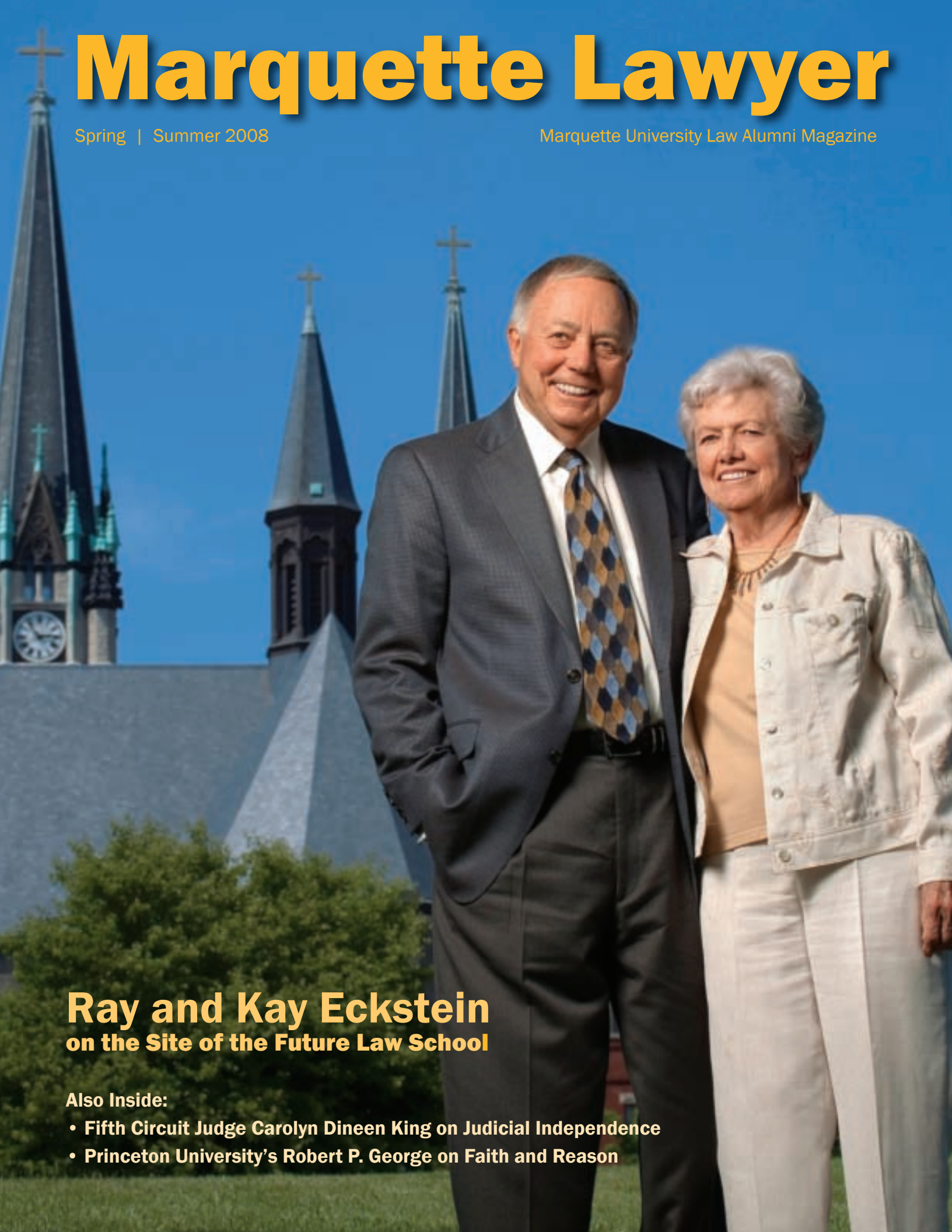


Marquette Lawyer

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Marquette University Law Alumni Magazine



Ray and Kay Eckstein on the Site of the Future Law School

Also Inside:

- Fifth Circuit Judge Carolyn Dineen King on Judicial Independence
- Princeton University's Robert P. George on Faith and Reason

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On the cover: Ray and Kay Eckstein, makers of an historic \$51 million gift, stand on the site of the future Marquette Law School, with Gesu Church in the background. Story starts on p. 4.

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Who Will Stand with the Ecksteins and Zilbers?

The gifts of \$51 million and \$30 million to Marquette University Law School within the past year do several things. They attest to the extraordinary generosity (and immensely successful careers) of Ray and Kay Eckstein and of Joe Zilber and his late wife, Vera. They honor the Marquette Law School of the past: Joe Zilber graduated in 1941 and Ray Eckstein in 1949. They reflect confidence in the future of the Law School and in the contributions that a great law school can make.

But perhaps more than anything, these gifts raise a question. There is no point in being indirect about it: *Who will stand with the Ecksteins and the Zilbers as we build a new Marquette University Law School?* We are doing this quite literally, in the form of Eckstein Hall, the majority of this project being funded by the Ecksteins' \$51 million commitment. We are doing it in a more metaphysical sense also, as facilitated in considerable part by the scholarship program endowed by the bulk of Joe Zilber's \$30 million commitment (the rest of the commitment going to the building). As extraordinary as these commitments are, they surely do not complete our campaign for the Law School.

This incomplete agenda is no surprise, not least because until now we have not formally announced the campaign and instead have been proceeding in a "leadership phase" before a formal announcement (this is sometimes also called a "quiet phase," but it has proved, well, hard to be quiet in these circumstances). This leadership phase has been gratifying even apart from the Eckstein and Zilber gifts. We have received several gifts that themselves exceed the largest single gift that the Law School had ever previously received, beginning with the \$1 million commitment last spring from the Bradley Foundation, which got us going.



While some of these gifts have been the result of requests that we have made, others have been unsolicited. This is very much along the lines of our lead donors' intent. In the lead article that follows this column, for example, you will read Ray Eckstein's remark that his and Kay's intent has been to inspire others to see clearly the Law School's potential and to help Marquette University do more.

In these circumstances, I want urgently to express to every alumnus and friend of the Law School that your financial support will be critical to our success. With respect to the building, although we are nearing a point where we hope to break ground, the project will require another \$20 million. We look to alumni and friends to support other aspects of the program as well—in particular for annual-fund donations to support the teaching, scholarship, and service mission of Marquette Law School.

For make no mistake about it: every donation to the Law School helps us to advance. As significant as tuition revenue is, there are aspects of the Law School program that we must fund otherwise. This includes direct instruction, where we have supported some faculty lines through the combination of generous individual annual-fund donations by hundreds of alumni. The same is true with respect to our burgeoning public-service and public-policy efforts, where we are increasingly connected to the community and the region that we primarily serve, as anyone familiar with the Law School could attest. Simply stated, our advances of the past decade-plus—but particularly those of the past several years—are real and are attributable in considerable part to increased financial support.

Against this backdrop, I hope that all alumni and friends of Marquette University Law School—that all concerned with Marquette University's mission of Excellence, Faith, Leadership, and Service—will step forward and join the Ecksteins, the Zilbers, and the 40 or so others who by late this past year had enabled us to climb near an historic summit. My wife, Anne, and I have joined this group, as have several of my faculty colleagues. Others are joining as well, for they see the remarkable partnership between the Law School and the larger University that has occurred under the leadership of Rev. Robert A. Wild, S.J., President. I hope that the Law School's history and its vision for the future will inspire you to stand with us as well.

J.D.K.

Marquette Transporters: Ray and Kay Eckstein

The Roots of an Historic Gift

BY BRIGID O'BRIEN MILLER



Y

ou might expect a man such as Raymond Eckstein to have a lot to say about the extraordinary success that he has achieved after more than four decades doing business on the Mississippi River. But after making a \$51 million gift, one of the largest in history to an American law school and the largest individual gift ever to any university in the state of Wisconsin, he is still remarkably humble, a man who would rather live his values

than spend a lot of time talking about them.

Catholic education provides a foundation

Ray Eckstein knows discipline. He says that it started early on, with the Catholic education he received during his early years in Cassville, Wis. (pop. today ca. 1,100).

In 1939, he went to Campion High School in Prairie du Chien, Wis., a Jesuit boarding school. "I got an excellent education, but they were tough," Eckstein recalls. "The Jesuits had a stern hand."



Ray and Kay Eckstein, flanked by Dean Joseph D. Kearney and Rev. Robert A. Wild, S.J., President, stand on the site of the future Eckstein Hall, just south of Gesu Church and the current Law School.

At about the same time in Chicago, Kathryn Henderick was also experiencing the rigors and joys of a Catholic education provided by the Benedictine sisters at St. Scholastica High School.

Both would credit these formative years with the life they would end up leading together, but neither would have predicted exactly what shape that life would take.

Relishing the college years

Ray enjoyed a high school basketball career good enough to get him noticed. In 1943, he left to attend Marquette University on a basketball scholarship. It was his transition from small-town boy to city life, and he was forced to play, quite literally, with the big men.

“I’m about 6 feet and that was pretty tall, but I had the honor of playing against the ‘first of the big boys’—George Mikan, towering above us at almost 7 feet, who was playing for DePaul at the time. I

enjoyed two years on the team and realized I better turn my attention to my studies,” remembers Ray.

Eckstein started out in medical school, and it was after an anatomy exam in 1945 that he would have a chance encounter he would not soon forget.

“I was with a buddy of mine, having a few beers at the Ardmore after the test, when I saw two nice-looking coeds eating dinner. I told my friend, ‘I saw them first, and I get the one on the right!’”

Ray was fortunate that Kay Henderick returned his interest, and the courtship began. The couple remembers their time in Milwaukee fondly. Ray recalls, “We just loved our years at Marquette. I’ve always told my children and grandchildren, the college days are the best days you’re going to have.”

In 1948, Ray and Kay were married. Sixty years, eight children, and 28 grandchildren later, their partnership flourishes.

Building a career

Eckstein realized while at Marquette that law school was a better fit for him. He graduated from Marquette University Law School in 1949, while Kay earned her bachelor's degree in speech the same year. His first job at a Milwaukee insurance agency as a claims adjuster carried some perks. "For the first time in my life, I had a car. I remember thinking it couldn't get much better than this," he recalls.

Ray tried to set up a law practice in Milwaukee but fell short of the connections needed to thrive in the big city. With Kay expecting their first child, the couple returned to his native Cassville in December 1949, and Ray became a sort of "traveling attorney."

"The Mississippi River cut you off geographically," he says. "There wasn't a lot of legal business in any one small town, so you just traveled to all the various towns to piece it together."

An entrepreneurial vision

It wasn't long before Ray saw an opportunity that would take him in a new direction.

A power and light company was building a plant nearby, and it planned to bring on 50 permanent employees and scores of temporary workers. Knowing that these transplants would need places to live, Ray purchased land, subdivided it, and constructed homes on the plots. He sold them as well.

"In order to get the village to agree to put in the utilities, I had to guarantee the tenants, so I

"Our intention is for our gift to motivate others to get on board. The Law School cannot accomplish greatness unless a lot of folks pitch in. Hopefully they'll see the building project is a reality and want to get involved."

— Ray Eckstein

just took it on myself—both constructing the homes and then filling them," he explains.

It was the Mississippi River that would play host to a second opportunity—one that would change the course of Ray Eckstein's life.

The same power and light company was bringing in hundreds of barge loads of coal on the river, but the process of unloading them, in Cassville and other towns, was inefficient.

Ray's cousin convinced him to buy a small switch boat that could be used to speed up the process, and Ray found that he could charter other boats from larger companies.

In 1961, he founded Wisconsin Barge Lines. With a small fleet of tugboats and barges, the company carried commodities from port to port along the Mississippi River. After selling his first company, Eckstein formed a new company in 1978, naming it Marquette Transportation after his alma mater and the French Jesuit priest who had explored the Mississippi River with Louis Joliet. He continues to serve as a member of the board of the business, which is now headquartered in Paducah, Kentucky. The company's 38 tugboats and nearly 600 dry cargo barges serve some of the world's largest suppliers of food and commodities.

Legal education critical

Ray Eckstein is a quintessential entrepreneur. He sees opportunity and, with subtle confidence and steady discipline, turns an idea into a solution.

For all his humility, he says it's quite simple. "A lot of people have the ability, but they are afraid to take the risk," he says. "They don't have the

confidence to take on the debt, or they are more comfortable letting someone else do it. A real entrepreneur knows he won't fail, and I guess that's what distinguishes him or her."

Ray says his legal training was invaluable to his eventual business success. For decades the company never used an outside attorney. "When we started in 1958, we didn't have a lot of capital to work with, so it took a lot of hard work—24 hours a day. I was the attorney, worked the contracts, and handled the insurance claims. I just did whatever was needed to keep it going."

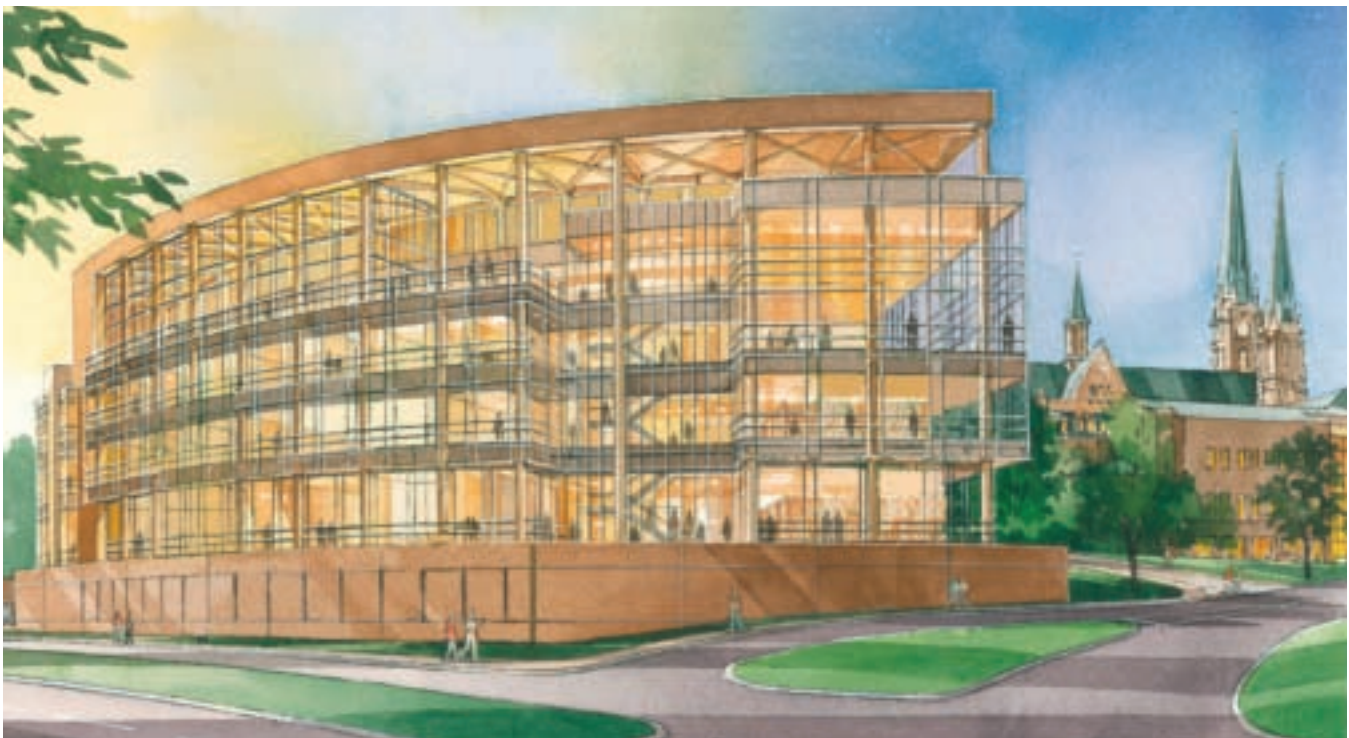
A vision for a lasting contribution

Business was kind to the Ecksteins. In 2005, the couple established the Ray and Kay Eckstein Charitable Trust to build on the philanthropic work they had already started, with a focus particularly on Catholic institutions. With his Cassville-bred humility intact, Ray Eckstein is typical in his understatement: "We just wanted to be able to do some good after we're gone."

It was a conversation with their granddaughter Kelly Erickson that got them thinking more seriously about a gift to Marquette Law School.

A 2006 Marquette Law School graduate, Kelly was honest when she told her grandparents that the law library could use an update. Ray and Kay began talking further with Marquette President Robert A. Wild, S.J., Dean Joseph D. Kearney, and others about what a new facility could really mean for the future of legal education at Marquette. Kay Eckstein says their granddaughter's recent experiences in the Law School had another effect as well: "We saw once again the caring, challenging environment that Marquette continues to offer its students."

Father Wild and Dean Kearney explained their vision that the Law School must continue to provide rigorous legal education for the men and women who will become leaders—both in their professions and in their communities—but that it also should become a place for public discourse,



Artist's rendering of Ray and Kay Eckstein Hall, as viewed from the Marquette interchange.

a place that serves the city and the larger region as an intellectual crossroads.

“We truly wish to provide a crossroads or commons for the region,” says Kearney. “The fact that we planned for our new building to overlook Wisconsin’s primary crossroads—the Marquette interchange—is a coincidence, but a happy and perhaps symbolic one.”

Ray and Kay Eckstein were excited by the University and Law School’s vision. They called Father Wild in spring 2007—on his birthday, no

less. Ray reported that he and Kay wanted to make a transformative gift of \$51 million to Marquette Law School to support the construction of the new building, including the new library to be housed within it.

Ray hopes that the new building will help recruit and retain a “great team of faculty and the brightest students.” He says, “I think Marquette can be on par with the big law schools out East. I really do.”

The Ecksteins are anxious to see groundbreaking on the new building. “Our intention is for our gift

President’s Dinner Honoring Ray and Kay Eckstein, June 14, 2007

TOAST OF DEAN JOSEPH D. KEARNEY

Father Wild’s assistant called me late last week and suggested that Father Wild should do the invocation at dinner this evening and that I should do the toast beforehand. It is almost always a good idea to accede to the suggestion of the president’s assistant, but it is especially so when the president is a priest and when you, as dean, are scarcely trained to do the invocation. Of course, this left the matter of precisely what to say in the toast, but I appreciated the confidence of the president’s office in offering me no further guidance. For, after all, have I not made previous remarks as dean?

Nonetheless, the pressure was significant. For a toast must do several things. It must unify—it must bring everyone together at some essential level. It must uplift and inspire—it must speak, not to the mundane, but to the transcendent. We can agree as well that a toast must be brief. And beyond these various general requirements, there is another, imposed upon me personally last month by Father Wild at the Père Marquette Dinner, when he registered dismay (mock or other, I do not know) that, rather unusually, my comments that evening included no Latin. I was saved by one of my colleagues on that occasion, but Father Wild implied that never again should I speak formally in front of him without using, as he termed it, “the mother tongue of the educated class.”

Unifying, uplifting and inspiring, brief, and in Latin. I was at a loss. I considered what unified us. I thought that perhaps it might be Chicago. I trotted that out last night at dinner with Kay, a Chicagoan, pointing out that four of us this evening (the president, Kay, my wife Anne, and I) are all Chicagoans. My hopes were dashed when the response came from Ray, who noted that Kay, a north sider, always said, “The south side of Chicago was another world.” So that gambit was unavailing, even apart from the fact that we are in Wisconsin.

Of course, on the briefest reflection, it was clear that what unifies us is Marquette University (and its law school in particular). But where is the uplift, the inspiration, let alone the Latin, in a toast that says, “To Marquette University”? And then, as I walked along a downtown street after dinner last night, the matter became clear. It was before me, as plain as the seal of this great University. The only additional context that I shall provide is that, on this floor of the Alumni Memorial Union, two years ago, I told the trustees that our law school ranked fifteenth out of fifteen

to motivate others to get on board,” says Ray. “The Law School cannot accomplish greatness unless a lot of folks pitch in. Hopefully they’ll see the building project is a reality and want to get involved.”

For now, Ray and Kay are enjoying time to reflect on a life of hard work and relishing their ability to “return some of what the Lord has given us.” As Ray is apt to put it simply, “I’ll tell you this: I’m having as much fun giving it away as I did making it.” •

For more information about the effort to build Eckstein Hall and more broadly to reposition the Law School, contact John Novotny, Director of Development for the Law School (414.288.5285 or john.novotny@marquette.edu), or visit <http://law.marquette.edu/building>.

in terms of space among law schools whose names begin with the letter *M*. I had been forewarned that, whatever I did that day, I must not touch upon the entire then-unresolved nickname matter, *Golden Eagles* vs. *Warriors*. Yet I could not resist when one board member asked me, “How many letters of the alphabet did you have to go through before you settled on the letter *M*?” I responded, “Suffice it to say that we went with the name of the University, rather than the nickname, so that there would be no ambiguity about which letter of the alphabet we should use.”

I found the whole nickname matter distracting at best, particularly since, as I asserted to one of this evening’s guests (Julie Tolan, the Vice President for Advancement) at a Christmas party also in these quarters two and a half years ago, if the University should change anything, it should be its motto. “I mean,” I said, “*Numen Flumenque*—God and the river. What could that mean?” I appreciate that it was Father Marquette who explored the Mississippi River, but what did that have to do with Marquette University today?

I was not wrong. It had little to do with Marquette then. But I failed to appreciate that the motto was not so much a comment on Marquette University of the past or even that day as an augury of its future. Who knew that Ray and Kay Eckstein, the beneficiaries of Catholic, Jesuit education and the doers of remarkable things along the Mississippi River, were in the wings, waiting to unfold for us one of the largest gifts ever to an American law school, the most extraordinary act of largesse in the history of this University, an undertaking that will transform this University? And so it became clear to me last night, what the toast should be. It should unify, uplift and inspire, in Latin, and be brief. And so it is two words: “*Numen Flumenque*.” God and the river. Thank you to Ray and Kay Eckstein, to Father Marquette, and to the river. •



Seal of Marquette University in Sensenbrenner Hall

Joe Zilber— Another Historic Gift



he previous pages relate the story of Ray and Kay Eckstein and their extraordinary commitment to support the construction of a new law school facility. A little more than three months after their announcement, Joseph J. Zilber, L'41, announced his own historic gift to the Law School. Specifically, on August 21, 2007, at an event on the site of the future law school, Mr. Zilber announced a philanthropic program that he called "New Potential for Milwaukee."

The primary part of Mr. Zilber's initiative is a \$30 million gift to Marquette University Law School. Five-sixths of the funds will be used for a massive expansion of the Zilber Scholars program, which has provided scholarship funds to law students for the past several decades. The remaining \$5 million will support the construction of the new building and, in particular, the effort of the Law School to serve as the center for discussion, debate, and, in instances, resolution of public policy issues affecting Milwaukee, the region, and places beyond.

We reproduce here Mr. Zilber's remarks, together with those of the president, Rev. Robert A. Wild, S.J., in introducing him, and the dean, Joseph D. Kearney, in response.

Introductory Remarks of Rev. Robert A. Wild, S.J., President of Marquette University

Welcome. It is especially appropriate that among our guests today to share this auspicious announcement are many of our first-year law students, who are in their second day of orientation. I am sure that Dean Kearney, the entire faculty and staff of the Law School, and your orientation leaders are working hard to make you feel welcome here at Marquette. I add my own good wishes for your success as you embark on your extraordinary journey—a challenging and rigorous time, admittedly, but one I expect you will find both intellectually and personally satisfying.



I also want to thank some of our community leaders for joining us today: our own alderman, Bob Baumann; our common council president, Willie Hines; state senator, Jeff Plale; our county executive, Scott Walker; the commissioner in charge of city development, Rocky Marcoux; and our mayor, Tom Barrett. This is definitely a community event as well as a Marquette event.

We are here today to talk about our city and the important role that higher education and our Law School play in this place we call home. Study after study emphasizes the importance of education—in creating opportunity, in spurring economic development, in addressing social issues, in helping to make a difference in our world.

Marquette University and our Law School fulfill those expectations for higher education—for our students as individuals, for our community, for our nation. Last fall and again this fall, for example, about a quarter of our freshman undergraduate class is composed of first-generation college students. In application after application, our admission officers

read stories of family sacrifice and commitment to make higher education a possibility for these promising students, because they understand that with a Marquette degree they could fulfill their dreams. I fully anticipate that some of these students will go on to law school, if that proves financially possible. Others will become entrepreneurs. Some will enter the Jesuit Volunteer Corps, the AmeriCorps, the Peace Corps, or some other service organization and so find a way to give back immediately to our larger human family. Really, that's the expectation we have for all of our graduates—that they find some way to make the world a better place by what they accomplish in their personal and professional lives.

Seated here with me on stage today is an exemplar of that sense of mission. Joe Zilber graduated from Marquette's Law School in 1941, after doing his undergraduate studies here in business administration. The son of Russian immigrants, Joe worked several jobs to put himself through Marquette and, thereafter, went into real estate and real estate development, where he achieved extraordinary success. At the same time he quietly made



Father Wild introduces Joe Zilber as Dean Kearney and others look on.

sure that others shared in that success. For example, for the past 30 years he has been helping Marquette students make ends meet through the Zilber Scholars program he established in the Law School. In fact, several of the orientation leaders present today are the beneficiaries of Mr. Zilber's generosity.

For his entire career, Joe Zilber has worked to make Milwaukee a better place—building homes, creating jobs, fostering economic development. Although his business operations have extended to seven other states, his corporate headquarters—and his heart—remain here in Milwaukee.

From the time I first met Joe, he has shared with me stories of his days at Marquette, most importantly meeting his beloved wife Vera here. Although he never was a practicing lawyer, Joe values the legal education he received at Marquette. He says that his classes taught him how to think and his legal background helped him immensely in business.

I am proud and grateful that Joe continues to see Marquette University so closely tied to the future success of our city. And now I will let him tell you more about his vision for Milwaukee's future.

Remarks of Joseph J. Zilber, L'41: New Potential for Milwaukee

For almost 90 years, I have been proud to call Milwaukee home. When I was a young boy growing up in the 2100 block of North 9th Street, Milwaukee was a booming industrial city. The giants of industry were running the machines that were helping America grow, 24 hours a day.

During my formative years, the strength of that industrial base grew many times over. When I came back from service after World War II, opportunity existed everywhere I looked. I was fortunate to take advantage of one of those opportunities and began building homes for returning GI's. Milwaukee was at the height of its expansion period. In the years that followed, competitive forces in America and later the impact of the global economy changed our city. We lost our industrial strength. In many respects, we fell behind other cities. We lost our way.

Today prospects for our city's future are brightening. Today there is more than a glimmer of hope. Each new development in the downtown area, like our Pabst project, is bringing people back as they realize the impact that new growth, opportunity, and innovation are having on young and old. We are finding renewed appreciation for the great natural resources we have in Lake Michigan and the Milwaukee River. Our city is reaching out, trying to find its new potential. We are no longer the city we once were. Today we need to look forward and concentrate on the city we can be. We need more. We need more jobs. We need more funding and a broader commitment to improving the quality of the education of our young men and women. We need to stop the brain drain caused when our best students go elsewhere in pursuit of financial and personal success.

We need to improve the commitment to efficiency at all levels of government and bipartisan public policy. We need an approach that is committed to getting things done, instead of one that points fingers. Our new potential rests in our basic core values. The strength of our ethnic heritage must converge for one purpose—to make life in Milwaukee better, richer, fuller. Our government, and those who work for it, must be efficient and responsive. That's their job. Most important of all, we need to make a singular commitment to our city. We must not be afraid to take on the difficult challenge of fixing what is wrong, including funding and improving our educational system, providing adequate health care services to all, investing in expanding the jobs that are here, and bringing new jobs to our community. We must be willing to stand up for Milwaukee and its neighbors and say we can and we will do better. Our citizens deserve no less.

I was recently blessed with two great-grandchildren. My sincere hope is that when they become young adults, they will look upon a Milwaukee that pushes the boundaries of its potential, a city that offers good paying jobs for its citizens, in a full and rich cultural mosaic. I hope they will see a city committed to enhancing its youth with great educational programs, one that respects and meets the needs of its poorest, the oldest, and the least fortunate among its citizens. It is time for us to rebuild Milwaukee.

In the time I have left, with all the energy and resources that I possess I will do what I can.

My parents came here with a dream. For me, their dream came true. What will the potential be for my new great-grandsons? When they come to see the town of my birth ten years from now, will they see that Milwaukee has achieved its new potential? I hope so—I truly hope so.

Toward that end, I have begun to make financial commitments designed to help achieve the goals that I have just outlined. The city of Milwaukee has been very good to me, my company, and my employees. These commitments are my attempt to return to the community of my birth the investment that it made in me. Our city is at a critical juncture in its history. I'm trying to do what I can to make sure that we move forward on the path to success. Each of us in our own way and with our own resources, large or small, can make a difference. Today I am announcing an initial commitment of \$50 million to charities, organizations, and institutions in our city that I believe can lead us on the path to achieving a new potential for Milwaukee. These groups can have a huge impact on the health, social, and educational well-being of our community.

I am here at my alma mater, Marquette University, to announce a \$30 million gift to the Law School, to be used to endow a permanent scholarship fund and to establish within the Law School a forum for debate on pressing public policy issues that require the immediate attention of our elected and appointed officials at every level.

The gift is part of my commitment to Marquette and to the city of Milwaukee. I will be making other announcements in the next few weeks. My goal is to stimulate other actions, both personal and monetary, large and small, to push our great city to reach its new potential. Today's gift to my alma mater is a great start to that new potential.

Finally, to you first-year law students, thank you for being here today. May you have the same success I have had. Remember, in all these years, I have never lost a case.

Of course, I've never argued one either! Thank you.



Remarks of Dean Joseph D. Kearney

Joe, this is an extraordinary gift, and Father Wild has asked me to say some words in gratitude. I am pleased to do so, especially here, on the site of the new law school.

Joe Zilber, the son of immigrants, is a Marquette lawyer and a Milwaukee legend. He became the former when he graduated as a member of our Class of 1941. He has become the latter over the decades since, particularly as he has built Towne Realty and other Zilber companies into national leaders in residential and commercial real estate.

Joe Zilber would have been entitled during this, his 90th year, to focus on the past, on a job well done. But that is not his style. Still today (and maybe even literally today), Joe engages in hours-long conference calls and meetings concerning his businesses. I know this from

my conversations with Jerry Stein, Marquette Law School Class of 1962, and Jim Janz, Marquette Law School Class of 1964 and Marquette University Trustee, who have worked with Joe for, combined, just under 90 years.

This brings me, then, to Marquette University Law School—Milwaukee's law school. Our name, in fact, was Milwaukee Law School before we had the great good fortune of being adopted in 1908 by Marquette University. In our early days as a law school, we were the place to which all of Milwaukee would come for legal education. Over the years, our reach and our ambitions have grown still further. But throughout, we have never lost sight of our mission of preparing skilled and ethical lawyers to counsel and advocate for clients or, as Milwaukee's native son Joe Zilber exemplifies, to take their legal education with them into the world of commerce and contribute to the betterment of others' lives in that way.

It is to help us support our future students that Mr. Zilber has directed the bulk of his remarkable \$30 million gift. Joe, we are deeply humbled by your investment in the future of our community.

We are inspired as well to be Milwaukee's law school in a larger sense today than in the past. I refer to our developing effort to serve as a—no, *the*—intellectual commons for this region. We seek for Marquette Law School to be the place where students, lawyers, business leaders, judges, academics, policymakers—all engaged citizens, really—come to explore and discuss public policy problems and find, perhaps, some common ground and even some solutions. We want people to say about the Law School, "That's where you take the hard problems, the ones that affect us all."

Joe Zilber's gift directly advances this goal. Eckstein Hall, our planned new building on this site, in its exterior aspect, will be noble, bold, harmonious, dramatic, confident, slightly willful, and, in a word, great. The public knows this already from the rendering that was published in May. Today I can tell you that the interior of the building will be just as extraordinary. It will inspire and convey a sense of community, for both inhabitants and visitors. Its dominant interior feature will be the Zilber Forum, a gathering and meeting space which will be the heart of the building. All aspects of the program will revolve around the Zilber Forum—research, teaching, dining, conferencing—all of the vibrant life that defines a great law school. With Father Wild's support, we are on the cusp of constructing the best law school building

in the country—*the best law school building in the country*. That, not coincidentally, is the standard that Trustee Jim Janz suggested to us before a single sketch was drawn.

Let me note in closing how fitting it is that this building will rise here, on Tory Hill, which many immigrants in decades past called home and from which they sent forth their children. How fitting then that Joe Zilber should play a key role in helping the new Marquette Law School rise on this site. Father Wild and I have both mentioned that he is the child of immigrants. It was thus perhaps not merely fortuitous but providential that, in the computer rendering of the proposed Zilber Forum which we showed Joe a few weeks ago, the architect had placed on a screen in the forum an image of the Statue of Liberty. It has a universal appeal, the architect reasoned. That is true, but he had no idea that it would particularly appeal to Joe Zilber, whom

he did not know. The episode reminded me of the phrase in Emma Lazarus's poem, not the lines inscribed on the Statue of Liberty about the huddled masses, but a phrase preceding those lines, referring to the United States as the "mother of exiles." It is the rule of law in America that has particularly helped make us a destination for immigrants, and by helping to promote it over the decades and by educating the children and grandchildren of immigrants, Marquette Law School is, like many of our sister schools, *America's* law school. But how fortunate for us that Joe Zilber's parents selected *Milwaukee* as their new home; that Joe Zilber selected Marquette University and its law school for his education; and that he has forgotten neither his parents nor his alma mater nor the community to which they belong.

Joe, on behalf of all of us at Marquette University and, indeed, if I may, all Milwaukee, thank you. •



Thank you.

Paulina Jasso is the Community Coordinator for MPD District 2, Milwaukee Safe Streets Initiative, Marquette University Law School. Her office, courtesy of the Lincoln Village Business Association, is located in District 2 at 12th Street and Lincoln Avenue.



Responding to Crime In a Different Way

Marquette's Restorative Justice Initiative

BY SONYA BICE



he modern concept of restorative justice, seen by some of its advocates as a more effective and humane approach to crime and conflict than the predominant U.S. norms, has been experimented with in various contexts both in

the United States and abroad for about 30 years. Courses in the theory and practice of restorative justice—applications of which are also known as victim-offender reconciliation programs (VORP) and victim-offender mediation (VOM)—can be found at law schools around the country.

Marquette Law School, however, is the only law school to have created a comprehensive program dedicated to the study and application of restorative justice principles. Under the leadership of former Wisconsin Supreme Court Justice Janine Geske, Distinguished Professor of Law, Marquette's Restorative Justice Initiative offers students courses and clinical experiences, serves as a clearinghouse on restorative justice scholarship and research, and collaborates with leaders in the movement, including Dr. Mark Umbreit, executive director of the Center for Restorative Justice & Peacemaking based at the University of Minnesota.

Restorative justice proponents reject reliance on only the retributive justice model—what Geske has called the “trail ’em, nail ’em, jail ’em” approach—and seek instead in appropriate circumstances to shift the focus from the offender to the victim, from the offense committed to the harm done. Restorative justice practices, which are rooted in many indigenous cultures and in varied religious traditions, have applications in a wide spectrum of conflicts, in elementary school classrooms, in criminal courts, and in lands torn by civil war.

The starkest contrast between the two models can be seen in the choice facing Ugandans, who have for decades suffered grotesque brutality at the hands of a rebel group. The country is divided on the way to hold the four rebel leaders accountable for war crimes. The International Criminal Court in The Hague has issued indictments, but the rebels want to participate in a tribal reconciliation ritual. In the ritual, called a *mataput*, the offender faces the person he has wronged, admits responsibility for the harm, and

shares a meal with the victim's family. Exhausted by endless violence, many of those who have suffered the most have said they would prefer the tribal reconciliation process.¹

The application of restorative justice practices in the U.S. criminal justice system, which Geske says was once viewed as “a wacky idea,” has now gained respect in legal and academic circles, bolstered by reams of empirical research showing high rates of satisfaction among participating victims. There is also some evidence of lowered recidivism rates for participating offenders.²

“Restorative justice is a movement that is truly developing all over the world, and Marquette Law School is now playing a leadership role in it,” Umbreit says. “This is a very bold step for the Law School to take.”

“We do have the most vibrant program in the country,” Geske notes. “I get calls constantly from law schools around the country. We have students choosing to come here because of the program.”

The establishment of the Restorative Justice Initiative at Marquette comes at a crucial juncture for the movement. In recent years some of its practices have gained mainstream acceptance: the ABA endorsed VOM in 1994,³ and in 2000 Wisconsin became one of the first states to implement formal restorative justice practices in juvenile justice and criminal justice systems.

The work of Marquette Law School's Restorative Justice Initiative gained momentum with the recent award from the federal government of an almost \$400,000 grant to develop an antigang pilot program, to be implemented in police districts on the near north side and the south side of Milwaukee. The program incorporates restorative justice principles to fight the destruction of neighborhoods by gang activity. The grant is part of a larger federal antigang effort being implemented in more than 100 cities across the country. Leading the Law School's work on the grant, Geske hired Paulina Jasso and Ron Johnson to work as coordinators in Police Districts 2 and 5, respectively; their role is to coordinate and focus resources in the two communities. They will also convene restorative justice circles to bring together community members, former gang members, police officers, and prosecutors to increase understanding of ways gang activity deeply harms the community.

“I guess it’s my dream to energize neighborhoods, to take back neighborhoods,” Geske says. She finds inspiration in the successes of programs such as the Red Hook Community Court in Brooklyn, New York, an experimental court housed in a center offering an array of community services, which has won accolades for innovative practices. Judge Alex Calabrese of the Red Hook Community Court was the keynote speaker at the Restorative Justice Initiative’s annual conference in November.

But even as they seek a bigger role for restorative justice programs, some advocates fear that being embraced by the justice system could be the kiss of death.

“On the one hand, recognition by and active collaboration with the formal justice system is vital to implementing the underlying vision of restorative justice,” Umbreit has written in the *Marquette Law Review*. “On the other, such widespread growth . . . has made the movement increasingly vulnerable to being co-opted by the very justice systems that were initially so critical of its existence.”⁴

Umbreit has posed several questions about the movement’s future: Is restorative justice in fact about developing an entirely new paradigm of how American criminal justice operates at a systemic level, or is it a set of processes, specific principles, and practices that can operate within conventional criminal justice systems? Will restorative justice be marginalized through being required to deal with only the most minor types of criminal and delinquent offenses, many of which would self-correct on their own?

Geske and restorative justice

Geske was drawn to restorative justice’s focus on truly understanding and repairing harm, a far cry from what she saw in the day-to-day operation of the state criminal justice system. “While sitting in criminal court for nine years,” she has written, “I experienced both the successes of our criminal justice system as well as its failures in bringing restoration to victims and communities harmed by crime.”⁵ She calls restorative justice’s victim-centered approach “a means to address those failures through the

Theory meets

Restorative justice applications that involve Marquette law students and alumni take place in many settings inside and outside of the criminal justice system, from bright elementary school classrooms to the bleak confines of Green Bay’s overcrowded maximum security prison—even to war-weary countries on the other side of the world.

Schools

Christine Agaiby, L’05, is the restorative justice manager for Alternatives, Inc., where she oversees the peer jury programs in 27 public high schools in Chicago. In the programs, a student who admits to a violation of the school district’s Student Code of Conduct is given the opportunity to go before a peer jury. “When they come into the circle, they often take on an attitude that there’s nothing wrong with what they did,” Agaiby explains. “For example, they’ll say there’s nothing wrong with using bad language in class. And the jurors, who are their peers, talk to them: ‘Think about the reasons why using bad language is wrong. Could you speak like that at home? How do you think the teacher feels when you use those words in class, and what kinds of safety issues do you create when those words are thrown around?’ The jurors can’t move on until the student accepts accountability for his or her actions. And they put together an agreement that gets the student back involved in the community of the school, and they relate that agreement to the offense.”

Students who don’t choose the peer jury route face a standard suspension.

“What the disciplinarian would do would be a very punitive model,” Agaiby says. “In the restorative model, we address the specific offense or crime and also bring in the victim so that the victim feels restored.”

Agaiby attended the restorative justice program at the Green Bay Correctional Institution while a law student at Marquette. “That was my first observation

practice



“In the restorative model, we address the specific offense or crime and also bring in the victim so that the victim feels restored.”

— Christine Agaiby, L’05

of real restorative justice practices, and those three days were the best thing I did in law school,” she says. “It was so amazing. It changed my life. I still think very often about those prisoners and that whole experience.”

Prisons

In Green Bay, at the maximum security state prison which houses more than 1,000 offenders, Professor Janine Geske brings prisoners face to face with crime victims to hear firsthand the life-shattering consequences of violent crime. It is a part of the prison’s Challenges and Possibilities Program, an intensive 20-hour course available to small groups of prisoners.

Where victims request it, direct mediation between offender and victim can be arranged, but more often the dialogues involve “surrogate victims” who have experienced harrowing losses—children killed by drunk drivers, spouses and parents killed in senseless violent crimes. The powerful and moving conversations, Geske says, result in a measure of healing for both victims and offenders that is all but impossible to find in the conventional system. “The key to healing is, first, to truly understand the harm,” Geske says. “And it’s not because the offenders are going to get out any earlier as a result—they aren’t.”

Global hot spots

Erika Jacobs, L’06, traveled to South Africa while a law student to see how restorative justice principles apply in human conflicts where the scale of the individual harms is almost beyond comprehension.

“I took field notes as staff members met with ex-combatants who were seeking resolution from the struggle, either between members of their own liberation party or with the South African government,” she says. “I was able to sit in on healing circles between ex-combatants as they told stories of torture and betrayal by fellow combatants.”

Jacobs interned at the Centre for the Study of Violence and Reconciliation in South Africa. The Restorative Justice Mediation Project for Human Rights Violations helps survivors and their former enemies begin to heal the deep wounds of South Africa’s apartheid era. The organization employs psychologists, lawyers, criminologists, and sociologists, and it operates a trauma clinic, where counseling is available to victims and perpetrators of violence. The Centre for the Study of Violence and Reconciliation is a nongovernmental entity; the South African government’s own approach to healing the nation, the Truth and Reconciliation Commission, is viewed, Jacobs says, with mixed emotions by South Africans. “Many people who fought in the struggle did not trust the Truth and Reconciliation Commission to solve or heal all the wounds and problems that surrounded the struggle. People believed the Truth and Reconciliation Commission helped the country as a whole in avoiding a major conflict after the fall of apartheid but looked to more localized organizations to help resolve conflicts on a more personal level.” •

guidance of professionals who understand how best to address the needs of those who have been harmed.”⁶

After years on the bench where she saw the worst people could do to each other, Geske brings a capacity for deep compassion and intense spirituality to her work with shattered victims and with offenders who have committed reprehensible acts. Occasionally she facilitates face-to-face meetings between a violent offender and a victim of that offender’s crime; one such meeting, between a Wisconsin woman whose brother was gunned down and the man who, as a teenager, had pulled the trigger, was featured in an edition of *Dateline NBC*.⁷

Geske tells moving stories of the forgiveness and psychological healing she has witnessed in the Green Bay Correctional Institution’s Challenges and Possibilities Program, where participating prisoners meet with family members of victims of violent crime and come to a new understanding of the profound suffering their crimes caused.

“Many people believe restorative justice has a deep spiritual component,” she says. “There is definitely something special that happens in these meetings.”

Defining restorative justice

Howard Zehr, one of the movement’s early leaders and the author of a key text in restorative justice theory,⁸ defined restorative justice as a fundamentally different view of justice. Where the conventional U.S. criminal justice system asks questions related to the offender (What law has been broken? Who did it? What does he or she deserve?), the restorative justice approach asks questions related to the victim (Who has been hurt? What are his or her needs? Whose obligations are these?). While restorative justice does not reject traditional punishment such as incarceration per se, many advocates would give it a much more limited role, typically as a last resort when restorative justice approaches have failed.

Geske defines restorative justice as “a victim-centered approach to holding offenders accountable for the harm they have caused.” That definition provides the elements of the restorative process: a victim, an offender, accountability, and reparations.

Three common types of restorative justice dialogue occur in response to a specific offense:

- victim-offender mediation, entailing direct mediation between victim and offender, guided by a professional mediator;
- group conferencing, which involves the victim and offender as well as additional community members;
- circles (also called peacemaking circles, repair of harm circles, and sentencing circles), which can include the wider community and involve a process using a “talking piece” (this signifies that the person holding the piece is the only one permitted to speak).

All three practices, as applied in a criminal justice setting, are used in the subset of cases where an offender has been apprehended, has admitted causing the harm, and has taken responsibility for the actions—and the victim chooses to try the restorative justice approach instead of, or in addition to, the conventional approach.⁹

Offenders benefit, restorative justice proponents say, from being forced to deal directly with the person who has been harmed; victims benefit from being permitted to talk directly with the offender; and the system benefits both from lowered caseloads and from lowered recidivism rates.

A differing view

Advocates of restorative justice are candid about some of the unintended negative consequences of poorly executed programs and are concerned that, as the movement moves into the mainstream, it risks losing its philosophical bearings. But to some critics of restorative justice, the movement’s philosophical underpinnings are what is problematic.

In *Compulsory Compassion: A Critique of Restorative Justice*, Annalise Acorn, a law professor at the University of Alberta, regards it as necessary to “deconstruc[t] the rhetoric” of restorative justice, and to take issue with what her book characterizes as restorative justice’s fundamental assumptions: “that we can trust wrongdoers’ performances of contrition; that healing lies in a respectful, face-to-face encounter between victim and offender; and that the restorative idea of right-relation

Ronald Johnson is the Community Coordinator for MPD District 5, Milwaukee Safe Streets Initiative, Marquette University Law School. His office is located in *Coffee Makes You Black*, a Milwaukee restaurant at 28th Street and Teutonia Avenue.



holds the key to a reconciliation of justice and accountability on the one hand, with love and compassion on the other.”¹⁰

Another critic cautions that restorative justice principles about community involvement become harder to implement as the community is harder to define: “[C]ommunity’ is a very dangerous concept. It sometimes means very little, or nothing very coherent, and sometimes means so many things as to become useless in legal or social discourse.”¹¹

At risk of being a victim of its own success

As committed as she is to the underlying principles of restorative justice, Geske remains wary of the potential for restorative justice principles to be implemented in piecemeal fashion; in the process, she fears, its distinctive focus on victim needs and accountability to the community will be sacrificed. “A lot of people have latched onto it as

another name for rehabilitation, and in some programs, the victim and community are being washed out,” she says.

Umbreit says he has seen some programs “retrofitting restorative justice terminology”—and nothing more—to existing programs.

For Geske, the mark of a restorative justice program is simple. She looks for the magic word: *victim*. She has seen detailed descriptions of programs that purport to be restorative justice programs, where, she says, “the word *victim* never appeared once.”

Though passionate about its potential, Geske is cognizant of the dangers of restorative justice principles being applied by poorly trained people, however well-meaning, in volatile situations. “Another fear, and it’s a valid fear, is that if the processes are not done well, victims are revictimized,” she says. “All sorts of bad things can happen.”

Some see restorative justice as colliding with social and

political realities that they believe are driving the current U.S. system to be, if anything, more, not less, punitive. In recent decades, incarceration rates have skyrocketed. Michael O’Hear, Professor of Law at Marquette and a nationally recognized expert on sentencing issues, points out that a system that “incarcerates Americans at rates that are unrivaled among western democracies” still is criticized by a majority of Americans in surveys as not dealing “harshly enough” with criminals.¹²

Umbreit knows that the work of restorative justice advocates will take time and patience. Ultimately, he thinks people can be persuaded. He has seen it happen.

“Often when you read restorative justice stuff or hear people talk, you get this kind of romantic version of the

community. The fact is, there are many communities—many would suggest most communities—that want more vengeance, more punishment,” Umbreit says. “Working with, quote, the community, unquote, is a messy issue. Unless you go in and plant seeds, and work with individuals and small groups to help plant and nourish restorative principles and practices, I think the exact opposite of restorative justice could happen in many settings.

“On the other hand, what I have seen over and over again is that we all have the dark side of us and the more open side. When you work with communities and people, restorative justice tends to tap into that higher self.” •

Sonya Bice will graduate from Marquette University Law School in May 2008.

1. See *Uganda and Rebels Agree to Third Phase of Five-Stage Peace Deal*, N.Y. TIMES, July 1, 2007; Jeffrey Gettleman, *Uganda Peace Hinges on Amnesty for Brutality*, N.Y. TIMES, Sept. 15, 2006, at A1.
2. See Mark Umbreit, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQUETTE L. REV. 251 (2005) (providing an excellent overview of the movement nationally and globally, summarizing the extensive empirical research on certain restorative justice practices, and identifying some unintended negative consequences as well as some of the challenges that arise as restorative justice practices are integrated into the conventional criminal justice system).
3. Criminal Justice Policy on Victim-Offender Mediation/Dialogue, 1994 A.B.A. RES., available at <http://www.vorp.com/articles/abaendors.html>.
4. Umbreit, *supra* note 2, at 261.
5. Janine Geske, *Why Do I Teach Restorative Justice to Law Students?*, 89 MARQUETTE L. REV. 327, 327 (2005).
6. *Id.*
7. *A Victim’s Voice: 21 Years Later, a Woman Confronts Her Brother’s Killer. Could a Face-To-Face Meeting Help Bring Closure?*, Aug. 6, 2006, *Dateline*, NBC News (transcript at <http://www.msnbc.msn.com/id/14190842/>).
8. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* (2002). For an articulation of the underlying philosophy of restorative justice principles by two of the movement’s best-known proponents, see HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (1990), and JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* (2001).
9. Of course, some crimes affect multiple victims, and differences sometimes arise as to the best way to repair the harm. Cf. David Doege, *A Plea for Leniency, a Split in the Family: Three-Time Drunken Driver Seeks Lesser Sentence; Some of Victim’s Relatives Agree*, MILWAUKEE JOURNAL SENTINEL, Feb. 19, 2007, at A1.
10. ANNALISE ACORN, *COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE* (2004) (publisher’s summary).
11. Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 UTAH L. REV. 343, 343. See also Ellen Waldman, *Healing Hearts or Righting Wrongs? A Meditation on the Goals of “Restorative Justice,”* 25 HAMLINE J. PUB. L. & POL’Y 355, 362 (2004) (“[R]estorative procedures are lauded and sold to public agencies and law enforcement bureaus because they facilitate psychological growth and healing, not because they make victims whole in concrete material ways. While this trade-off may be sensible when dealing with the minor misdemeanor and property crimes for which restorative justice procedures are generally reserved, it is more problematic when extended to crimes of greater scope and magnitude.”); Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STANFORD L. REV. 751 (2000) (comparing the systemic problems of restorative justice and VOM with the systemic problems of the conventional criminal justice system).
12. Michael O’Hear, *Is Restorative Justice Compatible With Sentencing Uniformity?*, 89 MARQUETTE L. REV. 305, 305–06 & n.8 (2005).

A restorative justice experiment in the Milwaukee DA's office:

Perspectives from defense counsel and prosecutor

While seeking better ways to meet the needs of crime victims he met while working in the consumer fraud unit, Milwaukee County Assistant District Attorney David Lerman discovered the groundbreaking program in the district attorney's office in Des Moines (Polk County), Iowa, which has been in place since 1991. Lerman obtained some funding and got the Milwaukee County Community Conferencing Program (CCP) off the ground in 2000. While other cities offer restorative justice programming for juvenile offenders, Lerman relates, Milwaukee County and Polk County are the only counties in the country that involve both juvenile and adult offenders in restorative justice programs that operate in the district attorney's offices. Lerman is currently focusing on restorative justice applications in Milwaukee Public Schools.

"The conferencing model is the main piece of what we do," Lerman says. "That started off in adult court six years ago, and we started in the juvenile court in autumn of 2004. There's a subsidiary of the conferencing program which we call community accountability circles. Those are drug cases where the victim is the broad community. We've also done work in schools. The goal there is to introduce the concept of restorative justice broadly, doing circle work as a preventive technique for discipline issues."

Marquette law students facilitate some of the conferences. CCP Program Manager Erin Katzfey follows up on referrals, recruits volunteers to facilitate conferences, and monitors the offenders through the successful completion of the agreements, keeping judges and assistant district attorneys informed of the status of the cases. "We get about 150–160 referrals a year and do about 80 conferences a year in the

adult program," she says. Though the program is ambitious, it represents a tiny fraction of Milwaukee's annual caseload, which consists of some 10,000 misdemeanors, 12,000 criminal traffic offenses, 7,000 felonies, and 2,500 juvenile cases. The Des Moines (Polk County) Victim Offender Reconciliation Program (VORP), which considers all crimes except domestic violence eligible for VORP sessions if the victim wishes, is substantially larger; it conducts more than 1,000 sessions a year.

In Milwaukee, the adult program serves offenders either before charging or before sentencing. A separate program for 17-year-olds facing felony marijuana charges allows those who complete the agreement to walk away with a clean record.

"I like thinking about it in terms of a toolbox, and in a forward-thinking prosecutor's office, this should be one of the tools present and available because it really does provide a service to victims who want to have a real hands-on approach to dealing with the trauma and distress of what happened to them," Lerman says. "Secondly, as a prosecutor's office, we're supposed to be engaged in protecting public safety. We're not talking about totally ridding the criminal justice system of trials or prisons, but there are many offenders for whom this approach can be far more beneficial, and we know this because our recidivism numbers show that people who participate in restorative programs are half as likely to reoffend."

The community conferencing program shares some characteristics with the common prosecution practice of diversion or deferred prosecutions for first offenses. But Lerman says conferencing brings added value. "Deferred prosecutions are fine, but because they don't

involve the victim and they don't involve the community, there can be a lot of missed opportunities. This process is using crime as a hook to create communities of care—to get people talking again around civic issues.

“At some level,” he says, “this work is about helping modern, urban America recreate what it means to be in a community. And, by extension, what it means to be in a democracy.”

Lerman, a veteran prosecutor who has written extensively about restorative justice in the criminal justice system, has been successful in keeping the program funded, but it has always been on a year-to-year basis. “For this work to ultimately succeed in a prosecutor’s office, it can’t be viewed as an add-on,” he says. “It has to be viewed as part of what goes on in the way we engage in the business of justice.”

Defense attorney Jonathan C. Smith, L’95, with the Milwaukee firm of Kohn & Smith, has attended CCP sessions with clients. He speaks highly of the program and says that his clients who have been referred to the program are grateful for the chance to show that they are worthy of a second chance at a clean record. He regards the CCP as having a much more “therapeutic or rehabilitative effect” than deferred prosecution agreements, which are, in any event, rarely to be had in Milwaukee County.

One frustrating aspect to the program, though, is what he called “the luck-of-the-draw aspect.” Clients who are first referred to the program do not necessarily make it in, even if they want to. It all hinges on the victim’s willingness to participate.

In one of Smith’s cases involving a defendant charged with theft, the victims were actually willing to fly in from out of town to participate in the conference, giving the offender, a young woman, the opportunity

“For this work to ultimately succeed in a prosecutor’s office, it can’t be viewed as an add-on. It has to be viewed as part of what goes on in the way we engage in the business of justice.”

— Milwaukee County
Assistant District Attorney David Lerman

to pay restitution and have a second chance at a clean record.

But in another, a young man charged with a hit and run that resulted in property damage was referred to the program but denied when the victims declined to be involved. “The back story to this was that this young man had previously been the victim of a carjacking,” Smith says. “In fact, he still had bullet fragments in his

head and shoulder.” So when a car started following him late one evening as he drove home from work, he panicked, ran traffic lights, and hit two vehicles.

When the case was referred to the CCP, the victims, Smith says, “didn’t want any part of it.” His client was devastated. Had he completed the CCP successfully, he would have had a citation as opposed to a criminal conviction. “He had such hope. He really didn’t want a criminal record.

“That case saddened me. Does it seem fair? No. Quite frankly, my opinion would be that if a case is deemed worthy of participation in that program, we could have a fallback such as a diversion agreement if the victim opted not to be involved.”

That’s a situation that appears to occur with some regularity. Lerman’s office compiled statistics on reoffense rates of offenders who went through the program as compared to those who were referred to the program but did not end up participating because the victim chose not to. The reoffense rate for the participants was 20.8 percent; the reoffense rate for the nonparticipants was 42.5 percent.

Nevertheless, Smith, a self-described “law-and-order Republican,” sees the CCP as a small ray of light in an otherwise disproportionately punitive justice system. “We have a problem,” he believes. “We are ending up branding too many people as criminals. We are locking up a whole host of people who have no business being locked up.” •

Professor Anzivino Receives University Award



Marquette University recently selected Professor Ralph C. Anzivino of the Law School as a recipient of the University's John P. Raynor, S.J., Faculty Award for Teaching Excellence. Professor Anzivino had been nominated by several of his colleagues at the Law School, and his nomination was supported by letters from alumni, students, and colleagues.

The award was presented on May 3, 2007, at the University's annual Père Marquette Dinner, an end-of-the-year gathering of faculty and administrators from across the University. Dr. Madeline Wake, then Provost of the University, asked Dean Joseph D. Kearney to present the award on behalf of the University.

Remarks of Dean Kearney in Presenting to Professor Anzivino the University's John P. Raynor, S.J., Award for Teaching Excellence

It is a privilege this evening for me to speak not just on behalf of the Law School, but for the entire University. This would always be so, but especially is it the case here, because of my high regard for the individual whom we now collectively honor, my colleague Ralph Anzivino, Professor of Law.

Let me elaborate. To begin, this is Ralph Anzivino's thirty-first year on the law faculty of Marquette University. Yet the length of this tenure is relevant, if at all, only because it makes the excellence that marks Ralph's teaching all the more impressive for his having sustained it across three decades. And so it is to this excellence that I wish to speak.

The most powerful words are not my own. Nor are they those of the former award-winners who wrote in support of Ralph's candidacy, including my colleagues Dan Blinka, Tom Hammer, and Jack Kircher, and my former colleague (soon to be Provost at Loyola University) Christine Wiseman. The most powerful words come from Ralph's former students.

Several common themes emerge in their letters of support. First, students recall Professor Anzivino's unusual combination of being both demanding and not overbearing. Ralph is from the old school, in the sense of asking students to stand when called upon and of using the Socratic method. This is not for sport. As recounted by a member of the Class of 2005, "Professor Anzivino would call on a student at random, ask him to stand, and pepper him with questions on a specific case. The process was terrifying, but Professor Anzivino had the ability to impart just enough fear in students to force us to be well-prepared. Still, when it came time for us to stand on our given day, he treated us with respect and gently tugged the relevant information out of us with probing (and sometimes leading!) questions."

Second, there is Ralph's sense of humor, which students have noted for years to be related to and in fact to be part of his teaching abilities. As one student related to the university committee that selected Professor Anzivino for this award, "his quick wit makes class even more interesting and keeps students engaged and attentive throughout an entire class." How much humor value there is in courses on creditor-debtor relations and Article 2 of the Uniform Commercial Code, I personally could not say—but apparently quite a bit, to judge from the students' comments on Ralph's teaching.

Then there is the somewhat less funny matter of Ralph's exams. I thought the comment of a member of the Class of 1996 to be notable: "His exams were extremely tough, and they turned out to be excellent preparation for both the bar and the practice of law itself. In my law practice, the only legal questions that come across my desk are the hard ones. Professor Anzivino's exams, which many of my classmates thought were quite diabolical, were nothing more than realistic predictors of the kind of questions we would all be living with quite soon enough."

I wish to underscore that, whether it is the excellence in preparation that Professor Anzivino demands, the humor with which he leads a student, or his rigorous exams, it is evident to me that these lessons "take" with our students. I know this because I have the responsibility as dean to go out and minister to our alumni. When I ask a group of alumni at lunch, as they go around the table to introduce themselves, to tell us who their favorite professors at Marquette University Law School were, two names come up more than any other: Jim Ghiardi, Class of 1942, now marking as professor emeritus his sixty-first year on the faculty of the Law School, and Ralph Anzivino.

And the lessons our graduates recall concern more than the law. I shall quote one alumnus, among the many possibilities available to me. Charles Constantine is a Racine County Circuit Court Judge and the Chair of the Wisconsin Board of Bar Examiners. Judge Constantine was one of Professor Anzivino's first students; he summarized his former professor as "dedicated, intelligent, with an intellectual curiosity," combined with "great communication skills." Judge Constantine remarks that, both in his own teaching

and even in aspects of his judging, he has to a great extent "tried to emulate Professor Anzivino's style: be prepared, have a sense of humor, engage the students, but don't be condescending." This is yet more evidence of the lesson imparted to me by a great teacher of English, my mother, who used to tell teachers concerning their students, "It is *you* they are studying most."

In this regard, I wish to say something about Ralph Anzivino, the man or colleague, as opposed to the teacher (to the extent that such a distinction can be made). Ralph is not long on words, and so on this particular point I will try to emulate him. I will simply say that he is a man of considerable humanity.

Note from 1976

I should like finally to be able to tell you that Ralph developed all of these skills and attributes since his arrival here in 1976. The problem is that yesterday I reviewed his file, back to the beginning, and I now know that such a statement would be untrue. In fact, I have brought along with me a note from 1976, on a 4" x 6" scrap of paper, that pretty well demonstrates it. "Dean Boden," the note says, "The students who spoke to Mr. Anzivino were TREMENDOUSLY impressed. He has our total endorsement

as a potential faculty member!" This is the sort of succinctness that Ralph would appreciate.

Ralph, please come to the podium. For, simply stated, your accomplishments in teaching at Marquette University, it is my privilege, on behalf of the Provost and the rest of the University, to present you with both this note from 1976 and, from 2007, this All-University John P. Raynor, S.J., Faculty Award for Teaching Excellence. •

Remarks of Professor Ralph C. Anzivino in Accepting the Raynor Award

Can you imagine how much money it cost me for him to say all those things?

As our dean indicated, my first year at Marquette was the fall of '76, the spring of '77. That was certainly a wonderful year to be here at Marquette. Some of you will remember how in the spring of that year the men's basketball team won the NCAA championship. I remember the students flooding out into Wisconsin Avenue, running down Wisconsin Avenue to the lake, yelling and screaming. The remarkable thing was there was no damage done. They actually knew how to win with class—I was so impressed by that.

Now some might say that, in winning that championship, there was perhaps some divine intervention involved. Perhaps for the basketball team, that may have been true. But hiring me that year—I would have categorized that as more of a giant leap of faith.

One of the concepts that we teach students at the Law School is a concept we call the benefit of the bargain. You are probably all familiar with it. A contract is struck, and each side of the transaction would like to get the benefit of the bargain. One person would like the new car, the other the \$30,000. Now, if that car is defective in some way, the new car buyer is certainly denied the benefit of the bargain. In 1976, I made a bargain with Marquette University, and I can say, with the highest degree of certainty and clarity, that I have received, over the years, much more benefit of that bargain than has Marquette.

Marquette, for example, over the years, has put food on our table, as it did tonight. My family is here with me, and Marquette literally did it again tonight. It has provided the means for us to care for ourselves when we were injured or ill. It has educated almost all of my children, here at Marquette. It has contributed to my wife's and my retirement account. And it has permitted me to do that which I love to do the most, and that is to be a teacher.

Father Wild, in a recent interview in the *Marquette Lawyer* magazine, commented on teaching. In reading through the article, I noticed that he indicated that this is "where the rubber meets the road." I agree with the good Father (and would even if that were not obviously a prudent thing to do). My spin on the concept is that we, the faculty, are really the face of Marquette as it relates to our students. My dean no doubt would say "*in loco parentis*"—and even those of you who are not Latin scholars, as he is, appreciate that essentially this means "in the place of the parent." We, as the faculty, are in the place of the parent.

Indeed, I have heard it often said that a faculty member, or a teacher, is a child's third parent. I am happy to say, and very proud and thankful to say, that Marquette has given me the opportunity to be one of those third parents. Truly, in my lifetime, Marquette has been, for me, the gift that has kept on giving. I am deeply grateful for everything Marquette has given to me and my family—including, now, this Raynor Award. And I can say, from every part of my heart, that I thank you, Marquette. Your generosity to me and my family has really been overwhelming. Thank you. •



Marty Greenberg, Katie Maloney Perhach, Patricia Gorence, and Tom Curran at the 2007 Alumni Awards ceremony.

Honoring Some Exemplars

The Law School in 2007 honored several alumni for various aspects of their career or service to the Law School. Genyne Edwards, L'00, then the President of the Law Alumni Association Board, Dean Joseph D. Kearney, and the President of the University, Rev. Robert A. Wild, S.J., presented the various awards to the recipients.

Charles W. Mentkowski Sports Law Alumnus of the Year

Martin J. Greenberg, L'71, received the Charles W. Mentkowski Sports Law Alumnus of the Year Award. Greenberg excelled as a student at the Law School, serving as an editor of the *Marquette Law Review* and being admitted into Alpha Sigma Nu. Since graduation, Greenberg has become one of the nation's leading experts on the development of sports facilities.

The Alumni Association was “impressed with how Marty has sought to share his expertise,” authoring numerous articles and books, including most notably perhaps *The Stadium Game*, concerning the location and financing of sports facilities. Greenberg has been as well an engaged public citizen in the best tradition of the legal profession, seeking to apply his knowledge of the law—not just sports law, but also especially real estate law—to improve Milwaukee. The most recent and perhaps most significant example of this is Greenberg's service as Chair of the Wisconsin State Fair Park Board of Directors and his work at nursing that enterprise to fiscal health.

Throughout this time, Greenberg has been a loyal alumnus of the Law School, most prominently as founder and one of the first directors of the Law School's National Sports Law Institute. As Dean Kearney observed, “How grateful we are that this Milwaukeean would boldly make the claim that Marquette would have not simply a sports law institute, but the *National Sports Law Institute*.”



If it were not for Chuck Mentkowski, there would be no attorney Marty Greenberg. There would be no National Sports Law Institute. Chuck Mentkowski gave me a chance. He took a risk on me. So an award that bears his name in memory has very special meaning to me.

....

What was at the time a conference in Fort Lauderdale, a vision for the future of Marquette Law School, and the generosity of the Wisconsin sports community, has now turned into one of Marquette's marquee law programs and the very best sports law program in the world.

From conceptualization to formation, some at Marquette gave the National Sports Law Institute little chance of success. I want particularly to thank former dean Frank DeGuire for his leadership and profile in courage in making certain the National Sports Law Institute became a reality.

....

It is easy to remember the legal and academic achievements of my dear friend and mentor Charles Mentkowski. Those achievements, however, are not what I will remember about him most. What I will remember is a man who was willing to take chances in expanding the minds and opportunities of future Marquette lawyers. I am forever grateful for the chance he took on sports law. It is this sense of innovation in legal education that should be Charles Mentkowski's legacy. Without him, the National Sports Law Institute may not have risen in prominence around the world, and I may not have even become a Marquette lawyer. How can you possibly say "thank you" to someone who made such a tremendous impact?

— From the remarks of Martin J. Greenberg, L'71, in accepting the Charles W. Mentkowski Sports Law Alumnus of the Year Award

Howard B. Eisenberg Service Award

The Howard B. Eisenberg Service Award honors a relatively recent graduate of the Law School who has demonstrated a particular commitment to the school, the profession, or the underserved. The Alumni Association's Awards Committee looks for someone who in his or her early years in the profession has demonstrated the same service ethic as marked Howard Eisenberg's career.

In the words of Dean Kearney in presenting the award, "With all respect to the members of the committee, they did not have to look far this year." **Katie Maloney Perhach, L'00**, graduated from Marquette University's undergraduate program *summa cum laude* and from the Law School *cum laude*. The Alumni Association cited her as evidently bringing the same dedication to her practice at Quarles & Brady as she must have invested in her studies while in school—a dedication that extends equally to her pro bono clients, of which there have been many.

Perhach has devoted several hundred hours annually to nonpaying clients who would not have been able to afford an attorney. These clients have included a Senegalese woman in the Immigration Court in Chicago on a gender-asylum claim, a very difficult claim to win. They have brought as well contentious work on behalf of a woman whose effort to gain

custody of her late sister’s children was opposed in part on the ground that the woman was too poor to be entrusted with rearing the children. Nor was that some small family-law matter, as the engagement required Perhach, in addition to her own legal work, to find another lawyer to act as guardian of the children’s estate and still another attorney to probate the late mother’s estate.

Dean Kearney concluded the presentation of the award by reading from a letter nominating Perhach for the honor: “In sum, Katie is an excellent example of Jesuit education. Her strong faith, supported by the ideals developed in seven years at Marquette, has made her a leader in serving others. She shines as a Marquette lawyer and would wear well the mantle of an Eisenberg Award winner.”



This award is a testament to the belief of my colleague, Mike Gonring, and our firm, Quarles & Brady, that it is our duty as lawyers to help to ensure that justice is available to all persons, regardless of income. I am truly blessed to be working at a firm that is dedicated to helping provide quality legal representation for those in our community who are least able to pay for it, but most in need of those services.

....

One final thank you goes out to Marquette University. Over the course of the last 38 years, the Maloney family has received 29 degrees from the University, including six degrees from the Law School, with our seventh to be awarded this coming May. Marquette has instilled in each one of us a thirst for knowledge, the desire to help those less fortunate than we, and the ability to make a difference in the lives of others. And for this, each one of us will be eternally grateful.

— From the remarks of Katie Maloney Perhach, L’00, in accepting the Howard B. Eisenberg Service Award

Lifetime Achievement Award

Thomas J. Curran, L’48, received the Lifetime Achievement Award. Dean Kearney noted that it was not simply Curran’s almost quarter century of service as United States District Judge here in Milwaukee that recommended him for the award: “I am inclined to think that Tom Curran would be receiving this award even if he had never become Judge Curran, for his accomplishments simply from 1948 to 1983 would have sufficed.”

Tom Curran joined his brothers’ law firm in Mauston, Wisconsin, in 1948, and for a brief moment—a year or so—the firm was Curran, Curran & Curran. One of the brothers left in 1950 to become a circuit judge in Juneau County. The firm flourished nonetheless, and today Curran, Hollenbeck & Orton, S.C., is one of the largest out-state firms. In the words of the dean, “You cannot maintain a firm of this size—or even stay in business for so long—without developing a reputation for quality and trustworthiness, and the Curran firm surely has that reputation.” Much of that reputation developed during Tom Curran’s 35 years of practice in Mauston.

His own stature as a lawyer enabled Tom Curran to be elected by his statewide peers to the presidency of the State Bar of Wisconsin, a signal honor. Curran thereupon received a seat on the federal district court in Milwaukee. The strength of Judge Curran's belief in Marquette University can be seen in the fact that all six of his children attended the University, and three of them attended the Law School. In presenting the award on behalf of the University, Dean Kearney

Given the very special place Marquette already had in the lives of the Currans, it was no surprise, when I was discharged from the navy in July 1946, that I would come up and enroll at Marquette. And I found myself, four days later, sitting in a classroom, for we then had the three-semester-a-year program, given that probably 95 percent of us were veterans. I would guess that we ranged in rank from a private to a brigadier general—a former brigadier general. The only problem was that the general had trouble remembering the “former” part of it—or at least he did, for maybe two or three weeks, until he ended up in Professor Ghiardi's class.

....

If there is a message that I should leave tonight, I want it to be one that relates to what I think distinguishes Marquette's law school from a number of other law schools, and that is its interest in legal ethics. I do not think that our judicial system can function effectively unless we have more emphasis on high standards that must first be addressed in the classroom. The temptations are too great, unless you have an ethical compass to guide you through some of the very difficult cases that confront the practicing bar.

And yet it has been my experience, both as a trial lawyer and as a federal judge, that those lawyers who adhere to the highest standards of personal conduct and civility toward their fellow advocates are the people who are most admired and most respected within their profession. Far from impairing the quality of their advocacy, their style enriches and enforces their skills in the debate and greatly enhances their persuasive powers.

— From the remarks of Thomas J. Curran, L'48, in accepting the Lifetime Achievement Award



MARQUETTE
UNIVERSITY

LAW SCHOOL

**You are invited to attend
the 2008 Law Alumni
Awards Convocation**

Thursday, April 24, 2008

5:30 p.m., reception

6 p.m., program



Alumni Memorial Union
Monaghan Ballroom, 3rd floor
No charge



Law School

Alumnus of the Year

Gregory B. Conway, L'70

Law School Lifetime
Achievement Award

Ralph J. Huiras, L'41

Law School Howard B.
Eisenberg Service Award

Raeshann D. Canady, L'04

Sports Law

Alumnus of the Year

James T. Gray, L'90



Nominations are currently being accepted for 2009. To receive information on how to nominate a deserving classmate or colleague, please contact Christine Wilczynski-Vogel, Assistant Dean for External Relations, christine.wv@marquette.edu or 414.288.3167.

thanked Judge Curran for his accomplishments as a Marquette lawyer for well more than half a century and added, “How grateful also I have been since becoming dean for the counsel combined with good humor that you have provided to me.”

Alumna of the Year

Patricia J. Gorence, L’77, was the Law School’s Alumna of the Year. Gorence serves with distinction as United States Magistrate Judge in Milwaukee. As with Judge Curran, though, it is as much her service before becoming a judge, as well as her extrajudicial work in service of the community, that recommended Gorence for the award.

Some of this work has been direct service within the legal profession, including in the United States Attorney’s Office for the Eastern District of Wisconsin and as Deputy Attorney General for the State of Wisconsin. But, in the words of Dean Kearney at the awards ceremony, “The trial and advocacy skills that Pat Gorence brought to and honed in those positions have been put to use outside of the profession as well. Simply stated, Pat Gorence has been and continues to be a leader in this community in the effort to ensure that the less fortunate receive assistance and equal justice.”

Examples abound. Gorence is a founder of Women’s Resource Day. For more than a decade, this program has sought to help low-income women in Milwaukee in myriad ways, including workshops on parenting skills, resume writing, finding a job, confronting domestic violence, first-time home buying, and countless other topics. Gorence has been an integral part also of an organization named the Bottomless Closet. This enterprise provides professional business attire free of charge to low-income women entering the workplace; it has served hundreds of women in need.

Gorence has been a leader in countless other community initiatives as well. Dean Kearney remarked that “[t]hey are far too numerous to list, although I may find myself held in contempt of court if I do not pause to note Judge Gorence’s service on the University of Wisconsin-Milwaukee’s Slovenian Arts Council for almost two decades now.”

Kearney concluded by pointing to two examples of how Gorence has melded together

Alumni Service to the Community Award

A 1985 law school alumna—the Honorable Maxine Aldridge White—received an award at the separate All-University Awards Ceremony in 2007. Judge White, pictured here, received an Alumni Service to the Community Award.



her judicial service with her broad concern for her fellow man. One is the work that she has done for the local federal court in supervising the “pro se law clerks.” These are the young lawyers working for the court whose special charge it is to help the court sort through the pleadings filed in civil litigation by prisoners unrepresented by counsel. Gorence leads here in part by example, making clear to all involved in the process that, while these individuals are not entitled to better substantive results than the law will permit, they are as human beings entitled to respect from those involved in the judicial process. The other is the work that Judge Gorence undertook a few years ago, along with others

but in a leadership role, to ensure that the prosecutors and other law-enforcement officials in the various communities of Milwaukee County take a reasonably consistent approach to the prosecution of offenses, regardless of whether they occurred in the city of Milwaukee or somewhere else in the county.

* * *

Marty Greenberg, Katie Maloney Perhach, Tom Curran, and Patricia Gorence, together with so many of their fellow Marquette lawyers, reflect how fortunate, indeed, Marquette Law School is in its alumni. •



I would like briefly to address a few of my remarks to the soon-to-be new lawyers, the Marquette law students who are here. If I could give you one bit of advice as you start what I hope will be a fulfilling, challenging new career, I would urge you to include a commitment to serve others as an integral part of your daily life.

I have found that my community involvement and service have enriched my life in ways I never could have imagined. Working as a volunteer reporter on a civil rights newspaper in Alabama many years ago opened my eyes to a whole different world and ultimately gave me a better understanding of myself. Looking back, I realize it changed my life.

I have been fortunate to have good role models for service in my life: my parents, immigrants from Slovenia, who emphasized the importance of community and helping those who were less fortunate than we were; and, probably most of all, my husband, John, a Marquette High and Marquette University graduate, who has devoted his time and talent for the past 40 years to building and rehabilitating homes so that migrant workers who settled in Wisconsin and other low-income people could, often for the first time, own a home of their own. He is truly an inspiration to me and our children.

— From the remarks of Patricia J. Gorence, L'77,
in accepting the Alumna of the Year Award

1948

Wilfred J. Hupy died May 26, 2007, at the age of 91. He was a decorated combat veteran of World War II. After law school, Hupy established his practice in Menominee, Mich., and served as probate judge from 1956 until his retirement in 1979. Survivors include six children, two of whom are Marquette lawyers.

1949

Richard (Dick) E. Tyson died on March 24, 2007, at the age of 83. He was active in many bar association, civic, and real estate activities over his career. He retired in 1994 from the Minnesota Title Insurance Company to his home in Baileys Harbor, Wis., giving countless hours of pro bono service to the poor and clients who had no other voice.

1957

Robert B. Peregrine was presented with the Leonard L. Loeb Award by the Senior Lawyers Division at the State Bar of Wisconsin's annual convention in May

2007. The Loeb Award recognizes a senior lawyer who has improved the legal system and who has shown leadership in advancing the quality of justice for all. Peregrine continues actively to practice with Peregrine & Roth in Milwaukee, specializing in real estate, probate, estate planning, and corporate law.

1958

Richard J. Steinberg, who has presided in municipal court in the City of Brookfield for over 30 years, recently was honored for his benevolent works beyond the courtroom by the International Fraternal Order of Eagles. He was presented with the highest honor bestowed by the Eagles: induction into the International Fraternal Organization's Hall of Fame. He is only the third Wisconsin person to receive this honor in over 100 years.

1960

Ken E. Voss, of the Milwaukee office of DeWitt Ross & Stevens, has been named in the 2008 edition of *Best Lawyers*

One small girl had a significant effect on the life and career of Peggy Zimmer, L'92.

Zimmer attended Marquette University as an undergraduate, receiving a bachelor of arts degree in 1989 and concentrating on elementary education. While completing her practicum teaching, she met an eight-year-old girl and began to tutor her.

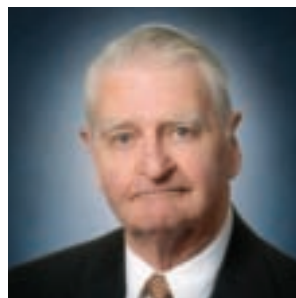
"She missed school a couple of days," explains Zimmer. "When she returned, her face and arms were bruised, and she remained silent when asked about how she became injured. I could clearly see that she had been abused and was too afraid to tell me."

As a result of that experience, Zimmer researched the laws about the mandatory reporting of suspected child abuse. Upon reflection, she realized that she enjoyed learning about the law and decided to attend law school to become a prosecutor to protect innocent victims such as her young student.

in America. His area of practice is construction law.

in probate and trust administration, estate and trust planning, and business and real estate law.

1965



Robert J. Moser has joined Howard & Howard in Kalamazoo, Mich. He concentrates his practice

1966

Michael W. Wilcox, of the Madison office of DeWitt Ross & Stevens, is listed in *Best Lawyers in America*. He has been so listed in trusts and estates for more than 20 years.

1968

William A. Jennaro of Cook & Franke has

PEGGY ZIMMER

And she did. After graduating from Marquette Law School in 1992, Zimmer began her career as an assistant district attorney in Richland County, Wisconsin. Then came a move to the Waukesha County Corporation Counsel's Office, where Zimmer represented the interests of the public in CHIPS (Children in Need of Protection or Services) and termination of parental rights cases. This experience of dealing with the dynamics of child abuse prepared her well when she then became an assistant district attorney in Milwaukee, focusing on child abuse prosecution. Zimmer's next move was to Chicago, where she was appointed as an assistant attorney general for the State of Illinois.

"Throughout these various positions, I was very fortunate to work in the company of many skilled and dedicated prosecutors," recalls Zimmer. "Prosecutors at many times have a thankless job. They do not get paid for the real amount of work that they do, and they have to witness the many evil things people do to each other. Despite this—or maybe because of this—they continue to serve the public. I admire them."

During Zimmer's time in Chicago, an opportunity arose at the National Center for Missing and Exploited Children (NCMEC) in Washington, D.C., and she accepted the position that she now holds: Deputy Director for the NCMEC's Office of Legal Counsel. Zimmer provides technical assistance to prosecutors around the world who are battling against the staggering amount of child pornography and sexual exploitation. She also assists with and presents technical training seminars, supports the development and production of resource materials for prosecutors, and provides case-specific analysis and support.

"Being a prosecutor for so many years helped me develop an understanding of the dynamics of prosecuting crimes against children," notes Zimmer. "I am very fortunate to be part of NCMEC because it gives the victims of child sexual exploitation and others a voice and a mechanism to be heard by law enforcement officials,

prosecutors, judges, and legislators."

Zimmer's particular position provides her the opportunity both to offer legal advice and representation to the staff of NCMEC (from responding

to subpoenas to assisting in protecting intellectual property and proprietary interests) and to help the organization undertake new initiatives, all while protecting NCMEC's grant of immunity provided by Congress.

Looking back, Zimmer regards her career as a journey, guided by a bit of divine providence, the first step of which was her education at Marquette. Zimmer says that Marquette instilled in her a sense of justice. "To me, justice is not some lofty ideal that can never be obtained. It can be achieved in small ways by our making a difference in individual lives. I remember my first day at law school, when Dean DeGuire talked of being a 'Marquette lawyer' and how this spoke to such matters as developing a sense of personal responsibility to uphold the best aspects of the legal profession and the importance of public service."

During her career protecting the most innocent, Zimmer has learned that it is vital to have passion about one's undertakings, whether in a career or more broadly in life. "Being passionate about the issue of child sexual victimization has kept me going through the long hours preparing for trials, seeing so much victimization, and dealing with the frustrations of the criminal justice system. I feel that I contribute to making a positive difference in the lives of children and their families."

A Marquette lawyer, indeed. •



MIKE CRAMER



Michael Cramer, '78, has come full circle: back in school nearly 30 years after he graduated. But this time he is on the other side of the lectern.

Cramer recently joined the faculty as a full-time clinical assistant professor at the Preston Robert Tisch Center for Hospitality, Tourism, and Sports Management at New York University's School of Continuing and Professional Studies. "I am teaching what I know and what I have done," says Cramer. "When my students and I discuss some of my real-world experiences, we can talk not only about cases, but about outcomes, ethics, and both what was done and how it was done."

Working hard and taking advantage of the right opportunities at the right time, Cramer has had a wide-ranging career. Most recently, he was the executive vice president and chief administrative officer of Pinnacle Foods Corp., a multibillion-dollar food conglomerate. He joined Pinnacle in 2004 after a phone call from a former partner and longtime chairperson of a number of companies in which the two were involved. "The businessman-friend asked me if I was interested in participating in 'one more deal,'" Cramer relates.

At the time, Cramer had been in Texas almost six years, serving as president and chief operating officer of Southwest Sports Group, L.L.C., and Southwest Sports Realty, L.L.C. In those roles, he served at various times as president of the Dallas Stars hockey team and the Texas Rangers baseball team.

"This opportunity to return to a private-equity/distressed-business situation was appealing to me," Cramer explains. So, by joining forces with two strong private equity firms and an established company with impressive brands, he was able to help turn the ailing company around. The result was a \$2 billion company that was stabilized and recently sold to the Blackstone Group.

Cramer had experience in the field. He previously had been a founding partner of C. Dean Metropoulos & Co. (CDM), a private investment and management firm that operated and managed several publicly and privately held consumer companies. These included The Morningstar Group Inc., International Home Foods, Inc., Ghirardelli Chocolate, and Stella Foods.

This is not the way Mike Cramer started his career after law school. He began in the profession in Milwaukee, working for several years with Steve Enich, a 1949 Marquette Law School alumnus who had encouraged Cramer to apply to Marquette for law school. Then, in the late 1980s, Cramer opened a practice with several of his law school friends.

Although Cramer thereafter entered the corporate world, as sketched out above, he remains close to his classmates and is very involved in a number of the Law School's undertakings. He is on the advisory board of the Law School's National Sports Law Institute and is serving on his class reunion committee, happily sharing stories of bygone days with his fellow classmates (he says that you know who you are).

"We had a wonderful class full of great characters, and we had a lot fun together," says

Cramer. He would be remiss not to recall a certain Opening Day of the baseball season in Milwaukee, for which Cramer coordinated a classwide “field trip”—complete with pre- and postgame festivities that lasted days because of a delay of the game due to snow. Perhaps that was a foreshadowing of his love for and success in the sports law field.

Graduated from law school for nearly 30 years now, Cramer says that it is during the past 10 years that he has reconnected. “Dean Eisenberg initiated contact with me, reaching out, coming to see me and other alums in Texas,” he explains. “Until then, I hadn’t thought a lot about what I could do for the Law School.” Since he reconnected with the Law School, he has seen many positive things happen.

“It’s neat to see the growth of the school, the quality of people coming in, the programs, and especially the growth of the sports law program,” says Cramer. “And what a tremendous asset we have in Dean Kearney. He is tireless in reaching out to and communicating with alumni.”

Cramer is also very encouraged about the much-needed new building. “I’ve seen the plans and I’m delighted with the prominence of the building, the inside design, and resources it will provide,” he says. “The past ten years have been a period of remarkable growth and development of the Law School. It is a tremendous asset to the Milwaukee community and the entire state of Wisconsin.”

“I owe Marquette Law School a tremendous debt,” he observes. “I received a great education which, in turn, provided many opportunities to me. But I am excited about the future even more because of the promise it offers to future generations of legal professionals.” •

again been selected by his peers for inclusion in *Best Lawyers in America*. The selection is in the category of alternative dispute resolution.

1969

John R. Kuhnmuensch, Jr., has been named Vice President, Human Resources, for Arandell Corporation, Menomonee Falls, Wis. His responsibilities include coordinating human resources programs and policies; overseeing the recruitment, training, and management of the company’s workforce; administering the company’s three collective bargaining agreements; and helping develop Arandell’s overall labor relations strategy.

Patrick M. Ryan, Chairman and Managing Partner of Quarles & Brady, died on August 22, 2007. He joined Quarles in 1970, was involved in management since

1985, and was elected as managing partner in 2002. Ryan was equally well-known for his commitment to helping women, minorities, and the disadvantaged.

1972

Thomas G. Healy was presented the 2007 Outstanding Pro Bono Award by Legal Action of Wisconsin in recognition of his nearly 20 years of service to the Volunteer Lawyers Project.

1974

Jolene L. Shellman has joined Magnetek, Inc., Menomonee Falls, Wis., as Vice President, Legal Affairs, and Corporate Secretary. Shellman was in private practice with the Varnum, Riddering, Schmidt & Howlett law firm from 1997 until 2006.

1975

John W. Knuteson was elected in April 2007 as Municipal Judge for Wind Point/North Bay (Racine County) to serve a two-year

term. He had been elected and served as Village of Wind Point Trustee/Finance Chairman (1997–2001) and as Village President (2001–2007).

1978

Forrest Jack Lance,

Atlanta, Ga., while at a conference in San Francisco, assisted the San Francisco police in capturing a fleeing bank robbery suspect. His tackle of the suspect resulted in a knee injury that required surgery. Lance has represented the Rockdale County Public School System for 24 years and has served as General Counsel for the last 6 years. He and his wife, Glenda, have three grown daughters, including Maria, a student at Marquette University School of Dentistry.

1980

Ann M. Kisting joined Special Olympics Illinois in February 2007 as Vice President of Marketing and Development. She lives in Chicago.

1981

William E. McCardell, of the Madison office of DeWitt Ross & Stevens, is listed in the national publication, *Best Lawyers in America*. His areas of practice are construction law, labor, and employment law.

1982

Michael J. Gonring, III, a partner at Quarles & Brady, was selected as the “Lawyer of the Year” in 2007 by the Milwaukee Bar Association. Gonring was honored for his longtime commitment to providing pro bono legal services. He serves as the national pro bono coordinator for Quarles & Brady and has himself undertaken thousands of pro bono hours throughout his career.



E.G. Schramka has joined Suby, Von Haden, of Madison, Wis., as principal and director of estate and trust services.

1984

Marie Darst Roes is employed as a self-help lawyer in the Stearns County Law Library located in St. Cloud, Minn. She fills a void that exists between the roles of a paid attorney and a county employee working at the courthouse’s service center. She has helped dozens with issues ranging from divorce to child custody/support to landlord-tenant matters.

1985



David C. Sarnacki, a family law attorney and mediator with the Sarnacki Law Firm, Grand Rapids, Mich., has been recognized as a Fellow of the Michigan State Bar Foundation and is listed in *Best Lawyers in America* for family law.

David J. Wambach, District Attorney for Jefferson County, Wis., was recently honored by the

Wisconsin Association of Homicide Investigators as the 2007 Prosecutor of the Year for the successful prosecution of a 1987 cold-case homicide.

Christine M. Genthner has joined the law firm of Habush Habush & Rottier as an associate in the firm’s office in Kenosha.

1987



James B. Sherman was recently reelected as Chair of the Executive Committee of Wessels & Pautsch, in Minneapolis, Minn., leading the firm’s operations in all its offices in Minnesota, Illinois, Wisconsin, Iowa, and Indiana. He resides in the Twin Cities.

DON LEVY

At age 74, Don Levy has no plans to retire from his full-time law practice. “Well, maybe,” he says—when asked whether he might some day consider it—“if I get old!”

After graduating from Marquette Law School in 1960, Levy joined his brother already in practice to form the firm of Levy & Levy in Cedarburg, Wis. Levy focuses primarily on family law as well as real estate and business law. “There are rewards and challenges every day,” he says. “I’m privileged to have an opportunity to help people solve problems, to do things for them they can’t do for themselves.” He is humbled that this tradition has spanned nearly half a century and is proud that he even has some fourth-generation clients. “I have clients now whose great-grandfather was my client.”

Levy has been recognized for his expertise as an attorney. He has been listed annually in *America’s Best Lawyers* since 1987 and noted as well by *Milwaukee Magazine* as one of the metropolitan area’s best family lawyers. Levy has lectured on family law topics before state and local bar associations and is a fellow and past president of the Wisconsin Chapter of the American Academy of Matrimonial Lawyers.

But Levy has interests beyond the law. He is especially dedicated to his local community. For example, he is currently chairing a committee to operate the Rivoli Theater in Cedarburg and to restore its 1936 Art Deco marquee and façade. In 1975, he helped to form the Cedarburg Landmark Preservation Society and now serves as its president. The group led the effort to ensure that Cedarburg’s historic Grist Mill (1855) was spared destruction. The mill is now the focal point of the historic downtown district.



Other interests include Cedarburg’s public library, the Cedarburg Performing Arts Center, and St. Mary’s Ozaukee Hospital, where he serves as board

president. Levy’s ongoing efforts within the community earned him in 2002 the Greater Milwaukee Foundation’s Frank Kirkpatrick Award, which honors individuals who enrich the lives of Milwaukee-area residents through physical and infrastructure development. Levy and his wife, Janet, were recently honored with the Cedarburg Foundation Civic Award for their volunteer and community service within the Cedarburg area.

Even so, Levy’s involvement in Marquette Law School as an alumnus well antedates the school’s own building initiative. “I am very appreciative of the Law School, and I owe a great debt of gratitude,” he explains. He has shown his appreciation in a variety of ways; he is a past president of the Law Alumni Association Board and is a longtime member of the executive committee of the Law School Advisory Board.

Levy has seen significant positive changes made at the Law School since his graduation in 1960. “There was just one female student in my class back then,” he remembers. “I have been impressed with the continual improvement over the decades with regard to the quality of education the school provides.”

But the biggest change, he believes, is yet to come. “The Marquette Law School is going top tier. We have outstanding leadership and now with a new facility planned, we have a great future ahead of us,” Levy says. “Upward we go!”

The Levys have three grown children and eight grandchildren. •



Michael C. O'Neill has joined the Hodgson Russ law firm in Buffalo as a partner in the Insurance & Reinsurance Practice Group. Before joining Hodgson Russ, O'Neill worked as a trial and coverage attorney in Buffalo for seven years and practiced for nine years in Chicago

Heidi L. Vogt has been appointed by von Briesen & Roper as a leader in the firm's Litigation and Risk Management Practice Group. Her practice focuses on insurance coverage litigation, commercial disputes, constitutional law, construction disputes, environmental litigation, and complex litigation.



1991



Luke A. Palese has joined Resources Global Professionals to lead the legal services business efforts in the Chicago office.

1992

Joseph T. Leone is listed in *Best Lawyers in America*. He practices intellectual property law with DeWitt Ross & Stevens, Madison, Wis.

Lawrence A. Thomas has joined Nixon Peabody in Boston, as counsel in its business practice. He focuses his practice on all aspects of technology transactions, internet law, IP licensing, data privacy and security, technology-related dispute resolution, contract and business processes, revenue recognition, and regulatory compliance.

Steven J. Thomas was promoted to Senior

Vice President, Assistant General Counsel, for Kohl's Department Stores, Inc. Kohl's is a national retailer based in Menomonee Falls, Wis., with over 930 stores across 46 states.

1993



Steven R. Glaser has joined Quarles & Brady as a partner in the Corporate Services Group. He has significant experience in mergers, acquisitions, and divestitures, including leveraged buyouts, management-led buyouts, and employee stock buyouts. Glaser is a resident of Germantown, Wis., where he serves as the chairman of the Village of Germantown Board of Zoning Appeals and as a director of the Germantown Community Scholarship Fund, Inc.

1994

Lee Anne N. Conta is a shareholder in the Litigation

and Risk Management Practice Group of von Briesen & Roper. She concentrates her practice in litigation and insurance coverage disputes, with a special emphasis on intellectual property, commercial, construction, and environmental coverage matters.



Michael E. Holy was elevated to shareholder in the Chicago law firm of Johnson & Bell, effective January 1, 2007. His practice focuses on product liability, pharmaceutical liability, medical liability, employment law, and other complex civil litigation.

Elizabeth Latham Leone and **Joe Leone** (1992) had their fifth child in spring of 2006. Elizabeth hung up her law hat some time ago and keeps busy raising and homeschooling the Leone brood, while Joe practices intellectual property law

with DeWitt Ross & Stevens in Madison. The family lives in Brooklyn, Wis.

Eric A. Schlam, Arlington, Va., has been named Director, Law Department, Assistant General Counsel, and Corporate Secretary of the Airlines Reporting Corporation. He has been practicing as in-house counsel for the past 12 years.

1995

Arthur T. Phillips has joined the Milwaukee office of Whyte Hirschboeck Dudek in the firm's Human Resources Law Practice, advising clients on employee benefit matters. He serves as board chair of the Wheaton Franciscan Healthcare Foundation for St. Francis, a member of the Board of Directors for Clement Manor, Inc., and chair of the Administrative Services Committee for Gesu Parish in downtown Milwaukee.

Steven F. Stanaszak has been elected as an equity shareholder in the Milwaukee office of Whyte Hirschboeck Dudek.

1998

Jason G. Wied has been named Vice President

of Administration for the Green Bay Packers. Wied joined the Packers in September 2000 as corporate counsel. He will continue to oversee the team's corporate governance with the Board of Directors and manage shareholder relations. Wied and his wife, Melissa, have three children.

1999

Michael D. Cicchini published *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 Seton Hall Law Review 335 (2007). He was also named in *Wisconsin Super Lawyers & Rising Stars* magazine (2006) in the field of criminal defense. Cicchini practices in Kenosha, Wis.

Daniel S. Galligan has become an equity shareholder in the Milwaukee office of Whyte Hirschboeck Dudek.

Amy E. Worden lives in Midland, Mich., where she is a litigation case manager for the Dow Chemical Company. Son, Xavier Harlan Wilson Worden, was born on November 29, 2006.

2000

Scott C. Baumbach has been elected to the partnership of Michael Best & Friedrich, practicing exclusively in representing management in various areas of employment law.

Carlo M. Cotrone, a member of the Intellectual Property Practice Group in the Milwaukee office of Michael Best & Friedrich, has been elected to the partnership of the firm. His practice focuses on general intellectual property matters with an emphasis on electrical and computer-related patents and transactions implicating such patents.



Joshua B. Fleming has joined Locke Reynolds in its Indianapolis office. He concentrates his practice in product liability. He has experience defending manufacturers of heavy and industrial equipment, motorcycles, commercial ovens, firearms, computers, and other products.

Glen A. Weitzer is a member of the Intellectual Property Practice Group of Michael Best & Friedrich in the Waukesha office and is newly elected to the partnership of the firm. He focuses his practice on patent prosecution for the mechanical arts, including refrigeration systems, paper-manufacturing equipment, small internal-combustion engines, motorcycle engines, and motorcycles and related accessories.

Elizabeth A. Westlake practices at Davis & Kuelthau, Milwaukee, in the area of corporate law.

2001

Adam Omar Shanti has been named Vice President-General Counsel of Abu Dhabi Islamic Bank's Paradigm Investment Banking Company Limited. Shanti is based in Dubai.

James O. Sullivan, Jr., was elected Wisconsin State Senator (D-Wauwatosa) in 2006 and became the Majority Caucus Secretary in 2007. Sullivan started a term as a commissioner of the Midwestern Higher Education Compact on March 22, 2007, and will serve until January 1, 2009.

2002

Patrick M. Miller has joined Baker & Daniels in its construction, environmental law, and real-property litigation practice. He works in the downtown Indianapolis office.

2003



Erin K. Fay joined Boyle, Fredrickson, Newholm, Stein & Gratz in Milwaukee as an associate. She is licensed to practice in the United States Patent and Trademark Office, among other tribunals.



Eric J. Lalor is an associate at Boyle, Fredrickson, Newholm, Stein & Gratz. He is a member of the American Intellectual Property Law Association.

Adrienne Olson and **Natalie Remington**, associates with Quarles & Brady and members of the firm's domestic-abuse injunction advocacy team, were recognized by Legal Action of Wisconsin's Volunteer Lawyers Project. They are part of a seven-member team involved with the Task Force on Family Violence and serve at the organization's courthouse clinic two afternoons a month. Olson is a co-captain of the team.

2004



Jane E. Appleby has been appointed to a three-year term on the State Bar of Wisconsin Committee on Professional Ethics. She focuses her practice at Quarles & Brady on general civil and commercial litigation. Appleby is a member of the Marquette Law Alumni Association Board and is involved in several other professional organizations.

Vivian Torres's route to the legal profession was scarcely typical. It began when her family escaped from Cuba in 1961 and came to the United States with only the belongings in their suitcase. Her father escaped first, disguised as a priest because Castro was expelling the religious. Torres, her mother, and sister followed shortly thereafter under the ruse of visiting a sick uncle in New York. They received a hardship visa and never returned. Those acts of courage and faith allowed—and required—Torres and her family to begin anew.

“Neither of my parents could speak English, and my sister and I were then just four and five years old,” explains Torres. Despite these obstacles, they not only persevered, they flourished. “We left behind everything we had to start a better life.”

Torres, a 1983 Marquette Law School graduate who is now presiding judge for the Medina County Court at Law in Hondo, Texas, recalls her early years. Her father (who recently passed away) worked three jobs to support their family, which first settled in Amarillo, Texas. “He worked as a typesetter, at a drive-in movie theater, and as a dishwasher at Pizza Hut,” she says. A diligent worker, he was soon promoted and accepted a position managing a Pizza Hut first in Amarillo and then was again advanced, this time to district manager in La Crosse, Wis., where the family then moved.

This move subsequently presented an opportunity for Torres's father to become a franchise owner. Eventually, he sold his interests to Pepsico, at which time his company

Dawn L. Drellos has a solo practice in Wauwatosa, Wis., in civil litigation, business, contracts, and employment law. She is admitted in Wisconsin, the District of Columbia, and Florida.

Daphne C. Roy is an associate at Davis & Kuelthau, practicing in Milwaukee in the firm's corporate law area.



VIVIAN TORRES

owned more Pizza Hut franchises than any other privately held entity in the United States.

When the family moved to La Crosse, Torres was 12 years old and still gaining fluency in English. Torres

gratefully recalls a teacher who kept Torres by her side and gave the young student extra attention so that she could learn English more easily. After graduating from high school in La Crosse, Torres attended Marquette University both as an undergraduate and for law school.

“When I graduated from law school in 1983,” Torres relates, “I had several opportunities available, but my dad’s company needed in-house help. So for several years, I worked in Del Rio, Texas, and then in San Antonio, helping him acquire overseas locations for Pizza Hut franchises.” The experience opened many doors for Torres and gave her an opportunity to work with many prominent and well-respected attorneys in various fields of the law.

In 1988, Torres entered private practice and joined a small firm in Texas, where she made partner quickly (indeed, within the first year). The firm eventually grew to five partners and six full-time staff. Torres decided to run for Texas County Court at Law and in 2003 won a seat. The jurisdiction handles a wide variety of misdemeanors

and all family-law cases in the area, as well as probate and some civil cases. In short, Torres is busy.

But the position offers many rewards. Chief among them is the opportunity to intervene in an appropriate way with children and families. “Every day I have a chance to assist in custody decisions and provide early intervention with juveniles in the criminal justice system,” Torres says. Torres is also very involved in the professional development of her colleagues and frequently speaks to the Texas State Bar Family Law section. “I concentrate on encouraging and training others regarding pro bono family service. We have such a direct need in our community,” she relates. There is no public defender program in her court, so judges rely on private lawyers to take court-appointed cases for those who cannot pay. Torres also has special interest in preventing domestic violence. “I hope that I am giving back to a country that has given me so very much.”

Although Torres is far away from Wisconsin and Marquette, she recalls her Marquette education often. “Ethics are such a significant part of practicing law,” Torres says. “My experience at Marquette taught me a lot in that regard.”

Torres is impressed with the Law School’s renewed efforts to reconnect with its alumni. “I am sure that this is also a reflection of how the school treats its current students,” she says. “This positive trend will serve to contribute to the Law School’s continuing success.”

Torres notes that she especially looks forward to connecting with her classmates at their 25-year class reunion in 2008. •

John J. Schulze, Jr., has been elected to a three-year term on the Board of Directors of the Energy and Telecommunications Section of the State Bar of Wisconsin. Schulze is employed by American

Transmission Co. of Waukesha and lives in Johnson Creek, Wis.

Jeanne E. Welcembach is a partner at Welcembach Law Offices in Milwaukee and heads

the Spanish-speaking litigation department; her languages include Spanish and Portuguese.

2005

Jeremy Westlake, Quarles & Brady, is part of the firm’s seven-member domestic-abuse injunction advocacy team, which was honored by Legal Action of Wisconsin’s

PAUL DACIER

Paul Dacier, L'83, is living his dream. As a child, he always wanted to be involved in the business world; his Marquette Law School education helped him get there.

Today, Dacier successfully melds legal expertise with business acumen, as he serves as Executive Vice President and General Counsel of EMC Corporation. EMC, a worldwide developer and provider of information infrastructure technology and solutions, has its headquarters in Massachusetts. It posted revenues last year of \$13.23 billion and has more than 37,000 employees.

Dacier looks back on the many stepping-stones that paved his way to his present position, beginning with his involvement in Boy Scouts. "I became an Eagle Scout as a teenager, which opened a lot of doors for me," he says. "I stayed involved as an adult and became president of the Knox Trail Council in Framingham, Massachusetts." The council was 10,000 strong and provided Dacier an opportunity to "be prepared" for leading a company three times as large.

Dacier also acknowledges his six years as an attorney with the former Apollo Computer, Inc. (later acquired by HP) and a prior year at a small Milwaukee law firm as vital building blocks for his present position at EMC. Dacier oversees more than 70 legal professionals and aggressively defends the company's interests regarding proprietary data storage technology. He joined EMC as corporate counsel in 1990 and was promoted to general counsel in 1992, to vice president in 1993, to senior vice president in 2000, and to executive vice president in 2006.

This Marquette lawyer's responsibilities with EMC are broad-ranging. He must be well versed in the legal aspects of the company, while also being savvy concerning its business operations. He is responsible for the worldwide legal affairs of the company and its subsidiaries, and he oversees the company's internal audit, real estate, and facilities organizations, as well

as its government affairs and aviation departments.

Dacier is committed as well to public service. In 2003, he was appointed by Governor Mitt Romney as a member of the Massachusetts Judicial Nominating Commission for a three-year term. In 2006, Governor Romney also appointed Dacier as the presiding officer in the proceedings to de-designate (or remove for cause) the chairperson of the Massachusetts Turnpike Authority, who was in the hot seat for management of a tunnel project whose collapse killed a woman.

Dacier is involved in other community activities as well. For example, he is a trustee of the Social Law Library, one of the oldest law libraries in the United States, located in Boston in the John Adams Courthouse. He has received numerous awards, including being named one of the top ten Massachusetts lawyers in 2005 by the *Massachusetts Lawyers Weekly*. And Dacier and his wife, Kim, are busy parents of three children.

The legal education underlies the various professional undertakings. "My Marquette Law School education has served me well—it taught me how to analyze the facts, identify the most important issue, and advise accordingly," Dacier says. "It challenged me to develop my critical thinking and writing skills, which are necessary for every businessperson or lawyer."

Dacier looks to the future of the Law School with enthusiasm. "Marquette Law School is in very capable hands," he says. "Dean Kearney is vibrant, insightful, and strategic. I look forward to helping him continue his efforts with the Law School." •



Volunteer Lawyers Project for representing victims at permanent-injunction hearings. Westlake is an associate with the firm and focuses his practice on intellectual property.

Emily Nolan-Plutchak has become an assistant State Public Defender for Walworth County, Wis.



Sven E. Skillrud has joined the Tax Planning Practice Group in the Milwaukee office of Godfrey & Kahn. His practice will focus on tax law and executive compensation.

2006

Sara L. Harris is an associate in the Labor and Employment and

Compensation and Benefits sections at von Briesen & Roper.



David S. Kowalski joined the Madison law firm of Balisle & Roberson as an associate in January 2007. He works primarily in the areas of divorce, child custody litigation, nontraditional family issues, and appellate practice.

Emily A. Menn lives in Troy, N.Y., where she is the Director of Education and Professional Development for the New York State dispute resolution association.

Mathew D. Pauley received an M.A. in Bioethics from the Medical College

of Wisconsin in January 2007 and completed a master's degree in dispute resolution. Pauley is serving in a two-year post-graduate fellowship at Memorial Medical Center in Springfield, Ill., as the center's first Clinical Ethics Fellow.

Jessica M. Swietlik has joined von Briesen & Roper, as an associate in the Litigation and Risk Management Practice Group.

Christina L. (Votto) Ruud has joined Rose & deJong, a general practice firm in Brookfield, Wis. She married Matthew P. Ruud on June 16, 2007. The couple lives in Lake Mills, Wis.

Anne E. Wal is an associate at von Briesen & Roper, practicing in the Real Estate and Construction section and the Banking, Bankruptcy, and Business Restructuring section.

2007

Adam S. Bazelon has joined the firm of Meissner, Tierney, Fisher & Nichols, in Milwaukee.

Anissa M. Boeckman has been hired as an associate at Jeffrey Leavell S.C. of Racine, Wis.

Christopher J. Kukowski has joined the attorneys at Boyle, Fredrickson, Newholm, Stein & Gratz in Milwaukee.

Steven J. LaFore has joined the law department of Northwestern Mutual in Milwaukee, as counsel on the Investment Products and Services Team.

Lauren A. Schwarz has joined von Briesen & Roper as a member of the Banking, Bankruptcy, and Business Restructuring section. Her practice focuses on commercial and business litigation, real estate, and construction law and litigation.

Molly J. Smiltneek has been hired as an associate with Grzeca Law Group in Milwaukee.

Andrea F. Whiteside has joined the Milwaukee firm of Meissner, Tierney, Fisher & Nichols. •

Marquette University Law School Reunions

will be held Friday, June 6, and
Saturday, June 7, 2008

for the classes of

1963, 1973, 1978, 1983, 1988, 1993, 1998, 2003

Questions? Phone: 414.288.3167, Christine Wilczynski-Vogel
Email: christine.wv@marquette.edu



Linnea Matthiesen

JESSICA MARQUEZ MURPHY AND LINNEA MATTHIESEN

BY JESSICA POLINER, L'06



Jessica Marquez Murphy

While a law student and supervised fieldwork intern with Centro Legal on Milwaukee's South Side, Jessica Marquez Murphy, L'07, received her assignments and set out to accomplish them. Not an hour into her first day as an intern, she headed to the courthouse. Marquez Murphy submitted child support papers, filed a summons and petition for a divorce, and requested pretrial dates in two courtrooms. Nearing the end of her day, Marquez Murphy reunited with her supervising attorney, Linnea Matthiesen, L'03, for the most nerve-racking task of all. Under the watchful eye and guidance of Matthiesen, Marquez Murphy made her first appearance of record under the student practice rule in a stipulated-divorce case.

A little more than a year later, now a lawyer herself, Marquez Murphy works side-by-side with Matthiesen at Centro Legal, a nonprofit law firm providing legal representation in the two largest areas of low-income litigation—family law matters and misdemeanor criminal defense. Both Marquez Murphy and Matthiesen agree that the agency's principal differentiator is the firm's cost-sharing model, where in most cases the client pays a portion of the fee. "In two years and over 150 closed cases later, I have had only two clients fail to show up for a hearing, and both called to tell me beforehand," adds Matthiesen.

Marquez Murphy and Matthiesen credit Marquette Law School for providing them abundant opportunities for practical experience. Marquez Murphy explains, "I was fortunate to enroll in the substantive law classes that I wanted, including all of the family law classes, the child abuse seminar, the domestic violence workshop, and the restorative justice program. More than anything, though, the Law School allowed me to learn outside of its walls."

And learn she did. Marquez Murphy volunteered with the Boys and Girls Club, served as a Public Interest Law Society fellow at the Task Force on Family Violence, and interned at Legal Action of Wisconsin and, ultimately, at Centro Legal. While still a law student, Marquez Murphy

gained an understanding of the plight of low-income women and children, especially when domestic violence is present. Marquez Murphy knew that she wanted to combine her various experiences and her substantive legal knowledge to aid domestic violence victims. Centro Legal provided her the opportunity.

In her last semester at the Law School, Marquez Murphy helped to author a grant application to help fund Centro Legal's family-court representation of victims of domestic violence. "Unfortunately, because domestic violence is a common matter among our clients, there is an overwhelming need for this project," Marquez Murphy explains. United Way recently approved the grant.

Referrals are made to the project from the District Attorney's office and domestic violence support organizations. Nearly all clients are at-risk individuals who need a safer and more stable home life to avoid slipping into a crisis situation. Before she had worked for even six months with Centro Legal, Marquez Murphy could count 35 individuals as her clients, a reflection of the high caseload at Centro Legal.

Of course, Marquez Murphy is not alone at the project. As a family law attorney focusing on guardian ad litem appointments and divorce cases, Matthiesen works closely with Marquez Murphy to provide a variety of services to the project's clients. "With the United Way grant, we are now able to assist domestic violence victims through a divorce, if this is desired, help implement safety plans, and make referrals to other community agencies when necessary," relates Matthiesen. Both Matthiesen and Marquez Murphy also work with new supervised fieldwork interns from Marquette, who help Centro Legal tackle its large caseload. "I am eager to share my experience and knowledge with them," says Marquez Murphy.

Centro Legal's executive director, Chris Ford, feels the same way. "We need more folks, whether students or lawyers, like Linnea and Jessica," he says. "Some very fine individuals are emerging from Marquette Law School." •

Dear Fellow Alumni,
I am very honored to serve as the president of the Marquette University Law Alumni Association, especially during this exciting time in the school's history.

We're at a turning point this year: Our long-awaited goal of building a new school has moved to its final planning stages. In many ways, this is happening more quickly than many of us would have imagined.

We owe enormous gratitude to Ray and Kay Eckstein, whose \$51 million donation has moved us so far, and to Joseph Zilber, whose \$30 million donation not only adds to this building fund but will also provide tuition scholarships to many future generations of Marquette law students.

As I look back at my time at Marquette, both as an undergraduate and law school student, I see what a life-changing experience those years were for me. I am so pleased that many others will have a similar opportunity to earn a Marquette law degree—with the added benefit of studying in a new state-of-the-art facility.

I am equally pleased for Marquette University, the metro Milwaukee area, and the entire Wisconsin legal community. We will all benefit from the prestige that will accompany this new law school building as well as the insight and leadership that will come from those who receive their legal education at Marquette Law School.

While only a select few are able to donate millions to our alma mater, we can all do our part to give back to the school that has been such an important springboard in our lives. For many of us, one of the best ways to give back is by maintaining or renewing our ties with Marquette Law School.

You have an excellent opportunity to do so at the upcoming annual Law Alumni Awards reception, which will be held April 24, 2008. Please join us as we recognize Greg Conway, L'70, as the Law School Alumnus of the Year;

Ralph Huiras, L'41, who will receive the Law School Lifetime Achievement Award; Raeshann D. Canady, L'04, who will receive the Law School Howard B. Eisenberg Service Award; and James Gray, L'90, who will be honored as the Sports Law Alumnus of the Year.

Finally, I would like to add that it has been an honor to work with Dean Kearney and my fellow board members. I also want to thank Genyne Edwards, last year's alumni association president, and all the outgoing board members. I've truly enjoyed my time with you as well as our many stimulating and inspiring discussions.

M. JOSEPH DONALD, L'87
PRESIDENT,
MARQUETTE UNIVERSITY LAW ALUMNI ASSOCIATION



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[HTTP://LAW.MARQUETTE.EDU](http://law.marquette.edu)

Challenges to Judicial Independence A Perspective from the Circuit

The Honorable Carolyn Dineen King, of the United States Court of Appeals for the Fifth Circuit, visited campus last year as the Law School's Hallows Judicial Fellow. The highlight of her visit was the annual Hallows Lecture, which was subsequently published in the Marquette Law Review and appears here as well.

Introduction by Dean Joseph D. Kearney

It is my privilege to welcome you to our annual E. Harold Hallows Lecture. This lecture series began in 1995, and we have had the good fortune more or less annually since then to be joined by a distinguished jurist who spends a day or two within the Law School community. This is our Hallows Judicial Fellow. Some of these judges we meet for the first time. Others are more known to us beforehand—already part of us, really. Within that latter category, I am very grateful that today we have with us two of our past Hallows Fellows. I would like to recognize them. Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court delivered the Hallows Lecture in 2003, my first year as dean. She is a friend of the Law School as well as a friend of this year's Hallows Fellow. The other is Judge Diane Sykes, a Marquette lawyer (Class of 1984), who is a member of the United States Court of Appeals for the Seventh Circuit and who delivered the Hallows Lecture in 2006. Thank you to both Chief Justice Abrahamson and Judge Sykes for being with us today.

Permit me to tell you something about the individual in whose memory this lecture stands. E. Harold Hallows was a member of the Wisconsin Supreme Court from 1958 to 1974, spending the last 6 of those 16 years as Chief Justice. That is a long time on a common-law and constitutional court, and Justice Hallows not only witnessed but participated in—even helped to cause—significant changes in legal doctrine in this state. All of that might be reason enough to remember him. But, as many of you are aware, Justice Hallows was *Professor* Hallows at Marquette University Law School for 28 years before his appointment to the Wisconsin Supreme Court. A generation of students took Equity and Equity II from Professor Hallows, who found time for this undertaking even in the midst of his work as a lawyer in Milwaukee and his extensive service to court reorganization and law reform efforts.

This year's Hallows Lecturer is the Honorable Carolyn Dineen King. For the past 28 years, Judge King has served on the United States Court of Appeals for the Fifth Circuit, recently completing a seven-year term as Chief Judge of that court. Judge King is an alumna of Yale Law School and maintains her chambers in Houston.

and the Rule of Law: Courts

This is nonetheless sort of a homecoming for her, not so much in the sense of a past affiliation with Marquette as because she is, at least as I see it (and as she sees it), from Milwaukee; she attended St. Robert's School in Shorewood for eighth grade and, thereafter, Downer Seminary, one of the precursors to the University School of Milwaukee. Because Marquette Law School is Milwaukee's law school, no less than when that was our name (until 1908), this gives us something of a connection to Judge King. It became official when Judge King had the good judgment—I know that she agrees with me on the matter—to hire Annie Owens, a Marquette lawyer (Class of 2005), as her law clerk during 2005–2006. We are delighted that Annie, currently working at a Washington law firm before spending next year as a Bristow Fellow in the Office of the Solicitor General at the Department of Justice, has come back for this lecture. So, in light of these Milwaukee and Marquette connections, we regard Judge King as falling into the Abrahamson-Sykes category of already being part of us.

Of course, no connection to the Law School is sufficient to warrant an invitation to deliver the Hallows Lecture. One must also have something interesting—preferably even challenging—to say. I am optimistic that Judge King will meet this criterion as well. Please join me in welcoming our Hallows Judicial Fellow, the Honorable Carolyn Dineen King.



Hallows Lecture by Judge Carolyn Dineen King

Thank you, Dean Kearney. I am going to talk today of something about which I care very deeply.

The first half-dozen years of the twenty-first century have been characterized by steadily increasing concern on the part of judges, lawyers, and academicians about serious challenges to judicial independence that we face in this country. Many law reviews, periodicals, and newspapers have contained articles on the subject, and at least one recent television talk show featured

a segment on judicial independence. In September 2006, retired Supreme Court Justice Sandra Day O'Connor and Justice Stephen Breyer convened a conference in Washington, D.C. on the topic of "Fair and Independent Courts" attended by several Supreme Court Justices and many of the country's business leaders, representatives of the press, state and federal judges, lawyers, and academicians. While challenges to judicial independence have been with us since the



founding of the Republic, those that have produced the current ferment are viewed by some as particularly troubling because they may be doing lasting harm.

What I would like to do today is to look first at why judicial independence is critically important to our system of government. I will move on to describe specific challenges to judicial independence that we face in the federal court system. While my focus is on the federal system, similar challenges are faced in the state court systems as well, a point that came through loud and clear from comments made by distinguished state court judges and practitioners at the O'Connor–Breyer conference. Finally, I would like to pay particular attention to the significant differences between how those challenges play out at the Supreme Court level and at the level of the intermediate federal appellate courts.

To define the contours of judicial independence and to show why it is important in our system of government, some history is useful. I am not a constitutional historian. But among the background papers furnished to participants in the O'Connor–Breyer conference was an excellent paper by Professor Jack Rakove of Stanford University on the origins of judicial independence, and what follows borrows heavily from that paper and its source material.¹

The judiciary that the American colonists were familiar

with was the English judiciary. Before the eighteenth century, royal judges served at the pleasure of the crown and, as Professor Rakove describes it, “courts were often viewed more as active agents of royal power than as impartial institutions mediating between state and subject.”² By contrast, juries were viewed, at least by some political theorists, as potentially independent of the crown. The Act of Settlement of 1701 established that royal judges would serve during good behavior and not at the king’s pleasure, and was intended to secure for judges the same ability to act independently that juries were thought by some to possess.

But even after the Act of Settlement and the independence that it secured for individual judges, the English judiciary continued as a part of the executive, and the highest court of appeal was the House of Lords. Further, the British government did not extend the Act of Settlement to its colonies—one of the many bones of contention between the American colonies and the British government. Instead, the colonists continued to have judges who served at the pleasure of the crown, and, as a result, the colonists placed much faith in independent juries (who decided questions of law and fact) to resolve their legal problems.

After independence, the American states (unlike Great Britain) adopted written constitutions of government. These constitutions were greatly influenced by Baron Montesquieu’s 1748 work, *The Spirit of the Laws*, which set out, for the first time, a modern, tripartite theory of separation of powers in which the judiciary was to be a separate entity.³ Montesquieu also described as the very definition of tyranny the concentration of executive, legislative, and judicial power in the same hands.⁴ The constitutionalists of the late eighteenth century took these views to heart; for example, the 1780 Massachusetts Constitution, which was largely drafted by John Adams, provided that “the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”⁵

In the years immediately after independence, the three branches of state governments reflected in these first constitutions were not initially viewed as coequal, regardless of how they were defined in the constitutions.⁶ Initially strengthened as a check on executive power, the legislative branch had the most power, and the judicial branch was the weakest of all. But as the state legislatures hastily began to legislate in order to fight a revolutionary war and to raise the money and armies necessary to do so, the results were sometimes extremely problematic and burdensome for the former colonists, and criticism of state lawmaking grew loud and frequent.⁷ Along with the criticism, however, came the recognition that the legislatures' primary role as a check on executive authority had been supplanted by their expanding responsibility for carrying out the lawmaking essential to the young nation. What was needed, no less than a check on executive power, was a check on legislative power.

James Madison, focusing on the want of "wisdom and steadiness" in legislation,⁸ saw the judiciary as having an important role in addressing both legislative and executive abuses of power. Madison identified judicial independence as central to this function, and, like the English, he defined the concept primarily in terms of tenure during good behavior, with "fixed" and "liberal" salaries important as well.⁹

Alexander Hamilton also recognized the importance of an independent judiciary as a bulwark against the encroachments of the other two branches. In *Federalist 78*, for example, he stressed that "though individual oppression may now and then proceed from the courts of justice, the general liberty of the people . . . can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments."¹⁰ Hamilton believed that complete independence is "peculiarly essential in a limited Constitution," where courts are the only mechanism by which the constitutional limitations placed on the legislature could be preserved.¹¹ Beyond these institutional dangers, he wrote that judicial independence protects against the additional threats that surges of public opinion pose to constitutional limitations and individual rights.¹² Like Madison, Hamilton emphasized that life tenure was indispensable for the judicial branch to

remain independent, thereby preserving the judicial check on these perils.¹³ And to limit "an arbitrary discretion in the courts" themselves—judges "making it up as they go along," in the words of Professor Rakove¹⁴—it was necessary to bind the courts, in the words again of Hamilton, "by strict rules and precedents."¹⁵

Although lifetime tenure and fixed salaries would help secure independence for the judiciary, more was required if the judiciary was to be effective in countering the weight of elected legislatures. The critical piece came in the form of a written constitution, to be drafted by a convention called for that purpose and submitted to the people for ratification. As Professor Rakove points out, a constitution developed by these methods "could then be regarded as legally superior to ordinary acts of government. And that in turn could enable independent judges to enforce constitutional rules and norms against the other branches of government."¹⁶ Relatedly, an emerging doctrine of judicial review was also percolating at the time of the Constitutional Convention. Among the comments of the Framers were brief indications that they understood the concept and that the decision to award judges tenure on good behavior was designed in part so that they could fulfill that duty.¹⁷

The judicial role was further solidified by the Convention's resolution of the critical question of how conflicts between national and state laws would be resolved. The answer, of course, was the Supremacy Clause, which made the Federal Constitution the supreme law of the land and obliged state judges to enforce it as well. In one fell swoop, the Constitution was established as fundamental law and the enforcement of the division of power between the national government and the states was made a judicial function.¹⁸ Madison took some comfort in the role that the Supreme Court would play as the tribunal which would ultimately decide these boundary disputes.¹⁹ But, he added: "The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality."²⁰ He clearly refers to the judicial independence that lifetime tenure and fixed salaries were designed to promote.²¹

The result of the Framers' efforts to establish an

independent judiciary is Article III, Section 1 of the Constitution. We are all familiar with it, but it bears repeating:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

To sum up, the Constitution provided for an independent judiciary, separate from the elected branches. Its function was to enforce the provisions of the Constitution and of what was likely to be a large body of federal law—to hold the elected branches true to the Constitution and federal law and to resolve disputes over the division of power between the federal and state governments. Tenure during good behavior and a salary that could not be diminished were the primary mechanisms designed to secure the independence of the judicial branch. The goal was judges who would not be subject to domination or manipulation by the elected branches or by the shifting passions of the people at large. And, as we have seen from Hamilton's writings, among others, the judges themselves were to be constrained by the very laws they were to enforce, constrained by "strict rules and precedents," in his words, with the goal of limiting "an arbitrary discretion in the courts."²²

In the words of a modern day Justice, Stephen Breyer, "judicial independence revolves around the theme of how to assure that judges decide according to the law, rather than according to their own whims or to the will of the political branches of government."²³ Professor Dennis Hutchinson of the University of Chicago has identified two premises from Breyer's succinct formula. "First, the judicial independence is not an end in itself but is an instrument in service of the rule of law. Second, . . . 'judges free from executive and legislative control will

be in a position to determine whether the assertion of power against the citizen is consistent with law."²⁴

Having described the origins and contours of judicial independence, I turn now to current challenges to judicial independence that are viewed by many as sufficiently serious as to threaten the judiciary's ability to function as intended by the Constitution. I look first at how the judiciary has fared with the President and with members of the legislative branch.

What we see is that the independence of the judiciary is being challenged by a large volume of sometimes vitriolic attacks being leveled at both the state and federal judiciaries. While attacks on the judiciary are nothing new, they are nonetheless disturbing when they reach the volume and pitch of those that we have witnessed in the last several years. These attacks emanate from the President himself, who with distressing frequency (particularly when an election is upon us) takes the podium to decry "activist judges" at the state and federal level who, in his view, are responsible for various decisions with which he and members of his political base disagree. The term "activist judges" has become, and is intended to be, a key rallying call to the political base, not only from the President but also from members of both houses of Congress and from the base itself.

The attacks on the judiciary are triggered most often by judicial decisions, such as the Schiavo case, the Ten Commandments cases, the Pledge of Allegiance case, and the eminent domain cases.²⁵ After the courts decided not to intervene in the Schiavo case, then House Majority Leader Tom DeLay warned that the judges would have to "answer for their behavior" in a court system "run amok."²⁶ Shortly after Judge Lefkow's husband and mother were murdered and the violence that occurred in a state courthouse in Georgia, Senator John Cornyn took to the Senate floor to suggest some vague connection between the deranged murderers responsible for "recent episodes of courthouse violence" and "judicial activism."²⁷ To his credit, he subsequently backed off of that. Although some have called for the impeachment of judges responsible for the controversial decisions, Representative James Sensenbrenner, then chair of the House Judiciary Committee, rejected the notion that Congress should

respond to cases such as the Schiavo matter by attempting to neuter the courts through the impeachment of judges. But even in rejecting impeachment, he warned ominously, “This does not mean that judges should not be punished in some capacity for behavior that does not rise to the level of impeachable conduct.”²⁸ He reserved the right to tinker with the courts’ jurisdiction, and he proposed the creation of an inspector general within the judiciary. Other congressmen have suggested that the way to rein in the courts is to starve them, raising the specter that constraints on the federal judiciary’s budget, beyond those already resulting from the escalating deficit, would be the payback for controversial decisions.

Judicial independence is undermined not only by these external attacks but also by the high degree of political partisanship and ideology that currently characterizes the process by which the President nominates and the Senate confirms federal judges. It should be said at the outset that, at least to some extent, this is nothing new. At several points in our history, presidents have scrutinized the ideological leanings of prospective Supreme Court nominees with the goal of nominating Justices with views compatible with the respective views or perceived needs of those presidents. President Franklin D. Roosevelt, for example, was particularly careful about the views of nominees to the Supreme Court and the intermediate federal appellate courts after the Court’s rulings in the early 1930s invalidating various pieces of New Deal legislation that the President considered crucial to the recovery of the nation from the Great Depression. The Senate has engaged in the same kind of scrutiny as a part of the confirmation process.

Let me be clear: there is nothing inappropriate with

political or partisan considerations factoring into the judicial appointment process. After all, the Framers vested the nomination and confirmation powers in the elected branches of government, and it is to be expected that the President and senators would seek judges whose judicial philosophies seem consistent with their own.

That said, the last 50 years or so, and the last 25 years in particular, have featured an ever-increasing and contentious focus in the nomination and confirmation process on whether candidates for the Supreme Court and the intermediate federal appellate courts are committed, either by reason of their background and experience or by reason of explicit or implicit commitments they have made as a part of that process, to particular positions on several politically salient issues including abortion, civil rights, and the rights of criminal defendants. The force of this change has been particularly felt by the intermediate

federal appellate courts, whose judges had been

selected under the more ideologically neutral system of patronage that generally guided appointments until the 1960s.²⁹ Before talking about the ramifications of the focus on political ideology for judicial independence and for the rule of law, I would like to talk about what has been afoot during the last half century that has played a role in the intense and widespread interest in the political ideology of judicial nominees.

Beginning in the early 1950s, decisions by the Supreme Court, under the leadership of Chief Justice Earl Warren, focused increasingly on the constitutional rights of individuals, as distinguished from property or business matters.³⁰ Perhaps the most famous is the 1954 decision in *Brown v. Board of Education*, which struck down the so-called “separate but equal” education of black citizens that prevailed in

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Southern and adjoining states.³¹ *Brown* was only the first in a series of Supreme Court decisions directed at dismantling laws that discriminated against blacks in many aspects of their lives. During the 1960s, the Court broadened the protections of criminal defendants under the Fourth, Fifth, and Sixth Amendments to the Constitution. This is the era of the decisions that mandate the appointment of counsel for indigent defendants in criminal cases,³² that require warnings for suspects being interrogated designed to advise them of their constitutional rights,³³ and that require the exclusion from trial of illegally obtained evidence,³⁴ to name just a few.³⁵ During the 1970s, the Court recognized new rights for women under the Fourteenth Amendment, with the most controversial case being the 1973 decision of *Roe v. Wade*, in which the Court held that the Constitution protects a woman's right to choose abortion during the early stages of her pregnancy.³⁶

The beneficiaries of these decisions had been largely unable to obtain protection of these rights from the elected branches of government. With the advent of these decisions, the federal judiciary became the forum to which the disadvantaged (or those who perceived themselves to be disadvantaged) turned to vindicate their rights.³⁷ The Supreme Court led the way, but the lower federal courts were entrusted with fashioning remedies to enforce these rights.³⁸

Early successes in the federal courts attracted members for, and energized, interest groups that were advocates for the disadvantaged. The federal courts were seen by these groups as the place to achieve social change.³⁹ By the mid-1970s, conservative interest groups, also energized, stole a page from the book of the liberal interest groups and sought to enlist the aid of the federal courts to overturn or narrow the gains of the so-called liberal activists in the preceding 20 years.⁴⁰

Beginning in the 1960s, these policy-oriented issue activists started to ally themselves with the two major political parties: liberals allied themselves with the national Democratic Party and conservatives with the national Republican Party.⁴¹ With issue activists swelling the ranks of the two political parties, or at least providing votes for their respective candidates, and with the federal courts being seen by these groups

as a vital battleground, appointments to the Supreme Court and the intermediate federal appellate courts became a critical element of party policy. As Professor Stephen Burbank of the University of Pennsylvania Law School puts it, the courts came to be seen as fodder for electoral politics . . . [with the view] that it is appropriate to pursue chosen ends through the selection of judges who are committed or will commit in advance to pursue those ends on the bench. The impression sought to be created is that not only are courts part of the political system; they and the judges who make them up are part of ordinary politics.⁴²

Burbank's observation was recently confirmed by the Federalist Society's Executive Vice President, Leonard Leo, who said that, in the current environment, "a judicial confirmation process needs to resemble a political campaign."⁴³

With this historical backdrop, a significant goal of the appointment process for the Supreme Court and for the intermediate federal appellate courts has become the appointment of judges who could be relied upon to further the activists' policy agendas.⁴⁴ The reason for this seems to be that the leading political and issue activists in (or allied with) each party are the ones who, if satisfied with the party's or a candidate's position on critical issues, will mobilize the masses to turn out on election day; if dissatisfied, they and their followers will either stay home or, worse yet, actively campaign against the party or its candidate.⁴⁵

Particularly after the reported disappointment of Republican administrations with Justice Souter's perceived infidelity to the ideology of those administrations, reliability became vitally important. As Professor Burbank points out, the risk that a judge might be won over by the rule of law ideal or might experience a post-appointment "judicial preference change" has caused some presidents to seek protection by nominating individuals whose preferences seem to be "hard-wired."⁴⁶ For candidates whose views are less certain, the candidate might be "induced nonetheless to commit to a desired path

of judicial decision in advance.”⁴⁷

Another factor at work in the appointment process is the trend toward selecting nominees for the Supreme Court from the intermediate federal appellate courts. While this has the advantage for the selection process of providing a nominee’s track record and information about his temperament—and the advantage for the nominee of providing useful experience—it has the disadvantage of creating an incentive for decisions made with an eye to advancement.⁴⁸ As Professor Vicki Jackson of the Georgetown University Law Center describes it, “if lower court positions came to be viewed more as ‘stepping stones’ rather than ‘capstones,’ the temptation at the margin for self-interested decision making might increase, especially in an atmosphere in which confirmation battles focus more openly on ideology.”⁴⁹

A few years ago, I attended a symposium on judicial independence at Yale Law School.⁵⁰ After the speakers had made their presentations, comments from the floor were requested, and Judge Guido Calabresi of the Second Circuit, formerly the dean at Yale, popped up from the back row. He said that he had only been on the Second Circuit for a few years, but that it was long enough for him to conclude that the greatest threats to judicial independence were judges with ambition. He said that many such judges were real candidates for advancement only in their own minds.⁵¹ Nevertheless, a judge with ambition constantly has his eye on what the Administration or the Senate Judiciary Committee would think about a decision under consideration and how the decision would affect his chances for advancement. Some such judges go around the country making speeches to various interest groups, including well-known groups that seem to me to be increasingly akin to political parties or organizations, about their views on various hot-button issues. I recognize that judges have First Amendment rights, but some of the speeches that I have read seem designed to send

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signals or assurances about their views on issues that may well come before them, thereby enhancing their chances for promotion by the right president.

Several books and countless articles have been written on the political ideology that each of the presidents from Richard Nixon to George W. Bush has looked for in his nominees to the Supreme Court and the intermediate federal appellate courts and on the degree to which that political ideology served as a litmus test for nomination.⁵² In the time that I have today, I cannot do more than provide a few

brief generalizations on that subject, generalizations that will necessarily be of limited utility. Beginning with President Nixon, Republican presidents have promised to appoint only conservative judges—those who believe in “strict construction” of the Constitution.⁵³ Inherent in that promise is a goal to reverse or greatly narrow the policy gains liberals were perceived to have made in federal court litigation in the 1950s and 1960s, including gains in the areas of civil rights and the rights of criminal defendants. President Reagan also emphasized that his nominees must have a judicial philosophy “characterized by the highest regard for protecting the rights of law-abiding citizens” and by the “belief in the decentralization of the federal government and efforts to return decision making power to state and local elected officials.”⁵⁴ And, as one might expect in the post-*Roe v. Wade* era, President Reagan promised to work for the appointment of judges “at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”⁵⁵

To achieve these ends, “[l]egislative, patronage, political, and policy considerations were systematically scrutinized for each judicial nomination to an extent never before seen.”⁵⁶ Under the direction of Reagan’s Attorney General Edwin Meese, lengthy, probing interviews became common between Justice Department and White House officials and prospective nominees with the goal of ascertaining in advance how the

nominees would rule on the political issues important to the administration.⁵⁷ Some nominees successfully resisted these efforts, but the risk was that too much resistance could prove fatal to the nominee.

The conservative political ideology sought by President Reagan has been sought with equal intensity by both Presidents Bush.⁵⁸ Their selection efforts have been aided by conservative interest groups such as the Federalist Society, which began to develop in the early 1980s. The groups have come to provide forums and opportunities for advancement for their members and valuable opportunities for Republican administrations to vet their judicial nominees.⁵⁹

The two Democratic administrations in the last thirty years have differed somewhat from the Republican administrations in the way that they attempted to satisfy party issue activists. Carter abandoned patronage concerns and created so-called merit screening panels to recommend qualified judicial nominees.⁶⁰ Primarily, though, President Carter sought to satisfy his liberal party base by appointing black and female judges in large numbers, at least as compared with the number of these judges appointed by prior presidents, and some merit screening panels were given goals to strive for.⁶¹ Additionally, President Carter ran on a platform that supported the decisions of the Warren Court, and the selection criteria he established included that a recommended nominee “possesses, and has demonstrated, a commitment to equal justice under law,” which some conservatives viewed as a euphemism for liberal ideology.⁶²

From my own experience, the man who is now my husband, Circuit Judge Thomas M. Reavley, and I were both identified by the merit screening panel charged with finding potential judges for

the western half of the old Fifth Circuit (which stretched from Florida to Texas). Neither of us was ever asked what our views were on issues important to President Carter’s supporters, although Judge Reavley’s progressive views on race issues were generally known because of his extensive public service. I am a fourth-generation Republican, and when I was approached by the merit screening panel to see if I was interested in applying for a circuit judgeship, I told the chairman about my Republican lineage. He responded that President Carter did not care what my politics were.

Like President Carter, President Clinton also sought to satisfy party activists primarily by diversifying the federal bench.⁶³ But he took a more moderate approach than had President Carter on some issues, including crime, and that approach was reflected in some of his nominations.⁶⁴ He also continued the Department of Justice/White House interview process for intermediate federal appellate court judges that began under President Reagan.⁶⁵ Overall, I think it is fair to say that both Presidents Carter and Clinton were careful not to appoint judges with political views on the key issues that would be objectionable to the Democratic Party’s liberal base.⁶⁶

As political factors have increasingly come to bear on a president’s judicial nomination decision, the trend has been mirrored in the Senate confirmation process, where interest groups have one last shot to derail an undesirable nominee or to save an embattled one. Though influential in the confirmation process for Supreme Court nominees since at least the 1960s, interest groups really began to focus on lower federal court confirmations in the 1980s.⁶⁷ One result has been the increased use and threat of obstructionist tactics by senators to block particular nominees or to influence the nomination process itself through compromises.⁶⁸ Another

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consequence has been the pointed questioning during Senate confirmation hearings that often attempts to probe a controversial nominee's political leanings and the ways in which a nominee would decide particular issues.

I need to end this description of the ideological pressures that have become so prevalent in the judicial appointment and confirmation processes with one very important caveat. Whatever may have been the commitment of a president to his political base with respect to the political ideology of his nominees, not every judge appointed by that president has fit the description of what he was looking for; indeed, happily for the Republic, many have not.

It is clear to me that, in the last 50 years, we have come a long way from the goal of the Framers of a judiciary independent of the executive and legislative branches. In the words of Circuit Judge Diarmuid F. O'Scannlain of the Ninth Circuit (a very impressive judge, I might add),

By demanding to know in advance how a particular nominee will rule in a given kind of case, the political branches are exerting precisely the sort of direct control over the judiciary that Hamilton and the other Framers sought to avoid with the creation of a separate and distinct third branch.⁶⁹

But even without direct or indirect assurances as to how nominees would rule, a highly partisan or ideological judicial selection process conveys the notion to the electorate that judges are simply another breed of political agents, that judicial decisions should be in accord with political ideology, all of which tends to undermine public confidence in the legitimacy of the courts.⁷⁰ The loss of public confidence in the legitimacy of the courts—confidence that courts will decide impartially, in accordance with the rule of law—could, in turn, undermine compliance by the public with unpopular decisions.

Having described what I believe to be the causes of the politicization of the appointment process and how it has come to function, I would like to examine how the structure of lower court decision making combines with strong partisan or ideological views on the part of some of its judges to imperil the

fidelity of those judges' decisions to the rule of law. I will do that by contrasting the way in which the Supreme Court functions with the way in which a large intermediate federal appellate court functions.

The current Supreme Court hears approximately 80 fully briefed cases a year. All nine Justices hear and decide each case. Virtually all cases receive oral argument, at which questions can be explored with counsel and alternative outcomes and rationales pursued by the Justices themselves as well as by counsel. Every case receives a full opinion, and there are often concurring opinions and dissents. These opinions are circulated in draft form, with the Justices examining each critically and asking questions and making suggestions. While constitutional scholars and even the newspapers tell us that there are somewhat consistent voting patterns⁷¹ by some Justices in some types of cases coming before the Supreme Court, there is clearly no such thing as clique voting on the Supreme Court. Every vote is carefully considered; a Justice concurring in today's case may be dissenting in tomorrow's.

The result is that the record in the case, the relevant law, and the resulting opinions are thoroughly vetted by nine of the country's toughest critics. First and foremost, the Justices are accountable to each other for their work. Once the opinions are released, they are poured over by academics, journalists of every kind and stripe, lawyers, and the public at large. The Justices are thus held accountable for their work, indeed for their every word. As Chief Justice William Howard Taft remarked: "Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism."⁷²

Contrast this with the intermediate federal appellate courts. First, the workload is different in quantity and quality. Using the most recent year for which statistics are available, 2005, an intermediate federal appellate judge on average participated in the termination on the merits of 457 cases.⁷³ Using another measure of workload, such a judge authored 154 opinions and concurred in or dissented from 308 others, for a total of 462 cases that bore his name.⁷⁴ With the exception of a few cases

that are heard by the full en banc court, we sit in panels of three judges. Only 20 percent of the fully briefed cases in the Fifth Circuit, to give one example, are orally argued. As for differences in quality, most intermediate federal appellate court cases do not demand the kind of effort that most of the Supreme Court's cases require, and most would have only one outcome, no matter who appointed the panel members.

But the sheer volume of cases means that not every case gets the full attention of all three judges, let alone the full en banc court. Indeed, it would be an unusual case in which more than one judge on the panel reviewed the record, and not many cases benefit from an in-depth study of the applicable law by all three judges. This work pattern necessarily means that the level of interaction between the judges hearing a case is dramatically different than it is on the Supreme Court, and the level of functional accountability for his work of each judge to other judges is correspondingly different. As for external scrutiny, when our opinions are issued, most do not receive thoughtful review by anyone other than the parties. Some academics take an interest in some of our opinions, as do some journalists and bloggers. But on the whole, our work does not receive anything like the scrutiny that Supreme Court opinions receive.

This means that one or two of what Professor Burbank calls hard-wired judges, whether liberal or conservative, on a panel can produce a result that is not true to the rule of law, either because it is not faithful to the record in the case or because it does not fairly apply the existing law, without that fact being apparent to anyone other than the litigants. In high-volume courts, judges are often effectively forced to rely on "borrowed intelligence," i.e., to concur in opinions without a thorough grasp of the record or the governing law, simply because there are not enough hours in the day to acquire a thorough grasp of the record and law in the 450 cases a year that are disposed of on the merits. It is not a big step from there to clique voting, that is, voting with or at the direction of other like-minded judges simply because they share common ideological objectives, again without a good grasp of the record or governing law. After three



decades of judicial appointments based on partisan ideology, it should come as no surprise that clique voting happens, albeit infrequently, in more than one (but, I think, not many) of our intermediate federal appellate courts. Madison, who warned about the pernicious effects of factions in *Federalist 10*,⁷⁵ would be horrified to see them at work in some of our federal courts.

What does this mean for the rule of law, for the principle considered so important to the Framers that judges are to decide cases according to the law, rather than according to their own views of what the law should be or to the will of the political branches or the popular masses? The politicization of the appointment process, particularly for intermediate federal appellate judges, presents a grave danger to the rule of law. A judge who has been selected primarily for his perceived predisposition to decide cases in accordance with a particular political ideology may be consciously or subconsciously influenced to decide cases in accordance with that ideology, rather than in accordance with an impartial and open-minded assessment of what the law actually is. Professor Jackson, having identified that possibility, downplays its effect. She says: "As a normative matter, to think that judging is all about a judge's political or policy attitudes is to miss the constraining force of law."⁷⁶ But that view, of course, assumes the point at issue. The constraining force of law may be seriously weakened in the mind of a judge bent, either consciously or subconsciously, on implementing a particular political or ideological viewpoint. Such a judge, viewing a case through the prism of his ideology, may

misread or gloss over Supreme Court cases with holdings contrary or unhelpful to his ideological commitment. It bears remembering that it is Supreme Court cases that are viewed as the problem by many political or interest groups. Or such a judge may misread the record in the case in such a way as to distort the question presented or the evidence and thereby to facilitate the preferred outcome. The result is a decision that is not faithful to the rule of law. The overall result is some courts that are fragmented into ideological groups, having ceased to function as a court in many cases coming before them.

It is no answer to say that the Supreme Court is there as a constraining force to restore the rule of law to a case in which an appellate panel has not been faithful to the law. The judge bent on implementing his ideology knows that appellate review of his decision is highly unlikely. As Justice Scalia confirmed in his dissent in *Kyles v. Whitley*—which is one of the rare modern Supreme Court cases that solely involves the application of established law to the record—the Supreme Court is not a court of error, and “[t]he reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere—with trial judges and juries, state appellate courts, and the lower federal courts.”⁷⁷

Instead, the Supreme Court generally takes cases where the law is unclear or in need of further development or where the circuits are in conflict. What this means is that the intermediate federal appellate courts are the courts of the last resort for all but the handful of cases that the Supreme Court will agree to hear. It is precisely that fact that has resulted in the politicization of the intermediate federal appellate court appointment process. Political and issue activists understand only too well that ideologically committed judges on these benches can make an enormous difference in the outcomes of hundreds of cases each year. Too, it would be a mistake to think that ideologically committed judges affect the outcomes only in cases that involve the so-called hot button issues: the civil rights of racial and ethnic minorities and women; abortion; the rights of criminal defendants; the death penalty; and states’ rights (or the proper balance of power between federal and state governments). My own observations suggest that these judges cast a much wider net. They have

strong views on plaintiffs’ jury verdicts, especially (but not only) large ones; on class actions; on a wide range of federal statutes imposing burdens on corporate defendants; on religion in schools and in public areas; and on and on.

If candidates for the presidency of both parties continue, as they have now for decades, to energize issue activists within or allied with their parties by promising the appointment of judges who will pursue the respective political and ideological agendas of those parties in their decisions, then judicial independence will continue to be severely threatened, and with it the rule of law in the United States. The *Washington Post*, in a 2005 editorial, captured the imminence of the threat:

The war [over Justice O’Connor’s successor] is about money and fundraising as much as it is about jurisprudence and the judicial function. It elevates partisanship and political rhetoric over any serious discussion of law. In the long run, the war over the courts—which teaches both judges and the public at large to view the courts simply as political institutions—threatens judicial independence and the integrity of American justice.⁷⁸

Aside from changes in the political process, positive change could also be effected within the court system itself if the Supreme Court were to function somewhat more often as a court of error, making clear that improper application of precedent will not be tolerated. While I recognize that significant time restrictions prevent the Court from doing so in the great majority of cases, even deciding a few such cases each term could provide a significant check on ideologically committed appellate judges, as no judge likes to be overruled by a critical opinion from the Supreme Court. As Justice Stevens recognized in his *Kyles* concurrence, “Sometimes the performance of an unpleasant duty conveys a message more significant than even the most penetrating legal analysis.”⁷⁹

The emphasis in the confirmation proceedings of Justice Alito on his fidelity to the rule of law during his tenure as an appellate judge was also a positive sign from two standpoints. First, it conveyed to the public following the confirmation proceedings the importance of

faithful adherence to the law by a judge, no matter what his political leanings were thought to be. Second, it just may have conveyed to judges aspiring to higher office the notion that faithfully adhering to the rule of law is an important qualification for promotion and, conversely, that there may be a price to be paid for failing to do so.

Perhaps the most positive development, at least as I see it, is the powerful message that Chief Justice John Roberts has sent about the approach that judges should follow in today's highly politicized environment. In a recent interview with Professor Jeffrey Rosen of George Washington University Law School that appeared in *The Atlantic Monthly*, Chief Justice Roberts reminded us that Chief Justice John Marshall's continuous effort to unify his Court, to urge his Court to speak with one voice, was based on the recognition that a court so unified fosters public respect for the legitimacy of the court as an impartial institution that rises above ideology.⁸⁰ Chief Justice Roberts also reported his firsthand observations

of how the D.C. Circuit countered the politicization of that court's appointment process by working to achieve consensus, by "function[ing] as a court," as he put it.⁸¹ From these models, Chief Justice Roberts observed that a successful judicial temperament is marked by "a willingness to step back from your own committed views of the correct jurisprudential approach and evaluate those views in terms of your role as a judge."⁸² By contrast, the "personalization of judicial politics,"⁸³ in which judges pursue their ideological agendas at the expense of a unified court, undermines the rule of law and may leave the public with the perception that judges are little more than agents of the political powers that put them in office.

It is not too late, as the Chief Justice suggested, for judges to follow Marshall's example. By "refocus[ing] on functioning as an institution," courts can rebuild the institutional legitimacy that has been diminished by the politicization characterizing the judicial appointment process for the past 30 years.⁸⁴ •

1. Jack N. Rakove, *The Original Justifications for Judicial Independence*, in FAIR AND INDEPENDENT COURTS: A CONFERENCE ON THE STATE OF THE JUDICIARY 43 (T. Alexander Aleinikoff et al. eds., 2006).

2. *Id.* at 45.

3. 1 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151 (Thomas Nugent trans., Colonial Press rev. ed. 1900) (1748).

4. *Id.* at 152.

5. MASS CONST., pt. 1, art. XXX.

6. Rakove, *supra* note 1, at 48.

7. *Id.* at 49.

8. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 2 THE WRITINGS OF JAMES MADISON 166, 167 (Gaillard Hunt ed. 1901) (emphasis omitted).

9. *Id.* at 170.

10. THE FEDERALIST NO. 78, at 464–65 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

11. *Id.* at 465.

12. *Id.* at 468.

13. *Id.* at 468–70.

14. Rakove, *supra* note 1, at 54.

15. THE FEDERALIST NO. 78, *supra* note 10, at 470.

16. Rakove, *supra* note 1, at 50.

17. *Id.* at 50–51.

18. *Id.* at 52.

19. THE FEDERALIST NO. 39 (James Madison).

20. *Id.*

21. Rakove, *supra* note 1, at 52.

22. THE FEDERALIST NO. 78, *supra* note 10.

23. Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 989 (1996).

24. Dennis J. Hutchinson, History of Attacks on Judicial Independence, Presentation at the Workshop for Judges of the United

States Court of Appeals for the Fifth Circuit (October 6, 2005); see also Pamela S. Karlan, *Judicial Independences*, in FAIR AND INDEPENDENT COURTS, *supra* note 1, at 40 ("[J]udicial independence is not an end in itself, but is rather a means of ensuring freedom and the rule of law.").

25. See generally Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV. 661, 665–66 (2006).

26. Editorial, *Hail of Criticism Batters Judges, Imperils Justice*, U.S.A. TODAY, April 12, 2005, at 12A.

27. *Angry at Rulings, Some Judge the Judges*, ABC News, May 1, 2005, <http://abcnews.go.com/Nightline/LegalCenter/story?id=1028391&page=1>.

28. *Clarity for the Judiciary*, WASH. POST, May 11, 2005, at A16.

29. NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 13 (2005).

30. *Id.* at 13–14.

31. 347 U.S. 483 (1954).

32. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

33. *Miranda v. Arizona*, 384 U.S. 436 (1966).

34. *Mapp v. Ohio*, 367 U.S. 643 (1961).

35. See SCHERER, *supra* note 29, at 14.

36. *Roche v. Wade*, 410 U.S. 113 (1973); see also SCHERER, *supra* note 29, at 14.

37. SCHERER, *supra* note 29, at 15.

38. *Id.*

39. *Id.*

40. *Id.* at 16.

41. *Id.* at 13.

42. Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, in FAIR AND INDEPENDENT COURTS, *supra* note 1, at 190.

43. Robin Cook, *Confirmation of High Court Justices Akin to Political Campaign*, *Leo Says*, UVA LAWYER, Fall 2006, at 14. In his remarkably candid comments, Leo described the highly organized campaign to ensure

nomination and confirmation of people committed to conservative priorities. Among the “preemptive, rapidly reactive, and very strategic” tactics that he and other conservatives employed for the recent nominations of John Roberts and Samuel Alito were intensive research on the nominees, polling to determine how best to frame the message to be given to the public about each nominee, extensive media interaction to get that message out, and mobilization of grassroots conservative activists to contact senators identified as being “on the fence” about a particular nominee and to convey messages of support for that nominee. *Id.* at 14–15. Explaining the importance of a consistent, aggressive media strategy designed to define the nominee as quickly as possible, Leo remarked that “[y]ou can’t just assume that the nominee’s qualifications will by themselves stand up to attack.” *Id.* at 15.

44. SCHERER, *supra* note 29, at 23; Burbank, *supra* note 42, at 204.

45. SCHERER, *supra* note 29, at 22–23.

46. Burbank, *supra* note 42, at 204 (citing Theodore Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 Mo. L. REV. 1209 (2005)).

47. *Id.* at 205.

48. See Karlan, *supra* note 24, at 29.

49. Vicki C. Jackson, *Packages of Judicial Independence:*

The Selection and Tenure of Article III Judges, in FAIR AND INDEPENDENT COURTS, *supra* note 1, at 73.

50. See generally King, *supra* note 25, at 668.

51. *Id.*

52. The party platforms for each election also provide some insight into the standards by which each respective president has chosen his judicial nominees. For example, the 2004 Republican Party Platform said:

In the federal courts, scores of judges with activist backgrounds in the hard-left now have lifetime tenure. Recent events have made it clear that these judges threaten America’s dearest institutions and our very way of life. In some states, activist judges are redefining the institution of marriage. The Pledge of Allegiance has already been invalidated by the courts once And while the vast majority of Americans support a ban on partial birth abortion, this brutal and violent practice will likely continue by judicial fiat. We believe that the self-proclaimed supremacy of these judicial activists is antithetical to the democratic ideals on which our nation was founded. President Bush has established a solid record of nominating only judges who have demonstrated respect for the Constitution and the democratic processes of our republic, and Republicans in the Senate have strongly supported those nominees.

It also stated:

We support the appointment of judges who respect traditional family values and the sanctity of innocent human life.

Republican Party Platform of 2004, <http://www.presidency.ucs.edu/showplatforms.php?plat index=R2004>.

The 1996 Democratic Party Platform discussed judicial appointments in conjunction with civil rights law and affirmative action:

Over the last four years, President Clinton and the Democrats have worked aggressively to enforce the letter and spirit of civil rights law. The President and Vice President remain committed to an Administration that looks like America, and we are proud of the Administration’s extraordinary judicial appointments—they are both more diverse and more qualified than any previous Administration. We know there is still more we can do to ensure equal opportunity for all Americans, so all people willing to work hard can build a strong future. President Clinton is leading the way to reform affirmative action so that it works, it is improved, and promotes opportunity, but does not accidentally hold others back in the process. Senator Dole has promised to end affirmative action. He’s wrong, and the President is right. When it comes to affirmative action, we should mend it, not end it.

Democratic Party Platform of 1996, <http://www.presidency.ucs.edu/showplatforms.php?plat index=D1996>.

The 1988 Republican Party Platform echoed the Republican platforms from 1980 and 1984, declaring:

We appointed judges who respect family rights, family values, and the rights of victims of crime.

. . . .

[W]e reaffirm our support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.

Republican Party Platform of 1988, <http://www.presidency.ucs.edu/showplatforms.php?plat index=R1988>.

And in 1976, the Democratic Party Platform said:

All diplomats, federal judges and other major officials should be selected on a basis of qualifications. At all levels of government services, we will recruit, appoint and promote women and minorities.

Democratic Party Platform of 1976, <http://www.presidency.ucs.edu/showplatforms.php?plat index=D1976>.

53. See SCHERER, *supra* note 29, at 36; SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 198 (1997); Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 888 (2005).

54. SCHERER, *supra* note 29, at 52, 55–56.

55. See *id.* at 58; GOLDMAN, *supra* note 53, at 297.

56. GOLDMAN, *supra* note 53, at 292.

57. *Id.* at 301–05.

58. See generally Goldman, *supra* note 53, at 877–89.

59. See SCHERER, *supra* note 29, at 109–10, 124–25.

60. GOLDMAN, *supra* note 53, at 238.

61. *Id.* at 238–39, 242–43, 249; SCHERER, *supra* note 29, at 77–81.

62. Elliot E. Slotnick, *Prologue: Federal Judicial Selection in the New Millennium*, 36 U.C. DAVIS L. REV. 587, 591–92 (2003).

63. SCHERER, *supra* note 29, at 83–85, 105.

64. *Id.* at 73.

65. See generally Sheldon Goldman et al., *Clinton’s Judges: Summing up the Legacy*, 84 JUDICATURE 228, 229–30 (2001).

66. SCHERER, *supra* note 29, at 73.

67. *Id.* at 108–09.

68. *Id.* at 109, 151–57.

69. Diarmuid F. O’Scannlain, *Today’s Senate Confirmation Battles and the Role of the Federal Judiciary*, 27 HARV. J.L. & PUB. POL’Y 169, 174 (2003).

70. See Jackson, *supra* note 49, at 67; Burbank, *supra* note 42, at 195–96.

71. See, e.g., *The Supreme Court, 2005 Term: The Statistics*, 120 HARV. L. REV. 372 (2006).

72. Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, in FAIR AND INDEPENDENT COURTS, *supra* note 1, at 15.

73. U.S. Judicial Case Load Profile (2005), <http://www.uscourts.gov/cgi-bin/cmsa2005.pl>.

74. *Id.*

75. THE FEDERALIST No. 10 (James Madison).

76. Jackson, *supra* note 49, at 71.

77. 514 U.S. 419, 458 (1995) (Scalia, J., dissenting).

78. Editorial, *Not a Campaign*, WASH. POST, July 3, 2005, at B6.

79. *Kyles*, 514 U.S. at 455 (Stevens, J., concurring).

80. Jeffrey Rosen, *Roberts’ Rules*, ATLANTIC MONTHLY, Jan./Feb. 2007, at 104, 105, 113.

81. *Id.* at 111.

82. *Id.* at 113.

83. *Id.* at 106.

84. *Id.* at 105.

Faith and Reason: Why We Do Good

On June 11, 2007, Professor Robert P. George participated in the Pallium Lecture Series of the Archdiocese of Milwaukee, delivered at the Archbishop Cousins Catholic Center in St. Francis, Wis. As the McCormick Professor of Jurisprudence at Princeton University, Professor George succeeded Woodrow Wilson, Edward S. Corwin, and others in one of the nation's most prestigious endowed chairs. Professor George and the Pallium Lecture Series are introduced here in the transcribed remarks of Archbishop Timothy M. Dolan. We are grateful to Archbishop Dolan and Professor George for the opportunity to print their remarks.

Introduction by Archbishop Timothy M. Dolan

What a turnout! Thank you, everyone, for your presence, and welcome to this last of the Pallium Lecture Series for the year 2007. We have had two winners thus far, with Jim Towe and Cardinal McCarrick, and we have an excellent speaker this evening in Professor Robert George of Princeton University.

Professor George, you may not be familiar with the genesis of the Pallium Lecture Series. I had the privilege of being appointed Archbishop of Milwaukee by Pope John Paul II about five years ago, and there is, as you know, the tradition of the archbishop's receiving the pallium, a cloak of sorts. Since my reception of the pallium was a year off, I thought, "Let's do our best to prepare for it, spiritually and intellectually."

So we began the idea of these Pallium Lectures, simply as a way for the people of the Greater Milwaukee community and the Archdiocese of Milwaukee to become acquainted with some questions, with some topics of interest to the church that are related to the culture and society at large—a sort of an exploration of the rich intellectual heritage of the Catholic Church. They went over so well that we decided to keep going, and this evening you are concluding the fifth annual series. We have had close to two dozen lectures, and they have just been splendid. To all of you who have been a part of this from the beginning, thank you.

Of course, one of the themes in the Pallium Lecture Series has been the interaction of faith and culture, of faith and reason. We think of that epic encyclical of Pope John Paul II, the great *Fides et Ratio*, "Faith and Reason." In other words, how do our faith and human reason interact? How do they come together? How do we bring our values to the marketplace? How are we more enlightened, virtuous citizens of this country, this society, this culture?

If you had to locate geographically a place that would exemplify contemporary American culture, you probably could not go wrong in choosing Princeton University. Princeton in a sense personifies learning and

cultural progress and the academic domains, and it counts Professor Robert George among its faculty. You can read his very impressive biography.

Professor George is himself a philosopher, in the philosophy of law, jurisprudence, and he teaches in the area very successfully at Princeton. He is one of the school's most acclaimed teachers and the author of many books, and he has been very involved in the intellectual life of the Church and of our American culture. So if we wanted to get a man who embodied both *fides*, faith, and *ratio*, reason, we could not go wrong in getting Professor Robert George. And with that brief, yet heartfelt, introduction, I would like to present him to you, to welcome him—and to express my thanks to you, Professor, for your presence this evening.

Please join me in welcoming Robert P. George, the McCormick Professor of Jurisprudence and Director of the James Madison Program in American Ideals and Institutions at Princeton University.



Pallium Lecture of Robert P. George

Thank you very much. Thank you, Archbishop Dolan, for that introduction. I appreciate it very much. It is a great honor to be in this archdiocese and to have this invitation from you to give the Pallium Lecture. When I look back on the distinguished line of lecturers in this series, I wonder to myself, “What the devil am I doing here?” Maybe you got the wrong Robert George. But here I am, and here you are, and it is a pleasure for me to have the opportunity to speak with you.

I want to thank Father Paul Hartmann, who has been such a wonderful host and arranger of things. Thank you, Father, for all that you have done to facilitate my visit.

And I am going to embarrass her, but this is a very special opportunity, and I am delighted to ask you to join me in welcoming a former student of mine, just graduated from Princeton, who was the great leader of our wonderful pro-life group on campus, and the young woman who instituted “Respect Life Sunday” in the Princeton University Chapel. She is

from here, Milwaukee, and I am so proud of her—Ashley Pavlic. Milwaukee has much to be proud of in Ashley.

I want as well to say a special “hello” and “thank you” to my friends and colleagues from the Bradley Foundation for sponsoring this series and this particular instantiation of it. I now have a lengthy and wonderful relationship with the Bradley Foundation. The Bradley Foundation assisted in my scholarly career, early on, giving me grants that enabled me to produce the work that got me tenure at Princeton. It also was instrumental in funding the James Madison Program in American Ideals and Institutions, which I had the honor to found in Princeton in 2000. The foundation very generously conferred on me one of its very prestigious Bradley Prizes and then put me on the Board of Directors. So I owe an enormous debt, which I am so pleased to acknowledge here in Milwaukee, to the Lynde and Harry Bradley Foundation.

And it is a real honor to have here this evening two of my brothers on the Bradley Foundation Board, Tom Smallwood and Dennis Kuester, as well as several members of the staff, including some of my oldest friends at the Bradley Foundation, Dan Schmidt, Dianne Sehler, Jan Riordan, Alicia Manning, and Michael Hartmann. Thank you all for coming—I hope that you didn’t feel compelled to come here because a board member was speaking. But whether or not you felt compelled, I am honored that you are here.

It has been a real blessing for me to work with the Bradley Foundation, and I know what a blessing the Bradley Foundation has been to the city of Milwaukee and the state of Wisconsin. It is a wonderful thing to have the foundation here, and working not only on the most important and pressing and

urgent national issues, but also on so many issues that are so vital to the future of Milwaukee. I have the privilege of serving on the committee of the Bradley Foundation that is devoted to assisting Milwaukee and Wisconsin, and it has made me something of—well, I hope, more than—a friend of Milwaukee. I have come to understand your city. I hope to learn still more about it, but there is a sense in which I have to come to understand myself as a sort of adopted son of Milwaukee, and I like that very much, because it is such a wonderful city. So I thank the Bradley Foundation for that, and I know how grateful the people of Milwaukee are to the Bradley Foundation for the great work that it does.

As Archbishop Dolan said, I am going to address you this evening on the question of faith and reason, the relationship of faith and reason, and I want to lay particular emphasis—in fact, mainly to comment on—the great encyclical by that title (or the Latin, *Fides et Ratio*) of Pope John Paul II. So let me begin.

In his 27 years in the chair of St. Peter, the late Pope John Paul II produced an extraordinary volume of writings. His books, encyclical letters, sermons, and other documents are a treasure trove for the Church. Of course, scholars will labor over them, as scholars are wont to do. Bishops and priests will seek guidance from them in carrying out their pastoral ministries. But serious Catholics of every stripe—and not just scholars, bishops, and priests—have much to learn from writings of the pontiff that history will know as John Paul the Great. Even the writings directed specifically to his brother bishops—such as the encyclical letter on Faith and Reason that will be the focus of my remarks this evening—contain

***The
transcendence of the
truths of faith to cultures
and cultural structures, in the
teaching of John Paul II and
the Catholic tradition, follows
from the nature of truth as
understood by the late Pope,
the current Pope, and the
Church.***

valuable lessons for all faithful Catholics, and, indeed, for Christians of every description.

Perhaps the first thing to notice about *Fides et Ratio* is precisely the fact that it is addressed to “the Bishops of the Catholic Church.” In this respect, the encyclical differs from, say, the 1995 encyclical letter, *Evangelium Vitae*, on the value and moral inviolability of human life, which was addressed not only to “the Bishops,” but also to “Priests and Deacons, Men and Women Religious, Lay Faithful,” and, indeed, “all people of Good Will.” The latter encyclical was concerned with very practical moral and political questions facing contemporary societies, such as abortion and infanticide, suicide and euthanasia, war and capital punishment, poverty and oppression. These are, of course, pressing and nearly universal issues. Still, the issues taken up by Pope John Paul II in *Fides et Ratio* are certainly no less universal, and in important ways no less pressing. So why the much more limited scope of address?

I suspect that the answer is that the pontiff’s principal concern in *Fides et Ratio* was with the moral and spiritual health of the Church herself. In particular, it seems to me, he wished to instruct his brother bishops regarding the importance of the intellectual, as well as spiritual, formation of priests. It was, I believe, the Pope’s view—it is certainly mine—that the Church’s essential tasks of catechesis and evangelization are severely hampered by what he perceived to be widespread intellectual weaknesses in seminaries and other Catholic institutions of learning. If I am getting his drift, these weaknesses are simultaneously causes and effects of various intellectual vices as well as methodologies and ideologies that are hostile to, or, in any event, incompatible with, a proper understanding of the truths of the Gospel.

Of course, the Pope was a former philosophy professor, and the encyclical is, at one level, a sort of celebration of the dignity and importance of philosophy and an



exhortation to philosophers to “think big.” And so the late Pope denies the self-sufficiency of faith: quoting St. Augustine, he declares that “if faith does not think, it is nothing.” Indeed, faith itself points to the indispensable role of reason and, thus, of philosophy. “In the light of faith,” the Pope says, “I cannot but encourage philosophers—be they Christian or not—to trust in the power of human reason and not to set goals that are too modest in their philosophizing.” And while he stresses the

role (and profound importance) of philosophy in the theological enterprise, he also insists on the autonomy of philosophy as a scholarly and intellectual discipline.

It would be a mistake, however, to read *Fides et Ratio* as fundamentally a professional philosopher’s celebration, or even defense, of the importance and autonomy of his beloved discipline. John Paul II was writing not as Karol Wojtyła, the philosopher, but as Peter, the Rock on which Christ builds his Church. As supreme pontiff and pastor of the Catholic Church, he was addressing problems in the Church that impede the successful prosecution of her divine mission. He was concerned to promote a proper understanding of the relationship between theology and philosophy, between faith and reason, not, primarily, for the sake of solving what is, admittedly, an intriguing intellectual problem, but rather because the salvation of souls is at stake. He was moved to offer instruction to his brother bishops precisely with a view to renewing the intellectual life of the Church *for the sake of her saving mission*.

Now, please do not misunderstand me. The encyclical does not suggest that anyone is going to go to hell for the “sin” of holding an incorrect understanding of the relationship between faith and reason. It does suggest, however, that the widespread misunderstanding of this relationship, particularly among those primarily responsible for catechesis and evangelization, weakens the ability of the Church to transmit saving faith. Indeed,

the faith that Christians attempt to transmit, when they badly misunderstand the relationship, is Christian faith only in a weak and defective sense. It may, for example, be an overly rationalistic faith, or an overly emotional one. The Jesus in whom people are invited to have faith may be, not the Christ of the Gospels—the Word made flesh who suffered and died for our sins and whose resurrection makes possible our own salvation—but rather a magician, or a sympathetic friend, or a mere example of ethically upright living, or what have you.



So far, in discussing the late Pope's emphasis on reason and its importance to the life of faith and the mission of the Church, I have spoken only of philosophy. And it is true that the Pope himself—rightly, in my view—stressed the role of philosophy in the theological enterprise and, therefore, the need for priests and other evangelists to be trained heavily and rigorously in philosophy. And he was plainly alarmed that indispensable philosophical work is widely neglected—both in theological research and in priestly formation—in favor of psychological and sociological approaches to theological subjects, approaches that are often (not inevitably, not always, but often) reductionistic and, as such, incompatible with the very faith in whose service they are putatively placed. But the Pope also recognized the legitimacy, autonomy, and importance of non-philosophical methods of inquiry and intellectual disciplines, including psychology and sociology and, especially, the natural sciences. Scholars and students in these disciplines rightly, in the Pope's view, pursue knowledge of their subject matters for its own sake, as well as for its practical use in the improvement of the conditions of human life.

Here, perhaps, it is worth pausing to take note, however, of the Pope's warning against possible corruptions of these fields that render them incompatible with Christian faith. The first of these warnings is that the legitimate autonomy of the sciences can be misinterpreted

as somehow liberating them from the overarching requirements of the moral law. So what the Pope calls the “scientistic [as opposed to scientific] mentality” can lead people “to think that if something is technically possible it is therefore morally permissible.” The second warning is against “scientism” as such, that is, “the philosophical notion which refuses to admit the validity of forms of knowledge other than those of the positive sciences.” This notion—a philosophical, and not itself scientific one, you will note—“dismisses values as mere

products of the emotions” and “consigns all that has to do with the question of the meaning of life to the realm of the irrational or imaginary.”

The reality of scientism reveals not only the possibility of philosophical error, about which no one needs convincing, but also the way in which philosophy can become anti-philosophical. The positivism at the heart of scientism was devised by philosophers as part of their philosophical enterprise—reason itself in the critique of what were perceived to be the pretensions of reason. By instrumentalizing reason—viewing it as, in Hume's famous phrase, the mere “slave of the passions”—it reconceived philosophy, not as the search for wisdom (what the Pope calls the pursuit of sapiential knowledge), but as a purely analytic enterprise. But when reason is instrumentalized, it soon turns on itself in utter distrust. Then, as even the analytic value of reason is denied, positivism collapses into the darker phenomenon of nihilism, the critique of which is impossible from the purely analytic perspective. To overcome nihilism, philosophy must return to its original Socratic status as both an analytic *and* sapiential pursuit. If the Pope believed that the restoration of philosophy in Catholic intellectual life is essential to the catechetical and evangelical mission of the Church, it must be philosophy restored to its Socratic status and thus revived. Obviously anti-philosophical philosophy won't do. So the Church herself, according to John Paul II, has a stake in the

renewal of philosophy in *both* its analytical and sapiential aspirations.

John Paul, whose own philosophical commitments and methods were drawn from the phenomenological tradition associated with such thinkers as Husserl and Scheler, is at pains in the encyclical to observe that the Church herself does not *choose* among those philosophical systems and methods that are compatible with Christian faith (whether or not their origins are in the work of Christian thinkers). More than one system, he plainly supposes, can be valuable in the pursuit of truth and the understanding of faith. True, as the Pope acknowledges in a subsection of the encyclical entitled “The enduring originality of the thought of St. Thomas Aquinas,” Thomism has a special standing—a sort of pride of place—in the intellectual life of the Church, at least since the publication of the encyclical letter *Aeterni Patris* by Pope Leo XIII. But in commending this philosophical approach, and Aquinas himself as a model of intellectual rigor and philosophical and theological attainment, the Church does not confer upon Thomism standing as the “one true philosophy.” Indeed, *Fides et Ratio* states explicitly and emphatically that “no historical form of philosophy can legitimately claim to embrace the totality of truth, nor to be the complete explanation of the human being, of the world and of the human being’s relationship with God.”

At the same time, the magisterium of the Church claims the authority to “intervene,” as the encyclical puts it, in philosophical matters to “respond clearly and strongly when controversial philosophical opinions threaten right understanding of what has been revealed, and when false and partial theories which sow the seed of serious error, confusing the pure and simple faith of the people of God, begin to spread more widely.” So: although diverse philosophical systems may legitimately be embraced by

Catholics, and while various systems can contribute to the project of understanding faith, the Church’s view of philosophy is not an utterly relativistic one. For there are also false and destructive philosophies—false and dangerous philosophical teachings. And the encyclical lists among these not only scientism and nihilism but also “eclecticism,” a position that ignores the logical requirement of internal coherence and sometimes abandons even the principle of the unity of truth; “historicism,” which relativizes truth by denying its

“enduring validity”; and “pragmatism” of the sort that sacrifices moral principle to perceived

interests and expediency. Philosophical errors are possible in part because of the weakening of reason itself by sin. Thus, in the absence of revelation and faith, even those aspects of the moral life that can, in principle, be grasped and understood by reason would, to some extent, remain hidden from view. Reason needs faith to illuminate even those truths to which it has access. But more on this point later.

The point I wish to focus on now—a point more central to the encyclical—is that faith also needs reason. Just as there are philosophical

errors, so too are there theological ones. And the abandonment of philosophy, or the failure to develop and deploy sound philosophical methods, results according to *Fides et Ratio* in some of the errors characteristic of contemporary theology—including Catholic theology. Above all, fideism—particularly as it manifests itself in what the Pope labels biblicism—is the consequence of a theological error about philosophy, indeed, the theological error of supposing that theology can *do without* philosophy, that faith can get along without *rational* inquiry, understanding, and judgment.

Now, perhaps this is puzzling. For, in a certain sense, is Catholic doctrine anything other than the Church’s understanding of biblical revelation? How, then, can

“In the light of faith,” the Pope says, “I cannot but encourage philosophers—be they Christian or not—to trust in the power of human reason and not to set goals that are too modest in their philosophizing.”

biblicism be a vice? How, indeed, can fideism—an utter reliance on faith—be an error?

The Pope describes “biblicism” as a view that tends to make the reading and exegesis of Sacred Scripture the sole criterion of truth. In consequence, the word of God is identified with Sacred Scripture alone, thus eliminating the doctrine of the Church. . . . Scripture . . . is not the Church’s sole point of reference. The “supreme rule of faith” derives from the unity which the Spirit has created between Sacred Tradition, Sacred Scripture and the Magisterium of the church in a reciprocity which means that none of the three can survive without the others.

The Pope notes that, when unpurified by rational analysis, religion degenerates into superstition. He says that, “deprived of reason, faith has stressed feeling and experience, and so runs the risk of no longer being a universal proposition.” More to the point, Scripture itself is not self-interpreting. And the required interpretation proceeds according to canons of rationality that one must bring to the scriptural text. Of course, an interpreter may wish to let the sacred text speak for itself, free of the alleged distortions that would be introduced by human philosophical principles. Indeed, he may emphatically deny that he brings any philosophical assumptions whatsoever to the text. But, of course, he cannot escape the problem of the need for philosophy. The most any interpreter can hope for is to bring philosophically *sound* principles of interpretation to the text. It is only in the light of such principles, or so the late Pope—in line with the entire Catholic tradition—teaches, that the word of God may be accurately understood.

Furthermore, philosophy and other forms of rational human inquiry are often indispensable to understanding the full practical implications of propositions revealed in Scripture. On this point, John Paul the Great was crystal clear:

Without philosophy’s contribution, it would in fact be impossible to discuss theological issues such as, for example, the use of language to speak about God, the personal relations within the Trinity, God’s creative activity in the

world, the relationship between God and man, or Christ’s identity as true God and true man. This is no less true of the different themes of moral theology, which employ concepts such as the moral law, conscience, freedom, personal responsibility and guilt, which are in part defined by philosophical ethics.

The soundness of what the Pope says in this regard is clearest today, I think, in the moral sphere, where rational inquiry—and, again, particularly philosophical analysis—is crucial to understanding revealed truths that are the data and content of faith. Take the question of marriage, for example. Philosophical work is indispensable to working out the full meaning of the proposition, revealed in the book of Genesis and the Gospels, that marriage is a “one-flesh communion” of a man and a woman. I wish to stress that it is not merely that philosophical work is needed to defend the Jewish and Christian understanding of marriage against the critique currently being waged against it with great force (sometimes, of course, from within the Church) by liberal secularism. That is true and important. More than that, however, the meaning of the proposition cannot be fully understood—even apart from the liberal critique—without philosophical reflection. What does it mean for a man and woman to become “one-flesh”? Is the biblical notion of “one-flesh union” merely a metaphor? If not, do married couples become “one-flesh” only in the sense that they are genetic contributors to their biological offspring? Are marriages between infertile spouses truly marriages? Can an infertile man and his wife become “one-flesh”? If so, why not two persons of the same sex? Why not more than two persons?

There are answers to these questions. But one cannot simply look up the answers in the Bible. To achieve an adequate understanding of the biblical teaching, one must advert to philosophical truths. To grasp the profound, and quite literal, sense in which spouses in marriage truly become one-flesh—and not merely in their children, and, indeed, even if they cannot have children—one must think through the matter philosophically. One must understand correctly, for example, the status of the human being as an *embodied person*, rather than a *non-bodily person who merely inhabits and uses a non-personal body*. For the

biological (“organic”) unity of spouses in reproductive-type acts (even where the non-behavioral conditions of reproduction happen not to obtain) unites them interpersonally—and such interpersonal unity provides the bodily matrix of a comprehensive (and, thus, truly marital) unity—only if persons *are* their bodies (whatever else they are) and do not merely inhabit them. Is the body a part of the personal reality of the human being? Or is it merely an instrument of the conscious

and desiring part of the self? These are *philosophical* questions that cannot be evaded if we are to understand, much less defend, the biblical view of marriage.

But if reason is, as the Church acknowledges and teaches, weakened by sin in the fallen condition of humanity, how can we trust it not to corrupt the interpretation of Scripture? Well, we, as individuals, have no guarantee that we will understand Scripture correctly. For us there is only the honest trying. No philosopher as such enjoys the charism of infallibility. No Catholic, certainly no Catholic philosopher, can be certain that he has interpreted the data of revelation correctly, or worked out its true implications, before the magisterium of the Church, drawing on all of her resources—including the work of exegetes, theologians, and philosophers—resolves the issue definitively. It is in the Church herself and her magisterium that authority and the charism of infallibility reside. Or so Catholics believe.

But fallibility, while demanding an attitude of humility and a policy of rigorous self-criticism, should not be taken as vindicating the radical distrust, much less the fear, of reason. Philosophical fallibility is no ground for

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fideism—biblicist or otherwise—much less does it warrant the anti-philosophical positions of positivism and nihilism. It is not as if there is a reliable, or more reliable, *alternative* to philosophy for the Christian or anyone else.

Nor, from the Catholic viewpoint, can the magisterium of the Church herself do without the contributions of philosophy. To settle the mind of the Church on disputed questions in exercising her own teaching office, philosophical reflection

on the data of revelation is often necessary. And so John Paul, speaking of “the fundamental harmony between the knowledge of faith and the knowledge of philosophy,” said that “faith asks that its object be understood with the help of reason; and at the summit of its searching, reason acknowledges that it cannot do without what faith presents.”

There are, of course, from any Christian viewpoint certain truths of faith that cannot be known by unaided reason. For example, the truth that the one and only God is three persons—Father, Son, and Holy Spirit. Were this truth unrevealed, it could not be known—even “in principle,” and even if reason were unweakened by sin. Still, even with regard to this truth of faith, as *Fides et Ratio* explicitly teaches, philosophy plays a central role in theological understanding. If the one God is three persons in perfect unity, then what is their relation to one another? How could the Church even begin to understand the relations of the persons within the Holy Trinity without an adequate understanding of the concept of a person? And while such an understanding is necessarily, as the Pope says of all talk of God, analogical,

where but to philosophy can the Church go in seeking its understanding?

It is sometimes said that so long as science and religion remain in their proper spheres there need be no conflict between them. Peace (if not always mutual respect) is ensured by separation. And there is truth in this. Religion and science have all too often invaded each other's spheres. But faith and reason, while enjoying, as the late Pope says, a legitimate independence or autonomy from each other, are also profoundly *interdependent* in the ways that I have indicated in explicating the teaching of *Fides et Ratio*.

This interdependence is signaled in the encyclical's magnificent opening sentence: "Faith and reason are like two wings on which the human spirit rises to the contemplation of truth." This is not to say that there are two truths: that something can be true as a matter of faith, yet false as a matter of science, history, or philosophy. As I have already remarked, the Pope firmly reasserts the unity of truth. (So, for example, if Christ is not risen bodily from the dead as a matter of historical and scientific fact, he is not risen as a matter of faith; and if his resurrection is indeed, as the Church teaches, a truth of faith, then it is true historically and scientifically as well.) Nor, as I have also remarked, is this to deny the autonomy of theology and philosophy or, indeed, faith and reason. Faith and reason, the Pope says, are two orders of knowledge. But they are linked, and, to some extent, overlapping, orders. Some truths are known only by revelation; others only by philosophical, scientific, or historical inquiry. Those known by revelation are often, however, *fully* understandable, or their implications *fully* knowable, only by rational inquiry. And often the *full human and cosmic significance* of those knowable by philosophical, scientific, and historical inquiry only becomes evident in the light of faith. And then there is the category of truths, particularly in the moral domain, knowable, in principle, at least, by philosophical inquiry but also revealed. Here revelation illuminates the truths of natural law, bringing into focus their precise contours, and making apparent to people of faith their supernatural significance. At the same time, natural law principles inform the Church's understanding of the content of revelation (as in the

example of marriage) and enable the believer more fully to grasp the meaning and implications of what is revealed. *Thus it is* that on the "two wings" of faith and reason the human spirit rises to the contemplation of truth.

Of course, on any Biblical understanding—Jewish or Christian, Protestant, Orthodox, or Catholic—faith is not merely a way of *knowing*. It is also a kind of trusting. As "the assurance of what is hoped for and the conviction of things unseen," in the words of the New Testament *Letter to the Hebrews*, faith is a placing of oneself in God's hands. Thus it is, for Jews and Christians, that Abraham is our "father in faith." (Indeed, as John Paul II has observed, thus it is for Christians that Jews are our *elder* brothers in faith.) But on the Catholic understanding—and here again the late Pope is in line with the entire Catholic tradition—faith is also reasoned and reasonable. Faith is trusting and believing, but not entirely without reasons and reasoning.

By the same token, reason itself is supported by faith. It is in the light of faith that we can trust reason despite our acknowledged human fallibility. And those traditions of faith that resist the collapse into fideism provide critical resources for understanding *practical* reason as a *moral* truth-attaining faculty or power. Although, in principle, anyone ought to be able to see that reason can be more than merely instrumental, more than emotion's ingenious servant ("the slave of the passions"), it is no accident that resistance to the positivistic reduction of reason (or the nihilistic denial of rationality) comes, in the main, from philosophers firmly rooted in traditions of faith. If, as Pope John Paul taught and as Pope Benedict teaches, faith has nothing to fear, and much to gain, from reason, then it is also true that reason has nothing to fear, and much to gain, from faith.

But, of course, there are different, and competing, traditions of faith. And their engagement has often been less than friendly. Indeed, it has sometimes been bloody. No pope in history—indeed, few religious leaders of any kind—have been more candid than John Paul II in acknowledging this sad fact. But from this fact, the Pope, who was by far the greatest ecumenist in the history of the papacy, did not draw the conclusion that the Church should avoid engagement of issues of theological principle

with those who do not share the Christian faith, or her version of the Christian faith. On the contrary, it is the quest for truth—on the “wings” of faith and reason—that provides the “common ground” of honest theological engagement and ecumenical cooperation. And here philosophy is crucial precisely because of a lack of shared faith. “Philosophical thought,” the Pope said, “is often the only ground for understanding and dialogue with those who do not share our faith.”



And he made abundantly clear in the encyclical that by philosophy he means the real sapiential and analytic thing: not ideology, not apologetics, not sophisticated techniques of persuasion. Without abandoning the truth-claims of Christianity—indeed, while vigorously reaffirming them—*Fides et Ratio* eschews triumphalism and the intellectual or spiritual denigration of non-Christian traditions:

When they are deeply rooted in experience, cultures show forth the human being’s characteristic openness to the universal and transcendent. Therefore they offer different paths to the truth, which assuredly serve men and women well in revealing values which can make their life ever more human. Insofar as cultures appeal to the values of older traditions, they point—implicitly but authentically—to the manifestation of God in nature.

And, the Pope continues, the Gospel—while demanding of all who hear it the adherence of faith—must be understood to allow people to preserve their own cultural identity. “This means,” he says, “that no one culture can ever become the criterion of judgment, much less the ultimate criterion of truth with regard to God’s Revelation.”

Of course, Pope John Paul was no moral relativist. Still less did he relativize the truths of the Gospel. His point was that these truths *transcend* particular cultures just as they cannot be captured in any one, final, ultimately and

definitively *true* philosophical system. Yet, just as faith cannot do without philosophy, it cannot do without cultures—which, like philosophies, are (even at their best) particular and limited. People understand, appropriate, and live the truths of faith in light of particular cultures—or they understand, appropriate, and live these truths *not at all*. So faith is, unavoidably, mediated by and through cultural structures—if it is present at all—even as it necessarily

transcends every culture.

The transcendence of the truths of faith to cultures and cultural structures, in the teaching of John Paul II and the Catholic tradition, follows from the nature of truth as understood by the late Pope, the current Pope, and the Church. Truth is, in Christian teaching, both universal and universally longed for. God *is* truth—Jesus Christ, as the Son of living God, is “the way, *the truth*, and the life.” And “God has,” as Pope John Paul said in the second half of the opening sentence of *Fides et Ratio*, “placed in the human heart a desire to know the truth—in a word, to know *himself*—so that by knowing and loving God, men and women may also come to the fullness of truth about themselves.”

So, whoever sincerely pursues truth, existentially as well as in the scholarly disciplines, seeks—and thereby honors—the God who is Truth. Whoever, in whatever cultural context and drawing on the resources of whichever cultural structures, exhibits “the human being’s characteristic openness to the universal and transcendent,” is indeed on *a* path to the truth. And God, as he is understood in Catholic tradition, is (like the father of the prodigal son in the Gospel parable) already calling out to him in welcome, ready to place a ring on his finger and prepare the fatted calf, for it is, as John Paul II said in another great encyclical—*Veritatis Splendor*, the Splendor of Truth—“on the path of the moral life that the way of salvation is open to all.” •

A Lawyers' Teacher

Professor **James D. Ghiardi, L'42**, recently marked his sixty-first year as a member of the Marquette University Law School faculty. Ghiardi currently is Professor Emeritus, but his legacy continues, as was noted by speakers at a recent luncheon, including **Professor J. Gordon Hylton** and Ghiardi's former students, **Professor John J. Kircher, L'63**, and **John P. Brady, L'73**. This is most obviously true in the practice, where numerous of his former students frequently find themselves even arrayed against one another in litigation in torts and other areas of the law.

The legal academy also would do well to emulate Professor Ghiardi's scholarship, as reflected in the comments of another of his former students, himself a renowned teacher and scholar. Specifically, **Aaron D. Twerski, L'65**, the Irwin and Jill Cohen Professor of Law at Brooklyn Law School and former dean of Hofstra Law School, drew a contrast to some modern scholarship and remarked as follows: "People reacted to Jim Ghiardi's articles. Thirty years ago, he wrote about punitive damages—the need for judicial control of them, the constitutional problems associated with them. Finally, the Supreme Court, 20 years later, got the message that there may be some due process problems, in *BMW v. Gore* and the like. . . . It makes no difference whether you agree or disagree: Jim Ghiardi was talking about real problems, and he had an impact. Scholarship was designed to speak to lawyers, to speak to judges, to get and bring the problems to court." •



Aaron D. Twerski and James D. Ghiardi



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