenience of a president of the same party as the one who appointed them.

B. The District Courts

But the Supreme Court is a unique institution, differing dramatically from the rest of the federal court system. The “inferior” federal courts, as the Constitution terms them, have very different dockets from the Supreme Court's. More than 400,000 cases are filed annually in the federal district courts, and approximately 50,000 or so appeals arrive to the various circuit courts of appeals. Those cases look very different from those heard at the Supreme Court, and the judges who decide them are engaged in very different functions from the justices.

To go to the other extreme on the pyramid: District judges have the least power to “make law” by the cases they decide. Their opinions are not binding on any other of the hundreds of district

judges hearing similar cases. Nevertheless their opinions matter: The number of cases and issues they decide so far outstrips the number of cases heard and decided at higher levels of the system that, in addressing the legal issues that come before them, district judges must and do look for, rely on, and cite as precedents the opinions of other district judges.

Unlike the Supreme Court, district judges have no choice in the cases they hear. The district courts have to decide the cases that litigants bring to them, and those cases are generally assigned at random, within the federal district in which the cases were filed, to the district judges who will preside over them. Wholly apart from the influence the opinions that they write may have on the development of the law, however, district judges have the most power of anyone in the system to affect the outcome of the particular disputes they are charged with managing and resolving. Deciding formal questions of law is only one part of their jobs—while for the Supreme Court, that is quite literally the only thing the justices do. District judges supervise pretrial litigation, preside over trials, and encourage settlements. Many rules of law, procedure, and evidence vest district judges with discretionary authority to decide what to do in particular cases as they see fit.

The wise district judge is not usually looking over her shoulder at what the court of appeals (let alone the Supreme Court) might do with her decisions—although the careful district judge will often take care to create a clear record of the decisions she makes and the reasons for them. District judges know that most of the decisions they make, about legal as well as practical administrative matters, will never be reviewed. Most cases eventually settle—with the settlement terms strongly influenced by rulings the judge has made in the course of the case to that point—and thus there will be no appeal or any review of the rulings.

Moreover, even those cases that are

litigated to ultimate resolution and then appealed will be presented to the courts of appeals based on a limited number of rulings selected by appellate lawyers as possible hooks to overturn the judgment; thus, many rulings over which the trial judge agonized will not be challenged. On rulings that are reviewed, the governing standard of review will often grant considerable deference to the district judge. So the chances that any given decision made by a judge in the often lengthy process of presiding over litigation will be overturned by an appellate court are quite low.

While at least some of the decisions made by a district judge will attract public attention and even controversy, most of even those matters, such as sentencings in high-profile criminal cases, are of only passing interest to the general public and do not implicate major political questions; in the few that do, the press mostly understands that the district court decision is only a way station en route to resolution of the issue by higher courts. So there is little public scrutiny of district judges' decisions relative to the close public attention to the work of the Supreme Court.

Finally, the work of the district court judge is powerfully shaped by the sheer volume of cases. There is a need for speed. In my district court days, I would often remind my clerks that in all legal decision-making, there is a tension between getting

In my district court days, I would often remind my clerks that in all legal decision-making, there is a tension between getting it right and just getting it done.

it right and just getting it *done*. Justice delayed is justice denied, as the saying goes, and many issues raised by lawyers in the course of litigation are raised in hopes of securing a marginal advantage—obtain a few more documents in discovery, get another piece of evidence excluded or admitted. Cumulatively those issues matter, but each one has to be decided quickly, will not affect anyone but the particular parties before the court, and probably will not be determinative of whether the case is won or lost. And there are many cases in line behind the one before you at any given moment, all with a claim to your attention.

District judges are necessarily primarily focused on doing justice to the individual parties who appear before them, in the factual contexts in which abstract legal issues are presented in particular cases. That inevitably influences how the judges see the merits of broader legal questions, and it can encourage judges to stretch the boundaries of abstract principles to do justice in a particular case. Sometimes, too, the focus on the particular case might obscure the fact that the proclaimed rule that decides this case correctly may not be right across other possible applications in other cases.

Unlike the Supreme Court, every district judge is a solo act, king or queen in his or her own court. If issues are close and the law unclear, the individual judge makes the decision, which, as I've



Compared to members of the Supreme Court, district judges have very different incentives with respect to how they handle their life tenure. Federal judges have a very good retirement program.

noted, often will not be appealed. And on those close issues, if the judge is only 51 percent sure of which side is right, that side will win the day. Of course, the judges are constrained by their oaths, and also by inclination, to follow the law as best they can discern it. But discerning it is not so easy. I was always amused, while a district judge, when nonlawyers asked whether I was often tempted to depart from the law to impose my own views. I would point out that I had to decide issues of law arising in an unbelievably broad range of legal specialties, from admiralty and bankruptcy through insurance disputes and personal injury, to securities fraud, pension benefits, and intellectual property. In almost none of those areas did I have any preexisting expertise or experience, let alone any preformed opinions about how specific legal questions in those fields should be answered. Even where I had some generalized policy preferences, the issues arising in individual cases tended to be so highly specific that I would never have given them the slightest thought before they came before me, and a general belief about broad principles of law was of little help in grappling with the sometimes-unknowable practical effects of adopting one rule or another to resolve the particular question posed by the case. I was delighted when I could find any guidance at all in clear statutes or prior decisions of other courts about what the law was, so I wouldn't have to decide the more difficult question of what I thought the law ought to be.

At the same time, for many questions, either the law was unclear, or it clearly instructed me to exercise discretion and do what I thought was fair. And of course, what I thought fair was the product of my own thought and experience. To the extent that, for example, a judge tends, based on his or her experience and political philosophy, to think that litigation is a way for the little guy to hold big corporations accountable, or alternatively to think that litigation is mostly a way for lawyers to make money and a drain on the efficient operations of the marketplace, close calls on summary judgment or class certification or whether a pleading is "plausible" under the rule of *Bell Atlantic Corp. v. Twombly* (U.S. 2007) are likely to be made differently in different courtrooms. I don't think any sensible person would dispute that where the law gives little guidance, a particular litigant with a particular type of case, if given the power to choose his own judge, would quite rightly think that he would be better off with, say, a Republican rather than a Democrat, or

with a liberal rather than a conservative, when close questions need to be decided.

The selection process for the judges who do this work is, *de jure*, the same as for Supreme Court justices: presidential nomination and Senate confirmation. But the *de facto* political process is quite different. The sheer number of judges who must be appointed makes it impossible for a president, or even a Senate committee, to thoroughly vet every candidate.

While the number of Supreme Court justices any given president will get to appoint is the product of chance and, to put it bluntly, largely depends on when the Grim Reaper strikes, every president will get to appoint a substantial number of district judges and judges of the courts of appeals. That is partly a function of the number of judgeships: nearly 700 in the district courts, for example, compared to just nine. Besides the sheer number of judgeships, other factors influence the frequency with which presidents exercise the power to appoint district judges. Compared to members of the Supreme Court, district judges have very different incentives with respect to how they handle their life tenure. Federal judges have a very good retirement program. One of its key provisions is that a judge, upon reaching certain benchmarks of age and service, may take "senior status," opening up a vacancy while continuing to sit, often for something close to a full caseload, but with the ability to temper the grueling work of a full-time judge. Most of us take advantage of that opportunity. In fact, most (though not all) district judges take senior status upon reaching eligibility. That assures regular turnover in the courts, giving every president the responsibility, and the opportunity, to appoint a large number of federal judges. Given the august status and considerable power of Supreme Court justices, retirement or a reduction in activity is much less attractive.

Moreover, the White House has much less involvement in the selection process for district judges than it does for Supreme Court justices. District judges are typically recommended by the senators of the state in which they sit; this tends, even in highly contentious times, to motivate senators to protect their own patronage by not unnecessarily attacking the candidates proposed by their colleagues. Senators of the party in opposition to the president's will snipe at candidates who seem, or can be made to seem, to stray from the political principles of the opposition party. But the lower-court benches

must be peopled, so that the important work of resolving lawsuits can be accomplished. And while senators will often seek to score points off presidents of the opposing party, and may at some point want to appear to their constituents or donors to be safeguarding the courts from the radical or reactionary judges the opposing party would appoint, for the most part district judge nominees are going to be confirmed, even where the opposition party has the political strength to refuse confirmation. Even if a nominee fails of confirmation, the replacement nominee will often have rather similar ideas, although perhaps he or she has been less outspoken or more temperate in making them known over the course of a career in practice.

The result of all this is that the lower court benches are far more politically diverse than the justices of the Supreme Court, and the composition of those courts is less affected by the vagaries of when a vacancy occurs. Since every president will get to appoint a substantial number of district judges and judges of the courts of appeals, so long as there is reasonable turnover of the party that controls that White House—and in the past 75 years, there has only been one stretch when the same party held the presidency for as long as three terms—the makeup of the lower federal courts will be widely representative of the views of both major political parties. And remember, while you might prefer to have your case decided by a liberal or a conservative judge, the case—in most circumstances—will be assigned to a judge at random. Whether the federal bench as a whole has more judges appointed by one party or the other will not matter to your case.

That reality may depart from an idealized model of equal justice. If you believe that there is a platonically or divinely ordained right answer to every legal question, it will be distressing to think that not every case will be decided according to what *you* think is the right answer. But if you recognize that not every tough legal call has only one right answer, and that many have a reasonable range of answers, you will recognize as well that not every case is going to go the same way, and that this may be a desirable rather than a damaging feature of our system of justice. The consumer, the worker, the welfare recipient may not win every close case, but neither will he or she lose them all.

C. The Courts of Appeals

The courts of appeals are one step up from the district courts, not just in hierarchy, but in the level of abstraction of the issues they decide. Their decisions set precedents that will affect a range of cases. While the context of a particular case can still shape the way that the court perceives an abstract principle, the wise appellate judge has to be more careful to test whether what seems like a fair rule for this case will work in a broader range of cases to which it might apply. Unlike the district judge, we on the courts of appeals may never see the human beings who are parties to the cases—or may see them only as spectators in the gallery. We may study the record of a trial, but we have not seen, up close and personal, the witnesses and victims whom the district judge has encountered in the courtroom.

Moreover, we appellate judges are more like pathologists than emergency room doctors, dissecting what went right or wrong in a case that has most likely passed the point at which it had any urgency for the parties—if the parties needed an answer immediately, they would probably have settled the case long ago and gotten on with their lives. The pressure to get it done of course remains. Even in a case that has been fully resolved below, the parties need to know, in some reasonable time, whether that resolution is final. Also, as at the district court, efficient resolution is important not only to the parties but to the many others whose cases await decision. You can't take forever on any one case, however important and difficult it may be, because dozens of other cases are waiting in line for your attention. But on the appellate court, the balance tilts a little further away from getting it done and a little further toward getting it right.

As for selection, there are only about 180 court of appeals judges in “regular active service” (as distinguished from judges who have taken senior status), so screening for nominations is more centralized in the White House and greater scrutiny by the Senate is possible. Political controversy over nominees is more frequent than for district judges. Still, legislative attention for even that many judges is limited.

The decision-making process at the courts of appeals also differs from that at the Supreme Court, as well as from the solitary intellectual struggles of the district judge. We decide every case to begin with, and nearly every case with finality, in panels of three. My court has 13 judgeships. Of the active judges

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at this moment, six members have been appointed by President Joe Biden, five by President Donald Trump, one by President Barack Obama, and one by President George W. Bush, and we also have 15 senior judges sitting regularly who have been appointed by presidents going back to Jimmy Carter. The panels are more or less randomly created, and the cases assigned to each panel are entirely randomly distributed.

It matters little to the resolution of any given case whether the majority of active judges on the court are “liberal” or “conservative,” or were appointed by Democrats or Republicans. Even at the level of the panel, the easy cases, and there are many, tend to be decided unanimously, because the merits are clear and controlling.

For closer, harder cases, the proclivities of different judges will take on more importance. But given the random assignment of cases to panels, the close cases will not all go a single way. Narrow issues of law get settled, and are then applied as precedents, fairly and scrupulously, to other cases. But each new issue that arises and presents a close question gets decided by a different panel, and so some rulings may have a more liberal tinge while others take a more conservative direction. Which party has appointed a majority of the entire body of active judges on the Court is less significant than the newspapers (with their breathless accounts of how the incumbent president's latest appointment may have “flipped” a circuit) make it appear. Although there is a mechanism by which the full group of active judges can review the decision of a panel, that process is too cumbersome to be invoked in any but highly important cases. So most of the decisions of panels will not be reviewed, by the full court or by the Supreme Court.

Let me note one other feature of deciding cases in panels. In my experience, a body of three judges, drawn from a politically and jurisprudentially diverse pool, has some significant advantages over decision-making not only by individual judges (three heads being better than one) but also by larger bodies of judges such as an en banc court. Most of our decisions are unanimous, not only because most of our cases are not all that close or all that divisive but also because the close or difficult cases are also fairly specific. They involve not a choice of fundamental political or legal direction, or the resolution of a single issue presenting a binary choice of rules, but the selection of which of two or more competing principles or ways of reading a specific text will control the result in a highly particular circumstance. There

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will often be a range of views, rather than a binary choice, and there is an opportunity for compromise and considerable pressure to do what I was taught judges are supposed to do—to decide the least that needs to be decided to resolve the case. The easiest way to lose the “swing voter,” where there is one, is to stake out an extreme position that will purport to control the broadest range of future cases. A small group of judges can really listen to each other's arguments, and try to reach a consensus on a rule of decision that resolves the present case in a way least disrespectful of the concerns that animate each judge's advocacy of one or another competing rule.

The courts of appeals sit halfway between the trial courts and the Supreme Court with respect to their relation to the facts of the cases before them. As I noted above, the district judges are intimately close to the facts of each case, and most often will directly confront the parties to the case. Doing justice in the particular case is paramount. By the time a case reaches the Supreme Court, the case is typically a vehicle for deciding a particular legal issue that the Court has decided needs to be resolved at a relatively high level of abstraction because the issue is important to a wide range of cases that may come up. The courts of appeals are in between: their decisions set precedents that need to be followed, but it is often possible to decide a particular case in a way that is fair to the parties but creates only a rather narrow rule, which will affect only cases closely similar to the one before the court. The Supreme Court, too, has some incentive to proceed slowly and narrowly—but given the small number of cases it decides, there is a greater pressure, or temptation, to go big: to answer a question in a way that settles, once and for all, a major issue. Close attention to the narrow facts of the particular case can interfere with announcing a broad rule. Announcing broad rules promotes consistency, at least at the level of principle.

The greater focus on the facts of particular cases, and a process that promotes compromise and the creation of narrow rules, both features of the process in the intermediate appellate courts, are additional factors leading to greater diversity—and less ideological coherence and consistency—across outcomes in those courts.

IV. The Virtues of Incoherence, and Some Practical Tips to Maximize Them

So we return to the question of consistency and coherence. If one thinks, as I do, that many



hard and novel issues do not have unambiguously right answers, it seems to me that a considerable amount of diversity is a good thing. Would I rather that every case be decided the way I would decide it? *Sure*, a part of me says. Like any private citizen, I have my own ideas of what a just society would look like, and I would like the law to conform, in all respects, to that notion. But in a democratic society, even one that has certain counter-majoritarian features built in, the ultimate shape of society and the ultimate resolution of issues are political questions, which must be settled by the people. I can't expect all citizens, or all judges, to share my vision. Nor will a single political vision consistently dominate the views of a majority, election after election.

The law that emerges from this somewhat messy system is the product of the political choices of the citizenry, as expressed through electoral results, shifting over time. Each election leaves a residue, in the form of legislation adopted by the political branches of government, which cannot easily be totally overhauled with each change of administration. Each election will also produce a crop of life-tenured judges who will interpret that legislation, and who will also interpret the vague terms of the Constitution that can trump the legislative preferences of passing majorities. The law, in consequence, does not come to us from a single lawgiver, with a consistent set of principles from which every rule or every outcome is deduced. Such a coherent body of law would be great if the lawgiver were perfectly knowledgeable and perfectly just. But the vision of such a system is also inherently totalitarian, and will go drastically awry when the Supreme Leader, or the dominant faction, is misguided. A more complicated system gives room for more flexible outcomes, which in turn move the entire system in a more moderate direction. That is frustrating for reformers. Progress in any direction is slow, and proceeds in fits and starts, with cycles in which reformers of

an opposite persuasion move the law in what seems to the previous group of reformers a very wrong direction.

The system is unruly, and a little bit ramshackle, but even as limited to federal law, and putting aside the great diversity of state law, this inconsistency has the great advantage of preventing either wild swings in the overall shape of the law or the hardening of a single vision into a perpetual and immovable body of rules dominated by a single philosophy. In the end, I prefer that to a more winner-take-all system. The existence of the Supreme Court imposes some discipline on the system as a whole. Many major questions will be resolved by that Court, and the lower courts will have to fall in line. But the Supreme Court, too, changes its shape over time. So long as a system of precedent holds—and despite occasional appearances, the fact is that precedent is so essential a feature of legal reasoning that for the most part this system will hold—the Supreme Court, too, presides over a body of its own law, which itself is the creation, over time, of justices with different agendas and approaches.

Let me close by looking at a few concrete lessons from this way of looking at the evolution of law and the structure of the federal judiciary. As I suggest some of these lessons, I recognize that they take the form of advice to actors who have little interest in anything I say, and who will most certainly not take my advice, particularly in our highly partisan times.

First, advice for presidents on the selection of lower court judges. Federal district judges have a very hard job, and one that will rarely determine issues of the magnitude of the question whether abortion will be a crime or a constitutional right. Presidents will presumably appoint people whose political and social views, and whose judicial philosophies, are roughly congruent with their own. But many lawyers will satisfy that criterion. The judges you pick are the face of fairness in our system. District judges are the only

judges most litigants will ever see. They will have to be calm, poised, and willing to listen. You want people who are smart, moderate—in temperament even more than in politics—and fair-minded. And no small thing: you want people who will show up for work. Life tenure and judicial independence mean that a federal judge answers to no one. When I took a vacation as a district judge, I needed no one's permission, and effectively the only people I even needed to tell that I'd be away for a week or two were my own staff. The dumb or the lazy should not apply. Nor is there much place for judges whose primary agenda is to change the world. That's not really the job description for district or even court of appeals judges. So a lawyer who will be bored by the ordinary cases that have to be decided will chafe in the role and will not be very good at the real work of the courts.

Senators should apply similar criteria, and once satisfied that the candidates have the smarts, skills, patience, and work ethic to do the work, the members of the Senate should presumptively confirm the choices of the president. In this I agree with Senator Lindsey Graham, who has consistently noted that elections have consequences and that one of those consequences is that the president will get to appoint the judges. Sure, the Senate can vote a couple of them down, but the next person nominated will probably be only marginally different in philosophy. So stop with the political theater. Litmus tests about the issues that will dominate the Supreme Court are not especially relevant in the selection of trial judges, and not dominant even with respect to judges of the courts of appeals.

Second, advice to lower court judges about how to conduct themselves in doing their job. As noted, federal judges have a great deal of independence, and so have no more reason to listen to my advice than the president or a senator. But consider: Resist the tendency to succumb to "black robe disease." You are not infallible. Humility is a cardinal virtue in judges. This mostly affects how

you treat litigants and lawyers in the courtroom. But it also applies in deciding legal issues. Adhere to the traditional rule of avoiding broad rulings where possible and deciding only what you must to resolve the dispute before you. And, to highlight an issue that has been in the news a bit for the last couple of political administrations, don't reach to impose a nationwide injunction. Decide the case in front of you, and stay in your own lane.

If you are on a collegial court such as a court of appeals, actually listen to what your colleagues have to say. One basic problem with the philosophy that "there is a right answer to every legal issue" is that of course, to each of us, the right answer is *our* answer—the one dictated by our own preferred methodology and our own substantive views. And if your view is taken to be the definitive right answer, there can be no compromise.

For what it is worth, I have found that sitting on panels with judges whose views on many subjects may diverge widely from mine has given me a better understanding of the concerns that motivate their views. My court is not representative of the political views of the majority of voters in the three very blue states that the Second Circuit comprises, and certainly not of the academic and liberal neighborhood in which I live. That is a function of the fact that the presidency turns over, while the local political majorities do not change. So I have more contact, and more importantly I have to share decision-making power, with more conservative legal thinkers than I have worked with in any other legal job I have held. I have learned from that experience, but you only learn if you listen.

Finally, to the Supreme Court. Remember the principles of judicial restraint. Now, I want to say straight out that some of you in the audience may think, "Yeah, suddenly these liberal judges have discovered judicial restraint now that they don't control the Supreme Court." There is truth in that. I think about these issues now rather differently than I did as a callow Supreme Court

law clerk in 1976. But that's what age and experience are supposed to do: they make you more conservative, in the truest sense of that word. Times change, and majorities shift. The courts get their power, ultimately, from the reality and the perception that judges adhere to precedent and exercise moderation. Adopting the view that "no principle is settled until it is settled right"—meaning, of course, settled the way I think it should be settled—may allow you to make a lot of change quickly but exposes you to the risk that the next generation will be equally able to undo your legacy, and the sense of politicization and instability will reduce the value of the courts as respected and fair arbiters.

Here's another issue that has been salient in recent press coverage of the Supreme Court, the so-called "shadow docket." That refers to the Court's power to issue temporary stays of lower court orders, and it's a misnomer. There's nothing shadowy about it. It is not secret, except to whatever extent the media have long paid it less attention and only now have learned to attend to it. The real issue with such requests for emergency rulings is that those requests push the Court to intervene earlier into cases. Normally the Supreme Court takes cases only after they have been finally resolved in the lower courts. There are good reasons for that. It used to be said that it was good for complex issues to be allowed to "percolate" through the lower courts, so that the Supreme Court could learn from the diverse views advanced as the issues were decided by a number of different courts. Early intervention into that process smacks of arrogance and inevitably gives the impression that the justices think that they have nothing to learn from that process, or indeed even from having cases fully and carefully briefed and argued before them. If you think that every case has only one right answer, and that that right answer is yours, well, you'll probably behave accordingly. But I don't think it's the right way to behave. Are there cases in

which it is clear that a lower court has gone off the rails, or where the status quo should be preserved precisely in order to enable an issue to be carefully considered? Of course. But those are infrequent.

If we were to fantasize about possible fundamental change in the federal court system, the one proposal for radical change in the Supreme Court that has any appeal to me is the notion of term limits for Supreme Court justices. A system with term limits could have several valuable results. First, it could reduce the pressure on political actors to engage in such practices as appointing the youngest candidates, and to engage in extreme vetting of the views of potential nominees and bitter confirmation fights, by lowering the stakes of each appointment. Second, it could reduce the calcification of views as justices serve for 30 years or more and become political and cultural icons. The current appointment practices can't be good for avoiding judicial arrogance. And third, it could make the Supreme Court bench more changeable and more diverse in political views, like the lower federal courts.

The terms would have to be long. We really want being on the Supreme Court to be the last job a lawyer will hold or, if not, one that sees the justice thereafter continuing as a life-tenured senior federal judge, rather than to be a stepping stone to some other public office or private profit-making venture.

Now, I want to say straight out that some of you in the audience may think, “Yeah, suddenly these liberal judges have discovered judicial restraint now that they don’t control the Supreme Court.”

But we also should want to guarantee that every president who wins election by the people will have an equal opportunity to leave his or her mark on the Court. You can do the math and find a length of term that would serve both of those goals.

That change is almost certain not to happen. If it did, it would probably guarantee that any dream I might sometimes have of a long-term Court that would decide all the cases exactly as I would want them decided could never come to fruition. But it would avoid the long-term tyranny of a Court that would follow a single philosophy or be consistently out of step with changing generations of legal and political thinking.

If you get the impression that I have some skepticism about the Supreme Court, and a great deal of affection for the “inferior” courts, you are correct. I think the sometimes messy and inconsistent jurisprudence that emerges from the buzz of diverse, case-specific judgments of courts grappling with concrete cases and real people is superior to the jurisprudence of philosophers, academics, and judges who deal at a high level of abstraction with broad principles.

And that, friends, is my case against excessive consistency, and in favor of the complex and sometimes contradictory principles that animate American law. ■





AN ASSESSMENT OF DEMOCRACY IN THE CRIMINAL JUSTICE SYSTEM

Carissa Byrne Hessick

I would like to begin by putting each of you on the spot. It won't require anyone to answer a question. Yet I do want to make you think about your personal role in our criminal justice system.

Those of you who do not work as prosecutors, judges, or defense attorneys might think that you do not have a role in the criminal justice system. But that is not true. *Everyone* plays a role because the American criminal justice system is uniquely democratic.

You may not appreciate this because this role of democracy has been eroding, especially since the second half of the 20th century. Unfortunately, at the same time, the criminal justice system has

ballooned in size. Our incarceration rate is five times higher than 50 years ago.

I suspect that these two phenomena are related. As ordinary Americans have played a smaller role in the criminal justice system, the system is no longer subject to the limitations that public opinion might place on the actions of those who work within it. So those who work in the system can expand the footprint of the criminal justice system. The result is a type of bureaucratic creep, with an especially pernicious outcome—specifically, more people in cages.

But I am getting ahead of myself. I should describe the role that democracy is supposed to play in the criminal justice system before explaining the ways in which it is failing. Then I will offer a little bit of hope about what we can do.



This is a lightly edited version of the annual Barrock Lecture on Criminal Law, delivered by **Carissa Byrne Hessick** at Marquette Law School on November 15, 2022. Hessick is the Ransdell Distinguished Professor at the University of North Carolina School of Law, where she also serves as director of the school's Prosecutors and Politics Project. A complete essay version, including footnotes, will appear in this fall's issue of the *Marquette Law Review*.

Our Uniquely Democratic Criminal Justice System

No country on this planet reserves a bigger role for democracy in criminal justice matters than the United States. Our approach is attributable, in part, to decisions made when our country was founded. Changes in the 19th and 20th centuries made our system even more democratic. The result is important democratic features associated with the role that each of the three branches of government plays in the criminal justice system.

Let's start with the judicial branch and the role of juries. The U.S. Constitution requires that a determination of guilt in criminal trials involve juries. This requirement is designed to ensure that ordinary citizens play a key role in individual criminal cases, something about which the founding generation felt quite strongly. John Adams believed that "the common People should have as compleat a Controul . . . in every judgment of a Court" as in the legislature.

A lack of jury trials was one of the complaints in the Declaration of Independence. Maybe that is why the right to a jury trial appears twice in the Constitution—once in Article III and then again in the Bill of Rights. The jury was seen not only as a right of the accused but also as an important right of participation for the general public. Indeed, Thomas Jefferson said that if he had to choose between democratic participation in the legislature and such involvement in the judicial branch in the form of juries, he would choose juries.

When our country was founded, the jury did not just find facts; it also made law. This view of the jury's role has fallen out of fashion—probably because it is discussed mostly in the context of jury nullification, which is controversial. But even if you are not a fan of jury nullification, it is important to understand that the modern jury does more than simply decide which witnesses are telling the truth. Jurors also have to make judgment calls because many crimes and defenses include elements such as "reasonableness" or "materiality." Every year, when I teach criminal law, I emphasize how these terms require jurors to consult their own sense of right and wrong. Personal judgment is necessary because those elements are not questions of black and white; they are matters of degree.

Several years ago, when I was teaching in Arizona, one of my students got called for jury duty. Her case involved an argument between two men at a public pool. At some point during the argument, one



of the men yelled a curse word, the one beginning with an *F*, at the other. Unfortunately, the other man was an off-duty police officer, and he responded by arresting the first man. Prosecutors brought charges for disorderly conduct and for assaulting a police officer. My student found out later that the arrested man had been willing to plead guilty to disorderly conduct, but the prosecutor refused to drop the assault charge. The case went to trial.

In their deliberations, the jurors quickly agreed to acquit on the assault charge—which seems like the obviously correct decision to me—but seemed inclined to convict on the disorderly-conduct charge. My student spoke up, telling the other jurors that they should use their personal judgment about whether shouting a curse word at a public pool ought to be a crime. The other jurors seemed skeptical of this approach; they did not think that they

had the power to make decisions of that sort. But my student insisted that, because the statute talked about whether the defendant's conduct was "unreasonable," they had to use their judgment about whether something was serious enough that it should be illegal. "That's what I learned in my criminal law class," she told them.

The other jurors were not sure whether to believe her, my student later told me, and so she suggested that the jury send a note to the judge asking for guidance. But when another juror pointed out that it might take a while for the judge to respond, the rest decided to defer to the law student in their midst. They quickly decided that shouting curse words in public should not be illegal—some of them noted that they engaged in that sort of behavior themselves all the time. They acquitted the defendant on both counts.

This is hardly the only example of a jury's needing to make judgment calls in deciding criminal cases. Here in Wisconsin, you are all familiar with the Kyle Rittenhouse case. Rittenhouse shot three men, killing two, during violent protests in Kenosha, Wisconsin, in 2020. He raised self-defense at trial—a defense that under Wisconsin law required jurors to decide whether Rittenhouse's actions were reasonable in light of the circumstances at the time. In other words, the jury had to make not only a factual decision about what Rittenhouse did and what was happening around him but also a sort of moral judgment about whether his actions were reasonable.

I know that some people do not agree with the Wisconsin jury's decision in the Rittenhouse

I know that some people do not agree with the Wisconsin jury's decision in the Rittenhouse case.

case. But personally I would rather have my fellow citizens making controversial decisions about whether someone's use of force is factually and morally justified than have that decision made only by government actors.

Juries are not the only source of democracy in the criminal justice system. We also elect our criminal justice officials. Forty-five states elect their local prosecutors. Forty-six states elect sheriffs. And many states elect their judges.

These direct elections are largely attributable to Jacksonian populism of the 19th century. In the decades after the Revolutionary War, most judges and prosecutors were appointed. But with people beginning to see appointments as little more than the spoils of patronage politics, reformers began to call for judges and prosecutors to stand for election. Elections were seen as a way to prevent patronage appointments and as a method to ensure local control over important offices.

Today, direct elections allow political outsiders to get elected to important criminal justice offices. For example, in 2017, Larry Krasner ran for election as district attorney in Philadelphia. Krasner was not simply an outsider; he was a legal agitator who had filed dozens of lawsuits against police officers for civil rights violations. He was so unlike the typical candidate for office that the head of Philadelphia's Fraternal Order of

Police called Krasner's candidacy "hilarious." The voters elected Krasner.

Local elections allow communities to adopt different responses to crime. For example, the people in Philadelphia recently decided to reelect Krasner, while the people in San Francisco decided to recall their district attorney, Chesa Boudin. The two prosecutors had taken similar approaches to crime and public safety, but the communities felt differently about whether those approaches were succeeding.

Because these elections are held on the local level, individual voters have more input into who holds these offices, and they are more likely to be heard. For example, just this past year, my local community held an election for district attorney. Because I study prosecutors, I invited the two candidates to come to my law school and participate in a candidate forum—an invitation that both candidates accepted. At the forum, the candidates talked about why they were running and what they planned to do if elected. Students and members of the community were able to ask questions and get specific answers to their specific concerns. Most people are not able to get such answers in a presidential or gubernatorial election. In contrast, most sheriffs and prosecutors, elected on the county level, serve relatively small communities.

Let me turn from the role that democracy plays in the judicial

branch (through juries and judicial elections) and the executive branch (through local elections for sheriff and prosecutors) to talk about the legislative branch. It might seem obvious to say that democracy plays a role in the legislative branch—after all, legislators are elected. But my interest here is a major development of the 20th century, in which the legislative branch asserted more control over the content of criminal law.

For much of the country's history, the law was largely developed through judicial opinions. The major crimes that we learn about in law school—homicide, burglary, arson, rape, kidnapping, robbery, theft, assault, and battery—did not become illegal because state lawmakers passed bills criminalizing that behavior. These acts were illegal, long before any such bills passed, because of the common law transported from England. Judges created that common law.

Beginning in the early 1900s, state legislatures embraced the process of reducing the law to statutes—codification. Legislatures routinely use their power, creating new crimes and new defenses, altering the definitions of existing crimes, and changing the penalties associated with various crimes. And, as we saw most recently in the 2022 elections, a number of people who run for Congress or state legislatures run on platforms about crime. When they take office, these legislators make further changes to the criminal law, bringing that law in line with what their constituents want. This process helps ensure that criminal law is democratic.

In short, some of the democratic features of our criminal

justice system were intentionally designed by those who founded the country, and other features expanding the role of democracy were adopted in subsequent centuries. Taken together, they ensure that criminal justice in the United States is, by its nature, democratic.

Modern Democratic Deficits

Unfortunately, the jury, criminal justice elections, and criminal law statutes are all failing to deliver on their promise of making our criminal justice system more democratic. In one way or another, these democratic features of the criminal justice system are not working as intended. The result is a system with egregious democratic deficits.

Let's begin with the jury. Juries serve as an opportunity for democracy in the criminal justice system only if we have trials. Unfortunately, trials have all but disappeared in modern America. Some 97–98 percent of all convictions in this country are the result of guilty pleas. In some places, it is not too much to say, there are no trials at all. In 2021, not a single criminal trial was held in federal court in Rhode Island. Every single defendant pleaded guilty or (less likely) had the charges dismissed. There are, of course, other examples. Let me simply note, from an available statistic, that here in Wisconsin during 2002 the two federal districts held only 11 trials in the entire year.

Criminal trials have thus largely disappeared for two reasons. First, for many decades now, judges have imposed a penalty on defendants who insist on going to trial and who then lose, as most do—a “trial tax.” A recent

The modern democratic deficit in the criminal justice system goes beyond the general lack of jury trials.

report from the National Association of Criminal Defense Lawyers documents that, on average, such defendants receive sentences three times longer than those who plead guilty.

A second way that prosecutors discourage trials is through plea bargaining. A plea bargain, of course, is when a prosecutor offers a defendant something in return for pleading guilty, such as the dismissal of some charges, the opportunity to plead guilty to a less serious offense, or a favorable sentencing recommendation.

In the 19th century, plea bargaining was a disfavored practice. If appellate courts discovered that a defendant had pleaded guilty pursuant to a plea bargain, they would vacate the conviction and refuse to enforce the terms of the bargain. When isolated examples of plea bargaining were discovered by the media or outside officials, those bargains were condemned as corruption. The assumption was that the prosecutor was letting the defendant off too easy.

But once it became clear that plea bargaining was common in urban courts, the practice spread like wildfire. Legislatures got in on the action by passing laws that gave prosecutors leverage to pressure defendants into pleading guilty. In particular, in addition to mandatory minimum sentencing laws, they enacted “overlapping statutes,” which enable prosecu-



tors to bring multiple charges for the same conduct.

Threats to deploy such laws allow prosecutors to pressure defendants into pleading guilty even without having to give the defendant much of a “good deal.” Trials have become “bad deals” because convictions on multiple charges or with applicable mandatory minimums, together with the trial tax imposed by judges, ensure that a defendant will receive a much longer sentence if the jury convicts. Almost all defendants plead guilty because going to trial is too risky.

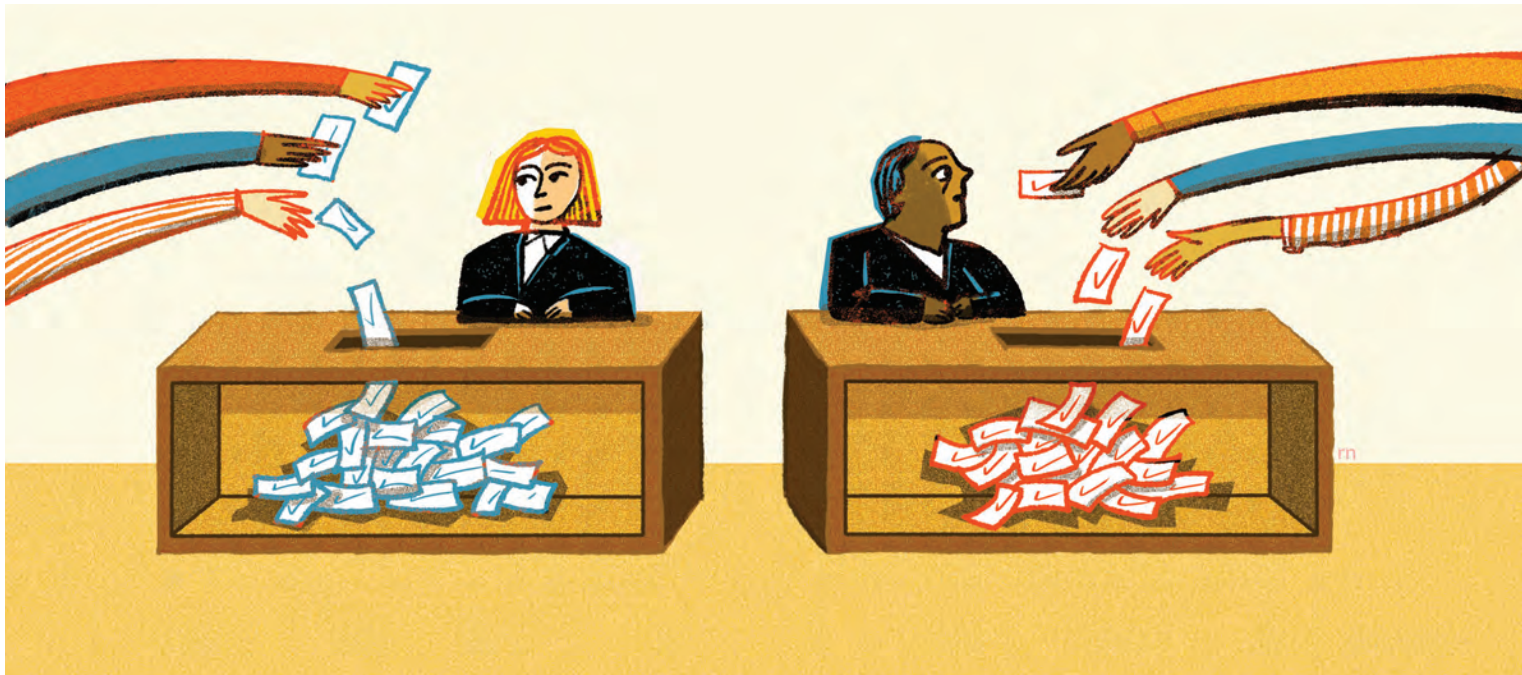
I have written a book about this, *Punishment Without Trial: Why Plea Bargaining Is a Bad Deal*. I explain there that plea bargaining has warped our criminal justice system; it is bad for defendants, for victims, for truth, and for justice. Importantly here, plea bargaining is also bad for democracy. When we stop having trials, juries are no longer standing between a prosecutor and a conviction. In a world without trials—the world of plea bargaining—the prosecutor alone gets to decide whether a defendant is guilty. Whether it is the man in Arizona who cursed at someone at a public pool or Kyle Rittenhouse in Wisconsin, no trials mean that the prosecutor decides.

Remarkably, this state of affairs is seen as a feature, not a bug, by those who work inside the criminal justice system. This attitude is on full display in a well-known 1967 essay by Arlen Specter,

the district attorney in Philadelphia during the 1960s and 1970s (and later a U.S. senator). Specter said that issues such as self-defense should not be decided by juries; the lawyers should just negotiate over the facts and reach some sort of compromise. He preferred a world in which juries were excluded from those decisions—and his wish has largely come true.

To be clear, sometimes I do not like what juries decide. But I have reservations about *a lot* of democratic decisions. After all, plenty of unserious people with dubious morals—and even more questionable policy preferences—get elected to public office. For me, the question about whether to retain a role for democracy in the criminal justice system involves alternatives. As Winston Churchill put it, “democracy is the worst form of government, except for all those other forms that have been tried.”

The modern democratic deficit in the criminal justice system goes beyond the general lack of jury trials. Democracy is also falling short in criminal justice elections. Although those elections are still taking place, they are often uncontested, and (where there is an actual race) voters are often uninformed. Most prosecutors and sheriffs win office without ever facing an opponent. My own study of prosecutor elections documented that only 30 percent of prosecutors face either a primary or a general-election opponent. Research by



others on sheriff elections suggests similar rates—somewhere along the lines of 60 to 70 percent of sheriffs run unopposed. Uncontested elections impede democracy because, if voters do not have a choice in an election, they cannot make a change.

You might say that these elections are uncontested because voters do not want change; they are happy with their current elected sheriff or prosecutor. But I do not think that explanation is correct. Unlike other offices, voters cannot necessarily take matters into their own hands when they do not like what their elected criminal justice officials are doing. Think, for example, about a voter who is not happy with how the local schools are being run. That person is free to stand for election to the school board. The same is not true when it comes to criminal justice elections. All states require bar admission for someone to run for prosecutor, and some states require current or previous law-enforcement experience (or a clean record) to run for sheriff.

Of course, there are good reasons for some restrictions. It is, for example, important that judges be lawyers, given the need to decide legal issues. Yet it is incontestable that these restrictions frequently keep people from being able to challenge incumbents. In fact, some places can't find anyone to run for some offices. When we did our national study of prosecutor elections, we found more than a dozen counties where other government officials

had to appoint someone because no one ran for the position. This is especially a problem in rural areas; there are some counties where no lawyers live, so there is literally no one who is qualified to run for the office.

Even when there are contested elections, there are often democratic deficits. A lot of voters do not know much about the relevant issues. Evidence shows that some appreciable number of voters apparently do not even know that these are elected offices.

One reason for the lack of voter knowledge may be a lack of media coverage. Our Prosecutors and Politics Project at the University of North Carolina School of Law just finished a pilot study of media coverage for prosecutors. In that study, we found that some incumbents and candidates receive almost no media coverage. Others get media coverage, but it does not give voters much information that would support an informed vote. In particular, we found very little coverage of incumbents' policies and candidates' platforms. It is important to know about policies and platforms because prosecutors must make important decisions about how to use their limited resources. Only if voters are knowledgeable will they be able to help determine how those decisions are made.

Media coverage is not the only reason that voters do not know about those decisions. Some of the most important prosecutorial decisions—decisions

about charging, declining to charge, and plea bargaining—are done outside the public view. The same is true about law enforcement's interaction with the public, although the proliferation of cell phone cameras and police-worn body cameras has improved the situation somewhat.

Sometimes these decisions will come to light in a high-profile case. For example, we now know more about the Department of Justice charging policy for mishandling classified documents because Jim Comey got hauled in front of Congress to explain why the government was not going to charge Hillary Clinton for the classified information found on her private email servers—an explanation that has taken on newfound importance in light of the investigation surrounding classified documents found at the Mar-a-Lago resort in Florida. But more mundane policies—the sorts of policies that affect people's everyday lives—remain hidden. For example, our recent survey of prosecutors in four states found that 80 percent of incumbents had not publicly announced their enforcement policies on personal possession of marijuana.

That the public does not know what their elected officials are doing (or not doing) can have real-world consequences. In particular, it can make the system more punitive. There is research suggesting that sheriffs and prosecutors are more punitive than their constituents would prefer. Perhaps if voters knew what their elected officials were doing, they would pressure them to be less harsh. Or perhaps they would vote them out of office.

Voters do not simply lack important information: sometimes they are affirmatively misin-

formed. You may already know about the research showing that Americans routinely think crime is going up, even when it is going down. Other research suggests that the misinformation problem runs deeper. Multiple surveys show that people assume that sentences are too lenient because people underestimate how much punishment defendants actually receive. For example, an Illinois survey gave respondents two typical burglary fact patterns and asked them to identify the appropriate punishment. The majority of respondents said that a non-incarceration sentence was appropriate, and fewer than 10 percent said that a sentence of two or more years in prison was appropriate. At the time, Illinois imposed a four-year mandatory sentence for the crime.

That voters are misinformed has important, and unfortunate, consequences. Someone who believes that crime is going up and that sentences are far too short is likely to vote for the legislative candidate promising “law and order.” If elected, that candidate will work to pass harsher laws, even when the existing laws are more punitive than what their constituents think necessary or appropriate. Because they are mistaken about crime rates and about the punishments being imposed, those constituents will not push back on these choices, and the supposedly democratic criminal law will not reflect public opinion.

What makes this situation worse is that politicians often use crime as a wedge issue in elections, sometimes affirmatively trying to mislead voters. Crime was an issue here in Wisconsin during the most recent election for the United States Senate (in 2022). It was also an issue in my home

Unlike other offices, voters cannot necessarily take matters into their own hands when they do not like what their elected criminal justice officials are doing.

state of North Carolina. There, some groups sent photoshopped mailers in statehouse races, falsely putting two Democratic candidates in T-shirts that said “Defund the Police” (which is not what their original T-shirts said) and changing a photo of another candidate who had been cheering and waving at a parade to make it look as though the candidate had cheered and waved at violent protests.

Most people who complain that crime is used as a wedge issue care about how these tactics shape election results. I am more concerned about how these tactics shape crime policy and the criminal justice system. Politicians can easily mislead the public because most people do not know how the criminal justice system works. For example, for the past year, I have been traveling across the country talking to laypeople about plea bargaining. The vast majority of people I speak with are surprised to hear how few trials take place. Most of them are shocked to find out that the vast majority of crimes being processed in American courts are relatively low-level rather than serious crimes.

[T]he constant passage of new crimes is worrisome when—as often—the bad behavior that people care about is already illegal.

How does this lack of knowledge, combined with exploitation of criminal justice issues during elections, affect the laws that get enacted in Congress and state-houses? Legislators wanting to capitalize on voter concern about crime introduce legislation to create new, more severe laws. Other legislators are afraid to vote against these laws because they do not want to be attacked as “soft on crime.” The result is a seemingly never-ending supply of new criminal laws, increasing punishments and criminalizing behavior.

It might not be obvious why new laws that criminalize behavior would be something to worry about. After all, if people think that certain behavior is bad, then perhaps we ought to criminalize it. But the constant passage of new crimes is worrisome when—as often—the bad behavior that people care about is already illegal. If there is some action you believe ought to be a crime, I’ll bet I could find you an existing statute saying that it is.

So what, then, do the new laws that state legislatures and Congress enact every year do? Many of them criminalize behavior that is already illegal. This means overlapping statutes, which, as I mentioned earlier, create pressure for defendants to plead guilty. Other laws addressing conduct that is already illegal are written so broadly that they also crim-

inalize what seems like innocuous behavior. The result is that trivial wrongdoing can end up falling within broad definitions of serious crimes. For example, Congress’s Computer Fraud and Abuse Act of 1986 appears to make using someone else’s Netflix password a federal crime.

Unfortunately, legislators do not have many incentives to change these overly broad laws. Instead, they simply rely on prosecutors not to fully enforce these statutes as written—at least not in high-profile cases. And if a prosecutor does enforce these laws to their full extent, legislators may criticize the prosecutor rather than bothering to revise the statute. My own favorite example is an oldie but goodie: in the 1980s, a North Carolina prosecutor brought criminal charges for illegal gambling against some senior citizens who were playing a “nickel-and-dime card game.” When asked about the prosecution, the chairman of the judiciary committee of the state’s House of Representatives did not think that changing the law to exclude those games from the broad criminal statute was necessary; instead, he hoped that “prosecutors would use better judgment.”

Hope for the Future

Up until now, I have painted a pretty bleak picture of democracy and criminal justice. Some criminal law professors point to

the problems that I have identified and say this is a reason to have less democracy in our criminal justice system; they include such eminent scholars as Rachel Barkow in a previous Barrock Lecture (2016). They think democracy makes our system more punitive, and that in order to reverse mass incarceration, we should insulate criminal law decisions from popular will and elections.

Those other professors are right that turning to experts and elites can lead to a less punitive system. For example, the death penalty continues to be legal in most U.S. states because a majority of Americans support the death penalty. A majority of people living in Europe also support the death penalty, but capital punishment has been prohibited in European countries because their public officials do not think that capital punishment is an issue that should be settled by majoritarian preferences; the experts and the elites think it is wrong, and so it does not exist.

Personally, I am not ready to give up on the idea of using democracy as a tool for criminal justice reform. Indeed, I have seen signs of hope that democracy could serve as a moderating force in criminal law. Let me highlight three of them here.

First, I have seen signs of hope from judges. You might think that judges are not an obvious tool for more democracy. But I think that judges can do things to make the system more democratic. For example, there are judges who are making prosecutors justify their plea-bargaining decisions in open court. They ask the prosecutors about the original charges that were filed and how the prosecutors justify the reduced charges in

the plea bargain. This allows the public a glimpse into how prosecutors are using their power. That transparency creates more informed voters, who can then use that information in the next election. It also lets the public know that law enforcement believes it is acceptable to give out lower punishments than what the statutes prescribe. That may lead people to wonder whether we should change our laws so that the punishments are not simply being used as a way to pressure defendants during plea bargain negotiations.

Another example of judges making the system more democratic is when they push back against overly broad construction of criminal laws, as in the U.S. Supreme Court's decisions in *Skilling v. United States* (2010), interpreting Congress's "honest services" statute, and *Bond v. United States* (2014), involving the less well-known Chemical Weapons Convention Implementation Act of 1998. These judges are not doing this because they champion criminal justice reform or because they identify as politically liberal. But in interpreting these laws narrowly, the judges' decisions make our laws hew closer to what people think is appropriate criminal legislation.

Second, I have seen signs of hope in efforts to create more transparency and accountability. A few states have passed statutes requiring certain information to be reported by prosecutor offices. And some prosecutors, as in Philadelphia, have started sharing information voluntarily. There is a great organization, the Prosecutorial Performance Indicators, which is run by people at Florida International University and Loyola University of Chicago. It helps prosecutor offices identify metrics they can use to measure their performance, and then it helps those offices provide information about those metrics to the public.

Third, there is a lot more interest in criminal justice elections. National media outlets have started covering some elections for sheriff and for prosecutors. My own research has uncovered an increase in the percentage of contested elections in large cities. This media scrutiny and these contested elections can have ripple effects. For example, I recently received a phone call from a newly elected prosecutor. During a contested election, a voter had asked him to promise that he would make the office more transparent if elected—a promise quickly given. Having won the election, the candidate wanted to fulfill it. Because I study prosecutors, he reached out to me in order to ask how he could do that, and



I put him in touch with the people at the Prosecutorial Performance Indicators.

I am not telling that story because it makes me look good. I am not the hero in that story. Neither is the prosecutor who promised to be more transparent. The hero in that story is the voter who stood up and insisted on a promise of increased transparency. That small act brought about real change.

The great thing about democracy is that we can all be that sort of hero. All of us can go to a candidate forum and ask a question or elicit a campaign promise. We can send a letter to the editor in order to prompt more in-depth reporting by media outlets about what happens in the criminal justice system. We can refuse to be misled about crime and criminal punishment. And we can tell the people whom we know and love that they should do these things, too.

I have said that some academics want less democracy in criminal law, but I still have hope that democracy can result in a sensible and a fair criminal justice system. There is a lot of work to be done for that to happen. I hope that you all will join me in doing that work. ■

So Simple, So Complex, So Human

EVICTION

More help, in court and beyond, is available for people facing evictions, but reaching broad solutions through the legal system is difficult.

by Alan J. Borsuk and Tom Kertscher

The yellow sheet of paper offers an easy-to-understand gateway into a complicated world for the ordinary renter. “Your landlord has started a court case to evict you,” it begins. Three short sections on the one-page sheet are labeled: Act. Get Informed. Get Help.

The fact that, since June 2023, the sheet is being offered to all tenants at the start of eviction proceedings in Milwaukee County Circuit Court is, in itself, a sign of significant changes in a complex issue—one that made Milwaukee the focus of national attention in 2016 but that presents itself across the country. Especially when it comes to “get informed” and “get help,” there have been substantial developments in Milwaukee County. In interviews, many who are involved in eviction matters, whether on the side of landlords or of tenants or working in the system itself, described the extent of initiatives aimed at increasing stability in housing while reducing evictions.

And lawyers are central to almost every facet of the changes.

Matthew Desmond’s 2016 book, *Evicted: Poverty and Profit in the American City*, recipient of a Pulitzer Prize, focused almost entirely on Milwaukee. One of the book’s themes was the small percentage of people facing evictions, in a process many find baffling, who got any legal help.

Since then, eviction defense efforts in the region, primarily led by two longtime legal services organizations—Legal Action of Wisconsin and

the Legal Aid Society of Milwaukee—have made representation by an attorney a reality for many more people facing eviction. Even so, lawyers are still involved in well under half of all cases.

Over the same period, other avenues of legal advice have grown in the region. Key developments include efforts offering free advice to tenants through Marquette Law School’s volunteer legal clinics; creation of an eviction diversion program, housed within the Milwaukee Justice Center in the Milwaukee County Courthouse and funded by a grant from the National Center for State Courts; and the rise of Mediate Wisconsin, a private nonprofit led by two Marquette Law School graduates who also have been adjunct professors at the Law School.

Avoiding eviction is only part of the growing legal involvement. Lawyers have increasingly become involved in working out the best feasible arrangements for both sides when tenants who are behind on payments are going to leave.

Lawyers also are at the forefront of one of the hottest issues involving evictions: whether the names of tenants in court actions should be made not easy to find in online records. That helps some

people rent new apartments by making it harder for landlords to know a potential tenant's full rental record.

Non-legal help also has grown. Agencies such as the Milwaukee Rental Housing Resource Center and Community Advocates have increased their work to assist people in finding places to live and staying in those places amid financial stresses. There was increased use of federally funded rental assistance grants during the height of the COVID-19 pandemic, although much of that help has ended. The United Way of Greater Milwaukee and Waukesha County also has supported work to help people avoid eviction.

The pandemic and its spillover effects changed the eviction landscape. A nationwide moratorium was imposed on many evictions. Since the moratorium ended, the pace of evictions, while high, has not skyrocketed as some feared.

In all, the handling of eviction matters in Milwaukee County has changed, with legal representation and legal counseling as key aspects of that. Advocates generally say that the changes are good, but not enough, and critics generally say that the changes have brought improvements to the system, but with downsides.

A simple idea gets complex—and human

At a core level, an eviction is a simple legal matter. A tenant agrees through a lease to rent a place to live. If the tenant doesn't pay, the property owner can go to court to get the tenant ordered to leave—can seek the remedy of eviction for the breach. In the longtime words of the Wisconsin Supreme Court (these being from 1979): “The decisions of this court have held that there are a very limited number of issues permissible in an eviction action.”

Yet eviction proceedings often become not only complex but intensely human. To observe cases in Milwaukee County's small claims court is to glimpse a remarkable array of people and issues that they face in their daily lives.

On the owner's side, the array ranges from corporate landlords with lawyers who know the system well to mom-and-pop landlords who may be as much in need of guidance on how to proceed as their tenants are. On the tenant's side, the array often runs to low-income people who are struggling with major life issues while living in less attractive (though only somewhat “low rent”) places. The eviction process is both a symptom of their problems and a further cause.

It is instructive to look back at the way evictions were handled in court as recently as a decade ago. In Milwaukee County Circuit Court, the small claims division, which handles evictions, was based for years in a large courtroom on the fourth floor of the courthouse. The room often was filled with court employees, numerous lawyers, and even more numerous tenants. A range of “proceedings” were conducted simultaneously, involving everyone from the judge on the bench to parties huddling throughout the room, formal and informal conferences in rooms behind the courtroom, and conversations in the hallway outside, often involving people (including lawyers) on both sides of a case. To inexperienced observers, the scene was almost chaotic and certainly hard to grasp. “It was basically a huge cattle call, back in the day,” recalled one lawyer who represents property owners.

Raphael Ramos, L'08, was a staff attorney at Legal Action of Wisconsin before he was appointed earlier this year by Wisconsin Governor Tony Evers as a Milwaukee County Circuit Court judge. In an interview before his appointment, he described his work leading the nonprofit law firm's Eviction Defense Project, launched in 2017. It is one of two legal assistance eviction-prevention programs in the county. The other, Eviction Free MKE, a three-year pilot project launched in 2021, is run by the Legal Aid Society of Milwaukee.

Ramos said that before the emergence of eviction legal assistance



“One of the most consistent themes that our tenant clients will tell us is that if they had a proceeding where they didn't have a lawyer, the proceeding went fast, it was difficult to understand, and they barely, if at all, had the opportunity to speak.”

Raphael Ramos, L'08, at the time a lawyer with Legal Action of Wisconsin's Eviction Defense Project

programs for tenants, a “justice imbalance” prevailed. He recalled how court proceedings often began with the questions: “Are you here for the eviction? How much do you owe?” Almost no tenants fighting an eviction were represented by an attorney. In contrast, landlords, generally more familiar with the process, were often represented by someone experienced in evictions.

Ramos recalled a story from several years ago that illustrated to him the stark difference legal representation could make. A Legal Action client agreed with his landlord to adjourn the

eviction case while he obtained money he owed the landlord. The man didn't think he needed an attorney for the next hearing and arrived unrepresented in court, ready to pay. But the landlord decided not to settle, and the eviction request was approved. The man later returned to Legal Action, but at that point, it was too late for anything to be done. The man broke into tears; his young daughter tried to comfort him.

"It was absolutely devastating," Ramos said. "Preventing those sorts of situations is precisely why we have tried to increase access to representation. The harms people suffer because of eviction are not limited to displacement and economics; they are emotional, deeply personal, and change the way that people view the world. I have no doubt that the little girl and her father will remember that moment the rest of their lives, and it breaks my heart that they had to go through it, when it might have been avoided."

"The need is significant, and the importance of attorney representation can't be overstated," Ramos said. "One of the most consistent themes that our tenant clients will tell us is that if they had a proceeding where they didn't have a lawyer, the proceeding went fast, it was difficult to understand, and they barely, if at all, had the opportunity to speak."

Ramos said, "We try very hard to make sure that the representation we provide leads to housing stability, not just a short-term fix. The work we do is not intended just to put a Band-Aid on things. . . . In doing that, there is an underlying benefit for the landlord as well, because if we can help mend the fractured relationship, the tenant has housing, the landlord has rent."

Colleen Foley, executive director of the nonprofit Legal Aid Society of Milwaukee, said, "Where one side completely dominates and the court system is more focused on a gigantic docket that [judges] need to process, that's not justice. The system's not supposed to work like that."

Attorneys representing property owners had mixed views of the changes in eviction work. On the one hand, several agreed that the increased number of tenants getting legal representation made proceedings fairer for tenants and leveled the playing field. Several said that dealing with tenants' attorneys was often better than dealing with tenants directly because the attorneys understand the law and take a professional approach. That often helps lead to resolutions that are agreeable to both sides, within the circumstances.

But several property owners' attorneys said that proceedings often are slower because more attorneys are involved and those attorneys use strategies for delaying outcomes. Some noted also that more property owners are calling on attorneys to represent them than in the past.

Several attorneys said that delays in concluding cases can mean increases in lost rent for owners, and extra costs for owners to pursue cases can mean higher rents or increased security-deposit requirements for all tenants, including those who pay their rent steadily.

Heiner Giese, a Milwaukee lawyer who has represented apartment owners for more than 40 years, said he has generally had good relationships with attorneys representing tenants. But he said, "Often, the most that attorneys for tenants can accomplish is to delay an eviction."

Tristan Pettit is executive vice president of the law firm of Petrie + Pettit and head of the firm's landlord-tenant team. He said that the substantial increase in the percentage of eviction cases involving lawyers for the tenants has slowed down many proceedings. But, he said, it has also had benefits. "If you have a difficult tenant, having an advocate [for the tenant] can make things much easier," he said. He said that it took some time to adjust to changes, but the attorneys on his team generally have had helpful interactions with tenants' attorneys. "Things are positive now," he said.



"Often, the most that attorneys for tenants can accomplish is to delay an eviction."

Heiner Giese, a Milwaukee lawyer who has represented apartment owners for more than 40 years

A judge's view on why attorneys add value

In general in Milwaukee County, the first hearing on an eviction case is conducted before a court commissioner. In the last several years, these have generally been done on Zoom, although in August 2023 that was phased out in most cases. If there are contested matters, the case then goes before a judge at a subsequent hearing in person.

Milwaukee County Circuit Court Judge Cynthia Davis, L'06, completed a year's rotation in small claims court this past summer. So she has had a close-up view of how eviction proceedings are going. Her opinion on the increased role of attorneys representing tenants? "They truly add value to the process," she said.

Davis gave four reasons for that conclusion:

(1) "Eviction laws are very technical," she said. Some landlords who aren't represented by attorneys make mistakes, such as giving the incorrect number of days to vacate premises. There can be 5-day, 14-day, or 28-day notices, with 5 days the most common. Lawyers can spot flaws in notices and in how a notice is served, she said.

(2) There are sometimes valid defenses against an eviction, such as that the landlord is retaliating against a tenant or the landlord has not fixed a condition that is covered by "rent abatement" rules. In general, an attorney articulates a defense against eviction better than an unrepresented tenant does. Retaliation defenses rarely succeed because they are hard to prove, she said, but they need to be considered where raised.

(3) Even if there is no defense at law in an eviction action, a lawyer often helps negotiate a stipulated dismissal, either a payment plan or an agreement to leave, or a combination of the two. Reaching agreement on such things is often in the best of interest of both the landlord and the tenant.

(4) Lawyers know how to make requests for redaction or sealing of a record involving eviction, which can help their clients in the future as they seek other housing.

Some do not favor all the changes. That includes those landlords and their advocates who question all the public and philanthropic support going to provide attorneys for tenants. Yet some advocates focused on improving the general housing picture for low-income people also fall into this group. In the *Stanford Law Review Online* in July, two law professors questioned giving legal representation of tenants priority over what they regarded as the bigger need of tenants: rent money.

Juliet M. Brodie, a professor of law at Stanford Law School, and Larisa G. Bowman, a visiting associate professor of law at the University of Iowa College of Law, both have extensive experience representing low-income families facing eviction.

Here's their view, as summarized by the law review: "Most low-income tenants facing eviction do not need a lawyer. They need rent money. . . . If we want to reduce evictions, tenant lawyers are not the best tool. Rental assistance could resolve, or even avoid the filing of, most eviction cases." The authors said that the \$46 billion in federal funds made available during the height of the COVID pandemic to help people who otherwise would have been facing eviction showed how much increased rental aid could reduce eviction problems. They called the movement to provide every tenant a lawyer in eviction proceedings "misguided."

Evaluating the legal assistance programs

Both eviction legal assistance programs involved in Milwaukee have been evaluated by outside organizations.

The first 16 months of work by Legal Aid's Eviction Free MKE—September 2021 through December 2022—were studied in a March 2023 report done for the United Way of Greater Milwaukee



"Where one side completely dominates and the court system is more focused on a gigantic docket that [judges] need to process, that's not justice. The system's not supposed to work like that."

Colleen Foley, executive director, Legal Aid Society of Milwaukee



Some landlords who aren't represented by attorneys make mistakes, such as giving the incorrect number of days to vacate premises. There can be 5-day, 14-day, or 28-day notices, with 5 days the most common. Lawyers can spot flaws in notices and in how a notice is served

From discussion with Cynthia Davis, L'06, Milwaukee County Circuit Court judge

and Waukesha County by Stout Risius Ross, a Chicago-based consulting firm. According to the report:

- Through the first half of 2021, 2 to 3 percent of tenants had legal representation in eviction cases; from July to November 2022, the monthly rate rose to 14–16 percent.
- Eviction filings rose in 2022 to more than 13,850, a 70 percent increase from 2021, when court operations were slowed by the pandemic and (for part of that earlier year) a federal moratorium on evictions was in effect.
- During the period studied from September 2021 through 2022, 58 percent of eviction cases were dismissed when both parties were represented, compared to 46 percent when only the landlord was represented.
- Similarly, during the same 16 months, when only the property owner was represented, 38 percent of cases resulted in a default judgment, with the tenant failing to appear in court. When both parties were represented, the default rate was 29 percent.
- Milwaukee County likely received economic benefits worth \$9 million during the 16 months as a result of Eviction Free MKE. The estimate covered money that did not have to be spent on social services and foster care and money saved by reducing the number of people who leave Milwaukee County, among other things.

The University of Wisconsin–Milwaukee's 2020 survey of Legal Action of Wisconsin's clients found:

- 79 percent of clients who got their case dismissed or reached a settlement agreed or strongly agreed with the statement, "I would not have been treated as fairly in court without the eviction defense attorney."
- 92 percent of clients whose cases were dismissed or settled agreed or strongly agreed with the statement,

"Having an attorney changed the outcome of my case."

- 90 percent of clients—including clients who were evicted—agreed or strongly agreed that they were satisfied with the outcome of their case.

A day in eviction court

Some vignettes from contested eviction cases on a typical day before Judge Cynthia Davis during her tenure presiding in Milwaukee's small claims court may be instructive:

- Davis accepted a stipulated dismissal, under which a 29-year-old tenant agreed to move out. Only Legal Aid attorney Mitchell Yurkowitz, representing the tenant, appeared in court. He requested and was given an adjournment to file a motion seeking to redact his client's name from the public record (Davis granted the motion at a hearing three weeks later).

Seven months before that action was filed, a different landlord had sought an eviction against the same individual. The landlord in the earlier case was represented by an attorney, but the tenant was not and did not appear for the hearings. The landlord secured a judgment of eviction and for \$6,467 for damages to the premises; the latter had not been satisfied as of early June. There was no redaction in that case.

- A second vignette, involving different parties: At a court proceeding three months before the eviction hearing, the tenant had appeared by phone, and the attorneys for both parties appeared by video over Zoom. At the subsequent eviction hearing, only Yurkowitz, the lawyer for this defendant also, appeared in person. Davis granted a stipulated dismissal, with the landlord dropping money claims.

- A third: A suburban Milwaukee limited liability corporation (LLC) filed for an eviction of a woman and her mother, who were both assisted in court by a Mandarin Chinese interpreter. The LLC landlord appeared in court without an attorney, and the woman

was represented by a Legal Aid attorney, who was able to get the first eviction hearing adjourned while working toward an agreement. A stipulated dismissal was sought, but at an eviction hearing later, the landlord, appearing in court along with the tenant and her lawyer, said he no longer agreed to the stipulation.

At that second hearing, Legal Aid attorney Gilbert Malis, L'19, asked Davis to accept the stipulation because the nonprofit organization, Community Advocates, had paid the landlord \$4,950 in rent owed. Davis agreed and dismissed the case. Davis also granted Malis's motion to redact the defendant's name. Citing a balancing test under the law, she said the case had "limited public interest," whereas a publicly searchable record of the tenant's name in the caption of the case could hurt the tenant's ability to rent in the future.

•Vignette four: Another suburban Milwaukee LLC sought an eviction against a 26-year-old woman. At the eviction hearing, the tenant and her attorney, Jesse Owens, appeared in person, as did a member of the LLC. Owens persuaded Davis to dismiss the case, arguing that the LLC did not have authority to sue because it was not registered at the appropriate time with the state; Davis rejected the plaintiff's argument that the LLC had registered two weeks before the hearing and that the registration could be retroactive. Davis also granted Owens's redaction motion, citing the balancing test.

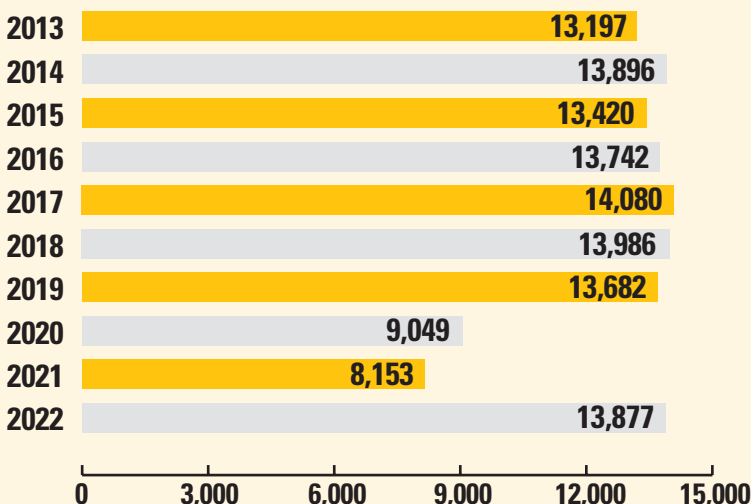
The LLC filed a new eviction action against the woman. Four months later, that case was still pending. Two eviction cases had been previously filed against her, in 2018 and 2020.

•And a fifth story: Davis approved a stipulated dismissal, under which a 42-year-old tenant agreed to pay the landlord \$800 and move out within a few weeks. Both parties were represented in court. In moving for redaction of the defendant's name, the tenant's lawyer, Legal Action's Jill Kastner, said that her client needed to rent a new apartment

Evictions remain steady over time, while redactions shoot up.

Milwaukee County Circuit Court eviction cases filed

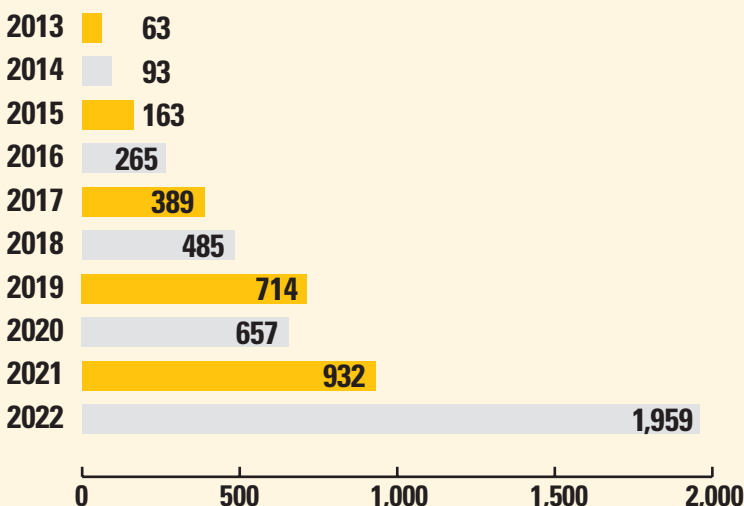
Eviction filings have numbered roughly between 13,000 and 14,000 per year for the past decade, except when courthouse operations were shut down or curtailed because of the COVID-19 pandemic.



Source: Milwaukee County Clerk of Circuit Court

Redaction orders approved in eviction cases

The number of redactions approved has grown dramatically over the past decade. The 2022 total represented 14 percent of all eviction filings, up from less than 1 percent in 2013.



Source: Milwaukee County Clerk of Circuit Court

Eviction proceedings have collateral personal impacts on tenants.

University of Wisconsin–Milwaukee researchers surveyed 1,091 Legal Action of Wisconsin eviction clients immediately following the conclusion of their eviction cases. About 6 percent of the clients were evicted; the rest received a dismissal or reached a settlement, or merely obtained legal advice. The researchers' November 2020 report found:

20% of clients said their children had to change schools because of their eviction case

25% of clients said they lost a job because of their case

50% of clients said their case negatively impacted their health

and that she had seen “for rent” notices saying applicants cannot have been evicted. The motion was not opposed, and Davis granted it.

Eviction actions were also filed against the woman in 2012, 2015, and 2019. She was not represented in those cases, and no requests to redact were made.

To be sure, any sample of vignettes will be incomplete. In particular, Davis entered any number of eviction judgments, even on the day discussed.

The controversy over redacting records

As the foregoing vignettes may suggest, perhaps the hottest issue in eviction work currently is “sealing” or, somewhat more accurately, “redacting,” which results in the name of the tenant being not searchable in the case caption in Wisconsin’s online database of court proceedings, known as CCAP. From a tenant’s perspective, the most valuable work of attorneys representing tenants is often their success in obtaining a ruling to redact.

The number of requests in Milwaukee County Circuit Court to redact names of defendants in eviction filings has skyrocketed. In 2011, according to the clerk of the court, there were 63 such requests. In 2022, there were 1,959. “These have flooded our system,” Davis said. She was spending two mornings a week on such requests while she was on the small claims bench.

The heart of the issue, on the tenant’s side, is the impact of having a name on a public record. One of the routine steps that landlords take when considering an application to rent is to see if the potential tenant has been involved in an eviction proceeding, even in cases that didn’t result in an eviction order. Having such a record is very likely to be a barrier for someone looking to find a new place to rent.

Requests to redact a name typically are not granted when an eviction proceeding reaches a final judgment of eviction. But a large number of eviction filings do not end up with final judgments because cases are dropped or dismissed, whether pursuant to a formal agreement or otherwise.

And the filing of the case in itself creates a public record. Generally, Wisconsin law strongly favors—indeed, requires—the accessibility of public records. Among other provisions, the legislature has provided (Wis. Stat. § 19.31) that “[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.” Numerous cases have

been decided to guide a judge’s discretion in this context.

Not surprisingly, there are differing views on when or even whether to redact records in the eviction context, with property owners generally on one side and advocates for renters on the other.

Tim Ballering heads Affordable Rental Associates, which owns 300 units generally on Milwaukee’s south side. The company also manages another 350 units. Ballering said that new tenants who have had an eviction in the prior year fail to fulfill their lease obligations (to pay their rent) at significantly higher rates than other new tenants. By three years post-eviction, the track record is about the same as that of tenants without eviction records. Preventing landlords from seeing names of people who have been evicted is not only a problem for landlords, he said, but also for people who are better candidates to be reliable renters yet who may lose out in getting an apartment to someone with a past eviction.

Nick Toman, L’08, managing attorney at Legal Aid, had a different point of view. “You have to have a little bit of faith in the justice system and the courts and the judge to make that determination—that the merits of the eviction aren’t relevant to the future rental prospects,” he said. “That’s what the courts are saying when they grant the motion to seal, that this eviction doesn’t fairly reflect on this person as a tenant and future landlords shouldn’t rely on the existence of this eviction to make determinations about them.”

Toman said that some landlords read too much into someone’s contesting an eviction proceeding. “They’re not only going to assume that you deserved to be evicted, but they’re going to assume that you’re a pain in the butt and you fought it,” he said.

Francesca Voci, L’22, an attorney on the evictions team at Legal Aid, said she understood the landlords’ views, but that not all people who became involved in evictions are poor candidates for future rentals. Some went through difficult circumstances such as medical problems or job loss and are ready to move on. Difficulty finding a place to live can make that harder. Voci regards housing as “a human right,” and allowing people to have stable shelter is often a key to stabilizing their lives, she said.

One attorney for property owners who asked that his name not be used said he felt public records laws were being manipulated by lawyers

for tenants. Court records generally are expected to remain public, he said. “Nobody is there advocating for the public,” he said. He understood why individual tenants want their names kept off the record, but in the broader picture, in his estimation, it’s in the public interest to keep records open.

Milwaukee attorney James Bottoni, L’00, who represents landlords and management companies, had a different view from some other attorneys representing property owners. He said he usually doesn’t take a position on redacting tenants’ names in eviction proceedings. He said he tells tenants that it is in their self-interest to leave an apartment before an eviction judgment is filed. If they leave and don’t owe the owner money, his client’s interest in their cases is over.

When she was presiding in small claims court, Davis said, she generally ruled for redacting names in cases that were resolved short of an eviction order. She said she weighed the interests, as required by law, and often found them to weigh in favor of making a tenant’s name not publicly searchable. But, she said, with the rapidly increasing number of requests to redact names in CCAP, consistent policy is needed, which might require action at the state level.

More recently, at an administrative rules meeting on October 9, 2023, Wisconsin Supreme Court justices voted 4 to 3 to have a court commissioner draft a proposed order to reduce how long records of certain eviction proceedings are to be kept on the CCAP website.

The rise of mediation

In the aftermath of the publication of *Evicted*, the Matthew Desmond book that drew national attention to the phenomenon of evictions in Milwaukee, judicial, political, and civic leaders launched initiatives to reduce the number of evictions and help tenants keep or find stable housing. Providing legal help to those served with eviction papers was only one goal. Avoiding

eviction actions in the first place by resolving landlord-tenant disputes before they reach the court system was more appealing from all points of views.

Mediate Wisconsin was created in 2012 as a nonprofit, grant-funded organization focused on reducing home foreclosures by working with owners and lenders to find paths beneficial to both. The effort was, in part, an outgrowth of work through Marquette Law School to respond to what was then a home-foreclosure crisis.

In 2017, Mediate Wisconsin, led by Amy Koltz, L’03, along with Joanne Lipo Zovic, L’99, began offering mediation services related to eviction cases or situations that are headed toward the court system. Koltz said, “We found that landlords and tenants who want to engage in mediation are looking for a solution and haven’t been able to reach agreement. Often we find that it is challenging for them to communicate effectively” because one party or both may be avoiding the other. “When a third-party mediator engages in the conversation, communication can be more productive many times,” she said, and that can lead to agreement on a payment plan or a plan for the tenant to leave without court action.

Property owner Tim Ballering said, “*Mediate first* is a concept that we were unaware of in our industry.” The impact of COVID-19 accelerated efforts to mediate, he said. “A lot of people knew mediation was available mid-process, but to do it upstream is best for everyone.” He said mediation efforts overall have been “very successful.”

Koltz said that Mediate Wisconsin can sometimes help tenants find financial help with paying rent or take other steps to resolve problems. The mediators collaborate with the legal service programs for tenants, as well as with the Milwaukee Rental Housing Resource Center, a collaborative effort of nonprofit and government groups aimed at helping both tenants and landlords with housing issues.



“You have to have a little bit of faith in the justice system and the courts and the judge to make that determination—that the merits of the eviction aren’t relevant to the future rental prospects.”

Nick Toman, L’08, managing attorney, Legal Aid Society of Milwaukee, on requests by tenants in eviction cases to redact their names in online records

With a two-year grant from the National Center for State Courts in 2022, Milwaukee became one of 12 places in the United States with an additional tool for preventing situations from becoming eviction proceedings. Meagan Winn became the coordinator for the Eviction Diversion Initiative, which is housed in the Milwaukee Justice Center offices in the Milwaukee County Courthouse.

Winn is not a lawyer and is not a mediator. But, receiving referrals from courts, agencies, and others (including walk-in traffic), she tries to direct people to places where they can receive help. “My goal is to have people get to the right place as quickly as possible,” Winn said. The definition of diversion is flexible, she said. She aims to prevent avoidable evictions through such possibilities as emergency assistance and mediation. She characterized the work as trying to take “a problem-solving approach.”

Is making attorneys available to more people facing evictions helpful? Winn said case filings have stayed about the same, but eviction judgments have gone down, which suggests to her that the answer is “Yes.” But the bigger issue is the shortage of affordable housing in Milwaukee while so many people are living in poverty, she said.

In addition to the mediation efforts, there is the informal but often-effective avenue for working out settlements: conversation and negotiations between attorneys for the parties, whether in a courthouse

hallway, as has often happened, or elsewhere.

Ramos, while a Legal Action leader on eviction defense, said that more than 90 percent of eviction cases handled by Legal Action result in evictions being avoided or delayed. Postponement has value for clients, he said, because it gives them time to plan for a move, rather than being forced out after a rushed, humiliating visit from sheriff’s deputies. And settlements negotiated by attorneys are higher quality than what tenants can typically work out on their own, he said, given that they build in protections such as more time to pay back rent or to move out if that is what is agreed upon.

Lawyers also can help in cases that are more cut and dried. When it’s not disputed that a tenant owes back rent, an attorney often can quickly arrange to get a landlord paid through programs run by nonprofits such as Community Advocates. Attorneys, while advocates for their clients, also bring a professional approach to the situation and are able more calmly to find resolutions than perhaps a tenant and landlord could on their own, said Legal Action’s Toman. “Half my job is to be like the Vulcan” character in *Star Trek* programs, he said: “to give dispassionate, logical analysis.” “Sometimes that means the landlord is not going to be punished in the way the tenant thinks the landlord should be punished, but that’s not going



Maggie Mullican



Daniel Pope

WANTING TO HELP

Motivation for law students to get involved in eviction work is simple.

Maggie Mullican decided to go to law school because she wanted to do good for others. Daniel Pope enrolled at Marquette Law School after working 20 years as a chef. He wanted to become involved in public service and decided law school was a good route to do that. Morgan Gullede majored in social work as an undergraduate student at a university in Missouri and had an internship helping people with housing issues. She thought many of them weren’t getting as much help as they needed, and she wanted, as she put it, more tools to help them. So she came to Marquette Law School.

And Francesca Voci? Actually, her first interest when she enrolled at Marquette was sports law, one of the Law School’s specialties. But her strong second interest was public service law. When she graduated in 2022 and didn’t get the sports-related job she

sought, she took a position at the Legal Aid Society of Wisconsin, working with clients facing eviction. “I really love it,” she said.

There is certainly a theme in introducing these people, and it’s a common one among Marquette law students and graduates: a strong desire to help others through public service. A focus among many of them in recent years has been eviction issues.

For Mullican and Pope, both current law students, that means they spent the summer of 2023 as Marquette Law School Public Interest Law Society (PILS) interns, working at the Legal Aid Society, assisting lawyers involved in Eviction Free MKE, a multipartner effort that provides legal help to people facing eviction. Their work included research on issues that came up related to evictions and observing and assisting attorneys involved in cases.

to help them and their family find stable housing. It gets real emotional real fast when you're dealing with your home and your family and all of your possessions."

Some lawyers who represent landlords say that the balance in eviction proceedings has moved too far toward helping tenants. One attorney expressed a fear that the system is becoming "a court of law for landlords and a court of equity for tenants." If anything is wrong on the landlord's side, a case will be dismissed, but tenants don't get held to the same standard, he said.

In any event, with the end of the surge of pandemic-related funding that slowed evictions and made more rent assistance available, and with high levels of political gridlock at the federal level and in many statehouses, expanded initiatives related to tenants seem unlikely.

Asked what he sees ahead, property-owner Ballering said, "I don't know if I see much changing. What would I like to see? More getting in front of the case before proceeding, more mediation, more help for people."

With the increased participation of lawyers, progress has been made in representing tenants and seeking ways to avoid evictions and, for some, in stabilizing housing. But the problems are far from solved, for reasons that go well beyond small claims court. ■



"When a third-party mediator engages in the conversation, communication can be more productive many times."

Amy Koltz, L'03, Mediate Wisconsin

"My goal is to have people get to the right place as quickly as possible."

Meagan Winn, Milwaukee County's Eviction Diversion Initiative



How did it go? "Great," said Pope. "I learned so much. I've taken away way more than I've given back."

Mullican agreed. "This summer has made public service work even more appealing," she said.

Gulledge's internship was with Legal Action of Wisconsin, working with its eviction defense team. She did research on issues such as late fees charged to tenants, which she said are sometimes "unconscionable," and assisted lawyers working on court cases. "I absolutely loved it," she said. "It's great to be around such a strong group of advocates."

Voci said that on a typical workday, she spends all afternoon in eviction court. "Small claims court is an excellent place for attorneys to cut their teeth," she said. She said she typically has a caseload of about 100.

Mediation is a big part of Voci's work. Often tenants don't talk to their landlords, largely out of fear. They also are terrified of the court process, she

said. A lot of what she does involves communicating with everyone involved in a case and explaining options to clients. These are often not the options Voci wishes they could be, since the law is elementary that nonpayment of rent is a breach of a lease and can lead to eviction. But she does her best to get them the best outcome possible.

The internships, for which students receive some financial support from the school's Public Interest Law Society summer fellowships, are not the only way for Marquette law students to get involved in public service legal work. All four of the people in this story, as well as dozens of others each year, have been involved in volunteer pro bono work, in some cases involving eviction-related cases. Most regard it both as a way to serve others and a way to develop their skills and pursue the goals that brought them to Marquette Law School.



Morgan Gulledge



Francesca Voci

A Glimpse into a Challenging Area of Practice

Plaintiff's-Side Medical Malpractice Lawyers in Wisconsin Lose 90 Percent of the Time at Trial. It Has Not Deterred J. Michael End, L'73.

A young man living in western Wisconsin had pain in one of his calves. He told his aunt who was a nurse. She thought it could be a deep vein thrombosis, a serious condition, and she promptly took him to the local clinic. A staff member there felt the man's calf and didn't think anything was unusual, other than the man might have a varicose vein. The man and his aunt left.

Four days later, the man came back. He said he was still in pain and was now short of breath. The staff at the clinic

did a chest X-ray. A doctor said it was pneumonia, even though later it was determined that the X-ray didn't indicate that. The man was given antibiotics.

A week later, the man returned to the clinic, saying he was in great pain and his breathing was very labored. The staff ordered a urine test. As the man was leaving the clinic, he collapsed and died. He had a pulmonary embolism (a blood clot in his lungs) that originated with deep vein thrombosis in his leg, just as the man's aunt had told the clinic at the start.

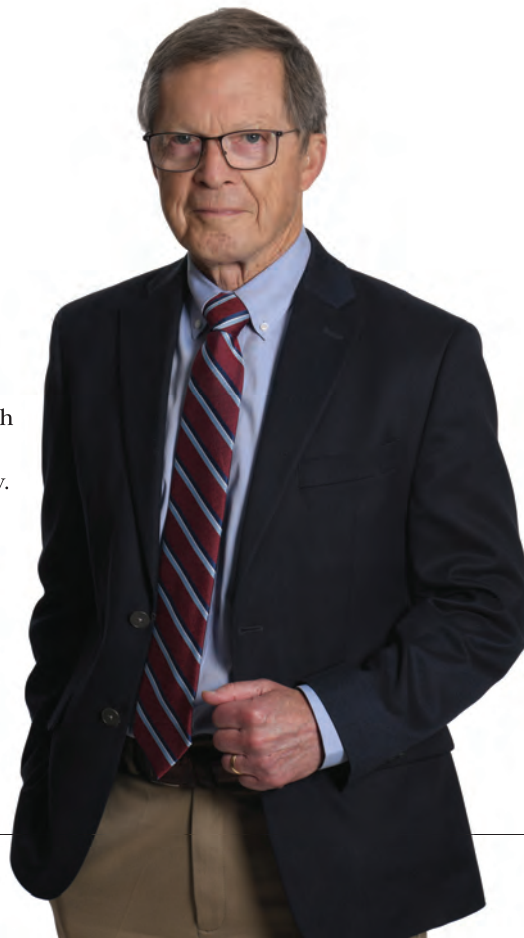
Welcome to the world of J. Michael End, L'73, a leader among a small number of lawyers in Wisconsin who represent plaintiffs in medical malpractice cases. (End recently sat down for an interview with the *Marquette Lawyer* to provide a window into this world.)

Why is it a small number, about 10 or so currently, across the state—including End and his two partners in a firm based in downtown Milwaukee? A big reason, End says, is that it is so difficult to win a medical malpractice case, particularly in Wisconsin. Plaintiffs nationwide lose about 90 percent of their cases—and those are among the relatively small number of cases that lawyers agreed to pursue, after screening or sorting.

Indeed, End says, he lost that case in western Wisconsin, which occurred 17 years ago. After hearing from the man's family and looking into the situation, End had agreed to represent the family. "I thought the case was relatively strong," he said.

As End recounts it, in the county where the case was tried, pretty much everybody knew everybody else, and the clinic was a fixture. It was not until the second day of trial that End learned that the bailiff was a retired doctor from the defendant clinic. End brought in a nationally respected expert to testify that the clinic should have spotted the man's problem. But the defense brought in an expert who said the clinic staff acted reasonably.

"You can't always bank on winning on the facts," End says.



The History Behind Current Medical Malpractice Law

The current era of medical malpractice law in Wisconsin began in 1975. Arguments at that time maintained that medical malpractice cases were becoming numerous, awards were large, and malpractice insurance premiums were rising. Medical care in the state was being affected negatively, advocates for change claimed.

The Wisconsin legislature enacted a law requiring all Wisconsin physicians and hospitals to have medical professional liability insurance. The required minimum limits of coverage are now \$1 million per claim and \$3 million per year. The law also created a state-administered fund to pay any damages exceeding the mandated \$1 million/\$3 million of liability insurance coverage. Doctors and medical institutions generally were required to make annual payments to that fund. And legal standards were changed such that it became harder for plaintiffs to win.

Almost 50 years later, the system remains in operation. Over the decades, there have been steady declines in the number of malpractice cases won by plaintiffs and in the amounts of awards to plaintiffs. The state fund for awards over \$1 million has been used, but not to a level anywhere near the amount that it has accumulated. In a recent report, it listed a net position of \$1.26 billion. The fund's net position had been \$361.3 million in 2012, so it has increased, on average, about \$100 million a year since then. End pointed out that Wisconsin health providers were required to make no premium payments to the fund in the past three years because of the fund's strength.

The annual report issued in 2022 for what is known as the state's Injured Patients and Families Compensation Fund said that from July 1, 1975, through June 30, 2022, the fund was named in 6,398 claims, and it made payments on 691. That means payments were made from the fund in less than 11 percent of claims. The total amount paid from the fund over 47 years was just south of \$1 billion (not to be confused with the more than \$1 billion currently in the fund).

In June 2022, 157 hospitals, 16 hospital-affiliated nursing homes, 16,220 physicians, 979 nurses anesthetists, and 1,255 other participants were taking part in the system, for a total of more than 18,000 individuals and agencies covered. There were 45 new claims filed that year, or less than one claim for every 400 participants.

End pointed to figures from Wisconsin's director of state courts showing the number of medical malpractice lawsuits filed in 1999 to be 294. That has trended down steadily since then, with only 87 cases filed in 2022—fewer than 30 percent of the 1999 total.

End also pointed to case law from the Wisconsin Supreme Court holding that surviving spouses or minor children are the only family members who can collect compensation in a medical malpractice case involving someone who died as a result of malpractice.

"I can't tell you the number of times the phone rings, and I hear this story, and I say, 'Well, was your mother survived by her husband?' 'No, Dad died five years ago.' 'And are there any minor children?' 'Oh, no, we're all in our 30s now,'" End says. "We have to say to the people, 'You don't have a cause of action in Wisconsin.'" End says that such a restriction on recovery is quite unusual among states across the country.

Then there are the jury instructions. End says that the standard jury instructions in medical malpractice cases in Wisconsin make it difficult to win. For example, in the case of a doctor in general practice, Wisconsin's standard jury instructions say that the doctor is "required to use the degree of care, skill, and judgment which reasonable . . . doctors who are in general practice . . . would exercise in the same or similar circumstances, having due regard for the state of medical science at the time . . . plaintiff . . . was treated [or] diagnosed." (The omitted portions of the quotation concern similar instructions for other cases, involving doctors who are not in general practice but specialists.) End says it is not hard for lawyers for defendants in a malpractice case to find doctors who will testify to that effect.

Overall, he says, "Wisconsin is either the worst or the second-worst state of the 50 states in the number of payments per population for medical malpractice. We are embarrassingly horrible." He adds, "I try not to take cases that are going to lose. I want to win. Yet so often, I do my best to win a medical malpractice case and present a really strong case, and somehow we lose."

What Motivates Michael End?

So why does he do it? To what extent is his practice "a cause" for him? End doesn't see it so much as an ideological or political cause, but rather as an effort to help people. "I would say that

"There aren't a whole lot of lawyers doing it, so the poor injured person has a tough time finding someone."

— Michael End

the cause is trying to help an individual who needs help and knowing that it is going to be against all odds,” End says.

His practice is something he somewhat slipped into long ago. End grew up in the Milwaukee area. He is, as he put it, a “3Mer.” He graduated from Marquette High School, Marquette University (majoring in political science and philosophy), and—with a gap for military service in Vietnam—from Marquette Law School. His father was a doctor, as were others in his family. Did he consider going into medicine? He says he always fainted at the sight of blood, so no.

He met his wife, Joan, when both were undergraduates at Marquette. They were married while he was in law school. They’ve been married for 52 years and have four adult children and 10 grandchildren.

End says he had a law school classmate who was working at a firm that specialized in defense of insurance companies. End got a position as a clerk at the firm. After graduation, he became involved in mortgage foreclosure cases and personal injury cases. That led to his first medical malpractice case. Even then, he says, a lot of lawyers didn’t want to touch such cases, but he was interested. He has maintained it as his specialty for more than 40 years.

He recalls that his first medical malpractice case involved someone who had lost hearing in one ear after a doctor’s treatment. End did extensive research on the procedure involved in the case and found an expert witness from Fort Lauderdale, Fla., to testify. “My memory is that I managed to lose that case, but what I’ve learned after doing malpractice work all these years is that that’s not unexpected.”

The State of Representing Medical Malpractice Plaintiffs

End and his colleagues have won cases as well—he’s made a living, after all, and remains dedicated to the work. But he says as it has become harder to win, the number of lawyers taking medical malpractice cases has gone down. He understands why younger lawyers would avoid the work, and he doesn’t know the future of the specialty.

“Every day, people call our office and say, ‘I’m looking for a malpractice lawyer,’” he says. “Many of the people have horrible injuries, and they deserve some compensation. But we have to weigh, using our experience as best as we can, whether or not this case is one that we want to take on and if the potential result at the end of

“Wisconsin is either the worst or the second-worst state of the 50 states in the number of payments per population for medical malpractice.”

— Michael End

it is enough to warrant spending hundreds of hours of our time.” He says there have been cases where expert witnesses alone have cost more than \$100,000.

“There aren’t a whole lot of lawyers doing it, so the poor injured person has a tough time finding someone,” he says.

End recounts a case from northern Wisconsin from a few years ago. A woman in her 70s had an aortic aneurysm. The local doctor measured it and wrote in the chart what he found. End says the size of the aneurysm put it in a category where experts that End brought into the case said the risk of surgery outweighed the potential benefit. The doctor went ahead with the surgery, and the woman died during the procedure. “I’ll never forget the *voir dire*,” End says of the jury selection process. All the jurors knew each other. End went ahead with the case, the defense attorneys brought in an expert who said the local doctor made a reasonable decision, and the plaintiffs lost.

But it is not easy to win in more populous counties either, he says. At the time of this interview, his firm had just lost a case in Milwaukee County in which the plaintiff was a woman who underwent a procedure involving her thoracic spine. She had walked into the hospital, but became a paraplegic as a result of the surgery. The woman lost in court.

So why does he keep doing this? “It’s an opportunity to help people to whom a favorable outcome is very important, and I have learned enough medicine and trial experience over the years to enable me to sometimes help those people,” End says. Now in his 70s, he said he wants to keep up the practice. “So far, I’m still enjoying it,” he says. “I like to tackle the cases.” There are still many people who deserve their day in court for things that happened to them, he says, even if finding lawyers to take their cases—and especially to win them—is hard. ■



Ramona A. Gonzalez



Kimberly A. Kolch



Geraldo F. Olivo



Russell J. Karnes



Dotun Obadina



Jonathan J. Feldbruegge

81 Ramona A. Gonzalez, a La Crosse County Circuit Court judge, received the State Bar of Wisconsin's 2023 Lifetime Jurist Award.

83 Carl Ashley has been appointed chief judge of Wisconsin's First Judicial Administrative District, encompassing Milwaukee County.

87 Robert B. Blazewick was appointed chief administrative judge of the Defense Office of Hearings and Appeals, based in Arlington, Va.

Kevin H. Govern has been appointed associate dean for academic affairs at Ave Maria School of Law in Vineyards, Fla., where he also serves as professor of law.

88 Janet C. Protasiewicz was elected to the Supreme Court of Wisconsin and took the oath of office on August 1, 2023.

93 Kimberly A. Kolch is a labor relations specialist/school attorney with Madison-Oneida Board of Cooperative Educational Services (BOCES) in Verona, N.Y.

95 Sherry M. Terrell has joined Milwaukee Area Technical College as the school's general counsel.

02 Patrick M. Miller was named construction and real estate litigation practice group leader for Faegre Drinker, in New York, N.Y.

Carrie Reichartz of New Berlin, Wis., founded Mercy's Light Family, an organization that helps young mothers who have been victims of rape, sexual abuse, and trafficking.

05 Atheneé Lucas started a new position as senior legal counsel—compliance at Accruent, in Dallas, Tex.

07 Adam S. Bazelon joined Axley Attorneys as a partner in the Waukesha, Wis., office and is a member of the firm's litigation practice group.

08 Geraldo F. Olivo, practicing at Henderson, Franklin, Starnes & Holt, in Fort Myers, Fla., was sworn in as secretary of the Lee County Bar Association's executive council.

Raphael F. Ramos was appointed to the Milwaukee County Circuit Court by Gov. Tony Evers.

09 Aryeh D. Derman joined Clark Hill as senior counsel in the firm's banking and financial services group. He is based in the firm's Chicago office.

Tonya N. Natkins accepted a position as legal operations manager for Farmers Insurance.

10 Tyrone M. St. Junior II was promoted to vice president and associate general counsel at Robert W. Baird & Co. in Milwaukee.

Russell J. Karnes was honored for his dedication and volunteer efforts for the Mobile Legal Clinic, a project of Marquette Law School and the Milwaukee Bar Association, during the Milwaukee Justice Center's 12th Annual Run for Justice.

11 Vincent R. Bauer joined the Division of Legal Services for the Wisconsin Department of Administration as legal counsel.

Todd LaForest, in Phoenix, Ariz., was named president of Molly's Grape & Citrus Co.

Dotun Obadina joined Paul Weiss Rifkind Wharton & Garrison, in New York City, as counsel in the corporate department and a member of the firm's mergers and acquisitions group.

Nicholas Smith was promoted to agency legal counsel for the Wisconsin Office of the State Public Defender.

12 James C. Witecha was promoted to chief legal counsel at the Wisconsin Elections Commission.

Jonathan J. Feldbruegge joined von Briesen & Roper's Milwaukee office as a shareholder in the litigation and risk management practice.

14 Kristen D. Hardy and **Emil Ovbiagele** were featured on the cover of the May 2023 *Wisconsin Lawyer Magazine* for their work hosting the state bar's *Bottom Up* podcast, discussing the challenges in the legal practice today.

AJ Peterman was promoted to general counsel at Fleet Farm in Appleton, Wis.

21 Curtis A. Edwards joined Lin Law in Green Bay, Wis. His practice focuses on trusts and estates, business law, and real estate law.

Bridget Smith accepted a position as a field attorney with the National Labor Relations Board in Milwaukee.

Employment data for recent classes are available at law.marquette.edu/career-planning/welcome.

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.



GOALLL!

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wide-ranging options for internships and other opportunities connected to sports have opened doors for many students.

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