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J. Reuben Clark Law Society

BYU Law School Alumni Association

J. Reuben Clark Law School

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CLARK MEMORANDUM

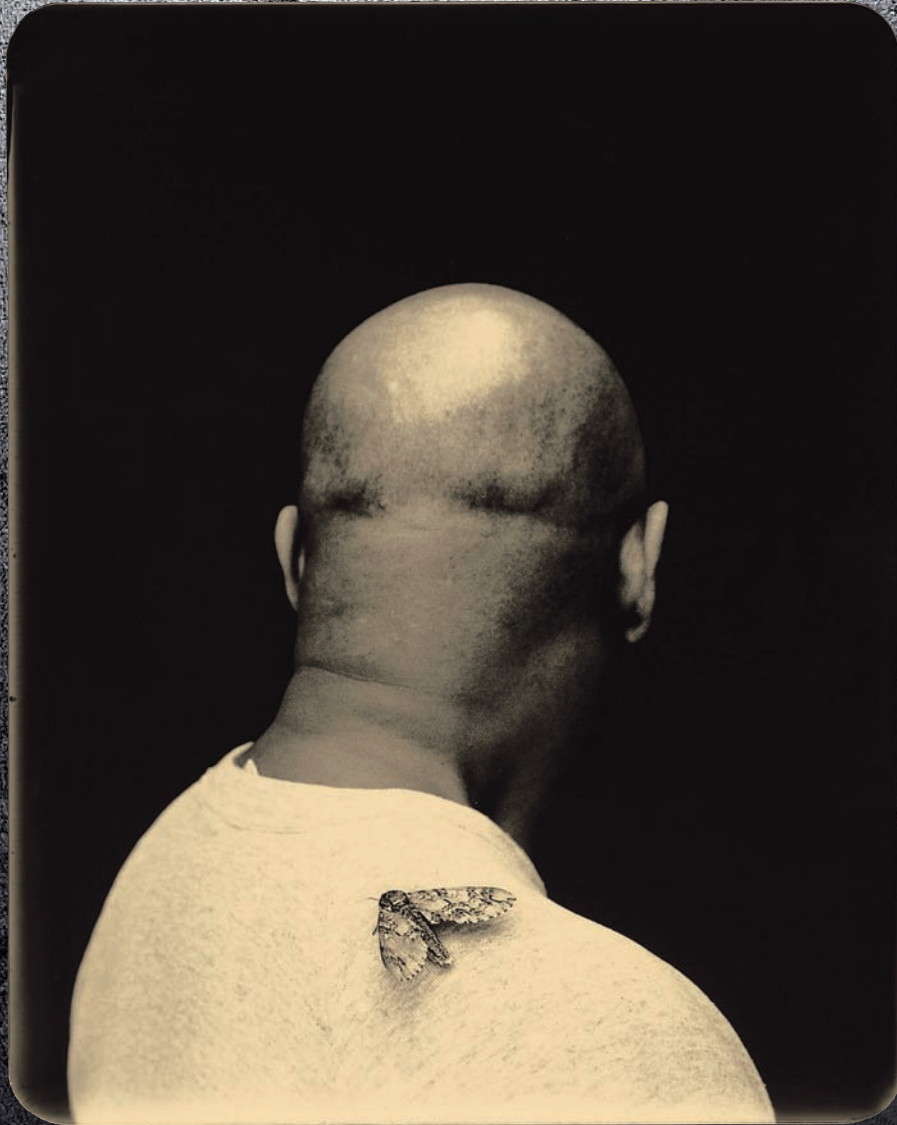
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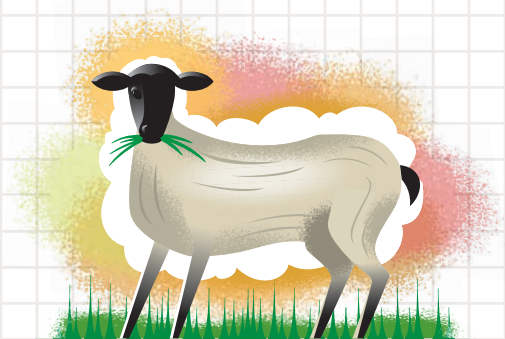
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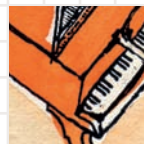
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DEAR ALUMNI AND FRIENDS,

The school year is upon us. This fall, mixed with the usual excitement and anticipation, there is some relief as we come to the close of a summer filled with dust and hammering from three major building projects on the second floor of the Law School. With the support of the university, and with funds from alumni and friends, we have built a beautiful new trial courtroom, a spacious student commons, and a large, quiet, study area in our library, which replaces a similar area on the fourth floor that will now be used for Law School conferences and symposia. Each project addresses long-standing student and Law School needs, and—exciting to me—their functional value is matched by their aesthetic quality. I am eager for you to drop by the Law School to see the improvements. The trial courtroom is particularly stunning, with finely detailed cherry-wood millwork and all of the latest trial practice technologies.

It is hard not to feel excitement about the aesthetic and technical advances these projects represent, but I hope a summer of hard hats has not gone to my head. This school, after all, welcomed its first class to the St. Francis Elementary School on Ninth East. The core of a legal education is not found in the construction of courtrooms and commons but in the construction and development of critical and analytical thinking skills. That construction project, which likewise can involve disruption and indeed some hammering, is one that goes on every year and is surely the most important “construction project” this fall.

Understood in its proper frame, I hope, improving the quality of the space in which students learn can have important symbolic value. The careful workmanship of the craftsmen who have done the molding and carving of the cherry millwork is, perhaps, a reminder of the careful craftsmanship that is required of a successful lawyer. Attention to detail matters. Understanding both the narrow frame of a particular panel, as well as how one frame (or analytical point) fits the entire project, matters.

Perhaps I focus on the symbolism because I am eager to explore additional ways to improve the physical spaces in which students learn and engage at the Law School. I'd love, for example, to see more natural light. In fact, in arming myself for discussions with the university, I did some research on the value of natural light in learning environments and was interested to find studies suggesting that students in purely fluorescent-light environments were shorter on average and more prone to dental decay. All will likely be relieved to learn that I have not led with an argument for producing taller law students with whiter teeth, but the idea of bringing more light to the Law School is an appealing project. Ultimately, of course, any effort to bring physical light to the Law School remains secondary to the primary occupation of learning and discovering more powerful light and truth and then taking it from the Law School as the guide by which to serve and to lead.

The Law School continues to be blessed with extraordinarily fine materials for our long-term construction project. The class that joins us this fall is highly accomplished and capable of building with the same quality as those who have gone before them. As described in further detail in our forthcoming Law School Annual Report, our faculty continue to devote themselves to their craft, investing in the students and in advancing knowledge in their respective areas of the law. And, as my experience with graduates across the country attests, the service and leadership of our alumni are evidence that, in the most important sense, light has been incorporated into the Law School construction project.



Warm regards,

A stylized, handwritten signature in dark ink, appearing to read "Jim".

JAMES R. RASBAND



BY JUDGE MICHAEL W. MOSMAN*

TWO CHEERS

FOR THINKING
LIKE A LAWYER

IT USED TO BE THE CASE that one of the main, stated goals of law school was to teach the young acolytes how to “think like a lawyer.” I’m not sure quite as much is made of this in today’s law schools, perhaps because figuring out exactly what that phrase means is not easy, and lawyers tend to abandon projects they cannot explain with precision. Still, the idea endures that we have a way of thinking about things that sets us apart, that can be taught, and that serves us well. And I think there is some truth to it. » I’m not going to attempt a precise explanation today of what it means to think like a lawyer. But I am going to talk about some

*The following remarks were presented
to J. Reuben Clark Law
Society at the University of Oregon
on November 5, 2010.*

traits of lawyers’ minds and suggest that while they can be useful, they have their downside. For this reason, only two cheers. » I want to discuss three traits of thinking like a lawyer and show their strengths. But then I want to turn these traits on their heads and show their weaknesses.

ASSUME NOTHING



One trait of the lawyer mind is to assume nothing. The classic story that used to be told about this trait was of the senior partner and the young associate traveling on a train together. The young lawyer looks out the window and says, “Look, all the sheep have been sheared,” to which the wise old partner replies, “Well, at least on one side.” While the trait of assuming nothing can be annoying to others and frustrating to young lawyers, it has its uses.

For one thing, it combats groupthink, or commonly held assumptions—the things everybody knows but are actually unexamined; such as the commonly held assumption in a community that John Doe is guilty of some notorious crime or that Jane Doe is incapable of harming a flea. The lawyer approaches such assumptions with an open mind: the task is to break down what we know about what happened into component parts, assume nothing, and examine the facts with care. I once heard Paul Fortino, a partner at Perkins Coie who represented Guantanamo detainees, say it this way: “I felt that as to my client, terrorist is a question, not an answer.”

I remember in my first year of law school when I first realized this was a way of thinking that lawyers knew and I didn’t. I had a criminal law professor named Woody Deem, a former star practitioner with an unorthodox style. One part of his unorthodoxy was the pop quiz. That day’s quiz was on larceny, the taking and carrying away of the personal property of another with the intent to permanently deprive the owner of it. The quiz involved a man breaking in, grabbing the homeowner’s baby, discarding the blanket and pacifier, and running out of the house into the cold night with a baby wearing only a diaper. I thought I had law school figured out; it was clear to me that the trick was that the man had not stolen any personal property, just the baby. Of course, I got the question wrong. In a later phone call to my dad, a lawyer, I complained about the ridiculous question. I explained it to him, and by the time I got to the discarded blanket, he interrupted me and asked, “Was there a diaper? Because that would be larceny.”



This pattern of thinking, of assuming nothing and examining everything, isn’t unique to lawyers. We share it with good economists and with legendary figures like Perry Mason, Sherlock Holmes, Colombo, and Monk.

While we have discussed this as “assuming nothing,” we are really nudging up against a question of epistemology: How do we know what we think we know? And what is the core point of epistemology? As the inimicable Tyler Cowan put it, “You are wrong so, so, so often. This is, or rather should be, the central lesson of epistemology [and, I would add, a good legal education]. It is a lesson which hardly anybody ever learns.”

What would a thoughtful trial lawyer have learned along these lines? Here is my partial list:

1. That eyewitnesses are sometimes dead wrong and are often wrong on important details
2. That honest people can remember the same events differently
3. That the same facts can give rise to very different inferences
4. That in even the most ordinary historical events, it can be very difficult to figure out what happened
5. That in most debates, the best argument has serious flaws, while the worst argument has undeniable strengths
6. That in a tight spot most people will still try to be truthful
7. That you don’t really know something—or even less, know it’s true—just because you read it somewhere
8. That most experts don’t know what they think they know

A mind trained along these lines would approach most issues and disputes with a certain degree of care, of openness to change, of willingness to re-examine, of unwillingness to assume that anyone who disagrees with him or her is an idiot. This does not mean that we never come to know anything. It does mean that we have a highly tuned awareness of the limits on our ability to know. It is captured for me in the words of Learned Hand, in his 1944 Fourth of July speech in Central Park:

What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to the earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind the lesson that it has never learned but never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.

It’s worth stepping back to ask where this lawerly, careful style of thinking comes from. That is, what has driven lawyers to think this way? In my view, it principally is the product of an adversarial system. It is born in the dualistic dialectic of trials. The caution that is so common to lawyers comes from having your every assertion tested and attacked by an adversary. In the experience of most people, this is unheard of. The average doctor, college professor, TV host, cab driver, or contractor rarely has a highly motivated, skilled adver-

sary try to take apart his every assertion, with the winner gaining a pot of money. And the focus on proof, instead of pronouncement, comes from the requirement of meeting a certain standard of proof as to each element of your case, or you lose.

In any event, this way of thinking—focusing on proof, not assumptions, and carefully linking your proof to your propositions—can be very useful. So I commend to you the trait of assuming nothing.

ELIMINATE IRRELEVANCIES



I want to turn now to a second trait of thinking like a lawyer: the skill of focusing on what's relevant and eliminating irrelevancies. Isn't this, in your own experience, one of the main ways you find yourself silently—or openly—critiquing the comments of others? "Well, that doesn't really support the original proposition." There is probably no other way the casual comments of nonlawyers trying to prove a point are more different from lawyer's comments than in their tendency to rely on irrelevancies. Of course, even lawyers are not immune. Someone in your organization, for example, put out the proposition that you needed an interesting and charismatic speaker. To which somebody responded, "I know a federal judge who will do it." Which, as you can now see, is utterly irrelevant to the proposition.

This ability to eliminate irrelevancies can be very useful in eliminating bias and prejudice. In a recent pleading, for example, in a Fair Labor Standards Act case, the plaintiff's lawyer made sure to mention that the defendant/company owner was a "Russian immigrant and convicted federal felon." Credibility was not an issue in the early pleadings on class certification. It didn't take long for his opponent to point out that the whole comment was completely irrelevant, and, in fact, completely improper.

The lawyer's efforts to eliminate irrelevancies and focus on what actually matters and to get juries to do the same can be a very laudable thing. It means that despite your immigration status, your criminal record, your race, your income, or your political affiliation, you have a shot at justice. So I commend to you the trait of eliminating irrelevancies.

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STRICT APPLICATION OF NEUTRAL RULES



In addition to focusing on the relevant, the law tends to reward and require the strict application of neutral rules. In my work, in particular, I am often called upon to determine the legally “correct” answer and then stop right there. I apply neutral rules, determine what result those rules dictate, and then in many cases my work is done. Maybe sea lions die, maybe a really nice person gets fired, or maybe a business loses the patent it needs to survive. Not always, but often, the law turns a blind eye to the consequences that may flow from the application of legal rules.

While this sounds like a grave weakness to some, it can be a significant strength in the application of the law. For example:

When I am considering the fair and just sentence for a defendant, I will often receive the most heartrending letters from his family, even from his children, begging me not to send their son/husband/daddy to prison, or their lives will be ruined. What use do you think I ought to make of this information? I think the answer, at least in calculating the Sentencing Guidelines, is: very little. Or, to put it another way, how would you feel if you were the very next defendant being sentenced for the same conduct, and you didn’t happen to come from a lovely family who were good at writing letters?

There are all kinds of rules keeping out powerful, relevant evidence: confessions, smoking guns, fingerprints, DNA, and the like. Many nonlawyers think the cost of these exclusions is always too high. I’m not here to defend them always, in all cases. But there is this strength: The exclusions happen according to neutral rules that operate in favor of the least popular group in society, and they get applied with some regularity even in the face of that unpopularity.

So, we focus on proof and don’t make assumptions, we screen out irrelevancies, and we stick with the strict application of neutral rules. This helps us make more accurate decisions, avoid bias and prejudice, and apply neutral rules in an evenhanded way—all in all, not bad. Two cheers for thinking like a lawyer.

But there are costs. Sometimes, those costs can be very high, even catastrophic. It’s worth thinking about the ways we think as lawyers that blind us to a better way. It’s worth examining these same basic traits for their doppelganger, their weaknesses.

AVOIDING ASSUMPTIONS: HALFWAY THROUGH THE BRAMBLE BUSH



Let’s return to the trait of avoiding assumptions. Sometimes, not making assumptions isn’t the path to accuracy. Instead, it is the path to foolishness.

Take, for example, the story of the sheared sheep. How many flocks of sheep in the universe are sheared on one side only? In the real world, the world in which people have to make decisions without perfect information, the answer is, not enough to matter.

So if we are not careful, we can take this mental habit of challenging assumptions and carry it to the point where it does us great harm. If you will bear with me for a minute, I want to put this habit of challenging assumptions—often born in law school—in a very simplified context.

The broad trend of political philosophy, at least since the early modern philosophers, has been to re-examine the legitimacy of the state and its coercive power through binding law. I suppose this is simply part of the eternal quest of philosophy to wonder about the nature of things, to ask, for example, how we can even know if we exist.

I have the greatest respect for notable philosophers who have struggled with these difficult questions. The problem, as I see it, is that most of us only get a passing introduction to the philosophical method. They stare into the abyss; we blithely jump over a ravine. That’s just part of the overall schizophrenia of the law, which is really two things operating simultaneously. On one hand, at the level of abstraction, the law is an idea and is bound up in the whole question of who we are, what is society, and how, if ever, the law acquires coercive power. It is an offshoot of philosophy and is concerned with deeply serious and difficult questions about the nature of law and the state.

But at another level, law is an exercise in pragmatism, a glorified trade that for its operation depends on a host of assumptions that keep the day-to-day machinery of the law moving. I don’t mean this pejoratively. I loved practicing law, and it’s a great way to do a lot of good. But at the level of implementation and action, most lawyers are not very concerned with questions about whether we can even know what constitutes an external world. As the authors of *Plato and a Platypus Walk into a Bar* put it, “These are questions that are better examined over coffee and cigarettes in a small Parisian café than over an assembly line in Detroit,” or for that matter, a box of documents in an associate’s office.

We see these two types coexist in the legal world even today: the abstract legal theorist, usually a law professor, who understands law as a branch of political philosophy and the no-nonsense lawyer entirely occupied with the work of individual clients and cases. Sometimes, as in Abraham Lincoln, we get both types in one lawyer. But not often.

Most of you, I suspect, will be wholeheartedly engaged in the business of law. But the philosophical tradition of questioning assumptions that you were mildly infected with in law school can still affect you in unhelpful ways. First, because you were introduced to skepticism but never really came to grips with it, you may become leery of declaratory statements. You have this ill-defined notion that it’s hard to know anything, or maybe just dangerous to make any claim to knowledge, so you constantly hedge your bets. This hedging is different than the spirit of liberty that Judge Hand described. Instead of care or even caution, it is cowardice. It seems premised on the idea that the law is built entirely on shifting sands, with no solid foundation, and the best a poor lawyer can do is avoid getting trapped in a categorical statement. I’m sure that for the new law student, or for the sloppy one, the central lesson of law school may seem to be that there are no rules and no right answers. But that’s stopping too soon, without paying the price for discerning the underlying solidity of law. The disillusionment of *its* is supposed to “dis” only the “illusions,” not the whole. Professor Karl N. Llewellyn used a nursery rhyme to teach the process of first getting blinded by the law and then seeing again more clearly:

*There was a man in our town
And he was wondrous wise:
He jumped into a bramble bush
And scratched out both his eyes—
And when he saw that he was blind,
With all his might and main
He jumped into another one
And scratched them in again.*

[*The Bramble Bush: On Our Law and Its Study*
(New York: Oceana Publications, 1951), 4]

Llewellyn's main point is one that some of you need to hear: just being blinded by the law, that is, abandoning all your prelaw assumptions and being willing to question the truth and reality of everything, is only half the journey. The rest of the journey is to carefully figure out what is real, true, stable, and reliable. You won't learn this in law school. But you can learn it on your own through the dint of hard work. And even setting aside for a moment your access to revelation as a source of truth, you can, as lawyers,

still come to know things to be true. The law was once populated with a host of serious-minded lawyers who understood this and struggled with it—now, not so much.

My challenge to you is to do one of two things: either recognize that this whole philosophical skepticism enterprise is just not your thing, back out of the bramble bush, and have at it in the business of the law; or finish the journey. Study, think hard, and rediscover a solid foundation for the law. It is the work of a lifetime.



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ELIMINATING IRRELEVANCIES— BUT WHOSE?



The second trait I mentioned earlier was eliminating irrelevancies. It, too, has its dark side. We can mistakenly assume that analytic purity—and by that I mean focusing only on facts or statements that tend to prove the proposition—is the best, or even the only, path to truth. In doing so, we can end up discarding other, equally valuable ways of figuring out what is real, or true, or correct.

For example, sometimes we focus on what a person is saying, testing it for its internal coherence, but don't focus enough on who the speaker is. This was driven home to me in an experience I had during a summer clerkship. My firm was representing a bank whose customers had been swept up in a sprawling real estate scam. During the summer, I helped interview six or seven of those couples, who had lost everything. The scam involved the developer visiting people in their homes, trying to get them to take out a second mortgage and invest the money with him. He had the 1980s equivalent of a PowerPoint presentation, and it was a beauty. All the numbers added up to support his promise of great returns, and it was backed up by high-profile endorsements and proven past performance. Of course, it was all a lie. After his show he'd gather up his materials and leave.

Then the husband and wife would be alone. Six or seven times, I heard a tearful man who'd lost his life savings say something like this:

I told her I thought it was a great opportunity, and we should do it. She seemed very reluctant. I asked why, and she couldn't really give me a reason. She just said there was something about the guy that she didn't trust. I told her that wasn't really a valid reason, and so we went ahead. Boy, do I wish I had listened.

I hope the point of this story is clear. Malcolm Gladwell, in his book *Blink*, makes the same point. There are ways of knowing that can't be reduced to a structured argument. You ignore them at your peril.

NEUTRAL RULES: A BRIDGE TOO FAR



The last trait I mentioned earlier was following neutral rules. I have tried to point out that following the same rules the same way for everybody is part of the genius of Western law. Now I'd like to look at the downside of rulemaking. For over a century, law has had an identity crisis about the certainty and neutrality of the rules of law. It started with the so-called "realism" of Justice Oliver Wendell Holmes. In 1881, while still a law professor at Harvard, he suggested that the law was not, after all, neutral or certain but depended on the life experiences, views, and personal prejudices of judges and juries. "General propositions do not decide concrete cases," he said, and more famously, "The life of the law has not been logic: it has been experience." The more provocative description of this new realism was by Professor Robert Hutchins: "What a judge has for breakfast is more important than any principle of law."

The law—and lawyers—were both horrified and fascinated by this new way of seeing things. To say there was an overreaction is an understatement. To summarize a century of development: we took refuge in written rules. We decided that to avoid the idiosyncrasy and partiality of the broad but neutral rules, we would just have a written regulation that would clearly cover everything and be basically self-executing. The law has generally turned away from heuristic answers and now seeks algorithms. I hope you will agree with me that the idea that enough regulations can be written clearly enough so that the answer to every legal question is clear and requires no judgment or debate has been a complete and total disaster.

If I can make up my own distinction here: I believe in neutral, predictable rules that apply evenly to everyone but that are written at some level of generality. But I don't believe in regulations that cover every aspect of life. Even if the enterprise were possible, it would vastly reduce liberty. And as Justice Benjamin N. Cardozo recognized, the whole idea is a mistake:

No doubt the ideal system, if it were attainable, would be a code at once so flexible and so minute, as to supply in advance for every conceivable situation the just and fitting rule. But life is too complex to bring the attainment of this ideal within the compass of human powers. [The Nature of the Judicial Process (New Haven: Yale University Press, 1921), 143]

I don't mean to suggest that we dispense with all regulation. The certainty and clarity that some degree of regulation provides is essential to taking action. Before I go to the airport, for example, I don't want to guess what I can take on the plane. But I think they can go ahead and quit explaining to me how to buckle a seat belt.

We've all experienced the same thing—some rigid bureaucrat applying a senseless regulation in ways that do some harm and no good.

So I commended to you the beauty of neutral rules. But I hope you will think about the pervasive harm and lost liberty that can come from overregulation.

THINKING LIKE A LAWYER: HOW TO LOSE FRIENDS AND ALIENATE PEOPLE



So far I've looked at the strengths and weaknesses of three traits of thinking like a lawyer. Now I want to step back and look at the phenomenon of thinking like a lawyer in terms of how it can ruin your life.

Rigorously analytical thinking is only a tool—and just one tool among many—for arriving at the truth. I should point out that being analytical has, in my experience, served the purposes of liars and self-deceivers almost as often as it has aided truth seekers. Please listen carefully, for we have come to the place in my remarks that represents the entire reason I have driven to Eugene. Your friends and families want you to hear this. Being illogical is not necessarily the same thing as being wrong. Or, to be more precise about it, stating your position or views in an illogical way is not the same thing as being wrong. I hope you caught the difference. Your friends and family know this, and they

get mad when you act like your orderly statement of your position, coupled with your rhetorical skills, makes you right.

You make this worse when you use a calm, rational demeanor and tone of voice as a weapon. Many of you have done this already. You have two false assumptions: first, that the person who speaks more analytically is right, and second, that the person who speaks slowly and calmly is right. So, when you are arguing with a loved one or friend and you use calm speech as a weapon, knowing it will prod him or her to even greater emotionality, you have done doubly wrong.

Particularly in a family setting, there is another, perhaps more fundamental problem: you can actually be right and still be dead wrong. For example, if I have a discussion with my younger children, perhaps they will stake out some position that is, in fact, patently silly, readily demonstrable as untrue and unwise. I might quickly show that in ways that are, for the sake of argument today, objectively irrefutable. Yet every word I speak in so doing will be deeply wrong.

Why? Because in the name of getting the right answer on this issue, I am destroying the fragile bridge between me and her. Please work hard never to hear the words I have heard: "I can't talk to you about things, Dad, because I just feel trapped by your arguments."

I mentioned earlier that one of the things we do is to note irrelevancies in the speech of others. My advice is: Don't. Hear what is being said. Better yet, hear what is meant by what is said. I've heard lawyers in personal arguments say, "I'm just going by what you said," as if that answered everything. In a deposition, it might. But in life, go by what is meant in the context of who they are. Learn to hear in more than one language, more than just the language of law. Initially, you may have to translate, but try to learn to seamlessly see the world through more than just the prism of the law. Right now you are immersed in the law. But soon, if you want to be happy, you must come up for air.

This is really just about being humble. Trust me, most of us have a lot to be humble about. Ask yourself: Do lawyers generally live better lives than other people?

Are they happier? More successful? Better parents or spouses? Better lovers? Are they even better politicians and legislators? The answer to each question is, of course, no. So maybe, just maybe, you still have a lot to learn from those around you, and you should pay attention.



FAITH

Finally, thinking like a lawyer can get in the way of living with faith. By that I mean *faith* with both a small and a capital F. I don't mean to suggest that faith and reason are antithetical to each other. I see them as Venn diagrams, with substantial overlap. But most of the important endeavors in life require faith to act.

1. Faith to act. Let's start with the business world. The most common complaint people in business have about lawyers is that they gum up deals and get in the way of making things happen. There is an element of risk, of the unknown, in most transactions, and many lawyers can't seem to get over that. They obsess over what might go wrong or what cannot be known. Most CEOs have to learn, at some level, to ignore their own lawyers in order to succeed.

2. Faith in personal relationships. Of course, the same risk and uncertainty that exists in the business world exists to an even greater degree in personal relationships. The foundation of every romance, every deep friendship, every family, is trust, faith, and perhaps a little fear, but not logic, not counting the cost, not rigorous analysis.

*The sense of danger must not disappear:
The way is certainly both short and steep,
However gradual it looks from here;
Look if you like, but you will have to leap.
.....
The worried efforts of the busy heap,
The dirt, the imprecision, and the beer
Produce a few smart wisecracks every year;
Laugh if you can, but you will have to leap.
.....*

*A solitude ten thousand fathoms deep
Sustains the bed on which we lie, my dear:
Although I love you, you will have to leap;
Our dream of safety has to disappear.*

[W. H. Auden, "Leap Before You Look"]

3. Faith in God. My own view is that God is not illogical; in fact, He is the Author of logic. But He is possessed of vastly more truth and knowledge than we are. So He speaks in what seem like mortal ironies: Cast your bread upon the water, and it shall return to you; he that will lose his life shall find it; he that is greatest let him be the servant of all; if ye have done it unto the least of these, ye have done it unto me. Well, thinking like a lawyer simply won't bring you the happiness and light found in these truths. But trust will. Faith will. A suspension of skepticism will.

Still, this sort of faith and reason can coexist. I have always taken heart from the version of the Golden Rule found in Luke 10:25–28 (see also Mark 12:32):

And, behold, a certain lawyer stood up, and tempted him, saying, Master, what shall I do to inherit eternal life?

He said unto him, What is written in the law? how readest thou?

And he answering said, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy strength, and with all thy mind; and thy neighbour as thyself.

And he said unto him, Thou hast answered right: this do, and thou shalt live.

As far as I know, this is the closest any lawyer has ever gotten to actually being praised by any major religious figure. But what he had done was worth praising: he had glimpsed the synthesis of the law and life.

CONCLUSION

My assurance, my message to you is that if you will treat thinking like a lawyer as a brilliant and effective tool, but only a tool, with limits on its usefulness, and stay open to other tools for living your life, then your life as a lawyer—no, as a person with a law degree—can be satisfying and whole.

**Michael W. Mossman, '84, is a U.S. District Court Judge, District of Oregon.*

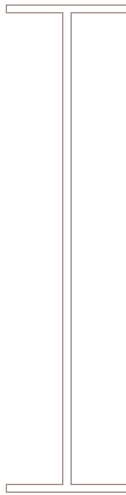
THE STRUGGLE FOR GENDER EQUALITY

I most decidedly do not want to sound like an ad campaign, however “We’ve come a long way, baby!” is about the best way I can think of to describe our current state of affairs when it comes to women in the law. The expression comes from the 1960s ad campaign for cigarettes designed for women, with the idea at the time being that women had progressed so much in society that they now had cigarettes designed just for them. Of course, there are a number of ironies in the ad, the most obvious one being that by calling women “baby,” the campaign demonstrated just how far women still had to go. In much the same way, women in the law have indeed come a long way, but we see all around us examples of just how far we have left to go.

ILLUSTRATIONS BY MARCOS CHIN

The following article is adapted from a talk given to the Orange County Chapter of J. Reuben Clark Law Society on April 8, 2011.





I will share with you some of my thoughts about gender bias in the law, including examples of women who inspire me, anecdotes from my own legal career, obstacles I have faced along the way, and some thoughts about checking our own biases. I will leave with you the hope that I have for my own daughters, granddaughters, sons, and (one day) grandsons. We still have a long way to go, but I am indeed hopeful as I look forward and see us continuing toward the goals of equity feminism: fairness, equality, and access for all, regardless of gender.

I'll start by giving two examples of tremendous women in the law who inspire me. Tani Cantil-Sakauye, our new chief justice of the California Supreme Court, is only the second female to hold this critical post within our legal system and the first Asian-Filipina American to do so. She is amazing, intelligent, fair, and strong. She is 51 years old, a mother of two teenage daughters, and someone I know and admire greatly.

In my own appellate district, my dear friend Carol Codrington was just appointed this past January. She is the first African-American to be appointed to our appellate district, and she is currently the only African-American woman on the court of appeals statewide. She is a dear friend, and I was privileged to speak at her confirmation hearing held at the Supreme Court of California in San Francisco before then chief justice Ronald George, then attorney general (now governor) Jerry Brown, and the others on the commission. I am proud of these women who are amazing and strong examples to me. They are part of a long chain of pioneers in the law that will undoubtedly continue into the future and one day include many who are just now entering or have yet to enter the profession.

As for me, I am the mother of six children—four daughters and two sons—and

the nana of three brilliant and capable granddaughters. Much like Thumper in the Disney classic *Bambi*, when it comes to my granddaughters, I am simply "twitterpated." I have sentenced defendants to multiple life sentences. I have presided over more than 30 horrific child molestation cases as well as many murder, attempted murder, sexual assault, gang, and domestic violence cases. I serve on committees, task forces, and judicial faculties at the county, state, and national levels. I am logical, forward thinking, in charge, and a bottom-line sort of person; but when it comes to my granddaughters, I am indeed twitterpated. Putty in their hands. I tried to get them to call me "Judge," but they refused. Nana—of all the ridiculous things to be called—Nana.

I converted to the LDS Church when I was 12 years old. A precocious child, when the missionaries knocked on my door, I read the entire Book of Mormon and decided to get baptized. My single mother and my two younger sisters joined some six years later. I am on my fourth tour of duty as Young Women president and have been honored to serve as Relief Society president as well. I am a card-carrying, temple-going, active member of the LDS Church, and I am the presiding judge of one of the largest counties in the country—2.2 million people and 7,200 square miles.

Before becoming a judge, though, I was a commissioner. Before becoming a commissioner, I had my own law firm—a very successful firm, I might add. I represented regional banks, a large agricultural conglomerate, a car racing group, and many others, doing mostly business and real estate litigation. When I decided that I wanted to eventually become a bench officer, I devoted a portion of my practice to criminal defense

through the county conflicts defense panel. As you can imagine, all of this went over well with some of the Relief Society women who knew better than me what was best for my family and my community.

As a female LDS attorney, you feel the sting of gender bias both in the professional world in which we circulate and, unfortunately and more disappointingly, in the communities and cultures of our wards and stakes. I wish I could shift this over to the men, but I must say for the most part in my experience within the Church, it has been the women more than the men who have shown strong bias concerning the working woman. It seems that unless you are in the fields of education, nursing, or retail, you often become isolated as a result of strongly held preferences and biases by some of our sisters. An insightful bishop took care of that and made me Relief Society president. So on Sundays I made home visits, and on many a Monday I made jail visits.

Believe it or not, they were very much the same. I found that when people are in crisis, when people are hurting, they all need respect and compassion. Whether it is the single mother at church with tattoos and piercings who has lost her job and needs a food order or the young man caught up in the courts who has lost his way to drugs, they both need to be treated with dignity, even if that dignity results in consequences for their choices. When sentencing the cruelest of criminals, I try to do so with decorum, never demeaning or losing sight of the integrity of the office I hold so dear.

As a litigator, I had many experiences that I'm sure countless others have had: I was often mistaken for the court reporter or clerk, called "Miss" instead of "Ms.," or, worse yet, "hun" or "young lady." These seem like small things, but the cumulative effect is annoying, to say the least, and serves as one more distraction in a high-stress situation. It also does something strange to women. Rather than command respect based on our performance and our gender, we do odd things in response, like lower our voices when speaking in court, talking in our female version of a manly man voice. Why do some women lawyers do that with their voices, anyway? I think it confuses juries, and I know it confuses me. It is rather odd, but we do it. More significantly, we often

respond by behaving less zealously as advocates and by acting in ways that are more dramatic and antic-driven in an attempt to compensate for gender bias.

I decided rather early on that I would engender my gender. I brought a portable crib to my office and hired my mother as an office manager and nanny. The clients loved it, and I was able to keep my youngest at the office until I felt he was old enough to be in part-time day care. I would not become one of the boys, and I would not abandon the parts of womanhood that I enjoyed. My successes with juries would come from accentuating exactly who I was, without pretense. I was prepared, well spoken, and at ease. I *wanted* juries to see me as a woman, a mom, a sister, an aunt, and a daughter, because that is who I am. It did not require me to transgender my patterns of speech, my appearance, or my behavior. I did not have to be base or crude in order to be accepted. Indeed, I think that being a strong, compassionate, intelligent woman is why I was so successful. Respect is garnered when respect is given without falsehood.

Shortly after I began practicing law, an opportunity arose for me to take over a practice from an attorney who had practiced for years. He became a judge, and it was up to me to keep those longtime, important clients. The attorney's parting words to me were, "Don't blow it, young woman." His biggest client was a very successful agricultural business. These were farmers, men, manly men, men who ran a huge multimillion dollar operation, and men who were wealthy and powerful enough that they were not used to being told no.

I will never forget walking into the office of the CEO and owner of that business as a very young, female attorney, knowing that I was going to have to tell this gruff, grouchy, and powerful man something he did not want to hear. I was sick. I knew that this was make-or-break time. Keeping my integrity by giving my honest advice was, of course, most important, but I was well aware that if this business was pulled from me, my firm would go under. Before I went into that office, I did indeed feel like a little girl.

I took a big breath, stood firm, and presented my advice, knowing it was contrary to what the farmer wanted. He listened, never interrupting me, and then sat glar-

ing at me. Finally, he spoke: "Well, Sherrill, guess you'll be our lawyer. Guess we will follow your advice." He shook my hand and became one of my best clients. He owned a top-notch stock car and funny car racing business and hired me on to handle that business as well. Many an afternoon, I in my six-inch stilettos was in that garage, hanging with the guys and going over the contracts, signing them on the hood of a race car. They would hustle to flip over their pin-up calendars as a sign of respect, and I am certain their language was cleaned up as well. I retained and expanded their business because I was an excellent attorney who would not compromise her integrity or her gender. We are friends to this day.

In the mid-1990s, the statutory rape laws in the state of California were gender-specific in that only men could be charged and only females could be protected. During that time, I had one of the most significant opportunities of my legal career. The football coach at a local high school made national attention by soliciting sex for his wife from two of his quarterbacks. He would bring the young men, both of whom, incidentally, were from strong and intact religious families, into his home and his life, making them part of the family. Then, as part of a very perverted plan, he strongly encouraged them to have sex with his wife. This went on for a few years until the story finally broke.

Even though these young men were minors whose lives had been turned upside down, they were not protected under the statutory rape laws of California at the time, because they were male and the person they were having sex with was female. The families of the victims came to me for help, and I took on their case, *pro bono*. With the help of these brave young men, I was able to start a grassroots campaign and help change the statutory rape laws in California to become gender neutral. Many other states followed our lead, and this is why we now see many female teachers, for example, prosecuted for having sex with their underage male students.

I lost a law partner as a result of that case and became the target of extreme gender bias, as did the young men. Jay Leno made jokes on national television discounting the notion that a teenage boy could be a victim.

In court, male attorneys and judges made crude and inappropriate remarks. Shock jocks and others on the radio used this as fodder, questioning my relationship with these boys as a female attorney about the same age as their perpetrator. Some feminists jeered me as well, go figure, claiming that the change in the law would open up additional ways to oppress women. It was a difficult time, but it was a victorious time. It was the right thing to do. We testified in Sacramento, and the law was passed. Those young men did something courageous as they stepped out of the shadows, and I am proud to have helped them.

Shortly after that, I decided to apply to become a judge. I was a shoo-in—at least that's what everyone thought. I went into my judicial nomination evaluation (JNE) interview confident and collected. Two of my interviewers were women, so I knew that gender bias wouldn't be an issue, of course, and thought to myself, "I have this made, sisters!" At 35, I was young and far more naïve, I suppose, than I had ever imagined. The experience could not have been much worse. Most JNE interviews last between 30 and 90 minutes. The first few minutes were great as we ran through my strengths. Then it got ugly. For the next several hours I was grilled on being a Mormon and, more extensively and specifically, on how I could possibly be a judge *and* a mother with all those children. When I left, I was battered and bruised and pretty dumbfounded. It was no surprise that I didn't get the job. Despite my previous successes, and although I knew I was only one of a hundred applicants, not getting the position really made me think that I simply might not be judge material.

Nevertheless, I was given the opportunity to serve in a similar capacity as a commissioner. I held that post for nine years. I loved it but knew I wanted more. Year after year the judges, commissioners, and attorneys with whom I interacted encouraged me to apply for a judgeship. I knew I wanted to, but I didn't want to go through that miserable experience again. After nine years I finally put my name back into the hat. This time around it was a much better experience. My JNE interview took 20 minutes, and my evaluators told me they had not received a single negative evaluation. A far cry from those who had questioned me as a woman, mother, and Mormon, the evaluators this time around focused on attributes like fairness, integrity, and legal acumen.

Being sworn in as a superior court judge was for me a defining moment in my life. Not only did it give me a little taste of sweet vindication, as you can imagine, but it also allowed me to honor my mother, my sisters, my husband, and my children. I was subsequently elected by my peers to the office of presid-

ing judge. In its more than one hundred year history, I was only the seventh woman ever appointed to the Riverside County Superior Court and only the second woman appointed to my current position of presiding judge.

Recently, this topic of gender bias got me searching. I felt a little bit like a kid who is snipe hunting—looking for but never finding the illusive snipe. In this case I was searching for a female LDS judge in California other than myself. I called the Church offices, which sent me to the statistics department, which sent me to the legal department, which sent me to a real law firm with a name like McConkie in it. That resulted in someone doing some research and calling back with the simple answer "We don't know the answer." I called all of my male LDS judges from the trial court to the court of appeals, up and down the state. The universal conclusion was "Never heard of one; don't think they exist."

So I would love to be corrected, but I think I am on fairly good, elevated burden of proof standards when I say that I



think I am the only female LDS judge in the state of California. I am certain that I am the only female LDS presiding judge in the state of California. It is a little startling, isn't it? If anyone knows of other California snipes such as me, I welcome your e-mails of correction.

As women, we need to do all we can to combat bias in appropriate ways. When my youngest was in his senior year of high school, he lettered in three sports. I was in a plum assignment presiding over felony trials with the most experienced lawyers, the most interesting cases, and a beautiful top-floor office at one of the newer court-houses. But I had a 45-minute commute that precluded me from watching him play baseball. As a mom, I wanted to be there; as a judge who did not want to look weak, I was torn. In the end, I traded in the plum for a difficult domestic violence family law assignment in order to be closer to home and able to attend his games. I am a mom who happens to be a judge, and compromising my priorities would have been a compromise of who I am. I gained the respect of both men and women on the bench because my family came first. We as women often tend to be our own worst enemies; we like to blame the guys, but we are frequently just as culpable, if not worse. Women, figure out what your priorities are, and do not compromise or yield to bias or pressure. You will be less stressed, and you will find that those who are important to you will respect your decisions.

To the wonderful men who support the women in their lives, as my husband and sons have supported me, I thank you. I ask you to continue to check your biases and consider how you deal with the women in your life. I hope you encourage your daughters to be what I refer to in my Young Women organization as "ultimate women." Ultimate women are those who rely on their inner beauty, who are intelligent, who are strong, and who are courageous. I love that my niece, the same niece who was a beauty pageant finalist, a vocalist, and a viola player, graduated from BYU with an advanced degree in mathematics despite being told "girls don't like math" over and over by her peers, teachers, and leaders. She is a great example to me of an ultimate woman. Encourage the women

in your lives to continue to learn, to serve, and to define themselves.

So what hope do we have for the future? I am very hopeful. There are 58 presiding judges in California. It is truly the highest honor that can be bestowed on trial court judges to be asked by their peers to lead and represent them. Of the 58 presiding judges, we have, I believe, a record 13 female presiding judges, and Los Angeles has its first-ever female presiding judge. I see more female attorneys in court all the time and wide-scale acceptance of attorneys on their merits, not their gender.

Over the past 15 years in my combined time as a commissioner and a judge, I have had many amazing experiences and significant accomplishments. I believe my success is in some ways a direct reflection of the obstacles I overcame as a woman—an LDS woman—along the way. Perhaps I committed a little bit more as I felt the need to overcome the bias—being considered a young lady instead of a lawyer, a court reporter instead of a litigator, or a soccer mom only instead of a judicial candidate. Despite the frustrations and the obstacles along the way, I have often thought, "Who better than me, a mother of six, to sort out the complex issues of high-conflict custody battles? Who better than me, an LDS woman, to preside over child molestation cases where the victims and the juries need a gentle touch? Who better than me to handle domestic violence cases?"

I am confident that we will one day see true fairness, equality, and access for all, regardless of gender. To get there, though, each of us needs to step up and ask, "Who better than me?" I am convinced that the best ways to combat the biases we face are to perform to the best of our abilities, to be committed to excellence in all aspects of our profession, and to embrace the gospel in a way that never leaves others to question our standards. Although we see less bias today than in decades past, I am confident that we will only continue to progress. One day we will look back on our present times and the progress we will have made from now, thinking to ourselves, "We've come a long way, baby."

**Sherrill Anne Ellsworth is presiding judge, Riverside County Superior Court.*

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PREDICTING VIOLENCE*

Shima Baradaran
and Frank McIntyre

*This is a shortened version of an article by the same title forthcoming in the *Texas Law Review* (2012).

INTRODUCTION

The last several years have seen a marked rise in state and federal pretrial detention rates. Many of those being held are detained pretrial rather than released on bail. It is unclear whether this increased detention has caused a commensurate decrease in crime rates. It is also unclear whether the United States is effectively detaining people who would otherwise commit crimes on pretrial release. Judges determine who to detain pretrial, often based on a defendant's "dangerousness," which is based on the current charge against the defendant or on prior convictions.



Judges considering the “danger” posed by a defendant in pretrial release is a relatively new phenomenon. Historically, most defendants were guaranteed release on bail before trial.¹ The major factor to determine pretrial release used to be whether a defendant posed a flight risk. However, after the Federal Bail Reform Act of 1984, judges were charged with determining which defendants were “dangerous” or posed a threat to public safety, allowing judges to hold particular defendants in jail pretrial. Across the nation judges began predicting which defendants would be likely to commit a violent crime. Much debate ensued on whether that determination was appropriate, as well as which factors should be taken into consideration. However, the debate died more than 20 years ago, and there has been little dialogue since on how pretrial detention is going for America. Today, politicians are searching for a solution to the rising costs of incarceration in tough economic times; however, pretrial detention’s impact on high incarceration rates has yet to enter the discussion.²

Our analysis of a nationally representative 15-year dataset of over 100,000 defendants shows that the United States could significantly reduce the amount of people held in jail pretrial. These data show that currently judges often detain the wrong people. We also demonstrate that up to 25 percent more defendants could be released pretrial without an increase in pretrial crime. As many counties in the United States spend more money on jails than on schools,³ changes to pretrial detention could have sweeping public policy effects, especially since the majority of people in U.S. jails are pretrial defendants.⁴ If pretrial detention can be reduced and more defendants can be safely released without increasing crime, more defendants would have access to pretrial liberty and due process, counties would save substantial amounts of money on corrections that could be put toward other important social goals, and the public would continue to feel safe at home.

History of American Pretrial Prediction

Under the common law, due process and the presumption of innocence guaranteed defendants the right to bail before trial.⁵ U.S. federal law required bail to be presumed for everyone but murder defendants (where significant proof of the alleged crime was present).⁶ Until 1944, federal law guaranteed bail for all noncapital federal offenses,

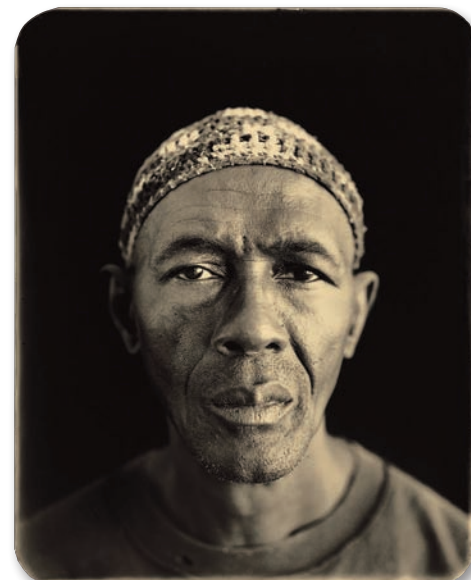
and most states followed suit.⁷ In 1944, Rule 46 of the Federal Rules of Criminal Procedure allowed courts to consider several factors in setting bail, including “the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and *the character of the defendant*.”⁸ While it did not consider whether the defendant posed a threat while released, the ability of judges to consider the “character of the defendant” provided an opening to evaluate a defendant’s dangerousness.

As time went on, bail reform continued to expand upon the reasoning for which defendants could be detained pretrial. The 1966 Bail Reform Act focused on a defendant’s appearance in court, permitting judges to consider a defendant’s prior record⁹ and thus opening the door for judges to consider additional factors besides flight risk.¹⁰ Under the District of Columbia Crime Bill of 1970,¹¹ judges, for the first time in U.S. history, could detain a defendant pretrial, without setting any bail, if the defendant was deemed dangerous to society.¹²

Taking a cue from the D.C. Crime Bill and a greater public fear of crime, the Federal Bail Reform Act of 1984¹³ took a leap towards preventative detention, focusing on protecting the public from danger.¹⁴ The act was soon challenged in court, but it withstood constitutional challenges of vagueness, violation of right to bail, presumption of innocence, due process, and excessive bail.¹⁵

Before the Bail Reform Act of 1984, various states had passed legislation allowing judges to consider in making bail determinations the danger that defendants posed to the community.¹⁶ Some state laws generally listed criteria to consider when making bail decisions (such as community ties, employment status, financial resources, drug addictions, etc.); however, judges were free to ignore these criteria and focus solely on the criminal charge and the prior criminal record of the defendant.¹⁷ Because dangerousness was not clearly defined, there were no “precise legal standards” that judges were required to follow, and determining dangerousness varied greatly by state.¹⁸

Often, state courts evaluate three main categories to determine dangerousness: (1) the present offense charged, (2) past conduct, and (3) judicial discretion of the accused’s circumstances and character. To objectively determine dangerousness, the present offense charged often triggers dangerousness assessments based upon the nature of the crime. Many states review the defendant’s criminal record and record of appearances to evaluate dangerousness. The most subjective factor that courts consider when determining dangerousness is the defendant’s character.



This could include (1) the accused's family situation, (2) employment, (3) finances, (4) character and reputation, (5) record of appearances or history of flight, (6) community ties,¹⁹ (7) alien status,²⁰ (8) gang involvement,²¹ (9) possession or control of weapons,²² (10) propensity for violence,²³ (11) general attitude and demeanor,²⁴ (12) history of depression,²⁵ (13) treatment of animals,²⁶ and (14) "any other factor" relevant to making a determination of dangerousness.²⁷ A defendant found to pose a danger to the public will either be detained pretrial or released subject to restrictive conditions that are the "least restrictive" conditions to ensure the defendant's appearance and protect the community.²⁸

Past Studies on Predictions of Violence

A number of studies have been performed over the last 50 years in order to examine various bail systems, pretrial detention, and prediction of pretrial crime. While informative, many are limited in scope and outdated.

Foote's Philadelphia Bail Study in 1954 found that judges based pretrial detention on the charge because it was an easy standard to apply,²⁹ despite the fact that those with lesser offenses were less likely to appear in court than defendants with more serious criminal charges.³⁰

The National Bureau of Standards Study in 1969 found that the instances of criminal defendants committing serious felonies pretrial were low, contradicting claims by advocates of preventive detention.³¹ The study concluded that there was no statistical relationship between the first arrest type of crime and the second arrest crime. It also asserted that none of the 10 characteristics used in the District of Columbia's Bill were accurate predictors.³²

A 1970 Los Angeles study concluded that defendants are rarely arrested for new crimes on pretrial release.³³ This study agreed with the NBS study, concluding that those released pretrial are not very likely to be rearrested.

A Harvard study conducted in 1970 confirmed the NBS study's findings on pretrial detention,³⁴ concluding that the initial charge is a poor indicator of recidivism.³⁵ The study determined that juvenile arrests, previous incarceration, conviction of violent or dangerous crimes within the past 10 years, and convictions of four or more misdemean-

ors were better predictors. However, problems with its sample size limit the study's informative value.³⁶

Goldkamp's Philadelphia Bail Study in the late 1970s found that detained pretrial defendants were much more likely to be incarcerated after conviction or pleading guilty than those who were released pretrial.³⁷

Studies in the 1980s indicated that most defendants appeared at trial. However, rearrest rates were quite high, between 10 and 20 percent, thus failing to convince policy makers to reduce pretrial detention.³⁸

Since the 1980s, few studies regarding pretrial detention have been done. A study conducted in New York, where dangerousness cannot be a determinant factor of preventive detention, showed that few defendants were rearrested for violent crimes while on pretrial release.³⁹ The study determined that residing at a New York City address, having a residential telephone, being employed, being in school, or participating in a training program full-time were all factors that related significantly to a low risk of pretrial misconduct.⁴⁰

These studies illustrate the difficulty of accurately predicting pretrial crime. Scholars disagree as to (1) whether judges should rely on the initial charge to set bail,⁴¹ (2) what the crime rate is for defendants released pretrial,⁴² (3) whether past criminal behavior is an accurate predictor of future criminal conduct,⁴³ (4) whether a previous failure to appear has an indication on future failures to appear or an impact on predicting future crimes.⁴⁷ Also, as far as age and gender, all of those who have commented on this have noted that younger male defendants are more likely to commit pretrial crime than older female defendants.⁴⁸ Finally, many scholars have lamented that determinations of bail and predictors of pretrial crime can never be effective or accurate.⁴⁹

Pretrial Crime Dataset

Our national dataset is based on a nationally representative sample covering the 75 largest counties in the United States. The data are drawn from the Bureau of Justice's State Court Processing Statistics from 1990 to 2006 and include over 116,000 observations.⁵⁰ Each observation records what happens to a given felony defendant from the time of their arrest through their trial. The data contain information on the initial crime committed, any subsequent bail crime, the defendant's prior record, any failures to appear, and demographic characteristics such as age, gender, and race.

MANY COUNTIES
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THAN ON SCHOOLS

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THAN ACTUAL CONVICTS

Our dataset allows us to overcome two types of selectivity bias inherent to pretrial risk assessment. First, because the sample size is large and many jurisdictions use different determinations for detaining or releasing defendants, we can predict how dangerousness differs between those commonly—but not always—held and those commonly released. Second, many defendants are released based upon a number of conditions that may make them less likely to commit crime. However, knowing a defendant’s crime risk under no restrictions is not pertinent if the most common way defendants are released is with restrictions.⁵¹

Overall, there is a relatively low level of arrests pretrial. Of all of the defendants released, only 16 percent of them are rearrested for any reason, while 11 percent are rearrested for a felony and 1.9 percent are rearrested for a violent felony.

In 43 states judges consider the defendant’s present charge in determining release.⁵² Prior studies have found that judges often rely on the initial charge to set bail,⁵³ though some studies have concluded that the crime charged is unrelated to the crime the defendant is rearrested for on release.⁵⁴ Our large sample allows us to draw a much cleaner inference than found in previous studies.

While the Harvard study and others claimed that there was little information in the initial charge, this turns out to be untrue. For example, those with an initial murder charge are more than 20 times more likely to be rearrested on a violent felony charge than a defendant charged with fraud (0.3 percent v. 6.4 percent) and about six times more likely than someone arrested on a drug possession charge (1.1 percent v. 6.4 percent).

Defendants charged with violent crimes are *not* necessarily more likely to be rearrested pretrial. The defendants with the highest rearrest rates pretrial (21 percent) are those charged with drug sales and robbery. Those released who are charged with the more “dangerous crimes,” such as murder, rape, and felony assault, have much lower overall rates of pretrial rearrest at 12 percent, 9 percent, and 12 percent. However, those *originally* charged with violent crimes are much more likely to be rearrested pretrial for violent crimes, showing that the initial charge is linked with the type of crimes committed pretrial.

While there is a large range of “dangerousness” pretrial, those released pretrial are perhaps much less dangerous than most people would anticipate. For almost all crimes,⁵⁵ defendants are only about 1–2 percent likely to be arrested for a violent crime pretrial.

Thirty-three states and the District of Columbia conduct some review of the defendant’s prior convictions as a factor in pretrial release. However, prior work has disagreed as to whether past conduct⁵⁶ or previous convictions are accurate predictors of future criminal conduct.⁵⁷ This more extensive dataset analysis indicates that past crime *is* a key predictor of future crime. Though there is a correlation between prior convictions and rearrest, the data show that defendants with four or more prior convictions are not rearrested much more than defendants with no or just one prior conviction. Repeat offenders, those with four prior convictions, are still only committing pretrial violent crime in about one in 30 instances. A person with prior convictions appears to be more dangerous than a person with prior arrests, yet both categories of defendants are more likely to commit violent crimes pretrial.

Age is also a strong predictor of future arrests. The older the defendant, the less likely the defendant will be rearrested. Teenagers are four times more likely to be rearrested than a defendant over the age of 50. Along with age, both prior record and initial charge make substantial differences in the probability of rearrest. On the other hand, prior failures to appear are not significant predictors of future violent behavior.

Judges detain defendants pretrial not only on the basis of dangerousness but also on flight risk. Flight risk varies somewhat with age, but the difference is not as pronounced as it was for violence risk. A prior failure to appear more than doubles the chance of flight. This is significant because historically courts looked primarily at flight risk to determine whether to release an individual on bail. Initial offense is also a strong predictor, but in a very different pattern compared to violent crime. For violent crime, an initial violent crime charge indicated the highest chances of rearrest for violence; but for flight risk, those most likely to flee are those accused of drug crimes.

In general, the factors that a judge can easily observe about a defendant that make him more likely to flee are almost completely uncorrelated (and thus unrelated) to the factors that

make a defendant likely to be rearrested for a violent crime. This is not to say that the two events are entirely uncorrelated but rather that the things *one can predict* about future crime are uncorrelated with the things *one can predict* about flight risk.

In states that consider both flight risk and dangerousness, which constitute the majority of states, dangerousness seems to be a much larger consideration for judges. A one-unit log increase in flight risk increases the chances of being held by about 2 percent, while a similar increase in predicted violence leads to a 10 percent increase in likelihood of detention. Thus, potential for violence is considered almost five times more heavily than flight risk in most states.

In the states that do not consider dangerousness or that ban preventative detention, flight risk becomes dramatically more important. A one-unit log change in flight risk produces an increase of 9.9 percent in the chances of being held, while a similar increase in predicted violence increases the chances of being held by 8 percent. Thus, while these states may not be following the law perfectly, flight risk is a bigger consideration than expected danger.

Since the 1980s both federal and state detention rates have increased. Over the last two decades local jails have housed more pretrial detainees than actual convicts.⁵⁸ Based upon the dataset and current pretrial detention practices, judges are often releasing and detaining the wrong groups of people. The data suggest that about half of those detained are less likely to commit a violent crime pretrial than many of the people released. The percentage of pretrial defendants released could be increased from its current 62 percent to 85 percent while maintaining a crime rate of 14.7 percent, which is lower than the current rate of 16 percent. Thus, our predicted model can provide guidance for judges to make more efficient decisions and increase the number of people released pretrial without causing increased danger to the public.

Beyond just reducing the prison population, more accurately predicting rearrest rates would have a great impact on defendants. Often defendants who are detained pretrial suffer prejudice, being more likely to be convicted or plead guilty.⁵⁹ Beyond the likelihood of guilt, defendants detained pretrial often encounter difficulty in financial and employment pursuits,⁶⁰ in obtaining private counsel,⁶¹ and in sentencing.⁶² In addition, increased detention increases costs for counties, which are dealing with tight budgets.

We do not ignore that there are large costs to victims and society when more crimes are committed. The costs of murder, rape, burglary, robbery, and other felony offenses are tremendous financially and in other intangible ways.⁶³ The aims of detaining defendants pretrial have evolved in order to protect society from repeating events that brought the defendants to court in the first instance.



Conclusion

In our society today we expect the government to provide for our safety by preventing crime and violence and often criticize the criminal justice system and its inefficiencies. Others tackling the pretrial crime and prediction problem have advocated speedy trials,⁶⁴ an increase in pretrial supervision programs,⁶⁵ bail forfeiture,⁶⁶ more visibility of judicial detention decisions,⁶⁷ and setting bail amounts in a more logical way.⁶⁸ While our model is not the end-all to solving the problem, accurately predicting pretrial violent crime contributes in several important ways.

First, this expansive dataset and study show that pretrial crime is actually quite unlikely. Looking specifically at some of the most dangerous felony defendants, the data show that only 1.9 percent are rearrested for violent felony crime. To look at it another way, about 80 percent of released pretrial defendants have less than a 3 percent chance of being arrested pretrial for a violent crime. Overall, the average rearrest rates are only about 1–2 percent for a violent pretrial crime.

Second, while most defendants released pretrial do not commit violent felonies, there are several factors that judges should consider in order to more accurately predict the likelihood of pretrial crime. The present offense, prior convictions, and prior failure to appear are all important predictors of pretrial rearrest. Regarding the present offense charged, those charged with robbery, burglary, and motor vehicle theft are more likely than the average defendant to be rearrested for any crime on release. While defendants charged with drug offenses were thought to be dangerous, they are among the least likely to be rearrested for a violent crime. The data also show that prior convictions are directly correlated with future likelihood to commit crime. Although pretrial crime is generally exaggerated, defendants with prior convictions are more likely to commit pretrial crime—about one in 30 instances. As for failing to appear in a prior court proceeding, it is a good predictor for being a flight risk but not a good predictor of pretrial violent crime. However, past failure to appear is an indicator for being rearrested for a nonviolent crime.

Third, based upon these factors, judges often weigh the dangerousness of a defendant

much more heavily than flight risk. However, if the state is not permitted to consider dangerousness, flight risk is a bigger consideration.

Finally, while recognizing the overall increase in detention rates, this study shows that if the goal is to prevent crime, judges are releasing and detaining the wrong groups. About half of those detained have less chance of being rearrested pretrial than many of the people released. We would be able to release 25 percent more defendants while decreasing pretrial crime levels if we released defendants using our evidence-based model. This model demonstrates that judges may safely release some older defendants, people with clean prior records, and people who commit fraud and public order violations without increasing danger to the public.

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NOTES

- 1 *Ex parte* Milburn, 34 U.S. 704, 710 (1835); Coffin v. United States, 156 U.S. 432, 452 (1895); Taylor v. Tainter, 83 U.S. 366, 371–72 (1872); United States v. St. Clair, 42 F.2d 26, 28 (8th Cir. 1930).
- 2 Newt Gingrich & Pat Nolan, *Prison Reform: A Smart Way for States to Save Money and Lives*, WASH. POST, Jan. 7, 2011, Opinions.
- 3 Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification As a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010).
- 4 See BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 7 (2000); BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 5 (2007). See NAT'L ASS'N. OF COUNTIES, JAIL POPULATION MANAGEMENT: ELECTED COUNTY OFFICIALS' GUIDE TO PRETRIAL SERVICES 4 (2009). In 1995, the percentage rose to 56 percent. See BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 7 (1995). See BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 7; BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 5. According to the Annual Survey of Jails, the number of pretrial detainees has increased from 49 percent of the jail population in 1985 to about 56 percent of the jail population in 2006.
- 5 See Shima Baradaran, *Restoring the Presumption of Innocence*, forthcoming in *Ohio State Law Journal*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1757624.

- 6 *Id.*
- 7 Act of Apr. 30, 1790, ch. 9, 1 Stat. 112.
- 8 *Stack v. Boyle*, 342 U.S. 1, 5 n.3 (1951) (quoting FED. R. CRIM. P. 46(c) (1951)).
- 9 18 U.S.C. § 3146 (a).
- 10 *Id.*
- 11 District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91–358, 84 Stat. 473 (July 29, 1970).
- 12 See Baradaran, *supra* note 5.
- 13 Federal Bail Reform Act of 1984, Pub. L. 98–473, tit. II, ch. 1, 98 Stat. 1976 (1984) (formerly S. 1762).
- 14 John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 1 (1985).
- 15 See *United States v. Jessup*, 757 F.2d 378, 384–85 (1st Cir. 1985); *United States v. Hazzard*, 598 F. Supp. 1442, 1451 (N.D. Ill. 1984); *United States v. Payden*, 598 F. Supp. 1388, 1395–96 (S.D.N.Y. 1984). See also Schall v. Martin, 467 U.S. 253 (1984).
- 16 See FLA. STAT. ANN. § 907.041(1) (1985). Goldkamp, *supra* note 14, at 1, 5.
- 17 Goldkamp, *supra* note 14, at 9–10.
- 18 Andrew Von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFF. L. REV. 717, 725 (1972).
- 19 Alabama, ALAB. R. CRIM. PROC. 7.2(a)(1)–(13); Alaska, ALASKA STAT. § 12.30.020(c) (2009); Colorado, COLO. REV. STAT. § 16-4-105(C)–(J) (2010); Connecticut, CONN. GEN. STAT. ANN. § 54-64a (b)(2); Delaware, DEL. CODE ANN. tit. 11, § 2105(b); District of Columbia, D.C. CODE § 23-1322(e)(3) (2010); Florida, FLA. R. CRIM. PROC. 3.131(b)(3); Illinois, 725 ILL. COMP. STAT. § 110-6.1(d)(2); Indiana, IND. CODE § 35-33-8-4 (B)(1)–(8) (2010); Iowa, IOWA CODE § 811.2(2) (2010); Kansas, KAN. STAT. ANN. § 22-2802(8) (2009); Maine, ME. REV. STAT. ANN. tit. 15, § 1026(4)(C) (1)–(11) (2009); Massachusetts, MASS. GEN. LAWS ch. 276, § 58 (2010); Minnesota, MINN. R. CRIM. PROC. 6.02(2)(c)–(m); Nebraska, NEB. REV. STAT. ANN. § 29-901.01 (2009); Nevada, NEV. REV. STAT. § 178.4853(1)–(10) (2009); New Mexico, N.M. RULES CRIM. PROC. FOR DIST. CTS. Rule 5-401(C)(3); North Carolina, N.C. GEN. STAT. ANN. § 15A-534(c) (2009); Ohio, OHIO REV. CODE ANN. § 2937.222(C)(3); Rhode Island, R.I. GEN. LAWS § 12-13-1.3(c)(3)–(10) (2009); South Carolina, S.C. CODE ANN. § 17-15-30 (2009); South Dakota, S.D. CODIFIED LAWS § 23A-43-4 (2009); Tennessee, TENN. CODE ANN. § 40-11-115(B) (2010); Vermont, VT. STAT. ANN. tit. 13, § 7554 (a)–(b) (2010); Virginia, VA. CODE ANN. § 19.2-120 (2010)(D)(2); Washington, WA. ST. SUPER. CT. CR CRR 3.2(c), (e). Some state statutes refer to these factors by saying the court “may consider” while others say “shall consider” or “must consider.”

20 See e.g., Arizona, ARIZ. REV. STAT. ANN. § 13-3961(A)(5) (A)(V)-(VI).

21 Arizona, ARIZ. REV. STAT. ANN. § 13-3961(G); Georgia, GA. CODE ANN. § 17-6-1(f)(4) (2009); Illinois, 725 ILL. COMP. STAT. § 110-5(a) (2010); Virginia, VA. CODE ANN. § 19.2-120 (D)(2) (2010).

22 Alabama, ALAB. R. CRIM. PROC. 7.2(a)(7); Illinois, 725 ILL. COMP. STAT. § 110-5(a) (2010); New Hampshire, N.H. REV. STAT. ANN. § 597:2(III-A); Washington, WA. ST. SUPER CT. CR CRR 3.2(d)(3).

23 Illinois, 725 ILL. COMP. STAT. § 110-6.1(d)(8) (2010); Kansas, KAN. STAT. ANN. § 22-2802(8) (2009).

24 See *Querubin v. Commonwealth*, 440 Mass. 108, 116 (2003).

25 New Hampshire, N.H. REV. STAT. ANN. § 597:2.

26 *Id.*

27 Florida, FLA. STAT. § 907.041(3)(B)(3) (2010); Indiana, IND. CODE § 35-33-8-4 (B)(9) (2010); Maine, ME. REV. STAT. ANN. tit. 15, § 1026 (2009)(4)(C)(9-a); Missouri, MO. ANN. STAT. § 544.457(2); Nevada, NEV. REV. STAT. § 178.4853(10) (2009); New Hampshire, N.H. REV. STAT. ANN. § 597:2(III-A); New Mexico, N.M. RULES OF CRIM. PROC. FOR DIST. CTS. Rule 5-401(C)(5); Ohio, OHIO CRIM. PROC. Rule 46(C); Rhode Island, R.I. GEN. LAWS § 12-13-1.3(c) (2009); Tennessee, TENN. CODE ANN. § 40-11-115(B)(8) (2010); Washington, WA. ST. SUPER CT. CR CRR 3.2(c).

28 Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954).

29 *Id.* at 1043, 1048.

30 *Id.* at 1046.

31 See J. Locke et al., *Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants: Pilot Study*, National Bureau of Standards Technical Note 535, 1, 2, 117-171 (1970) [hereinafter NBS Study].

32 Sam J. Ervin, Jr., *Foreword: Preventive Detention—A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 291, 295 (1970-1971).

33 Michael R. Gottfredson, *An Empirical Analysis of Pre-Trial Release Decisions*, 2 J. CRIM. JUST. 287, 300 (1974).

34 Ervin, *supra* note 32, at 296.

35 Arthur R. Angel et al., *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 311 (1970-1971).

36 *Id.*

37 John S. Goldkamp, *Philadelphia Revisited: An Examination of Bail and Detention Two Decades After Foote*, 26 CRIME & DELINQ. 179, 190 (1980).

38 DONALD E. PRYOR & WALTER F. SMITH, PRETRIAL ISSUES: SIGNIFICANT RESEARCH FINDINGS CONCERNING PRETRIAL RELEASE (1982) in 31 CRIMINAL LAW AND PROCEDURE PAMPHLETS.

39 Qudsia Siddiqi, *Predicting the Likelihood of Pretrial Failure to Appear and/or Re-Arrest for a Violent Offense Among New York City Defendants: An Analysis of the 2001 Dataset*, 7 (2009).

40 *Id.* at 23.

41 Angel et al., *supra* note 35, at 309-10.

42 See Foote, *supra* note 28, and Qudsia Siddiqi, *supra* note 39.

43 In 1969, NBS pointed out it was 5 percent; see NBS Study *supra* note 31, at 1; see also Gottfredson, *supra* note 33 and accompanying text.

44 DONALD E. PRYOR & WALTER F. SMITH, PRETRIAL ISSUES: SIGNIFICANT RESEARCH FINDINGS CONCERNING PRETRIAL RELEASE (1982) in 31 CRIMINAL LAW AND PROCEDURE PAMPHLETS.

45 Angel et al., *supra* note 35, at 309-10. NBS Study, *supra* note 31, at 1; however, the Harvard study did point out that previous convictions do help predict recidivism. See Angel et al., *supra* note 35.

46 BUREAU OF JUSTICE, DEPARTMENT OF JUSTICE, SPECIAL REPORT, PRE-TRIAL RELEASE AND MISCONDUCT 1 (1985).

47 See NBS Study *supra* note 31, at 1, although the 1970 Harvard study stated that previous FTAS do impact future FTAS. See Angel et al., *supra* note 35, but see Siddiqi, *supra* note 39, at 26.

48 See BUREAU OF JUSTICE, *supra* note 46; see Siddiqi, *supra* note 39, at 26.

49 See NBS Study *supra* note 31, at 1; see Foote, *supra* note 28.

50 See State Court Processing Statistics from 1990-2006, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&cid=282>.

51 ANTHONY YEZER ET AL., CLASSIFICATION SYSTEMS FOR THE ACCUSED (1986).

52 See, e.g., Idaho, IDAHO CODE ANN. § 19-2904 (2009); North Dakota, N.D. R. CRIM. P. Rule 46.

53 See *supra* Part II.

54 *Id.*

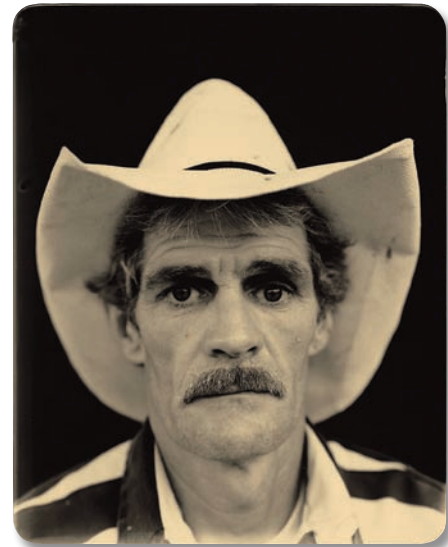
55 The three exceptions are murder, rape, and robbery.

56 Angel et al., *supra* note 35.

57 See NBS Study, *supra* note 31, although the Harvard study did point out that previous convictions do help predict recidivism. Compare BUREAU OF JUSTICE, DEPARTMENT OF JUSTICE, SPECIAL REPORT, PRE-TRIAL RELEASE AND MISCONDUCT 1, 4 (1985).

58 U.S. Dept. of Justice, Bureau of Justice Statistics, *Annual Survey of Jails: Jurisdiction-Level Data*, 1985-1987, 1989-1992, 1995-1997, 2000-2004, 2006, available by year at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies?sortBy=7&q=annual+survey+of+jails>.

59 In this study, 74 percent of those detained were found guilty and 69 percent served prison sentences, while 53 percent of those released were found guilty and 26 percent served prison time. See Foote, *supra* note 28, at 1051-53; Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 643 (1964) (Detained defendants are more likely to receive prison sentences than bailed per-



sons regardless of how high or low bail is set.); Patricia Wald, *Foreword, Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. REV. 640 (1964).

60 See Angel et al., *supra* note 35, at 354.

61 *Id.* at 347-49.

62 *Id.* at 350-51.

63 See *Crime in the United States by Volume and Rate per 100,000 Inhabitants*, 1990-2009, Table 1, available at http://www2.fbi.gov/ucr/cius2009/data/table_01.html. See also Mark A. Cohen, *The Monetary Value of Saving a High-Risk Youth*, 14 J. QUANTITATIVE CRIMINOLOGY 1 (1998); Mark A. Cohen et al., *Willingness-to-Pay for Crime Control Programs*, (working paper), available at <http://ssrn.com/abstract=293153>.

64 Foote, *supra* note 28, at 1073. See also Ervin, *supra* note 32, at 291 (advocating speedy trials and noting that most defendants do not commit crimes within the first 60 days of bail release).

65 Mary Toborg & John Bellasai, *Attempts to Predict Pretrial Violence: Research Findings and Legislative Responses*, in THE PREDICTION OF CRIMINAL VIOLENCE, 104, 106 (FERNAND N. DUTILE & CLEON H. FOUST EDS., 1987). See also PAUL B. WICE, BAIL AND ITS REFORM: A NATIONAL SURVEY 66 (1973).

66 Angel et al., *supra* note 35, at 365-68.

67 Goldkamp, *supra* note 14, at 55-56.

68 Curtis E. A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 11, 21 (2008).

ART

Page 18: Still-life photograph by Bradley Slade. Portraits of inmates (cover, contents page, and pages 19-20, 23, 25) by Deborah Luster (Jack Shainman Gallery, NYC), from *One Big Self: Prisoners of Louisiana* (Twin Palms Publishers, 2003). Background image from iStockphoto.

AFTER 25 YEARS OF SERVICE

Nancy Stevenson Van Slooten, '83, international chair of the J. Reuben Clark Law Society, never even thought about attending law school. She was in the BYU accounting program intent on joining the MBA program after returning from her mission. One of her accounting professors suggested law school, so Nancy called Reese Hansen, then dean over admissions, who encouraged her to apply. He touted law school over business school: "A lawyer with an accounting degree can do what an MBA does, but an MBA can't do what a lawyer does." He also said that women should be lawyers and doctors rather than nurses and secretaries because "they set the work schedules and can earn more money with less time away from the family." She was accepted to both programs but chose law school.

Amid the stresses of her first year she was called to be Relief Society president in her student ward, where she learned to balance the needs of the sisters with her rigorous law school schedule. The blessings came after she graduated and was hired at a Los Angeles firm, where she took over the retiring senior partner's practice on a four-year partnership track. In the first interview Nancy stated her priorities for

balancing professional life with family life. She became the only woman and non-Catholic attorney in the firm. The firm later allowed her to work three days a week at the law firm and three days a week at a CPA firm when she decided to pursue her CPA.

In 1986 Nancy was invited to Provo to meet with Law School officials and other LDS attorneys about beginning a professional organization. In 1987 the J. Reuben Clark Law Society was formed. Nancy joined the charter national board of the Law Society along with 16 others. John Welch, Sr., a board member and a senior partner at Latham & Watkins in Los Angeles, became the chair of the Los Angeles Chapter of the Law Society, with Nancy as his assistant.

Nancy began volunteering in the Law Society when she was single and practicing law and has continued to serve throughout her courtship and marriage and while raising children. She and her husband adopted three children from Russia, two from Ukraine, and one from California. After bringing the two babies home from Russia, she resigned from her firm partnership and began part-time work—15 hours a week with one day each week in the office—fulfilling Dean Hansen's assertion that lawyers set their own schedules.

Nancy was the chair of the Los Angeles Chapter when her family moved to Georgia. She then became part of the Law Society's International Board, where she promoted chapter events, assisted in the compilation of the Law Society handbook, and helped set up committees.

In 2001 Bill Atkin, then international chair, asked Nancy to set up the new international

student chapters. In just six years there were 75. Serving as the chair-elect of the executive committee in 2007, she became the international chair in 2009 and will complete her term in October 2011.

Through her work with the student chapters, Nancy has developed a deep love for the students and for mentoring them. As an entering law student Nancy had a chance encounter with an LDS attorney on a bus in Los Angeles. He invited her to his office and told her some of his experiences of negotiating the analytical and skeptical attorney traits in his professional life with being teachable and open to the Spirit. Nancy felt blessed by that encounter and looks with satisfaction at similar mentoring opportunities between students and attorney mentors affiliated with the Law Society.

As the first female international chair of the Law Society, Nancy is no stranger to having to stand up to be heard. Her law school class was composed of only 10 percent women, and she was the first woman partner at her law firm. From her early years in practice she tells this story: "I had been appearing before the same judge in the probate court for many years (he was known not to approve of women attorneys, but I knew he respected me anyway), presenting myself by saying, 'Good morning, your honor. Nancy Stevenson appearing for the petitioner.' The first court appearance after my marriage I presented myself by saying, 'Good morning, your honor. Nancy Van Slooten appearing for the petitioner.' The judge stopped the court and asked, 'Did I hear a new name? Are congratulations in store?' I said, 'Yes, your honor, I recently got married.' He responded, 'And

Women

Van Slooten and Downing Finish Terms

he still lets you work?' I respectfully replied, 'Yes, your honor, and I still let him work.' The judge's female clerk stood and applauded."

In reflecting on her time as international chair, Nancy points to important accomplishments. "We have worked to streamline the efficiency of the Law Society so that it is ready for future international growth,"



she says. "We have encouraged our members to be an influence for good, be a part of their communities, and be leaders in their communities. As people hear about the Law Society, we hope that the members will be known as good people who stand for good things." Nancy doesn't think that describing the work of the Law Society as "saving souls" is a stretch. "One mission of the Law Society is buoying each other up spiritually—reaching out to other attorneys, connecting with them, and not just standing by as they flounder."

of Influence

in Law School Organizations > BY JANE H. WISE



ALWAYS LEARNING

After 20 years in the workplace, Tani Pack Downing, '91, president of the BYU Law School Alumni Association, is surprised when she is the only woman in the room. It used to be the rule, but things have changed a little. "People sometimes did not know I was a woman until they met me," she says. "I guess because of my name." Tani remembers an experience from working at her first law firm: "We had a deposition scheduled, and when the opposing attorney, who was a man, showed up, he asked me if I was the court reporter. When I told him who I was, he seemed surprised. He had been expecting a man."

There were only a couple of women attorneys in the first two firms Tani worked in. When she began working for state govern-

ment, closer to half of the attorneys working for the legislature were women.

This is a change from when Tani was growing up. Her best friend's mother was the only woman she was acquainted with who worked outside the home—as a high school teacher. "She always had piles of books at the side of her chair or bed," Tani recalls. "I was inspired by her. Not only did I prepare myself for a profession—going to college like she encouraged me to do—there are 30 books now stacked at the side of my bed. There are biographies, historical works, and Church books. I want to always be learning."

Tani says her career path has been nothing she could ever have scripted. Her first job was as an associate with Alverson, Taylor, Mortensen & Nelson in Las Vegas. Her husband was a Marine, and when his next assignment came as a posting in Hawaii, she found a job with a law firm in Honolulu. At the end of her husband's service the family moved to Utah, where Tani was hired as an associate general counsel to the Utah legislature. Seven years later she began in-house work at an up-and-coming high-tech firm, but when the tech bubble burst, Tani was part of the layoffs. She was subsequently hired as the general counsel and director of appeals for the Utah Department of Workforce Services. After Governor Huntsman was elected, he appointed her as its executive director. A few years later the governor appointed her to be his deputy chief of staff and

general counsel in the governor's office. The job demanded 60 to 70 hours per week, and she was always on call. After Huntsman was appointed ambassador to China, she heard about a position for state risk manager and asked for Governor Herbert's blessing to move into that position so that she could spend more time with her family. She has been working there since August 2009.

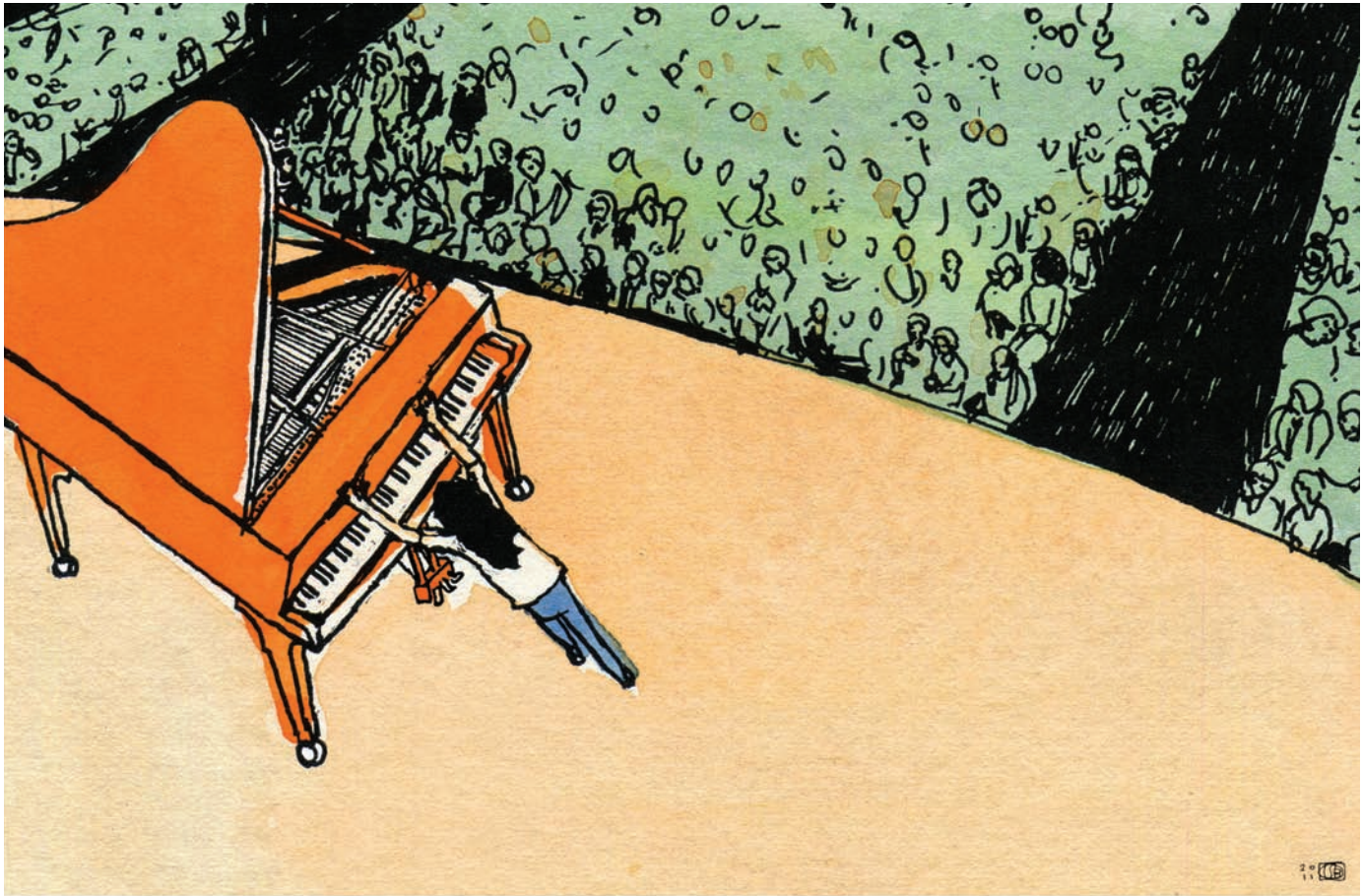
Tani has been president of the BYU Law School Alumni Association since 2010 but has been involved almost since graduation. When she was only a few years out of law school she volunteered to be class representative, and she later became the chair of the events committee. In 2008 she was elected vice president of the Alumni Association—during a board meeting she didn't attend. She learned of the appointment when Mary Hoagland sent her a congratulatory e-mail. She was surprised but happy to continue serving. Tani became president-elect in 2009 and president in 2010. As an immediate past president when her term ends in fall 2011, Tani will still sit on the Alumni Executive Committee.

As president, Tani has focused on making connections with alumni in each region, and she has made it a priority to connect alumni to the Law School. Several initiatives have been to use social media, to link the alumni newsletter with the Law School's web page, and to add videos to the newsletters. She wants new graduates to feel immediately part of the Alumni Association and to serve on committees and as committee chairs, since they are the future leaders of the organization.

In the tough job market, Tani encourages alumni to feed potential jobs into Career

Services for new graduate placements. She beats the bushes for clerkships, internships, and externships for the 2Ls. "It is important to keep the doors open for the people coming behind us." In another Alumni Association hiring initiative, alumni throughout the country have been asked to host Dean James Rasband at their law firms. His presentations focus on the Law School and its students—their high LSAT scores and grades, where they've come from, and what their plans are; the credentials of the faculty and the new faculty; and the new building projects at the Law School. Tani hosted one of these presentations at the Utah State Capitol, where all the state attorneys attended. Tani says, "It is very exciting to bring the Law School into law firms and offices and let others see what is happening there. It is very impressive."

Unlike her earlier law firms, Tani has always seen women active in the Alumni Association. Two other women, Mitzi Collins and Wendy Archibald, have also served as presidents. She believes there is great value in participation for both men and women because of the networking and professional associations inherent in this service. "I have grown close to people I didn't know in law school. Some of my closest friends have come through my service to the Alumni Association."



Wheels to Keep Us Moving

BY SARA NIELSON, '11

During the past three years, I've been a quiet, diligent student. I tried not to bother too many people. I didn't speak in class unless spoken to. So I wasn't surprised when I heard the rumor that I had been chosen to speak today, because some people at the Law School were under the impression that I couldn't actually talk and saw this occasion as their last chance to confirm it. In my defense, I've spent the last three years surrounded by 150 people who know—full-on know—deep down in their hearts and spirits that they are right about everything. And they are dying for the chance to prove it vocally.

Those of you who have lived with or around a law student can attest that it's hard to get a word in. So, I'm honored to have this chance to speak, and if anyone behind me raises their hand and wants to make a point that they think has been overlooked, I'm going to ignore them.

As an undergrad at BYU, I worked in this concert hall as a stage manager. I worked events like this one, and many times I had to move grand pianos back and forth across the stage during a performance. More often than not, after I finished my moving and got the piano into place, I received a modest bit of applause from the audience. I think people were genuinely amazed that I didn't push the piano right off the edge of the stage. More likely, they were amazed that I was able to move it at all, being

so small and pathetic. Many times people would make comments like, "I don't know how you manage to move those pianos around so easily. They're so heavy." My response was always the same: "They're on wheels. I mean, the pianos have nice wheels. I'm not carrying them on my back."

A similar thing has often happened over the past three years. I tell people that I'm in law school, and then I have to spend some time convincing them that I'm actually studying to be a lawyer and not a court

...
*This speech
was given
at the J.
Reuben
Clark Law
School
convocation
held in
the de Jong
Concert
Hall at BYU
on April
22, 2011.*
...

reporter or a 911 dispatcher, but an actual lawyer. But once I have them convinced, they usually say, "Oh, law school sounds so difficult. I don't know how you do it, being so small and pathetic." Oh, and they usually say, "Bless your heart," a few times in there somewhere.

In addition to being mildly offensive, these people are right, and I think my classmates would agree with me that for the past three years we have all been struggling with something that's too heavy and awkward to manage alone. But I don't know anyone who has done it alone. We have had spouses, friends, children, parents, siblings, neighbors, and each other. In short, over the past three years, we all have had people in our lives, wheels to keep us moving. I think many of them are here tonight.

So while I know that graduates often need words of hope

and praise on this big day and that messages of repaying debts and doing good in the world have their place, the message I bring to you today is one of gratitude—not just of gratitude in today's moment but as a continuing part of life. From this group on stage will emerge talented, successful, competent attorneys working and serving in many places and in many fields. They will run businesses, whole states, banks, homes, classrooms, and much more. But if I have to give advice today, it is this: when you reach these heights and along the way, don't imagine that you did it on your own. One of my favorite poets, Walt Whitman wrote that pursuing self-sufficiency kills gratitude. I think he is right. In all your success, I hope you can allow yourself to need other people and acknowledge them for what they are: the wheels that keep you moving.

But for today, I know that my classmates are all feeling grateful, not just to be done (which, rest assured, they are feeling), but grateful for you—you as groups and as individuals.

Now, of course it's impossible for every graduate to get to say what he or she is feeling tonight, but if they could, if given a chance, I think most of them would have a similar message. For instance, I asked Autumn Begay, a woman whose quiet strength I admire, what she would say today. Here it is:

First and foremost, I want to thank my wonderful husband, Jeremy. Hun, your encouragement and support have been steadfast. Through all the late nights studying and weekends consumed in school, you were my greatest support and strength. You carried me through the rough spots and championed my successes. This journey has been as much yours as it has been mine. I love you.

To my sweet little Elijah, you were literally with me in class from day one of your existence. Your birth and sweet spirit have brought me perspective and joy.

Mom and Dad Smith, you have always made me feel that I could aspire to great heights. Thank you for all of your love and your support. Your encouragement throughout my life has meant so much.

Mom and Dad Begay and all of the Begay clan: that you are here today means so much to me. Your excitement for me fills my heart with joy. Finally, my wonderful classmates, I don't know how to express how grateful I am to you. You each are so amazing and inspiring. I truly treasure your friendships. We have come a long way together from that first nerve-racking day at law school. I want you to know how much I admire and respect you. Thank you!

I asked my friend Tyler LaMarr (who was the first person who showed me how to really study) what he would say today, and, being a man of few words, he said this:

Thank you, Mom and Dad, for teaching me about the things that are so much more important than law school, and thank you, Yumi and Naomi, who are my most important things.

Finally, I asked Rachel Miller, someone whose kindness I have admired and benefited from since our first semester. She asked me to say this:

Mom and Dad – I owe it all to you. I was incredibly lucky to grow up in a terrific Idaho home where reading, thinking, and discussing was the family evening routine. The lessons of hard work, integrity, and faith I learned at home have become the bedrock of my academic success and future

aspirations. No matter what age or degree I attain, you will always be my loving and wise parents, whose examples I will try to follow. Love you, Mom and Dad. Thanks for everything!

It would be lovely if we could go on until each graduate got to say to their families and supporters what I know they're thinking. But some of us are probably getting hungry and want to move this thing along. But while I have your attention, I hope you will forgive me and indulge me while I say some thanks of my own.

When I started law school, my husband had recently passed away, and I was lost. But I came here with my son, and we started something new, something that my husband wanted for us. My parents gave up two years of retirement to help me through it. I could not have finished one week, let alone three years, without them or the rest of my family. Thank you.

Those are the people that kept me moving at home. It took a whole other set of people to keep me going at school. I think this group saw, right away, how lost and broken I was, and they carried me. They let a tiny, weird little widow join their group and learn from them. After three years I think of them as brothers—brilliant, evil, genius brothers, whom I don't want to see or talk to for at least two weeks. Thank you.

Finally, I want to thank my son, Luke. He has put up with a lot in the last three years and will likely put up with more. Luke, you are my favorite person in the whole world, and I'm going to keep working to prove it to you every day.

To my classmates, thank you all and congratulations.

BONNIE GELDMACHER, RECIPIENT OF THE PRESIDENT'S APPRECIATION AWARD



An acquisitions librarian at the Hunter Law Library for the past 25 years, Bonnie Geldmacher is one of four Brigham Young University employees to receive the President's Appreciation Award in August 2011.

Geldmacher's colleagues describe her strongest traits as (1) her consistent dedication to her work, (2) her ability to prudently economize in library purchasing, (3) her devotion to her student

employees, and (4) her repeatedly going the extra mile in many areas.

"Ms. Geldmacher is very adept in supervising staff and student workers," says fellow law librarian Galen Fletcher, '93. "She was the head of the Technical Services Department at the law library from 1998 to 2002, during which time she coordinated the department's successful migration to a new library system while overseeing two faculty librarians, other staff, and students. Her work was recognized with the Law School Employee Award in 2000." He adds, "Bonnie has been an absolute jewel in her efforts to train and work with student employees over the years. Her students stay in touch with her because of her care and focused attention to them during their time here and long after graduation. Every summer, ex-employees stop by specifically to see and thank her."

BRADLEY SLADE (4)

DAVID ARMOND AND SHAWN NEVERS RECEIVE AALL AWARD

BYU law library faculty David Armond, '04, and Shawn Nevers, '05, won the AALL Call for Papers Award in the Open Division this year. They presented their winning paper, "The Practitioners' Council: Connecting Legal Research Instruction and Current Legal Research Practice," at the annual conference of the American Association of Law Libraries in Philadelphia this past July. Shawn Nevers previously won the same award in the New Members Division in 2007.

The article grew out of ideas the two had discussed for ways to improve teaching legal research in first-year legal writing and research classes. They wanted input from practitioners who

were using research skills every day in their profession. In 2009 they invited lawyers to be part of a Practitioners' Council to advise them about current legal research practice.

"You mean you want to make law school reflect what we actually do in practice?" an attorney responded to their invitation to be part of the council. Armond and Nevers are experts in using a variety of legal resources, but they wanted a connection to current legal research in law practice. The council, made up of seven practicing attorneys, now acts as an advisory board regarding current research practice and provides real-world insight and experiences to enhance teaching.

The council meets for lunch with Armond and Nevers during the year in brainstorming sessions where differences between academic and client-based research are highlighted. Practitioners have shared what feature they use most often in electronic researching, skills they think new attorneys must have, and ways to avoid the same mistakes practitioners often make.

Armond and Nevers continue to use the Practitioners' Council to inform their teaching. Their perspective on assignments has changed. "We found that our checklist approach to legal research skills needed more refinement. Not only would we need to develop assignments that required finding a statute, but also the exer-



cises would have to teach the student how to develop sensitivity for how difficult the discovered statute would be to apply. Not only would time limits need to be part of the micropracticums, but also we would need to teach students to be aware of how timing increases the difficulty of assignments. The Practitioners' Council helped us to understand the metacognitive elements of a task we were likely to take for granted."



BYU LAW ALUMNI ARE NEW MISSION PRESIDENTS

Nine graduates of J. Reuben Clark Law School have been called to serve as mission presidents throughout the world.

① Jeffrey G. Boswell, '76, with his wife, Shirley J. Boswell, has been called to preside over the Baltic Mission. Boswell is a shareholder with Kimble, MacMichael & Upton in Fresno, California.

② Jordan W. Clements, '82, is a managing partner of a private equity investment firm. He and his wife, Julie A. Clements,

are serving in the Minnesota Minneapolis Mission.

③ Fred D. Essig, '82, has been called as mission president over the Chile Santiago North Mission, where he serves with his wife, Mary Ann S. Essig. He is a partner in the firm Dixon & Essig in Salt Lake City.

④ David L. Glazier, '81, shareholder at Kirton & McConkie in Orem, Utah, is president of the El Salvador San Salvador Mission with his wife, Beverly B. Glazier.

⑤ Jon M. Jeppson, '76, with his wife, Bonnie B. Jeppson, serves in the New Jersey Morristown Mission. He is a cofounder of the law firm Matheson, Mortensen, Olsen & Jeppson in Salt Lake City.

⑥ Michael A. Neider, '76, and his wife, Rosemary C. Neider, preside over the Nevada Las Vegas Mission. He is president of Miro Industries, Inc., in Sandy, Utah.

⑦ Evan A. Schmutz, '82, a member manager of Hill, Johnson & Schmutz in Provo, Utah, presides

over the Philippines Cebu Mission with his wife, Cindy L. Schmutz.

⑧ Karl M. Tilleman, '90, with his wife, Holly B. Tilleman, is president of the Canada Vancouver Mission. He is a managing partner at Steptoe & Johnson LLP in Phoenix, Arizona.

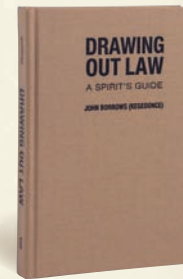
⑨ Mark A. Wolfert, '83, serves in the Georgia Atlanta North Mission with his wife, Carol A. Wolfert. Residing in Orem, Utah, he is partner and general counsel for dōTerra International.

John Borrows, *Drawing Out Law: A Spirit's Guide*

(UNIVERSITY OF TORONTO PRESS, 2010) >>>> Reviewed by Scott Cameron

I have long felt that the *Clark Memorandum* should be a vehicle for introducing the writing of its members to the Law Society as a whole.

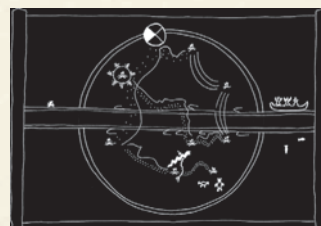
John Borrows was a visiting professor of law at BYU Law School during fall semester 2007. As a fellow of the Trudeau Foundation, he was able to work on two of his books, *Canada's Indigenous Constitution* (University of Toronto Press, 2009) and its companion volume, *Drawing Out Law: A Spirit's Guide*, during his semester here. In the former volume, Borrows recognizes Canada as "a legally pluralistic state" and seeks to explain the significant role that indigenous legal traditions should play in Canada. The companion volume, *Drawing Out Law*, is an episodic narrative that combines biography, oral tradition, dream, pictography, and theology to convey the power of Borrows' own Anishinabek legal heritage.



To demonstrate three strategies that contemporary indigenous people may employ in Canada, one of Borrows' episodes describes a political meeting where indigenous candidates for Parliament relate their views. After the candidates speak, an elder relates the following:

In the old days, we used to weave lessons from the natural world into our teachings. Our leaders would expand our understanding by telling stories. They understood that stories could appropriately combine reason and emotion when they correlated with one another. We need more true stories to help us make sound decisions. . . . Our hearts and minds have to line up when we make a decision; these men are not helping us. They [the candidates] are too one-sided, too focused on reason alone. Stories may be hard for some to understand, and may be too open-ended for others, but that's part of their beauty. They generate innovation and creativity. They leave some of the work in making judgments to those who are listening to them. Stories don't force your mind to the speaker's conclusions in the same way that words alone do. Stories respect a person's agency. I wish more of our people would function in this way again. [215]

Borrows follows the Elder's advice; he weaves lessons from the natural world into his narrative. He informs the "heart and mind" of the reader through stories, dreams, and pictographs. *Drawing Out Law* is an odyssey of the spirit that the narrator, a young law professor, takes through the Four Hills of Life. The reader accompanies the professor in his odyssey as he is guided to a deeper understanding of his Anishinabek culture and legal heritage by his grandparents, Nokomis and Mishomish. The reader is beckoned along with the professor to sit at their fire and hear their stories—eventually being encircled in the Anishinabek worldview. As the narrative concludes, the young professor watches Nokomis and Mishomish ascend the last hill, gaze back at their own valley, and see Anikee (Thunderbird). The professor's love for them is evident, and the reader's admiration is transformed into reverence.



The *Clark Memorandum* welcomes the submission of short essays and anecdotes from its readers. Send your short article (750 words or less) for "Life in the Law" to wisej@law.byu.edu.

Clark Memorandum

J. Reuben Clark Law School

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