

MARQUETTE LAWYER

SUMMER 2024



WYLIE AITKEN'S WINNING PERFORMANCE

A California—and Marquette—Lawyer
Stars in Court and in Other Pursuits

ALSO INSIDE

Cassell and Erez on Victim Impact Statements

Lipton on Corporations and Social Responsibility

Bagley Calls More Diversity Among the Patent
Community "Our Secret Weapon"

Doorbell Videos Could Land You in Court

Tilley on (Ranney on) All-American Tort Law



Dean Joseph D. Kearney on the fourth floor of Eckstein Hall, in a study room featuring one of the oak tables originally found in the Grimmelsman Memorial Reading Room of the 1924 Law Building (later renamed Sensenbrenner Hall).

In Celebration of Progress and Continuity

On the surface, Marquette Law School today scarcely resembles most of its past. Eckstein Hall, opened in 2010 yet still setting the standard among law school buildings for beauty and functionality, provides a splendid architectural contrast to our home from 1924 to 2010, to say nothing of the converted Mackie Mansion that served us earlier. For an example of a different sort, as displayed in a good deal of this magazine's current content, none of our four annual distinguished lectures even existed 30 years ago. And consider the changes in the makeup of our student body—race, gender, geography, for leading examples. The list of developments is long and profound.

A look below the surface, though, reveals considerable continuity in conjunction with the progress. A few examples: Both Torts and Contracts remain first-semester courses, as apparently since the formation of the Milwaukee Law Class in 1892 and the incorporation of the school into Marquette University in 1908. The *Marquette Law Review*, one of the nation's oldest law journals, publishes regularly, as it has since 1916. Interested students still learn the basics of becoming trial lawyers, perhaps aspiring to the same professional success as Wylie Aitken, L'65, whom we profile in this issue's cover story.

This admixture of the old and the new may explain why I am drawn to the continued use, in Eckstein Hall, of the old table pictured on this page. My final request of the movers in July 2010 was that this table

and the eight other such heavy oak tables, then in the 1967 Legal Research Center's Wisconsin Room, be carried over to Eckstein Hall. I had only recently learned from Professor Emeritus James D. Ghiardi, L'42—whose association with the Law School, as a student and a faculty member, spanned more than 75 years, with only World War II intervening—that the oak tables were original to the Grimmelsman Memorial Reading Room when the then-called Law Building (later renamed Sensenbrenner Hall) opened in 1924. The century-old tables are now found throughout the new building: The photo here shows one of them in a study room on the top floor of Eckstein Hall—the old, even if also timeless, amid the new.

So might it be said more generally of Marquette Law School. In particular, one who looks for the *mission* of the Law School will find it realized in respects variously new and traditional. Generations of law faculty and students have advanced the Marquette University mission—"the search for truth, the discovery and sharing of knowledge, the fostering of personal and professional excellence, the promotion of a life of faith, and the development of leadership expressed in service to others"—in ways both recognizable and novel. May it ever be so.

Joseph D. Kearney
Dean and Professor of Law

Contents SUMMER 2024



4

WYLIE AITKEN'S WINNING PERFORMANCE

by Alan J. Borsuk

Wylie Aitken, L'65, loves the arts, but he realized long ago that he wasn't going to be a success on stage. The law intrigued him, and that led him to Marquette Law School, followed by a long and continuing career as a plaintiff's lawyer in Southern California, representing "the little guy" in suits against defendants such as Disneyland. Aitken and his wife, Bette, have been major patrons of the arts, advocates for education, leaders in California politics, and supporters of Marquette Law School.

2

From the Dean

14

Army of Survivors

Victim impact statements serve a number of important purposes, as shown in this analysis of what was said in court by many of the victims during the sentencing proceedings of Larry Nassar, once the team doctor for USA Gymnastics. Drawing on their Barrock Lecture on Criminal Law at Marquette Law School, Professors Paul G. Cassell of the University of Utah and Edna Erez of the University of Illinois Chicago describe how such statements, now permissible in courts throughout the United States, give victims voices that should be heard.



24

Deploying Our Secret Weapon

Professor Margo Bagley of Emory University, in Marquette Law School's Nies Lecture on Intellectual Property, concludes that drawing more women and underrepresented minorities into inventing and patenting will serve America's interests, including in global competitiveness.



32

Of Chameleons and ESG

Professor Ann M. Lipton of Tulane University takes the occasion of Marquette Law School's Boden Lecture to examine the sometimes-competing pressures on corporations to maximize profit and support society's broader needs.

44

Watch Out

Based on a homeowner's surveillance video, journalist Tom Kertscher was ticketed for not coming to a full stop at a stop sign outside Milwaukee, which led him to look at how common the use of such videos is by law enforcement.

50

All-American Tort Law

Professor Cristina Tilley of the University of Iowa offers reflections on tort law's history and its possible future, prompted by a recent book, *The Burdens of All: A Social History of American Tort Law*, by Joseph A. Ranney, the Adrian P. Schoone Fellow at Marquette Law School.



59

Class Notes

Marquette University Law School

Eckstein Hall
P.O. Box 1881
Milwaukee, Wisconsin 53201-1881
Phone: (414) 288-7090
law.marquette.edu

EDITOR:
Alan J. Borsuk

DESIGN:
Kristin Pelisek

COPY EDITOR:
Amy Bauman

PHOTOS:
John Livzey
Cover story

Mike Gryniewicz
Other photos

Copyright 2024
Marquette University
All rights reserved.





WINNING PERFORMANCE

Wylie Aitken has turned his passion for the stage into big wins for injured clients—and for education, the arts, politics, and Marquette Law School.

BY ALAN J. BORSUK

There's an old guitar case lying on the floor next to Wylie Aitken's desk. It isn't that he plays the guitar that's inside the case. He took lessons at one time. "I thought I'd join the Kingston Trio," he said. "I was never any good at it. I finally said, 'That's not a talent of mine.'" He also had a big interest in his youth in acting. He wasn't enough of a risk taker for that as a career. But he loved—and still loves—the performing arts of all kinds, and he keeps the guitar close at hand.

So what are Wylie Aitken's talents? It's a formidable list.

Look around his office and the rest of the Aitken Aitken Cohn law offices in Orange County, California, just south of Los Angeles, and you'll see lots of evidence of this. There are plaques and photos, almost too many to count, recognizing Aitken's success as a personal injury lawyer and as a leader in the legal world in California. There are mementos and awards for the impact that he and his wife, Bette, have had in boosting higher-education institutions, theater, and music in Southern California.

On the wall next to Aitken, as he sits at his desk, is a piece of artwork with images of

President John F. Kennedy, Attorney General Robert F. Kennedy, and Senator Edward M. Kennedy, inspiring figures for Aitken.

High on a wall, almost straight in front of Aitken, is a modest-sized reproduction of Leonardo da Vinci's painting *The Last Supper*. It's not a fancy print, and Aitken, a Roman Catholic, said he looks at it as more of a fond memory than a religious statement. But let us pause a moment for a story, which is something Aitken does often and well: He was a newspaper delivery boy in his childhood in Wichita, Kansas. Once, he saved up some money and bought this copy of the painting for his mother, who was a devout Catholic. She treasured it, both for the image itself and for her son's buying it for her.



Now and then:
Above, Wylie Aitken at a St. Patrick's Day party hosted by his law firm in March 2024. Below, Aitken as a Marquette law student in the 1960s.

She kept it hanging in her home the rest of her life. And now it hangs in the office of that son, who said his mother was his inspiration.

In a hallway near Aitken's office is a painting of a young girl on the witness stand in court, with Aitken standing close by her side. She is gesturing, and he is looking at her with obvious care and warmth. The image is from a trial in 1991 when the girl, who had been mauled by a mountain lion in an Orange County park, was testifying in a damage suit against the county. She and her mother won a \$2.1 million verdict. The painting is based on a photo that ran at the time on the front page of the *Los Angeles Times*.

There are sports memorabilia, family photos, law books (of course), and much more.

Oh, and then, displayed prominently on the top of Aitken's desk, is a basketball with the logo of Marquette University. The ball is signed by Michael R. Lovell and Robert A. Wild, S.J., the current and former presidents of the university, by Shaka Smart, coach of the men's basketball team, and Megan Duffy, then the coach of the women's team, and by Joseph D. Kearney, dean of the Law School.

Wait a moment. Almost all of these awards and mementos and souvenirs say California, California, California. Where did Marquette come in?

That's another story, one that explains how Wylie and Bette Aitken took a detour from California in the 1960s so he could attend Marquette Law School, an experience that shaped much of their life, leading to a warm and special relationship between the Aitkens, Marquette Law School, and Marquette as a whole, which continues six decades later.

FROM THE MIDWEST TO THE WEST COAST TO "BACK EAST"

Wylie Aitken said some kids grow up "military brats," moving often as a parent is transferred from post to post. He grew up "an engineering brat." His parents were raised in Duluth, Minnesota. They married, and at the time Aitken was born, the family was living in Detroit. They all moved to Chicago and then to Wichita because of job changes for his father, who was an engineer. Why Wichita? That's where Boeing had a large plant. In an oral history recorded as part of a project at California State University, Fullerton, in 2016, Aitken recalled his Wichita time as "my Tom Sawyer-Huck Finn years," filled with outdoor life and friends.

When he was in eighth grade, his father was assigned to work at the Huntsville space project near Birmingham, Alabama, for a year. Among Aitken's experiences: Getting on a city bus, he and one of his sisters raced to the back, where they wanted to sit. The driver of the bus stopped, came to the back, and told them that that was the "colored section," so they had to move forward. The incident was among the experiences that made a lifelong impression on Aitken about the evil of racial segregation.

The family moved again in 1955, when Aitken was a sophomore in high school, to Orange County, southeast of Los Angeles. That was the year that Disneyland opened in Orange County, and the area was growing rapidly. Aitken quickly fell in love with Southern California, an affection that has never abated.



In high school, he pursued his artistic impulses, especially with an interest in acting. His mother said often that she expected him to go to college. Following graduation, he enrolled at nearby Santa Ana College for two years and at Cal State Fullerton (then known as Orange County State College) for one year. He was still interested in arts and culture, but he realized the likelihood of success was low for a career in those fields. He had a good academic record, and he was ambitious.

He didn't know much about what it took to be a lawyer, other than what he learned watching shows such as *Perry Mason* on television. But, he said, "I just was very intrigued by the law profession." He heard that you could get into some law schools with three years of college experience. Saving a year of college appealed to him, and he wanted to go to law school "back east."

Aitken sent letters and applications to a list of law schools. He got encouraging responses from some. Yet one school offered him not only admission but a full academic scholarship: Marquette. He had never been to Milwaukee, but the scholarship offer was a dealmaker. So he headed to Marquette. (He insists that Milwaukee is "back east," while acknowledging that others argue it is in the Midwest. The fact that Marquette is now in the Big East sports conference perhaps buttresses his argument.)

In 1955, another family, the Robbs, moved to Orange County, in this case from St. Louis. They had a daughter, Bette. When she was a senior in high school, Bette got a job working in a Robert Hall clothing store. During the Christmas season, she oversaw the gift-wrapping service that the store offered. Then a freshman in college, Wylie Aitken was one of the temporary employees whom Bette supervised. And that's how the two met. In 1963, the two married. Bette stayed in Southern California while Wylie went to Milwaukee for the second year of law school. They soon had a baby, and Bette and the baby moved to Milwaukee for Wylie's third year of law school.

Marquette Law School proved to be a formative experience for Wylie. He was the youngest person in his class—and, he said, he looked it. But he did well. He ended up third in the class. More important, he ended up with a passion for practicing law, especially tort law.

When he was presented with the Marquette Law Alumni Association's Lifetime Achievement Award in 2004, Aitken expressed his thanks to Marquette, "which made me a St. Thomas More Scholar and

"I wanted to go out and win. . . . I just passionately wanted to be a plaintiff's lawyer."

gave me a full-tuition scholarship, which enabled a young kid of 20 years of age to come here—all I had to do was to figure out how to pay for food and find a place to sleep." He went on to thank one of the Law School's most renowned professors, James D. Ghiardi, L'42, "who first awakened me to torts—though my plaintiff's career and battles with the Defense Research Institute may not be what he intended." He particularly recalled former Professor Robert O'Connell, "my mentor, my friend, and the person who opened law and life for both my wife and me." Aitken added, "He even gave Bette and me our first china set, imitation Indian Tree, which we have to this very day."

After the Law School's graduation ceremonies in 1965, Wylie and Bette went to a picnic for graduates and then straight to their car to head down Route 66, the legendary highway from Chicago to Southern California. Aitken was eager to start the new phase of his life.

"I WANTED TO GO OUT AND WIN"

Aitken considered becoming a criminal defense lawyer. He said he wanted to defend the defenseless. But, he said, in the criminal justice system, so much of a lawyer's work involves plea bargaining and procedural matters. He wanted to be in the courtroom. "I wanted to go out and win," he said, and he liked the idea of doing jury trials. He thought his personality was suited to the courtroom. He said that if he wasn't going to succeed as a performer on stage, he thought he could use his talents in front of audiences of 12—namely, civil juries. And he would be representing those who had real needs, sometimes taking on powerful interests and working to right wrongs done to everyday people. "I just passionately wanted to be a plaintiff's lawyer," he said.

Aitken began working for a law firm in Orange County. It was going well, he said, but he saw that if he stayed with the firm, there were lawyers ahead of him in line for bigger positions. He didn't want



All three of Wylie Aitken's children, including Darren (above), became lawyers and are part of the Aitken firm. Aitken says his career advice to them was simple: "Follow your passion."

“He holds the jury in his hand. He is a master. I am prepared to be disappointed, but instead I’m overwhelmingly impressed.”

– Susan Mattern, in a book recalling listening to Aitken’s opening arguments in her daughter’s case

to wait. “One thing about me: I don’t lack ambition,” he said. And Orange County was booming, which meant there was a lot of opportunity.

So Aitken opened a law firm. He wanted to take on tort cases, advocating for those who believed they had been injured by others. Things started slowly, and Aitken did his share of divorces and other relatively routine legal work for people. “We had to pay the bills,” he said. But the tort practice picked up and, after Aitken won some substantial verdicts, his reputation began to grow.

With the help of mentors, he also became involved in organizations of lawyers in Southern California and statewide. At the age of 33, he became the youngest president in the history of the California Trial Lawyers Association, as it was then known. “I just kept building a reputation,” he said, which brought him more clients with higher-stakes cases.

Aitken’s personality was certainly important to building that reputation. He is outgoing, warm, funny, a storyteller, even folksy, and still someone who loves performing. But the reputation was also built on what lay beneath those traits: an unrelenting capacity for hard work, for understanding the intricacies of anything he tackled, and a big commitment to winning.

“I never met anyone as passionate about the law as my father,” said his daughter, Ashleigh Aitken. A former federal prosecutor and the current mayor of Anaheim, California, she also practiced as part of the Aitken law firm and remains listed as “of counsel.” She said her father has an encyclopedic memory, a strong work ethic, and an untiring commitment to clients. “He has such a keen sense of right and wrong,” she said.

Aitken’s two sons, Darren and Chris, are also partners in the law firm. “My father has always led by example,” Chris Aitken said. “You grew up in

the family, you grew up in the firm,” said Chris, who eventually decided to become a lawyer. After working in other legal settings for a while, his father’s passion for fighting for “the little guy,” often against big corporations, drew Chris to join the family firm. He said it is a big testament to his father and to the whole family that they are all involved in the law practice. His father developed a place where they could practice but have their own paths, as he described it. They each do serious personal injury cases, but he said, “We have our own caseloads, clients, subspecialties.” Chris’s subspecialties include trucking cases and cases involving brain injuries.

All three Aitken children and all three of their spouses are lawyers. Aitken said he never lobbied his children to become lawyers. His advice to them was only this: “Follow your passion. . . . Otherwise, it doesn’t work.”

What motivates Wylie Aitken? Darren Aitken said his father loves to solve problems, to strategize, to be around people, and to make life better for the people around him. Darren said the firm is a family firm in several senses of the term, especially because of the warm work culture his father has established. “My dad is a true lawyer,” he said. “It’s what he loves to do.” Bette and the law—those are his father’s true loves, Darren said.

Today, the firm, Aitken Aitken Cohn, with its main office in Santa Ana close to the John Wayne Airport, includes Aitken as founding partner and six other partners, including the two sons. The firm has smaller offices in Riverside and San Clemente.

Several cases involving Aitken and his colleagues stick out as Aitken talks about his career.

THE DISNEY CASES

Disneyland is the most famous attraction in Orange County. For many years, local political and community leaders treated it with great deference, Aitken said. Disney was largely allowed to control its own affairs, and public safety officials took a hands-off approach to Disney grounds.

In 1998, a cleat tore loose from the Sailing Ship *Columbia*, one of the park’s attractions, as it was docking with park visitors on board. The cleat struck and killed a 34-year-old man, Luan Phi Dawson, of Duvall, Washington, and badly disfigured his wife, Lieu Thuy Vuong, who was struck in the face.

Aitken said the conventional wisdom among many lawyers was, “You can’t beat the Mouse.” But he took the case. The suit he brought claimed major problems in how Disney staffed the ride, trained



the staff, and maintained the ship. It also claimed that a nylon rope used in tying the ship to the dock stretched and snapped back, leading to the cleat's flying loose. A conventional hemp rope would not have stretched. Aitken said that, in addition, Disney did not allow Anaheim police to visit the scene until four and a half hours after the accident. The case was settled for an undisclosed amount, but the *Los Angeles Times* reported that the settlement was estimated to be \$25 million.

Of great importance to Aitken, the case led to changes in California law and regulation. Disney's lax oversight of safety in the park and the weak response of the Anaheim police led to stricter governmental safety oversight of theme parks and to changes in policies of Anaheim emergency services departments.

In a second major Disney case, in 2003, Marcelo Torres, 22, of Gardena, California, was killed while riding on the Big Thunder Mountain Railroad attraction at the park when the car he was riding in derailed. Aitken's suit alleged that there were problems with maintenance and safety issues around the ride. One improvement in procedure since the

1998 fatality on the Sailing Ship *Columbia* was that when the incident occurred, authorities were given prompt access to the scene—and so was Aitken, who immediately went to the park.

The case was settled in 2005 for an undisclosed amount. Unlike with the *Columbia* case, Disney took responsibility for unsafe practices on the ride. But at the time of the settlement, Aitken was quoted in the *Los Angeles Times* saying, "This was not just one mechanic making a mistake. This was really systemic to how they were running the park."

THE MOUNTAIN LION CASE

On March 23, 1986, a mother, father, and two young children went for an outing in an 8,000-acre wilderness area in Orange County known as Caspers Park. Laura Small, then five years old, was walking along a stream, with her mother a few feet from her, when a mountain lion attacked the girl and carried her away. Pursued by another park visitor, the lion dropped the girl. But the girl suffered major injuries, especially to her head. She lost sight in one eye and much of the use of the right side of her body.

Laura Small, who was attacked in a park by a mountain lion in 1986, testifies with Aitken at her side in the 1991 trial of her suit against Orange County, California. This painting hangs in Wylie Aitken's law office.

Aitken's son Chris, who is part of the law firm, said, "My father has always led by example."



Chris Aitken

In a 2016 book, *Out of the Lion's Den*, the mother, Susan Mattern, recounted the story of what the daughter and the family went through. The parents were urged by friends to sue Orange County for not warning people about the danger. They were connected with an attorney who investigated the case but who was not experienced in lawsuits such as this. He referred the family to Wylie Aitken.

The case was challenging from a legal standpoint. A big issue: Was the county responsible for the actions of a wild animal that was native to the area? Aitken argued in the suit and at trial in 1991 that county employees knew there was a danger from mountain lions. Not only did they not warn people, but they even gave visitors, including the girl's parents, assurances that the park was safe and that mountain lions were not a threat to attack people.

In the book, Mattern writes that she was not impressed with Aitken at first. She thought he was too casual about the case, and she feared he was not paying attention to the details. She was nervous as the trial date arrived in 1991, thinking they were going to lose.

Then she listened to Aitken's opening statement. She described it in the book: "He is persuasive; he is sincere; he makes you want to listen to his every word. He smiles; he knows when to add a touch of humor, and when to get serious again. He holds the jury in his hand. He is a master. I'm prepared to be disappointed, but instead I'm overwhelmingly impressed. He's better than any lawyer I've ever seen in any movie. He is eloquent. He's able to do what I can't do—speak to a roomful of people and leave them hungry for more. My worries about Wylie not knowing the case disappear after a few minutes. He knows the case better than I do, and I was there. The jury is sitting at the edge of their seats as he sits down. I'm waiting for thunderous applause. I'm thrilled. And relieved."

The trial attracted major news attention in Southern California. When the verdict came in, the daughter and mother were awarded more than \$2 million.



OTHER BIG CASES

The history of Aitken Aitken Cohn includes a list of major verdicts. For example, in 2013, the firm's website says, the firm was chosen as "national liaison counsel for a team of more than 30 law firms and 80 lawyers nationwide that represented millions of Toyota vehicle owners in the largest automobile class action lawsuit settlement in U.S. history." The focus of the cases was whether certain Toyota vehicles were prone to sudden and unintended acceleration. The cases were settled for a total of \$1.63 billion.

A few other cases:

In 2021, an oil pipeline off the Pacific shore of Orange County ruptured and spilled 126,000 gallons of crude oil into the ocean. In 2023, the Aitken firm settled a case in which multiple people harmed by the spill sued an energy company and multiple shipping companies for \$95 million.

In 2007, a car driven by a federal government employee ran a red light and rammed a car whose passengers included a four-year-old-girl who was securely in a car seat. The car the girl was in struck a utility pole, which fell and crushed the car. The girl was left a ventilator-dependent quadriplegic. Aitken brought suit against the federal government and won a \$55 million verdict, the largest-ever Federal Tort Claims Act personal injury verdict.

Then there was a \$17 million verdict for a welding contractor severely injured in an explosion

at an industrial plant. And a \$15 million wrongful-death verdict benefiting two young daughters of a 48-year-old man who was killed when his car was rear-ended by a California state employee. And a \$10 million settlement on behalf of five schoolchildren who were injured when the driver of their school bus lost consciousness and crashed.

The list goes on. But Aitken would make three important points:

- **He and the firm as a whole do lose cases sometimes.** He is not reluctant to say the firm's lawyers do good work, but he noted that, like anyone, he and they sometimes lose. "If you haven't lost a case," he said, "you've never tried cases."

- **It's not all about multimillion-dollar cases.** Sure, those attract attention. But Aitken describes a recent case, involving an accident, which settled for \$900,000. It wasn't as large an amount as Aitken had hoped the plaintiff would get. But when he told her the outcome, she burst into tears, saying that now she could go forward with some confidence about the future.

- **Aitken is proud of the indirect effects of some of the cases he has won.** The Disney cases led to action in the California state legislature to tighten up safety oversight of amusement parks. The mountain lion case led to legislative action requiring warnings about safety in more places. Vehicle crash cases, including those involving the Aitken firm, have led to major improvements in safety.

Aitken is not shy about publicity. "Why should I be?" he said. He has cooperated with and sometimes encouraged news media attention to his cases. But, he said, "I disdain lawyer advertising." His bent for publicity is not just pride, he said, "although I have a healthy ego." He believes that many of the stories of individuals whom he has represented need to be told. "You want to be heard," he said. He is proud of the impact some of his victories have had.

GIVING BACK TO THE COMMUNITY

During his Wichita childhood, Aitken once won \$40 playing games at a church event. He took the money home and showed his mother. She responded, "You can't keep that money." Aitken said, "My mom's passion was for giving to others. When you had good fortune, you shared it with others." She made him go back and play until he lost the money.

That was one of the influential moments that led to Wylie and Bette Aitken's becoming big givers in several important ways.

"My mom's passion was for giving to others. When you had good fortune, you shared it with others."

– Wylie Aitken



They have been deeply involved in supporting education in Orange County and throughout California. That includes major service to Chapman University in Orange County, where Wylie Aitken served on the board of trustees, including a four-year term as chair of the board. He and Bette have supported the creation and growth of the Fowler School of Law at Chapman, including the Bette and Wylie Aitken Family Protection Clinic and a distinguished visiting professorship named for them. They were also instrumental in creating Chapman's center for the arts.

They have been deeply involved in the arts scene in Orange County. The Chance Theater's arts center in Anaheim is named for Bette Aitken, and they have been key supporters of other performing arts programs.

Aitken said, "I've always been fascinated by film." He and Bette have been involved in many ways with promoting film education at colleges and in similar efforts aimed at increasing the quality of film work and

Wylie Aitken with his daughter, Ashleigh, at the Aitken law firm's 2024 St. Patrick's Day party. She is mayor of Anaheim, California, and of counsel to the firm.



Wylie Aitken speaks at the 2004 Law Alumni Awards ceremony in Marquette University's Alumni Memorial Union, where he received the Lifetime Achievement Award.

expanding the number of people involved in the field. Aitken was recently named a trustee of the American Film Institute. Other trustees include Steven Spielberg, Shonda Rhimes, Eva Longoria, and Halle Berry.

Aitken also has advocated for maintaining and strengthening arts programs in California public schools as chair of the California Arts Council.

But any list of Wylie Aitken's interests has to include politics. He has been a leader in Democratic and liberal politics in Southern California and beyond, a close associate of senators and governors. Again, this started with his mother. "My mom was a New Deal Democrat. Don't even think twice about not being a Democrat in our house," he said.

As the piece of art that hangs over his desk suggests, Aitken, as a young man, especially admired President John F. Kennedy. And Wylie and Bette were in the hotel ballroom in Los Angeles in June 1968 when Robert F. Kennedy spoke after winning the California Democratic presidential primary, remarks immediately followed by Kennedy's being assassinated as he left the ballroom.

In 1996, Aitken was a key figure in the underdog campaign for the U.S. House of Representatives by Democrat Loretta Sanchez against nine-term incumbent Robert Dornan, a nationally prominent Republican. Sanchez narrowly won and served in Congress for the next two decades.

Aitken agrees that Orange County was for many years strongly conservative in its overall political makeup. But, he said, the county has changed and

is now more "purple." The county, with a population of more than three million, includes a large Hispanic population and the largest concentration of people of Vietnamese ethnicity in the United States.

AND THEN THERE'S MARQUETTE

Wylie Aitken said he wasn't involved very much with Marquette Law School as an alumnus in the first 30 or so years after he completed law school. Then one day, in the 1990s, he received a phone call from Howard B. Eisenberg, the Law School's dean from 1995 until his death in 2002. Eisenberg said he was in Southern California and wanted to meet Aitken. "I just bonded with him," Aitken said. "I loved Howard Eisenberg." He said they were "soulmates" when it came to a lot of issues, including social and political matters.

Aitken said when he thinks of Marquette Law School, he thinks first of two people: his mentor, Professor Robert O'Connell, and Eisenberg. With Eisenberg's encouragement, Aitken became more involved in Law School matters and became a major donor. And the relationship with the Law School continued after Eisenberg's death and the appointment of Joseph D. Kearney as dean. Aitken said he knew that Eisenberg thought highly of Kearney, which carried a lot of weight with Aitken.

The generosity and impact the Aitkens have had on Marquette can be seen in the fact that the elegant two-story reading room on the third floor of Eckstein Hall is named the Wylie and Bette Aitken

Reading Room. The Aitkens have also been generous donors in support of scholarships for Law School students. And Wylie, a big basketball fan, has been a generous supporter of Marquette athletics. Hence the basketball that sits atop his desk—and, this past season, Aitken's attendance in December 2023 at the men's basketball game between Marquette and Notre Dame, another team Aitken follows, at the Fiserv Forum in Milwaukee. (Marquette raced to a 17–0 lead and won, 78–59.)

Why has Aitken been so loyal to Marquette? He was there only for three years and that was six decades ago. Daughter Ashleigh found the question easy to answer: “Marquette changed his life.” His family didn't have the resources to send kids to college, she said. His education at Marquette Law School “was life-changing for him.” And the scholarship he received meant he left without debt, which, Ashleigh said, “gave him the room to breathe, and it gave him the room to excel.”

But most important, she said, “He's a very loyal man. He's never going to forget where he came from.” And Marquette University Law School is a crucial part of where he came from.

A JOB, A PASSION, EVEN A HOBBY

“I've been fortunate,” Aitken said. “I've been the kid in the candy store.” He said he has never felt for a day during his career that he was just going to work. He always has felt that he was answering the call to fight for people who were harmed or hurt by others.

His son Chris said, “My father has always led by example. . . . My dad has always been an extremely hard worker.”

Son Darren, who is the firm's managing partner now, said that after finishing law school he worked at a national firm but after several years decided he liked working in the family firm. “I like being in an environment like this,” he said. Darren said it appeals to him that he has clients who are the CEOs of large corporations and clients who empty the trash for those CEOs at night.

Daughter Ashleigh was the last of the family to join the firm. She taught high school and worked on Capitol Hill in Washington for U.S. Sen. Dianne Feinstein, a California Democrat, and for Rep. Dick Gephardt, a Missouri Democrat who was then a leader in the House of Representatives. She decided to go to law school, was an assistant U.S. attorney, and, after marrying and having children, joined the Aitken firm. She said that,

Why has Aitken been so loyal to Marquette? “Marquette changed his life,” said his daughter, Ashleigh. “He's a very loyal man.”



Bette and Wylie Aitken (center) with family members at the 2004 Law Alumni Awards event at Marquette.

after the first week, “I thought, ‘Why the heck did I wait so long?’ . . . I loved the firm, and I loved being in a family business.” But she also felt the call of public service, and her primary job now is as the mayor of Anaheim, the first woman elected to the position.

Wylie Aitken still has the personality of a performer. Has he slowed down? A bit, but, at 82, he still works close to full time. And he still likes to perform, not with that guitar next to his desk, but with the skills of a consummate client advocate. “I just can't seem to stop,” he said. “I like to keep engaged.”

Darren Aitken said people often ask him when his father is going to retire. “My dad retired at age 65,” he tells them. “Then he took up a hobby. It just turned out that his hobby is the practice of law.” ■



ARMY OF SURVIVORS

How Victim Impact Statements in the Larry Nassar Sentencing Promoted Justice

“Perhaps you have figured it out by now, but little girls don’t stay little forever. They grow into strong women that return to destroy your world.”

—Victim impact statement of Kyle Stephens

BY PAUL G. CASSELL AND EDNA EREZ

Over the past several decades, crime victims’ rights advocates have sought to amplify the victim’s voice in the criminal justice process. A key part of that effort has been giving crime victims the right to deliver a victim impact statement (a “VIS”) at sentencing before a sentence is imposed. In the United States today, the federal system and virtually all states allow VISs.

While VISs are firmly entrenched in the American criminal justice landscape, the wisdom of allowing such statements is sometimes disputed. Yet many arguments about VISs rest not on empirical data but rather on speculation about what those statements might look like, what victims’ motives are in delivering them, or what effects the statements might produce. This reliance on speculation stems from the fact that surprisingly little is known about VISs. To be sure, anecdotal examples of particular statements have been cited by scholars. But relatively little empirical scholarly work exists regarding VISs.

This dearth of empirical research is partially explained by the difficulty in studying a “typical” VIS. Different crimes perpetrated by different offenders in different ways cause different forms of victimization. And even when the victimization stems from the same crime, that crime may take varying forms or be perpetrated in different social contexts, with different offender–victim relationships producing variable harms. Because each crime—and each victim—is unique, it is hard to determine whether victims’ assertions in their

Paul G. Cassell is the Ronald N. Boyce Presidential Professor of Criminal Law and University Distinguished

Professor of Law at the University of Utah’s S.J. Quinney College of Law. Edna Erez is Professor of Criminology, Law, and Justice at the University of Illinois Chicago. This article is a version of the Barrock Lecture on Criminal Law, delivered by the authors in the Lubar Center at Marquette University Law School on November 6, 2023.

An extended version of this article appears in this spring’s *Marquette Law Review*.



VISs result from their unique circumstances. And that difficulty has left scholars wondering what factors might drive victim impact statements and their content generally.

Recently, a distinctive data set of VISs developed. In January 2018, Rosemarie Aquilina, a state court judge in Michigan, allowed 168 direct and indirect victims of former USA Gymnastics team doctor Larry Nassar all to deliver VISs. The nation was riveted as Nassar's victims explained, in broadcast hearings lasting days, the impacts of how Nassar had sexually abused them. The resulting set of VISs is rich in details about what kinds of assertions victims make in them.

Nassar committed similar crimes against each of his victims, allowing a robust research approach to answer questions about the content of, motivations for, and benefits of submitting VISs. Specifically, it is possible to explore whether (roughly) the same crimes produce (roughly) the same VISs. This data set also has the advantage of the lack of significant utilitarian motives for submitting the VISs, such as the desire to affect the sentence. When the victims delivered their VISs, they already knew that Nassar would spend essentially the rest of his life in prison. Thus, the opportunity to present the VIS itself drove victim participation. Further, the victims had complete freedom in what they discussed and to whom they addressed their statements; their statements were completed without any “guidelines or control” from criminal justice personnel, a difference from some other sentencing hearings.

To explore issues surrounding the content of VISs, we relied on a thematic content analysis of the VISs presented at Nassar's sentencing. The analysis generates both quantitative and qualitative information, focusing on such questions as why a victim chose to present a VIS, which audiences the victim was addressing, the types of harms the victim suffered, and the meaning of the opportunity to present a VIS. With those findings in hand, we return to the core question about VISs: Do they promote justice?

THE VICTIMS AT NASSAR'S SENTENCING

The data set here comprises 168 victim impact statements by direct and indirect sex abuse victims of Larry Nassar (or, in some cases, by their representatives). Our specific interest in the case is victim participation in the sentencing proceeding.

Some brief background about the case will provide helpful context. From 1996 through 2016,

Nassar served as the team doctor for the U.S. Women's National Gymnastics Team, and also as a physician at Michigan State University. These roles gave him access to hundreds of girls and young women—dozens of whom he sexually abused over many years. And yet, even though multiple reports of Nassar's abuse reached authorities, the reports were not taken seriously.

Eventually, on September 12, 2016, the *Indianapolis Star* published a bombshell article detailing Nassar's abuse of two athletes. The article was followed by numerous other complaints of Nassar's sexual abuse, triggering multiple investigations and legal proceedings. For example, Nassar was charged with federal child pornography crimes and received a federal sentence of 60 years in prison.

Of particular interest here, Nassar was also charged with state law sex abuse crimes in Ingham County, Michigan. Ultimately, in November 2017, Nassar pleaded guilty to seven counts of sexual misconduct, meaning that no criminal trial would be held and the victims did not have to testify at any trial. Following his guilty pleas, in January 2018, Judge Rosemarie Aquilina held a sentencing hearing. The minimum sentence was 25 to 40 years in prison. Under Michigan law, the victims were entitled to present VISs. Judge Aquilina decided to allow every Nassar victim who chose to do so to present a VIS.

Initially, it was expected that about 80 individuals would speak. Other victims joined after the first victims began delivering their statements—which were nationally televised. Eventually, 168 victims came forward to provide VISs, either in person or through other means, including two victims who were overseas and sent video VISs. To provide all those who wanted to speak an opportunity to be heard, Judge Aquilina set special sessions. Ultimately, over seven days, 106 primary victims, 23 indirect victims (e.g., parents, siblings, partners), and 39 representatives of victims (e.g., victim advocates and family members speaking for the victims) submitted statements conveying the harms the victims suffered.

About a quarter (24 percent) of the women who presented VISs stated that they had reported suspected sexual abuse to USA Gymnastics or Michigan State. But their complaints were not taken seriously. In a few cases, the victims complained to their parents, but the parents also did not believe them. The VISs thus included descriptions of harm inflicted not only by Nassar but also by his enablers and those who questioned the victims' reports of abuse.

“
Eventually,
168 victims
came forward
to provide VISs,
either in person
or through
other means,
including two
victims who
were overseas
and sent
video VISs.”

QUANTITATIVE AND QUALITATIVE ANALYSIS OF THE STATEMENTS

Let's turn to the results of our content analysis, examining several areas of interest about VISs.

REASONS FOR SUBMITTING A VIS AND DISCLOSING IDENTITY

One of the primary purposes for allowing victim impact statements is to allow victims to speak and be heard about the harm they suffered from a defendant. Judge Aquilina consistently confirmed these VIS purposes—to speak and be heard—in her comments to the victims, both before and after they delivered their VISs.

We found that the majority (80 percent) of the women who presented VISs decided to participate in Nassar's sentencing when they first learned about this opportunity. Others (20 percent of the presenters) initially did not plan to participate but changed their minds as the hearings unfolded.

Victims disclosed the reasons that prompted them to come forward and deliver a VIS (or the reasons that initially prevented them from doing so). Some victims spoke because they thought it would be healing for them. For these victims, speaking was important because it would help them regain agency by preventing the abuser from controlling them. For others, the decision whether to speak depended on how doing so would affect them or their personal or professional lives. Still others mentioned that they needed to deliver a VIS to speak on behalf of other women whom Nassar abused but who, for various reasons, chose not to speak.

Kyle Stephens was the first victim to speak at the sentencing. She said that “[t]his process has been horrific, but surprisingly therapeutic. I am addressing you [the judge] publicly today as a final step and statement to myself that I have nothing to be ashamed of.” The next victim who spoke (a 17-year-old who was assaulted at the age of 9) thanked the judge for the opportunity “to tell you how Larry Nassar has hurt me and the effect that this has had on my life.”

The victims who changed their minds in favor of presenting a VIS most often listed their reasons as being inspired by other victims, wishing to support other victims, or overcoming the shame of being a victim. Some women observed Judge Aquilina, either in court or on livestream, and decided to come forward based on the empowering atmosphere created by the judge and their “sister survivors.”

More than two-thirds (69 percent) of the presenters used their real name when delivering (or requesting to deliver) a VIS, while almost a quarter (23 percent) used a pseudonym. The remainder (8 percent) used either initials, an alphabetical letter, a number, or other pseudonymous forms of identification. Yet, when it came time to deliver the VIS, one-fifth (20 percent) of those who had initially wished to remain anonymous decided to use their real name—feeling empowered by the positive atmosphere.

Some victims, however, decided to remain anonymous for reasons such as preserving a favorable image, a desire not to be known as a Nassar victim, or avoiding possible detrimental effects on their lives. For others, the fear of being stigmatized and having the victimization interfere with their reputation or professional standing made them reluctant to reveal their identities.

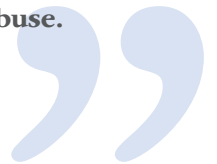
THE LENGTH, STRUCTURE, AND MANNER OF PRESENTING THE VISs

The primary and indirect victims (and their representatives) presented their victim impact statements orally, commonly by reading a prepared written statement. Most presented in person, while a few presented via video. The VISs varied in length, ranging between 137 and 6,365 words, with a mean of 1,227 and a median of 969 words. As a result, the VIS did not take long to present. For example, if we assume that the victims spoke at a standard speed of about 130 words per minute, then the median time for presenting a VIS was around eight minutes.

Three-quarters (75 percent) of the presenters were accompanied by a support person, either a parent, sibling, intimate partner, or friend. In 14 percent of the cases, the direct victims were unable or unwilling to present the VIS in open court because it was too painful or difficult, leading to someone else's presenting the VIS in their name. In a few cases, the victim stood by the presenting representative's side.

Almost two-thirds (64 percent) of the primary victims and a third (32 percent) of the indirect victims began their presentations by showing their (or the direct victim's) picture at the time they were victimized. Many employed more than one visual aid to allow the court and the audience to appreciate the young age at which they suffered sexual abuse. The victims (or their representatives) then went on to compare their lives before and after the abuse. They described how they met Nassar, their interactions with him, his sexual abuse, its impact on them, and

The VISs thus included descriptions of harm inflicted not only by Nassar but also by his enablers and those who questioned the victims' reports of abuse.



(in some cases) their views about what punishment Nassar deserved. Several primary and indirect victims also expressed their anger toward the institutions that had enabled Nassar's sexual abuse.

THE CRIMES AND THEIR HARMFUL EFFECTS

The overwhelming majority of the direct victims (89 percent) described different harms from Nassar's crimes, both short- and long-term, to them and (often) to their families. The VISs commonly depicted young, happy, and engaged girls who were trying their best to make it in the world of elite sports or gymnastics before they met Nassar. Regardless of whether they described themselves as confident in their athletic ability or insecure about reaching the top, their VISs explained how meeting Nassar harmed them.

One victim described the first time Nassar sexually assaulted her: "It is not something easily forgotten, the intense sense of terror, anxiety, and disbelief [that] came washing over me. I lay there in pain unable to speak, staring blankly at the wall, desperately searching for a way to escape." Another victim explained, "Treatment after treatment with Nassar, I closed my eyes tight, I held my breath, and I wanted to puke. My stomach pierced me with pain."

Nassar's abuse led to tears, stress, anxiety, panic attacks, sleepless nights, guilt, and, for some, self-harm. Victims described the harm they sustained at Nassar's hands in various ways, such as damage that "diminished my self-esteem, increased feelings of shame, humiliation, embarrassment, powerlessness, guilt," including "guilt that I didn't prevent all the other girls who followed me from being abused by you" and anger that is still felt today. Another talked

about Nassar's "treatment" as a "moment of terror and confusion."

Many victims described Nassar's grooming tactics that preceded the sexual abuse. The tactics included feigning friendship, cultivating trust, and offering gifts. Victims detailed Nassar showing personal interest in them, taking an interest in their lives and daily activities, and sending messages with compliments on social media.

An important component of the harm the victims suffered was a strong sense of betrayal by Nassar. But the victims also felt betrayed by institutions that were supposed to protect them—a much deeper sense of betrayal.

THE AUDIENCE FOR THE VIS

The sentencing hearings provided the victims, indirect victims, and victim representatives an opportunity to speak. But to whom were they speaking?

Addressing the Defendant

In delivering their VISs, the majority of the victims—three-quarters (76 percent) of the primary victims and about two-thirds (65 percent) of the indirect victims—chose to address Nassar directly. In some cases, the victims asked for and received permission from the judge to address him directly. In other cases, the victim simply began speaking to Nassar.

So far as can be determined from the transcripts, the reasons the victims chose to address Nassar varied. Most wanted to convey to him their feelings about the abuse, frustration over the long time it took to bring him to justice, and relief that he was finally being held accountable for his crimes. The victims appeared to be proud of the individual and collective efforts they



made to expose his abuse and obtain his conviction. They wanted to address him directly and bring to light what was previously hidden.

Many of those who asked to speak to Nassar raised the issue of forgiveness, emphasizing that the decision to forgive was theirs to make from an empowered position. Addressing Nassar was also an opportunity for victims to strengthen their own position while lowering his—a phenomenon that has been observed in other cases.

Addressing the Enablers

Nassar's victims also addressed their VISs to the institutions that enabled Nassar's crimes, criticizing their failure to respond to reports of abuse. The first victim who provided her VIS criticized Michigan State University (MSU): "[The Michigan State Police Department] handled it beautifully, but MSU officials were a different story, because their response from Dean William Strampel was to send an e-mail to [Nassar] that day [that] told him, quote, 'Good luck, I am on your side.'"

Some victims considered the entire chain of command in the organizations to be responsible. Other victims also addressed specific agents within these organizations, particularly trainers who failed to protect them. Victims expressed their anger, dismay, and frustration at the organizations that appeared to stay silent regarding their responsibility for enabling the abuse.

Addressing the Judge

More than three-quarters of the direct victims (78 percent) addressed the judge in their VIS, compared to 52 percent of the indirect victims and 58 percent of the representatives. Only a few victims addressed the judge concerning the sentence—an unsurprising fact, as Nassar had already been effectively sentenced to life in prison. Almost half of the victims (44 percent) expressed appreciation to the judge for the way she handled the hearing and her empowering words.

Most of the victims (92 percent) also essentially acknowledged that the sisterhood they experienced with fellow victims helped them in delivering their VIS. Several victims also referred to "an army of survivors," who helped to take down Nassar.

THE VIS AS AN EMPOWERING AND THERAPEUTIC TOOL

Both direct and indirect victims felt that making a statement—together with the judge's response—was empowering and provided them some healing. Compared to past complaints to authorities, which

had been ignored, this time the experience was different. The victims highly appreciated the opportunity to be heard and felt that they finally had a voice.

Identifying and demanding accountability for Nassar's enablers were also part of the healing process. Almost half of the victims (42 percent) specifically mentioned the therapeutic or healing value of delivering the VIS. For example, one victim thanked the court "for allowing me an opportunity to speak my thoughts and heal my heart." Another victim said "[w]hile I came to the stand as a victim, I leave as a victor because you do not have the authority anymore and because I am one of the many women who are helping to put you behind bars for the countless crimes that you've committed."

To sum up, the VISs contained repeated references to the healing power of the opportunity to deliver a statement.

THE DESIRABILITY OF VICTIM IMPACT STATEMENTS

Having set out our findings about victim impact statements in a real-world criminal case, we can now turn to what these findings tell us about the desirability of VISs more broadly. Our findings support the arguments conventionally made in support of VISs.

PROVIDING INFORMATION TO THE SENTENCER

One of the important rationales for allowing VISs is to provide information to the sentencer, typically (as in the Nassar case) to a judge. This has often been described as the "informational rationale" for VISs.

Our analysis of the Nassar VISs supports the informational rationale. As discussed, most of the VISs described Nassar's sexual abuse, his grooming of the victims, and the manipulative tactics Nassar employed to hide his abuse. Almost all of the victims (89 percent) described how Nassar had harmed them. Many of the victims discussed his sophisticated approach to concealing his crimes. Many others discussed the sense of betrayal that Nassar caused. Still others discussed the "secondary victimization" that they suffered from being caught up in the criminal justice process.

This information would be helpful to a sentencer, as it described the harm from Nassar's crime—a relevant factor at sentencing. This information also showed Nassar's premeditation and sophistication

Judge Aquilina consistently confirmed these VIS purposes—to speak and be heard—in her comments to the victims, both before and after they delivered their VISs.



in perpetrating and concealing his crimes. And it revealed how Nassar abused his position of trust and took advantage of vulnerable victims, as well as unsuspecting fellow physicians. Here again, these facts are all relevant to sentencing.

Sometimes critics of the VIS argue that the statements divert attention away from a defendant's culpability. But even if the critics were correct that a defendant's culpability is the only valid basis for punishment, that premise would still not justify excluding VISs. As the Nassar impact statements make clear, VISs do not solely relate to the after-the-fact impact of crimes on victims. Instead, in describing how the crime was committed (e.g., whether the crime was sophisticated and involved deliberate concealment), the VISs shed light on a defendant's blameworthiness.

But in any event, the critics' starting premise—that culpability is generally the be-all and end-all of punishment—is incorrect. The argument assumes that a criminal sentence must rest entirely on retributive grounds linked to culpability. In fact, it is well settled that a criminal sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. Punishment based on these justifications does not always turn on a defendant's culpability. For example, a state might decide to increase penalties for gun crimes, not because defendants have suddenly become more culpable but rather because the harms from such crimes have become more apparent, necessitating harsher sentences for deterrence. And, as Professor Tyrone Kirchengast has noted, “courts are increasingly using VIS . . . as evidence of general harm to victims and the community in order to determine the extent to which general and specific deterrence and denunciation ought to inform the determination of offence seriousness and formulation of a proportionate sentence.”

CREATING THERAPEUTIC BENEFITS FOR THE VICTIM

Another key rationale for allowing victim impact statements is that they serve expressive and communicative functions that can produce therapeutic benefits for victims. The argument supporting this conclusion is straightforward. As one of us (Erez) has explained at length, “[p]roviding input for VIS also helps victims to cope with the victimization and the criminal justice experience. Many victims who filled out a VIS claimed that they felt relieved or satisfied after providing the information.” Interestingly, while much of the debate

about VISs has swirled around their instrumental usefulness (as discussed in the previous section), victims more frequently cite expressive and communicative reasons for wanting to deliver a VIS.

A well-developed theory underlies the therapeutic rationale for VISs. Therapeutic jurisprudence—or “TJ”—is based on the idea that participation in criminal cases can, if structured properly, have therapeutic benefits. Under this conception, as Professors Tali Gal and Ruthy Lowenstein Lazar have explained, TJ “highlights the need and desire of victims and their remaining relatives to be heard, respected, and acknowledged—even when the eventual outcome is not influenced by their statement.” The basic insight, as explained by Professor Jayne Barnard, is that VISs can empower victims by helping them “regain a sense of dignity and respect rather than feeling powerless and ashamed.”

Our findings support this therapeutic rationale for a VIS—many of the Nassar victims referred to the healing qualities of delivering a VIS. One interesting feature we found in the Nassar VISs was several examples of guardians for minors requesting that the judge allow their children to deliver a VIS—and the judge finding it was in the “best interests” of the child victims to speak. This provides further support for the conclusion that delivering a VIS—for those who choose to do so—can have therapeutic qualities.

These victim acknowledgments about the healing effects of delivering a VIS came during the sentencing hearing itself. Did the victims' perceptions change afterward, when they had more time to reflect? In preparing this article, we did not seek to interview Nassar's victims. But we have attempted to find accounts from other sources about what the victims ultimately thought about the process. The accounts we have located paint a uniformly positive picture about having the opportunity to speak. Victims reported that the process was therapeutic and even cathartic (although, obviously, many victims were critical of Nassar's enablers and found preparing for the process difficult).

In deciding whether the Nassar sentencing hearing was therapeutic, it is also noteworthy that about 80 of Nassar's victims originally planned to deliver an in-court victim impact statement. But then, as the highly publicized process moved forward, more victims saw exactly what was involved and decided to participate.

“The sentencing hearings provided the victims, indirect victims, and victim representatives an opportunity to speak. But to whom were they speaking?”



Finally, looking back on the hearings, Judge Aquilina concluded that, as the victims spoke, “I literally watched them grow to ten feet, and they got their power back. And it was so transformational even for me. . . . They know they mattered, and then when they spoke[,] [t]hey were just transformed into butterflies.”

One concern sometimes raised about VISs—even by those who concede their therapeutic qualities—is the administrative burdens associated with allowing victims to speak. Our study suggests that these burdens are insignificant. The average time for a Nassar victim to deliver a VIS was very short—about 10 minutes or less per victim.

To be sure, in the Nassar case, an unusually large number of victims spoke. But even in such a mass victim case, the victims could all be heard within one week, and Judge Aquilina’s docket did not appear to be overwhelmed.

EXPLAINING THE CRIME’S HARM TO THE DEFENDANT

Victim impact statements are also justified on the grounds that they can help explain the crime’s harm to the defendant, which might be an important starting point for the defendant’s rehabilitation. This argument is unrelated to the ultimate prison (or other) sentence a judge imposes but rather (as the U.S. Court of Appeals for the Ninth Circuit has explained) rests on the consequences of a victim’s looking the “defendant in the eye and let[ting] him know the suffering his misconduct has caused.” Thus, if a VIS helps a defendant understand and gain empathy for the victim, it may serve as the first step toward his effective rehabilitation.

As discussed above, about three-quarters (76 percent) of the primary victims and about two-thirds (65 percent) of the indirect victims

addressed Nassar. These are large percentages—a clear majority of the VISs in our study—and suggest that the potential positive effects of a victim’s addressing a defendant are an important area for future research.

While we are skeptical of relying on what Nassar himself said about the experience, it is interesting that he acknowledged the effect of hearing from victims. In a statement to the court, Nassar said that “[t]he words expressed by everyone that has spoken, including the parents, have impacted me to . . . my innermost core.”

SERVING A PUBLIC EDUCATIVE FUNCTION

Beyond educating defendants about the harm their crime inflicted, victim impact statements can also serve to educate the public. The Nassar sentencing hearing serves as a quintessential example of the VIS’s public educative function. The hearing spotlighted the crime of sexual assault and the role of those who enabled Nassar’s assaults. As CNN recounted shortly after the Nassar hearing, the “stunning victim impact statements from the ‘army of survivors’ have focused sharply critical attention on the systems of power that protected Nassar for so long.”

One of the most positive effects of the Nassar VISs is that the statements encouraged other sex abuse victims harmed by other abusers to come forward. Several months after the sentencing hearing, Judge Aquilina recounted that “[w]omen have contacted me and said I feel like those girls were telling my story verbatim, and when you spoke to them and you believed them, your words are healing me.” Judge Aquilina said that women had told her that they recorded her remarks, “and when they need a boost they listen to my words, which I’m grateful for.”

Nassar's sentencing also spotlighted the role of those who enabled Nassar's long-running sexual abuse. As the hearing concluded, CNN reported that "[t]hrough the sentencing marks the end of Nassar's time in the public eye, it has focused critical attention on USA Gymnastics, the US Olympic Committee and Michigan State University, the institutions that employed Nassar for about two decades." Indeed, during the first week of the sentencing hearing, USA Gymnastics cut ties with the training facility where Nassar abused some of his victims, and three leaders of the board resigned under intense public pressure. The cause-and-effect seems clear: "As one brave, young gymnast after another took the podium to lambaste serial molester and former gymnastic physician Larry Nassar, the national governing body for the sport announced . . . that its top executives were stepping down."

[E]ven if the critics were correct that a defendant's culpability is the only valid basis for punishment, that premise would still not justify excluding VISs.

In addition, shortly after the start of Nassar's victims' testimony, two top MSU officials—President Lou Anna Simon and Athletic Director Mark Hollis—decided to leave their posts. And amazingly, one Nassar victim said during her statement that MSU was still billing her mother for the medical appointments where Nassar sexually assaulted her. "Are you listening, MSU? I can't hear you. Are you listening?" she pointedly asked. Apparently MSU was listening because shortly after that the school announced that Nassar's patients with outstanding bills would not be billed, and the university was reviewing whether to offer refunds.

Similarly, as the victims spoke, related congressional legislation suddenly started to move toward approval. The bill—the Protect Young Victims from Sexual Abuse and Safe Sport Authorization Act—was first proposed in March 2017 and passed the Senate in November 2017. But it was while the Nassar victims' testimony was wrapping up in Michigan that a companion bill overwhelmingly passed the House on January 29, 2018, and the next day, the Senate approved the final version unanimously by voice vote. On February 14, 2018—about two weeks after the Nassar sentencing hearing concluded—President Donald Trump signed the bill into law.

All of this fallout from the Nassar VISs suggests that the hearing played an important public educative function.

IMPROVING THE PERCEIVED FAIRNESS OF SENTENCING

Another justification for victim impact statements is that they help to improve the fairness of the

process—as perceived both by the public and by victims. Given the structure of contemporary criminal justice systems, fairness requires victim participation. And, as one court has explained, recent victims' rights enactments "recogniz[e] that the sentencing process cannot be reduced to a two-dimensional, prosecution-versus-defendant contest. Instead, [these laws treat] sentencing as involving a third dimension—fairness to victims—requiring that they be 'reasonably heard' at sentencing." As Professor Douglas Beloof has explicated, it is no longer appropriate to evaluate criminal justice issues solely in terms of the venerable "due process" or "crime control" models. Instead, numerous state constitutional amendments, as well as federal and state statutes, now recognize that crime victims should be given the opportunity to participate in criminal proceedings, including sentencing proceedings.

The argument here is not that, merely because the defendant gets to allocute at sentencing, the victim should do so as well. Such a claim might be subject to the rejoinder that the criminal justice system sometimes gives some rights to defendants alone. Rather, the point is that the defendant speaks at sentencing because this opportunity is critical to the proceeding's legitimacy. We allow defendants to allocute at sentencing, explains Professor Mary Giannini, to "assure the appearance of justice and to provide a ceremonial ritual at which society pronounces its judgment." By the same token, allowing victims the same opportunity helps assure perceived fairness. In other words, victim impact evidence is appropriate not merely because defendants have that opportunity; rather, it is appropriate for the *same reason* that defendants have the opportunity.

Of course, determining what procedures contribute to "fairness" is arguably a subjective exercise. But allowing the victims to speak is a recognized part of federal and state criminal justice systems all across this country and is also expanding to be part of criminal procedures in many other countries around the world. A point often overlooked by critics is that VISs are not some kind of American exceptionalism. In fact, many countries have criminal procedures that allow victims to make victim impact statements or that provide a functionally equivalent opportunity to participate. And an expanding role for victims appears to be a common, contemporary feature of other international tribunals.



To be sure, to some degree, our argument here is circular: We are justifying the use of victim impact statements in a Michigan court proceeding because the Michigan court procedures allowed them—just as many other states and countries would allow them. But this argument is circular only to a degree. Through democratic legislative processes, in 1985 Michigan passed a crime victims’ rights act, extending victims the right to deliver a VIS. Then, three years later, Michigan voters overwhelmingly amended the Michigan Constitution, enshrining victims’ rights in Michigan’s organic law and specifically protecting a victim’s right “to make a statement to the court at sentencing.” To be perceived as a fair process, a criminal justice system must align with the public’s views as to what is a fair process. To our knowledge, in Michigan there has never been an organized effort to change those enactments. Now, more than three decades later, surely the burden of demonstrating that Michigan’s VIS provision fails to improve the perceived fairness in the process rests on its critics, not its proponents.

* * * *

Scholars have debated the value of victim impact statements for victims and the criminal justice system, examining the ways VISs give voice to victims at sentencing. Our study reviews a data set of 168 VISs delivered by victims (and indirect victims) of crimes of sexual abuse by Larry Nassar. Capitalizing on the fact that these VISs were all delivered by victims of roughly the same crime committed by the same defendant, this article explores and confirms what has aptly been described as the “heterogeneity” of victim impact statements.

Consistent with earlier research, we find that the VISs delivered by Nassar’s victims were varied, reflecting the individualization of the victims, the individualized harms Nassar inflicted, and the different ways in which the victims suffered throughout their ordeals. Despite this heterogeneity, however, many commonalities stood out. Among other results, we found that VISs were relatively short in length (typically under 10 minutes long). Even so, the VISs commonly provided substantial information about the direct harm that Nassar’s victims suffered, as well as harms suffered indirectly by those connected to his victims by family or other ties.

Our study’s findings generally support allowing victims the opportunity to present VISs at sentencing. While the Nassar VISs varied in detail, they commonly contained valuable information relevant to sentencing, which was properly provided to a sentencing judge. The VISs also contained significant evidence of therapeutic value to the victims in having the option of presenting a VIS. Substantial grounds also exist for believing that a VIS might have educative benefits. A VIS might help a defendant’s efforts toward rehabilitation. And a VIS might perform broader educative functions, such as informing the public about the harms of sexual abuse and the culpability of institutions that enable it.

VISs are currently permitted not only in Michigan but also in the 49 other states and the federal system, as well as in an expanding number of countries around the world. This widespread use of VISs reflects the importance of victims’ voices being heard for multiple purposes in criminal justice. Our study provides grounds for policy makers to continue supporting the use of the VIS. ■



United States Patent

AUTOMATIC TELEPHONE

INVENTOR
MANN

Fig.

Inventor:

Inventor

PATENTED

998,681.

J. R. P.
PERFORATING

Patented July 20, 1915

John D. Morgan

DEPLOYING OUR SECRET WEAPON

DRAWING MORE WOMEN AND UNDERREPRESENTED MINORITIES INTO INVENTING AND PATENTING WILL SERVE AMERICAN INTERESTS, INCLUDING IN GLOBAL COMPETITIVENESS.

By Margo A. Bagley

I consider it a privilege to deliver the Nies Lecture on Intellectual Property, named in honor of the late Helen Wilson Nies, the great jurist of the U.S. Court of Appeals for the Federal Circuit, and am grateful to everyone at Marquette Law School who was involved in the invitation and this visit. My topic—the importance of innovator diversity and, indeed, the imperative of such diversity for global competitiveness—involves a logical step in my academic and personal journey.

Over time, I have increasingly infused my scholarship with a strong *justice* theme, influenced by both my faith and my experiences as an African American female. Whether a topic grounded in patents, for example, relates to access to medicines, new biotech inventions, or benefit-sharing

obligations for Indigenous peoples and local communities, I often find myself supporting the position of the marginalized. I seek justice and fairness for those who may not be able themselves to effectively articulate their compelling narratives in various forms.

Let me begin by recalling some features of patents that are pertinent to my remarks. Patents, most simply, are rights granted by the government to one entity to exclude others from making, using, selling, or importing into the United States an invention for a term of time (currently about 20 years) from application filing. The law also permits one to buy, sell, bequeath, or otherwise dispose of patents, like other personal property. Yet patent rights are territorial; there is no global patent. So an inventor wanting protection in multiple places will need to seek patents in various countries or regions.

In the United States, Congress's authority to create a patent system stems from the Constitution: Article I, Section 8, Clause 8 authorizes the creation of exclusive rights, for limited times, for authors and inventors in their writings and discoveries. In the words of Abraham Lincoln in 1859—the only president to obtain a patent on an invention—patents are designed to add “the fuel of interest to the fire of genius.”

The U.S. government historically has pushed a fairly pro-patentee agenda (certainly in international negotiations, even if not always at home), which is well-reflected in a seminal article by Heinrich Kronstein and Irene Till in 1947. They noted:

This American view toward patents . . . stemmed from an actual faith that . . . patents under the control of private owners would not be subjected to abuse. The files of the United States Patent Office contain a constant reiteration of this theme; they reveal an absolute faith in the beneficial effects of an uncontrolled patent system. It was precisely this freedom, it was believed, which accounted for the rapid technological advance in the United States.

Thus, our leading the world in patent filings during the latter twentieth century was a normal, expected outcome. We did see a flip in leadership going to Japan for a time. However, it was widely perceived that Japan's approach, in many cases, was to patent fairly incremental changes and create patent portfolios *around* strong American patent families, as opposed to coming up with numerous pathbreaking inventions.

As the American tech industry started to take off in the 1970s, the U.S. government began pushing other countries more forcefully to adopt stronger IP protections, particularly for patents and copyrights. In recent United States Patent and Trademark Office (USPTO) strategic plans and United States Trade Representative (USTR) reports, we see a focus on expanding

the nation's international leadership on intellectual property and pressuring other countries to ensure adequate protection of intellectual property rights. Why?

The concern, as eloquently stated by Professor J. Thomas McCarthy in 1995, was that Americans should care if other countries do not protect IP covering technical and entertainment information because, otherwise, we have very little to sell to the rest of the world. He pointed to the replacement of U.S. Steel by Disney on the Dow Jones Index as a sign of the growing importance of intellectual property to the U.S. economy.

Here is how the U.S. Chamber of Commerce puts it today:

America's IP is worth \$6.6 trillion, more than the nominal GDP of any country in the world. IP-intensive industries account for over 1/3 . . . of total US GDP . . . The direct and indirect economic impacts of innovation are overwhelming, accounting for more than 40% of US economic growth and employment.

Even if the numbers are somewhat inflated, they make clear that intellectual property is important to the American economy.

Professor McCarthy also noted the movement abroad of significant amounts of manufacturing to China, further supporting the idea that we needed to ensure global protection for what we were still good at: information products and entertainment. Yet he, and seemingly others, may not have fully considered the ramifications of “copiers” eventually moving from imitation to innovation, spurred on by U.S. protectionist interests.

Responding to China with more women and minorities in IP

China has long been an American concern due to rampant copying and counterfeiting activity, lax intellectual property laws, and low damages awards for infringement. The 2013 and 2019 reports of the Commission on the Theft of American Intellectual Property declared that “China is the world's

largest source of IP theft” and that China is “the most active and persistent perpetrator of economic espionage.” Of course, as the two largest economies, with each striving for dominance, China and the United States have a complex relationship, and the political, military, and economic tensions cannot be disentangled from the intellectual property challenges.

Specific American reactions to China's intellectual property practices include the following: In 1989, both countries entered into a memorandum of understanding for China to create a copyright law and to protect software from rampant counterfeiting activity. This memorandum was of particular importance as the United States had recently begun to treat software as copyrightable. Then, in 2007, the U.S. government pursued a partially successful World Trade Organization (WTO) action against China's intellectual property policies.

Intellectual property has been rapidly increasing in importance in China, and China's Indigenous Innovation Policy includes innovation through coopting and copying technology developed elsewhere—that is, forced technology transfer, including through the “Made in China 2025” program, whose goal, according to one scholar (Kal Raustiala), is to have “China dominate technology markets by 2049.”

For many years, China consistently has been on the USTR's “Section 301 priority watchlist” as a country that does not adequately protect intellectual property. In fact, according to a 2011 report from the International Trade Commission, China's intellectual property rights infringement cost the U.S. economy approximately \$48 billion in 2009. The report stated that if China complied with its current international obligations to protect and enforce intellectual property rights, 2.1 million jobs could be created in the United States, with “[t]he most direct jobs impact in high-tech, innovative industries.”

It is not surprising that China is not concerned about creating jobs in the United States: China wants to create jobs in China. And, with pressure from the United States and others, China has evolved to view intellectual property as a tool for economic growth and geopolitical dominance.

When I initially saw China's 2011–2020 intellectual property strategy plan, I almost panicked. The plan called for 2 million patent applications to be filed by Chinese citizens or entities by 2015. At that time, there probably were not 2 million total applications filed globally—in all countries combined. I was concerned that China would simply overwhelm patent examining systems worldwide. Thankfully, my worries did not come to fruition, as China reached its goal without breaking the system. Yet that does not mean there were no untoward consequences.

When foreigners obtain patents in a country, that generally leads to money flowing out of the country to the pockets of the foreign entities. Constantine Vaitsos described it well in 1976: “[T]he monopoly privileges granted through patents have, among other repercussions, an international, rather than simply a domestic, income distribution effect. They also have, as a result of income flows across national boundaries, balance of payments implications.” Historically, this outward flow has often meant wealth transfer from low- and middle-income countries to higher-income countries whose inventors are obtaining patents abroad. For a high-income country such as the United States,

the balance between foreign and resident patenting for many years has been closer to 50/50, with a slight majority for domestic patent applicants.

But then something strange started happening: Chinese citizens began filing patent applications at an unheard-of rate. After a few years, not only did we see more applications filed in the USPTO by foreign applicants than domestic applicants, but also China's patent office overtook the USPTO as the patent office receiving the most patent applications worldwide, a title it shows no sign of relinquishing any time soon.

In 2019, Chinese entities were the fourth-largest group using the U.S. patent system, dramatically increasing their filings by 93 percent over the prior 10 years. This increase has largely been attributed to China's patent subsidy program and the national and provincial-level financial support provided to putative inventors. For several years, Chinese patent applicants could receive a wide variety of incentives for developing inventions and filing for patent protection. Incentives could be monetary, such as payment of filing fees and payments to inventors, and non-monetary, including reduced prison sentences for convicted criminals. Not surprisingly, these policy interventions opened a floodgate of patent application filings by Chinese residents.

So what is the United States to do in response? Fight back and deploy our secret weapon: women and underrepresented minority group members who can be drawn into the inventor ranks. Our nation is now attempting to activate and deploy

[W]ith pressure from the United States and others, China has evolved to view intellectual property as a tool for economic growth and geopolitical dominance.

that weapon in the battle for innovation supremacy.

The problem is that these group members face historical and continuing barriers to patenting from a variety of causes and in varying forms. The U.S. government seeks to identify and address those causes, with the recent draft of the strategic plan for the USPTO having as its primary goal to “[d]rive inclusive U.S. innovation and global competitiveness.”

The SUCCESS Act (Study of Underrepresented Classes Chasing Engineering and Science Success Act of 2018) required the USPTO, in conjunction with the Small Business Administration, to prepare a study on the number of patents applied for by women, veterans, and minorities; this would use publicly available data, as the USPTO does not collect demographic data. The resulting USPTO study reported that innovation in the United States is highly concentrated, with vast swaths of our population not fully participating. A different study in 2018, led by Alex Bell, of more than one million inventor-patentees shows that, among women, minorities, and individuals from low-income families, there are many “lost Einsteins”—i.e., high-ability

individuals who would have contributed valuable inventions had they been exposed to invention and innovation as children. The findings indicate that increasing the rate of invention by members of these underrepresented groups could quadruple the total number of inventor-patentees in America.

Historic barriers to expanding the ranks of patent owners

Many of the barriers to inventing or patenting for women and for underrepresented minorities in America are not new; they stem from long-extant discriminatory stereotypes that serve to hinder progress for individuals and the country as a whole. The 1857 *Dred Scott* decision that Blacks were not citizens was the basis of a U.S. attorney general opinion, the next year, concluding that Blacks also could not be inventors on patents and that the persons who enslaved them could not claim ownership of the enslaved person's invention via the patent system. The 1858 matter involved the invention of "an enslaved African American man named Ned [who had] invented an improved 'double Cotton Scraper, and two plows.'" The novel and valuable machine could speed up the process of preparing fields for planting.

Although the legal effect of the *Invention of a Slave* decision was short-lived, its impact in facilitating a belief that African Americans could not invent was and remains detrimental. In her brilliant article, "Race and Selective Legal Memory: Reflections on *Invention of a Slave*," Professor Kara Swanson notes how Black activists, over many decades, have sought to bring to light the inventions of Black and brown people in the face of a persistent myth of innovative and intellectual inferiority.

Citing a Black patent examiner, Henry Baker, who collected evidence of patents granted to Blacks, Professor Swanson wrote: "In 1913, Baker noted that although his list of nearly 400

African American patentees sat in a book on the shelves of the Library of Congress, a candidate for Congress in Maryland, fighting a 'hotly contested' election, had recently asserted 'that the colored race should be denied the right to vote because . . . "no one of the race had ever yet reached the dignity of an inventor.'" This trope was used to justify white supremacy and to support, as proof of Black inferiority, the assertion that African Americans could not invent, despite voluminous evidence to the contrary. Swanson also noted the lofty symbolism of patents in this country as an indicator of American might and exceptionalism and even of citizenship, such that the results of being excluded from or having reduced access to the benefits accruing from patents can be profound.

The USPTO's efforts in this area are not just diversity for diversity's sake. Real national competitiveness issues are driving this push, in addition to equity, inclusion, and social justice concerns. A 2015 McKinsey report on 366 public companies found that those in the top quartile for ethnic and racial diversity in management were 35 percent more likely to have financial returns above their industry mean and that those in the top quartile for gender diversity were 15 percent more likely to have returns above their industry mean. In a 2012 global analysis of 2,400 companies conducted by Credit Suisse, organizations with at least one female board member yielded a higher return on equity and higher net-income growth than those without any women on the board.

But does that matter for *inventing*? Yes. The data clearly show that R&D follows power—or at least money. For example, companies direct their efforts to diseases that affect wealthy people, even though more disability-adjusted life years are lost to infectious diseases than to cancers. Similarly, we may be underproducing certain inventions because those with the greatest incentive to find solutions are not engaged in innovation.

Overcoming R&D's neglect of women and minorities

There is a long history of neglect of diseases that predominantly impact women. A study of patents from 1976 to 2010, led by Rem Koning at Harvard Business School, found that patents from all-female teams were more likely than those from all-male teams to focus on women's health. Such patents also were more likely to identify differential side effects and treatments that work better for women. Moreover, male inventors were more likely to generate patents that addressed topics like "erectile" or "prostate" than "menopause" or "cervix." Male inventors, according to the study, "also tended to target diseases and conditions like Parkinson's and sleep apnea that disproportionately affect men." Koning notes that the "findings highlight how demographic inequities in who gets to invent lead to demographic inequities in who benefits from invention."

Recent work also shows how increasing the number of Black physicians in an area benefits Black patients, and more generally it discloses the benefits of matching minority patients with minority physicians. So the world needs more inventors like Dr. Patricia Bath, a Black woman who invented a laser treatment to remove cataracts, which was inspired by her observation that Black Americans were twice as likely as white Americans to suffer from blindness.

Now, to be clear, this does not mean that women only invent for women or Blacks only invent for Blacks. For example, a librarian helping me gather research for this talk told me of a female inventor who patented a prosthetic testicle for men who need to have one removed for testicular cancer or other reasons. Women are just *more likely* than men to invent solutions to problems that affect women uniquely.

I saw a similar phenomenon on the continent of Africa while lecturing in the Emory Advancing Healthcare Innovation

in Africa (AHIA) program. The AHIA project teamed law and MBA students from the United States with African scientists in a bootcamp for learning innovation commercialization fundamentals. One of the things that struck me was that inventors in other countries also often focus on developing solutions to local, domestic problems. Thus it is important also to support researchers in low- and middle-income countries and to support inventors from underrepresented groups, including veterans.

So all of this is about more than just which country wins the race to have the most patents. The concern is really about who gets to *benefit* from technological developments. It also is about who gets to be seen as intelligent, even as “American,” as Swanson explains. And, of course, who gets to benefit has other implications for our global competitiveness. If we have an undereducated workforce, a sick workforce, those ills will affect productivity and creativity, and there is plenty of evidence that systemic justice deficits contribute to poorer health outcomes, educational outcomes, and more.

A friend recently had to begin kidney dialysis. Through her struggles, I learned that a substantially disproportionate percentage of dialysis patients in the United States are African American or Hispanic, relative to their composition of the U.S. population. It made me wonder if there is an underproduction of innovation in the kidney disease space because of the race of a significant percentage of the population of patients relative to the race of the predominant population of inventors.

For these and many other reasons, we need, as a country, to deploy our secret weapon. As an African American woman, I have interacted with the patent system in many ways—including as an engineer and as a named coinventor on three patents, as a patent attorney obtaining and enforcing patents for clients, and as a patent law professor teaching hundreds of future attorneys about patent law. In each of these areas, I am one of a fairly small number of people who look like me.

Thus, I was thrilled when Professor Colleen Chien, now of the University of California Berkeley School of Law, who is doing pathbreaking and important work with agencies, companies, and firms on piloting rigorous innovator diversity initiatives, invited me to join her in this area of research. We organized a conference in fall 2022 at Santa Clara University, in conjunction with the USPTO and various firms and companies, on Innovator Diversity Pilots—the first conference of its kind. I personally learned so much from our conference, which was packed with creative and compelling “fire starters”—presenters speaking about diversity, equity, and inclusion (DEI) projects that they had already begun, as well as researchers making pitches, including to USPTO Director Kathi Vidal, who was one of our keynote speakers.

One pitch, by Professor Jordana Goodman, now of the Illinois Institute of Technology’s Chicago-Kent College of Law, was based on her research showing that women are less likely to be signatories on documents filed with the USPTO, such as patent

So what is the United States to do in response? Fight back and deploy our secret weapon

applications and responses to office actions, than are men. Partners often sign such documents, but that practice can give a distorted, incomplete, and inaccurate view of who is doing the work and can hinder women as they seek to advance in a firm. Goodman proposed an elegantly simple solution: that the USPTO add an additional line in response documents to allow for more than one person’s signature, for example, on an application cover sheet. A small intervention, but one that can have an outsized impact on the visibility of women in the field of patent law.

What law firms and corporations are doing

There is really no way I can do justice to the various presentations from the conference, but I will provide a sense of some of the highlights that relate particularly to the USPTO, law firms, and corporate initiatives.

First, several USPTO initiatives are an outgrowth of the Council for Inclusive Innovation, whose creation was proposed in the study required by the SUCCESS Act. These initiatives include an internship program for university and community college students, a first-time-filer expedited examination pilot, expansion of free legal services (which tend to support disadvantaged communities), and a community

outreach campaign that leverages the USPTO's expansive network of teleworking patent examiners across the country.

In terms of law firm and corporate initiatives, Caren Ulrich Stacy, CEO of Diversity Lab and a special advisor to the USPTO on DEI issues, developed the "OnRamp Fellowship." Ulrich Stacy had spent decades hiring talent for major firms and noticed that the classic stereotypical criteria of success, such as the prestige of the law school one attended, did not always correlate highly with actual success in practice. She used a "Moneyball approach" to see what factors actually correlated with success, and she developed a pilot program for women returning to the workforce after leaving for several years to have and raise children. For such returners, Ulrich Stacy looked at varying indicators of success and created a formula to calculate the likelihood that they would be successful after a 10 to 20-year hiatus from the practice of law.

Four law firms—Cooley, Baker Botts, Sidley Austin, and Hogan Lovells—piloted one-year fellowships for these women. The pilots were very successful and led to Diversity Lab's OnRamp Fellowship, used by 50+ legal departments and firms, bringing 200+ women lawyers back to legal work, of whom 20 percent have been patent attorneys and 30 percent women of color. Overall, 87 percent of OnRamp Fellowship participants have received and accepted offers of work.

You might have heard of the Mansfield Rule, named after Arabella Mansfield, the first woman admitted to the practice of law in the United States. The idea came from Diversity Lab's 2016 women-in-law hackathon. The Mansfield Rule evolved from a law firm's commitment to interview one woman for every leadership role in every search, to a commitment that 30 percent of candidates considered for leadership, equity partnership, and lateral partnership positions would be women,

We need patent attorneys who "see" diverse inventors and who can relate to their experiences and find value in their innovative solutions . . .

people of color, LGBTQ+ individuals, or individuals with disabilities. "Certification Plus" status is available for those who not only consider diversity in hiring but actually achieve those percentages in their firms/departments.

Participant firms also report data to Diversity Lab at multiple points in the process for transparency purposes. And the program continues to expand and improve. The 2020 certification program added the inclusion of transparent leadership position descriptions and, in 2021, transparent compensation criteria and processes. Interestingly, before the Mansfield Rule, only 12 percent of surveyed firms and legal departments were even tracking diversity. Today, 100 percent of 250 surveyed firms (in the United States, United Kingdom, and Canada) are doing so, as well as 75 legal departments. The certification process is annual, which is for accountability, transitions in leadership, and continued progress. There are monthly knowledge-sharing meetings for participating organizations and a yearly symposium where newly promoted partners from underrepresented groups are introduced to in-house counsel who make outside-counsel hiring decisions.

More and more firms are participating each year, with two-thirds of the current participants joining in the past two years. The results also show upward trends in the diversity of executive teams relative to non-adopter firms. The Orrick firm, for example, went from 38 percent underrepresented members on the executive committee before the Mansfield Rule to 61 percent in its most recent reporting cycle. The firm also went from

19 percent underrepresented practice group leaders to 43 percent, which seems pretty impressive.

Another firm, Schwegman Lundberg & Woessner, created the SLW Academy, motivated in part by the murder of George Floyd, as Minneapolis is the firm's headquarters. The academy aims to increase representation for underrepresented groups in patent law through educational opportunities geared to high school, college, and law students. The firm created a holistic series of free videos and quizzes on patents and other practice success information to educate and equip not only minority candidates but all who choose to avail themselves of the materials. The program also offers the opportunity for earning a certificate of completion and is working on facilitating career connections and ways to further partner and scale with others.

Professor Lateef Mtima of Howard University School of Law piloted a CLE program 20 years ago to expose underrepresented attorneys to cutting-edge issues of intellectual property, to help them connect with people of color in the field, to pique their interest in the area—to help diversify IP. Then, several years later, Mtima decided to expand and create a second day of programming with the same goal but targeted to students. An important element was the inclusion of "micro-scholarships" that would allow students of historically Black colleges and universities (HBCUs) to take unpaid intellectual property internships and still have funds to pay rent and meet their basic needs. This program started with Howard and is now scaling to add four more of the six HBCU law schools.

Professor Mtima also has mentioned the wealth of intellectual property resources available at the Michelson Institute for Intellectual Property, which includes videos, grant opportunities, and more, particularly directed to underrepresented groups. Harrity & Harrity's intellectual property team is also doing pathbreaking work in providing a plethora of diversity-related programs, all advancing under the DEI leadership of Elaine Spector. The firm has also teamed up with "ADAPT.legal" (Advancing Diversity Across Patent Teams) for data analytics and in other areas. One particularly interesting Harrity & Harrity initiative is the Patent Pathways Program, which aims to increase the number of diverse patent practitioners through training, mentoring, and job opportunities.

Jeremiah Chan, head of patents, licensing, and open source at Meta, the parent company of Facebook, describes the ADAPT.legal hub as a clearinghouse of sorts for a variety of innovator diversity piloting initiatives. The idea is that a company, law firm, or government agency wanting to begin a pilot but not knowing where to start can go to ADAPT and get a wealth of ideas based on what others have tried. The Patent Pipeline Program (PPP) is one ADAPT.legal initiative supported by Meta. Started by Braxton Davis, an African American patent attorney, the PPP focuses on helping minorities holding STEM degrees to become patent agents. When Davis joined Meta a few years ago, Chan helped with scaling the program. The program partners with law firms and corporate legal departments to recruit candidates, working primarily with HBCUs, and in the most recent cycle received 230 applications. PPP provides patent training, and firms monitor the training and offer internships. The first cohort of three individuals finished the program, the next cohort of eight are all at top firms or companies, and the pipeline is growing.

One may wonder why anyone should even care about diversity in

the ranks of intellectual property attorneys. I can provide an example from my own experience. Part of the reason I became a patent attorney is my positive experiences with patent attorneys while working at the Procter & Gamble Company. In fact, I might not be a coinventor on a patent on reduced-fat peanut butter today if it were not for a female patent attorney named Tara Rosnell, who saw my name in lab notebooks and other documents and sought me out (after I had moved to a different group in the company), for the patent application she was preparing, to investigate whether I had contributed to the conception of the invention. I have always been grateful for her diligence. We need patent attorneys who "see" diverse inventors and who can relate to their experiences and find value in their innovative solutions—who see them as inventors capable of making inventive contributions. This is not to say that others cannot, but let's increase the odds.

Are there potential barriers to the success of these efforts? Of course. Change often takes time, and if results are not seen quickly, initiatives may die. Alternatively, interest may wane given shifting financial priorities and judicial

decisions. Complacency may set in, or there may be active opposition to DEI initiatives. All of these can stunt or stifle actual, lasting, innovative progress.

I like this quote, which Jeremiah Chan shared, by Arthur Ashe, the great tennis player and humanitarian: "Start where you are. Use what you have. Do what you can." It speaks to people individually, organizations collectively, and the United States as a country. We can start from here and make a brand-new end, expanding our innovation ecosystem diversity and enhancing our global competitiveness.

There are myriad ways that discrimination and bias can combine to profoundly limit inventor participation in the patent process. The utilitarian purpose of patents is to incentivize inventors to invent and disclose, so it makes sense to incentivize as large and as diverse a group as possible in order to maximize the likely output of innovative activity. This incentive is important in terms of our geopolitical aspirations as a country but, hopefully, also because of our democratic commitment to provide opportunities for flourishing and reaching one's potential that are available to all. Thank you. ■



Margo A. Bagley is vice dean and the Asa Griggs Candler Professor of Law at Emory University School of Law. This is a version of the annual Helen Wilson Nies Lecture on Intellectual Property, delivered in April 2023 in Marquette Law School's Lubar Center. The lecture also appears in essay form in the most recent issue of the *Marquette Intellectual Property & Innovation Law Review*.



Of Chameleons and ESG

There is no separating government from private sector structures and incentives. Nowhere is that more clearly seen than in debate over corporate social responsibility.

BY ANN M. LIPTON

At some point, every business law student will read the case of *AP Smith Manufacturing Co. v. Barlow*. The New Jersey Supreme Court was confronted with the question whether the directors of AP Smith Manufacturing were permitted, over the objections of some of the company's stockholders, to cause the company to donate \$1,500 to Princeton University. The court answered that corporate charitable contributions are, in fact, a permissible use of corporate resources. Included among its justifications—in 1953, at the height of the cold war—was this, in part quoting Princeton's president:

[I]f private institutions of higher learning were replaced by governmental institutions our society would be vastly different and private enterprise in other fields would fade out rather promptly. . . . “[D]emocratic society will not long endure if it does not nourish within itself strong centers of non-governmental fountains of knowledge, opinions of all sorts not governmentally or politically originated. If the time comes when all these centers are absorbed into government, then freedom as we know it . . . is at an end.”

In other words, private corporations must advance the public good in order to forestall communism.

On the other side of the ledger, 17 years later, Milton Friedman published his famous essay in the *New York Times*, “The Social Responsibility of Business Is to Increase Its Profits.” His core argument was that if corporate managers were to use shareholder resources to advance the public

good—to “spen[d] someone else’s money for a general social interest”—they would be engaging in “pure and unadulterated socialism.”

Then again, in 2020, the CEO of MSCI, a financial services company, argued that investing with a view to a corporation’s environmental and social performance—ESG investing, as we will discuss—is necessary to “protect capitalism. Otherwise, government intervention is going to come, socialist ideas are going to come.” But three years later, Elon Musk, the CEO of Tesla and owner of the company formerly known as Twitter, said in an interview that investing based on a corporation’s environmental and social performance is “communism rebranded.”

Apparently, then, businesses must protect the system of private enterprise with socially responsible behavior that forestalls government action, *and* they must avoid socially responsible behavior, else they assume governmental functions and ultimately destroy private enterprise.



Ann M. Lipton is associate dean for faculty research and the Michael M. Fleishman Associate Professor in Business Law and Entrepreneurship at Tulane Law School and Tulane University's Murphy Institute. Before entering teaching, she practiced law in New York City and clerked for the Hon. David H. Souter at the Supreme Court of the United States. This is an article form of the Robert F. Boden Lecture, delivered by Professor Lipton in the Lubar Center at Marquette University Law School in September 2023.

As this article will demonstrate, the entire conversation is misleading. Its fundamental error is the assumption that there is any possibility of separating the government from private enterprise. In fact, the government is inextricably linked with private enterprise, encouraging its structure and policing its incentives. There is no getting the government out of the corporation—and nowhere is that seen more clearly than in modern controversies over corporate social responsibility and ESG.

Taming Corporations

The corporate form is a uniquely efficient manner of doing business. A corporation is recognized as an entity independent of its shareholders, employees, and directors, which enables it to hold property in its own name, to sue and be sued, and—unlike the humans associated with it—to live indefinitely. In contrast to the business forms that preceded it, such as the general partnership, investors in corporations are not liable for the business's debts. Thus, if the corporation incurs significant liabilities, an investor might lose all of the capital she committed to the enterprise, but her personal assets are shielded from the corporation's creditors. As a practical matter, then, corporate shareholders can claim all of the benefits of corporate activity, but if the corporation becomes insolvent, many of the losses fall on others.

These features of the corporate form are so valuable that originally they were very hard to obtain. States granted the right to incorporate on a case-by-case basis, and usually only for public works projects, such as bridges, canals, and roads, while state politicians maintained seats on corporate boards. Corporations were, in a sense, arms of the state, akin to an early form of administrative agency or public-private partnership.

At that time, the organizing document that formed the corporation—the charter—would delineate the precise actions the entity was authorized to take, occasionally down to the prices

it could charge to the public. That was unsurprising, because often the corporation's funding came from the clients it was intended to serve. The corporation might be forced to dissolve after a period of time, such as 10 years. There were prohibitions on corporations' ability to hold stock in other companies, preventing managers from creating a corporate empire. Transformative decisions, such as a merger or a charter amendment, would require the unanimous vote of the stockholders—which was very difficult to achieve and not realistically possible if shareholdings were dispersed. These limits were functionally the only form of corporate regulation that existed, and through them, the corporation's very existence was conditioned on assurances that it would be run to benefit society as a whole.

Over time, as the economy developed, the special charter system came under stress. Charters were viewed as a form of political patronage, and advocates demanded that they be made available to all businesses. Meanwhile, once corporations began doing business across state lines, the charter no longer served as an effective form of regulation; chartering states, after all, had no interest in regulating the behavior of the corporation when it operated elsewhere. Eventually, charters became available pursuant to a uniform administrative process, and the regulatory restrictions fell away. Business regulation moved out of corporate law—out of the charter—and was replaced with what we call “external regulation,” such as antitrust law, employment law, and so forth.

Freed from these constraints, corporations grew to massive size; by the beginning of the 20th century, the giant corporations were capable of exercising power over huge swaths of the economy, and after World War I, securities ownership rapidly dispersed among the population. That raised the question whether corporations should be run solely to serve the interests of their

shareholders—that is, to earn as much profit as possible—or whether instead they should be run with a view toward benefiting all of their stakeholders, including employees, customers, and surrounding communities. The argument has continued ever since.

Shareholder vs. Stakeholder Primacy

The special features of the corporate form—unlimited life, limited liability, tradeable shares, and centralized management—enable corporations to amass vast resources, concentrating power in a handful of managers to direct and coordinate the labor of thousands, or even millions, of people. Corporations, and their controllers, thus exercise a great deal of power over how economic resources are allocated, over how political decisions are made, and over the daily lives of the American public.

Corporate power may ultimately benefit society. It may be used to build necessary infrastructure, conduct critical research, supply necessary goods and services, achieve technological advances, and produce great works of art. Corporations contribute to human flourishing by providing financial security to investors; income, training, and advancement opportunities to employees; and creative outlets for entrepreneurs.

At the same time, corporate power can be abused. Corporations may damage the environment, or mistreat their workers, or produce goods that are shoddy or dangerous, or form monopolies that stifle innovation. For that reason, society regulates corporations, to promote the benefits of the form while limiting the harms. Corporations must comply with rules regarding their hiring practices and their relationships with employees, their workplace and product safety, and their treatment of the environment and natural resources. While disagreements are many and varied over precisely what regulations are necessary, most would agree that some sort of regulation is appropriate.

The debate over shareholder primacy concerns whether these regulatory systems—which, in broad strokes, operate by setting floors and ceilings on certain kinds of corporate behavior—are sufficient to protect the public and to ensure that corporations behave in a prosocial manner. In other words, the debate concerns whether—within these floors and ceilings—corporate managers should use their remaining discretion to generate the maximum potential profit for their shareholders or whether, instead, their discretion should be channeled toward balancing the interests of all stakeholders, including customers, employees, and the general public.

The shareholder-primacist view is that corporate managers should use their discretion to act solely in shareholders' interests. Other corporate constituencies—such as creditors and employees—can protect their interests with contractual terms. Communities can protect their interests with business regulation. Shareholders, by contrast, receive only whatever assets remain after the corporation pays its bills. Therefore, if managers strive to maximize profits, they will necessarily first have satisfied obligations to other constituencies, making all parties better off.

Moreover, shareholders are the only group with no specific entitlements: By definition, they receive only the corporate “residual,” namely, what remains after the corporation meets its obligations to others. The reassurance they get in exchange for that vulnerability is that managers will attempt to earn as much profit as they can.

According to shareholder primacists, if corporations violate the law—if their products are not safe or if they pay below minimum wage or if they dump pollutants—they will have to pay various legal penalties, which will diminish their profits. Beyond that, markets also extract a price for misbehavior. Contractual counterparties such as customers, creditors, and employees will not do business with exploitative firms, and this will inflict further financial penalties on bad actors.

In the end, then, this school of thought holds, these twin forces—markets and government regulation—will make profits very difficult to achieve unless corporations behave in a manner that the public as a whole judges to be prosocial. It is therefore unnecessary for corporate managers to go further and consciously seek to share corporate wealth with stakeholders; that will occur naturally, as a result of profit seeking on



shareholders' behalf. Between democratically imposed governmental regulation and the invisible hand of a market reflecting popular sentiment, the interests of shareholders and the interests of the general public will become aligned.

Stakeholder theorists disagree. In their view, the corporate form—controlled by shareholders, who are the only constituency with the ability to elect directors—is so powerful that it can evade regulatory and market sanctions. Corporations are mobile; they can relocate operations to a new state, or a new country, in search of fewer regulations and fewer costs. Governments are slow and underfunded, and may not be able to detect lawbreaking easily, especially when corporations employ a complex bureaucratic structure that is impenetrable from the outside. Corporations can drag out legal disputes for years, so any penalties are ultimately paid far in the future, at dollar figures well below the true costs of the harm they inflict. And corporate resources can be marshalled to lobby politicians and thus prevent new regulations from being enacted in the first place.

Nor can markets be depended upon to exert discipline. In a world where corporations evade regulation in general, they can also evade antitrust regulation in particular, allowing a small number to exercise outsized market power and impose onerous terms. Corporations can also use their political power to rig the legal ground rules, so that, for example, consumers and employees are routinely forced to arbitrate disputes without the protections of class-action procedures.

There is no getting the government out of the corporation

Consider the examples of Amazon and Starbucks. As of this writing, both are engaged in aggressive antiunionization campaigns—with Starbucks only recently demonstrating signs of softening—and both have been found to have repeatedly violated the law. However, the National Labor Relations Board has no power to impose financial penalties. That means lawbreaking is, functionally, cost-effective.

These are the types of arguments stakeholderists make when maintaining that we should arrange matters so that corporate boards do not run the company solely to benefit the shareholders. If markets and government regulation are insufficient to channel corporate behavior in a prosocial direction, then corporate boards must take on that responsibility directly.

The perennial reply—one that has been offered in defense of shareholder primacy since 1932—is that the stakeholder model offers no alternative principle to guide managerial decision-making. In practical effect, it licenses boards of directors to make use of corporate resources to advance their personal values, which may not be reflective of society's values. Few would argue that Mark Zuckerberg, for example, or Elon Musk should be trusted with deploying the resources of Facebook or Tesla—resources committed by investors in hopes of earning a financial return—to impose their own vision of the social good. Henry Ford was a fabulously successful businessman in his day, but he was also a virulent antisemite who at one time tried to force his employees to conform to his vision of civic virtue. The mere fact that corporate moguls have the skills to run a successful business is no guarantee that they have the moral judgment—let alone the democratic legitimacy—to use the resources at their command to engage in their own brand of social engineering.

Redefining Shareholder Primacy

This debate has been replayed, in one form or another, for nearly a

century, but recently a new solution has been proposed: Instead of giving corporate managers free rein to reallocate any surplus value generated by the corporation, *shareholders* will make those decisions. They will decide whether and to what extent they desire to sacrifice corporate profits to achieve social goals. Investors can choose to invest only in prosocial companies, or to vote for policies they believe to be prosocial. If enough investors participate in this project, and if they share similar values, prosocial companies will find it easier to raise capital, and managers of prosocial companies will receive more support from their shareholder base. In the end, companies will behave in a more prosocial manner because they are responding to the demands of their investors.

Investors, the theory goes, will be willing to sacrifice profits because they will reap the benefits in their capacities as nonshareholders. Investors, after all, also exist as consumers, employees, and inhabitants of the planet. They may prefer higher wages, better working conditions, safer products, and a cleaner environment. They may also have an ethical desire to avoid earning profits via exploitative means. And, after all, if investors are the ones who are entitled to corporate profits in the first place, they should be able to reallocate those profits to workers or to the community or to saving the environment if they choose to do so. This proposal solves the “Henry Ford problem”: it provides a mechanism for generating more prosocial corporations without relying on the moral instincts of America's business elite.

One criticism of this approach, recently voiced by multiple candidates for the Republican presidential nomination, is that it functions as an end run around the legislative process. It's an attempt by advocates to win policy concessions that they cannot win through the procedures of democracy. To which the stakeholderist response is something like hearty agreement.

After all, the premise of stakeholderism is that the regulatory process is, in fact, insufficient to constrain corporate antisocial impulses. Government is sclerotic and dysfunctional. Policies that Americans overwhelmingly support do not get traction. Voter suppression—procedures that make it difficult for Americans to register to vote and cast a ballot—and gerrymandering and Senate malapportionment render politicians no longer responsive to the public they serve. And corporations can use their vast resources—representing the contributions of thousands or millions of individuals—to influence political outcomes in a manner that trumps the will of the electorate.

Yet, goes the argument, these problems do not plague *corporate* democracy. In corporate law, there is no gerrymandering. There is no nonpartisan election administration. There are no complex voter registration requirements. Not only is mail-in voting uncontroversial, but shareholders can also vote by telephone and over the internet. In the political realm, candidates are permitted to lie to voters. In the corporate realm, we call that securities fraud.

Consider other legal developments. In *Citizens United v. FEC* (2010), the Supreme Court placed responsibility for curbing corporate excesses squarely on the shoulders of shareholders. The Court held that corporate political spending is protected First Amendment speech, to be constrained—if at all—“through the procedures of corporate democracy.” Similarly, in *Burwell v. Hobby Lobby Stores, Inc.* (2014), the Court held that at least some corporations are capable of having *religious* interests, which then must receive recognition and accommodation by the legal system, including, under some circumstances, mandatory exemptions from generally applicable laws. These interests are derived from the religion of the corporations' shareholders, in accordance with ordinary procedures for corporate decision-making.

Thus, the Supreme Court placed on shareholders the responsibility to direct the corporation's social behavior in addition to its economic path. If the U.S. Constitution requires that corporations be permitted to use their vast resources to influence the very political system we rely upon to constrain their behavior—and if corporations may even be relieved of the burden of legal compliance, depending on the religious commitments of their shareholders—then, goes the logic, the only remaining avenue for society to reassert control over corporate behavior is via shareholder activism.

To be sure, this is not exactly a theory of stakeholder capitalism. The proposal takes as a starting point that any excess returns of the corporation *belong to the shareholders initially to direct*. The corporation is still being run to benefit shareholders; it is simply that shareholders are permitted to decide they want something other than (or in addition to) profits. And there are good reasons to believe that the capital class has no more legitimacy to make social policy than do corporate CEOs. People with stakes in the stock market tend to be white men who are older, wealthier, and more conservative than the general public.

But the larger practical problem is that individual shareholders are difficult to mobilize. Dispersed and rationally passive, they are unlikely to monitor corporate elections and vote, or trade, in sufficient volume to impact corporate behavior. Indeed, ever since shareholding became widespread after World War I, there have been efforts to harness the great mass of shareholders to redirect corporate activity in a more prosocial direction. In the early part of the 20th century, shares were marketed to consumers and employees on the theory that these groups would curtail corporate misbehavior. Through the 1950s, women tried to use their power as shareholders to have women seated on corporate boards. In 1970, Ralph Nader spearheaded “Campaign GM” to persuade the shareholders of General Motors to restructure the board in the public interest. These efforts largely failed.

Recently, however, a dramatic shift in the nature of investing breathed new life into the project. Whereas once upon a time individuals invested directly in the market, in the 1970s and 1980s individuals began investing through institutions, such as pension funds and, more commonly, mutual funds. Mutual funds in

particular have exploded in popularity, in part because of changes to the tax code and changes to the regulation of retirement plans, making them an attractive option for employers that provide retirement benefits to their employees. Today, the three largest mutual fund complexes, together, control nearly 25 percent of the shares of the companies that make up the S&P 500.

Unlike individuals, institutional shareholders are regulated by law. They must monitor their holdings and, if appropriate, cast votes on behalf of their beneficiaries. The new institutional concentration of the shareholder base, and the legal obligations that have followed, finally make feasible the long-held dream of shareholder social activism.

More Money, More Problems

Whereas once it might have been impossible to imagine the great mass of retail shareholders exercising such influence over corporate policy, now that we have a consolidated, professionalized investing class, that goal seems more attainable. But if institutional investors are encouraged to use their governance powers to exert social control over corporate behavior, that only presents a new problem. Managers of mutual fund companies have no more legitimacy to effectuate social policy than do the CEOs of corporate America; the “Henry Ford problem” has merely been pushed down to the investor level.

In fact, for almost as long as there have been mutual fund companies and pension funds, there have been concerns that trustees might use beneficiary assets to further their own interests. As a result, these intermediaries are subject to a host of regulations that either require, or at least strongly encourage, that they maximize asset values, without regard for other concerns. For example, the Employee Retirement Income Security Act (ERISA), which regulates private pension plans, requires fund trustees to act solely in the financial interests of the fund. Pension funds for public employees usually have similar standards. The 401(k) plans through which many investors obtain their mutual fund shares are likewise regulated by ERISA. These plans permit employees to select from an employer-determined menu of fund options, and, with limited exceptions, funds may not be included on the menu if they would sacrifice financial value to achieve some other kind of social objective. Not

[E]ver since shareholding became widespread after World War I, there have been efforts to harness the great mass of shareholders to redirect corporate activity in a more prosocial direction.

only do those rules limit how retirement money may be used, but they also influence the rest of the mutual fund industry; mutual fund companies must sponsor funds that focus on maximizing financial value if they want a slice of the retirement plan business.

Moreover, mutual funds and pension funds exist within a larger corporate ecosystem that continually encourages both investors and their portfolio firms to push for profit maximization. Activist hedge funds—private funds, available exclusively to wealthy investors—have adopted a business model of purchasing shares in companies they perceive to be insufficiently profitable, using their governance rights to push for wealth-maximizing governance changes. These strategies are unavailable to ordinary mutual funds due to regulations of their permissible activities. But hedge funds today are much bigger than they were 30 years ago, because Congress and the Securities and Exchange Commission (SEC) widened exemptions from the federal securities laws placing limits on their size. Consequently, they can amass more capital and target more companies with bigger threats.

These hedge funds cannot act unilaterally, of course; they rely on the voting support of other shareholders, namely, the mutual funds and pension funds that generally must maximize profits for their beneficiaries. In the 1990s, the SEC paved the way for greater collaboration by amending the proxy-voting rules in ways that made it easier for hedge fund activists to lobby other shareholders to support their preferred policies and candidates.

Additionally, corporate executives and, increasingly, corporate boards are paid in stock and stock options, incentivizing them to keep stock prices high. That, too, is at least partly a product of federal law: the securities laws require that companies disclose the relationship of executive pay to shareholder returns, and until recently they offered tax breaks for performance-based pay.

These regulations and incentive structures create a thick barrier against enlisting institutional investors to encourage corporations to sacrifice profits in favor of a social agenda. For the project to work, then, a new argument must be advanced: that prosocial corporate behavior does not sacrifice profits at all.

Enter ESG

ESG stands for “environmental, social, and governance,” and the phrase refers to a particular approach to investing and, correlatively, to managing a company. The theory is that investors (and therefore corporate boards) should attend to how their business affects, and is affected by, the environment; to how their business affects, and is affected by, relationships with employees, customers, and communities; and to some notion of “good” corporate governance, involving transparency to investors and the public, protections against self-dealing, and giving investors a voice in how the corporation is run. Investors may choose to invest in companies that score highly on ESG metrics, or they may cast their votes to express a preference for management to adopt ESG policies—to mitigate the environmental impact of the corporation’s actions, to improve working conditions, and so forth—all as part of an effort to mitigate risks in the investor’s portfolio.

The ESG acronym was first coined by the United Nations, as part of an effort to persuade the largest financial institutions in the world that a globalized economy required a set of minimum standards of conduct, in order to avoid backlash and hostility to industrial development. Undoubtedly, the UN was moved to act not out of concern for the wellbeing of the capital class, but out of concern for local populations injured by corporate activities. At the time, the UN focused on problems such as exploitation of labor in the developing world, corruption of local officials, and the destruction of natural resources. But earlier efforts to appeal

to the moral instincts of institutionalized shareholders had failed, so now the UN adopted a new tactic: enlightened self-interest. The claim was that good corporate citizenship would open up new profitable markets, and bad behavior would close them off. The UN worked closely with major asset managers to develop a set of principles, and ESG as an investing approach was born.

Certainly, there are plausible arguments for how prosocial corporate behavior can contribute to the bottom line. Climate change is perhaps the most obvious example: investors would be irresponsible if they did not attend to whether their assets are at risk of being hit by wildfires, or flooding, or excessive heat. Additionally, governments around the world are requiring that companies reduce carbon emissions, and investors may, purely as a financial matter, want to know that their portfolio companies will be able to comply cost-effectively.

A similar claim can be made about social factors. If companies mistreat their employees, they will be unable to attract the strongest performers; they may experience high turnover and labor unrest, all of which will cut into profits. If they do not diversify their workforces, they may be vulnerable to discrimination lawsuits, or—more subtly—they may miss marketing opportunities and fall behind on cultural trends. Before the Civil Rights Act became law in 1964, activists boycotted segregated businesses and demanded they hire Black workers. The movement was successful in persuading businesses to diversify, not out of a sense of social responsibility, but because public backlash made diversity a *financial* concern.

Additionally, companies with strong reputations may be able to avoid regulation in the first place. For example, several tech companies recently signed on to a voluntary pledge about ethical development of artificial intelligence. They may be acting out of a sense of moral responsibility, but the more plausible explanation is that

they want to persuade Congress that extensive regulation is unnecessary. And it is likely not a coincidence that the Business Roundtable—an association of CEOs—came out in 2019 with a new statement rejecting shareholder primacy and declaring a commitment to serving all stakeholders, including customers and employees. At the time, the Democratic presidential primary was in full swing, with Elizabeth Warren and Bernie Sanders gaining momentum. In that context, the Roundtable’s statement read as a preemptive attempt to demonstrate that further corporate regulation was not needed.

This is the argument articulated by the *AP Smith Manufacturing Co. v. Barlow* court back in 1953 and echoed by MSCI’s CEO in 2020: When corporations practice good citizenship, they forestall the need for government intervention, thus minimizing government’s size and enlarging the space for private enterprise. For that reason, Professor Jonathan Macey once referred to ESG as “nothing shy of a remarkable libertarian turn in the history of American law.”

Thus, even though ESG is used in common parlance as a moral approach to investing, among professional asset managers it is typically discussed as an approach to financial risk management. And that argument is not at odds with shareholder primacy: to the contrary, it is the premise that justifies shareholder primacy as the fulcrum of corporate law. Corporate CEOs are permitted to operate massive enterprises that exercise extraordinary power over American life without any concern for the public *other than* the mandate to maximize shareholder wealth, all because of the baseline assumption that society has arranged institutions so that profits cannot be achieved through antisocial behavior. And if that is how matters are arranged, investors *should* in fact seek to invest in prosocial companies; prosociality *should* be a predictor of profit. If it is not, shareholder primacy has failed.



But here’s the rub: The original stakeholderist premise—the argument that took us down this path in the first place—was that the regulatory system is *insufficient* to align profit seeking with the social good. And if *that* is correct, then a focus on *financial* ESG will not, in fact, encourage corporations to become better social actors at all.

Consider climate change. It is certainly reasonable for companies to develop transition plans if they anticipate new regulations that will limit greenhouse gas emissions. And it is completely unnecessary if they can lobby the regulations out of existence. It may be reasonable for companies to develop strong reputations with consumers or employees, but press releases and public statements may work just as well as changes to substantive behavior—a practice known as “greenwashing.”

Thus, we end where we began. An idea for plugging regulatory gaps in a shareholder-primacist system ends up buttressing it.

Politics by Other Means

Today, ESG is controversial, and that is not a coincidence; if ESG began life as a mechanism of effectuating politics by other means, it was inevitable that politics would push back. Evaluating companies’ environmental performance often means considering climate change, and evaluating its social performance

often means evaluating its approach to diversity, equity, and inclusion (DEI). These are topics that are politically controversial. Objecting politicians tend to deny that these principles have any relationship to financial value; while the evidence on that score is mixed, there is reasonable cause for suspicion that ESG was developed in order to justify advocacy for corporate social behaviors that, in earlier eras, would have been treated as exercises in pure stakeholderism. Moreover, at least with respect to some aspects of the typical ESG agenda, the question of their financial value has a recursive quality that makes the truth difficult to evaluate.

Take, for example, the corporate commitments to diversity that were announced in the wake of the George Floyd protests. Corporations rapidly hired more Black officers and directors, but then just as rapidly slowed new appointments. DEI officers were suddenly in high demand, but the positions turned over quickly, because hires did not feel their efforts were supported or that the companies had any articulable goals. Companies continue to add women to their boards, but slowly, and largely as a result of natural attrition. These efforts, in other words, suggest that corporations are not making changes they believe will improve operational functioning; instead, they are seeking a degree of *social legitimacy* by appealing to an audience.

The impulse is not unlike efforts to demonstrate good corporate citizenship in order to ward off onerous regulation: a diverse board may not *itself* contribute to value, but it may put a softer face on corporate power in order to ward off backlash against its exercise.

Similar behavior is evident at the level of mutual fund asset managers, who are capable of exercising tremendous influence over the firms in their portfolios. They, too, have ostentatiously committed to diversifying public company boards and, for a time, to encouraging a green-economy transition. These commitments, as well, proved to be somewhat weak, suggesting that mutual funds, like operating companies, treated their public stances as a mechanism for legitimating their power and keeping regulators at bay.

But when ESG is undertaken for appearances' sake rather than for its operational significance, the implications are different depending on whether it originates from asset managers or from portfolio companies. When operating companies seek to avoid regulation or public backlash—if only through image management—their efforts redound to their shareholders' benefit; these actions are entirely consistent with shareholder primacy. If asset managers, by contrast, are using the investments of their beneficiaries to polish their own images vis-à-vis regulators and the public, those benefits redound to the investors in the *asset managers* and not to the *fund* investors, whose assets are being used to curate the managers' public personas. This has been characterized as an agency problem: the mutual fund company is using beneficiaries' assets to establish itself as a “good actor.” That said, even if the asset manager's motivations are less than pure, its beneficiaries can benefit from the approach. Suppose that the asset manager is cynically attempting to evade regulatory scrutiny by visibly “overseeing” its portfolio firms: If those firms, as well, can avoid greater regulation by cooperating

in the appearance of being “tamed,” then, ultimately, the firms will benefit financially (and syllogistically, so will the fund's beneficiaries).

There is, in other words, a cooperative quality to the project in which asset managers display their efforts to curb corporate excesses and corporate boards display a degree of acquiescence in being curbed. As Marcel Kahan and Edward Rock put it, “we need to believe that in even—and especially—the largest corporations, there are individual shareholders who collectively own and control those corporations. Because shareholders exercise control over managers, perhaps mediated through markets, it is acceptable that a small group of managers control huge concentrations of capital for which they are paid princely sums.”

But if corporate America is seeking a degree of social legitimacy with representative inclusion of historically marginalized groups, what has become painfully obvious is that to some segments of the American public, diversity may in fact suggest a *lack* of legitimacy. And the fact that a company seeks *social* legitimacy through a communications strategy is itself communicative: it suggests that diversity is profitable, which means there is a *market* for diversity, that diversity is mainstream. *That* statement invites a dispute over what constitutes the mainstream, with corporate profitability now serving as a proxy for public acceptance. The effort itself invites attempts to *reduce* corporate profitability in order to establish a *lack* of mainstream credibility.

That, perhaps, is the best way to understand the organized boycott movements that targeted Bud Light, for seeking the endorsement of a trans influencer, and Target, for featuring trans-inclusive and gay pride merchandise. Though there is every reason to believe these companies were attempting to expand their markets rather than to take a position on public policy, opponents of

trans- and gay-inclusive policies sought to demonstrate the popularity of their own cause by establishing that diverse marketing is unprofitable.

After the Supreme Court overruled *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization* in 2022, certain shareholder advocates requested that companies disclose their policies for helping women employees receive abortion care if they were employed in states where the procedure was restricted. The shareholder proponents argued that this was a financial issue—women would not want to work in states that restricted abortion access, and unwanted pregnancies would cause employee attrition—and therefore relevant to investors. Despite that framing, the symbology was inescapable: these shareholders wanted companies to affirm that abortion care is profitable—and therefore popular—by providing access. ISS, a proxy advisor firm that provides voting recommendations to institutional clients, agreed as to the financial relevance of these policies and recommended that shareholders support greater disclosure. Shortly thereafter, when more of these proposals came up for votes, ISS reversed course, warning that if companies disclosed that they were providing support for abortion care, they might become targets for political protest and, potentially, regulatory action by more restrictive states. In other words, the liberal side tried to link abortion access and corporate profitability, while conservatives tried to do the opposite.

All of which is to say: ESG as a *financial* strategy is vulnerable to exactly this kind of dialectic, and if political fights and backlash rob otherwise profitable strategies of some of their utility, at some point it will become more profitable to drop them. And that is going to be truer of practices that were adopted more for their public symbolism than out of any deeper belief in their functional contributions. Thus, in the wake of anti-ESG backlash—and in a general economic slowdown as well—businesses

have begun at least a partial retreat from some DEI efforts. That, too, is part of the shareholder-primacy story: corporations will respond to the demands of the market, without judgment as to the merit of those demands.

It is useful to consider the conflagration between the Disney Corporation and Florida's Governor Ron DeSantis through this lens. Disney, as a company, has over time come to embrace and cultivate its gay fan base, which, among other things, organizes lucrative "Gay Days" at Disney's Florida theme park. That history notwithstanding, when DeSantis backed a parental rights bill, colloquially known as "Don't Say Gay," which prohibited discussion of sexual identity in schools, Disney's CEO, Bob Chapek, initially announced that the company would not be taking a position on the bill, because the company preferred to remain neutral on political matters.

Disney's employees, many of whom were located in Florida and directly affected by the law, reacted with fury. They rendered the company ungovernable with protests and walkouts, creating a public relations nightmare. In that context, Chapek did the absolute least he could do: after the bill was passed, when it was sure to become law, he finally declared Disney's opposition. The gesture was so hollow that the Human Rights Campaign, an LGBTQ+ advocacy group, initially refused Disney's accompanying \$5 million donation. In any other context, Chapek's actions would be characterized as greenwashing.

From a corporate law perspective, Disney's response was not an example of social activism; it was a demonstration of shareholder primacy. The company felt, in real time, pressure on its ability to function, and it reacted. If workers had been demanding a raise, the company might have given them one. Instead, workers sought a political statement, and the company delivered the bare minimum it could, to buy labor peace. Which is exactly what a Delaware court held, when a shareholder later accused Disney of abandoning business motives and pursuing a political agenda.

Notwithstanding the weakness of Disney's opposition, DeSantis and the Florida legislature responded with fury, stripping Disney of control over a special tax district that encompassed Disney World. In some ways, it is tempting to claim that what befell Disney highlights the dangers of corporations' assuming political roles: it inspires the government to coopt business,

exactly the consequence that Milton Friedman, one of the fiercest defenders of shareholder primacy, predicted. But it is impossible to avoid that Disney's "political" stance was, by all evidence, a profit-seeking one. And it became a profit-seeking one because a particular group of stakeholders (employees) had learned, through years of experience, that corporations such as Disney exert tremendous influence as social and political actors and frequently derive great financial benefits from doing so. Once that political influence was established, it was inevitable that various constituencies would seek to channel it in preferred directions.

Reshaping the Corporation—a Reprise

Though some of the objections to ESG are rooted in the assertion that it is unrelated to financial concerns, others arise from an explicit attempt to *protect* the practices that ESG investors shun. This strain of ESG opposition may be viewed as its own form of stakeholder capitalism, in that it hopes to shape corporate behavior through capital allocation, even at the expense of profits; the only difference is that the values expressed on the anti-ESG side are the opposite of those traditionally pursued by stakeholderism advocates.

For example, in Louisiana, John Schroder, then the state treasurer, announced in 2022 that he would no longer invest Louisiana trust funds—which support various state programs, such as education and health care—with BlackRock, due to its endorsement of a global transition to green energy. According to Schroder:

This divestment is necessary to protect Louisiana from actions and policies that would actively seek to hamstring our fossil fuel sector. In my opinion, your support of ESG investing is inconsistent with the best economic interests and values of Louisiana. I cannot support an institution that would deny our state the benefit of one of its most robust assets. Simply put, we cannot be party to the crippling of our own economy.

That is not a claim that ESG investing—and in particular, investing with an eye on the effects of climate change—is unprofitable for investors; it is a claim that Louisiana trust funds should be used to support local industry, regardless of the effects on the value of the trusts themselves. And, to be fair, this is hardly an unusual position; other

It is useful to consider the conflagration between the Disney Corporation and Florida's Governor Ron DeSantis through this lens.

state funds have special rules that permit them to prioritize local projects. In other cases, politicians have claimed that ESG policies amount to a type of “social credit score” that targets industries supported by conservatives, and have sought to ban such practices. Between ideological opposition to the typical ESG priorities and distrust of its financial relevance, a budding ESG backlash has led to a slew of proposals to eliminate or limit the practice.

Shareholder proposals. One mechanism by which shareholders express their preferences—and influence corporate behavior—is by taking advantage of SEC Rule 14a-8, which allows shareholders to insert items on the corporate proxy ballot that will then be voted on by all shareholders at the next annual shareholder meeting. Rule 14a-8 has frequently been relied upon by shareholders offering social-responsibility/ESG proposals, such as proposals that companies report on the diversity of their workforce or on their greenhouse gas emissions. Rule 14a-8, in various forms, has existed since 1938, and conservatives have proposed to eliminate it or curtail it so it cannot be used for ESG topics.

Pension fund investing. Other proposals would limit private pension funds’ ability to use ESG metrics when making investment decisions. ERISA already requires pension funds to make decisions only on a financial basis, but the Trump administration proposed a rule that would require funds to generate extensive documentation to justify their use of ESG factors specifically. More documentation requirements would have been imposed for pension fund voting of shares unless the fund adopted a blanket policy always to vote with management recommendations. Since then, House Republicans have offered various pieces of legislation to discourage pension fund use of ESG factors. The Biden administration went the opposite route; a new Labor Department rule permits pension funds to consider the financial

impact of ESG factors. Congress voted to block the Biden rule, but Biden vetoed that action. Currently, 25 states are suing to suspend the Biden rule.

Climate disclosure. The SEC recently released new rules requiring public companies to disclose a battery of information about their exposure to climate-change risk and their emissions activity. Opponents of such disclosures have already declared their intention to challenge any climate change reporting requirements in court, and House Republicans have proposed legislation to prevent their implementation. Should these efforts succeed, investors would presumably find it more difficult to incorporate climate information into their investment analyses, which, among other things, could impact how and where capital is allocated throughout the economy.

Brokerage regulation. Missouri adopted a rule requiring that customers sign explicit waivers in order to authorize brokers to make recommendations based on social and environmental goals beyond maximizing financial returns. These waivers must be periodically renewed. It is worth noting that Europe has adopted almost the opposite rule: brokers are required to inquire as to whether customers have any sustainability goals at the outset of the relationship.

Proxy advisors. These companies provide expert and informed voting recommendations to institutional clients. In part out of a perception that proxy advisors unduly favor ESG principles, politicians have proposed regulating them more tightly and limiting their activities. Previous regulations on proxy advisors, imposed by the SEC under the Trump administration, were repealed after Biden took office; that repeal is currently the subject of an industry legal challenge. Presumably, these changes would alter the voting behavior of institutional investors, either by shifting the recommendations they receive or perhaps by inhibiting voting on some topics altogether.

Lending criteria. Some proposed regulations would limit the ability of financial institutions to consider ESG criteria when assessing the likelihood of repayment by a particular borrower. In practical effect, such a rule would limit the ability of financial institutions to price certain risks when making decisions as to whether and how to extend banking services to potential clients. Among other things, such a shift could lower the cost of capital for industries that tend to be disfavored by the use of ESG criteria, such as oil, gas, and firearms.

Voting disclosures. Under President Biden, the SEC has adopted rules to require mutual funds to provide more detailed disclosure on how they vote the shares they hold, including on ESG matters. The SEC claims that this will allow investors in mutual funds to better understand how their assets are being managed. Multiple states have sued to block the rule on the ground that it is intended to empower activists to influence fund voting behavior.

Fiduciary obligations. Lawmakers in Texas have proposed to make it easier for shareholders of Texas-incorporated companies to sue corporate managers for violating their fiduciary duties if they take ESG considerations into account.

This is but a sampling of the measures that have been proposed or enacted; many were dead on arrival, but others may still become law or at least influence the direction of future regulation. Significantly, none would radically reform the landscape; they would simply shift the existing corporate governance framework in relatively minor ways. In that manner, what the proposals perhaps inadvertently demonstrate is that—just as was true from the earliest days of the business corporation—the state has an inescapable role in shaping corporate priorities. Originally, this was accomplished via regulation of the corporate form; today much (though not all) of the attention has shifted to the institutional investors that increasingly

exercise governance powers within the firm. The words differ, but the song remains the same.

What we see, then, is that whether or not shareholder primacy is the order of the day, regulators must constantly address the legal architecture governing corporations and their shareholders, in order to ensure that the corporation functions as designed. In the ESG space, that translates to regulators making explicit decisions about what investment strategies are, or are not, likely to be profitable, and placing regulatory burdens accordingly. In that sense, the debate between the *Barlow* court, on the one hand, and the Friedmanites, on the other, can never be resolved, because there is no strategy that will free corporations from the state.

* * * *

The U.S. Supreme Court has treated corporations as associations of shareholders, who themselves can decide the political valence of corporate activity. But power and authority within the corporate structure are dictated by law in the first instance; they do not exist in a Hobbesian state of nature. There is no first (preconstitutional) principle that requires corporations to have a particular governance structure, and the shape of the corporate form at the nation's founding—and even at the time of the Civil War—was dramatically different from the shape of the modern corporation.

In part as a result of securities regulation, tax policy, and labor policy, 80 percent of shareholders are institutions, and institutions are both regulable and regulated. Their size is controlled by law; they may be required, or not, to diversify their holdings or to hold only liquid assets. The compensation investment companies pay their managers is regulated, which affects these managers' incentives. We regulate how institutional investors make decisions and the duties of the advisors they hire. All of these legal choices affect their investment strategies, and thus how institutional shareholders exercise influence within the corporation. Other regulations address rights of shareholders within the corporation, including their ability to place items on the proxy ballot and their ability to coordinate with other investors.

Recently, it has been suggested that if shareholders are to decide whether corporations must act to maximize profit, decision-making power should be vested, in some fashion, in the



retail investors who buy mutual fund shares. But how should that occur? Some have proposed that mutual funds should poll their beneficiaries and then take those preferences into account when casting ballots; legislation has also been offered to require that funds allow beneficiaries to cast their own ballots. Mutual funds have started experimenting with different systems voluntarily. But that only raises new regulatory questions. What disclosures will have to be made to retail investors, and what default rules will exist for those who do not make selections? How will shares be voted once a particular investor exits the fund?

In the field of architecture, there is a saying, “form follows function,” meaning that the design of a structure should facilitate its purpose. In corporate law, however, function also follows form, in the sense that whatever structure is selected, it will guide how the corporation and its shareholders behave vis-à-vis society. And that structure is inevitably selected by political actors. There is no option not to decide.

But that also means that society has choices. If we dislike how corporations function, the ground rules can be altered. We can change how decision-makers are selected and the values they advance. The corporate build is not inevitable and in fact has taken on different forms at different times. We can decide how it should look today. ■

[P]ower and authority within the corporate structure are dictated by law in the first instance; they do not exist in a Hobbesian state of nature.

WATCH OUT

Doorbell videos and other surveillance devices are nearly everywhere, and they can land you in court.

BY TOM KERTSCHER

We were sitting in my sister's backyard—my 85-year-old dad in his wheelchair and I in a lawn chair—under the bright afternoon sun. The temperature reached 88 degrees in West Bend, a city of 32,000 about 40 miles northwest of Milwaukee, in the conservative Wisconsin county (Washington) where I grew up.

My dad (Jim) and I, both lovers of hot summers, had been chatting for about an hour when we were startled by the arrival of a police officer. The officer had knocked at the front door and was directed to the backyard by my sister. Here's how I recall the exchange:

“Is that your car parked out front?”

“Yes.”

“Do you know why I'm here?”

“No.”

The officer pulled out her phone and showed me a one-second video of my car doing a rolling stop at a stop sign. Moments later, she wrote me a \$98.80 ticket.

Questions arose, some immediately:
How was the video recorded?

How did the police get it?

Had the officer driven around West Bend looking for me?

And, quickly enough, other questions, of a more big-picture sort:

Just how much are law enforcement agencies using video—public and private—to enforce laws?

And what about privacy rights?
Let's get at some of these.

Tom Kertscher is a freelance journalist who reported for the *Milwaukee Journal Sentinel* for many years and whose work has appeared previously in *Marquette Lawyer*.



“There are Ring cameras everywhere,” said Mary Triggiano, former chief judge of the Milwaukee County Circuit Court and now a clinical professor of law at Marquette University Law School. “Judges are letting in recordings, so long as they’re authenticated and relevant.”

Triggiano was referring to the most widely known brand of doorbell cameras, now owned by Amazon. Ring doorbells are in such wide use—reportedly 10 million users in the United States, though the company won’t discuss numbers—that the name itself is colloquially identified with the whole field.

The admissibility of the recordings notwithstanding, there are concerns about how video from the cameras is used.

“The question is, where do you draw the line?” said Deja Vishny, formerly an adjunct professor at Marquette Law School and a Milwaukee criminal defense attorney who received the 2023 Champion of Justice Award from the National Association

of Criminal Defense Lawyers. “One of the difficulties is if this invasion of privacy was only restricted to catching criminals, that would be one thing. But what is meant by being criminal? Is it smoking marijuana, which is legal in so many other states? Is it getting a ride to get an abortion? The problem is, once you have this lack of privacy, the line can keep moving, and it can entrap all types of conduct—which is a reason why we have the Fourth Amendment.”

Video use pervasive

Most everyone I told about my case was taken aback to hear that I received a traffic ticket based on a homeowner’s video. But thousands of law enforcement agencies in the United States use video cameras for surveillance.

According to a project of the Electronic Frontier Foundation, a San Francisco-based nonprofit digital rights group, and the

2,530 law enforcement agencies, including 73 in Wisconsin, have a partnership with Ring's Neighbors, a social media platform that encourages people to share footage recorded by their Ring cameras with neighbors and police.

Reynolds School of Journalism at the University of Nevada, Reno, as of early 2024:

- 2,530 law enforcement agencies, including 73 in Wisconsin, have a partnership with Ring's Neighbors, a social media platform that encourages people to share footage recorded by their Ring cameras with neighbors and police. (The project stopped tracking Ring data in March 2024.)
- 1,481 law enforcement agencies (39 in Wisconsin) use automated license plate readers. The camera systems, attached to police cars or mounted in public places, capture each passing license plate number and the location, date, and time, as well as a photograph of the vehicle.
- 464 agencies (including 6 in Wisconsin) use a camera registry. The agencies ask residents and businesses to provide information about their security cameras installed on their properties, in effect creating a network that law enforcement can tap.

- 147 agencies across the country have crime centers that enable analysis of surveillance and intelligence data in real time.

- And there are 79 "fusion centers" around the United States (two in Wisconsin), which are aimed at allowing federal, state, and local law enforcement agencies to collaborate and share intelligence on security and criminal matters.

"We're concerned about the growing network of cameras trained on our public and private spaces," said Timothy Muth, an attorney with the American Civil Liberties Union of Wisconsin.

"People always talk about the rights of the business owner with their cameras or the property owner who has the Ring doorbell," he said. "But I'm more concerned about the rights of the person who is unaware that they are being recorded; they aren't getting notice in Wisconsin. But it's a nationwide problem. We've really fallen down in failing to put together systems of regulation and control over how information like that is collected and stored and used by law enforcement."

My ticket

The officer, after saying hello to my dad and me, got right to business. The video clip showed my white Tesla coming to a partial stop at a stop sign. You could see the rear license plate but not the driver.

The young officer, polite and professional, explained that the video had come from a resident at that intersection, which I later learned is three

and a half blocks from my sister's house. The officer said that the resident had repeatedly complained to police about stop-sign violations outside his home.

That apparently meant the man had viewed, downloaded, edited, and shared the video with police in less than an hour. How long, I wondered, had the officer driven around West Bend looking for my car? Some might view it a huge waste of police time. But, having grown up in a town even smaller than West Bend, I can see the value in trying to prevent accidents.

The officer said the man told her he had seen my car failing to stop at that stop sign a number of times. I had to interject there. I drive to West Bend every week to see my dad, but, in fact, I took a different route that day from my usual one. So it was a fluke that I had ended up at that particular intersection.

I figured that the resident's misinformation worked against me. I wondered, too, about my not being a local resident (I live in Milwaukee County) and my driving what is perceived as a fancy car. Plus, police feel pressure to be responsive to a resident who complains.

"There is no constitutional right to privacy against a search by a private citizen, unless they are acting as an arm of the police," said Vishny. "Generally speaking, the Fourth Amendment does not protect people from the actions of private actors."

The officer went to her squad car to run my driver's license, which gave me a moment to think. I decided I'd use my phone to record the rest of our conversation.

I told the officer that although the video showed "I was rolling," I thought she should give me a warning. I hadn't been reckless or speeding, and my driving record is good.

"My main concern is kids. Okay?" the officer said. "There are a lot of kids in that area."

"I totally understand that," I agreed. "And I guess, sort of big picture, if it was flagrant or something crazy, or if I had a record . . . But if the goal is to get the person's attention and drive home the point of, 'Hey, that's a trouble intersection and safety is important,' I think a warning does that."

"I get it," she responded, "but unfortunately, it's this route today."

She handed me the \$98.80 citation for failure to stop at a stop sign, a violation of section 7.01 of the West Bend Municipal Code, adopting section 346.46(1) of the Wisconsin Statutes. That meant that the fine would go to the municipality paying

MILWAUKEE LEADERS WANT STOPLIGHT CAMERAS LEGALIZED IN WISCONSIN

The accompanying article focuses on the use of privately recorded video and its increasingly prevalent use. For a correlative (and contrasting) matter, Milwaukee officials have spent years trying to get permission for their police forces to use so-called red-light cameras, but the Wisconsin legislature has yet to give the figurative green light.

In 2017, a then-Milwaukee alderman, Cavalier Johnson, called for Wisconsin lawmakers to change state law to allow police to use red-light cameras. David Crowley, then a Democratic state representative from Milwaukee, proposed legislation to enable the City of Milwaukee to use such cameras on a limited trial basis. In a city where sometimes-fatal reckless driving was growing, police would have been permitted to automatically send traffic tickets to the owners of vehicles that were recorded speeding or running red lights.

Crowley, now the Milwaukee County executive, and Johnson, now Milwaukee's mayor, say that reckless driving has reached a crisis level. In February 2024, the two, along with other officials, held a press conference on a Milwaukee street corner to call for the legislature to allow such surveillance.

Police in Wisconsin—at least in West Bend, as we have seen—use footage from private cameras, such as Ring-brand cameras owned by homeowners, as evidence for writing traffic tickets. But police apparently can't use cameras of their own for that purpose.

Wisconsin law (Wis. Stat. § 349.02(3)) prohibits “photo radar speed detection,” which is defined as “the detection of a vehicle's speed by use of a radar device combined with photographic identification of the vehicle.” This is commonly taken to ban

the use of red-light cameras to write tickets for the offense of failing to stop at a red light. This is so even though it is not clear that such use would come within the statutory ban: the offense involves not speeding but failing to stop, and, further, no “radar device” would seem to be used.

In any event, more generally, the experience with or the record on red-light cameras, used by municipalities in 24 states including Illinois and Iowa, is mixed:

- Some studies found that red-light cameras reduce the number of right-angle crashes but may increase the number of rear-end collisions, the Congressional Research Service reported in 2020.
- The cameras are often the target of complaints that they are used to raise revenue rather than to promote safety, according to the same report.
- Studies evaluating the effectiveness of automated enforcement generally show a positive effect on traffic safety, but a 2021 national poll found that fewer than half of respondents “somewhat” or “strongly supported” using cameras to automatically ticket drivers traveling more than 10 mph over the speed limit on residential streets, according to the National Conference of State Legislatures.

Some view the use as problematic because the registered vehicle owner, not necessarily the driver, is mailed a citation for a recorded alleged violation, said Milwaukee criminal defense attorney Deja Vishny, a former adjunct professor at Marquette Law School. “Because the owner of the vehicle may not be the driver,” she said, “I question whether there is sufficient proof to convict unless the driver can be identified from the video.”

—Tom Kertscher

the officer's salary and operating the court. The citation also carried a 3-point penalty. In Wisconsin, drivers with a clean driving record have 0 points; license suspension occurs if a driver accumulates 12 or more points within a 12-month period.

Beryl Lipton, an investigative researcher at the Electronic Frontier Foundation, whose specialties include law enforcement surveillance technology, said using video surveillance affects how citizens perceive behavior. “If you have a camera, if you're constantly checking, well now every single time somebody walks by your house, it feels a little suspicious,” she said.

“And there have been studies on Ring and the types of complaints that it generates,” Lipton continued, “that suggest that people are more likely to start reporting people if they see them on a Ring camera. And in a lot of those cases, the suspicious behavior is not actually suspicious behavior. . . . It generates and reinforces a culture where neighbors and communities are suspicious of the people who are going by.”

A review in the January 2023 *Annual Review of Criminology* concluded: “Despite their ubiquity, the empirical evidence base for surveillance technologies is weak. For most technologies, even basic information about how many departments use them or how they are deployed is lacking. Even less accessible is good information about surveillance technology's financial and privacy costs, its impact on police–community relations, and its value in detecting and deterring crime.”

Video also alters how police prioritize cases, Lipton said. “There are serious crimes out there that need to be solved. And if the police are responding to the squeakiest wheel complaining about relatively innocuous traffic violations, then that is expensive police time and taxpayer money that is now going into feeding surveillance

subscriptions, and also policing these misdemeanors that in a lot of cases would get thrown out if there weren't a neighbor out there" with a camera making complaints to police.

"Ring" video

Ring cameras are sold to individuals and commercial users. For those who also pay for a Ring subscription, video recordings from the cameras, like the one the West Bend resident used, can be stored in the Cloud for up to 180 days, Amazon says. Subscribers can also post video to Ring's Neighbors app, in an effort to warn fellow app users, residents of the same neighborhood, about crime or events such as road closures and to share video with police and others; local police also have been able to post to the app to alert residents about crime activity or to seek information. The app allows users to see shared videos based on their address, so they can be alerted to happenings nearby.

In Wisconsin, even police departments in communities with only several thousand residents, such as the Milwaukee suburb of Saukville in Ozaukee County, use the Neighbors app, according to the Electronic Frontier Foundation database. Police departments in suburban Indianapolis, Indiana, and Raleigh, North Carolina, ask residents to register their cameras, to make it easier for investigators to seek out video.

Scientific American reported in December 2023 that it had found little evidence that cameras by Ring, or from vendors such as Google Nest, Skybell, ADT, or Vivint, prevent or deter crime. At the same time, countless anecdotes show how cameras can help solve burglaries and investigate other incidents. Here are a few examples from news reports in early 2024:

- Private surveillance video showed that a private company ambulance dispatched following a 911 call in Milwaukee drove past an intersection twice, without the crew's stopping to get out and look around for a woman who had called 911 before losing consciousness. The 49-year-old woman died of high blood pressure and heart disease, according to the Milwaukee County medical examiner.
- A Ring home camera recorded a "porch pirate," who was a child, perhaps five years old, walking with an adult and taking a package left outside of a home in Miami, Florida. The homeowner posted the video to social media.
- An Atlanta resident received notification from his Ring camera that two men had entered his

house; when he went there, he discovered several items missing and alerted police.

In January, Ring stopped allowing police to use its Neighbors app, in order to request video directly from users; the change came after privacy advocates raised concerns about the spread of surveillance. In emergencies, such as a kidnapping in progress, police can request an individual's video directly from Ring.

Police can still view video that residents post to the Neighbors app, and police can still get warrants or subpoenas to obtain video from Ring.

Fighting the ticket

Back in West Bend, I eventually learned that a 41-year-old man with kids had used a camera on his house to record me. The resident messaged police on Facebook, which led to the officer's being dispatched to his home, according to the police report. The man told the officer about frequent problems at the four-way-stop intersection where he lives. He said he saw me fail to stop and showed the officer video from a camera he has on his house. She showed me the clip on her phone.

I had assumed the officer had spent some time driving around the neighborhood looking for my car. But the man told police he had followed me to my sister's house.

I decided I would fight the ticket—not to claim that I had made a complete stop, but to raise questions about the use of video. So I went to Mid-Moraine Municipal Court online and pleaded not guilty. The automated response said my "court date" would be August 3, about five weeks later. That's when things got confusing.

Several days after that, the court emailed a pretrial notice, saying that I should make my case in an email to the city attorney, who acts as the prosecutor, and that many cases can be resolved by email. But the notice said to do so no *earlier* than August 21, 2023; that would be nearly three weeks *after* my court date.

The next email came from a local private-practice attorney who serves as prosecutor for West Bend and other municipalities in the counties of Ozaukee and Washington. He explained that my August 3 "court date" was actually my initial appearance and that entering my plea meant I didn't have to be in court that day.

Two days after I was allowed to, I made my case to the lawyer in an email, reiterating what I had told

Scientific American reported in December 2023 that it had found little evidence that cameras by Ring, or from vendors such as Google Nest, Skybell, ADT, or Vivint, prevent or deter crime. At the same time, countless anecdotes show how cameras can help solve burglaries and investigate other incidents.

the officer: a warning would have sufficed. I asked for the citation to be dismissed or to be reduced to an offense that carried no points. We exchanged a couple of more emails.

The municipality's lawyer suggested "amend to a two-point citation for obstructing traffic by slow speed—driving too slowly."

"How about amending to a citation that has no points?" I countered, knowing that would still give them a conviction and the fine.

"No, sir," the lawyer's response came back.

A trial date was set for more than four months after the citation was issued.

The trial

My trial was scheduled for 2 p.m. on November 9 at West Bend City Hall. I represented myself. The municipal judge, a clerk, the prosecutor, the officer, the resident, and I had all arrived by 1:45, so we started early. I declined to speak until my closing argument, which came after opening and closing statements by the municipality's prosecutor and testimony from the officer and the resident. The resident testified that he had observed my rolling stop and that it was recorded by the camera on his house. His video was played.

So, too, was something that perhaps I should have anticipated but that surprised me: footage from the officer's body camera. Body cameras are used by law enforcement agencies even more than Ring cameras. More than 4,500 agencies, including nearly 300 in Wisconsin, have their officers use them. This footage showed me saying that I guessed I was rolling at the stop sign.

After reiterating my belief that I hadn't been driving recklessly, and the fact that I had a clean driving record, I addressed the use of the resident's video, alluding to Wisconsin law that prohibits police departments from using "photo radar" for writing speeding tickets.

". . . I'm just raising concerns about the use of video," I said. "My understanding is it's not allowed in Wisconsin for police to use red-light cameras. But in this case, video is used for my citation, and it feels inconsistent."

"The person who owns and operates the video is here today," the judge began. "I'm not aware of any limitation that it cannot be used if proper foundation was laid, which it was, and somebody can identify the video, which it was. . . . Quite frankly, Mr. Kertscher, Ring video is everywhere; everybody's got Ring video these days. It's not

unusual for this court to not only review bodycam, which was admitted into evidence, but people have evidence on their Ring videos presented in court with the proper foundation."

The judge rejected my request to dismiss the citation. I told the judge I had learned my lesson, that safety is important, and I asked that those points be considered in any penalty given.


"Mr. Kertscher, this doesn't make you a bad person," the judge intoned. "People make mistakes all the time. But the question before me is whether or not you failed to stop at a stop sign, and I am finding you guilty of that question today."

The ACLU's Timothy Muth agreed that the police and the court followed proper procedures in handling my case. But Muth expressed privacy concerns. Based on the surveillance methods currently available, it would be possible to track a person driving across the country. And with cell phone tracking devices, it is possible to track passengers in that vehicle. So-called cell-site simulators—devices that "masquerade as legitimate cellphone towers" to surveil cell phones, according to the Electronic Frontier Foundation—are used by more than 70 law enforcement agencies, including the Milwaukee Police Department and the state Department of Justice in Waukesha, one county to the west.

"I think if people came to understand that it's almost as if the police were installing tracking devices on everyone's cars, that's almost what can be accomplished," Muth said. "That's the brave new world of surveillance that we're heading toward, where we do not yet have a system of transparency about what's being done, about who has access to these unregulated databases."

"What's very problematic is that Ring cameras and other devices collect a lot of data on people, and, a lot of times, they [police] are accessing data without a search warrant," said Vishny. "Here's an example: Police suspect drug dealing on the street, so they obtain footage from a Ring camera for the entire day. What they are requesting can be anything—from burglary, speeding, domestic violence, kids being kids giving rise to noise complaints, and complaints from racist neighbors who don't like Black or LatinX kids."

Vishny concluded. "I think there are really profound issues. People are very worried about the surveillance state. . . . The issues are serious and important." ■



"Quite frankly, Mr. Kertscher, Ring video is everywhere; everybody's got Ring video these days."

ALL-AMERICAN TORT LAW

A recent book by Joseph A. (Jay) Ranney, the Adrian P. Schoone Fellow at Marquette Law School, occasions reflections by a leading national scholar on tort law's past—and its possible future.



Cristina Carmody Tilley is professor of law at the University of Iowa. This is an edited form of keynote remarks at a conference this past fall supported by Marquette University Law School's Adrian P. Schoone Fund and held in the Law School's Lubar Center. An article version will appear in next fall's issue of the *Marquette Law Review*.

by Cristina Carmody Tilley

I will start this morning by describing Jay Ranney's accomplishment in *The Burdens of All: A Social History of American Tort Law*. Jay's remarkable book braids together three distinct scholarly traditions in illuminating the past and future of personal injury law. He gives us an intellectual history of both moods and markets in the United States, a doctrinal study of tort rules over two centuries, and an empirical compilation of tort cases over that time in five representative states. Only a master could weave these strands into the readable whole we celebrate today. But as all practicing lawyers know, the reward for good work is more work. So after I persuade you of the enormity of Jay's success, I'll explain why I am now looking for a sequel.

Let's begin with Jay's central thesis: American tort is a body of law that has waxed and waned in response to American social and economic trends. The book begins in the 19th century, identifying tort's corrective-justice posture and pro-defendant tilt, and moves to the twentieth century, where tort turns toward a distributive-justice posture with a pro-plaintiff tilt. These shifts in theory and outcome, the book shows, have complemented and facilitated an American cultural turnaround, from a climate of thoroughgoing rugged individualism to an ethos of collective well-being. Jay bolsters this broad claim about tort's reorientation with a multistate, multidecade survey of case law, showing that American tort law today typically operates in

a quasi-regulatory fashion to distribute risks for the benefit of all—even while it clings in certain pockets to the expectation that individuals shoulder responsibility for their own fates.

ERAS OF BURDENS: A SOCIAL HISTORY

Drilling down to specifics, Jay tells us that American tort law has moved through five eras. Each of these involves a response to social and economic dynamics, and each either accelerates progress or reins it in—all according to the felt necessities of any given time (as it always is with the common law). The following capsule history is rather an injustice to Jay's detailed, nuanced account, but it will serve our ends today.



1810–1870: Rugged American Man

The period 1810–1870 might be called the era of Rugged American Man, and it was matched by a tort law of individualized rights. Nineteenth-century Americans were able to turn away from their forebears' highly insular way of life; they ventured out of their local communities into new cities and states, where stranger-to-stranger accidents spiked as a byproduct of nationalizing travel and commerce. Tort responded, supplying or refining the concept of negligence to describe and condemn the interpersonal disregard that produced these inadvertent injuries.

Of course, the suggestion that self-sufficient Americans were obligated to look out for their neighbors' well-being encountered resistance in a culture that "celebrated individual self-reliance," as Jay puts it. Consequently, even as judges recognized negligence as a tort vessel to convey claims of stranger-inflicted injury, they made sure to limit its reach. In particular, the doctrine of contributory negligence relieved defendants of responsibility for careless injuries when the plaintiff bore even slight blame for his own predicament—a rule that, among other

**Just as
factories
and factory
accidents had
changed the
composition
of state court
tort dockets,
so, too, did
cars and the
proliferation of
car accidents.**

things, tended to shield employers from liability for worker accidents.

Notably, the physical-injury claims in the first part of the 19th century reflected an old way of life, where personal injuries arose from one-on-one hostility and claims for compensation were made via pleading assault and battery. But by the end of the century, the classic personal injury claim arose from a railroad or workplace injury. This brings us to a period that Jay might describe as "Industrial American Man."

1870–1910: Industrial American Man

During the decades from 1870 to 1910, individual self-sufficiency was dislodged from its foundational position in tort. The commercialization and technologization of daily life meant that Americans were under near-constant threat of stranger-to-stranger injury. Simply stated, the possibility of serious accidents loomed everywhere—in corporate factories featuring assembly-line technology and new power sources such as electricity, on national rail networks, and on urban electrified streetcars.

Again, Jay shows how tort dockets reflected this reality. In his book's taxonomy, *property claims* during the period declined from a high of 55 percent of cases to a low of about 10 percent, while *railroad accidents* climbed from 5 percent to a high of 35 percent in 1900. *Workplace accidents*, accounting for just 5 percent of tort cases in 1860, peaked at 43 percent in 1910.

Leading jurists and scholars of the day, worried about the toll that consumer and employee accidents were taking on the polity, began to question the rule that plaintiffs could recover only when entirely free from fault. Was it fair, these leaders asked (in Jay's words), to saddle slightly careless individuals with the cost of injury, when accidents might "be an unavoidable byproduct of industrialization and economic growth"? These doubts, he shows, led judges to start rationing or restricting the doctrine of contributory negligence as a defense to liability.

1910–1920: The Progressive "Pivot" Period

This skepticism reached a high point during the 20th century's second decade, which Jay describes as a crucial "pivot" point in tort law. During the Progressive decade of 1911–1920, the baseline of individualism in American culture and economic life gave way to a robust collectivism. Progressive activists joined together in a belief that "democracy and economic security were interdependent" and that state intervention on behalf of economically and physically frail individuals might be a linchpin of collective economic stability—and thus of democracy. These new ideas rippled immediately through tort law.

During this period, Crystal Eastman, a lawyer and journalist, gathered data suggesting that industrial injuries were often "the result of bad luck, not employer [fault] or worker fault." She and any number of other individuals argued that as long as financial support for injured workers was conditioned on proof of employer wrongdoing, too many Americans were bound to lives of poverty and dependence. Driven by these studies, legislatures in New York, Wisconsin, Minnesota, and then 15 additional states began to study workers' compensation schemes between 1909 and 1911. And, again, the dockets reflect this story. From 1910 to 1920, Jay explains, the percentage of state high court tort dockets comprising workplace accidents fell from 45 percent to 25 percent.

Just as factories and factory accidents had changed the composition of state court tort dockets, so, too, did cars and the proliferation of car accidents. Automobile-accident litigation was essentially a non-presence in state courts in 1910 but occupied 20 percent of the docket in 1920. The growing market for cars also led to a profoundly broadened approach to the concept of duty in negligence law. While most American states had long followed England's 1842 *Winterbottom v. Wright* rule, imposing on manufacturers a duty of care only to those with whom they

were in privity, that rule began to erode during the Progressive period.

Finally, in the well-known 1916 *MacPherson v. Buick Motor Co.* case, the New York high court abolished the privity rule altogether. The result was to permit plaintiffs injured by defective goods considered inherently or imminently dangerous to pursue remote actors up the chain of commerce. Like workers' compensation, a legislative innovation, the judicial erasure of privity allowed the state to spread the costs associated with technological risk-taking throughout the national economy, rather than letting it fall on unlucky injured individuals.

1920–1970: An Effort to Rebalance the Scales

Continuing forward, in the midcentury period, the decades 1920–1970, Jay shows how tort leaders rapidly embraced the idea of an American national collective and an interest in developing quasi-regulatory tort rules to guarantee cost-justified precautions by manufacturers and professionals without burdening socially useful innovation. Slowly in the 1930s, and at a rapid clip in the 1960s and into the 1970s, states began to drop draconian contributory-negligence rules, which had undercompensated careless plaintiffs and insulated careless defendants.

In their place arose comparative-negligence rules that treated injuries—and the behavior producing them—as the product of reciprocal risk. This change had the power to induce additional caution by—and collective cost-spreading to—potential defendants. It also created a more durable legal safety net beneath consumers, which encouraged them to participate fully in a nationally networked economy. Tort also adapted to make the contours of that safety net more predictable for repeat-player defendants by fortifying summary disposition of cases via the announcement of legal rules to guide potential defendants' primary conduct or behavior.

Alongside the decline of contributory negligence, Jay traces the ascent of strict liability for products. This upstart body of law was helped along by the California Supreme Court decisions in *Escola v. Coca-Cola Bottling Co.* (1944) and *Greenman v. Yuba Power Products, Inc.* (1963) and by William Prosser's appointment as Reporter of the Second Restatement of Torts. Some 19 states adopted strict product liability in the 1960s, and another 25 did so in the 1970s.



The doctrine of strict liability, forcing distributors along the American supply chain to assume greater responsibility for their products, regardless of fault, intensified a tort ethos treating the American marketplace as a networked collective bearing shared responsibility—and reaping shared profits—from a consumer class increasingly beholden to commercial suppliers.

1970–2010: Individualism Redux?

Finally, Jay brings his study full circle by documenting the resurgence of an individualist ethic in American culture from 1970 to 2010. This resurgence was fortified by a “tort reform” movement in the late 20th and early 21st centuries. Together, social and political activists placed a new emphasis on individual responsibility, which made its way into tort doctrine. The most notable *legislative* movement in the modern tort era has been the adoption of damage caps limiting the potential monetary recoveries of successful plaintiffs. And alongside that legislative initiative,

the private American Law Institute, in its Restatement project, was facilitating doctrinal change—for example, by shifting the design-defect test in product liability from an ostensibly plaintiff-friendly consumer-expectation test toward a risk-utility test that made recovery more elusive.

Just as Jay showed workers' compensation and the wipeout of privity to translate into immediate changes to state court dockets, so also does he show that damage caps and product liability reforms changed tort practice. In 1990, professional-malpractice claims accounted for 35 percent of the state court dockets that Jay examined. The adoption of damage caps and other rules making medical-malpractice lawsuits less attractive brought that number down to 18 percent by 2000. Similarly, product liability claims rose from 5 percent to about 13 percent of all claims between 1970 and 2000, but dropped back to just 7 percent by 2010, after the advent of the risk-utility test.

So, to sum up, Jay has framed the evolution of American society as a perpetual contest between two ideals. In one, society is organized around self-sufficient individuals who push their abilities to the limit, claim as their

own all benefits that may result, and expect their neighbors to shoulder their own burdens. In the other, society is organized around a collective that shares both burdens and benefits. In Jay's history, tort is as dynamic as the society it is serving and shaping. Tort rules bend first to accommodate the enterprising individual, leveraging the entrepreneurship that remakes an economy. They bend next to accommodate the vulnerable collectives of workers and consumers whom the new economy has left behind. And so on, as felt to be needed, decade after decade. The byproduct of tort's short-term agility, he concludes, is America's long-term stability.

WHAT'S MISSING—OR MIGHT BE ADDED

The story Jay tells in *Burdens* is inspiring, and fully persuasive . . . as far as it goes. Which is why, as I mentioned earlier, I wish it went just a bit farther. In order to explain my wish, let's first back up and take a 30,000-foot view of American law and society, in order to think together about tort's rightful place in both.

Public Law and Private Law—and Tort Law?

American *law* has long been depicted as occupying two distinct hemispheres. Public law is the domain in which government engineers the distribution of resources by allocating public funds and services and providing entitlements to act or prohibitions on action. Private law is the domain in which nongovernmental actors move through life alongside each other, accruing and using property, trading goods and services, and seeking a modicum of personal security—all without direct state oversight. American *life* has also been depicted as split in two: public life is carried out in the national economic marketplace and the political public square, while private life is lived close to home, in one's own heart and mind, alongside friends, family, and neighbors.

Jay's thesis is that tort sprang into being in the 19th century on the private law side of this divide, to do individual corrective justice, and gradually migrated by the 20th century to the public law side of this divide, to do collective distributive justice. But accepting Jay's thesis means accepting the neat division of American life and law into public and private. And while American life is many glorious things, neat is not one of them.

Yes, communities in the early republic were insular and culturally homogeneous, lending them a certain self-contained predictability. But over the course of the 19th century, explosions in industry, transportation, and communications, the emancipation of enslaved people, and the flight of American women from the home all combined to destabilize the tidiness of community life. People of all backgrounds began boarding trains, milling about department stores, laboring at factories, and mingling in theaters. Friction began to erupt in these not-fully-public, not-fully-private "middle spaces." Antagonism simmered between fourth-generation Americans and new immigrants from Europe, between wealthy property or factory owners and their day laborers, between men and women, between people of different races. This antagonism manifested in subtle hostility, in the humiliating exploitation of power imbalances, and occasionally in bodily and property injuries.

Unsurprisingly, the two tidy spheres of American law were poorly equipped to deal with the chaos of middle-space life in the 19th and 20th centuries. Federal legislators in the Reconstruction Era tried to adopt public law directives requiring private individuals to share middle-space resources, in hopes that those commands would produce public thriving. But the Supreme Court famously rebuffed those statutory commands as unconstitutional in the *Civil Rights Cases* in 1883. Where did that leave marginalized people like

The Supreme Court's rejection of public law remedies for identity-based harms and the states' rejection of private law remedies for identity-based harms created a legal diaspora

the plaintiffs there—Black theatergoers and train passengers degraded by their assignment to balconies and shabby cars? To the private law of tort, the Court answered.

True, private law historically had protected personal dignity and provided post-hostility repair in local communities. But just as the Court was telling marginalized Americans to sue in tort for social humiliation, state supreme courts managing tort dockets replete with plaintiffs maimed by trains, cars, and factory work felt compelled to redistribute wealth in ways that served both the haves and the have-nots of the new American economy. Gilded Age tort judges, confronted with an unprecedented number of claims for bodily injury and death leaving families destitute, concluded that claims of group-level emotional harm were comparatively unimportant. Indeed, state courts eventually articulated explicit rules against compensation for pure emotional harms. The Supreme Court's rejection of public law remedies for identity-based harms and the states' rejection of private law remedies for identity-based harms created a legal diaspora, in which dignitary claims based on race, gender, and class marginality had no legal home at all.

Despite—or perhaps because of—their non-status within the law, identity-based indignities endured throughout the 20th century and have arguably intensified in the 21st. Thomas Piketty became an unlikely celebrity in 2013 through his book demonstrating the lack of economic cohesion in a country beset by a wealth overclass and a wealth underclass. Journalists in 2018 won a Pulitzer Prize for exposing the astounding regularity with which female workers striving for merit-based success were treated as members of a category available for sexual gratification in the workplace. And thousands of Americans poured into the streets mid-pandemic to protest the oppressive police treatment of civilians marginalized by virtue of their racial identities, disabilities, or both.

Which brings me back to the wish that Jay had taken a slightly broader approach to his study. He admirably traces tort's role mediating between individual Americans and all Americans, but I am not persuaded that this has ever really been the deep fault line fracturing American community. The truth is that both the American collective and the American individual are aspirational tropes. Jay's study ends in 2010, and the fallacies of both



national cohesion and individual agency have come to the surface in painful ways since then. On highways, in grocery stores, at playgrounds, and through countless other middle spaces, the deep and enduring rift in American life is between classes, genders, and races.

It is true that members of marginalized groups have secured many public law entitlements to move comfortably through middle spaces; constitutional law and federal statutes put those rights on paper late in the twentieth century. But it is equally true that those public law entitlements are often hollowed out by the private cultural hostility and conduct of people sharing these spaces. Members of social groups degraded by private bias they encounter while moving in middle spaces are not seeking neat distributive justice afforded by pure public law any more than they are seeking neat corrective justice sought by pure private law. They

are seeking a third, more diffuse, kind of justice: social justice.

What body of law can afford that kind of justice? On Jay's account, tort has a quicksilver quality that defies the stasis of a public-private law divide. It operates as private when society needs individual justice, and as public when society needs distributional rules. My take on Jay's account is that tort is a hybrid of public and private—a middle kind of law, if you will, and therefore the best law to do middle-space justice. And I would argue that if Jay's account were broadened somewhat, we would find that tort has been doing social justice from the earliest years of American life.

A Sequel, Please?

This is why I am asking Jay for a sequel to his first social history of tort. What exactly do I want from book two? First, I suspect there is more to learn about the American tort story by considering both the first 20 years and the last decade or so of its operation, periods which were squeezed out of *Burdens* for understandable reasons. Second, I suspect there is more to learn by looking at tort's treatment of injuries sitting outside body and property, which are functionally excluded from

It is time to revive tort's original power to do social justice. Tort can do this by forcing communities into conversation about the legitimacy of state resource distributions

the book's dataset. Finally, the focus on bodily and property injuries from 1810 to 2010 reflects an implicit assumption that tort's conceptual scope is narrow, when evidence on the periphery suggests it may actually be large.

Let's turn first to chronology. By choosing to conduct his study between 1810 and 2010, Jay has inadvertently skipped tort's early origins. But the period from 1789 to 1810 offers useful lessons. In the first two decades of the country, American tort dockets consisted primarily of intentional tort claims, typically between people who belonged to the same closed community. In these cases, local juror neighbors who understood the social context of a given dispute were able to generate resolutions that reflected local expectations about the quantum of dignity to which each litigant was entitled in the circumstances. By forgoing this period, *Burdens* excludes data reflecting tort's seminal role promoting an expectation of interpersonal social dignity.

Turning next to injury: By confining his concept of personal injuries to those involving harm to body or property, Jay paints an incomplete picture of the interests that were originally considered worthy of tort protection. Intentional tort claims for assault, false imprisonment, and slander all vindicated interests in emotional and social well-being. In none was the plaintiff required to show an impact to his limbs or his land.

Limiting one's study of tort's scope to body and property injuries litigated during 1810–2010 leads, unsurprisingly, to an empirical confirmation that tort's scope is limited. To be sure, *Burdens* defines tort as a body of law allocating “the costs of accidents *and* other harms” (my emphasis). But the book is concerned much with accidents and little with “other harms.” For example, the book puts all the cases in the study into one of the following eleven categories: automobile accidents; railroad accidents; accidents causing

injuries to railroad workers; workplace accidents; personal injury on business premises; product liability; professional malpractice; property harm (including business torts and harm to land); debt; personal injury—general; and “other,” including all cases “not classifiable in the above categories.” Unfortunately, this taxonomy flattens the social stakes that are simmering under the surface of many cases treated as data points. Notably, those stakes often involve tensions over the treatment of marginal people in middle spaces.

Looking behind the property or bodily label assigned to a given case, to the social dynamics at play, supports a thesis that tort has always been a middle-space law concerned with the doing of social justice. Take, for example, the category of “debt.”

The survey categorizes about 40 pre-1870 cases as claims for “debt,” a category that includes “suits against creditors and sheriffs for improper debt-collection practices.” But digging beyond the book, into the cases themselves, the vast majority of the claims in this category—some 36—were brought by private individuals claiming that a law enforcement officer carrying out judicial orders (to seize an individual or to seize or sell property) did so wrongfully. These wrongs involved alleged lack of due care for civilian interests or apparent officer malice in the execution of judicial orders.

Of course, prior to the adoption in 1871 of 42 U.S.C. § 1983 (as we now denominate the statute), there was no public law mechanism to hold law enforcement officers liable for wrongful behavior depriving a civilian of rights. Moreover, prior to 1961 and *Monroe v. Pape*, that public law mechanism had never been authoritatively applied against law enforcement officers. The only legal mechanism by which civilians could complain of police overreach or abuse during the pre-Reconstruction period, and for decades after, was tort. In other words, most of the cases the

survey treats as attempts to recover wealth could also be viewed as attempts to vindicate a dignitary entitlement to fair treatment by the police.

A variety of other cases the survey categorizes in comparatively bloodless terms such as “personal injury–general” appear additionally to ask the community to weigh in on the dignitary status of individuals within socially marginalized groups, such as enslaved people, women, and the poor. For example, the two earliest North Carolina Supreme Court cases in the study, from 1811 and 1818, involve the status of enslaved people. Each vindicates the plaintiff-slaveholder’s claim, treating persons of African descent as property by virtue of their membership in a group classified as less deserving of full human dignity than other individuals. Yet *Burdens* shows Texas courts, just a few decades later, using tort to the opposite end. When a Black plaintiff sued a white Houstonian for assault and battery, the defendant claimed that he bore no duty to a person not recognized as a member of the Texas polity by virtue of his race. In 1843, the Texas Supreme Court responded that, despite their status as non-citizens, Black residents were entitled to be free from “wanton injuries and aggressions” and could protect that entitlement through tort litigation. So unlike the North Carolina high court, the Texas court used tort to invest members of the marginalized group, African descendants, with a quantum of dignity comparable to that allocated to white Texans.

CAN WISCONSIN POINT FORWARD?

I will conclude by offering a thesis for Jay’s next volume: It is time to revive tort’s original power to do social justice. Tort can do this by forcing communities into conversation about the legitimacy of state resource distributions, by urging community members to acknowledge the private animus that can render those distributions illusory, and by deploying the corrective message that tort verdicts can send to both the injured and the class of private people bent on denying them equal humanity.

This revival can and should apply across *all* of tort. But for present purposes, I will focus on two causes of action that are explicit or implicit modern doctrinal invitations to construct just communities: negligence and intentional infliction of emotional distress. And I will look at the ways that disputes litigated in Wisconsin have illustrated tort’s social justice power.



Why Wisconsin? Aside from being one of the states in Jay’s study, and the venue for this symposium at Marquette Law School, Wisconsin sits at a variety of significant cross-vectors: it is anchored by a major metropolitan city but replete with rural, agricultural counties; it is split virtually down the middle in terms of partisan politics; and its wealth inequality as of 2012 saw the richest 5 percent of households with average incomes 10 times those of the bottom 20 percent of households. Unsurprisingly, in the authoritative Marquette Law School Poll, two-thirds of Wisconsinites report avoiding hot-button issues with friends and family. Yet when called to jury service, these citizens have been able to “come now, and reason together” (*Isaiah* 1:18) in tort cases disputing everything from gun safety to racial and gender humiliation.

Let’s zoom in to a single case to see how a shared search for norms in a fact-dense, deeply personal context invites conversation, rather than

contention, on the divisive issue of gun ownership. As of 2022, 69 percent of Wisconsinites appeared to favor compulsory licensing for concealed carrying of guns, but the state earned a grade of D+ from the Giffords Law Center in 2023 because it had preserved its gun regulation regime with no changes for the year—data points suggesting a polity deeply split on collective gun policy. Nevertheless, jurors were able in 2015 to reach normative consensus on the reasonableness of commercial firearms practices in *Norberg v. Badger Guns*, a case litigated here in Milwaukee for the plaintiffs by Pat Dunphy, a Marquette lawyer and my terrific fellow panelist at today's conference.

In that case, a salesperson at Badger Outdoors, a gun dealer in West Milwaukee, had stood by while a teen whose age barred him from firearms purchases selected a .40 caliber handgun. The dealer then guided a “straw purchaser,” who was of age, to claim that he was the actual purchaser of the gun, in order to complete the transaction. According to the complaint, this gun and others sold in similar

transactions were used to shoot Milwaukee police officers. Wounded officers sued Badger for negligence in unreasonably ignoring evidence that they were selling guns to be used by individuals deemed ineligible by the state.

After a Milwaukee County Circuit Court judge denied motions to dismiss and motions for summary judgment filed by Badger and its insurers, a local jury concluded that Badger's slipshod sales practices were unreasonable. It went on to award the officers \$5 million in compensatory damages and another \$1 million in punitive damages. This condemnation of gun dealer practice reflects the ability of Wisconsinites to “reason together” toward shared values about the interpersonal care that commercial actors owe local residents. And it does this against a backdrop of splintered opinions on the appropriate role of the state in regulating the rights of residents to carry firearms and a political climate in which elected legislators are deadlocked on public law gun policy.

Now let's zoom out and look at how a more surgical tort cause of action has been used to construct community over time in the state. The tort of intentional infliction of emotional distress (IIED) has long been controversial, in part because detractors claim that its crucial element—defendant “outrageous” behavior—is inherently subjective. Of course, IIED's power to surface and challenge the private use of social capital to deprive private individuals of their distributive entitlements is what makes it a potentially powerful mechanism of social justice via tort, even as it makes the cause of action a lightning rod for criticism.

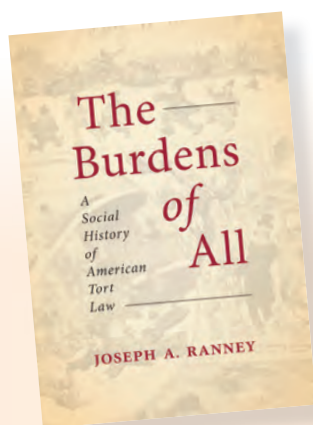
Sure enough, a survey of Wisconsin jury verdicts in IIED cases litigated from 2006 to 2022, most sitting outside the parameters of Jay's study, confirms the ways in which members of marginalized constituencies use tort to seek corrective action when fellow community members

treat them as unworthy of dignity. During that period, 14 cases involving IIED claims went to jury verdict.

Of those cases, 12 appeared to involve plaintiffs from marginalized constituencies, including Black women, Black men, women whose race was unclear, and two children, one disabled. Four of the female plaintiffs were claiming verbal, physical, sexual, or financial abuse by husbands or other domestic partners. The two Black women and one of the Black men were claiming degrading treatment in professional settings. One of the children was claiming sexual abuse by an uncle, while the other (the disabled child) alleged that he had been left strapped in his school bus seat for the entire day after his driver forgot him. In other words, these IIED causes of action are a crucial place where tort has tried to revive its preindustrial role as arbiter of community status relations.

Of course, plaintiffs are not guaranteed clear victories in these cases, nor should they be. What they are guaranteed is a legal forum specifically competent to hear claims of social indignity and to promise a way of convening ongoing community conversations about humanity entitlements in middle-space.

And this is why I am looking to Jay—or someone—to further the remarkable achievement of *Burdens*. He concludes his study in 2010, telling us that tort has largely opted to serve American collective interests. But the decade just behind us has hollowed out the assumption that there is a monolithic American collective that tort can usefully serve. Class, race, and gender destabilization today are causing dignitary injuries that are nothing like the paradigmatic “accidents” of the personal injury docket. If tort is to be a “faithful mirror” of the battles in American society, as Jay eloquently hopes, and if its rules are to be “part of a larger American story” going forward, can the story end where this book leaves it? ■



Professor Tilley's remarks celebrate, and use as a point of departure, a new book by Marquette Law School's Joseph A. Ranney.



Christine E. Woleske



Michael P. Maxwell



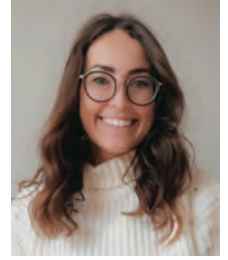
Susan V. Barranco



Brandon A. Wigley



Hannah Chin



Olivia K. Hansen

77 Timothy B. Daley, a Racine County Circuit Court commissioner since 1984, has performed 1,263 civil wedding ceremonies.

83 Paul T. Dacier joined Quinn Emanuel Urquhart & Sullivan in Boston as a partner.

93 Joseph E. Bender, partner and cofounder of Difede Ramsdell Bender in Washington, D.C., has been appointed to the Internal Revenue Service Advisory Council. He serves on the Tax Exempt/Government Entities Subgroup.

94 Christine E. Woleske, executive vice president for Bellin and Gundersen Health System and president for the Bellin Health region in Green Bay, received the Distinguished Service Award from the Wisconsin Hospital Association.

98 Kurt D. Dykstra joined Reinhart Boerner Van Deuren as a shareholder in the firm's Milwaukee office.

99 Michael J. Wirth joined von Briesen & Roper as a shareholder in Milwaukee.

Jose A. Olivieri, L'81, David E. Gruber, L'83, Derek C. Mosley, L'95, and Kristen D. Hardy, L'14, were named to the *Milwaukee Business Journal's* list of "100 Milwaukee-area power brokers for 2024."

01 Michael P. Maxwell, judge of the Waukesha County Circuit Court, has been appointed to the state's Commercial Court Docket by Wisconsin Supreme Court Chief Justice Annette K. Ziegler.

06 Jesse B. Blocher was admitted as a Fellow in the International Society of Barristers. He is a shareholder with Habush Habush & Rottier in the firm's office in Waukesha, Wis.

07 Amy K. Klockenga has been appointed as an adjunct professor of law at the University of Illinois Chicago School of Law.

08 Mauri Whitacre Hinterlong, general counsel and vice president of real estate, land, and legal with HEYCO Energy Group in Dallas, was a finalist for the Dallas business magazine *D CEO's* Corporate Counsel Awards—General Counsel: Solo.

10 Anique Ruiz was featured on Milwaukee television station TMJ4 for her work in motivating the next generation of Latino professionals through the WiscAMP STEM-Inspire Program at the University of Wisconsin—Milwaukee.

12 Susan V. Barranco launched her own firm, Barranco Legal, in Wauwatosa, Wis., focused primarily on workers' compensation litigation.

Sabrina Gilman has been promoted to vice president and general counsel of Emerson's Test & Measurement Business Group and its newly acquired business, National Instruments, in Austin, Tex.

13 Kristin Lindemann is an assistant attorney general for the state of Colorado in the Corrections and Public Safety Unit.

Kristina M. Minor has been named senior athletic consultant for Husch Blackwell in Chicago.

14 Stephanie N. Galvin is senior associate counsel for the Dallas Cowboys Football Club.

Mindy Nolan joined in creating a new partnership, Ahmad & Nolan Defense, in Milwaukee.

Brandon A. Wigley has been promoted to director of the Bader Leadership Institute at Bader Philanthropies, Inc., in Milwaukee.

16 Lindsey M. Anderson was promoted to partner at DeWitt Law, Brookfield, Wis.

Kevin J. Clark joined von Briesen & Roper, Milwaukee.

17 Kirsten Hendra joined the Karp & Iancu personal injury team in Milwaukee.

18 Ashley A. Smith has been named an associate on the corporate practice team at Michael Best & Friedrich in Milwaukee.

20 Austin J. Malinowski is working in the litigation department of Moss & Barnett in the firm's Minneapolis office.

21 Cooper Warner joined La Fleur Law Office in Milwaukee.

22 Hannah Chin is the human resources manager and associate legal counsel for the Whitefish Bay School District in Wisconsin.

Olivia K. Hansen joined the taxation and business group at Fox, O'Neill & Shannon in Milwaukee.

Josh R. LeNoble joined Reinhart Boerner Van Deuren in Milwaukee.

Keegan L. Rand is assistant, baseball operations, with the Texas Rangers Baseball Club.

Christopher R. Vandeventer has been named to the litigation team at Gimbel, Reilly, Guerin & Brown in Milwaukee.

23 Abigail J. Aswege, J. P. Curran, and Joseph J. Franke have joined Reinhart Boerner Van Deuren, Milwaukee.

Three members of the Class of 2023 have joined von Briesen & Roper in Milwaukee: **Maeve G. O'Malley, Meghan K. Wallace, and Melissa L. Weinstein.**

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

Our goal is for you *to reach your goal.*

Marquette Law School aims to see 100 percent of our graduates land good jobs within months of completing law school. Well beyond our direct program of legal education, we have a big commitment to career counseling, job-search assistance, and making connections between students and employers. Frankly, we're very good at this work.

We recently reported to the American Bar Association concerning the 186 members of our Class of 2023, providing information about their employment 10 months after graduation (the standard national measuring stick). Here are some data concerning the 183 of these new Marquette lawyers for whom we had information: For starters, 97.27% (178) were employed. Of them, 89.33% were in positions that required bar admission, while another 8.99% had jobs where a J.D. degree was an advantage. And 99.44% of them were employed in full-time positions, with 98.88% in long-term positions. Approximately two-thirds (64.61%) were working for law firms of various sizes, 14.61% were employed by businesses, 12.36% were in government positions, and 6.18% held public interest jobs.

There are personal stories in each percentage point. The Career Planning Center at Marquette Law School—like the Law School community more broadly—is here to help every new Marquette lawyer get on a path to a rewarding career.



MARQUETTE
UNIVERSITY

LAW SCHOOL