

## *In Memoriam: Professor Michael Zimmer*

*The editors of the Loyola University Chicago Law Journal dedicate this issue to the enduring memory of Professor Michael Zimmer.*



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### *Remembering Mike Zimmer*

Charles A. Sullivan\*

I am acutely sensible of how privileged I am to have known Mike Zimmer so long and so well for more than forty-four years. From the first moment I met him, I realized he was someone special—visionary in his approach to teaching and scholarship, bubbling with innovative ideas, and passionate in transforming the institutions he served.

We met when we were both brand new assistant professors at the University of South Carolina in 1971. And, in relatively short order, we

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were both non-renewed there (Mike, who disliked euphemisms, always called that being fired). By 1975, I was teaching at the University of Arkansas at Fayetteville and Mike at Wayne State, but we continued to work together on scholarly projects. Surprisingly, in light of our checkered history, Seton Hall Law, showing more valor than discretion, reunited us in 1978, and we stayed together at Seton Hall for two decades until Mike left to join the Loyola faculty—and, not incidentally, his wife Margaret Moses. To complete the circle, he had met Margaret at South Carolina when she was a professor in the French department at the university.

From a scholarly perspective, our collaboration over the years produced eight editions of our casebook on employment discrimination, three editions of a treatise on the same topic, one employment law casebook, and assorted odd articles—none odder than our first effort, a two-part magnum opus on the then newly passed South Carolina Human Affairs Law; a work that has never been cited anywhere by anyone for any reason. Fortunately, some of our other collaborations were more successful.

So that is the outline of our professional connection, but with Mike the professional was ever only half a step removed from the personal. Even beginning to capture the complete Mike Zimmer in the short space of a tribute is impossible, but perhaps, collectively at least, those of us writing for the *Loyola Chicago University Law Journal's* tribute will begin to do justice to him.

Mike had so many facets that are central to who he was and how he will be remembered. There are, of course, his two beloved children, Michael and Lanier, and the centrality of Margaret and his family in his life. There was Mike the Scholar, breaking new ground in employment discrimination and, later, in exploring the global workplace. There are innumerable friends, scattered across academia as Mike visited at several law schools and was beloved on the conference circuit—and, as far as I can see, everywhere else. There is Mike's life before South Carolina, which included being Editor in Chief of the *Marquette Law Review*, a clerk to renowned Seventh Circuit Judge Thomas Fairchild, and a stint on the dark side as a management lawyer at Foley & Lardner. And there's Mike the Builder. Seton Hall's magnificent edifice owes much to his deep involvement in all aspects of construction and design. We had a great architect, but it was Mike who brought the vision of a student-centered law school to the table. I could go on with the multiple dimensions of this multi-faceted man, but I will confine my comments today to two stories, both of which illustrate the passion and

commitment that Mike brought to his work as a law professor, and, indeed, to his life.

More than anyone else I know, Mike was fearless in his pursuit of what he believed to be right, and, as the stories will illustrate, he was able to rally kindred spirits in his efforts to improve the law schools where he worked. There are a hundred other stories about his efforts to improve legal education, but these are the two I know best, and the ones most indicative of what Mike was willing to risk to vindicate his beliefs.

First, there is South Carolina. Mike and I cut our teeth there—as did a number of other scholars who have gone on to make names for themselves across the country. In fact, the “class of 1971,” which included Mike and me, was to produce four deans: Harry Haynsworth of South Carolina, Southern Illinois, and William Mitchell; John Montgomery of South Carolina; Biff Campbell of Kentucky; and Don Weidner, just stepping down from Florida State. Add Mike and me, who served as Associate Deans at Seton Hall, and Tom Ward who did so at Maine, and the University of South Carolina looks, in retrospect, like a decanal incubator. At the time, not so much.

The addition of so many new faculty (and the names listed were only part of the class of ‘71) had predictably destabilizing effects at a sleepy Southern school, all the more so as the outside world was beginning to be felt in the ivory tower through several great social movements that were in full swing—civil rights, women’s equality, and anti-war. Not to mention the turmoil caused by Watergate. Much of this was just “in the air,” a cause for disagreements around the water cooler (although I don’t remember us having one), but some of the unrest emerged front and center in faculty meetings. For example, USC had begun admitting black law students in 1964 and this led to the shuttering of the state’s segregated law school at South Carolina State in 1966, leaving admissions policies and faculty hiring of minorities hot issues throughout our time there. And, perhaps needless to say, there were no female faculty at the Law School in 1971. The wave was coming, however, and it came with its own controversy at USC.

I don’t mean to suggest that the class of ‘71 was either of one mind on these kinds of issues or always focused on the biggest questions facing society. And I don’t mean to suggest that everyone who had been at the Law School before us was a dinosaur. But there were distinct centers of gravity on all these issues, and, closer to the ground, there was also a clash of teaching cultures. The new faculty brought with them different ideas of both what to teach and how to teach it. It was an era in which several older faculties’ idea of good instruction was lecturing from yellowing notes while the students followed along with

word-for-word “skinnies” provided by their predecessors. Needless to say, we saw it differently, and experimented with innovative learning techniques. Mike was at the forefront of this, sometimes with ideas I thought were wacky (Exhibit A is his use of oral examinations), but always with a focus on maximizing student engagement, trying to encourage what today we would call “active learning.” And teaching issues would not infrequently intersect with some of the larger societal questions. I remember vividly the dispute over one older property professor’s use of nineteenth century cases involving slaves to establish current doctrine, with not even a nod to that fact that it was humans who were the property in question.

Disputes about the direction of the Law School (and, I guess, legal education writ large) led to USC non-renewing Mike and me. In preparation for an upcoming reaccreditation, the administration had issued a document that was to guide our efforts and Mike, offended by much of the language and many of the ideas offered, led a few of us in drafting a spoof of it that appeared one night in the faculty mailboxes. Good-natured academic fun, one might have thought, but “We are not amused” understated the reaction of the Dean and a number of senior faculty.

Time passed, applications for promotion and tenure were submitted—and denied. And, to add injury to insult, both Mike and I were non-renewed. Much dissent among a wide swath of faculty and students followed, leading to a reconsideration by the tenured faculty. Upon mature reflection, they affirmed their earlier decision. In the meantime, wiser heads, like Don Weidner, lit out for the territories. Internal remedies having proved fruitless, Mike and I filed a complaint with the Committee on Academic Freedom and Tenure (“CAFT”) of the Association of American Law Schools. And, at least in our view, justice resulted: after CAFT recommended a sanction against USC, that institution wrote us a letter of apology and paid us damages. By that time, however, Mike and I had ourselves ended up elsewhere—in Detroit and Fayetteville, respectively.

This is not especially the time to draw lessons from this story—let’s just say that we both recognized that we could have been more respectful in our dissent. But it illustrates dramatically how committed Mike was to his view of the right as he saw it and, it is to be hoped, we made some points about faculty governance and academic freedom.

It also turned out to be a great bonding experience for the two of us and, although pretty painful and disruptive, undoubtedly contributed greatly to our scholarship: We came to understand intimately what it

meant to lose a job—and to see a career jeopardized. And we came to appreciate just how difficult it is to penetrate the causes of decision-making by collegial bodies and (as emerged later in my scholarship) the necessity of evidence of the employer's treatment of "comparators" to establish an illicit motive.

My second story fast forwards to 1987 at Seton Hall University and again involves a reaccreditation visit by the ABA. Recall that Mike and I were reunited there. I won't go into details, but let's just say that Seton Hall then was a pale shadow of what it is now. It had only a handful of scholars and an approach to teaching that was akin to throwing a kid in the water to teach him how to swim, which actually worked a surprisingly large percentage of the time but had enormous collateral damage. On top of all that, we had a facility less than a decade old that was both far too small and totally unsuitable for learning: if street noise didn't drown out class discussion in the main building, then rain storms on the tin roof would end them in the "Quonset hut" next door. Finally, there was an administration that either didn't know or didn't care about improving our brand of legal education. It produced a self-study that essentially declared things to be just fine.

A group of us—together a majority of the then-tenured faculty—put together the "counter self-study," which highlighted all of the problems the Law School faced. I would be remiss if I did not stress that Michael Risinger did most of the actual writing, but Mike Zimmer was critical to both the creation of the document and persuading a majority of our tenured colleagues to sign on. It was a high stakes gamble—the result was an ABA show cause order for why Seton Hall's ABA accreditation should not be revoked (which would have put everyone out of a job). But, faced with an unpleasant truth that had been papered over by successive law school administrations, the University responded generously. The ultimate result, again with Mike one of the strong hands on the tiller, was a magnificent new building (as I have said, with Mike heavily involved in the design), a new dean, and, ultimately, a new view of ourselves—as both a teaching and a scholarly faculty. And, not incidentally, Mike was also central to the creation of the new ethos as associate dean during four of the most critical early years of the new Seton Hall.

This, then, was Mike the Troublemaker (or at least so viewed by those in power). I saw him then, and see him now, as Mike the Visionary and, unlike a lot of those who claim the label, he was not only fearless but also effective in pursuing his vision. In this moment of upheaval in legal education, reflecting on Mike's career is particularly

apt, an opportunity for the faculty of today to draw some lessons from Mike to reimagine our profession and pursue our convictions.

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*Mike Zimmer: The Mensch\* of the Academic Employment and Labor Law Community*

Ann C. McGinley\*\*

It's not hard to write a tribute to Mike Zimmer. There is no question that he deserves the highest praise for his intellectual abilities, his knowledge of his field, and the key role he played in developing the field of employment law. Mike was a careful and influential scholar and a beloved teacher and mentor. Mike and Charlie Sullivan's casebook on employment discrimination law<sup>1</sup> (co-authored with Deborah Calloway and Rebecca Hanner White, respectively, at different times) is clearly the leading casebook in the discipline. Of course, Mike has also authored so many other books, both alone and with others. All have been well received, but the employment discrimination casebook is probably the most influential. *Cases and Materials on Employment Discrimination*, which is in its eighth edition, is responsible for generations of students' learning of employment discrimination law. But it is not only a casebook. It is also a deeply theoretical treatise that literally has influenced the development of the law. There are scores of faculty-written articles that are grounded in this book, and much of this scholarship has had a lasting imprint on employment discrimination law. Furthermore, Mike's law review articles and books have received many, many hundreds of citations in law review articles and in court opinions.<sup>2</sup>

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\* A "mensch" is a word of Yiddish origin that means "a person of integrity and honor"—*Mensch*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/mensch> (last visited Mar. 20, 2016); *Mensch*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/mensch](http://www.oxforddictionaries.com/us/definition/american_english/mensch) (last visited Mar. 20, 2016)—and "a good, honest person." *Mensch*, CAMBRIDGE DICTIONARIES ONLINE, <http://dictionary.cambridge.org/us/dictionary/english/mensch> (last visited Mar. 20, 2016).

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1. MICHAEL J. ZIMMER, ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* (8th ed. 2012).

2. A Westlaw search on January 24, 2016 revealed that Mike had at the time 822 citations in

But I would be slighting Mike if I were to praise only his intellectual and academic successes. Mike's strength was in the way he connected with people as a friend and mentor. Mike played a key role in welcoming new teachers and scholars into the labor and employment law community and in encouraging all of us in our teaching and scholarly endeavors. Mike had all of the qualities that the dictionary definition of "mensch" offers, integrity, honor, and goodness. But he also possessed additional qualities that I associate with the word: gentleness, generosity, and empathy. It was these characteristics, combined with his excellent intellectual abilities and knowledge of his field that earned Mike the first Annual Paul S. Miller Award for Contributions to Labor & Employment Law in 2011, conferred at the Sixth Annual Colloquium on Current Scholarship in Labor and Employment Law at Loyola Law School, Los Angeles.

I suspect that many of the readers of this tribute already know about Mike's strengths as an intellectual with deep knowledge in his field and have benefitted from his personal characteristics of honesty and kindness. Many probably witnessed the tremendous reaction that spontaneously erupted on the listserv when the news broke of Mike's death. It was obvious from the outpouring of sentiment in the labor and employment legal academy that Mike was someone special. It was amazing! To a person, everyone chimed in with reminiscences about the way Mike had made that person feel valued, welcomed, and competent. At the time I realized that Mike had spread this kindness to all of his colleagues in the same way that I felt that he had done so with me.

But I need to tell another story about what Mike did for me personally, a type of epilogue to the community's initial reactions to Mike's death. This story happened almost four weeks after Mike's death, and it demonstrates in an almost surreal way how Mike connected with people and his extraordinary generosity to me.

I have been working on a book for almost six years,<sup>3</sup> and last summer after I finally got my book submitted, the publisher, NYU Press, asked me for a list of potential reviewers who would anonymously review my book to determine whether it was ready for publication. I gave them a list of names, and on that list was Mike's name. If I had known that Mike was sick, I would not have put his name on the list. But, I did not

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law review articles and ten in court opinions.

3. ANN C. MCGINLEY, *MASCULINITY AT LAW: EMPLOYMENT DISCRIMINATION THROUGH A DIFFERENT LENS* (2016).

know that he was ailing. In any event, I submitted Mike's name along with others and the press went ahead and got three reviews of the book. All of the reviews came back positive; all said that the book was ready. The press never told me who the reviewers were.

Then came September and the awful news that Mike had died. I was breathless. Mike was so smart, so unassuming, and so generous to all of us teaching and writing in the employment law community. I had known Mike for almost thirty years, and I was shocked and saddened by his death. I communicated a number of times about Mike with many scholars in the employment and labor law community, and I saw the outpouring of praise for Mike and regret at his death on the listserv. I continued to think about Mike often.

A few weeks later, I opened up my email and was totally amazed and shocked. I received an e-mail from the editor in chief of *Jotwell*, an online journal that publishes reviews of books and articles. His e-mail notified me that Mike had selected my upcoming book to review. I realized that Mike must have been one of the NYU Press reviewers because otherwise, Mike would not have had access to my manuscript. Once again, I could hardly breathe. It felt as if Mike had reached out to me from the grave and had given me a pat on the back. The review was lovely and positive, but more important than my book by far was the amazing kindness that Mike had shown me. He must have been so sick at the time he wrote it, and he chose to do it anyway. There was no request for him to write it, and I did not even know that he had my manuscript.

But there it was! A sweet, friendly statement to me that Mike liked my book.<sup>4</sup> What a wonderful person he was! I will never forget him or this last kindness he offered to me when it must have been very difficult for him. He gave to me his most precious possession: some of the limited time and energy he had left. Mike was truly a mensch, in the best possible sense of the word.

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4. See Michael J. Zimmer, *Masculinities Theory Helps Understand Employment Discrimination and Could Help Reduce It*, JOTWELL (Oct. 21, 2015), <http://worklaw.jotwell.com/masculinities-theory-helps-understand-employment-discrimination-and-could-help-reduce-it/>.



*What Would Mike Do?*

Juan F. Perea\*

It is impossible to remember a dear friend in a few paragraphs or a page. Those of us who knew him know that Mike was full of grace. We were lucky to share in that grace. Though gone now, his life gave us great gifts.

As it often goes in academia, my first encounter with Mike was through his scholarship. Recently out of law school, I was invited to teach a course on employment discrimination at my alma mater, Boston College Law School. At the time, I was a field attorney at the regional office of the National Labor Relations Board in Boston. I was eager to become a law professor, so I jumped at the chance to teach a law school course. The first question in any such enterprise is “What book am I going to use?” I chose the book I studied when I took employment discrimination—Zimmer and Sullivan’s *Cases and Materials on Employment Discrimination*.<sup>1</sup> I learned later that Zimmer and Sullivan’s text is practically a leitmotif when it comes to teaching employment discrimination. I had chosen wisely, but I did not really know it at the time. Thus, my first encounter with Mike was through the pages of his book.

Many years later, on my first day at Loyola, I left the elevator. A colleague mentioned Mike Zimmer and I was floored. “Mike Zimmer? *The Mike Zimmer?* Mike Zimmer is here?” I had no idea he was at Loyola. In my mind Mike Zimmer was a rock star—author of the book I used during my maiden voyage as a law professor. I was thrilled that I might have a chance to meet him.

I think it was that first day that I met Mike and Margaret. They

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1. An outstanding and prolific scholar, Mike is renowned for his work in employment and labor law and constitutional law. He was author of several books, including a leading casebook, *Cases and Materials on Employment Discrimination*, currently in its 8th edition, and *The Global Workplace: International and Comparative Employment Law*. MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* (8th ed. 2012); MICHAEL J. ZIMMER, *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW—CASES AND MATERIALS* (Aspen 2d ed. 2012). Mike also wrote numerous law review articles. See, e.g., Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409 (2012); Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 COLO. L. REV. 1243 (2009); Michael J. Zimmer, *Wired for Collyer: Rationalizing NLRB and Arbitration Jurisdiction*, 49 IND. L.J. 141 (1973).

invited me out to lunch at a nearby French restaurant. We sat outside on a beautiful, sunny fall day. I remember ordering a nicoise salad, and loving the whole experience. We had such a good, engaging time. Mike and Margaret were so important in introducing me to Loyola.

Over time we all became friends. Mike and Margaret are very generous hosts, bringing together people from the many, varied parts of their lives. They routinely invited people new to Loyola to their home, to help us newbies feel more a part of our community.

Mike's office was just down the hall from mine. It became a regular destination. Before class, after class. We talked about all manner of things. Our pasts, the present, our children, our scholarship. Mike's office, like the man himself, was unpretentious and warm. He had on the wall a cherished drawing made by some of his former students. I think it was a handmade flowchart of one of the courses he taught.

Mike's door was always open. I do not remember a single time when he was too busy to talk, unless someone else was in his office. Even in that tender time just before class, Mike made himself available. Perhaps a little too available sometimes, as I remember some abrupt endings of our conversations when Mike realized he needed to be in the classroom in two minutes or less. Over time, I came to know Mike well, and I learned many important things about him and from him.

Mike was a great champion of the less privileged, people victimized by the powerful. I link this, at least in part, to his early days driving big, long-haul trucks. He loved sharing stories about his truck-driving adventures. I remember one particular story about taking a college friend on an improvised frolic through a parking lot. He laughed describing himself and the disbelief and horror etched on his friend's face. Mike had a strong rebellious streak against arbitrary authority. He always remembered where he came from.

Mike, Margaret and my wife Jenn and I share a deep love of music, which we enjoyed regularly with outings for dinner and a concert. We so enjoyed the food, the wine, and the music. I remember Mike as an adventurous diner, opting for the wild boar rather than the salmon (my usual, sigh . . .). We enjoyed so much good music, all different periods and styles. Muti's conducting was always a special highlight, particularly Bach's Mass in B minor and a spectacular version of Verdi's Macbeth. Mike seemed to particularly enjoy the percussion, the big brass, and the strings. We often discussed the percussionists and the dancing gestures necessary to coax the varied sounds out of their instruments, always at just the right time.

Mike loved collaboration of many sorts. He reached out to younger

scholars to collaborate on casebooks, to read their work and to mentor them. Collaborating with colleagues like Alex Tsesis, John Nowak, and me, he initiated Loyola's Constitutional Law Colloquium to provide young scholars an opportunity to present their work and to receive critique in a supportive atmosphere. Mike really enjoyed the success of others.

He adored his beloved wife, Margaret, and his beloved children Michael and Lanier. He took so much pride in all of their many accomplishments. He was so proud of Michael's success with his film "The Entertainers." We all enjoyed seeing the film and hearing some of its stars perform at the Chicago premiere at Pianoforte. He beamed when talking about Lanier's prestigious fellowship, which gave her the opportunity to work in Myanmar.

As Mike's illness progressed, he adapted to the difficulties with vigor and mostly without complaint. Evenings out became more challenging, but Mike and Margaret remained undaunted. Throughout his ordeal, Mike's zeal for life shone unabated. It was fitting that our last two outings together were to a concert and a beautiful dinner at Mike and Margaret's favorite French restaurant, Le Bouchon. I remember his complete delight with the music, and his sharp intelligence and wit fully present during dinner. Mike lived the best life he could under progressively harder circumstances.

Mike was an unusually generous friend and colleague for many of us. He gave all of us who knew him a great gift. He showed us a path for living a good, generous, thoughtful, and compassionate life. When my wife Jennifer and I face a difficult choice, we ask ourselves, "What would Mike do?" We ask this knowing that whatever Mike would do in difficult circumstances would be a really good thing to do.

The question, "What would Mike do?" and its answer, are great gifts and offer great guidance. They are testament to a life well lived, a life that continues to inspire and to radiate its warm light.

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*Reading Mike: Assessing Work Law and Policy in an Age of Global Capital*

Susan Bisom-Rapp\*

Mike Zimmer and I were friends and co-authors for twelve years

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during what I think of as his global period—the time in which he turned his attention to international and comparative employment law.<sup>1</sup> Characterizing the corpus of Mike’s global period is simple. His works are an assessment of labor law and policy in an age of global capital. As a colleague and frequent collaborator, however, I also perceive these writings as a window on the man’s values and concerns. Mike was committed to social justice, frustrated with how far behind the United States has fallen in safeguarding the livelihoods and working conditions of its people, intent upon revealing how and why we find ourselves in the present moment, and keen to discover what can be done to reverse current trends.

During Mike’s global phase, along with our colleagues Roger Blanpain, Bill Corbett, and Hilary Josephs, we produced two editions of a novel law casebook, *The Global Workplace*.<sup>2</sup> In addition to our text, Mike authored and co-authored a number of essays and articles on topics related to global workplace law. These pieces delve into, among other things, the International Labour Organization’s concept of decent work,<sup>3</sup> the pedagogy of global workplace law,<sup>4</sup> the European approach to gender equality,<sup>5</sup> transnational unionism,<sup>6</sup> the way ideas about labor

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1. While international and comparative employment law became a key focus of Mike’s later scholarship, he continued to produce important work on a subject he remained passionate about throughout his career: American employment discrimination law. See, e.g., Michael J. Zimmer, *Is the Antidiscrimination Project Being Ended*, 1 IND. J.L. & SOC. EQUALITY 1 (2013); Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409 (2012); Michael J. Zimmer, *Ricci’s Color-Blind Standard in a Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257.

2. ROGER BLANPAIN, SUSAN BISOM-RAPP, WILLIAM R. CORBETT, HILARY K. JOSEPHS & MICHAEL J. ZIMMER, *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW—CASES AND MATERIALS* (Aspen 2d ed. 2012); ROGER BLANPAIN, SUSAN BISOM-RAPP, WILLIAM R. CORBETT, HILARY K. JOSEPHS & MICHAEL J. ZIMMER, *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW—CASES AND MATERIALS* (Cambridge Univ. Press 2007).

3. Michael J. Zimmer, *Decent Work with a Living Wage*, in *THE GLOBAL LABOUR MARKET: FROM GLOBALIZATION TO FLEXICURITY* 61 (Roger Blanpain & Michele Tiraboschi eds., 2008).

4. Michael J. Zimmer, *Two Halves of a Whole: Teaching International and Comparative Employment Law*, 25 INT’L J. COMP. LAB. L. & INDUS. REL. 23 (2009). This article appeared in a special thematic issue on the pedagogy of global workplace law, which I guest edited with our colleague William Bromwich. See Susan Bisom-Rapp & William Bromwich, Editorial, 25 INT’L J. COMP. LAB. L. & INDUS. REL. 1 (2009).

5. Michael J. Zimmer, *Binders Full of Women & Closing the Gap*, 8 FIU L. REV. 541 (2013).

6. Michael J. Zimmer, *Unions & the Great Recession: Is Transnationalism the Answer?*, 15 EMP. RTS. & EMP. POL’Y J. 123 (2011). This article appeared in a special thematic issue on decent work in a post-recessionary world, for which I served as guest editor. See Susan Bisom-Rapp, *Introduction: Decent Work in a Post-Recessionary World*, 15 EMP. RTS. & EMP. POL’Y J. 1 (2011).

law reform ebb and flow across the border between the United States and Canada,<sup>7</sup> and the role of law in producing global income inequality.<sup>8</sup> In rereading these works recently, I found his observations to be as astute as ever. Below I will touch on Mike's ideas about these matters by first describing his view of how and why American law and policy provides such scant protection to those who labor, and second noting the steps he felt would be necessary to extricate ourselves from this new Gilded Age of income inequality and insecurity.

### *How We Got Here*

Mike's sense of urgency about present conditions is perhaps best captured by the Thomas E. Fairchild Lecture he delivered in 2012 at the University of Wisconsin Law School.<sup>9</sup> From my perspective, the lecture is Mike's magnum opus. In it, he addresses three key facts that demand attention: 1) economic inequality in the United States is extreme; 2) American law and social policy has over time externalized risks onto individuals rather than requiring institutions to bear them; and 3) business volatility makes it especially difficult for individuals to shoulder these risks.<sup>10</sup> As he notes elsewhere, these results are not natural nor are they inevitable.<sup>11</sup> Rather, they are produced by policy decisions driven by an ideology we must evaluate normatively. That ideology is neoliberalism.

Neoliberalism, or the belief that unfettered markets produce superior economic results to those markets constrained by government regulation,<sup>12</sup> is the foundation for the low labor standards and thin social protections of Americans who work for a living.<sup>13</sup> Despite statutory exhortations proclaiming "labor . . . is not a commodity,"<sup>14</sup> neoliberal assumptions treat human labor as just another factor of production, and

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7. Michael J. Zimmer & Susan Bisom-Rapp, *North American Border Wars: The Role of Canadian and American Scholarship in U.S. Labor Law Reform Debates*, 30 HOFSTRA LAB. & EMP. L.J. 1 (2012).

8. Michael J. Zimmer, *Intentional Discrimination That Produces Economic Inequality: Taking Piketty and Hsu One Step Further*, 64 EMORY L.J. ONLINE 2085 (2015).

9. See Michael J. Zimmer, *Inequality, Individualized Risk & Insecurity*, 2013 WISC. L. REV. 1. Being invited to give the 24th Fairchild Lecture was a singular honor for Mike, among many bestowed, because the annual event commemorates the life and career of the judge Mike clerked for after law school, a jurist he deeply admired. *Id.* at 65.

10. *Id.* at 2.

11. Zimmer, *supra* note 4, at 27.

12. Zimmer, *supra* note 3, at 62–63 (discussing the impact of Milton Friedman, America's leading neoliberal economist).

13. *Id.* at 66.

14. Zimmer, *supra* note 6, at 126.

as such prescribe minimal government intervention regarding workplace rights, protections, and conditions.<sup>15</sup> Such matters are to be dealt with according to market forces. Economic redistribution is not a goal of our system. “Instead,” as Mike put it, “economic growth is the singular goal, which makes capital the preferred player vis-à-vis labor.”<sup>16</sup> This ideological position puts those who labor at a serious disadvantage since individual firms, to the extent they can in a globalized economy, will seek to lower their labor costs as much as possible. To that end, the actions of capital include: enterprise disaggregation, which may send some operations abroad;<sup>17</sup> creating relationships with individuals that are short-term and impermanent, such as hiring independent contractors rather than employees;<sup>18</sup> and taking advantage of offshore, global supply chains.<sup>19</sup>

While enterprises operate with labor flexibility in mind, most employed individuals are subject to the employment at-will rule, which places them daily in danger of termination for a good reason, no reason, or even a bad reason, so long as the reason is not deemed illegal.<sup>20</sup> As for acting collectively by joining a labor union, the guarantees and remedies of the National Labor Relations Act,<sup>21</sup> which protects union organizing, collective bargaining, and other employee concerted activity for mutual aid and protection, are inadequate; U.S. union density is perilously low.<sup>22</sup> Finally, individual rights, such as those prohibiting discrimination, have been undercut by judicially created rules that prevent cases from proceeding to trial, weakened doctrine, and employers who lawfully insist employees agree that all employment disputes will be settled through binding arbitration, rather than in court, and without resort to class actions.<sup>23</sup>

Normatively challenging neoliberalism by interrogating its effects, Mike notes that the Great Recession, beginning in 2008, brought into relief “the tremendous problems we face—economic inequality, individualized risks and insecurity.”<sup>24</sup> The results of a system that fails

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15. *Id.* at 128.

16. *Id.* at 130–31.

17. Zimmer, *supra* note 9, at 10.

18. *Id.* at 11.

19. *Id.* at 14.

20. *Id.* at 18.

21. National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2012).

22. Zimmer, *supra* note 9, at 26.

23. *Id.* at 28–34.

24. *Id.* at 36.

to cushion individuals is unemployment, large declines in home ownership, flat or falling wages for those with jobs, an increasing inability to afford higher education, and poverty at a level not seen since the Great Depression.<sup>25</sup> Yet despite this, American law and policy has failed to change course and remains relatively disconnected from the people it should be designed to serve. Who is to blame? Mike places responsibility squarely at the feet of our elected officials, whose influence is purchased by corporate interests.<sup>26</sup>

Indeed, the work from Mike's global period insists we hold policymakers accountable for outcomes that are tremendously detrimental to the American people. One of his last pieces, for example, is a short essay<sup>27</sup> that ruminates on French economist Thomas Piketty's blockbuster book, *Capital in the Twenty-First Century*,<sup>28</sup> and juxtaposes Piketty's thesis with an article by legal scholar Shi-Ling Hsu—both Piketty and Hsu consider astronomical increases in inequality but Piketty focuses on the economics of inequality<sup>29</sup> and Hsu stresses the role of law in enabling the economics to function.<sup>30</sup> Mike takes things one step further. He argues that we must study employment law and policy to determine “why some social groups have been, and continue to be, economically disadvantaged.”<sup>31</sup> Drawing attention to the responsibility of policymakers for subpar economic outcomes for groups based on gender and race, he notes that “[a]ddressing how law generates increased economic inequality, whether through the failure of lawmakers to focus on it or through their intentional discrimination[,] should be a top social, economic, and political priority.”<sup>32</sup> Present circumstances are so unsustainable that failure to attempt to reverse them threatens our democratic political system. As Mike puts it in his Fairchild Lecture, we must “confront[] prevailing dogmas and prejudices to expose their fragility in order to end injustice.”<sup>33</sup>

### *What Can Be Done*

As a comparativist, Mike understood that studying the law of other

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25. *Id.* at 3–9.

26. *Id.* at 52.

27. Zimmer, *supra* note 8.

28. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014).

29. Zimmer, *supra* note 8.

30. *Id.*

31. *Id.* at 2086.

32. *Id.*

33. Zimmer, *supra* note 9, at 65 (drawing from the work of Amartya Sen).

countries could not only facilitate a thick discussion about the goals of work law but also could assist in revealing ways to accomplish those aims.<sup>34</sup> Given this, he was very interested in the approaches of different countries to workplace problems we confront at home. Yet toward the end of his career, one senses both a frustration at the extent to which the United States has fallen behind other countries in legal innovation,<sup>35</sup> and a deep concern about the capture of the American law and policymaking apparatus by “those at the top of the economic ladder.”<sup>36</sup> Reversing the latter trend might be accomplished in a number of ways, including through campaign finance reform, which Mike predicts would be fiercely opposed by moneyed interests,<sup>37</sup> overruling *Citizens United v. FEC*,<sup>38</sup> which he deemed unlikely given the Supreme Court’s present composition, or enacting a constitutional amendment to overturn the case, an effort that appears quixotic.<sup>39</sup>

Interestingly, Mike, who spent so much of his scholarly career carefully parsing and reconceptualizing employment discrimination law doctrine,<sup>40</sup> ultimately proposes organizing “a social movement to push for change.”<sup>41</sup> Ever the optimist, though in no way naïve, Mike suggests that scholarly discourse in a number of disciplines “may be moving away from raw individualism back toward a vision of society based on the collective welfare.”<sup>42</sup> That reframing may well be a necessary step to shifting the political discourse to one that can reform politics in a meaningful way and set the stage for much needed legal and policy reform. As Mike notes, “There should always be hope.”<sup>43</sup> I can think of no better way to end a tribute to a dear friend and colleague who I miss so very much, and remain grateful to for teaching me that

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34. Zimmer, *supra* note 4, at 27.

35. See Zimmer, *supra* note 5, at 557 (discussing European approaches to increasing the role of women on corporate boards and noting “[t]his Directive is another example of how the EU has passed the US by in terms of moving toward greater gender equality”); Zimmer, *supra* note 4, at 28 (discussing the failure of the drafters of the Restatement of Employment Law to grapple with the fact that the employment at-will rule puts the United States at odds with the rest of world).

36. Zimmer, *supra* note 9, at 50.

37. *Id.* at 55–56.

38. 558 U.S. 310 (2010).

39. Zimmer, *supra* note 9, at 52–58.

40. See, e.g., Michael J. Zimmer, *The End of At-Will Employment? The ‘Color Blind’ Standard of Intent to Discriminate*, 46 SETON HALL L. REV. (forthcoming 2016); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887 (2004).

41. Zimmer, *supra* note 9, at 60.

42. *Id.* at 64.

43. *Id.* at 65.



important point.

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*In Memory of Mike Zimmer*

Rebecca Hanner White\*

It is an honor to write in memory of my colleague, mentor and friend, Mike Zimmer. Mike was a passionate and original thinker who pioneered the law of employment discrimination. For four decades, he wrote creatively, thoughtfully, and persuasively about the ways in which our antidiscrimination statutes should be best interpreted and applied, and I am among the many employment discrimination teachers and scholars who owe Mike so much.

Mike, and his co-author and best friend Charlie Sullivan, shaped the way I think about and understand the law of employment discrimination. I am far from alone. Mike and Charlie structured an approach to mastering this complex area of the law, and a generation of law teachers, a generation of law students, and a host of others have been the beneficiary of their vision.

Employment discrimination law was in its infancy when Mike began his work in the field. He embraced it as his life's work, and he was relentless in his efforts to guide courts (and law teachers and their students) in their thinking about how the governing statutes should be analyzed to achieve their aim of eradicating discrimination in the workplace. A particular area of focus for Mike was the law of individual disparate treatment. The Supreme Court has described disparate treatment as "the most easily understood type of discrimination,"<sup>1</sup> a description that anyone who has studied the field even briefly would recognize as remarkably inaccurate, given the level of difficulty courts continue to experience in analyzing and applying our antidiscrimination statutes to cases that present individual disparate treatment claims. As Mike observed, in his most recently published work:

The law dealing with disparate treatment has always been complex and not very clear cut. The underlying question of material fact should be simple: Based on all the evidence in the record, is it reasonable for the factfinder to draw the inference that the challenged

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1. *Int'l Bhd of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)

employer action was motivated by race, gender or other characteristic protected by Title VII?<sup>2</sup>

But, as Mike understood, perhaps better than anyone, what would seem to be a simple question for the courts has proven to be anything but. Mike's writings focused on bringing coherence to this confusing area of the law in a manner that effectuated and enforced the statutory purposes of ending workplace discrimination.<sup>3</sup> No other scholar has been more influential in helping us to think about how best to analyze claims of individual disparate treatment.

After reading Mike's work for years, I had the good fortune of being invited by him and by Charlie to join with them as a co-author on their employment discrimination casebook and treatise. And what I had learned from reading Mike's work was enhanced immeasurably from talking with him about our area of the law and sharing and exchanging ideas and approaches. Mike was always a step ahead, and his enthusiasm and optimism never waned, no matter how disappointed he might have been with a decision (or series of decisions) handed down by the Supreme Court. I understood from the outset what a privilege it was to work with and to learn from him, and I will be forever grateful to Mike and to Charlie for inviting me to join with them in these projects that deepened my professional knowledge and enriched my career.

When I was a new law teacher, Mike was one of the first people in the field to reach out to me. He became an amazing mentor—supportive, encouraging, and always thought provoking. He made me feel comfortable and that I belonged right where I was at a time when I

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2. Michael J. Zimmer, *Title VII's Last Hurrah: Can Discrimination Be Plausibly Pled*, 2014 U. CHI. LEGAL F. 19, 35.

3. See, e.g., Michael J. Zimmer, *Ricci's Color-Blind Standard in a Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257; Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243 (2009); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887 (2005); Michael J. Zimmer, *Leading by Example: An Holistic Approach to Individual Disparate Treatment Law*, 11 KAN. J.L. & PUB. POL'Y 177 (2001); Michael J. Zimmer, *Slicing and Dicing Individual Disparate Treatment Law*, 61 LA. L. REV. 567 (2001); Michael J. Zimmer, *Individual Disparate Treatment Discrimination Today and Tomorrow*, 2 J. EMP. DISCRIMINATION L. 243 (2000); Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA*, 51 MERCER L. REV. 693 (2000); Michael J. Zimmer, *Individual Disparate Impact Law: On the Plain Meaning of the 1991 Civil Rights Act*, 30 LOY. U. CHI. L.J. 473 (1999); Michael J. Zimmer, *Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563 (1996); Michael J. Zimmer & Charles Sullivan, *The Structure of Title VII Individual Disparate Treatment Litigation: Anderson v. City of Bessemer City, Inferences of Discrimination and Burdens of Proof*, 9 HARV. WOMEN'S L.J. 25 (1986).

might otherwise have felt intimidated and out of place. What I came to learn was that my experience with Mike was anything but unique. Many of us who joined the ranks of employment discrimination teachers had the benefit of Mike's kindness, advice, and support. He was an insightful reader on drafts and a wise counselor on teaching ideas. And he was so unfailingly confident in our abilities that we had no choice but to have confidence in ourselves. As we developed as scholars, he was unstinting in his praise. And sharing time with him on a panel or at a presentation always provided an opportunity to learn and to be proud to be his colleague and friend. I regret that those newly entering the field will not have the benefit of Mike's guidance and mentorship. I hope that those of us who were the beneficiaries of Mike's friendship and support will resolve, when interacting with our junior colleagues, to try our best to fill the void that Mike's death leaves.

For me, all of these matters about Mike are of lasting importance. But more than anything else, what I will remember about Mike—more than ways of thinking about employment discrimination decisions or how to become a better teacher or mentor or scholar—has to do with family. The conversations I had with Mike that remain most vivid in my memory involve this aspect of his life. Mike was blessed to have a son and a daughter. So was I, and our children are very close in age. Mike would talk with me often about Michael and Lanier. His pride in his children, his enthusiasm for their interests and activities, and his sheer joy in being their father was both open and inspirational. Being a parent is the one job that truly matters, and the one I suspect most of us, if we are honest, feel least secure about how well we are doing it. Too often, even with our closest colleagues, the wall between our personal and professional lives is in place. Not so with Mike. I could, and often did, talk freely with him about my children, their hopes, fears, and aspirations, and mine for them. And just as I found Mike to be a role model for my professional life, I found in Mike a role model for the parent I have hoped and tried to be.

Most of all, Mike's love for and devotion to his wife Margaret was always front and center. In that way, he reminded me of my own husband and of how lucky I, like Margaret, was. In short, being around Mike was affirming in the ways that are most important in life.

Shortly after Mike's death, I heard someone describe him as a happy man. What an on-target description that is. Mike was one of the most joyful people I have ever known. He was also one of the kindest and most generous. Mike's impact is felt not only on those of us who knew him but also by countless working people who will never know him, but

who have had their lives made better by his life's work. I was fortunate to know such a man, and the world is better because of him.

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*The Teamster Law Professor: Michael J. Zimmer*

Paul M. Secunda\*

How do you define and measure the life of such an exceptional man like Michael ("Mike") J. Zimmer? To me, Mike's start in the workaday world as a Teamster defined him. I know. There are those who may still have unfavorable reactions to hearing the Union's name. But not only do I believe that such reactions are anachronistic, to me a Teamster is a proud member of one of the great and strongest unions of the American labor movement.<sup>1</sup>

Teamsters value family, workplace justice, and community. These are the wonderful women and men who keep our streets clear during snow storms, who provide health care in hospitals, and who keep our economy bustling by delivering goods by freight truck and operating warehouses. This may all seem an odd way to start a tribute to my dear mentor, colleague, and friend. But at essence, Mike was a Teamster.

Let me start with the family value because Mike's family was at the very heart of his life. I have been privileged to know Mike's spouse and fellow law professor, Margaret Moses, for many years now. I remember well Mike, Margaret, Charlie Sullivan (his academic wife and partner-in-crime, respectively), and I, discussing law, life, and family at a lunch during one of the American Law Institute ("ALI") conferences in Washington D.C. I also have followed the trials and tribulations of Mike and Margaret's treasured children through many law professor conference dinner stories and during just plain visits at his law school office in Chicago in recent years. Yes, Mike was a prolific and prominent labor and employment law scholar nationally and internationally, but he derived his strength and his passion for life and his work from his family.

Workplace justice. Perhaps no single person, with the exception of my own beloved maternal grandfather, embodied for me the on-going

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1. TEAMSTERS, <https://teamster.org/> (last visited Mar. 20, 2016).

struggle for workplace justice in the American workplace more than Mike. With every ounce and fiber of his being, Mike believed in the right of workers to be treated with fairness, dignity, and respect in the workplace. Interestingly, Mike, along with Charlie Sullivan, is perhaps best known today for his foundational contributions to the field of employment discrimination law (though he wrote and taught about global workplace law and constitutional law too). But back in 1967 when Mike was a law student at the same Marquette University Law School that I teach at today, he penned as the editor in chief a feisty defense of worker rights at the collective bargaining table.<sup>2</sup> There, Mike wrote: “[T]he Board has begun judging the reasonableness of the substantive positions of the negotiating parties. This final step may result in the seating of the NLRB at the negotiating table.”<sup>3</sup> And Mike was very clear that he did not want a governmental agency to be in the way of unions having the ability to bargain a fair contract with their employer.<sup>4</sup>

No less than forty-eight years later, just last year as the keynote speaker at the *Marquette Law Review*'s annual banquet (and just five months before his untimely passing), Mike was still focused on fairness and justice. In speaking to the assembled *Marquette Law Review* students at the University Club in Milwaukee, he observed: “Valuing just what others value is taking a great chance on being unhappy. Look for work that interests you—that advances your values—and is work that needs to be done to make the world a better place.”<sup>5</sup> Mike spent his life making the workplace and the world a better place. It was not always easy for him. Mike was not welcomed for very long in the 1970s as a young law professor at the University of South Carolina Law School. His ideals and convictions were a tad too progressive for that

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2. Michael J. Zimmer, *The Increasing Control of Collective Bargaining by the NLRB Under the Good Faith Duty*, 50 MARQ. L. REV. 526 (1967). Mike would have written initially on employment discrimination law, I am sure, had he founded the field of study earlier.

3. *Id.* at 527.

4. *Id.* at 540 (“Potentially, this test could be expanded to allow the Board to judge every position taken by bargaining parties. This would place the NLRB directly at the bargaining table in a position to impose by rule of law whatever contract provisions it finds desirable.”). Perhaps, Mike was prescient in knowing that would be a bad thing for workers with the coming of the Nixon Board in 1969 and the later politicization of the Board in the Reagan years under Donald Dotson. Cf. Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 750 (2006) (“Three Reagan appointees—Dotson, Dennis, and Hunter—interred *Materials Research* and (to the delight of management) limited Weingarten to unionized workplaces.”).

5. Michael J. Zimmer, *You Never Know Where Your Career Will Take You*, MARQ. LAW., Fall 2015, at 45.

institution at that time. Yet, he fought on; becoming a law professor at Seton Hall Law School for many decades, and then later, joining Margaret at Loyola University Chicago Law School. Throughout his long and productive law professor career his passion for making the world a better place morphed into case books, law review articles, and other writing that have literally changed the landscape of the American workplace law for the better. Simply put, there is more workplace justice in our world today because of Mike.

Finally, community. As much as family and workplace justice were central to Mike's life, so were his various communities and friendships. During his speech to the *Marquette Law Review* last year, he stressed the importance of friendships to his life: "Classmates taught me much of what I learned about law, lawyering, and living a happy life. I am sure that is still true for all of you. My law school friends are still my friends, and I look forward to brunch tomorrow with some of them."<sup>6</sup> Mike was the epitome of the mentor for which every junior law professor yearns. He was loyal, kind, funny, encouraging, constructively critical, and gave his every best effort not only to me, but to countless others in the labor and employment law community. Personally, I am not sure he ever realized how important his mentorship meant to me (though I attempted to express my gratitude at various points of time, he really was a very humble and self-deprecating man). I have not been allotted enough space in these pages to describe all the acts of professional and personal kindness for which I am grateful to Mike. But to name just a few: after the process was long over, I discovered that he authored one of my tenure letters; he nominated me for the ALI; and he was a supporter and serial attendee of what is now, the Colloquium on Scholarship in Employment and Labor Law ("COSELL")—in its eleventh year.

When the labor and employment law professor community lost our beloved colleague and friend, Paul Steven Miller, in 2010, the organizers of COSELL established a Memorial Award in Paul's honor to recognize on an annual basis someone, like Paul, in the labor and employment law professor community who had not only a profound impact on the development of labor and employment law scholarship, but who contributed to the labor and employment law professor community, and gave of his or her time generously to mentor junior colleagues. Mike was the obvious first choice for the Inaugural Paul

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6. *Id.* at 46.

Steven Miller award and received it at the 2011 Colloquium in Los Angeles. Showing his deep commitment to COSELL and to fostering a vibrant labor and employment law community, Mike and Loyola University Chicago Law School co-hosted the Colloquium the following year with Northwestern Law School. Mike had the privilege of seeing his dear friend and co-author, Charlie Sullivan, receive the same award in Chicago in 2012.

This year, for the first time, and with the blessing of Margaret, we will be inaugurating at the Eleventh Annual COSELL Colloquium, the Michael J. Zimmer Memorial Award. The Award will be handed out on an annual basis at COSELL to a junior labor and employment law professor who exemplifies the same values that Mike held dear and cared about deeply: family, workplace justice, and community. We could have just as easily named it the Teamster Law Professor Award.

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*Professor Michael J. Zimmer: A Model of Courage*

Kathleen M. Boozang\*

Michael Zimmer's life and career can best be summed up in one word: COURAGEOUS.

In demonstrating Mike's courage, it is easiest to point to his scholarship, which essentially midwived an entire new area of law: employment law and discrimination. Today's scholars are enviably strategic about their scholarly agendas, seeking to ensure that their work is sufficiently theoretical, interdisciplinary, inclusive of empirical analysis, with a normative take away. In contrast, Mike charged into his scholarly career with one goal in mind, which was to make a difference. The rest followed, but it was his drive to achieve the good that started him down the road to the scholar he became. And that vision was a better future for marginalized, mistreated, and underpaid workers throughout the world. In the last decades of his scholarship, Mike decried lost opportunities for transformation as he witnessed employment law become mired in rules designed to make justice evermore elusive.

But Mike never went down easy, and the entertainingly hyperbolic titles of his later scholarship bemoaned the harms to that which he held sacred, including, *Taking the Protection Out of Protected Classes*

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(2012);<sup>1</sup> *Price Waterhouse is Dead* (2004);<sup>2</sup> and *Title VII's Last Hurrah* (2014).<sup>3</sup> My favorite of Mike's titles immortalizes the moment in the 2012 presidential debate when Mitt Romney unwittingly demonstrated the state of opportunities for professional women at the highest echelons: *Binders Full of Women* (2013).<sup>4</sup> Mike did not limit his ire to presidential candidates, the Supreme Court, or Congress, dedicating an entire article in 2009 to expressing his dissent from the ALI's newest project in an article entitled *The Restatement of Employment Law is the Wrong Project*.<sup>5</sup> Mike never left any confusion about the aspirations of his many crusades. I loved him most because he wore his heart on his sleeve.

A review of Mike's scholarship further evidences his courage in being among the first scholars to address so many important issues that went beyond discrimination and equality. Mike understood the impact of globalization well before many of us, and, as with all of his passionate insights, committed his ideas to paper. Evidencing to the core the kind of person he was, Mike called for judges to go beyond their intellect, and to employ empathy for victims of discrimination who appeared before them.<sup>6</sup>

Professor Charles Sullivan's essay in this collection proves Mike's courage in his pursuit of transformation of academia itself. Whether his fight was for diversity among his students and colleagues or for more effective teaching, Mike was thoughtful and dogged. As a former colleague who conspired in some of the battles he waged, I can attest to his passion. Courage sometimes has consequences, as evidenced by Mike's departure from South Carolina. But Mike's career is marked by his sense of what was right, and one can only admire the courage he displayed as he sought to improve the world around him.

Mike was intellectually courageous. He taught a huge portfolio of

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1. Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409 (2012).

2. See Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887 (2004).

3. See Michael J. Zimmer, *Title VII's Last Hurrah: Can Discrimination Be Plausibly Pled?*, 2014 U. CHI. LEGAL F. 19.

4. See Michael J. Zimmer, *Binders Full of Women & Closing the Gap*, 8 FIU L. REV. 541 (2013).

5. See Michael J. Zimmer, *The Restatement of Employment Law Is the Wrong Project*, 13 EMP. RTS. & EMP. POL'Y J. 205 (2009).

6. See Michael J. Zimmer, *Response: Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575 (2003).



subjects, largely driven by intellectual curiosity. Never intimidated by the possibility of embarrassment of teaching beyond what he knew, Mike simply made sure he mastered new subject areas so that he knew what he taught. His breadth of subject matter not only enabled him to write in many areas beyond his core discipline but also equipped him to be an amazingly generous reader of others' work.

Mike lived a courageous life. He was an early feminist, and lived the principles and values of feminism as a husband, father, and colleague to many young women in the academy. His advocacy for women did not mean he gave us a pass—he was my first associate dean as a new professor, and he was as demanding as he was kind. But there was never any confusion about his expectations of us in the classroom or in our scholarship. I last sought career advice from him only a few years ago—he was as right when I first started teaching as he was twenty-five years later, and I have had a wonderful career in large part because of his mentorship.

Mike was most courageous in the last year of his life, when he fought through cancer to stay in the classroom as long as possible, to maintain the ties of friendship and family that sustained him and us always, and when he comforted those who continue to be devastated by his loss. He leaves a legacy of great scholarship, of colleagues who are better than they ever thought they could be because of him, and of an example of courage to fight for the good with vigor and passion. Until the end.

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*Professor Mike Zimmer—An Early Snapshot*

Donald J. Weidner\*

I first met Mike in 1971 when we got together over pizza in Chicago. We had contacted one another just after learning that we were both readying to move south to become assistant professors at the University of South Carolina Law School.

After graduating from Marquette Law School, Mike had clerked for Seventh Circuit Court of Appeals Judge Thomas E. Fairchild and then practiced for several years at the Milwaukee office of Foley & Lardner (where Judge Fairchild had previously worked). Mike was leaving his post at Foley and I was leaving my spot as a Bigelow Fellow at the University of Chicago. To this day, I recall in particular the affection

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that Mike expressed for Judge Fairchild and the gratitude Mike had for the experience he had at Foley to prepare him for his new job teaching and researching in labor and employment law. We were excited to be beginning our careers as law professors.

There was a very large class of new law professors hired at South Carolina that year. Some of us have remained friends for decades, including Mike, Charlie Sullivan, Tom Ward, Biff Campbell, and others. We were excited to begin our careers in legal education and bonded, as would any group of newly minted assistant professors hired at the same time. While we of course thought that South Carolina had shown remarkably good judgment in identifying us as the finest of the available talent, we also were struck by the fact that so many of us had attended a Catholic college, a Catholic law school, or both. Indeed, Mike had spent six months as a brother who was at the same time being recruited for the priesthood. Mike and I had compared notes on our recruitment—I had attended a Christian Brothers High School and hence was a “brothers boy” who had been recruited for a brief moment in time. Mike was very clearly the more promising prospect.

The then-Dean of the University of South Carolina Law School was Catholic, and, we thought, generally appreciative of the possibility that the occasional Catholic could indeed make a successful academic. Children of the late 1960s that we were, however, we also suspected we were hired in part to be “good Catholic boys”—in particular to be deferential to authority. (Eleven new faculty were hired by South Carolina that year, all of them male.) The first suggestion that we were not quite as behaviorally well scrubbed as the Dean might have hoped, came very early on.

In the fall of 1971, we, as new law faculty, took part in a university-wide New Faculty Orientation. Part of that Orientation included a “Retreat” designed apparently to prepare us for membership in the all-university team. Part of that Retreat included a playing of the game Battleship. We were divided into teams, asked to assume that there were no rules other than the stated rules, and given four salvos of four rounds to fire against differently weighted targets located somewhere on an unseen grid. The team that scored the highest number of points won. Mike and I were part of a team that included a group “leader” who insisted, despite the absence of such a limitation in the stated rules, that we could not repeat a salvo, even though the scorekeeper said that it had resulted in the maximum score. We did not repeat the salvo and we lost the game. The postmortem by this leader said that there was no real reason we had lost, but that we could have worked better as a group if

we all had agreed on consensus decisions. No one was responsible for the loss. Our only failure was the failure to be unanimous. At a time when many in Washington were saying that no one was really responsible for the mess that we were in in Vietnam, several of the law school's young Catholic gentlemen, including Mike, thought the disclaimer of responsibility was just a touch off the mark. We were brash young men and a bit too iconoclastic to graciously collaborate in what we perceived to be an exercise in groupthink. Retreat planners subsequently let us know that, in the future, law faculty members would not be invited.

Another part of New Faculty Orientation, a reception for all new faculty, was far more successful. That is where Mike met the woman who came to be the love of his life. Margaret Moses, now Professor of Law at Loyola University of Chicago School of Law, started on the University of South Carolina faculty as a French professor at the same time Mike started as a law professor.

As a young colleague, Mike was a great deal of fun to be with, both inside and outside the office. Apart from the fun, which was considerable and which popped up when you least expected it, I learned a great deal about Mike and a great deal from Mike.

I learned why Mike might have made a very good priest or brother. For openers, Mike was an astonishingly good listener. Mike would bow his head slightly to look you right in the eye to concentrate on what you were saying. He gave me and everyone else both permission and encouragement to share our thoughts and feelings. Mike had enough humility to hear the other person out. He had enough compassion to want to hear the other person out.

Mike was a teacher and mentor to all of us. He was always teaching by example. He was always pulling for the underdog, for the less fortunate, for those who were discriminated against, for anyone who needed a helping hand. Mike attracted me, and others, to his path. As a mentor, Mike was incredibly generous with his time, both to everyone around him and also to others who were at a great distance. I knew him as a young colleague who patiently read my ponderous tax manuscripts to give me a helping hand. He had the intelligence, keen eye and generosity of spirit to read many manuscripts of other young scholars in areas way out of his field. I know that he continued that way throughout his life. Former University of Georgia Law School Dean Rebecca White recently told me of Mike's generous mentorship of her, as has my own colleague at Florida State, Franita Tolson.

Our time together at South Carolina lasted only three short years, and they were wonderful years. Over the years since then, I came to know

Mike the family man. Whenever we met in person or spoke by telephone, Mike's most important topics were Margaret and their children, Michael and Lanier. Many men talk very little about their children, especially after they are young adults. Mike, however, would lovingly share the latest details of the lives of Michael and Lanier, in whom he was so proud. Even fewer men express great pride in the professional accomplishments of their wives. But Mike adored Margaret, and sang her praises without ever mentioning his own accomplishments.

The brothers were right. Mike was fundamentally the model of a wonderful Catholic. To me, his appeal was far broader. He was a magnificent human being by anyone's standards.

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*Remembering Mike Zimmer*

*"Justice is the end of government. It is the end of civil society."\**

Barry Sullivan\*\*

The facts of the case are chilling. The State of Illinois has amassed an enormous debt over many years, and it continues to accumulate unfunded liabilities at a rapid pace. Together with some of its political subdivisions, the state faces an almost overwhelming fiscal crisis. Our political leaders, far from offering a solution to these problems, have not even made a budget for the current fiscal year. Indeed, the state has had no budget for the past nine months, and there is little reason to believe that the situation will change any time soon.

More than a year ago, Governor Rauner proposed a budget. It included massive cuts, designed, perhaps, to solve the problems of many years' making in one budget cycle. The Governor's proposed budget was not passed by the General Assembly. Many observers believed that the cuts would severely disadvantage Illinois's neediest families—those who depend on Medicaid for their health care, on public transportation for getting to work, and on various other parts of our social safety net, to say nothing of the state's colleges and universities and the thousands of students they serve.<sup>1</sup> To put pressure

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\* THE FEDERALIST NO. 51 (James Madison).

\*\* Cooney & Conway Chair in Advocacy and Professor of Law, Loyola University Chicago School of Law.

1. According to the *Chicago Tribune*, Governor Rauner's budget proposal targeted "some of

on the General Assembly, the Governor “barnstorm[ed] the state,” promoting “his message that Illinois government is corrupt and in need of ‘structural reform.’”<sup>2</sup> One veteran legislator volunteered his assessment that the Governor “wants to run the government like it’s a business, we’re middle management, and he’s the CEO, and we must take orders. That’s not going to work.”<sup>3</sup> Rather than negotiate with the leaders of the General Assembly, the Governor reportedly spent almost \$1 million in an election-style media campaign aimed at discrediting the Speaker of the House.<sup>4</sup> The General Assembly eventually passed a budget, but it was hopelessly out of whack, and the Governor vetoed it.<sup>5</sup>

The impasse continues. Each side blames the other. According to the Governor, the Democrats (who make up a majority in both Houses) fail to appreciate the seriousness of the state’s financial situation; the Democrats, on the other hand, contend that the Governor is indifferent

state government’s political sacred cows: Medicaid; money for Mayor Rahm Emanuel’s beleaguered city budget; the CTA and Metra; public employee health insurance and retirement benefits; and the University of Illinois.” See Rick Pearson et al., *Rauner’s ‘Turn-Around’ Budget Has Cuts Called ‘Reckless,’ ‘Wrong Priorities,’* CHI. TRIB. (Feb. 19, 2015), <http://www.chicagotribune.com/news/local/politics/chi-bruce-rauner-state-budget-speech-20150218-story.html>.

2. See Kim Geiger, *Rauner: Can’t Trust Illinois Supreme Court Justices ‘to Be Rational,’* CHI. TRIB. (Apr. 8, 2015), <http://www.chicagotribune.com/news/local/politics/ct-rauner-illinois-supreme-court-met-0408-20150407-story.html>. The Governor also alleged that the Illinois Supreme Court was corrupt. Speaking while the Illinois Supreme Court was considering the constitutionality of a pension reform bill enacted by a previous administration, the Governor said that he did not “trust the Supreme Court to be rational in their decisions.” *Id.*; see also Kim Janssen, *Rauner Says Illinois Supreme Court Is Part of ‘Corrupt System,’* CHI. SUN-TIMES (Apr. 8, 2015), <http://chicago.suntimes.com/news/7/71/510389/rauner-illinois-supreme-court-corrupt-system>. The Court, by unanimous vote, ultimately held that the legislation violated Article XIII, Section 5 of the Illinois Constitution, which provides: “Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.” ILL. CONST. 1970, art. XIII, § 5; see *In re Pension Litigation*, 2015 Ill. 118585.

3. Pearson et al., *supra* note 1 (quoting Rep. Lou Lang, D-Skokie).

4. See Ally Marotti, *So Who’s Producing Those Anti-Madigan Ads?*, CRAIN’S CHI. BUS. (June 17, 2015), <http://www.chicagobusiness.com/article/20150617/NEWS02/150619802/so-whos-producing-those-rauner-anti-madigan-ads> (“Although the aim of the ad—attacking a colleague during budget negotiations rather than a political opponent before an election—is unprecedented in Illinois, the Sherman Oaks, Calif.-based media company that placed the TV blitz is the company behind the ads that helped Rauner win the election.”).

5. The Governor chose not to exercise his line item veto. See ILL. CONST. 1970, art. V, § 16; see also Kurt Erickson & Jordan Maddox, *Updated: Rauner Vetoes Budget: Move Puts Budget Question Back in the Hands of Democratic Leaders in the House and Senate*, S. ILLINOISAN (June 25, 2015), [http://thesouthern.com/news/local/govt-and-politics/updated-rauner-vetoes-budget/article\\_2c483e9a-5dde-511b-8a8e-36cb585ce182.html](http://thesouthern.com/news/local/govt-and-politics/updated-rauner-vetoes-budget/article_2c483e9a-5dde-511b-8a8e-36cb585ce182.html) (“Democratic state Sen. Donne Trotter of Chicago said Rauner should have used his line-item veto power to strike out portions of the budget he opposed, rather than vetoing the entire plan.”).

to the consequences and social costs of his proposed cuts. In addition, the Democrats point out that every offer the Governor makes comes with a “poison pill,” namely, a demand that the General Assembly pass legislation to limit the right of public employees to organize and bargain collectively.<sup>6</sup>

The foregoing narrative is disheartening, to say the least, and an equally disheartening (if somewhat different) narrative could be written about the present state of affairs at both the national and the local levels. For those who believe that the separation of powers and governmental checks and balances are principles meant to promote deliberation and wise governance—while also ensuring the operation of a government that works—the current situation may seem an occasion for despair.<sup>7</sup> For those who believe that the well-being of working people is crucial to our democracy,<sup>8</sup> these days may seem dark indeed. Unions, which retain only a fraction of their earlier influence, find themselves under attack (and not invariably without cause) at every level.<sup>9</sup>

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6. Paul M. Lisnek & Jordan Muck, *A Look Back at Bruce Rauner's First Year, in Office*, WGN-TV (Jan. 11, 2016), <http://wgntv.com/2016/01/11/a-look-back-at-bruce-rauners-first-year-in-office/> (“The governor says he’s not anti-union, but at the core of even the simplest agenda item—a property tax freeze—is a democratic poison pill: stripping state employee unions of some collective bargaining rights.”).

7. See THE FEDERALIST NO. 51 (James Madison) (“But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 71 (1824) (clarifying that the Constitution must not be given “that narrow construction, which would cripple the government and render it unequal to the object for which it is declared to be instituted”); see also *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”).

8. See, e.g., Pope Leo XII, *Rights and Duties of Capital and Labor* (May 15, 1891), [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html); see also William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 Ohio St. L.J. 1116, 1128–34 (2011) (discussing the development of workers' rights during the New Deal).

9. Despite “the positive correlation between the extent of unionization and the general level of economic equality,” the level of union membership has dramatically declined in recent years. See Michael J. Zimmer, *Inequality, Individualized Risk, and Insecurity*, 2013 WIS. L. REV. 1, 25 [hereinafter Zimmer, *Wisconsin Law Review*]. Although the overall percentage of union members was approximately 11.8 % of the work force in 2011, the percentage of public sector employees (37%) was far higher than the percentage of private sector employees. *Id.*; see also Michael J. Zimmer, *Decent Work with a Living Wage*, in THE GLOBAL LABOUR MARKET: FROM GLOBALIZATION TO FLEXICURITY 61, 75 (Roger Blanpain & Michele Tiraboschi eds., 2008)

It might seem odd to begin a tribute to my friend and colleague Mike Zimmer with these gloomy reflections on the state of our public life. I do so for two reasons. First, these territories, dark though they may seem, are preeminently Mike's territories. Constitutional law, labor and employment law, and social justice are territories that Mike knew well and cared deeply about. They are the territories in which he sowed and reaped for many seasons—as teacher, scholar, and citizen. And he did so to the great advantage of us all.

I will not try to speak for Mike, but I think it fair to say that he would have bristled at the idea that the legislative branch might properly be considered “middle management” or otherwise subservient to the executive. Nor would he have been sympathetic to the idea that the only proper measure of democratic government is the efficiency of its command-and-control system. Mike would have endeavored to focus our attention on the political branches' effectiveness in governing through thoughtful debate and deliberation, jealously guarding their respective prerogatives, to be sure, but also working together for the common good.<sup>10</sup>

Mike had little patience for those who sought to influence public opinion with false or misleading claims, and he would not have been sympathetic to the scapegoating of public employees. Nor would he have thought that abolition or emasculation was an appropriate response to any possible overreaching by unions. Like Justice Stevens, Mike was lately concerned about the distortion of politics by a different overreaching—that of big business and wealthy individuals, which was greatly exacerbated, he thought, by the Supreme Court's decision in

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(“[U]nions are rapidly becoming irrelevant in setting labor standards as well as in influencing labor policy generally.”). In *Friedrichs v. California Teachers Ass'n*, the Court was asked to strike down the requirement that public employees who choose not to join a union must nonetheless pay mandatory agency fees to compensate unions for bargaining on their behalf. A determination that the First Amendment prohibits such mandatory compensation might well have resulted in a further decrease in union membership. See, e.g., Adam Liptak, *Union Setback Looms in Suit Before Justices*, N.Y. TIMES, Jan. 12, 2016, at A1. After all, not many people will pay for something that they can get for free. On March 29, 2016, however, the Court affirmed the court of appeals' decision in favor of the unions by an equally divided vote. See *Friedrichs v. Cal. Teachers Ass'n*, No. 14-915 (Mar. 29, 2016). That decision, of course, lacks precedential effect, and the issue will almost certainly come before the Court again. EUGENE GRESSMAN, ET AL., SUPREME COURT PRACTICE 6 (9th ed. 2007).

10. See *supra* note 7. After all, government exists for the benefit of the people, and what Chief Justice Marshall said of our national government is also true of our states. See *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316, 404–05 (1819) (Marshall, C.J.) (“[T]he government of the Union is a government of the people; it emanates from them; its powers are granted by them; and are to be exercised directly on them, and for their benefit.”).

*Citizens United*.<sup>11</sup> Most of all, Mike was concerned about government policies that led to the seemingly inexorable growth of intractable inequality, and he was concerned by what such a division of rich and poor might portend for the future of democratic politics.<sup>12</sup>

My second, and more important, reason for beginning this tribute to Mike with all these gloomy reflections on the state of our public life and governance is that I think it healthy, in the midst of all this gloom, to consider what the spirit of Mike's response might have been. To be sure, Mike would have appreciated the seriousness of the fiscal problems that confront us, and he would have strongly disapproved of our elected officials' refusal to deal with them. Mike would have recognized that good cause for despair exists. But I know that despair was not a word within Mike's lexicon.

If Mike were with us, he would not allow himself—or us—to be distracted or defeated by despair. Mike would be thinking about these problems. He would be talking about them. He would be writing about them. He would be teaching about them. He would have an action plan, and there would be a whirlwind of intellectual activity. A hundred possibilities for fruitful change would be on the tip of his tongue and on the point of his pen. There is so much to think and talk about, Mike would tell us. There is so much to learn about; so much to write about; and so much to teach about. And that, after all—Mike would surely remind us—is what our vocation is all about.<sup>13</sup> What grounds have we for complaint, let alone for despair?

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11. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 479 (2010) (Stevens, J., dissenting) (“At bottom, the Court’s opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.”). Mike was also deeply concerned, of course, with the diminution of substantive rights through the emasculatation of the class action device. See Zimmer, *Wisconsin Law Review*, *supra* note 9, at 33–34.

12. See Zimmer, *Wisconsin Law Review*, *supra* note 9, at 58–59; see also Michael J. Zimmer, *Intentional Discrimination That Produces Economic Inequality: Taking Piketty and Hsu One Step Further*, 64 EMORY L.J. ONLINE 2085, 2087 (2015) (“Addressing how law generates increased economic inequality, whether through the failure of lawmakers to focus on it or through their intentional discrimination should be a top social, economic, and political priority.”).

13. See EDWARD H. LEVI, POINT OF VIEW: TALKS ON EDUCATION 38 (1969) (“The professional school must be concerned in a basic way with the world of learning and the interaction between this world and the world of problems to be solved. This is true in medicine, in law, in engineering, and even in training for the ministry.”).



Like many others, I admired and benefited from Mike's scholarship for many years before I met him. I only came to know Mike personally a few years ago, when I was interviewing for my current position at Loyola. My job talk was on the *Steel Seizure* case,<sup>14</sup> and Mike asked a very good question. I was not surprised. I knew that constitutional law and labor law were two of Mike's fields, and the *Steel Seizure* case involved both. I flattered myself to think that Mike must have been especially taken by what I had to say about the case. But once I joined the faculty and came to observe Mike on a regular basis, it did not take very long for me to realize that Mike's terrific question was not necessarily related to any special interest that he might have had in my subject or in my presentation of it. It was just vintage Mike. Faculty workshops. Job talks. Whatever the venue. The point was that we were there to engage the presenter's work, which we were obliged to do—thoughtfully, critically, and, above all, generously. To Mike's mind, that's what the nature of our common enterprise required, and Mike did it time after time after time. Mike was equally generous in reading drafts. Having trouble sometimes pulling the trigger, I might have given Mike several drafts of the same piece. Mike would always read them, no matter how many drafts there were. Towards the end of the process, though, he might well say, "You know, I *still* think this is ready for prime time."

When I was considering using a friend's unpublished materials to teach constitutional law, but expressed some reservation about going it alone, Mike asked for a set of the materials. Mike read the materials over the weekend, liked them, and agreed to use them to teach his section of the course. Over the next couple of years, the three of us, often spurred on by Mike's challenging comments, had many exhilarating conversations about the substance and teaching of constitutional law.

If Mike was generous to his colleagues, he was even more generous to his students. Not content with being a superb classroom teacher, Mike always kept his office door open, figuratively as well as literally. He was not just available to students, but welcomed them warmly. He was always available to talk with students about whatever was on their minds, whether it pertained to their studies, their career plans, or their lives. And they loved and admired him for it. Mike believed in intellectual engagement, collegiality, and institutional citizenship, and

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14. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952); see also Barry Sullivan, *Justice Jackson's Republic and Ours*, in H. JEFFERSON POWELL & JAMES BOYD WHITE, *LAW AND DEMOCRACY IN THE EMPIRE OF FORCE* 172 (2009).

he practiced those virtues every day.

As I say, I did not know Mike for very long, but it seems to me that I knew him forever, perhaps because he quickly became one of my closest friends. I am sure that many others, no matter how long they had known Mike, had the same experience. After all, Mike was irresistible. He had sound values. He was smart. He was wise. There was also a shining decency about him. Mike's integrity was absolute; his enthusiasm was both boundless and contagious. He was loyal and caring. He had a wonderful sense of humor, and he did not take himself—or anyone else—too seriously. He knew exactly who he was, and he was as comfortable with who he was as anyone I have ever known. Above all, as I have said, he was generous. He chose to see the best in others and in the arguments they made. How many times would Mike intervene in a faculty meeting to point out the good faith and the good points on both sides of an issue and then provide an insight that brought the discussion to a new level? That was true in his personal life as well. He would come out of the most dreadful theatre production you can imagine, having found the one good thing you could possibly say about it.

Mike was a true optimist, as he showed repeatedly over the last year of his life. And he was courageous, as he also showed repeatedly during that time, always doing what he had signed on to do, sometimes suffering a lot of pain in silence, and never making a fuss.

Mike soldiered on. Last fall, when he was in great pain, he did his fair share, and then some, in hosting Loyola's annual Constitutional Law Colloquium. Mike and Margaret continued to invite friends to their home for evenings that meant wonderful food (the preparation of which, like everything else, they shared equally), good wine, and sparkling conversation. In the spring, it was not clear whether Mike's treatments might interfere with his teaching, and the Law School made arrangements for Mike's class to be covered if Mike could not go on. But, of course, Mike did go on, despite the pain, and despite the grueling course of treatments.

Last winter and spring, I would sometimes pass Mike's office in the early morning. Unless you looked carefully, you might think that no one was there. But, if you looked again, you might see Mike sitting in the dark, sometimes with his overcoat still on, with his eyes closed. Getting to work was obviously a struggle, and Mike was clearly in the process of re-charging, so that he would be ready, in an hour or so, to go into the classroom and teach his Con Law class with the kind of energy and enthusiasm that were his trademark.

The courage that Mike showed in his illness was of a piece with the courage he showed as a scholar. Mike did not write for fame or for the accolades that turn some scholars' heads. Nor did he measure success by the prestige of his placements or the number of important lectures he was asked to give—though many excellent placements and prestigious speaking opportunities came his way. What Mike cherished was the chance to think hard about important questions and to share his reflections with others. What Mike sought to achieve in his scholarship was always aimed at shrinking the distance between law and justice, between reality and truth. His interest in labor and employment law was not accidental. In recent years, as the Supreme Court repeatedly has treated discrimination as if it were yesterday's problem, Mike insistently—and courageously—has reminded us that the truth is otherwise.<sup>15</sup>

Mike was the kind of scholar, I think, that Conor Cruise O'Brien had in mind when he described the “real, living university” as one characterized by “[r]espect for truth; intellectual courage in the pursuit of truth; [and] moral courage in the telling of truth.”<sup>16</sup>

Mike's scholarship enlightened and challenged us.

With generosity and optimism, enthusiasm and courage, Mike lived a life of love. He loved life. He loved his family. He loved his friends. He loved his students. He loved good food and wine and conversation. He loved his work. He loved learning. He loved teaching. He loved mentoring students and colleagues. He loved puzzling over things, finding answers, and trying to make the world a better place.

Wordsworth wrote:

Who is the happy Warrior? Who is he  
What every man in arms should wish to be?  
—It is the generous Spirit, who, when brought  
Among the tasks of real life, hath wrought  
Upon the plan that pleased his childish thought:  
Whose high endeavours are an inward light  
That makes the path before him always bright.<sup>17</sup>

Mike was a good man. His generous spirit brightened all our paths. We miss him. And we always will.

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15. See, e.g., Michael J. Zimmer, *Response: Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575, 604 (2003).

16. CONOR CRUISE O'BRIEN, MEMOIR: MY LIFE AND THEMES 297 (2000).

17. William Wordsworth, *The Character of the Happy Warrior*, in 41 THE HARVARD CLASSICS 656 (Charles W. Eliot ed., 1910).