



Society Update

The Official Publication of the Michigan Supreme Court Historical Society

Fall 2017



Report to the Court by Society President Charles Rutherford

On Wednesday, October 11, 2017, the Michigan Supreme Court opened its 2017–2018 term. As is its tradition, the Court heard its first argument in the old Supreme Court chambers at the Capitol where the Court sat from 1879–1970. Society President Charles R. Rutherford reported on behalf of the Society. His report is reprinted here.

“**M**ay it please the Court. I am Charles R. Rutherford, President of the Michigan Supreme Court Historical Society, and I am here today to report on the activities of the Society over the past year. I am joined today by some of our trustees and our executive director Carrie Sampson. When my report concludes, please excuse our group as we will be leaving for our board meeting at the State Bar of Michigan building.

In January, our Board of Directors voted to increase the cost of the Society’s annual dues from \$100.00 to \$150.00 and to request that our Life Members resume paying annual dues. This is the first time that dues have increased since the Society was formed in 1988. It was necessary to take this step to keep the Society solvent. Our primary source of income has been a percentage of IOLTA funds; however, interest rates have been historically low for so long that it has begun to affect our budget.

In April, we hosted our Annual Luncheon at the Detroit Athletic Club. Despite raising the price of the ticket, we had nearly the same record number of attendees at this year’s luncheon as we did last year. Our secretary of the Board, Lawrence P. Nolan, who recently concluded his term as State Bar President talked about Michigan’s great civil rights

case *Ferguson v Gies*. We presented to the Court a silver cup that had been given to Justice Samuel Douglass by the Detroit Bar upon his retirement from the bench in 1857. We were gratified to also learn more about Justice Douglass, and the judicial history of the Court, from Chief Justice Markman as one of our luncheon speakers.

At the board meeting before the Annual Luncheon in April, we elected two new trustees: Jill Wheaton from Dykema and Gregory DeMars, formerly of Honigman. Ms. Wheaton is an active member of our Advocates Guild. Mr. DeMars began his law career as a clerk to Justice G. Mennen Williams.



Chief Justice Markman with the Douglass Cup at the Hall of Justice.

The Law Clerk Directory that began last year continues to progress under the leadership of John Fedynsky. We now have the names of 200 current and former Michigan Supreme Court law clerks in our database. The farthest back of these reaches all the way to the 1950s and former justice Harry Kelly and his clerk Judge Roland Olzark. Beginning with last term’s outgoing law clerks, we have made a complimentary one-year membership in the

Society available to these “Invisible Scribes.” We will also publish the names of the current clerks and their law school affiliations in our fall newsletter as we did last year. (*see page 12*)



Our Coleman intern—a history student from Michigan State University named Trent Koch—is researching the justices of the Michigan Supreme Court who fought in the Civil War. The first part of his assignment has resulted in a website with a map showing where the justices fought. This fall he is studying the decisions of the justices, most notable among them the *Ferguson v Gies* case. We look forward to sharing his work with all of you and our membership soon.

We have launched a YouTube channel that features some of the Annual Luncheon vignettes and special sessions of the Court from the past. This medium provides yet another way to understand the Court, and is part of our preservation efforts. The channel can be accessed from our website at www.micourthistory.org.

The Society worked with Chief Justice Markman this past spring to develop a narrative for the portrait display on the sixth floor of the Hall of Justice. In June, we unveiled the “Pioneers in the Law” which is a collection of notable firsts among our historic justices, including the oldest portrait and the first justice to have been born in Michigan (Allen Morse) and the first justice to have graduated from a Michigan law school (Isaac Marston – University of Michigan Law School).



In September, we hosted a visit from the Third Circuit Historical Society with Chief Judge Robert Colombo Jr. at the Hall of Justice. We met with Chief Justice Markman in the Courtroom, then viewed portraits of Third Circuit judges who later served on the Michigan Supreme Court, and ended in the Learning Center.

Former Justice Alton Davis’s

portrait is being painted by artist Robert Maniscalco. Fundraising for the portrait is going well, and we look forward to dedicating this portrait – and others – at some point in the future.

Former Michigan Supreme Court Chief Commissioner Fred Baker has been volunteering his time to us as an interviewer for Former Justice Charles Levin’s oral history. This important project was begun by Roger Lane in the earliest days of the Society’s existence. As Justices have retired from the Bench, the Society wishes to record their voices for posterity. The 14 justices who have already been interviewed are available online via the Vincent Voice Library at Michigan State University.

The Society has a blog. A recent post was about who was on the Court the last time there was a total solar eclipse that crossed the nation from the Pacific to the Atlantic in 1918. You can read the blog from our website at www.micourthistory.org or follow us on Twitter at [micourthistory](https://twitter.com/micourthistory).

Our book, the *Michigan Supreme Court Historical Reference Guide Second Edition*, continues to be sold by Michigan State University Press. We presented a copy of the book to our newest Justice, Kurtis Wilder, whose investiture will be held at the Hall of Justice next week on Tuesday, October 17. All justices have been given a copy of the *Historical Reference Guide*.

The Advocates Guild, led by Mary Massaron, will hold its annual dinner at the Hall of Justice on Wednesday, November 8. We look forward to meeting with the Court again at that time.

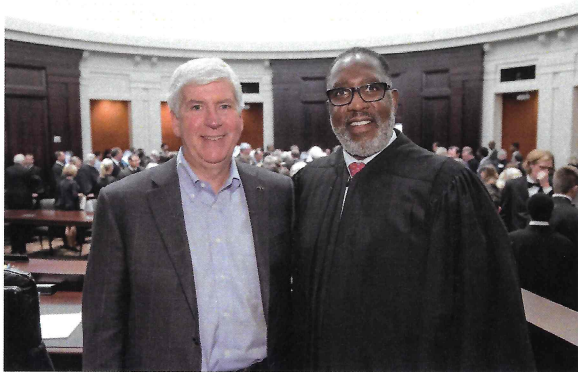
Our 2018 Annual Luncheon will be held on a very special date – April 19, 2018, is exactly thirty years to the day that then- Chief Justice Dorothy Comstock Riley incorporated the Society as a nonprofit 501(c)(3). We hope you will be able to join us at the Detroit Athletic Club for this special event. Our speaker for the luncheon will be Wayne State University Professor Vincent Wellman, speaking about “Michigan’s Reception of the Common Law: A Study in Legal Development” which was published recently by the Wayne Law Review. Also State Bar President Donald Rockwell will take part in the meeting.

That concludes my report on behalf of the Michigan Supreme Court Historical Society. I thank you for your time and for the support you provide to us. Please excuse us now as we depart for our meeting.

Investiture Ceremony



On Tuesday, October 17, 2017, Kurtis T. Wilder was sworn in as the 112th Justice of the Michigan Supreme Court in a special session of the Court. Richard Rassel from Butzel Long was the master of ceremonies. The Michigan Wing Civil Air Patrol Honor Guard presented the colors and led the Pledge of Allegiance. Reverend Emily Campbell, an Associate Pastor at First Presbyterian Church of Plymouth, gave the invocation. The Interlochen Arts Academy Chamber Singers, led by John Bragle, sang *Alleluia*. Speakers included Governor Rick Snyder, Cleveland attorney Harvey Kugelman, Society President Charles Rutherford, attorney Elizabeth Hardy, Wayne County Sheriff Benny Napoleon, and Justice Brian Zahra. Chief Justice Markman administered the oath of office. The robing was done by Justice Wilder's children Alycia and Klifton. The Interlochen chamber singers closed court with *America the Beautiful*. A reception followed the ceremony with music by the Detroit Symphony Civic Orchestra Alumni.



Larsen to Clement: Changes on the Court



Justice Larsen being sworn in by Judge McKeague.



Justice Clement being sworn in by Chief Justice Markman.

On Wednesday, November 8, 2017, Justice Joan Larsen took the oath of office for the U.S. Sixth Circuit Court of Appeals at the Hall of Justice in Lansing. The oath was administered by Judge David McKeague whose seat Justice Larsen is filling on the federal bench. Judge Richard Suhrheinrich, who had preceded Judge McKeague on the Sixth Circuit, was also in attendance for the swearing in. Justice Larsen began her service on the Michigan Supreme Court in October 2015. She was appointed to the federal court by President Trump in May.

Governor Snyder appointed Elizabeth (Beth) Clement to fill the vacancy left by Justice Larsen's departure on Friday, November 17, 2017. Justice Clement was sworn in at the Hall of Justice later that day in the company of her husband, Thomas Clement, general counsel for the Michigan Supreme Court, and their four children. Justice Clement is the 113th justice on the Michigan Supreme Court and the eleventh woman.



Gubernatorial Appointments to the Michigan Supreme Court: A Historical Perspective

Governor Snyder's appointment of Justice Beth Clement is his fifth since being elected governor in 2010. His previous appointments to the Michigan Supreme Court include Justice Brian Zahra in 2011; Justice David Viviano in 2013; Justice Joan Larsen in 2015; and Justice Kurtis T. Wilder earlier this year. With Justice Wilder's appointment, Governor Snyder became the first governor in Michigan history to appoint the majority of the justices sitting together on the Michigan Supreme Court (4/7).

Governor John Engler appointed three justices to the Michigan Supreme Court between September 1997 and October 1999 -- Clifford Taylor, Robert P. Young, Jr., and Stephen J. Markman.

Governor G. Mennen Williams, like Governor Snyder, appointed five justices: Clark Adams, Talbot

Smith, John Voelker, George Edwards, and Theodore Souris. However, only three of these justices ever served together at one time (Smith/Voelker/Edwards and Smith/Edwards/Souris). Furthermore, the Court was comprised of eight justices until Justice Souris decided not to run for re-election in 1968, and thus would not have been a majority.

Governor Fred Green who served Michigan from 1927 to 1930 also appointed five justices during his brief time as governor. His appointees included Richard Flannigan, who died on the Court; Louis Fead, Flannigan's successor; William Potter, who died on the Court; Walter North, who died on the Court; and Henry Butzel. These last two justices (Butzel and North) are numbers 4 and 5, respectively, on the list of Ten Longest Tenures on the Michigan Supreme Court. Butzel served 26 years, 5 months, and 6 days and North 24 years, 8 months, 29 days.

ADVOCATES GUILD

MICHIGAN SUPREME COURT HISTORICAL SOCIETY

The Rule of Law, the Michigan Supreme Court, and the Advocates Guild

By: Mary Massaron



This is the tenth year since the creation of the Michigan Supreme Court Historical Society Advocates Guild. And this year, the Advocates Guild dinner took place in the Rotunda of the Supreme Court building in Lansing. Each year, the justices of the Court, its chief clerk, and members of the Advocates Guild gather together for a relaxing evening to celebrate the Court, the lawyer's role in its work, and the rule of law, which all of us are committed to protecting.

As I told those present at this year's dinner, I have just returned from several weeks in South Africa, on a photo safari and trip to

Capetown and Johannesburg and through the interior of the country. My trip there was in many ways a pilgrimage to pay my personal tribute to the lawyers who participated in the long struggle to create a democratic government under the rule of law for all those who live there. I wanted to visit Robben Island, where so many were imprisoned for years and suffered in the most adverse conditions. I met a man who led the tour of the prison who had been incarcerated on Robben Island for participating in student protests. I spent time in the Apartheid Museum in Johannesburg and watched the many new clips of events during those difficult days. And I visited Nelson Mandela's home. It was an inspiring and thought-provoking trip – about democracy and the rule of law and the role of the lawyer.

In a speech he made from the prisoner's dock during one of his trials for protesting the government, Nelson Mandela said that he felt compelled to join the

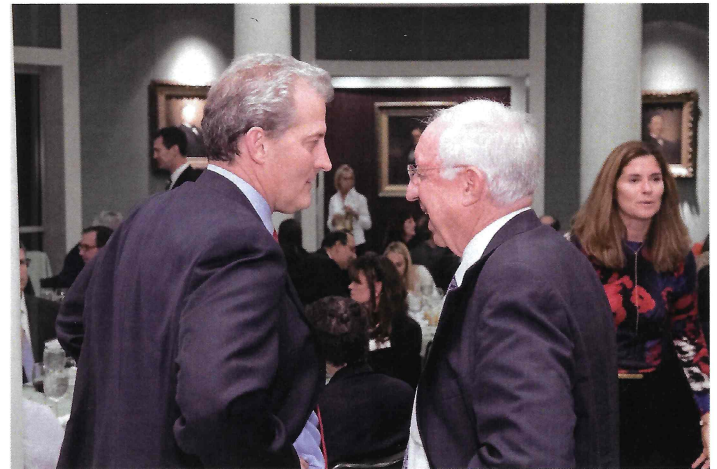
struggle because he was a lawyer, which he always thought to be an honorable profession. But when the laws are fundamentally unjust, he felt compelled to try to change them. Other lawyers too put their livelihoods, community standing, and lives on the line to fight for a constitutional government with rights for all. Bram Fisher, Joel Joffe, George Bizos, and other lawyers agreed to represent those charged under the apartheid government's unjust laws at great personal risk. Many lawyers practicing at that time turned down such requests. At the same time, these lawyers' commitment to change embodied their notion that law is an honorable profession, and that lawyers in a system that does not offer equal opportunity to all regardless of race are obligated to point out those defects and seek to change them. Nelson Mandela has said that he admired the Magna Carta, and the American constitution with its separation of powers and strong bill of rights.

In thinking about the many men and women who struggled to bring about a change in that apartheid government, I have also been reminded of how lucky we are to serve as lawyers in this country and at this time. Unlike the government that Mandela and others protested, we are blessed with a state and federal constitution built upon principles from the Magna Carta, with the separation of powers, and a bill of rights that protects all. The rule of law has been handed down to us – and we are the lucky ones in history because we enjoy the benefits of it every day. As we think about the Michigan Supreme Court, and its justices, and the advocates who appear before it, we should never forget that we are all engaged in the important work of effectuating the rule of law. It is a privilege for us all – and one that we can truly celebrate.

Scenes from the Dinner



Foster Swift attorney Richard Kraus (left) speaks with Supreme Court Clerk Larry Royster (right) during the reception in the justices' conference room.



Justice Brian K. Zahra (left) speaks with Judge Alfred Butzbaugh (right). To the far right is Justice Bridget McCormack.



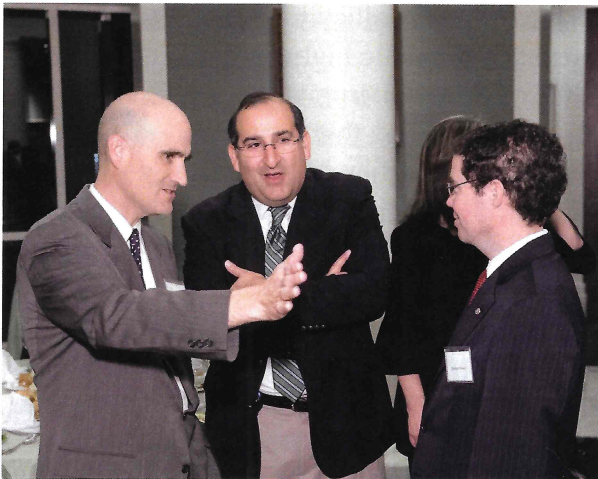
Justice Kurtis T. Wilder (center) with Advocates Scott Grabel (left) and Donald Visser (right) in the sixth floor rotunda.



Justice Richard H. Bernstein (left) with Advocates Richard B. Poling Jr. (center) and John W. Allen (right). In the background are Advocates Gaëtan Ger-ville-Reaché (seated) and Matthew Nelson (standing).



The crowd at this year's Advocates Guild Dinner. Guests dined at one of eight tables set up in the rotunda outside the Courtroom. The Michigan Supreme Court is on the sixth floor of the Hall of Justice.



Justice David F. Viviano (center) speaks with B. Eric Restuccia (left) and Michael Brown (right). Restuccia serves on the Advocates Guild Executive Committee.

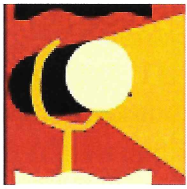


Chief Justice Stephen J. Markman (center) speaks with WMU Cooley Law School Professor Gerald Fisher (left) and Judge Denise Langford Morris (seated).



Matthew T. Nelson Elected to the Advocates Guild Executive Committee

Matthew T. Nelson was elected by the Michigan Supreme Court Historical Society's Board of Directors to serve on the Advocates Guild Executive Committee at the Board's meeting in October 2017. Mr. Nelson chairs the Appellate Practice Group of Grand Rapids' firm, Warner Norcross & Judd.



Spotlight on Solicitors: Part Three

A feature of the Advocates Guild, written by Andrea Muroto Bilabaye

The Solicitor General is the top appellate attorney in the state. In recognition of those who have held this prestigious post, the Advocates Guild is running our *Spotlight on Solicitors* series throughout 2017. Our first installment of this series ran in the Winter 2017 newsletter, featuring a short history of the office and biographies of the first two men to hold this position: Edmund E. Shepherd (1941–1957) and Samuel J. Torina (1957–1961). The second installment in the Summer newsletter covered the next three Solicitors General: Joseph B. Bilitzke (1961–1962), Eugene Krasicky (1962), and Robert A. Derengoski (1963–1982). Part three features Louis J. Caruso (1982–1990), Gay Secor Hardy (1990–1992), and Thomas L. Casey (1992–2008). Caruso, Hardy, and Casey all served under Attorney General Frank Kelly, who held this position from 1961 through 1999. Upon Kelly's retirement, Casey served under Jennifer Granholm from 1999–2003 and Mike Cox from 2003 through Caruso's retirement in 2008.



Louis J. Caruso (1982–1990)

Michigan's sixth Solicitor General was Fremont-native Louis J. Caruso. After earning his law degree from Notre Dame in 1948, Caruso opened his own law practice in Lansing. He then transitioned into the Transportation Division of the Attorney General's Office, becoming a recognized expert in highway law. He was serving as head of the Highway Division when he was appointed as Solicitor General.

Caruso argued before the U.S. Supreme Court for the first time in the landmark case *Michigan v. Long*, 463 U.S. 1032 (1983). In this case, the defendant was convicted of possession of marijuana. Police officers found the drugs during a traffic stop, when they searched his car after seeing a hunting knife in the passenger compartment. Caruso defended the officers' actions on behalf of the state, arguing that they searched the vehicle based on the reasonable, articulable suspicion that the defendant was armed—and under *Terry v. Ohio*,¹ officers have the right to briefly detain and frisk a person reasonably believed to be armed. The Court agreed with Caruso, finding that

the principles of *Terry* extend to the passenger compartment of a vehicle when an officer is conducting a lawful traffic stop.

In *Scheurman v. Department of Transportation*, 434 Mich. 619 (1990), Caruso had the chance to argue before the Michigan Supreme Court in the area of his expertise: highway law. There were two plaintiffs in this consolidated case. The first sued the Michigan Department of Transportation on behalf of the decedent, alleging that the lack of streetlights contributed to her being hit by a car as she was crossing the road. The second plaintiff sued the Wayne County Road Commission, arguing that a tall hedge bordering the intersection obscured drivers' vision, resulting in a collision between the plaintiff's bicycle and an oncoming vehicle. While the government is normally immune from liability, the highway exception allows for the state to be sued when a collision occurs due to negligent maintenance of public highways. Caruso, however, argued for a narrow interpretation of this exception. The Court agreed, holding that the exception extends only to the improved portion of the highway—that is, the portion on which vehicles drive. Since streetlights and hedges fall outside this purview, the government's immunity in this case remained intact.

Appearing for a fifth and final time before the U.S. Supreme Court, Caruso addressed the issue of campaign contributions from a corporation in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). The Chamber argued that Michigan's Campaign Finance Act, which prohibited corporations from using funds from the general treasury funds to support or oppose political candidates, was an unconstitutional restriction on free speech. Caruso advocated the state's position that the law was necessary to prevent corruption—or at the very least, the appearance of corruption—stemming from close ties between a corporation and a politician. The Court agreed with Caruso and upheld Michigan's law for twenty years, until it was overruled in the recent, controversial case *Citizens United v. Federal Election Commission*.²

Caruso retired after thirty-eight years of public service. Interestingly, he said that he received the call

informing him he won *Austin* about an hour and a half before he left for his retirement party. This was surely a satisfying end to a long and fulfilling career.

Gay Secor Hardy (1990–1992)

The first woman to hold the office of Solicitor General of Michigan was Gay Secor Hardy. Though a Michigan native, Hardy applied to the University of Chicago for her undergraduate program; the University accepted her application, even though she was only fifteen years old at the time. After earning her degree, she applied to the University of Michigan Law School; however, she was denied admission because she did not have a high school diploma. Instead, U of M allowed her to enroll in an undergraduate program, and she earned a second bachelor's degree before finally being accepted into University of Michigan Law School. Soon after earning her J.D. in 1955, Hardy started work as an Assistant Attorney General in the highway division. She also worked in the Consumer Protection Division and served on the Liquor Control Commission³ before being appointed Solicitor General.

Having worked in many diverse areas of law as an Assistant Attorney General, Hardy continued to handle an extensive variety of cases as Solicitor General. In *People v. Vaughn*, 186 Mich. App. 376 (1990), she argued a criminal law case involving aiding and abetting. The defendant in this case was convicted of aiding and abetting first-degree criminal sexual conduct committed by a never-identified individual. The defendant appealed his conviction, arguing that the law of accomplice liability required the principal to be identified and charged before the accessory could be charged with aiding and abetting the principal. Hardy advanced a narrower interpretation of the law, arguing that accomplice liability exists if a crime was committed by someone other than the accessory, and the accessory had, in fact, aided and abetted the principle's commission of the crime. The Court agreed with Hardy's position, finding that the law does not require a principle to be identified before the prosecutor can charge someone with being an accessory.

In *People v. Whiteside*, 437 Mich. 188 (1991), Hardy addressed the issues of probation, sentencing, and statutory interpretation all rolled into one case before the Michigan Supreme Court. Whiteside violated his

probation when he committed another crime. The trial court revoked Whiteside's probation and resentenced him on the underlying crime to a minimum of nine years in prison. Consistent with Michigan law,⁴ the trial court gave him credit for the number of days he served in the county jail prior to being sentenced. On appeal, the defendant argued that he also should have gotten credit for the number of days he spent in a residential drug treatment facility, which was a mandatory condition of his probation. However, the Court agreed with Hardy that the plain language of the statute only requires credit for time spent in jail. And a drug rehab facility, no matter how regimented or disciplined the environment, is not jail.

Abortion has always been a hotly litigated issue, and Hardy had an opportunity to leave her mark on this area of law in *Doe v. Department of Social Science*, 439 Mich. 650 (1992). In this case, the appellants challenged a Michigan law⁵ that prohibited the use of public funds to finance abortions for welfare recipients unless the mother's life is in danger. The plaintiffs contended the state law violated the Equal Protection Clause of the Michigan Constitution. Hardy argued that the statute encouraged a mother to choose childbirth over abortion, which is a legitimate state interest. The Court agreed, finding that the state's encouragement and funding of childbirth but not abortion does not infringe on a woman's right to choose.

By the time Hardy retired from the Attorney General's office, she had established a reputation as a pioneer, a leader, and a scholar. Throughout her life, she was active in promoting women's rights and participating in charitable organizations. Hardy passed away in March of 1998, at the age of 69.

Thomas L. Casey (1992–2008)

Thomas L. Casey was Michigan's eighth Solicitor General. He volunteered in the Washtenaw County Legal Aid Clinic after graduating from the University of Michigan Law School in 1974. Casey went to work for the Attorney General's Office in 1974 and had been working as an Assistance Attorney General for approximately seventeen years when he was appointed to replace Hardy as Solicitor General.

The crackdown on drunk driving was in full swing by 1990. In an effort to reduce the number of drunk drivers, the Michigan State Police began setting up

sobriety checkpoints. All drivers that passed through one of these checkpoints were stopped and checked for signs of intoxication. Casey defended this practice before the U.S. Supreme Court in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990).⁶ The respondents sued for injunctive relief before the program went into effect, arguing that this practice would constitute an unreasonable seizure under the Fourth Amendment. Adopting Casey's position, the Court held that this minimally intrusive seizure is allowed under the Fourth Amendment. The opinion also noted that empirical research demonstrates that sobriety checkpoints are an effective way to combat the widely recognized and highly dangerous problem of drunk driving.

Michigan's prohibition against assisted suicide was widely publicized in the 1990s through the exploits of Dr. Jack Kevorkian. In *People v. Kevorkian*, 447 Mich. 436 (1994), Kevorkian challenged a Michigan law⁷ making it a felony to assist a person in committing suicide. The legislature passed the law the previous year in response to Kevorkian's previous acts of assisted suicide. Though Kevorkian argued that a constitutional right to die could be inferred from the U.S. Supreme Court's abortion cases, Casey helped advance the state's position that the prohibition was constitutional. He also stressed the difference between the right to decline lifesaving measures and the right to request life-ending treatment. The Court agreed with Casey's argument, although it noted that precedent required a distinction between murder and assisted suicide, making the latter a lesser crime.

The dormant commerce clause was at issue in *Granholm v. Heald*, 544 U.S. 460 (2005), the last case that Casey argued before the U.S. Supreme Court. The plaintiffs in this consolidated case challenged laws in Michigan and New York that allowed in-state wineries to ship wine directly to consumers but prohibited out-of-state wineries from doing the same. They argued that this distinction between in-state and out-of-state wineries violated the dormant commerce clause by favoring in-state businesses while placing an undue burden on out-of-state businesses. Casey, however, argued that the laws were a valid exercise of the states' police powers under the Twenty-First Amendment, which gives states the right to regulate alcohol importation. Despite Casey's reasonable argument, the Court ruled against him. It found that the intent of the

Twenty-First Amendment was not to allow states to engage in economic protectionism that would otherwise be prohibited by the dormant commerce clause.

Casey retired after thirty-three years of working for the Attorney General's Office, sixteen of which were spent as Solicitor General. By the time he retired, he had argued before the U.S. Supreme Court nine times and before the Michigan Supreme Court twenty times. In addition to his contributions to the Attorney General's Office, Casey mentors law students and young attorneys, encouraging them to achieve the same levels of professionalism and excellence that he did throughout his fulfilling career.



Author Info

Originally from Houghton Lake, Michigan, Andrea Muroto Bilabaye is a third-year law student at Western Michigan University Cooley Law School. She currently works as a law clerk at Speaker Law Firm, an appellate firm specializing in family law.

Endnotes

¹ 392 U.S. 1 (1968).

² 558 U.S. 310 (2010).

³ When Hardy arrived for her first day of work at the Liquor Control Commission, she had to sit in the waiting room for nearly three hours. She later discovered that her new colleagues kept her waiting so they could make frantic phone calls to Attorney General Thomas M. Kavanagh, arguing that her appointment should be rescinded because a woman could not be expected to deal with situations like improper conduct on licensed premises.

⁴ Mich. Comp. Laws § 769.11b (2017).

⁵ Mich. Comp. Laws § 400.109a (2017).

⁶ Interestingly, Casey argued this case while he was still an Assistant Attorney General, two years before he became Solicitor General. It was his second time appearing before the U.S. Supreme Court: his first time was for *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989).



Portrait of Justice

Associate Justice Patricia J. Boyle

By Mary Massaron

Justice Patricia J. Boyle served on the Michigan Supreme Court as a justice from her appointment in 1983 until her retirement on January 1, 1999. I was privileged to serve as her law clerk for eighteen months during the early '90s. Justice Boyle came to the Court with extensive experience as a former prosecutor and a trial judge. She had served as an assistant U.S. attorney, director of research, training, and appeals of the Wayne County Prosecutor's office, and a judge of Detroit Recorder's Court before being appointed by President Carter as a judge in the United States District Court for the Eastern District of Michigan. In April 1983, she left that lifetime-

tenure position for an appointment to the Michigan Supreme Court. Many thought this a foolish step, but Justice Boyle loved the Court and was intrigued by the opportunity to influence the development of the law as a justice. Her jurisprudence was shaped by her experience. She was always conscious of writing opinions both for the parties so that they would know that their arguments had been fully and fairly considered, and for the bench and bar so that the holdings set forth in the Court's opinions and how to apply them to future cases would be clear. Justice Cavanagh said at her portrait dedication that her presence elevated the Court, and no one disagreed.

I was honored to speak about Justice Boyle at her portrait dedication from the perspective of her clerks. I recalled how rewarding it was to work with someone of her tremendous intelligence, prodigious scholarship, and willingness to follow the rule of law. On that occasion, I focused on the process of her decision-making. What I did not say then was how important she was to me as a role model, and after I left my clerkship, as a friend. Justice Boyle graduated from law school at a time when it was very difficult to find challenging work if you were a woman. She overcame every obstacle with warmth, humor, and tenacity, forging her own path to build an impressive list of achievements as a lawyer, judge, and justice. And she did it while raising four rambunctious sons and maintaining her marriage with the very high-energy and occasionally-difficult Terry Boyle, the husband she adored.

Justice Boyle's warmth and humor made her approachable – to her law clerks and to the law clerks of other justices. She was always ready to hear one of us talk about the difficulties of balancing family and work, or the issues around trying to blend two families after a divorce and remarriage, or the politics of life in a big law firm. She would listen intently, ask questions, and then tell you a story about some difficult time from her own life to reassure you that it would be OK. She didn't offer direct advice – but when you finished the conversation, you inevitably felt as though you were better-equipped to deal with the problem than when you had approached her. All of her clerks

became part of her family, which was always expanding. It included the Pernicks, Boyles, Erhardts (including her father about whom she often spoke), her law clerks, Mae Doss, Marjorie Baird, and a circle of close friends. Justice Boyle left a legacy of love with

those of us who knew her.



Watch this special session on our YouTube channel! Visit www.micourthistory.org to learn more!

But Justice Boyle's legacy lives on in more than the memories of those whose lives she touched and whose legal careers and personal lives have been changed by her influence. It also lives through the opinions she wrote while she was on the Court. Law reviews could be written analyzing her jurisprudential philosophy as illustrated in her opinions. But this short piece will highlight only one. It may not be her most important or her most well-written and persuasive – but it illustrates some of her abiding concerns, her love

of the Court, her sense of balance and justice, and her formidable logic and persuasive power. Justice Boyle's partial concurrence and partial dissent in *People v Brown* and *People v Juillet*, 439 Mich 34; 475 NW2d 788 (1991) illustrates her approach to writing when a fractured court issued multiple opinions. As was typical of her concurrences, she sought "to summarize the force of the opinions taken together and to set forth [her] position regarding the appropriate approach to the entrapment doctrine." In her view, neither of the defendants "could be found to be entrapped under the objective test." She based this conclusion on her application of the objective test to facts reasoning that a law-abiding person would not have given drugs for sex or provided drugs to third parties because a friend gave him free beer and marijuana. She then explained why, in her view, all the justices favored a new test for entrapment. Traditionally, the objective test asked merely whether "the police engaged in misconduct of a type that would induce a normally law-abiding person to commit the crime in question." She then examined the opinions of Justice Brickley and Justice Cavanagh noting that each looked at additional factors. Justice Brickley considered "the circumstances of the actual defendant," and Justice Cavanagh considered the "circumstances of the hypothetical defendant (the average drug user)." Adding these factors altered the test. Justice Boyle's critique of the test reveals her powerful use of logic.

Justice Boyle's discussion also reflected her concern for trial procedures – explaining that "protestations that the test remains 'objective' cannot obscure the fact that neither the prosecution nor the defendants have been given the opportunity to develop a record that anticipates this shift in analysis." Her opinion also reflected her balanced approach in the area of criminal law, acknowledging the importance of police undercover work and sting tactics while recognizing the need to restrain abusive investigative conduct, which she simultaneously recognized might stem from "police frustration and even good intentions...." She also voiced support for the notion that a "reprehensible-conduct test for entrapment" should be adopted; it allowed the court to "consider the most troubling aspect of the case under the misconduct analysis – the government's treatment of its informant, Roberts, a known prostitute, heroin addict, and user of other illicit drugs." She was concerned that the "govern-

ment's conduct manifested an exploitation of Roberts that is inconsistent with the proper use of governmental authority." Her decision also reflects her cogent use of conceptual underpinnings of an area of law in explaining the result she favored. She grounded her decision in part on the notion that "criminal conduct requires both an *actus reus*, a voluntary act or omission which causes social harm, and a *mens rea*, the mental state provided in the definition of the offense." The entrapment defense was intended to limit "government encouragement of an individual to perform a prohibited act" because the government's conduct "interferes with the functions expected of the act requirement in a rule-oriented system of law."

Justice Boyle was a giant on the Court. She embodied the very best ideals of our justice system: intelligence, humility, scholarship, empathy, courage, and a willingness to go where the law led her.

Author Info

Mary Massaron, a past president of DRI - The Voice of the Defense Bar, serves as the Appellate Practice Group Leader for Plunkett Cooney. A former law clerk to Associate Justice Patricia J. Boyle of the Michigan Supreme Court, she has handled or supervised the handling of over 400 appeals resulting in approximately 50 published opinions.

Law Clerk Directory:

Did you clerk for one of the Michigan Supreme Court justices? Or do you know someone who did? If so, please send us an email at lawclerk@micourthistory.org with the name of the Justice and the dates of service. We are compiling a law clerk directory.

Invisible Scribes

The Michigan Supreme Court Historical Society began collecting the names and stories of the justices' law clerks in 2016 for a law clerk directory. The list of current law clerks is published each year in the fall newsletter. Beginning this year, the Society has offered a one-year complimentary membership in the Society to outgoing clerks. This year that group includes the following "invisible scribes": Sean Dutton (Young/Wilder); Carrie Floyd (McCormack); Amy Lishinski (McCormack); Amanda Urban (Markman); and Molly Conway-Mannor (Zahra).

2017-2018 Michigan Supreme Court Law Clerks

Chief Justice Stephen J. Markman:

Cheryl Nowak, Senior Law Clerk
Michigan State University College of Law
David Loudon
Michigan State University College of Law
Joseph Shada
WMU-Cooley Law School

Justice Brian K. Zahra

Brian Balow, Senior Law Clerk
University of Detroit Mercy School of Law
Samantha Cook
Michigan State University College of Law
Steven Eatherly
University of Detroit Mercy School of Law
Jonathon Regal, Senior Law Clerk
Western Michigan University Cooley Law School
Andrew Winkler
WMU-Cooley Law School

Justice Bridget M. McCormack

David Arnold, Senior Law Clerk
Hofstra University School of Law (now Maurice A Deane School of Law)
Nino Monea
Harvard Law School
Aadika Singh
University of Pennsylvania Law School
Andrea Scanlan
University of Michigan Law School

Justice David F. Viviano

Alexander Gallucci, Senior Law Clerk
Notre Dame Law School
Gallant Fish
Michigan State University College of Law
Katherine Hopkins
University of Michigan Law School
James Varchetti
Western Michigan University Cooley Law School

Justice Richard H. Bernstein

Vivian Chang, Senior Law Clerk
University of Michigan Law School
Daniel Ellman
University of Michigan Law School
David Sheaffer
Michigan State University College of Law
Haba Yono
Wayne State University Law School

Justice Joan L. Larsen (term ended November 8)

Adam Dutkiewicz, Senior Law Clerk
Western Michigan University Cooley Law School
Jonathan Forman
University of Michigan Law School
Jesse Kirchner
University of Michigan Law School
Jessica Kraft
University of Michigan Law School

Justice Kurtis T. Wilder

Tamara York, Senior Law Clerk
Michigan State University College of Law
Hallam Stanton
University of Michigan Law School
Charlynn Turner
Western Michigan University Cooley Law School
Kristyn Webb
Loyola University New Orleans College of Law

Justice Beth Clement (term began November 10)

Adam Pavlik, Senior Law Clerk
Michigan State University College of Law
Jesse Kirchner
University of Michigan Law School
Heidi Williams

Court Mourns Long-Time Crier

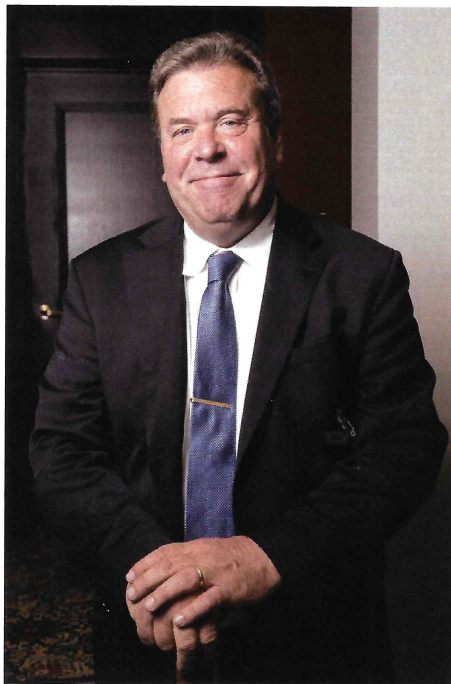


Photo of Dave Palazzolo by
Richard Browne

On Saturday, October 14, 2017, Michigan Supreme Court Crier Dave Palazzolo passed away after a brief illness. He was 59 years old.

Dave began working for the Michigan Supreme Court more than 25 years ago. He was hired by then-Chief Justice Dorothy Comstock Riley to fill the vacancy left by Lou Husband's retirement. Dave was the seventh crier in Michigan Supreme Court history.

His duties included managing the mail, printing services, and other building matters at the Hall of Justice. However, his public role was opening and closing official sessions of the Michigan Supreme Court.

The Desiderata by Max Ehrman was read at Dave's funeral; we excerpt this brief section for it exemplifies the way Dave lived and carried himself here in his work: "Go placidly amid the noise and haste, and remember what peace there may be in silence. As far as possible without surrender be on good terms with all persons."



The Society's booth at the NEXT Conference featured items related to the Michigan Supreme Court and the city of Detroit including maps of previous homes of the court.

SBM NEXT Conference

The Society was pleased to be an exhibitor at this year's State Bar of Michigan NEXT Conference (formerly known as the Annual Meeting) at Cobo Center in Detroit. Our booth was part traveling display/part pop-up shop with copies of our book *The Michigan Supreme Court Historical Reference Guide, 2nd Edition* for sale. Thanks to everyone who stopped by our booth and to these new and renewing members:

- Zenell Brown
- Candace Crowley
- William Gilbride Jr.
- Daniel Grow
- Lisa Kirsch Satawa
- John J. Lynch III
- Michael McDaniel
- Nicole Smithson
- Richard Winder

Society Goes to Texas

By Executive Director Carrie Sampson



The old chambers of the Texas Supreme Court were in the State Capitol. Like ours, the Texas State Capitol building was designed by Elijah Myers. He also designed the Colorado State Capitol.



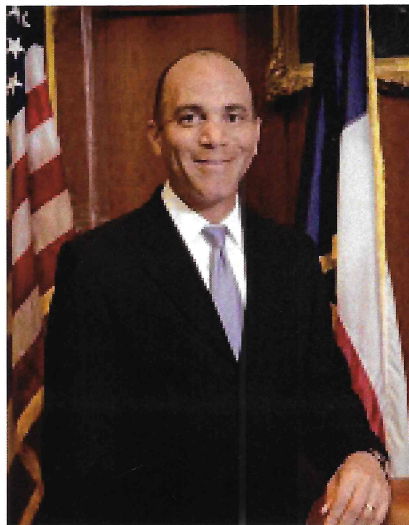
The new Supreme Court in Texas is in a building that dates from 1956. Portraits of the justices hang behind the bench and in the hallway of the court building.

In early September, I traveled to Austin, Texas, to take part in the annual conference of the American Association for State and Local History (AASLH). There is a court & legal history affinity group with colleagues doing similar work in other places including Indiana, Illinois, and at the U.S. Supreme Court. Rachael Drenovsky from our Michigan Supreme Court Learning Center has played an active role in leading the group, and was one of the coordinators of this year's session: "Taming Civics: Using Historical Narratives and Landmark Court Cases to Bring Civics to Life."

The session included discussion of the Texas Historical Society's publication *Taming Texas: How Law and Order Came to the Lone Star State*. The first in a series, the book is geared toward middle school students and is beautifully illustrated.

One of the quotes on the back of the book from retired Texas Supreme Court Chief Justice Wallace B. Jefferson reads, "A seventh-grade curriculum would be incomplete without an examination of the law's fundamental impact on society. *Taming Texas* serves that purpose brilliantly and, along the way, gives concrete meaning to 'Justice for All' in judicial civics."

Our group also toured the Texas State Capitol, which was designed by Elijah Myers, the architect who designed our own Michigan State Capitol. We also visited the Texas State Bar Building and the Texas Supreme Court.



Wallace Bernard Jefferson
Texas Supreme Court
Associate Justice 2001-2004
Chief Justice 2004-2013

The first African American Justice of the Texas Supreme Court, Justice Jefferson has a connection to Michigan. His undergraduate degree is from Michigan State University's James Madison College. His law degree is from the University of Texas School of Law.