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VERMONT BAR JOURNAL

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Spring 2019, Volume 45, No. 1



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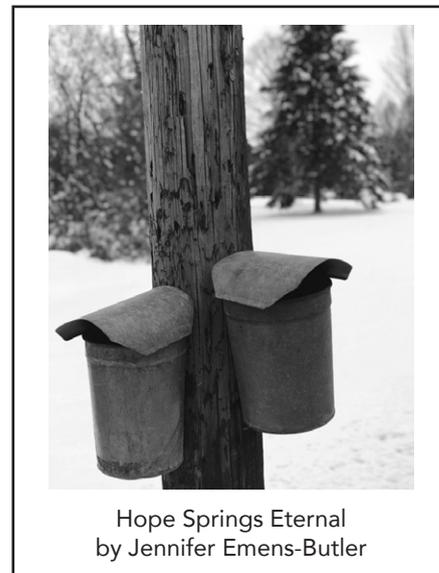
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VERMONT BAR JOURNAL

Vol. 45, No. 1

Spring 2019

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Published four times a year by the
 Vermont Bar Association
 Subscription rates: 1 year \$35. 2 years \$65.
 Printed by L Brown & Sons Printing, Inc.
 VBA assumes no responsibility for claims
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PRESIDENT'S COLUMN

Behold the Future

Predicting the future has long captured our imagination. Sweeping decisions have turned on prophecies since long before biblical times. Nostradamus was a celebrity in his day serving as a counselor to Queen Catherine of France. Orwell's *1984* (fake news at its best), *Planet of the Apes*, *Blade Runner*, *Hunger Games* and *Star Wars* all have enjoyed immense popularity. A lesser known but possibly more on point film striking particularly close to home is *Idiocracy*, a (maybe not so) futuristic story of an America shaped by rampant commercialism devoid of intellectual curiosity.

While speculating over the future is great fodder for Hollywood, psychics and Wall Street, the future of the practice of law is already here. We see it in the use of artificial intelligence, online legal services, alternative fee arrangements, and limited licenses, and the proliferation of electronic discovery and alternative dispute resolution. Perhaps there is no greater change occurring, however, than in the demographics of the Bar, both at home and nationally.

While most are probably aware of the graying of the bar anecdotally (aren't we all still members of the YLD?), the cold hard statistics are sobering:

- In Vermont, a full 50% of the Bar is 56 and older;
- The largest cohort is comprised of lawyers between the ages of 61 and 65;
- Less than 20% of the Bar is 40 and under and we have as many lawyers over 80 as we do under 30.

Considering that the age of 45 is generally considered the mid-point of a lawyer's career, the numbers are truly startling and demonstrate tremendous risk to the VBA, the Vermont Bar in general, our Courts, and access to justice particularly in rural areas. Over the next decade we could see a sharp decline in membership placing an extreme financial strain on the VBA which is dependent on dues and participation in CLE offerings. What happens when large numbers of lawyers retire or cut back without adequate replenishment? Already we are hearing stories of the vanishing Main Street Lawyer putting communities throughout the State at risk of losing access to legal services. We face significant headwinds from a burgeoning strain on Court resources, an opioid crisis, tremendous financial pressure on public sector legal services, and huge numbers of self-represented litigants. Maybe not coin-

centally, public understanding and confidence in our democratic institutions continues to decline threatening the rule of law. Although these issues are not unique to Vermont, they have an outsized impact on rural states.

So, what to do? First and foremost, recognize the predicament. The changing demographics of the Bar is at the forefront of discussions among Bar leadership. Concrete measures are also taking shape at both the national and state level. Many are familiar with the public service loan forgiveness program, a federal program established in 2007. The program promises basic financial security to allow talented professionals to enter essential but often low paying careers such as teaching, nursing and legal services. The general idea is that individuals may earn loan forgiveness after at least 10 years of public service. This program is considered to be an important tool for legal aid and public defender programs with limited budgets to recruit and retain talented professionals.

In practice, the program is more complicated. As the first cohorts of the loan forgiveness program began to "graduate" in 2017, only 1% of the applicants who applied for debt forgiveness were approved by the U.S. Department of Education which administers the program. The program has turned out to be confusing and convoluted even for lawyers. A recent high-profile lawsuit resulted in a finding by the U.S. District Court for the District of Columbia that the DOE acted arbitrarily and capriciously when it revoked the eligibility of four lawyers in the program. Nevertheless, some commentators are optimistic suggesting that the program is still being ironed out and simply going through growing pains. Anecdotally, it has worked as intended to attract talented young lawyers to Vermont Legal Aid. Additionally, some of the elite law schools provide their own loan forgiveness programs and certain grants are available through the Bureau of Justice Assistance for prosecutors and public defenders.

At the State level, the creative juices have been flowing. South Dakota has made impressive strides with its rural attorney recruitment program to place Main Street Lawyers in qualifying communities by offering an incentive payment of \$15,000 per year for 5 years. This program, supported by a collaboration of the South Dakota Supreme Court, lawyer legislators, and the



State Bar, now boasts 19 lawyers working in under-served communities with several additional positions in the process of being filled. Maine has also started a rural lawyer project, a 3-year program that awards paid summer fellowships to students who work in law offices in Maine's most rural counties.

Here in Vermont we are fortunate to have a talented and dedicated bar. We are now in the 5th year of our lawyer incubator project with 3 lawyers participating in this year's program. The project helps new lawyers transition into solo practice and provide legal services to under-served areas of Vermont. The project runs in 18 month cycles and provides a group of experienced lawyers to mentor the participants on all aspects of the new lawyer's practice. A small grant is provided to each new attorney to assist with the set-up of their law office. We also have a fellowship program offered to an individual lawyer every 2 years administered through our Bar Foundation in cooperation with legal aid. These steps are both significant and incremental.

Yet, as the future of the legal profession takes hold today, we need to double down on our efforts to address our changing demographics. Fortunately, with age comes wisdom gained from years of accumulated experience. So let's put it to good use through active engagement in the VBA to ensure a sustained and vibrant legal community in Vermont.



PURSUIITS OF HAPPINESS

Interview with Jennifer Wagner: Smallpipers Three

Jennifer Emens-Butler: I am here at Marsh & Wagner speaking with Jennifer Wagner about her pursuits of happiness. So, Jennifer, you had contacted me, which is great, and you brought me 3 lawyers.

JW: Indeed, I thought it would be a very interesting story for your column.

JEB: Have you always been interested in music?

JW: I started playing drums in 3rd grade.

JEB: Drums? So, is that the gateway instrument?

JW: [laughs] That is the gateway instrument.

JEB: Drums seem to be something a lot of young kids want to do, but did you play drums through school?

JW: I played for 2 years before my mother begged me to switch to an instrument that played a melody!

I had been somewhat obsessed with civil war movies, which was where the drums came from, so I switched to another war-inspired instrument, the trumpet, in 5th grade.

JEB: Now, I would assume, the drums are a little bit disturbing in the household, but the trumpet to me, is also very loud, and especially when you are learning can be a difficult thing to listen to for others in the home, would you say?

JW: Yes, but my Mom's only condition was that it had to play a melody, now being a lawyer, I see that I stuck with the rule.

JEB: The one criterion: Play a melody.

JW: But, yes, it's still quite loud.

JEB: And you still play trumpet to this day, right?

JW: Yes, I still play trumpet to this day. I play in the Middlebury Wind Ensemble, for 2 semesters, both spring and fall and in the summer in the Bristol Community Band.

JEB: So I assume, then, that you played that in high school?

JW: Yeah, I played the trumpet through high school, college and as an adult in the community.

JEB: Where did you go to college?

JW: The University of Vermont.



JEB: And did you play for an ensemble in school?

JW: I did. I played for the Wind Ensemble at school, the Hockey Pep Band, the Band, the Orchestra and the Brass Ensemble.

JEB: No marching?

JW: They don't have a football team at UVM.

JEB: Oh, that's right. So, no marching bands at all?

JW: That's why I chose UVM, because there was no marching band. I got into the University of Michigan, but you had to be in the marching band.

JEB: You mean to play the trumpet at the University of Michigan, you HAD to?

JW: You HAD to be in the marching band. And I hate marching. The University of Vermont was so attractive because

they didn't make me march. There was no football team, but I did play in the cold ice hockey rink instead for the ice hockey band.

JEB: Oh, you did? But at least you were seated!

JW: Yeah.

JEB: And do you like sports or it was just something that they required of trumpet-ers?

JW: No, it was just an option and it was fun! So much that when I went to law school, I started to play ice hockey myself. So I had this introduction to the game by playing trumpet and really liked the game, so then I learned to skate in law school and learned to play ice hockey, and played for 13 years on the 2 adult women's teams here in Middlebury.

JEB: Oh, my goodness, so you played the trumpet, saw all of the hockey action and wanted to play, but you had never even skated before?!

JW: That's right, I had a law school classmate who is a professional figure skater who needed help studying, so I swapped my outlines for skating lessons.

JEB: Using all of your skills: negotiating first, then bartering. Ok, so you played ice hockey for 13 years and we didn't even have that on the list of the pursuits of happiness, but you don't play anymore?

JW: No. Too many people were getting hurt, and I didn't want to be next on the list.

JEB: Right. It takes us so much longer to recover now.

JW: Exactly.



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JEB: Ok, so this is the second gateway instrument, the trumpet, and we are here to even talk about something else, although you still play trumpet. You got introduced into a third instrument in law school or just out of law school?

JW: 2004, well out of law school.

JEB: Ok, well out of law school and what is this instrument?

JW: Well that was the Highland Bagpipes.

JEB: Oh....

JW: Which is not what I am playing right now. That was a gateway instrument to the Scottish Smallpipes, which I play now.

The Highland Bagpipes again is a loud instrument like the drums and the trumpet.

JEB: I am noticing the theme, right. Who introduced you to the Highland Bagpipes?

JW: My Uncle John Turner was a Highland Bagpiper and a 3-time Scottish National Fiddle Champion. He had his own band and traveled to Scottish games and fiddled with a band. He was my hero when I was a kid. I really looked up to my Uncle John. I love the sound of the bagpipes, and I wanted to play the bagpipes. In 2004, I found a teacher in my town where I live...

JEB: Which you would think would be hard to come by, as it is not a very common thing.

JW: Yes, I had been looking for a teacher for a very long time, but in 2004, I found a teacher that actually lived in Bristol, where I live.

JEB: Of all places.

JW: Yes, of all places, and he was willing to teach me the bagpipes.

JEB: How many Highland Bagpipe teachers are there in VT? Probably not very many.

JW: Not very many. He was willing to teach me and so I studied with him for about 9 months, and I joined the Highland Pipe Band that he played with which is the St. Andrews Pipe Band in Essex Junction. So, for 3 years, I went Wednesday nights up to Essex Junction and played with the St. Andrews Band but that was conflicting with my trumpet playing nights, because trumpet was on Wednesdays...

JEB: Too much?

JW: Yes, but also, the Highland Bagpipe is about marching in parades, and back to that, I don't like marching.

JEB: Oh no, marching!

JW: Generally, people want to hear Highland Bagpipe outdoors, marching in a

parade or playing a wedding and not for very long.

JEB: Yes. It is an acquired taste, right?

JW: Right. Yes, for a lot of people.

JEB: You marched while you were learning the Highland Bagpipes?

JW: Yes, that is what the St. Andrews Band did, they competed in competitions and marched in parades so that's what I did.

JEB: And so now, at this point, you are getting pretty good at the Highland Bagpipes and you wanted to learn something else?

JW: I missed the trumpet, so I quit the Highland Pipes and went back to the trumpet. But then attorney John Finlay, who was the Juvenile Public Defender up in Chittenden County, which is the mirror for my role here in Addison County, connected with me. Someone at defender general camp, at their June training said, "oh, hey, you play bagpipes, John Finlay plays bagpipes, you should get to know him," so we talked, we brought our pipes to defender general camp, we would go set up in the parking lot and we would play pipes in the parking lot in June!

JEB: Did he have Highland Bagpipes?

JW: He had Highland Bagpipes, but he also was a Scottish Smallpiper, which is a different instrument than the Highland Pipes, still a bagpipe, but it's not mouth-blown-- it's blown by a bellows. It's smaller, it's quieter and it's a dance instrument that is meant for playing in accompanying dancers, rather than being a martial instrument of war leading the troops into battle.

John kept saying to me "Jenn, you have got to play the Scottish Smallpipes. There is this group that gets together at attorney Matt Buckley's house on the river in Richmond, every summer for a whole week and we just play the Scottish Smallpipes. We have teachers who come from Scotland, and it is so much fun! You have got to do this!"

JEB: Now, I want to do it! I mean, he made it sound really good. Good sound and no marching?

JW: [Pulls out Scottish Smallpipes]. It's like this. So, the Scottish Smallpipes-- this is a 4-drone version instead of a 3-drone version.

JEB: Drones?

JW: Yes, drones, these are the drones, and they play one constant note.

JEB: OK. So, 4 and in Highland only has 3? Is it more complicated?

JW: More sounds. You can have more chords. It's different. A Highland Bagpipe has 3 drones, 2 play high A, one plays low A, and this is set up so that you have got a base that plays A, a tenor that plays A, a baritone that can play a D or an E, and you have got a soprano which can play a high D or E, and those are the only notes that they play. The chanter can play 9 notes, and just 9 notes, so the chanter plays the melody against the sustained note on the drones.

JEB: The chanter has little holes in it like a recorder, so you play the melody with those?

JW: Exactly. So, the really cool thing about the Scottish Smallpipes is you have got your mouth free and you don't have to blow in anything, and you can sing.

JEB: You can sing and dance.

JW: I am also a singer. I sing in Maiden Vermont Barbershop Chorus. I have been with them for 15 years.

JEB: Oh, that's awesome another pursuit! So, you can sing with the Smallpipes?

JW: [Jennifer sings and plays the Scottish Smallpipes, *Amazing Grace* sample].

JEB: That is awesome! I thought it would sound much higher being smaller, but it sounds so rich.

JW: The Smallpipes play an octave below the Highland Pipes. One of the things I find most beautiful about the bagpipe is there is a tension in its music. If you know about music, if you play 2 notes that are next to each other on the scale it creates a tension in the music and then you change to a note that's a third or fifth and the tension releases. So, you get these wonderful tension and release moments as you play because you are always playing notes on the chanter against one or two fixed notes on the drones.

JEB: Yes. Start playing and my husband would start crying in a second. It has that sort of melancholy feel to it, you know? But do you play happy tunes?

JW: Definitely.

JEB: You can bring out the melancholy though, but it is also upbeat.

JW: It's really a dance instrument, so typically jigs and reels would be the kinds of tunes that would be played on the Scottish Smallpipes.

JEB: So you can dance and sing at the same time!

JW: I am working on that—have you seen the Quebecoise foot rhythm where musicians use both feet to create a complex percussive sound while playing an instrument or singing? I am working on it.

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See, I can do the foot rhythm and I can play and then I am going to be adding in the singing finally, but that will be my ultimate goal.

JEB: Like practicing law... a lot of balls in the air. So back to John Finlay's group...

JW: I had said no many times when John said I just had to try this, but then finally 2 years ago, he sent me an email and said, I will loan you a set of Scottish Smallpipes, and I said YES!

JEB: Well of course! And better to borrow than Highland Pipes with the mouth-piece! Are they less expensive?

JW: Well it was \$2700 for this, and it is a custom-made set. I had it custom made for me by a maker from Scotland in July.

JEB: Holy Moly! Good thing he loaned you a set.

JW: Yes! He came to my house and sat down and gave me a lesson on how to play them and then invited me to come play with a group of smallpipers that meet once a month, rotating around to the different members houses. These people all met at the Cairdeas school which used to be called The Vermont Bellows Pipe School, but now it's called Cairdeas. It was founded by Attorney Buckley. He at that time was very into playing smallpipes and he brought over from Scotland a bagpipe maker and bagpiper named Hamish Moore who helped him start the school. Every year for a week in July, Hamish would come over to the school, which was actually at Matt's house, and pipers from all over the country would come. Hamish's son, Fin Moore, has taken over the school and Fin made these pipes.

JEB: What a great connection. So the school has now taken on its own life, not just at Matt's house, and it's just for smallpipes, but I understand Matt prefers to play the fiddle now?

JW: Right. I think it is 30 years or 31 years the school has now been in session. Eating, lessons, fellowship, sessions in the night that go until 2 in the morning, where people just jam on the instruments and bring fiddles and banjos and play-- it's a lot a lot of fun.

We have had sessions at the Stone Coral in Richmond, because one of the smallpipers owns that bar, so we have sessions there and we have had people from Atlantic Crossing and a professional harpist come and join the school and play.

JEB: That is amazing.

JW: Yes, it is a lot of fun.

JEB: So, which interest takes up more of your time then, singing with Maiden Ver-

mont, the trumpet or Scottish Smallpipes?

JW: Well for Maiden Vermont, every Thursday night they rehearse, and then they have about 10 concerts a year.

JEB: Then how often do you rehearse for Scottish smallpipes?

JW: I rehearse once a month. I take lessons every other week.

JEB: And then the trumpet?

JW: Those rehearsals are Wednesdays.

JEB: Yes, so you are in 2 bands then, right?

JW: Right. The Smallpipes band is called Cauld Wind. We were just a collection of smallpipers who met at the Cairdeas school getting together once a month to play. But then I had this brilliant idea, I play in the Middlebury Wind Ensemble on trumpet and wouldn't it be great if I could play my smallpipes with the Middlebury Wind Ensemble. So I said to one of my teachers, Tim Cummings, who is a bagpiper, a composer, an arranger, and affiliate artist at Middlebury College, "Hey, would you arrange a piece of music for my Wind Ensemble AND my Pipe Ensemble" and he loved it, and so...

JEB: Together?

JW: Yes, to play together, so he did. He took some traditional American shape-note songs and he arranged them for the entire Wind Ensemble with my entire Scottish Pipe Ensemble, which inspired us to create an identity. Now we are a band called Cauld Wind. We had a good concert in the fall.

JEB: But were you torn?

JW: Between playing the trumpet or playing the smallpipes?

JEB: Yes.

JW: No.

JEB: So, you had him compose it for the Wind Ensemble so that your other band could join you, but you definitely wanted to bring your smallpipes into the equation?

JW: Exactly.

JEB: But you have time for it all? Let me see, singing Thursdays, trumpet Wednesdays and...

JW: Then Cauld Wind is the third Sunday of the month and then occasionally smaller groups within Cauld Wind get together like we just did this past Sunday and we play more music.

JEB: In your practice, I understand that the Juvenile docket has exploded, is that your primary area of practice?

JW: Probably about 35% of my practice.

We have 4 lawyers and we divide all of that Juvenile work amongst the 4 of us, so maybe 35% maybe 40% of my practice is the Juvenile work, but it helps having 4 lawyers handling all of that.

JEB: Right. But with your practice, how do you fit your evenings of music in with your daytime law practice? Do you find that to be difficult?

JW: Not too difficult, mostly I am able to plan in advance. I know, but not Juvenile court.

JEB: Right, emergencies, but they are during the day, right?

JW: Right, they are during the day and when they are an emergency, there is not much time to prep. Occasionally I will miss a rehearsal because I am prepping the night before for court the next day, but mostly I go to rehearsal and then I go home and prep for court the next day, because the music is the stress release.

JEB: You are in a very stressful area of practice and not to brush aside how much fulfillment you get out of helping people, but there is compassion fatigue and we can't have helping others be everything, right? So, this is your major stress release. Do you find that it is necessary for balance in your life?

JW: Absolutely, it is necessary for that balance to have the stress release of music because music is joy, the act of making music together is about releasing tension, it is about getting out of the head and into the body. It is very physical, and it is also very focused. It's concentrating on what you are doing, you are listening, you are in harmony with other people and it is not in the head thinking about the next case and how is that witness going to be responding, or what do I have to do, it is about being very present in the moment, which is very relaxing to be THAT present in something.

JEB: Yes, there is definitely science behind the stress release of music.

JW: Yes. Music creates these great endorphins that just bring happiness, and add to it social community and connectivity. Connectivity to people is all about also reducing stress. Having that sense of support in all of the communities that I play with is a beautiful thing. I also have a community in my theater group.

JEB: Acting? Well you have so many talents, it was a pleasure to interview you! Some people I've interviewed have one strong passion, but usually several other interests crop up in our conversation. While I could spend a whole interview on the trumpet or your singing, or your hockey "career," I think it is fascinating that there are

3 lawyers in this small circle of smallpipers, right?

JW: Yes, I think that is amazing that there are 3 lawyers in Vermont who play this unique instrument that not many people play.

JEB: How many people in Vermont play the Scottish Smallpipes would you say?

JW: I don't know how many but I would guess 20 would be generous.

JEB: Wow, that is a small number! Well I really appreciate you contacting me and I find your path fascinating, from instrument to instrument, but singing, hockey and acting as well is a bonus!

JW: I always want to try to combine all my passions, I have tried to bring bagpipes together with the trumpet and if I can get bagpipes into a theatrical play that would be great.

JEB: Now what about teaching? Do you have any students or are you interested in teaching somebody else how to play smallpipes?

JW: Interestingly, one of my teachers, Tim Cummings has approached me and asked me to become a teacher so that I can take the beginners and get them up to a certain level for him, but I don't have any students at the moment.

JEB: I was going to say, I don't know how you would fit this in between all of your passions, but if there is a lawyer who wants to join you after reading the article, they can contact you, right?

JW: Yes! I would love to have more lawyers playing smallpipes.

JEB: Because it's good for your mind and body, right?

JW: Exactly. I think any time a group of lawyers can put aside the law and sit together and do something else, it's building ties that last into the professional community. I'm sure if I had a case against my fellow smallpipers or band members, it would help us find common ground.

JEB: Wellness AND civility. Excellent combo! Thank you again for sharing your story!

Do you want to nominate yourself or a fellow VBA member to be interviewed for Pursuits of Happiness? Email me at jeb@vtbar.org.



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RUMINATIONS

The Pardon

Section 20 of the Vermont Constitution endows the Governor with “the power to grant pardons and remit fines in all cases whatsoever, except in treason in which he shall have power to grant reprieves, but not to pardon, until after the end of the next session of the General Assembly; and except in cases of impeachment, in which he shall not grant reprieve or pardon, and there shall be no remission, or mitigation of punishment, but by act of legislation.”

A pardon, like grace, is unearned mercy.¹ A criminal conviction, like sin, is a mark not easily erased. People seek pardons to remove the stigma of the conviction. Some religions believe grace is available to everyone. Pardons are not. More are denied than granted. Universalist preacher Hosea Ballou treated justice and mercy as opposites, in his *Treatise on Atonement* (1812).² Atonement suffices with Rev. Ballou; atonement is insufficient alone to justify a pardon.

The history of pardons in Vermont invites the question, what justifies a pardon? The Constitution leaves this decision up to the Governor, without standard or direction. History provides some answers, but the record is often limited to little more than that a petition was filed and subsequently granted or denied, without explanation. The Supreme Court has described Article 20 as providing “latitude for humane considerations.”³ But humane considerations are not always enough.

There are full pardons and conditional pardons. Full pardons today are usually granted solely to those who have completed the terms of their punishment, been released from their incarceration, paid their fines. Conditional pardons may be granted while the person is still in a correctional facility. Parole and probation are forms of conditional pardons.⁴

Judge Stephen Royce once stated that guilt of a crime “should only be expiated by punishment or pardon.”⁵ But does a pardon expiate? There are many unanswered questions.

Punishment

Justice must be expedient. Before Vermont built its state prison, opened in 1807, there were county and town jails, but no facilities for long term confinement, thus, the medieval practices of corporal punish-

ment—ear removals, brandings on foreheads with letters, the sting of the whip, fines, or banishment. Once the state prison was built, life there guaranteed a perfect misery for the inhabitants.⁶ Although rarely mentioned, the nature of the punishment must have served as a factor in the decision to grant a pardon, as pardons in the nineteenth century were granted before the sentence was completed, particularly when the health of the convict was in jeopardy. Those are called compassion pardons.

But the most essential criterion was penitence. Penitence means admitting guilt and regretting the offense to the state, and it must be sincere.

Philosophy

Vermont’s own Nathaniel Chipman wrote that “The world is more indebted to the Marquis Beccaria, for his little treatise on Crimes and Punishments, than to all other writers on the subject.”⁷ Beccaria was an eighteenth-century Italian criminologist and writer who wrote of pardons,

It is indeed one of the noblest prerogatives of the throne, but, at the same time, a tacit disapprobation of the laws. Clemency is a virtue which belongs to the legislator, and not to the executor of the laws; a virtue that ought to shine in the code, and not in private judgment. To shew mankind that crimes are sometimes pardoned, and that punishment is not the necessary consequence, is to nourish the flattering hope of humanity, and is the cause of their considering every punishment inflicted as an act of injustice and oppression. The prince in pardoning gives up the public security in favour of an individual, and, by his ill-judged benevolence, proclaims a public act of impunity. Let, then, the executors of the laws be inexorable, but let the legislator be tender, indulgent, and humane.”⁸

Even though the constitution gave the pardoning power exclusively to the executive branch, the Vermont legislature granted pardons in the early years.

Chipman believed, with Beccaria, that proportionality between the crime and its punishment was essential. In his 1833 *Prin-*

ciples of Government, Chipman wrote, “The punishment ought never to exceed, but to rather fall short of the demerit of the crime in the sentiments of the people. Where this is the case, humanity is engaged on the side of the law, and the punishment has a much more powerful effect than severity in the prevention of crimes.” Punishment is not vengeance; it is corrective; “the sole end of punishment is, or ought to be, the prevention of crimes.”

It is universally true, that certainty of punishment has a much more powerful effect than severity in the prevention of crimes. Indeed, the resentment and contempt of mankind, which always pursue the perpetrator of a crime, if not converted into compassion by the severity of the law, constitute a punishment of no inconsiderable efficacy.⁹

Chipman quoted a British politician who said, “What men know they must endure, they fear; what they think they may escape they despise. The multiplicity of our hanging laws, has produced these two things; frequency of executions and frequent pardons. As hope is the first and greatest spring of action, if it was so, that out of twenty convicts one only was to be pardoned, the thief would say, ‘why may not I be that one?’ But since, as our laws are actually administered, not one in twenty is executed, the thief acts on a chance of twenty to one in his favor; he acts on a fair and reasonable presumption of indemnity; and I verily believe, that in the hope of indemnity is the cause of nineteen in twenty robberies that are committed.”

Too harsh punishment and justice is undermined. Too many pardons and justice is destroyed. So there must be grounds and limits. There must be balance and restraint.

Magic Words

Former State Archivist Gregory Sanford studied Vermont’s experience with pardons, based on a review of over 200 petitions for pardons from the nineteenth century. He was looking for patterns, to see what worked and what didn’t. He found only five pardons granted to convicts who claimed they were innocent. Acknowledgment of guilt was a necessary prerequisite. Claiming wrongful conviction also worked

against the request, but having the support of officials or relatives whose petitions included certain "talismatic" words, such as "honest and industrious," in describing the convict's character, were common in successful petitions.

Sanford quoted a letter from the state prison warden from 1841 who explained "the Gov. wished to know what their conduct was before they came, whether there were any mitigating circumstances in regard to their crimes, what was the probability that they would be useful or rather not dangerous in [the] community, if set at liberty."¹⁰ That would have been Governor Charles Paine, the first to leave a record of how he reached a decision to grant a pardon.

Converting Traitors to Patriots

The first Vermont pardon was issued by Governor Thomas Chittenden on June 3, 1779. This proclamation relieved all persons who had previously aligned themselves with New York and openly opposed the nascent State of Vermont from all public offenses, crimes, and misdemeanors committed since January 15, 1777, the date of the state's Declaration of Independence. The Governor did not act alone. Executive powers under the first constitution were shared with a Council of twelve members elected at large, who approved the proclamation, designed to knit the various factions of the state together. The Governor blamed New York for assuming a "Pretence of Power" that was "never derived from God or Nature," imposed on the "credulous, whereby a Number have been traduced to follow their pernicious Ways."¹¹

Chittenden's proclamation was echoed by a law adopted in New York in 1782 granting pardons for all treasons and conspiracies by residents of what New York called the "northeastern part of this state," including capital crimes, but not treason or murder, saying those who sought to create an independent Vermont "were seduced and misled, by artful and designing men, from their duty and allegiance to this state." The law explained that the pardons were granted because the New York legislature was "disposed to extend mercy."¹²

These early pardons had a larger social purpose than the prevention of crime or the rehabilitation of the individual. They served as essential repairs to the fabric of the community, a knitting together of a state of its disparate populations. The Oath of Allegiance had a transformative impact.

Legislative Assumption of the Pardon

Beginning in 1782, pardons were issued by the legislature, and approved by the Governor and Council, as legislative acts.

The General Assembly had no express constitutional power to grant pardons, but for the first 50 years the legislature frequently acted as if it did. But then it took two generations before the legislature stopped acting as if it enjoyed the powers of all three branches. It even "adopted" the Vermont Constitution by acts of legislation in 1778 and 1786 following each of the first two constitutional conventions.¹³ In those 50 years, each of the branches came to realize the extent (and in the case of the legislature the limit) of their authority under the constitution. The judiciary exercised judicial review. It voided legislation that intruded into the judicial function, such as laws ordering new trials, suspending civil process, and ordering evidence to be admitted in court.¹⁴ The executive function grew, as there were more laws to enforce, more criminal laws, more punishments, and more petitions for pardons.

There were individual acts of pardon. In 1782, an act discharged Seth Smith from an indictment for insurrection and open rebellion against the state, and "attempting the Alteration and Subversion of our frame of Government, by endeavoring the betraying the same into the hands of a foreign power." Smith had been appointed by Governor Chittenden to represent Vermont in Congress, and "did so unfavorably," reflecting his allegiance to New York. Smith was obliged under the act to appear at the next session of the county court to answer all charges pending against him, and then take the Oath of Allegiance before a Justice of the Peace.¹⁵ In his petition, Smith admitted he was "penitently sensible of his heinous offence." The Governor and Council issued the pardon, after approving the legislation.¹⁶

Yorker partisans Timothy Lovel and Timothy Church both were restored to their property and had their banishments lifted in 1783 by legislation. Church had petitioned the legislature asserting his "deep and humbling sence of the vile part he has acted and desert of punishment," showing he was sincerely penitent. The Governor and Council agreed and issued the pardon.¹⁷

At that same session the legislature granted the Governor and Council the general power to pardon all those banished from the state "in as full and ample a manner as this Assembly could do, if convened."¹⁸ The act explained that the "Assembly being desirous, at all times, of shewing Mercy, when it can be done consistent with the Public Safety." In 1784, another act authorized the Governor and Council to pardon those residents of Windham County who had taken up arms against the authority of the state, "many of whom [were] now penitent and desirous of returning to their duty."¹⁹



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Even Charles Phelps, a Marlboro lawyer who had fomented rebellion against Vermont and had successfully persuaded Congress not to allow Vermont to join the Union in 1782, was pardoned in 1784, provided he paid 35 pounds to indemnify the state in prosecuting him. Most of his property, seized under the confiscation process, was ordered returned to him.²⁰

Timothy Church was also among 22 men awarded a "free pardon" by the legislature in 1784 for their insurgency in Windham County. Their forfeited property would be returned, provided they appeared at the county court and took the Oath of Allegiance. The Governor and Council approved the act, and remitted fines on six of them.²¹

In 1785, Abel Geer was sentenced to life in prison for counterfeiting. His petition for a pardon was denied. As it was "void of Suitable Expressions of Penitence," the Governor and Council and the legislature both ordered the petition dismissed.²² That session, the Governor and Council pardoned Eleazer Stearns, convicted of "having aided and assisted in forging and Counterfeiting Spanish Milled Dollars" and released him from the Brattleboro jail, requiring him to pay all the costs of trial and confinement.²³ This decision was made without any triggering legislation to justify the pardon.

James Mead, Thomas Lee, and Benjamin Johnson had, according to their petition for a pardon for rioting, "without any Just Cause or provocation Rose up in Riotous and Tumultous Maner . . . [to] Interrupt the County Cort at their Session in the County of Rutland in November last." They wrote that "when we Reflect on our Conduct we feele Guilty and Condemn our Selves and are Determined in future at the Expence of Life and fortune to Defend Government and Sivel Law." They had not as yet been arrested, but feared it was likely. The petition, submitted to the legislature in 1787, was read once and dismissed.²⁴

There are signs that the Governor and Council was awakening to the executive's discrete power to pardon under the constitution. The 1803 Governor and Council considered a pardon for George Whitney, who had been convicted of manslaughter. After investigating "the powers and extent of the Constitutional ground" as to its power, it ordered the request to lie on the table.²⁵

The Black Snake

The killing of federal agents by smugglers on the Winooski River in 1808 led to a trial and a hanging that became a public spectacle. The boat used by the smugglers was the Black Snake. Cyrus Dean was

hanged several days after his trial before the Supreme Court after conviction of murder. The place of execution was a few rods south of the old burial-ground in Burlington, and 10,000 people attended. Historian L.L. Dutcher wrote that Dean "exhibited to the last a degree of hardihood and careless concern, perhaps never equaled in this part of the country, and sadly contrasting with the mournful solemnity of the occasion."

The other smugglers avoided the noose. Samuel Mott's first trial was set aside as a result of a technicality. Truman Mudgett was tried in January, but the jury was undecided. He was kept in prison until the following January, when he was released. Mott, David Sheffield, and Francis Ledgard were convicted of manslaughter in January of 1809. The first two were sentenced to stand one hour in the public pillory, receive 50 lashes on the bare back, and serve ten years in the new State Prison, while Ledyard received the same, without the lashes. They were also required to pay the costs of the prosecution. Governor Jonas Galusha pardoned Ledgard in 1811, Sheffield in 1815, and Mott in 1817. When Mott's friends petitioned for his pardon, they described him as a "good natured, industrious, honest man."²⁶

Why one man should be hanged and others pardoned for the same crime, just a few years later, is a reflection of the changing politics of the era. The hard feelings of 1808 had dissipated. Perhaps the speed with which Cyrus Dean was tried and executed may have left some with an uneasy feeling, as if justice had moved too quickly. Dean's lack of penitence contributed to the disparities.

Pardons were granted by the Governor and Council in 1815 for Thomas Chambers and George Moore, two sailors who killed Judge Caleb Hill at Isle La Motte in 1814. Hill ran a tavern, and the sailors were on shore leave. "After they had tarried in the house for a short time, Judge Hill, for some reason which has not been fully explained, took up a musket and called on the men to surrender as his prisoners. The officer in command ordered his men to fire." The two were convicted of manslaughter.²⁷ A year is a very short period between conviction and pardon, but the pardon was granted to correct an injustice. There is no evidence of penitence or atonement in this example.

The Boorn Brothers

Stephen and Jesse Boorn were convicted of murdering Russell Colvin in 1819. They were sentenced to be hanged. Jesse petitioned the legislature for a pardon or commutation of his sentence, and the Assembly changed his punishment to hard labor for life at the state prison.²⁸ Un-

der stress, both brothers confessed. Shortly before Stephen's hanging, Colvin returned to Manchester, showing no indication of having been murdered. This was a case of justice gone awry. The brothers were released, but not by pardons. Instead, the state's attorney moved for a new trial, and then chose not to proceed further. The incident has been called America's first wrongful murder case.

That the legislature would act to alter a judgment of the Supreme Court was never raised. The case became notorious, engendering books and articles on the murder conviction without a body. The stunning news that the victim of murder should be alive made the story of the Boorn brothers' trial memorable, but curiously this is not the only reported instance of the phenomenon. Mary Brown and her sister were accused of killing Mary's husband Aaron, after he disappeared following a quarrel while they were making soap. The two women were charged with murder and making him into soap. Bertha Hanson, Starksboro historian, reported that at the trial, amid buckets of soap and a sap bucket of bones, the local physician had just identified the bones as human when Aaron walked in the door.²⁹ Similarly, Boulward Wright was charged with killing Lyman Booth in 1829 in Pownal, and released after Booth turned up, having run away from a beating by his fellow employees.³⁰

Records of pardons for the first half of the nineteenth century do not include any information about how the decisions were reached. Selah Hickok of Hancock killed Isaac Hobbs with a large stick to the neck, was convicted in 1815, and pardoned in 1820. Jean Baptiste Tumas fought a duel with Abraham Covely, and Covely died from a shot to the left side of his back. Tumas was convicted of manslaughter in 1821 and pardoned in 1828, with the proviso that he immediately leave Vermont. Daniel Palmer beat Ephraim Briggs to death with his fists at the Red Tavern in Danbury, was convicted and sentenced to life at hard labor, and pardoned in 1829. They fought over which man would be served first. After receiving his sentence, Palmer "politely thanked the judge that his sentence was not for a longer term."³¹ Clark Caryl murdered Hiram Strobridge at Royalton, slamming a skillet to the left side of Strobridge's neck, was convicted, and he was pardoned in 1835. Ezekiah Odell murdered David Leason at Manchester and was convicted of bashing Leason's skull with a rock, and he was pardoned in 1832.³²

Norman Cleaveland

Norman Cleaveland was convicted of murdering Hannah Lee in 1830, by an at-

tempted abortion. Cleaveland, a physician, was also the father of the fetus. Chief Judge Titus Hutchinson refused to stay Cleaveland's execution to allow an appeal to the Supreme Court, and the legislature intervened, passing an act to reduce his sentence to five years hard labor, provided Cleaveland assented to the conditions contained in the act.³³

The legislature's intervention in the Cleaveland affair appears to be the last time the legislative branch intruded into the executive function on punishment, other than by general legislation. In 1836, the Executive Council was abolished, and the Governor inherited its powers, although with some changes. The Governor could pardon the crime of murder after 1836, for instance, unlike the Governor and Council.

In 1834, during a riot at which the widow Grandy's home in Vergennes, a house of ill-repute, was torn down, Jonathan Hall murdered Michael Dalton, who was attempting to defend the widow. Hall was convicted of murder and pardoned in 1839. Two Irishmen, both drunk, fought, and John Corigan died from blows from a heavy bludgeon, wielded by Michael Moracy, in Montpelier. Moracy was convicted of manslaughter in 1836 and pardoned in 1841.³⁴ Orson Cone murdered Martin Beebe at Wells, was convicted in 1841, and pardoned in November 1844. William Quinn murdered Hugh Murphy at Fairfield in 1841 and was pardoned in 1844. Andrew Rogers murdered Stephen Rogers at Hartland in 1846 and was convicted of manslaughter. He was pardoned in 1855.

There were 17 pardons for murder or manslaughter in these years. There were certainly pardons for other crimes, but those records are beyond the reach of the sources used here.

Horace Graham

Horace Graham embezzled state funds while Auditor of Accounts, was convicted and sentenced to serve time in state prison. He was pardoned by Governor Percival Clement, Graham's successor as Governor, in 1920. Clement cited Graham's extraordinary effort as a war governor as justification for the pardon. At the succeeding annual meeting of the Vermont Bar Association, the members discussed whether he should remain a member, and among the issues was the meaning of the pardon. Did it mean no crime had been committed or was it only a voiding of the penalty? Graham remained a member of the VBA by one vote, but the question of the effect of the pardon was left unresolved in that venue.³⁵

Injustice

Paul Lawrence was caught in May of 1974 falsifying arrests for possession of drugs. He had been celebrated as the most effective anti-drug law enforcement officer in Vermont for seven years. Governor Thomas Salmon issued 71 full pardons, and all prosecutions that depended on his testimony were dropped.³⁶

A special committee formed to investigate the convictions issued a statement that the pardons should be construed as "wiping the slate clean . . . as if the events to which the pardons relate had never happened."³⁷

Pardons in the courts

Sensitive to the conflict of powers clause of the constitution, courts have been reluctant to impose themselves into the pardoning process, but there are cases where pardons have entered the law, often through the back door. Convicts with conditional pardons have challenged decisions made by governors and corrections officials in the Supreme Court on writs of habeas corpus. Pardons have also triggered other questions in cases unrelated to the pardons themselves.

Charles Smith was convicted of embezzlement of tallow, based on the testimony of his employer Willard S. Waters. After Smith was pardoned, he was offered as a witness, which was denied by the court, and this was recited as a ground for a new trial. Chief Judge Charles K. Williams, for the court, agreed he should not be allowed to testify. "The authority of Smith was the very point litigated in the trial, and there is now every motive to induce him to swear to his authority to sell, and, by the result of a verdict in favor of the defendants, induce the belief that he was unjustly convicted; and he must feel hostile to the plaintiff [Waters], on whose testimony he was convicted. The precedent would be bad; and it would be unsafe to grant a new trial on such testimony. Pardons would be procured for the purpose of making convicts witnesses, and procuring new trials on their testimony."³⁸

Carlos J. Barnes re-enlisted in the U.S. Army to the credit of Rutland Town in 1864 and after the war attempted to collect the \$500 the town had voted as a bounty, as an incentive to satisfy its obligation to supply troops for the Civil War. The bounty was conditioned on the principle that nothing should be paid to any soldier who had deserted. The Town refused payment, as he was a deserter, but Barnes countered with evidence that he had been pardoned by the President, along with all others who had deserted and then re-enlisted. Judge Wil-

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liam Wilson, writing for the court, affirmed the decision to deny him the bounty.³⁹ The pardon did not change the contract or erase the fact that Barnes had deserted. The presidential pardon did not erase the condition of the town vote.

In re Conditional Discharge of Convicts (1901) addressed a statute that authorized the Board of Prisons to parole or commute sentences of convicts, with no involvement of the Governor. The legislature was unsure of the validity of the new law, and made the act contingent upon approval by the Supreme Court. Governor William Stickney addressed the Court in a letter, asking for its opinion on the validity of the legislation. In a per curiam decision, the Court quietly laid it to rest as unconstitutional. The law violated Section 20 of the Vermont Constitution, which allocated the pardoning power to the Governor.⁴⁰

William F. McKenna violated the terms of his conditional pardon and was recommitted to serve the remainder of his term in 1906. Filing a writ of habeas corpus, McKenna argued that the time he served when at large should be credited to his term of incarceration. The Supreme Court was unpersuaded. The court agreed that an allowance for good behavior was not forfeited by the breach of conditions, but held the time spent at large could not be treated as time served.⁴¹

The problem identified in *In re Conditional Discharge of Prisoners* 21 years earlier was addressed in part in *In Re Hall* (1927). The statutes that gave authority to a court to “suspend execution of a sentence and commit the respondent to the custody of a probation officer are valid, and do not contravene the constitutional provisions which vest the pardoning power in the executive.” This is not a pardon, the court explained, but merely a suspension or postponement of its execution.⁴²

Joseph De Palo claimed he should be released from prison. Granted a conditional pardon, he had been set free, but later the governor concluded that he had violated the conditions, and he was ordered reincarcerated, although it took four years to locate him. In denying his writ of habeas corpus in 1942, Justice Sherman Moulton explained that, “in the eye of the law, the conditionally pardoned convict is looked upon as being constantly in the custody of the Governor, who is regarded as his jailer and “him always as it were upon a string that [he] may pull at pleasure,” quoting *Worthen v. Prescott* (1887). Neither the passage of time nor the change in the person of the governor justified De Palo’s claims.⁴³ *In re De Palo* also addressed the role of the Commissioner of Public Welfare in pardons. In 1929, the Commissioner’s office had issued a document that gave a certain date

as the termination date of the conditions earlier than the terms of the pardon. It was a mistake, and it did De Palo no good. The court made it clear that a pardon is the sole authority of the Governor. The Commissioner’s duty was solely to investigate and report.⁴⁴

Adrien Paquette was convicted of grand larceny in 1938. After serving four years, he was given a conditional pardon by the Governor so that he could be deported to Canada, conditioned on the usual good behavior and the “deportation warrant being served and federal officer taking custody.” The Governor believed he was not a citizen of Vermont. Paquette also believed this. Both were mistaken. He was taken into federal custody, but then federal authorities decided he could not be deported, and he was placed back in state prison. Paquette sued to be released from prison. The Supreme Court granted his petition for habeas corpus, finding that the terms of the pardon had been satisfied. He had not violated it. A pardon, explained the court, “is to be taken most beneficially for the recipient and most strongly against the authority by which it was granted, whenever its meaning is in doubt.”⁴⁵

The governor revoked a conditional pardon. The pardon was not specific as to the conditions or what would constitute a violation, but the high court would not invade the province of the chief executive, even though no hearing was held or no notice given as to what led to the convict’s subsequent arrest and reconfinement. The 1958 decision in *In re Charizio* held that, “A pardon may be made subject to any conditions, provided they are not unlawful, unreasonable, immoral, or impossible of performance.”⁴⁶

When Burton Tatro caused a fatal accident while intoxicated, the decedent’s representatives sued him and the State, questioning Tatro’s earlier pardon for DWI and the Governor’s actions in granting it, in light of what followed. The Supreme Court denied the claim against the State and explained that once a pardon is issued “all legal punishment and disqualifications resulting from the convictions are removed.”⁴⁷

In *Petition of Harrington* (1976), the court ruled that the grant of a pardon for a disbarred attorney did not automatically reinstate him, since “disbarment involves a discipline as opposed to a penalty.” There is still an underlying question of fitness, “even though the criminal aspect has been excused or expunged by the pardon. Pardons are given for many reasons. If the basis were the delayed establishment of total innocence, its impact might well be different than if it were a compassion pardon given on account of age or state of health.” The effect of the pardon was to restore him

to the position of an applicant for admission with no criminal record.⁴⁸

Justice Rudolph Daley’s decision in *Doe v. Salmon* (1977) addressed Article 6 in the context of a request to prohibit releasing a pardon as a public record. His decision recognized that a pardon is a public record available for public inspection, and as “a correlative to the right of inspection of public records and documents, the custodian of those records has a legal duty to the public to accord that right. This duty is ministerial in nature and so clear and specific that no element of discretion or of official judgment is involved in its performance.”⁴⁹

In 1980, for the first time the Supreme Court took the unusual step of recommending the Governor grant a pardon to a man who was convicted of crossing the interstate median. His purpose was to trace tire marks from his side of the highway to the other to see if an accident had occurred and to render aid if possible.⁵⁰ The records of Governor Snelling’s pardons do not include one for this defendant.

Formal Standards

Governor Richard A. Snelling was frustrated with the pardoning process. It lacked any rules or directions. In a memo dictated on February 3, 1983 to Chief of Staff Tim Hayward, the governor wrote, “I am very troubled by the right to issue pardons. I believe it is essential that there be such a right and there always should be someone who has it within their power to right a wrong, or to correct a serious injustice. If I issued only one pardon during my term of office and that pardon really did provide justice where priorly it had been lacking, I would feel good about the power and forget the pain of having had often to have said ‘no.’

“But it does seem to me that no one should have the power to administer ‘justice’ differentially. Hundreds, no, thousands of people have been convicted of breaking and entering and of crimes even less severe than those for which [the two applicants for pardons at issue] were convicted, under the law, and subject to all of the appeals available under the law.

“I do not think that a dozen years of non-criminal behavior, by itself, represents such a passage of time as to warrant a pardon. I can see, but frankly with some difficulty, pardoning a man of 70 for a criminal offense committed in his teens, which somehow or other still haunts him, despite a long life as an honest and productive citizen. But we need a better way of judging which of the thousands who were convicted in 1970 or 1971 should get pardons in 1983 than the system which brought those two recommendations to me.”

The following year a set of standards was

developed and adopted. They included the general principle that pardons should be issued "in the case of a clear injustice at the time of conviction where there was no other possible remedy." Otherwise, the governor would only consider full pardons after the individual was released from incarceration. The standards explained that, "The purpose for such a pardon is generally to afford an individual the opportunity to pursue a better life, or to correct a grave injustice."

The standards were adopted by successive governors. Forms were developed to systematize the process, and staff members in the executive office were assigned to screen the applications, which the governor would then use to grant or deny a pardon.

The current pardon application explains that pardons will usually only be considered after the passage of ten years for felonies and five for misdemeanors. The time spent after release should show not only exemplary behavior, but significant or outstanding contributions to the community and the family and regular employment. Pardons requested merely to remove obstacles to employment, which Governor Snelling had rejected as justifying a pardon, are not enough. The grant of a pardon must be a benefit to society, not just for personal gain or comfort. There must be recommendations in support of the application from four reputable members of the community. There must be acknowledgement of the crime, and a sincere remorse for having committed it.⁵¹

Statutory provisions

The process of applying for a pardon is also statutory. After a year of incarceration, the inmate may file a formal application explaining the reasons for the request. The governor, believing that the reasons are sufficient, can order a hearing, notifying the inmate and the state's attorney of the county where the conviction was decided. If granted, the governor may decide to publish the decision to pardon in newspapers.⁵²

The legislature has not attempted to set standards for the grant of pardons. The governor still has full discretion to grant or deny one. For conditional pardons, the law clearly states that the governor is the sole and exclusive judge to excuse the performance of the conditions or decide that the conditions have been violated, which could return the individual to a correctional facility.⁵³

Title 13 includes a requirement that victims of crimes receive notice of the offender's release when pardoned.⁵⁴ When a pardon is granted, all records of reversals or vacations of conviction are removed and destroyed.⁵⁵ DNA samples are destroyed if pardoned for crimes that caused them to

be taken.⁵⁶ A pardon does nothing to undo the harm to victims of a crime.⁵⁷

Curiously, a pardon does not entirely wipe the slate clean for those who seek to be allowed to work as licensed lenders. The law allows licenses for those convicted of crimes who have been pardoned, but not for crimes relating to the lending profession.⁵⁸

In 2007, the legislature tackled the issue of compensation for wrongful convictions in a chapter in Title 13 entitled, "Innocence Protection."

When a person was convicted of a felony and has served at least six months in a correctional facility and then pardoned, the individual may sue for compensation for wrongful conviction. Damages of not less than \$30,000 or more than \$60,000 are awardable for each year of incarceration, adjusted proportionally for partial years, and may include attorney's fees, physical and mental health care costs, and up to ten years eligibility for state-funded health care equivalent to Medicare services.⁵⁹

Recent numbers

A complete record of the pardons issued from 1782 to the present is not available. Although such records are public, many have been lost or destroyed over the years. The State Archives has compiled the pardons issued by successive governors since 1950. The list begins with Harold Arthur, the Lieutenant-Governor who took over from Ernest Gibson Jr. in 1950 after Gibson was appointed U.S. District Judge. Governor Arthur, in office for only a year, issued 14 full pardons and 144 conditional pardons. Governor Lee Emerson, who served two two-year terms (1951-1955) issued 21 full pardons and 451 conditional pardons. Joseph Johnson granted 18 full pardons and 517 conditionals in his four years. In his two years in office, Robert Stafford awarded 1 full pardon and 307 conditionals. Ray Keyser Jr. issued 38 full pardons and 348 conditionals in his two years. Philip Hoff served three terms, and in his six years he issued 93 full and 1,325 conditional pardons. In Deane Davis's four years, he granted full pardons in 49 cases and only 24 conditional pardons. Thomas Salmon, in his two terms, granted 202 full pardons and 26 conditionals.

The charts do not list any conditional pardons for the next four governors, although they must have been issued. In Richard A. Snelling's six years he issued 32 full pardons. In Madeleine Kunin's three terms she issued 11 full pardons. Howard Dean, who completed Snelling's fourth term and was elected to four more two-year terms, issued 78 full pardons. James H. Douglas, in six years in office, issued 13 full pardons. Gov-

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ernor Peter Shumlin, with three two-year terms, issued 208 full pardons, the majority of them (192) for marijuana convictions, following the enactment of a law decriminalizing the possession of small amounts of the drug. Shumlin's office pointed out to the press that this was the most pardons ever issued by a Vermont governor. Records of pardons issued by Governor Phil Scott are not yet compiled.⁶⁰

None of the 378 pardons issued between 1950 and 2016 were for murder or manslaughter. Most were minor matters, DWIs, possession of marijuana, and motor vehicle offenses, such as speeding or driving an unregistered vehicle. There were more than a dozen pardons for violations of the fish and game laws, including hazing wild ducks with a motorboat, setting steel traps within 25' of a beaver house, and fishing with an illegal device, without a license, or in closed trout waters. Those pardons were necessary for the convicted to be able to fish or hunt again legally in Vermont. There was one pardon for violation of the blanket act.⁶¹

There were a handful of major crimes pardoned, including grand larceny, arson, rape of a minor less than 16 years of age, incest, and DWI fatal. Every pardon has a story of its own, and every governor a different temperament as to relieving convicted people of the burden of their convictions.

The Long View

Hundreds of pardons later, you can see that this institutional form of unearned mercy has been used for many different reasons and purposes. It has served to correct injustice, as in Tom Salmon's pardons following the Paul Lawrence mess. It served to draw the people of the state together by allowing dissidents who had chosen to oppose Vermont independence and align themselves with New York to take the oath of allegiance, all their offenses commuted, their confiscated property returned, in Thomas Chittenden's first terms. In Governor Shumlin's 192 pardons of marijuana possession convictions, the pardoning process treated past crimes as invalidated by decriminalization, without the need for any showing of penitence.

The pardon has become codified and standardized. It has become pellucid and accessible to those who seek to erase their past conduct. The talismanic words are no longer secret. No one has a right to a pardon. But everybody has a chance. Everybody can hope.

Paul S. Gillies, Esq., is a partner in the Montpelier firm of Tarrant, Gillies & Richardson and is a regular contributor to the Vermont Bar Journal. A collection of his columns

has been published under the title of Uncommon Law, Ancient Roads, and Other Ruminations on Vermont Legal History by the Vermont Historical Society.

¹ A conditional pardon is "an act of grace or favor upon the part of the State by its Governor, and might be revoked without notice to the convict and without giving him an opportunity to be heard." *In re Saucier*, 122 Vt. 208, 211 (1961).

² Hosea Ballou, *Treatise on Atonement* (Portsmouth, N.H.: Oracle Press, 1812). Ballou was pastor at Barnard, Vermont at the beginning of his career as a preacher, where he read and was affected by Ethan Allen's *Reason the Only Oracle of Man* (1784).

³ *State v. Graves*, 119 Vt. 205, 216 (1956).

⁴ Parole is the conditional release of a convict before the expiration of the term of imprisonment and partakes of the nature of a conditional pardon. *Ex parte Gordon*, 105 Vt. 277 (1933). Probation is akin to the issuance of a conditional pardon. *State v. Barnett*, 110 Vt. 221 (1939). In 1937, in *In re Ronan*, Justice John C. Sherburne noted, "It has now become customary for the Executive to issue a conditional pardon upon the expiration of a minimum sentence if the prisoner has full complied with the prison rules, and courts have this custom in mind when imposing sentence." *In re Ronan*, 108 Vt. 481 (1937).

The law makes clear, however, that parole "shall be ordered only for the best interest of community and the inmate, and shall not be regarded as an award of clemency, a reduction of sentence, or a conditional pardon. 28 V.S.A. § 502a(c).

⁵ *State v. Town of Fletcher*, 13 Vt. 124, 128 (1841).

⁶ John Russell Jr., *An Authentic History of the Vermont State Prison; from the Passing the Law for its Erection in 1807 to July, 1812* (Windsor, Vt.: Preston Merrifield, 1812); John Reynolds, *Recollections of Windsor Prison: Containing Sketches of its History and Discipline; with Appropriate Strictures, and Moral and Religious Reflections* (Boston: A. Wright, 1839), 11. Reynolds wrote, "It was the original design that the whole prison should be kept warm, and large stoves were provided for this purpose; but it was found impossible to do this by the means used, and after a few years, the coldest part of the winter found not a spark of fire in any of the halls. Much is suffered on account of the cold; but it is a place of punishment, and this is the kind and feeling argument with which the keepers meet the entreaties of the shivering prisoners." See also Charles T. Morrissey, *The Closing of Windsor Prison: Vermont's Unique Experience in Correctional Change and Historic Preservation* (Montpelier, Vt.: Vermont Department of Corrections, 1980).

⁷ Nathaniel Chipman, *Principles of Government: A Treatise on Free Institutions* (Burlington, Vt.: Edward Smith, 1833), 214 fn.

⁸ Cæsar Bonesana, Marquis Beccaria, *An Essay on Crimes and Punishments* (Philadelphia: Philip H. Nicklin, 1819), 159.

⁹ Chipman, *Principles*, 213, 215.

¹⁰ D. Gregory Sanford, "Punish," Society of American Archivists Annual Meeting, Montreal, September, 1992 (unpublished).

¹¹ Thomas Chittenden, "Proclamation of Pardon Issued by Governor Chittenden June 3, 1779," E.P. Walton, ed., *Governor and Council* (Montpelier, Vt.: J. & J. Poland, 1873), I: 442-443.

¹² William Slade, *Vermont State Papers* (Middlebury, Vt.: J.W. Copeland, 1823), 173.

¹³ "An act securing the general privileges of the people, and establishing common law and the constitution, as part of the laws of the state,"

Allen Soule, ed., *Laws of Vermont 1778-1780* (Montpelier, Vt.: Secretary of State, 1964), 12: 36-37; "An act establishing the constitution of Vermont, and securing the privileges of the people," John A. Williams, ed., *Laws of Vermont 1781-1784* (Montpelier, Vt.: Secretary of State, 1965), 13:101; "An act establishing the constitution of Vermont and for determining who are entitled to the privileges of the constitution and laws," John A. Williams, ed., *Laws of Vermont 1785-1791* (Montpelier, Vt.: Secretary of State, 1966), 238.

¹⁴ *Bates v. Kimball*, 2 D.Chip. 77 (1824); *Staniford v. Barry*, 1 Aik. 314 (1825).

¹⁵ "An act discharging Seth Smith from an indictment found against him at the county court of Windham County," February 26, 1782, *Laws of Vermont 1781-1784* (Montpelier, Vt.: Secretary of State, 1968), 81-82; E.P. Walton, ed., *Records of the Governor and Council of the State of Vermont* (Montpelier, Vt.: J. & J.M. Poland, 1874), II: 373.

¹⁶ Edward A. Hoyt, ed., *State Papers of Vermont General Petitions 1778-1787* (Montpelier, Vt.: Secretary of State, 1952), 68-69; E.P. Walton, ed., *Records of the Governor and Council of the State of Vermont* (Montpelier, Vt.: J. & J.M. Poland, 1875), 147fn.

¹⁷ "An act allowing the return of Timothy Lovell to this state," February 19, 1783, *Laws of Vermont 1781-1784*, 171. "An act granting a pardon to Timothy Church," February 21, 1783, *ibid.*, 175.

¹⁸ "An act to enable the Governor and Council to pardon certain persons," February 24, 1783, *ibid.*, 178.

¹⁹ "An act to enable the Governor and Council to pardon certain persons therein described," March 8, 1784, *ibid.*, 254.

²⁰ "An act pardoning Charles Phelps Esq. Of Marlborough in the county of Windham, and restoring to him all his estate real and person," October 26, 1784, *ibid.*, 285-286.

²¹ "An act granting to the several persons therein named, a free pardon for the several crimes herein described." E.P. Walton, ed., *Records of the Governor and Council of the State of Vermont 1782-1791* (Montpelier, Vt.: J. & J.M. Poland, 1875), 333-334.

²² E.P. Walton, ed., *Records of the Governor and Council of the State of Vermont* (Montpelier, Vt.: J. & J.M. Poland, 1875), III: 82. Jonas Galusha later filed an invoice for ten pounds for executing the sentence of the Supreme Court for cutting off Geer's right ear and branding him on the forehead with the letter C. Pliny White, "Jonas Galusha: The Fifth Governor of Vermont," *Addresses Delivered Before the Vermont Historical Society in the Representatives Hall, Montpelier, October 16, 1866* (Montpelier, Vt.: Walton's Steam Printing Establishment, 1866), 33.

²³ Walton, *Governor and Council*, III:94.

²⁴ Hoyt, *Petitions 1778-1787*, 372-373.

²⁵ L.L. Dutcher, *The History of St. Albans, Vt.: Civil, Religious, Biographical and Statistical* (St. Albans, Vt.: Stephen E. Royce, 1872), 374-376.

²⁶ Gary G. Shattuck, *Insurrection, Corruption & Murder in Early Vermont* (Charleston, S.C.: The History Press, 2014), 301.

²⁷ The Criminal Justice Research Center has compiled information on all homicides committed in Vermont from 1760 to 1845. These records are published at <https://cjrc.osu.edu/sites/cjrc.osu>. They are the basic research used for Randolph Roth, *American Homicide* (Cambridge: Harvard University Press, 2009). See also L.L. Dutcher, *The History of St. Albans* (St. Albans, Vt.: Stephen E. Royce, 1872), 295-296; Allen L. Stratton, *History of the Town of Isle La Motte, Vermont* (Barre, Vt.: Northlight Studio Press, 1984), 51-55.

²⁸ "An act for the relief of Jesse Boorn," *Laws*,

passed by the Legislature of the State of Vermont, at their Session in Montpelier, Commenced on the second Thursday of October, One Thousand Eight Hundred, and Nineteen (Rutland, Vt.: Fay & Burt, 1819), 194.

²⁹ Bertha Hansen, *Bertha's Book: A View of Starksboro History* (Starksboro, Vt.: Starksboro Historical Society, 1998), 51-52.

³⁰ *Rutland Herald*, 18 August 1829 and 16 June 1829.

³¹ J.C. Williams, *The History and Map of Danby, Vermont* (Rutland, Vt.: McLean and Roberts, 1869), 216-217.

³² *Rutland Herald*, 18 November 1828.

³³ Theodore Romeyn Beck, *Elements of Medical Jurisprudence* (Philadelphia: J.B. Lippencott & Co., 1863), 487-488.

³⁴ A.M. Hemenway, *The History of the Town of Montpelier* (Montpelier, Vt.: A.M. Hemenway, 1882), 333; *Journal of the House of Representatives of the State of Vermont, at their session begun and holden at Montpelier, in the County of Washington, on Thursday, October 13, 1836* (Middlebury, Vt.: The American Office, 1836), 297; *Rutland County Herald*, 19 April 1836, 3. The Herald reported, "The case is said to have no precedent in the annals of this country."

³⁵ Paul S. Gillies, "The Great Falls: A Survey of the Regulation of the Profession of Law 1778-2013," *Vermont Bar Journal* 39:3 (Fall 2013), 12.

³⁶ Hamilton E. Davis, *Mocking Justice: America's Biggest Drug Scandal* (New York: Crown Publishers, 1978); "Lawrence Case Pardons to Get Okay," *Burlington Free Press*, 26 December 1976.

³⁷ Mike Harris, "Pardons an Attempt to Right Wrongs for 71 Vermonters," *Washington Post*, 6 January 1977.

³⁸ *Waters v. Langdon*, 16 Vt. 570, 573 (1844).

³⁹ *Barnes v. Town of Rutland*, 42 Vt. 622, 627-628

(1869).

⁴⁰ *In re Conditional Discharge of Convicts*, 73 Vt. 414 (1901).

⁴¹ *Ex Parte McKenna*, 79 Vt 34, 35 (1906).

⁴² *In re Hall*, 100 Vt. 197 (1927).

⁴³ *In re De Palo*, 101 Vt. 510 (1929).

⁴⁴ *Reilly v. Dale*, 113 Vt. 1 (1942).

⁴⁵ *Ex parte Paquette*, 112 Vt. 441 (1942).

⁴⁶ *In re Charizio*, 120 Vt. 208, 212-213 (1958).

⁴⁷ *Brown v. Tatro*, 134 Vt. 248, 250 (1976).

⁴⁸ *Petition of Harrington*, 134 Vt. 549, 555 (1976).

⁴⁹ *Doe v. Salmon*, 135 Vt. 443, 446 (1977).

⁵⁰ *State v. Fayen*, 138 Vt. 545, 456 (1980).

⁵¹ <https://governor.vermont.gov/sites/scott/files/documents/pardon%20application.FINAL%202017.pdf>

⁵² 28 V.S.A. § 809.

⁵³ 28 V.S.A. § 810.

⁵⁴ 13 V.S.A. § 5305(a).

⁵⁵ 13 V.S.A. § 5569(d).

⁵⁶ 20 V.S.A. § 1940(a).

⁵⁷ "The evil that men do lives after them; the good is often interred with their bones." William Shakespeare, *Julius Caesar*, Act III, Scene 2.

⁵⁸ 8 V.S.A. § 2204(a)(5)(C).

⁵⁹ 13 V.S.A. § 5573.

⁶⁰ <https://www.sec.state.vt.us/archives-records/state-archives/government-history/governors-pardons.aspx>

⁶¹ The blanket act provided that, "A man with another man's wife, or a woman with another woman's husband, found in bed together under circumstances affording presumption of an illicit intention, shall each be imprisoned . . ." *State v. Miller*, 60 Vt. 90 (1880).



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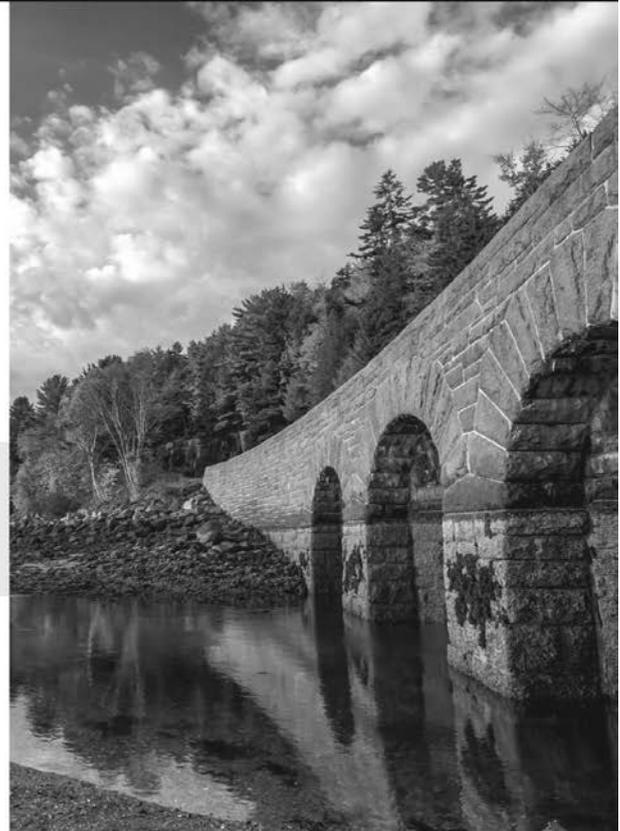


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Strengthening our Legal Analysis

Every Spring the Vermont Supreme Court visits Vermont Law School to hear oral arguments in pending cases. This semester, I decided to organize my Legal Writing II syllabus so that my students would be working on drafting judicial opinions at the same time the Vermont Supreme Court visits Vermont Law School. In doing so, we've been spending a lot of time working on improving our analysis and reasoning in our legal writing. This got me reflecting on my own writing as a practitioner and considering the ways we all can improve our client centered practices by strengthening our analysis and reasoning in our own legal writing. To do this, we should focus on the most common types of legal analysis in our legal writing. From my experience, those types of analysis are Common Law Analysis, Statutory Analysis, and Policy Analysis.

Common Law Analysis

As practitioners we are all familiar with the concept of common law analysis. And yet, I know from my own teaching and lawyering, that I do not always follow best practices when employing this form of persuasive analysis in my legal writing. Accordingly, it is worth taking a moment to reflect on this analytical approach to legal writing to make sure we are using common law analysis most effectively.

The most basic way to strengthen our common law analysis is to understand that the best methods of employing it are through analogy and distinction.¹ In short, our common law analysis in writing should focus on comparing and contrasting relevant case law to support our legal position. To do this, we should look at two areas of a precedential case – the facts and the reasoning. Obviously, the more closely aligned the facts or reasoning are to the case we are writing about the more valuable that precedent is in our writing. The key is to recognize that good common law analysis does not simply summarize the facts of a given precedent and conclusively tell the reader they are similar. Rather, good common law analysis shows the reader that the facts are similar or that the reasoning is applicable. To do this, the writer must specifically reference the salient facts or reasoning and directly explain the comparison. If the writer fails to clearly show the comparison, they risk losing the reader and therefore missing an important opportunity to persuade. As writers, we cannot assume

that the reader can see inside our minds, we must make our common law analysis explicit.

For example, in the below excerpt from an amicus brief, the writer shows the reader how the facts and reasoning of precedential cases fit with the facts in the case before the court. By using parentheses at the end of a citation, the writer can explicitly show the reader their logic and common law analysis.

The facts presented in Plaintiffs' complaint . . . suggests that the term "Natural" refers to things that tend to occur in nature. Indeed, Plaintiffs explain that genetic engineering "allows a plant to express a desired trait that it would not otherwise express." Doc. 37-1, at ¶ 21. In other words, Plaintiffs essentially acknowledge that genetic engineering allows a plant to express a trait that it would not naturally express. Where an advertiser employs artful semantics to sidestep the plain and obvious conclusion it wishes to avoid, courts are not hesitant to declare the statement to be misleading. See, e.g., *Sears, Roebuck and Co. v. F.T.C.*, 676 F.2d 385 (9th Cir. 1982) (upholding conclusion that a dishwasher advertisement was misleading where it boasted the machine's ability to thoroughly clean "heavily soiled dishes" without the need to pre-rinse them, despite the manufacturer's own user manual cautioning purchasers to do otherwise); *U.S. v. Bell*, 414 F.3d 474, 480 (3rd Cir. 2005) (upholding conclusion that a website was inherently misleading where it shared fraudulent tax advice that was based "purely on semantics" and legal interpretations "take[n] . . . out of context.")²

By employing this tactic when we draw analogies or make distinctions, we can be much more effective in our persuasive writing and use of common law analysis.

Statutory Analysis

Perhaps equally as familiar but less understood by practitioners is statutory analysis. While we all likely understand the principle, how best to use it in our writing is less well understood. Simply stated, statutory analysis is about applying a statute to a set of facts or given legal situation.³ To

do this well, writers must understand that statutory analysis is less about comparing and contrasting, and more about applying the words in a statute to the facts the lawyer is confronted with.

While every jurisdiction has a slightly different take on how to do statutory analysis, the Vermont Supreme Court has explained that its "primary objective in construing a statute is to effectuate the intent of the Legislature."⁴ In order determine this intent, the Vermont Supreme Court has indicated it "initially look[s] to the language of the statute itself."⁵ In doing so, "[t]he Legislature is presumed to have intended the plain, ordinary meaning of the adopted statutory language.⁶ If a statute is unambiguous the Court will "accept that plain meaning as the intent of the Legislature" and our inquiry proceeds no further.⁷

Within this framework, practitioners will be most effective if they focus their writing on the plain language of the statute at issue. Just as one would with common law analysis though, it is important to draw out your analysis explicitly. In other words, it is not enough to simply state that the words are clear by their plain meaning. Rather, the effective writer will show the reader that the plain meaning is clear by pulling on resources such as a dictionary, cases, or the purpose/findings section of the statute. The point being that good analytical writers do not hide the ball. They show the reader the support upon which their analysis and reasoning relies.

In addition, effective writers recognize that statutory analysis does not mean we do not use case law. Oftentimes, we use case law that has defined a statute previously, to support our interpretation of the same statute in our own case. While this hybrid approach to statutory analysis may sound counterintuitive, it is, in fact, an important tactic to employ in our statutory analysis writing.

Policy Analysis

We've all heard the common refrain that "courts don't make policy, legislatures make policy." Based on this, I'm sure many of us have been hesitant to make a policy argument in front of a court. While this truism is constitutionally sound, the reality is that in a common law system, courts cannot avoid making policy whenever they reach a precedential decision. As a result, I encourage writers to employ effective poli-

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cy arguments in their writing if time, space, and logic allow.

Breaking those three factors down, practitioners should only use a policy argument if time and space allow. This means that we should only get to a policy argument once we've exhausted our best legal arguments. In other words, before arguing that your position is supported by sound public policy reasons, make sure you've made the strongest legal arguments to support the outcome you are asking a court to reach. Put differently, only if you have time (in an oral argument) and space (in the limited page length of your brief) should you consider making an overt policy argument.

If time and space are available, the writer should determine whether logic supports a sound public policy argument. While writers should not overemphasize a policy argument, if good policy outcomes flow from a decision in your favor or the logic of your position, it may be appropriate to have a specific policy argument in your persuasive writing.

Having decided that a policy argument is in order, the challenge becomes how best to write it in a persuasive manner. First, make sure you save it until the end of your written work. Because most judges rightfully agree that their constitutional role is not to make policy, you will do yourself and your client a disservice if you lead with a policy argument. Instead, writers organize

their policy arguments in one of two ways. Either save your policy argument until the end – make it your last substantive argument. Or, weave policy points into each of your legal arguments. No matter which approach you take, it is important to recognize that you do not want to appear as though your policy argument is more developed than your legal argument. Instead, your policy argument should support or compliment your legal arguments.

In addition to the physical location of your policy argument, it is important to support any policy argument with ample citations to reputable sources. Just as you would show the reader why your position is correct with respect to common law or statutory analysis, you should also show the reader that your policy positions are sound. For example, data from government sources, reputable scientific journals, law reviews, or polling data may be good sources to support an argument that deciding in your favor is not only legally sound, but also good public policy. The idea being that, while a court may not decide a case based on policy, courts are made up of human beings and human beings like to believe their decisions are good for people. To that extent, policy analysis may be appropriate if time, space, and logic allow.

Ultimately, as practitioners our job is to persuade a judge or jury that our arguments are legally sound. In order to do

this, we need to use analysis and reasoning to show the judge or jury why we are correct. It is never enough to simply assert our position in a conclusive manner. Instead, as attorneys we should review our own work to make sure we are showing the reader, why we are correct. As I tell my students, good common law, statutory, or policy analysis requires using written words to *show* the reader, not just *tell* the reader, why you are right.

Jared K Carter, Esq., is an Assistant Professor of Law at Vermont Law School. Jared teaches legal activism, legal writing and appellate advocacy at VLS. He also directs the Vermont Community Law Center, a non-profit legal services organization focused on social justice, constitutional rights and consumer protection.

¹ John C. Dernbach et al., *Legal Writing and Legal Method*, 110-112 (5th ed. 2013).

² *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015).

³ Dernbach, 115.

⁴ *Okemo Mtn., Inc. v. Town of Ludlow*, 171 Vt. 201, 210, 762 A.2d 1219, 1227 (2000).

⁵ *Town of Hinesburg v. Dunkling*, 167 Vt. 514, 525, 711 A.2d 1163, 1169 (1998).

⁶ *Id.*

⁷ *Town of Killington v. State*, 172 Vt. 182, 188, 776 A.2d 395, 400 (2001).



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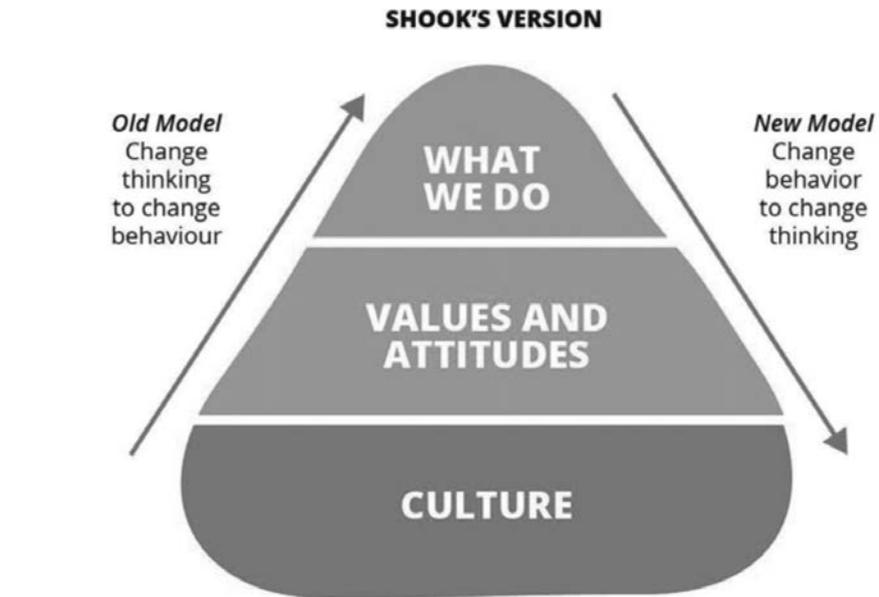
Lawyer Well-Being Committee and “Be Well” Introduction

We are extremely excited to kick off 2019 with opportunities for Vermont’s lawyers to come together and engage in activities that support their overall well-being. Our overall goal is to create a fun, engaging and sustainable environment for attorneys to have open communication about the unique stress and struggles they face in their service profession.

We have created a new *VBA Journal* column titled “Be Well” to spotlight on a quarterly basis interesting wellness topics and opportunities. This will be an opportunity to provide some realistic tools that attorneys can implement in their busy lives to start to build their wellness muscles. These tools will help ensure that any healthy and supportive practices are actually realistic and sustainable in your lives. We would like to start and cultivate discussions via VBA Connect with members on various wellness topics. This is an excellent platform for all of us to raise questions and participate in discussions so we can learn and support each other on the path to holistic well-being.

As a Lawyer Well-Being Committee, we will be planning a full-day of wellness activities, due to repeated requests to do so! Many of these activities will qualify for CLE credits, so it’s a win-win from every perspective! We are also dedicated to ensuring that every VBA event has a wellness component to it, whether it be mindful movement, dedicated time for a mindful break or meditation, or a CLE devoted to providing participants tools to cultivate awareness around how to improve their overall well-being. To change the legal culture from a place of stress-induced illnesses and addictions to a place of well-being must start with changing WHAT we do and WHY we do it, so that HOW we do it embraces the wellness goal that we are moving towards. The wellness model is proactive and intentional.

Additionally, we are scheduling our inaugural attorney wellness retreat in 2019, date TBD, which will provide enough space and time for a pause to reset the stressful trajectories our lives may be currently following. The plan is to commence this retreat on a Thursday afternoon, starting with a relaxing mindfulness practice, nourishing food and space to reflect on where we are currently experiencing stress or a lack of wellness in our life. Then, we will spend the next 2 ½ days, ending Sunday at noon, cultivating a healing schedule of mindful-



ness, wellness activities and plenty of space to relax and just “be” in a beautiful and serene location. The mindfulness activities will include: mindful movement or yoga, pranayama or breath control, meditation, and a variety of outdoor activities, such as hiking and forest bathing.

So please join us online at vbaconnect.vtbar.org, by selecting “join” next to the Lawyer Well-Being Community on VBA Connect and join or start a conversation! Stay tuned to VBA news on our wellness initiatives and enjoy upcoming issues of “Be Well.” That’s all for now, except that introductions are in order. Be Well.

Co-Chair Introductions:

Samara Anderson is a Legal and Policy Advisor for the State of Vermont, Agency of Human Services, a Registered Yoga Medicine™ Yoga Teacher and a social entrepreneur teaching mindfulness to stressed professionals and creating a non-profit community farm in Vermont to use farm animals, nature and mindfulness to heal people. She discovered yoga in 2003 when she graduated from Vermont Law School and was in a stressful and busy commercial litigation law firm at Boies, Schiller & Flexner LLP based in New York City. Her legal work has evolved from complex commercial litigation to public service with the State of Vermont, initially as an Assistant Attorney General and now as an in-house legal and

policy advisor for the Agency of Human Services. Her yoga practice has similarly deepened over the past sixteen years, culminating in completing her first yoga teacher training in 2013. She is currently becoming a 500-hour Yoga Medicine therapeutic yoga instructor using yoga to heal people. Since 2016 Samara has combined her mindfulness practices with the practice of law in her Mindful Practices CLE workshops to reduce stress and increase productivity and happiness. Attorneys and non-attorneys alike exclaim that they have never felt so relaxed and focused at the same time: two qualities that make for highly effective humans and attorneys.

Micaela Tucker is an attorney for Hershenson, Carter, Scott and McGee, P.C. in White River Junction. Mica is also a member of the Strafford School Board and the Chair of the Board of the NH/VT chapter of the Albert Schweitzer Fellowship. She is a former Assistant Attorney General for the State of Vermont in civil litigation and Medicaid Fraud prosecution and served Governor Shumlin’s administration as General Counsel for Irene Recovery. In addition, she is well-trekking in issues of special needs education and parenting and is a practicing Buddhist and novice yogi. Mica has degrees from Rice University and Vermont Law School and is a former Albert Schweitzer Fellow.



Vermont Bar Foundation Grantee Spotlight: VBA Legal Access Coordinator Mary Ashcroft

This is the latest in a series of articles highlighting Vermont Bar Foundation grant recipients. The Vermont Bar Foundation awards grants which provide legal assistance to low-income Vermonters on an annual basis, thanks primarily to the interest earned on lawyers' trust accounts (IOLTA). This article focuses on an individual grantee who has dedicated her legal career over the last eleven plus years to ensuring access to justice for hundreds of disadvantaged Vermonters.

Attorney Mary Ashcroft was in private practice in Rutland in 2008, when she learned of a new position that the Vermont Bar Association was advertising. The VBA Pro Bono Committee co-chairs at the time, Eileen Blackwood and Teri Corsones, had successfully applied for a VBF grant that would fund a part-time Pro Bono Coordinator position. The Pro Bono Coordinator would be tasked with overseeing the then-newly created Rutland Pilot Project (also funded with a VBF grant), and with helping coordinate pro bono projects throughout the state.

Attorney Ashcroft was doing considerable pro bono work, and was intrigued by the chance to assist more actively with pro bono efforts state-wide. She wryly recalls that during her interview with Eileen, Teri and then VBA Executive Director Bob Paolini, she asked if part-time meant half-time. Bob replied "no – closer to full-time!" She fortunately continued with the interview regardless, and was selected as the VBA Pro Bono Coordinator in April 2008. Both Eileen and Teri consider that decision to be the best they ever made as VBA Pro Bono Committee Co-Chairs!

In her new role, Mary's first task was to help set up the Rutland Pilot Project, envisioned as a way to connect attorneys with low-income litigants in landlord/tenant, collection and foreclosure cases in the civil docket, proposed wards in involuntary guardianship cases in the probate docket, and defendants in child support contempt cases in the family docket. Proposed wards in involuntary guardianship cases and child support contempt defendants are entitled to representation, but there was no mechanism in place for providing that representation. Court statistics showed that landlord/tenant, collection and foreclosure matters comprised 70 percent of the civil docket in Rutland, and that defendants in those cases were typically unrepresented. By ap-



proving the Rutland Pilot Project grant application, the VBF provided modest monies (\$60 per hour, based on the then public defender rate of compensation) to attorneys willing to provide legal services to low-income litigants in the specified categories of cases, with a cap of 3 – 5 hours per case. Attorney Ashcroft worked to recruit attorneys, set up the trainings, publicize the program, and process the payments to participating attorneys, many of whom also donated numerous pro bono hours for which they did not seek payment.

Following the success of the Rutland Pilot Project in its first year, Attorney Ashcroft secured VBF funding for similar programs in Bennington, Windham, Windsor/Orange, Addison, Franklin/Grand Isle and Washington Counties. Mary also instituted the every-other-year popular "VBA Pro Bono Conference" in 2010, where day-long CLE trainings are offered at the Vermont Statehouse to participants who agree to take on pro bono or low bono cases in exchange for the training. The VBA hosts the luncheon and the VBF hosts a reception for attendees, coordinated with the swearing-in of new Vermont attorneys at the conclusion of the Conference. In addition, Attorney Ashcroft has also taken on the role of Clerk for the Access to Justice Coalition. The Coalition consists of representatives of the Vermont Supreme Court, the Vermont Bar Association, the Vermont Bar Foundation, the Vermont Law School, Vermont Legal Aid and Legal Services Law

Line of Vermont. It meets regularly to review and plan access to justice initiatives in Vermont.

Recognizing the enormous need for legal representation for persons of limited means in Vermont, Attorney Ashcroft (whose title eventually became "VBA Legal Access Coordinator," to better describe the many programs with which she became involved) explored other avenues for connecting lawyers with litigants in need of legal assistance. In early 2017, she and other legal service providers throughout Vermont including Vermont Legal Aid, Disability Rights Vermont, the Vermont Network Against Domestic and Sexual Violence and the Vermont Law School Clinic joined forces with the Vermont Center for Crime Victim Services to apply for a "Victims of Crime Assistance" (VOCA) grant. For the part of the VOCA grant that Attorney Ashcroft oversees, victims of crime in need of legal assistance are matched with experienced attorneys willing to work for a reduced hourly rate, funded by the grant.

In May of 2017, in recognition of the burgeoning juvenile docket and the need for legal assistance for adoptive parents involved in Termination of Parental Rights (TPR) cases, Attorney Ashcroft was asked to seek to expand the Rutland Pilot Project to include representation for adoptive parents in TPR cases in the Rutland juvenile docket, regarding "PACA - Post Adoption Contact Agreements." The VBF agreed to the expansion, and drawing upon her ex-

tensive experience as a foster and adoptive parent, Mary organized PACA trainings for participating attorneys. Ten cases were processed in just two months' time.

In early 2018, in light of the success of the PACA expansion in Rutland, and in recognition of the need for similar representation state-wide, the Vermont Supreme Court awarded the VBA a three-year grant to fund PACA attorney representation in each county. A second Supreme Court grant also funds attorney representation of proposed wards in involuntary guardianship cases in each county, based on the very successful model in the Rutland Pilot Project and other counties that followed suit under Attorney Ashcroft's guidance.

Given the expanded programs and roles

that Attorney Ashcroft has undertaken since applying for the "part-time" position in 2008, the VBA was pleased to increase the position to full-time in April 2018. (The VBA began funding half of the position's salary in the fourth year, and now covers approximately 70% of the position's salary and benefits.) Attorney Ashcroft is gratified by the degree to which low bono and pro bono programs have developed since she began her work eleven years ago. She is quick to give credit, however, to the hundreds of Vermont attorneys who have responded to the calls for legal representation that each of the programs relies upon. "We have a dedicated and compassionate Bar. It is a pleasure working with them," said Mary.

For its part, the VBA is indebted to the Vermont Bar Foundation for funding the position eleven years ago, and is indebted to Attorney Ashcroft for not only responding to the advertising for a part-time Pro Bono Coordinator at that time, but for dedicating her legal career since then to ensuring that as many Vermonters as possible are connected with the generous Vermont attorneys that make access to justice possible – thanks to VBA Legal Access Coordinator Mary Ashcroft.

Teri Corsones, Esq., is the Executive Director of the Vermont Bar Association.



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Vermont Businesses Join VBF to Support Vermont Veterans



There are more than 49,000 veterans in Vermont – one out of every ten adults – too many of whom cannot afford legal services and the support they and their families need and deserve. The Vermont Bar Foundation is partnering with businesses across the state to change that – to make sure that all Vermont veterans, regardless of income, have access to justice.

Those who answered the call to duty should never be denied the rights and benefits they deserve when their days of service are over. It is the duty of all of us in the legal profession to help make sure that veterans have the legal assistance they need. Studies show that unmet legal needs of returning veterans are often a first step on a road to homelessness. This can be prevented with free assistance to veterans on matters such as prevention of eviction/foreclosure, child support issues, restoration of a driver's license, discharge upgrades, and addressing outstanding warrants and fines. And paying attention to the special legal needs of women veterans is becoming increasingly important as more and more women choose to serve their country in the military post-9/11.

The Vermont Bar Foundation (VBF) has a long history of supporting organizations statewide that provide free legal services to low-income Vermonters with civil law needs; from family court proceedings, bankruptcies, and disability claims, to housing issues, children's rights, and estates. One of those partners is the Veterans Legal Assistance Project at Vermont Law School. It is the only full-time, solely veteran-focused legal aid clinic in the state, providing free legal services to veterans – at or

We would like to give a very special thank you to the following businesses who have already stepped forward to support Vermont's veterans:

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VELCO
Vermont Gas Systems, Inc.

below 200 percent of poverty – all across Vermont.

Too many veterans are denied benefits they are owed and deserve simply because they have difficulty navigating the legal complexities of the VA system on their own and can't afford assistance. With legal assistance, many veterans can upgrade their discharge status and greatly improve their prospects for education and employment. Free legal assistance to low-income veterans constantly changes lives.

Members of the VBF Board are now working on a campaign to raise money to support programs that provide legal assistance for veterans, with a goal to raise \$100,000 from Vermont companies with a connection to the military and an affinity for veterans. If you know of any such Vermont business – veteran-owned, defense contractors, or generally supportive of veterans' issues – then please let VBF Executive Director Deborah Bailey know, especially if

you would be willing to reach out to your business contacts on VBF's behalf. Deborah can be reached at dbailey@vtbarfoundation.org, or (802) 223-1400.

Together we can guarantee that access to justice for all will not be curtailed, and veterans will get the special legal assistance they need, when they need it, even if they can't afford it.

Mark Sciarrotta, Esq., Vermont Law School '96 and Trustee, is VELCO's Assistant General Counsel, Communications Director, and Sustainability Director, advancing the Company's mission of creating a sustainable Vermont. He chairs the Bar Foundation's Revenue Enhancement Committee.

Don Hayes, Esq., is the staff attorney at the Vermont Veterans Legal Assistance Project at VLS's South Royalton Legal Clinic.



Again With the Metadata? Enough Already!

I have been writing and lecturing about metadata for years. (And in case you have forgotten, metadata is the “hidden” information about the electronic documents we create that we’re all supposed to be worried about.) I guess for some of late, I’ve run on with the topic long enough because a few have started to say “enough already.” Then this happened.

Earlier this year I was on the road visiting a dozen or so law firms over the course of two weeks and learned that several attorneys at two different firms were routinely emailing documents out to other attorneys without first removing the associated metadata. Making matters worse, in many instances the attorneys who were in receipt of these documents didn’t have to do anything to view the metadata. In other words, there was no metadata mining going on, no digging for it. All they had to do was open the document and they would find interesting and useful information staring them in the face. Think tracked changes as an example. Now here’s the kicker, no one was saying anything to anyone in order to keep the information coming. After all, this is a gift that keeps on giving. “Enough already.” I don’t think so.

Let’s talk ethics for a minute. There are basically two issues in play when it comes to metadata. The first is an attorney’s obligation to maintain client confidences, some of which can be metadata based. There is no exception in the confidentiality rule that says an attorney needn’t worry about maintaining client confidences if an electronic document is in use. This is why firms routinely require that all electronic documents be either scrubbed clean of metadata or converted to a pdf format prior to sending. Our professional conduct rules mandate this outcome. In fact, I can assure you that the two firms where the above mentioned problem attorneys practice have such a rule in place.

The second, and in my mind more interesting issue, concerns the viewing of metadata. At its most basic, if an attorney receives electronic documents with associated metadata intact, may the attorney view it? Suffice it to say that the issued ethics opinions on the subject run the gamut. Some opinions state it’s fine to take your advantages where you find them. At the other extreme you will find ones that say nope, can’t do it. But here’s where it gets interesting. If you read the opinions that

come down on the side of saying an attorney should not view metadata you often find an analysis that mirrors the analysis used with opinions issued over misdirected faxes back in the day. You find terms including the likes of inadvertent disclosure driving the analysis which takes me back to my story.

I can imagine that some of you reading this might be troubled by the story above. The fact that no attorney was willing to do the right thing and speak up seems so unfair. After all, the attorneys who sent the documents were simply unaware. Apparently they didn’t understand what metadata was all about, let alone what to do about it. Well I beg to differ. The attorneys receiving the useful information didn’t speak up because they understood there was nothing inadvertent about the actions of the attorneys who were sending out the documents.

Again, the Rules of Professional Conduct are in play. As attorneys we are to maintain client confidences. And in today’s world, professional competency means having an understanding about what computers and applications like word processing programs do and don’t do. This isn’t optional. You see, I understand why the attorneys receiving the documents kept their mouths shut. I actually think they made the correct decision because the ongoing disclosures were not inadvertent. A number of years ago, I might have called the disclosures innocent or naive, but not today. Today, I would label the attorneys who continue to routinely send out documents with the associated metadata intact incompetent. Yes, that may seem harsh, but it is true nonetheless.

If you aren’t already responsibly addressing the issues surrounding metadata on a daily basis, all I can say is now is the time and here’s why. There are firms that are using software tools that literally mine for metadata and sometimes they hit real pay dirt. Should opposing counsel ever do that to you, do you really want to try to argue that your routine delivery of the metadata was an unintentional act? I suspect that any impacted client would be less than impressed with that approach. In fact, I think they would call it what it is, just as I did, incompetent.

ALPS Risk Manager Mark Bassingthwaighte, Esq. has conducted over 1,000 law

firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark’s recent seminars to assist you with your solo practice by visiting our on-demand CLE library at alps.inreachce.com. Mark can be contacted at: mbass@alpsnet.com.

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More Financial Institutions Become Prime Partners: Please Join Me in Thanking Them

I am happy to share with you that the Vermont Bar Foundation has two new prime partners. In fact, we had to create a new prime partner level of Platinum when One Credit Union President and CEO, Brett Smith contacted us to let us know that the Credit Union would be giving a return of 2.5% interest on its interest on lawyers' trust accounts, commonly referred to by its acronym, IOLTA. This is a big shout out to One Credit Union for recognizing the Vermont Bar Foundation's mission of funding essential legal services for low-income Vermonters.

"At One Credit Union, our mission is to help members achieve their financial dreams. Our mission is built on the philosophy of people helping people. IOLTAs are the perfect blend of goals: safely hold funds put in trust on the path to homeownership or other goals, while the interest accrues to help those who cannot afford legal representation. Wins all around. Working together, we can make a difference. Together, we're One." – *Brett Smith, President & CEO.*

Heritage Family Credit Union also just came on as a prime partner at the Gold Level with a return of 2.0% interest on its IOLTA accounts. "At Heritage Family Credit Union we are people helping people; every person, every time. Being a prime partner with the Vermont Bar Foundation supports our mission and core values." – *Matt Levandowski, President & CEO.*

As you know, the Vermont Rules of Professional Conduct require Vermont attorneys and law firms to place client or third-party funds not held individually in a pooled, interest bearing account. These short-term or nominal funds might come from a personal

injury settlement, real estate closing, alimony, or unearned retainers. For those of you who may be new to the Bar or just have not been paying close attention to it, the interest generated by your IOLTA accounts is collected by the Vermont Bar Foundation. The Vermont Bar Foundation then distributes according to a non-competitive and competitive grants process among qualified non-profit organizations committed to providing civil legal representation to low-income Vermonters who cannot afford private representation and for public education relating to the courts and legal rights. Grantees range from community restorative justice centers, to pro- and low-bono representation programs, to representation for children, and to representation of Vermonters who have been victims of domestic and sexual assault.

If your financial institution is not a prime partner, they may be missing a source of steady deposits along with an opportunity to build relationships with attorneys and law firms. In addition to being an excellent way to give back to the community, especially those among us who are most in need, being a prime partner can also be factored into the institution's marketing programs and community investment goals.

The money IOLTA accounts raise truly are for services for a sector of the community that does not have any other recourse. In addition, the court system is now experiencing an unprecedented number of unrepresented litigants. It works much better for all concerned, including the system itself, if both sides are represented. There is a better chance of settlement, operations go smoother, and cases with represented litigants take less of precious court time

and resources.

With the economic meltdown in 2008, IOLTA account revenues dropped significantly at a time when low-income Vermonters were most in need of legal assistance. Interest rates are now finally climbing up and we have a unique opportunity to have more financial institutions sign up with the Vermont Bar Foundation as a prime partner.

I want to also thank The Bank of Bennington for coming back on to the prime partner program at the Silver Level of 1.5%. Thank you also to Claremont Savings Bank for increasing its IOLTA interest rate from .03% to 1.00%. That meant a \$30 per month contribution jumped to \$500 a month.

Lastly, I want to take this opportunity to thank those financial institutions that have been prime partners. The Gold Level (annual net yield of 2.0% to 2.49% and tied to a recognized market indicator) prime partners are: Brattleboro Savings & Loan Association since 2007; Mascoma Savings Bank since 2008; New England Federal Credit Union since 2008; and Passumpsic Savings Bank since 2008.

The Silver Level (annual net yield of 1.5% or higher, not tied to a recognized market indicator) prime partners are: North Country Federal Credit Union since 2013; and People's United Bank since 2008.

As you can see, where you bank matters. *If every lawyer's IOLTA account was held by a prime partner institution, it would mean \$500,000 more in revenue, which would allow the Foundation to fund more of the valuable programs that work to protect the most vulnerable among us. If you do not see your IOLTA institution listed in this article as a prime partner, ask us how you can help get them signed up. Also, check out our website, which is chock full of information about the Foundation and the grantees it funds at www.vtbarfoundation.org.*

Beth Danon, Esq. is a partner at Kohn Rath Danon Lynch & Scharf, LLP in Hinesburg and serves as chair of the IOLTA Committee for the Vermont Bar Foundation.



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Pro Bono Profiles

In March of 2018 Attorneys S. Scott Smith, Frank Twarog and Eugene Rakow [pictured L to R] were honored with the VBA's annual Pro Bono Legal Services Award for their work with Vermont's disadvantaged.

Here are their stories.



Scott Smith

If there is one lawyer who embodies solo general practice law in Rutland County, it's Scott Smith.

Scott and his mother moved to Rutland from Illinois following his parent's divorce. Scott's mom—who had been out of the job market for 15 years prior to the move—practiced her typing and shorthand skills and soon landed a job as secretary to Killington President Preston Leete Smith. For her son Scott, it was the best job a teenager's mom could possibly have—it meant all the free skiing he wanted. "I didn't pay to ski until I was 25 or 26," he recalls. Smith joined the Killington Ski Patrol.

Attorney Smith didn't like school but loved to read. He had no intention of going to college. But he graduated from Proctor High School at the height of the Vietnam war, and Castleton College with student deferment seemed a better alternative than the draft. Rebel Ryan, later a prominent Rutland lawyer but then a Castleton student, heard that Scott was on ski patrol and soon recruited him to join the college ski team.

"I loved Castleton," remembers Smith, as he recalled his college exploits on and off the slopes. He also found he enjoyed learning, and after he graduated decided to take his education further. By then Scott's mother was working for Rutland attorney Alan George as his legal secretary. With Alan's influence, Scott got into Case Western Reserve Law School.

Scott Smith needed to work during law school. At the end of his first year at CWR, he interviewed for a position with Charlie Vance, a prominent African American lawyer

Frank Twarog

The pro bono bug bit Frank Twarog during his first semester of law school. After graduating from UVM, Twarog had returned to Boston, his hometown, and was enrolled at Suffolk University Law School. He heard about the Shelter Legal Services clinic and volunteered to help out. "It gave me practice experience out of the gate," he recalls. Today he credits his continued pro bono commitment with that early clinic work. "Giving law students practical experience in [pro bono] guardian ad litem work or landlord/tenant programs could plant the seed for career-long desire to continue," he notes.

Frank's return to Burlington after his first summer of law school was pure chance. He had sent out 50 "cold letters" offering to clerk for free with a law firm and received only one response—from Jim Murdoch and Kurt Hughes. He accepted and clerked for them and later with Attorney Kevin Griffin in White River Junction to get in his clerkship time. He loved the freedom and variety of tasks that came during the clerkships. When he finished law school, Murdoch and Hughes offered Frank a position with their firm, and he took it. It was a heady time for Twarog, who finished law school, welcomed his newborn son and got a job, all in the same week.

Frank's law practice comprises about 60% state and federal criminal defense, and 40% in "any permutation of family law." It seems an odd juxtaposition—criminal and family practices—but Twarog notes that they are surprisingly similar. "Prob-

Eugene Rakow

Teacher-turned-new-lawyer Gene Rakow was not thinking of starting a Vermont law practice. He was too firmly tied to New York. After graduating from St. Bonaventure University in western New York State, Rakow attended St. Johns Law School in Queens. He taught 3 years in Brooklyn, New York's Bushwick neighborhood, then passed the New York bar exam and started his career with Legal Services of New York. He worked in Harlem and the Bowery, tackling the endless stream of family law cases that came through the door. "I wasn't getting paid much," he recalls, but he got experience—lots of it.

Rakow was one of 3 family law attorneys in his legal services office—they took turns covering the family docket at court every day. "Family Court was out of control," Rakow recalls. The lawyers teamed with volunteer psychiatrists to run a rapid intervention program at the courthouse, then the doctors took the stand to testify about a parent's competency. Gene remembers one case in which he examined a psychiatrist about a mother's ability to parent her children. "How do you feel about her?" Rakow asked the doctor. "Well, she's not paranoid, she's not schizophrenic, she doesn't have borderline personality disorder—she's just crazy," opined the expert. "But," he added, "she is not a risk to her children, she's just crazy."

Working among the poor and disadvantaged in NYC court helped Rakow hone the philosophy that he carried throughout his legal career: people need to be repre-

Scott Smith, continued

in Cleveland. Vance had been in a large firm, then started his own business law firm and needed help.

"I am looking for someone with tax experience," Attorney Vance told law student Smith. "My mother does my taxes," Smith admitted. "Well, that doesn't matter," said Vance "as long as you have a strong business background." Smith confessed that his triple major in college—psychology, history and philosophy—was rather weak on business. "Well, that doesn't matter. I need someone who writes well," Vance told the law student. "I gotta tell you, I hate everything I write," Scott admitted, "but other people seem to think it's OK."

Scott Smith got the job. He thoroughly enjoyed working for Vance—"he was a dynamic force and like a second father to me." But during Scott's final year in law school, Charlie Vance died unexpectedly. His funeral cortege stretched for blocks through the streets of Cleveland, Scott recalled. His dreams of working as a lawyer for Vance dashed, Scott headed back to Vermont after graduation.

Scott Smith was hired into the firm of Smith, Hansen, Carroll & George in Rutland, connecting again with Alan George. Other lawyers moved in and out of the firm, and ultimately so did Scott, who set up a practice with Rob McClallen. Eventually, Attorney Smith started his own solo practice which he still maintains today.

"I practiced doorstep law," Smith recalls of his earlier years in practice. "Whatever walked over my doorstep, I took it." For Smith that meant a lot of criminal law, some business law, family law and general civil litigation. Scott defines his practice now by what he doesn't do. "I don't do tax work, I don't do bankruptcy" he says. And until he got involved with the Rutland Pilot Project he didn't do foreclosure defense, either.

Scott Smith became an early participant with the Rutland Pilot Project. The project pays private attorneys a stipend—\$60 per hour for between 3-5 hours—to represent low income Vermonters in targeted cases. Smith took on one of the Project's very first cases—a landlord/tenant matter—and 11 years later has represented over 200 low bono clients. And he's taken nearly every type of case in the project: child support contempt defense, adult involuntary guardianships, collections defense, and even foreclosure defense. He also started taking VOCA funded low bono representation of crime victims. But it was in landlord/tenant matters that Smith excelled. He has represented both low income landlords and tenants and has become a fixture in civil court on days housing cases are heard.

Low bono cases fit well into Attorney Smith's philosophy of doorstep law. When Legal Services Law Line of Vermont set up a twice monthly rent escrow clinic in Rutland,

Frank Twarog, continued

lem solving with an individual client figuring out how to settle a dissolving marriage has a lot of the same components to figuring out how to defend someone against a criminal charge." For both types of client, Frank acknowledges, "it's the worst time in their lives." Twarog sees his role as trying to be objective and to get a practical result for them.

Twarog started helping out with victims of abuse through Steps to End Domestic Violence in Burlington. He considers himself as a sounding board for the cases they have, and he also helps to represent DV victims in any capacity. His is a holistic approach: "I'll help them get an RFA, but then I'll also go with them to Burlington Housing to help them get a Section 8 housing voucher or go with them to Lund Center or DCF to find parenting courses or to set up visits through the visitation center."

Kim Jordan, Legal Advocate at Steps, nominated Frank Twarog for the 2018 Pro Bono Award. She wrote "Frank is an excellent family law attorney who has represented many survivors of domestic violence who access our services. Frank has represented them in cases involving Permanent Relief from Abuse Orders, parentage, child support, and custody modification."

Kim has observed Attorney Twarog with clients, and appreciates his "competent, trauma-sensitive demeanor" and how he "explains his approach in clear and understandable language." She credits his work with making "a world of difference in helping domestic violence survivors feel safe, heard and on their way to an independent, sustainable life for them and their children."

One of Attorney Twarog's most rewarding types of pro bono work is as guardian ad litem in family division. He has worked with a number of kids and never says "no" when the court calls. Frank insists on meeting with the kids away from the courthouse—Pizza Putt and Zachary's Pizza are frequent stops. "It's fun just to be playing games," says Twarog. "Kids will speak when they are not feeling interrogated."

Not all GAL matters have happy outcomes—"Sometimes you just hope for the best." The toughest cases involve parents maligning each other, with the kids in the middle.

Attorney Twarog also takes pro bono referrals in criminal cases. These usually stem from a different legal relationship he has already had with the client—frequently domestic issues—and his relationship does not end with the resolution of any given legal matter. "I'm their lawyer for everything," he admits.

The VRPC 6.1 aspiration goal of 50 pro bono hours per year is not a problem for

Eugene Rakow, continued

sented. "I grew up believing that, and I never turn them down." But the craziness in the NYC court system itself took its toll, and burnout rates were high. Attorney Rakow's working days were 12 to 14 hours long, and he would see the same clients over and over. "They would get into one chunk of trouble, then would come back with a similar problem later," he remembers.

One day Gene noticed an ad in a New York Law Journal advising an opening with Vermont Legal Aid in a place called Rutland. "I sent in an application, almost on a whim," he recalls. He had never been to Rutland. From the many applicants for the position, the pool was narrowed to 100, then to 20 to interview. Rakow was number 20 on interview day—or rather night-meeting with Patrick Berg, Esq. of Vermont Legal Aid at 10:30PM. "I was sure he wouldn't remember me," Rakow chuckles. But Director John Dooley did, and when Rakow got the job offer, he took it.

Gene Rakow spent 3 years with Vermont Legal Aid, then moved to the Vermont Public Defenders' Office. Eventually he migrated into private practice. But he never left Rutland, and has served its residents for well over 30 years.

Rakow's early years in private Vermont practice encompassed federal and state criminal defense, including pro bono cases in federal court. He picked up personal injury cases, general litigation, boundary and contact disputes and wills and estates. His case load has modified over the years—now it's 60 % family law, including some mediation—and the few criminal law clients he takes now are related to domestic matters. And he continues to accept pro bono assignments from court. "I don't think there was ever a time when I was not either a guardian ad litem or attorney for kids," he recalls. "Family court always needs attorneys for the children and GALs."

Gene remembers one young lady he represented for 8 years. The last time he was in court with her, the judge took a look at Gene, then at the docket entries, and commented "My God, you have been representing her since she was 9 years old—and now she 17!" The child had been bounced around and both parents had significant problems, but Rakow was her constant.

It was Gene's career-long dedication to pro bono service that caught Judge Cortland Corsones' attention. The judge polled Rutland court staff and Rakow's name rose to the top of a distinguished list of volunteers. Judge Corsones wrote in his nomination letter, "Gene leads the way in accepting assignments."

"He not only effectively represents the children in court, but he also works tireless-

Scott Smith, continued

they put out a call to local volunteer attorneys. The idea was to negotiate and settle—or dismiss—as many landlord/tenant cases as possible during the parties' first appearance together in court. Scott volunteered and became a mainstay. Law Line attorney Maggie Frye was so impressed with Smith's constant presence at the clinic that she nominated him for the VBA's annual pro bono award in 2018. Said Frye of Smith, "he has been an extremely active participant at the clinic providing pro bono direct client services. Scott consistently volunteers when we have no one else to help with the day's cases."

That sentiment was echoed by Judge Sam Hoar who had presided in Rutland Civil Division. The judge wrote that Scott "... has assisted the parties and the court in achieving fair and sensible resolutions to often-thorny personal and legal problems. In the process, he has helped many lower-income Vermonters whose housing is in jeopardy, always cheerfully and with wisdom and common sense."

Smith describes rent escrow day in Rutland Civil Division as "hectic." "There aren't enough [witness] rooms, so I have to throw people out of one room to meet with other clients." His rent escrow day starts at 8:30AM and usually finishes by 11:30AM, although recently he worked through the docket of 19 cases and didn't leave until 2:30PM. Smith is off-handed about his volunteer work. It's not always all volunteer time. Smith recounted the landlord who watched him negotiate a rent escrow case, then hired him on the spot to help in one of the landlord's cases. And then hired Smith again, and then a third time, all on the same day.

In landlord/tenant cases, it's not unusual for Smith to make the extra effort to link his client to a homeless prevention organization so his evicted client won't be on the street. He has tracked down unresponsive clients in jail and in the hospital. And he has come into cases with less than a day's notice, as the writ of possession is about to issue, and has defeated the eviction.

Attorney Scott Smith recommends the low bono work to other attorneys, especially those just starting out. "This work gives them a grounding in other aspects of the law that they haven't had. And there's a little money in it." Smith notes that once an attorney gets experience being a tenant's attorney, he or she can go on to represent landlords and develop a paying practice.

Smith himself doesn't need the experience, but he keeps volunteering at rent escrow clinics and taking low bono cases. And as a result, many Rutland county residents have stayed in their homes or avoided civil contempt charges, all because of Scott Smith's "doorstep" law firm.

*Frank Twarog, continued*

Frank. "Without exaggeration, I can say I put in a ½ day per week--4-6 hours of pro bono work-- sometimes a little more," he says. "You make time for the people when they need you."

Frank sees his work similar to that of a MASH unit— "I do a fair amount of triage work, and whether the phone call is at 3AM or 3PM, you have to be in the position to drop everything and go to the police barracks or to the courthouse or back to the office to meet with the client."

"I love it because you never know what the day is going to bring."

Dealing with the emotions in family and criminal cases is tough, but Twarog has avoided the burnout that plagues other attorneys in similar practices. "There is a real benefit of having business partners who have similar caseloads. Having professional support and partners as a sounding board removes a lot of potential for burnout," says Twarog.

But when he does need a break, Frank helps out with his local town government. He is moderator for the Town of Hinesburg and spent many years as a member of the town Recreation Committee. He has fundraised for playing fields in town and is trustee of a fund which benefits the Hinesburg Community School. Still, he hasn't had much time to work on restoration of his vintage Land Rover, and he hasn't been in a gym for a year, both pursuits he'd like to have more time for.

Attorney Twarog acknowledges that it is a challenge to balance caring for himself and working 7 days a week; it's a lifestyle that will catch up with him. "Saying no is hard," he admits.

Frank shared some words of advice for other attorneys considering pro bono work. "We have an absolute obligation. Every one of us is fortunate to do what we do." "You may be surprised how satisfying it is to help others out," he maintains, as he recalls the reaction of his clients when they obtain a relief from abuse order. "It's not just a slip of paper, but to them it's proof that someone believes them. It's empowering. They have control again."

*Eugene Rakow, continued*

ly behind the scenes to help the parents to reach settlements that take their children's needs into consideration."

"Gene never hesitates to take the toughest cases that we have," continued Judge Corsones. "Without attorneys like Gene, the children of Rutland County would be without a voice in the courtroom."

Attorney Rakow has seen changes in the practice of law over his years in practice. "When I started with Legal Aid here in Vermont, they still had carbon paper, and you would make carbon copies of every pleading." There have been changes in how family cases are handled in court, too. Gene was an early supporter of the separate Vermont Family Court system when some colleagues felt it was a bad idea. "We have been extremely fortunate in the quality of judges we have," noted Rakow. "In New York some judges are political appointments and are ill-equipped to be judges." But he does wish that Vermont family courts included social workers more and allowed guardians ad litem to do their own investigations. "The New York court got a more complete picture of the family than we do here."

Attorney Gene Rakow is a proponent of pro bono work both in his words and his actions. He would like to see the private bar, and particularly the larger firms, involved in more pro bono cases in family court. "We need to spread that work among the bar," he said. "Most of us are fairly fortunate in our lives, and we make a good living. Doing pro bono work is a way of giving back to folks who don't have the privileges we do."

Mary Ashcroft, Esq. is the full-time Legal Access Coordinator at the Vermont Bar Association.



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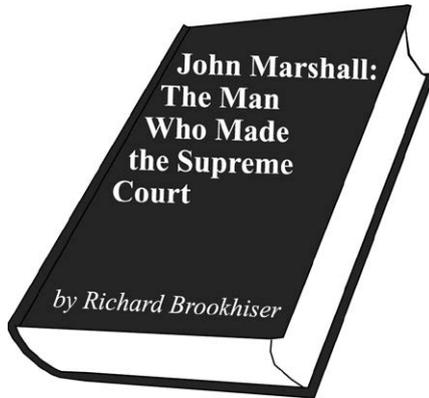
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BOOK REVIEW



John Marshall: The Man Who Made the Supreme Court

By Richard Brookhiser
(Basic Books, 2018)

Reviewed by Kevin J. Doyle, Esq.

John Marshall was a soldier in the Continental Army, a lawyer, a Congressman, Secretary of State in the Adams administration, and most famously, Chief Justice of the United States from 1801 to 1835. Protégé of Washington, he was a life-long Federalist, even when the party crumbled in the wake of the War of 1812, and those advocating for a strong national government and robust federal power no longer identified by that label.

Marshall's decades on the Supreme Court did more to advance the Federalist worldview than anything he could have done had he remained a Cabinet member or Congressman. The simple reason is that electoral politics can unseat a legislative representative or dissolve a presidential administration. The federal judiciary, however, is immune to political change. The Constitution guarantees Supreme Court Justices and judges of the "inferior Courts" lifetime tenure "during good behavior."¹ The Framers believed that an independent federal judiciary was critical to the rule of law in the fledgling republic. Alexander Hamilton famously explained the philosophical underpinnings of Article III of the Constitution, at once the shortest Article and the one that arguably exerted the most influence over our constitutional order:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. . . It may truly be said to have neither force nor

will, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise of this faculty.²

But Marshall's outsized influence from the bench on the life of the country was not lost on Jefferson, who, shortly after his 1801 inauguration and only weeks after Marshall became Chief Justice, commented that Federalism had "retreated into the judiciary as a stronghold."³ And, as Richard Brookhiser shows in his new biography of the great Chief Justice, *John Marshall: The Man Who Made The Supreme Court*, Marshall's opinions essentially addressed every important issue of his time. To Hamilton's thinking, the Supreme Court's exercise of "mere judgment" rendered it the branch of government least capable of thwarting the promises of the new Constitution. Hamilton's position on this was not unreasonable: as courts go about resolving fact-bound disputes, they impact the rights of parties in discrete ways. At least theoretically, the effect of a judicial ruling is far narrower than a policy promulgated by a President or a law enacted by Congress. But as Brookhiser explains in this entertaining study, it seemed that every issue was a question of first impression for the Marshall Court, and many of these issues were occasions for Marshall to announce authoritative interpretations of our founding charter.

Although the Constitution was spare in its wording, almost every clause articulated a principle or concept of political theory. Some principles were clear prescriptions. For example, the legislative function would reside in a bi-cameral Congress consisting of a Senate and a House of Representatives; there would be age requirements to hold certain federal offices; and there would be one Supreme Court. But as over two hundred years of constitutional history have shown, other concepts, such as "due process" and "commerce," have not been as easy to define. The achievement of Marshall and the early Supreme Court was to give fundamental meaning to these concepts and announce interpretive principles to guide future decisions.

In the context of deciding actual cases and controversies, Marshall articulated enduring first principles not only about the meaning of words and phrases in the Constitution, but about the vision the document was meant to achieve. To be sure, what that vision actually was divided Federalists and Republicans in Marshall's day, and continues to divide our country today. Yet without a doubt, Marshall's brilliant exposition of the Constitution—and just as importantly, his in-

fluence on the scope and exercise of judicial power—remain foundational to American constitutionalism.

Marshall's life before he joined the Court was remarkable in its diversity of experiences. His military service during the Revolution bonded him forever to Washington both for who he was and what he represented. After the war, Marshall settled in Richmond in 1784, and with Blackstone's Commentaries and a few brief lectures at William and Mary as his training, he embarked on a career in law. In Brookhiser's portrait, Marshall was an impressive litigator, a devoted family man, and loyal friend. He enjoyed sports and Richmond society. He excelled at the law and, like so many others of the Founding era, wore many professional hats—diplomat, legislator, Secretary of State. But he reached his fullest potential when he trained his considerable intellect and political skill on the Supreme Court.

The range of issues he confronted in thirty-four years on the Court is astounding: treason accusations against a former Vice President, contracts, slavery, the extent of Congress's power under Article I, and many others. Early on, Marshall issued his opinion in *Marbury v. Madison* striking down a section of the Judiciary Act of 1789 as inconsistent with the Constitution, thereby establishing the powerful principle of judicial review. The ultimate stakes in the case were relatively minor. As he was leaving office, President Adams made a series of judicial patronage appointments. One of these was the appointment of Federalist William Marbury as a justice of the peace for the District of Columbia. Adams signed Marbury's commission before leaving the Presidency, but the document was never delivered to Marbury. In President Jefferson's view, the failure of delivery meant Marbury was never legally appointed. Marbury asked the Supreme Court to issue a writ of mandamus to Secretary of State James Madison for the delivery of the commission.

The legal dispute turned on whether the Court had jurisdiction to issue the writ. The Judiciary Act of 1789 empowered the Supreme Court to issue the requested writ. Article III of the Constitution, however, did not give the Supreme Court original jurisdiction, only appellate jurisdiction, over the writ Marbury requested. Therefore, Marshall reasoned, that portion of the Judiciary Act was inconsistent with the Constitution and therefore void. The Court ruled that it did not have the power to issue a writ of mandamus to Madison. The result was that the Federalist Chief Justice denied the Federalist Marbury his commission as justice of the peace.⁴

Brookhiser comments that not everyone,

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including Jefferson, immediately recognized the full import of the decision—that in granting Jefferson a technical win, the Supreme Court took to itself the power to invalidate Congressional enactments contrary to the Court's interpretation of the Constitution. "President Jefferson said nothing at the time, but the longer he thought about *Marbury v. Madison*, the less he liked it. Four years later, he told his attorney general that he wished it could be 'denounced as not law.'"⁵

After laying out Marshall's basic biographical details, the author approaches the Chief Justice's life through the lens of his judicial opinions. These include the sensational trial of former Vice President Aaron Burr for treason in 1807. Jefferson himself reported to Congress that Burr was part of a plot to invade Mexico and break up the United States. Justice Marshall and another circuit judge presided over the trial in the Richmond circuit. During the trial proceedings, Marshall wrote a lengthy opinion on the constitutional requirements for proving treason under Article III ("No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."). Marshall stopped proceedings during the trial, ruling that there had been no proof by two witnesses to an overt treasonous act by Burr. The jury acquitted Burr of treason shortly

afterward. In a fascinating postscript to the treason trial, Brookhiser reports that foreign archives inspected many years after Burr's death revealed the truth. Burr had in fact asked Spanish and British diplomats to aid him "in dismembering the United States."⁶

In another seminal opinion, *McCulloch v. Maryland*, the Marshall Court considered whether the federal government's chartering of a national bank was constitutional. The Republicans argued that the bank was unconstitutional because Article I did not give Congress the enumerated power to create such a bank. States that opposed the creation of these national banks began taxing them. Marshall affirmed the constitutionality of the national bank under the "necessary and proper" clause, ruling that the Constitution permitted Congress to effectuate legitimate ends by appropriate means. The decision stands as one of the most important statements on federal power.⁷

Brookhiser concludes the book with an insightful chapter entitled "Legacy: Marshall, Jefferson, Lincoln." He writes that perhaps Marshall's greatest achievement was that he gave the Court dignity. Unlike perhaps the earliest days of the Court in the eighteenth century, with Marshall, the nation listened to the decisions of the Court. "Marshall's greatest impact," concludes Brookhiser, "was something elaborated by Marshall himself: defending the Constitution as the people's supreme act."⁸ In so doing, he was determined to "uphold[] the people's government against the attacks of men he deemed demagogues in Congress, in the states (including his own Virginia), and in the White House (including his own cousin [Jefferson])."⁹

After Marshall's death, Andrew Jackson appointed Roger Taney to be the next Chief Justice. Taney also had a long tenure, serving into the 1860s. Taney is remembered for the infamous *Dred Scott* decision, which essentially denied slaves the possibility of American citizenship and standing to sue in federal court. Amidst the national debate over whether slavery could be extended to the territories acquired during the country's western expansion, Taney's decision also denied Congress's power to exclude slavery from those areas. The decision set off a firestorm in the country. Abraham Lincoln eloquently attacked the decision, and in the process opened up a debate on the role of the Supreme Court in resolving contentious national issues. The abhorrent holding of *Dred Scott* profoundly damaged the standing and prestige of the Supreme Court, something that Marshall had worked so carefully to establish.

Although legal issues drive the structure of the book, the narrative is compelling and even colorful. Partly that is due to Brookhiser's talents as a historian and journalist. He has written books on Washington, Hamilton,

Madison, Lincoln, and others. He is not a lawyer, and so his recounting of legal history in this book is accessible to the general reader. And as a veteran journalist, Brookhiser vividly brings out the human-interest aspects of the legal disputes. But the colorful narrative also has something to do with who Marshall was. He was a convivial presence on the Richmond and D.C. social scene, who relished good conversation, and was famously in the habit of discussing cases with his fellow Justices over Madeira wine. He was also unquestionably a man of great intelligence and legal skill, adept at navigating the politics of his time and largely responsible for elevating the Supreme Court from a relatively minor institution to a dignified force in the evolution of American government. As Brookhiser describes it, at the close of the eighteenth century "an air of triviality clung to the Court."¹⁰ By the time of his death in 1835, the Court's prestige was undeniable. In his public statement on Marshall's death, even Andrew Jackson, who often had an antagonistic relationship with the Court, noted "the good he has done his country in one of its most exalted and responsible offices."¹¹

In the end, Marshall imbued the Supreme Court with integrity, dignity, and seriousness of purpose, thereby making it a respected and central institution in the American system of government. His is a model for the Supreme Court to emulate if it is to retain its exalted status as the ultimate expositor of the Constitution.

Kevin J. Doyle, Esq. is First Assistant U.S. Attorney at the U.S. Attorney's Office in Burlington. The opinions expressed in this review are the author's alone and do not reflect the views of the United States Attorney's Office or the U.S. Department of Justice.

¹ U.S. Const. Art. III, Sec. 1.

² Federalist No. 78.

³ Brookhiser, p. 6.

⁴ Even after the ruling, *Marbury* could have brought his mandamus action to a federal court with original jurisdiction over the matter, but Brookhiser explains that *Marbury* pursued it no further.

⁵ Brookhiser, p. 94.

⁶ Brookhiser, p. 122.

⁷ The aftermath of the decision was scandalous.

In one of many interesting historical facts detailed in the book, James McCulloch, the cashier of the national bank in Baltimore and the plaintiff in the landmark lawsuit, along with two others, were found to have embezzled \$3 million from the bank. Apparently due to the lack of an embezzlement law in Maryland, the men were acquitted of conspiracy charges because what they were alleged to have conspired to do was not criminal. Brookhiser, p. 167.

⁸ Brookhiser, p. 263.

⁹ Brookhiser, p. 264.

¹⁰ Brookhiser, p. 79.

¹¹ Brookhiser, p. 260.



IN MEMORIAM

Robert E. Manchester

Robert E. Manchester, 73, died January 15, 2019 from complications of a brain hemorrhage caused by a blood vessel rupture. Bob was a hard-working and persistent attorney who earned his JD from the University of Colorado Law School in 1969. After partnering with numerous law firms, he was practicing at Manchester Law Offices when he died. Bob played and coached rugby until his mid-thirties and started the first rugby team at CU Law School and in Vermont. He was an avid reader who enjoyed story-telling, exploring new and big ideas and mentoring several Brown University football players. Bob served on the Visiting Nurse Association board for several years. He is survived by his wife of 50 years, Judith Alling Manchester, two children and four grandchildren.

Mark L. Zwicker

Mark L. Zwicker passed away unexpectedly on January 26, 2019 at the age of 71. Mark was born in New York City and received his JD from the American University in 1972. He practiced law in Brattleboro for over 40 years developing many valuable relationships in the community through his practice and service through various social and community organizations. Mark had a passion for serving the underprivileged and had a huge heart. He was an avid New England sports fan and music collector. He is survived by his wife and two children.

Larry Mandell

Larry Mandell, 72, passed away surrounded by family and friends on January 21, 2019 after a short and unexpected illness. Larry received his JD in 1974 from Boston College after driving from Seattle to Boston with his then-new love, Marcie, to attend law school. Upon graduation, Larry and Marcie moved to Vermont and married at the Greenhurst Inn in Bethel in

1974. He and Robert Brower then started Woodbury Associates in 1975, commencing with the goal of training unemployed Vermonters for careers in the emerging paralegal field. He and Robert shared a vision of democratic, student-centered learning. Larry became the president of Woodbury in 1982 and helped it become a fully accredited college with many innovating programs over his next 30 years of service there. After retirement, Larry chaired the Public Assets Institute board where he became more involved with policy to promote racial, social and economic equity. Larry and Marcie were active in their community, where Marcie taught at Rumney for 25 years. Larry was a lifelong baseball and tennis player, discovering golf as well near retirement. He is survived by Marcie, their two children and two grandchildren, with whom he was extremely close.

Lloyd Alan Portnow

Lloyd Alan Portnow died at the age of 80 on January 21, 2019 at his home in Clemson, SC. Lloyd was born in Brooklyn, NY and graduated from Cornell University, and received his JD from Cornell as well in 1964. A US Army Veteran, he was a partner until his retirement with Portnow, Little & Cicchetti in Burlington. Lloyd loved his friends and family, his dogs, was an avid reader, a lover of music and enjoyed politics, estate and tax planning. He is survived by his wife, Nancy, and son.

John Patton Hyman, III

John Patton Hyman, III, died on January 27, 2019 in Indian Rocks Beach, Florida at the age of 76. Born in Bartow, Florida, Patton attended Emory University in Atlanta, Georgia, where he was a member of the Kappa Alpha fraternity and the Emory Glee Club and graduated with a BA and highest honors in political science. He traveled to Sydney, Australia as a Rotary Foundation Fellow, a trip he recounted with great

joy throughout his life. He received his law degree from the University of Florida and served as a Law Clerk to a US District Court Judge before returning to Atlanta to practice real estate law for almost 30 years. After leaving law practice, Patton and his family traveled the continent for a year in an RV, after which he and his family settled in the town of Barnet, Vermont, where he would live for the rest of his life. After a few years of semi-retirement, he resumed a small law practice and went to work at Karne Choling meditation center where he developed a pioneering program bringing mindfulness meditation practice to professional communities, including lawyers, educators, and nurses, including teaching at VBA programs. Patton was a classical pianist who inspired a love of music in his wife and children. He is survived by his wife, Carol, two children and a grandson.

Robert W. Gagnon

Robert W. Gagnon, 73, of Northfield, died on February 11, 2019 at the UVM Medical Center in Burlington. Born in Massachusetts, Bob attended the University of Massachusetts at Amherst, with a BA in Latin American History, and earned his JD from Washington University Law School in St. Louis in 1970. Bob served as a deputy state's attorney and then Washington County State's Attorney, later working for the Vermont Attorney General's Office as chief of the Criminal Justice Division, then in the Civil Division until he retired in 2004. Bob was an adjunct professor at VLS from 1982 until recently, teaching Evidence and Trial Practice. He was a VBA member with varied interests such as duck hunting, sailing, stamp collecting, woodworking, fly fishing and golf. He also spent many years motorcycling around New England and the Canadian Maritimes with his wife and spending summers with his family at their camp on Lake Groton. He is survived by his wife of 51 years, Joan, two children and one granddaughter.



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June 13th at the Delta Hotels Marriott (formerly Trader Duke's Hotel)
- **2019 Trial Academy**
July 12th at Vermont Law School
- **Annual Meeting**
September 26th-27th at the Hilton Burlington

Do you have an idea for a CLE? Let us know or connect with your Section or Division Chair.

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2018/2019 VBA Section and Division Chairs

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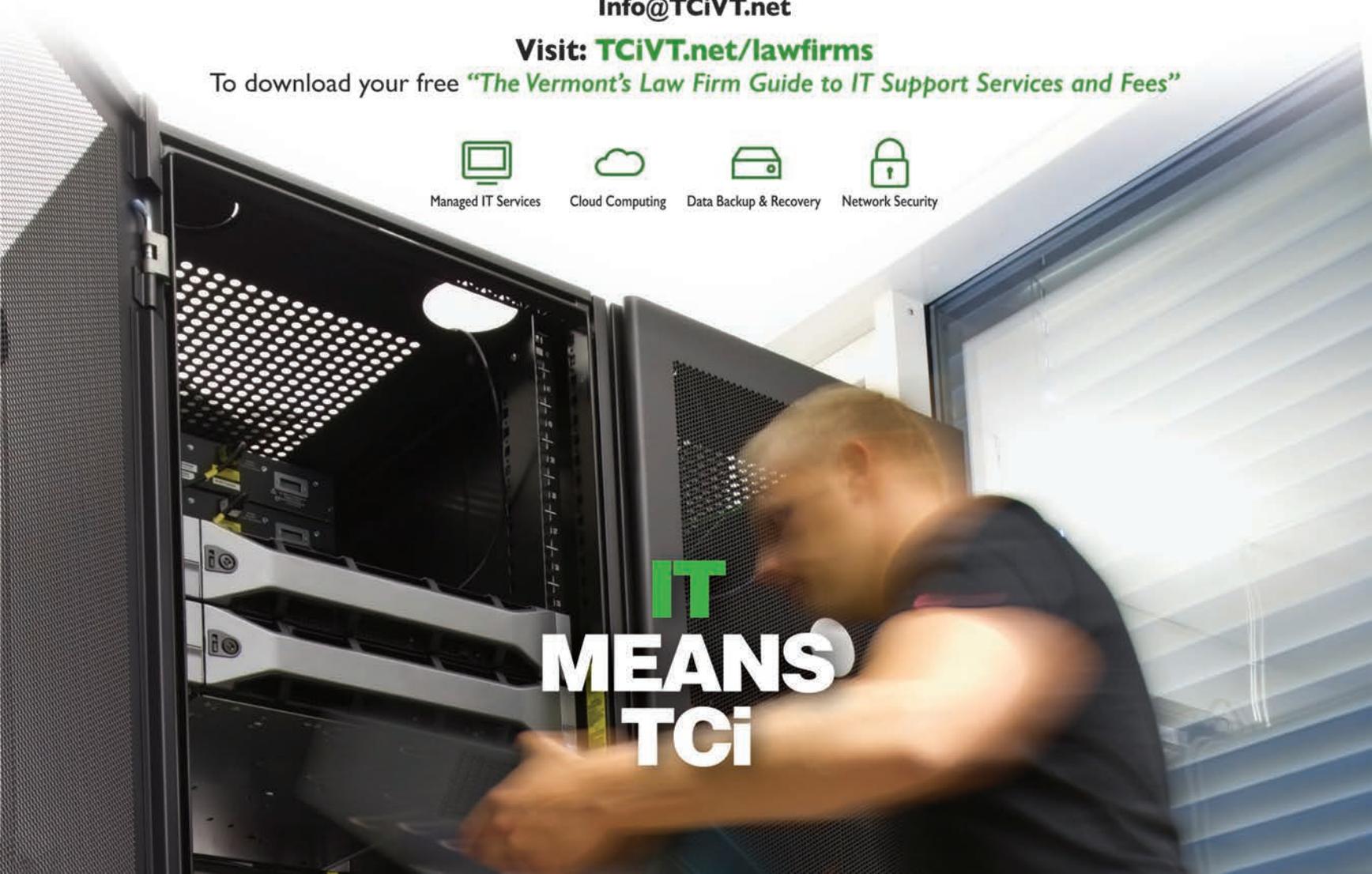
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