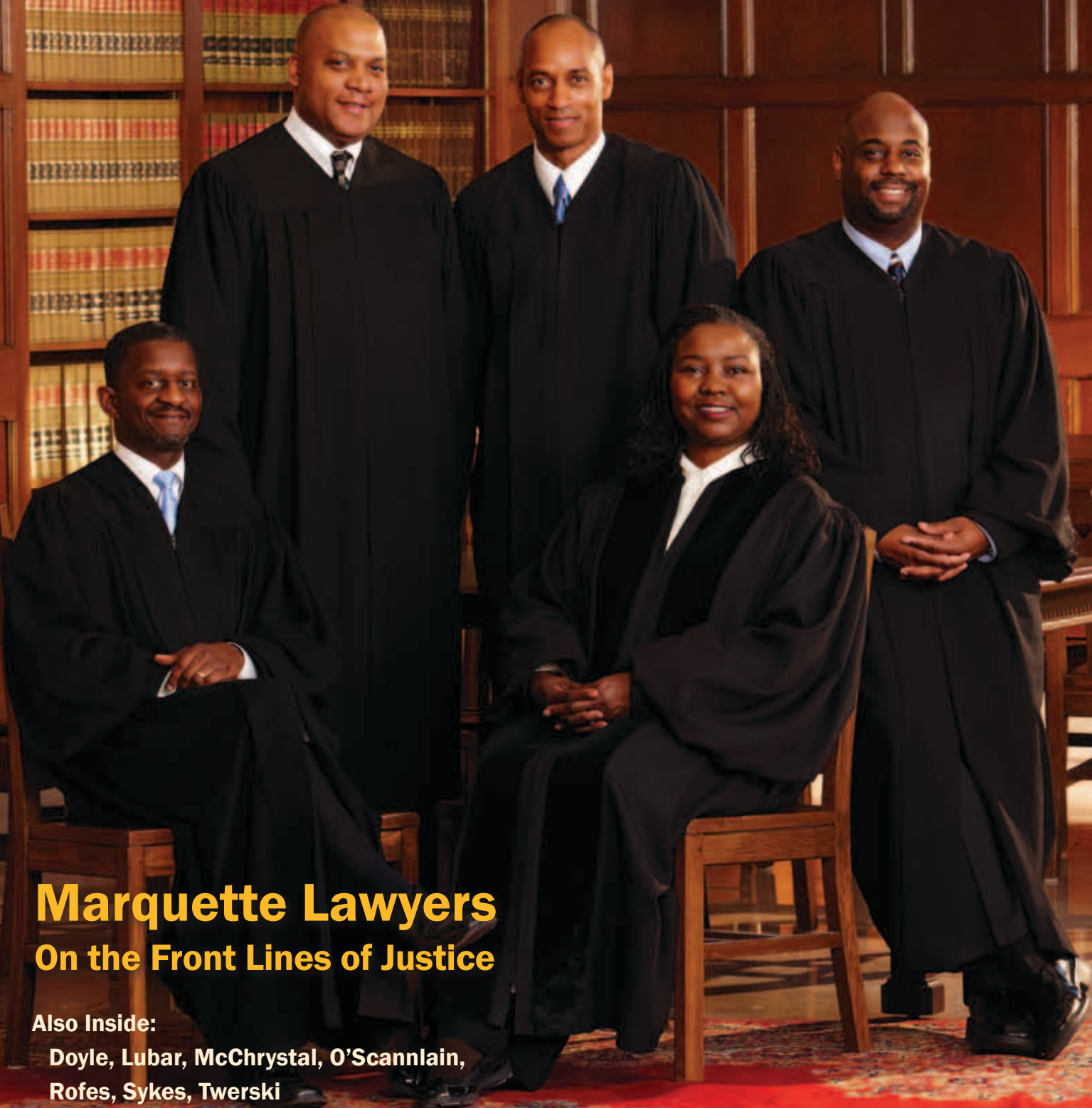


Marquette Lawyer

Spring 2009

Marquette University Law Alumni Magazine



Marquette Lawyers On the Front Lines of Justice

Also Inside:

Doyle, Lubar, McChrystal, O'Scannlain,
Rofes, Sykes, Twerski

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On the cover: Judges M. Joseph Donald, Frederick C. Rosa, Derek C. Mosley (standing, left to right), Carl Ashley, and Maxine Aldridge White (sitting), as photographed in Eisenberg Memorial Hall. Story starts on p. 4.



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Stewardship, the Law School, and You

The phrasing varies, but the essence of the question is the same: “How is the economic downturn affecting the Law School?” To this, the most frequent question posed to me of late, the answer, of course, cannot be comprehensive, either in the brief conversation at the basketball game or in this column.

For we are affected in virtually all spheres—whether admissions, programs, community outreach, fundraising, employment of graduating students, or a score of other matters—but in markedly different ways. In some instances, the economy is a threat to us; in others, such as in our public-service programs, it is an opportunity to lead and serve.

But for all these challenges and opportunities presenting themselves in these times, a perpetual need remains unchanged: substantial stewardship of the Law School. At some level, this stewardship must come from the dean and the faculty of the school, for it is to us that Marquette University has primarily entrusted the responsibility for the care and development of its Law School.

To be sure, the University’s senior leaders outside the Law School have responsibilities as well. And a large reason for our accomplishments in recent years is how seriously these individuals have taken these responsibilities and how substantially they have committed the University to the future of the Law School.

I have written of this last matter before, but the point should be underscored, for it is demonstrated over and over again. Most recently, the successful issuance of some \$60 million of bonds to constitute bridge financing for the construction of Eckstein Hall—at a time when the credit markets seemed closed to so many colleges and others—was an extraordinary accomplishment. My gratitude, on behalf of all of us at the Law School, to Father Wild as president, John Pauly as provost, Greg Kliebhan as senior vice president, and Chuck Lamb, who as vice president for finance led this effort, as well as to the board of trustees, is immense.

Yet all these—dean, faculty, university leaders, or even to name another group, students—are scarcely the only stewards of Marquette Law School.

You are as well. Whether you are an alumnus, a lawyer licensed in Wisconsin without a Marquette degree, or someone

with “merely” an interest in law and public policy in this region, you should rightly view yourselves as stewards of this institution. For we are an institution both directly educational and otherwise civic, and we depend upon you in important respects.

These are innumerable, but not all inexpressible. Each time you employ or mentor or merely provide an example for one of our students, or attend one of our programs or distinguished lectures, or comment on our faculty blog (<http://law.marquette.edu/facultyblog>), or make a financial contribution to support student scholarships or the new building, or coach a moot-court team, this is a form of stewardship.

To advance, we require such collaboration no less than in economically robust times. So for those of you who provide, each according to his or her specific opportunities or interests, such stewardship, thank you. For those who have thus far elected to remain mostly on the sidelines, I, as coach, invite you to put yourselves in the game. It is great fun, and we are winning.

I hope that the ensuing pages of this magazine give you a sense of this.

J.D.K.





Marquette Lawyers On the Front Lines of Justice

In recent years, Milwaukee has advanced in impressive ways. These range from the realms of architecture (the Calatrava-designed addition to the Milwaukee Art Museum) to athletics (Marquette's participation in the Big East Conference and the Milwaukee Brewers' return to the playoffs after more than a quarter-century) to industry (the relocation of Manpower, Inc., a Fortune 500 company, to downtown Milwaukee). And the migration of thousands of affluent households to the city center has changed the face of the city.

But challenges abound. For example, according to U.S. Census estimates, Milwaukee has the seventh-highest poverty rate in the nation, with nearly 35 percent of children living in poverty. These challenges especially affect areas in which lawyers (problem solvers, after all) and judges spend their time.



Marquette lawyers Derek C. Mosley, M. Joseph Donald, Frederick C. Rosa, Maxine Aldridge White, and Carl Ashley serve as judges in Milwaukee.

“Socioeconomic issues are permeating everything we deal with,” Milwaukee County Circuit Court Judge Carl Ashley said. Ashley and four judicial colleagues—Judges M. Joseph Donald, Derek C. Mosley, Frederick C. Rosa, and Maxine Aldridge White—recently shared their perspectives on the justice system. They spoke of their experiences on the front lines of justice in the municipal and circuit courts in Milwaukee.

These five Marquette lawyers also discussed judicial elections and their service on the bench. They are five of the seven African-American judges in the state and municipal courts in Milwaukee, and White is the only African-American woman on the state-court bench in Wisconsin.

Seeking to deliver justice in an urban area

All five judges agreed that the social and economic conditions of the community are having a dramatic impact on the people and cases they see in the courtroom.

“It’s not just the judiciary, but a broader issue about how we are going to deal with the young kids who are impoverished, who live in a war zone,” Ashley said. “We’re missing the boat when we think

that in our courtrooms we’re going to resolve it. You see an endless cycle of dysfunction. The reality is, if we’re ever going to do something effective to change the realities of so many folks and young kids, we have to dig a little deeper.”

White articulated a sentiment shared by many on the judicial front lines dealing with the issues plaguing our communities. “It’s a question that urban judges, or judges in counties that don’t have resources, confront: Are law and justice the same? If I apply the law to the facts of this case and decide the outcome, I’ve done my job. But is it justice?”

“How do I use the few resources I have by virtue of this robe to do a little bit more?” she questioned.

The judges discussed trying to find ways to avoid repeat offenses or incarceration, when possible, and finding partnerships with organizations that can provide education programs or job training.

Mosley, the one municipal judge in the group, said that economic issues play out in a unique way in his Milwaukee court: “We’re a forfeiture-based system. We take it very seriously on the bench, knowing that this person in front of us may not have a job or have the means to pay the



HON. CARL ASHLEY

Born: Milwaukee, Wis.

High School: Marquette

College: Marquette, 1979

Marquette University Law School: Class of 1983

Previous Legal Career:

Public Defender, 1983–1989; Private Practice, 1989–1997; Administrative Law Judge, 1997–1999

Judicial Career:

Elected 1999 and reelected 2005, Milwaukee County Circuit Court

Mentors: Celia Jackson,

Susan Hanson, Hon. Frederick Kessler, Dean Robert F. Boden, Dean Howard B. Eisenberg

Family: Married to Felita Daniels Ashley; daughters Elise, 11, and Zoe, 9

fine. We do a lot of programs so that, one, we avoid the incarceration of indigent people, but, two, we collaborate with organizations to assist with a host of issues including driver's licenses and employment. We're trying to make sure that not only do we punish offenders for offenses against the community, but we assist in preventing them from repeating those same offenses."

A call for collaboration

The judges discussed the courts' limited budgets and the need for all levels of government to work toward the proper allocation of resources and toward collaboration.

Mosley also stressed the importance

of communication and getting different governmental entities to work together to resolve some of the problems the judges are seeing. He offered an example of the way that local law enforcement, the city attorney's office, and the district attorney's office are collaborating to eliminate drug houses by taking a multifaceted approach.

"Unlike the past, the county's involved in the prosecution of the drug offenses in the house, while at the same time the city's also involved with the landlord in nuisance actions," said Mosley. "So now we're actually collaborating for the first time where we're not just putting Band-Aids on gunshot wounds: we're actually trying to solve each of these problems. It's very different from when I came into the legal system."

However, the judges agreed that the courts and law enforcement are not the sole answer. Families play an important role as well.

Rosa, who currently serves in the children's division of the Milwaukee County Circuit Court, said that too often poverty and high unemployment rates mean that young people don't have jobs, school, or community activities to fill their time during the summer. This lack

"It's not just the judiciary, but a broader issue about how we are going to deal with the young kids who are impoverished, who live in a war zone."

— Hon. Carl Ashley

“[T]here is a huge pot of money that is being spent. And the question that should be posed is this: Are we doing it smart, are we doing it the right way?”

— Hon. M. Joseph Donald

of structure can help lead to an increase in crime.

All five judges noted the enormous challenges posed by the current judicial structure, including a vast array of resources that are often not well-coordinated and the struggle to provide all the necessary services to the population they serve.

“In the family division,” White noted, “we see the combination of people who are attached to three or four different other courts. They may have, in addition to the family-division case, a children’s court case and a criminal case (which could be the parent or one of the children). So, collectively we see the combined stress of lack of money, lack

of education. You could have a case where the dad is in Nevada running away from immigration issues, the mom is in Milwaukee, the child is here in need of psychological and psychiatric treatment, and, after finding an interpreter, your challenge as a judge is to find a psychologist who will take a county rate, as well as to figure out whether you can make an appointment under the circumstances.”

This is not a request for more government spending, Donald noted. “It comes down to a question of reallocating resources. If you look at all of the funds that go to education, incarceration, job training, etc., there is a huge pot of money that is being spent,” he said. “And

HON. M. JOSEPH DONALD

Born: Milwaukee, Wis.

High School: Shorewood

College: Marquette, 1982

Marquette University Law School: Class of 1988

Previous Legal Career: Law Clerk, Milwaukee County Circuit Court, 1988–1989; Assistant City Attorney, City of Milwaukee, 1989–1996

Judicial Career: Appointed 1996, elected 1997, reelected 2003, Milwaukee County Circuit Court

Mentors: Allen Taylor, Judge Richard D. Cudahy, Rick Cudahy, Jr.

Family: Married to Ann; children Jordan, 20, Hillary, 16, and Ryan, 15





HON. DEREK C. MOSLEY

Born: Chicago, Ill.

High School: Marian Catholic
(Chicago Heights, Ill.)

College: University of
Northern Iowa

**Marquette University Law
School:** Class of 1995

Previous Legal Career:
Assistant District Attorney,
Milwaukee County, 1995–2002

Judicial Career: Appointed
2002, elected 2003, Milwaukee
Municipal Court

Mentors: Judges Carl Ashley,
M. Joseph Donald, Victor
Manian, and Maxine White

Family: Married to Kelly
Cochrane; children Kallan, 3,
and Kieran, nine months

the question that should be posed is this: Are we doing it smart, are we doing it the right way?"

Some things are being rethought. "There's a process underway," Rosa noted, "to create a unified court system, and it's focusing on children's court and family court. The idea is along the lines of one judge for one family."

Judicial elections

Last year's state Supreme Court race, in which Burnett County Circuit Court Judge Michael J. Gableman defeated incumbent Justice Louis B. Butler, Jr., also came up for discussion. The campaign raised not only the issue of politics and

partisanship in judicial elections, several of the judges said, but also carried racial undertones.

White, who has served on the Milwaukee County Circuit Court since 1992, said the attacks on Butler for his work as a public defender reminded her of the Willie Horton ads run during the 1988 presidential race.

Her colleague on the Milwaukee court, Donald, said he also saw race as a factor in elections. "The Justice Butler election does give some concern with respect to political races and race," he said. "I think that there are still some underlying tensions that will impact campaigns."

"Unlike the past, the county's involved in the prosecution of the drug offenses in the house, while at the same time the city's also involved with the landlord in nuisance actions. So now we're actually collaborating for the first time where we're not just putting Band-Aids on gunshot wounds: we're actually trying to solve each of these problems. It's very different from when I came into the legal system."

— Hon. Derek C. Mosley

Born: Brooklyn, N.Y.

High School: Midwood
(Brooklyn, N.Y.)

College: University
of Vermont, 1981

**Marquette University Law
School:** Class of 1984

Previous Legal Career: Staff
Attorney, Legal Aid Society
of Milwaukee, 1984–1985,
1987–1990; Staff Attorney,
Legal Aid Society, New
York, N.Y., 1986–1987; Legal
Staff Supervisor, Milwaukee
County Child Support
Enforcement, 1990–1994;
Family Court Commissioner,
Milwaukee County Circuit
Court, 1994–2004

Judicial Career: Appointed
2004, elected 2005, Milwaukee
County Circuit Court

Mentors: Judges James
Gramling, Jr., Michael
Guolee, Stanley Miller,
James Shapiro, and Jeffrey
Wagner; Court Commissioner
Andrew Reneau

Family: Married to Kathy
Jones-Rosa; children
Fred, 17, and Keyla, 13

“My mother always said, ‘You work or go to school, but you don’t sit around and do nothing.’ I find myself saying that a lot out in children’s court.”

— Hon. Frederick C. Rosa

Rosa noted that the partisan tone of the Supreme Court race seemed to follow the direction judicial races are heading these days, to the detriment of the profession. “It wasn’t dignified,” he observed. “I was pretty surprised and shocked by some of the ads I saw on television, and it seems that that is going to be the tone for the future. I have a lot of concern.”

The issue of race and judicial elections was a significant issue in Milwaukee during the mid-1990s, when the NAACP filed a lawsuit seeking a change from countywide judicial elections to a system of judicial subdistricts within the county. The theory was that this would allow for a more diverse representation on the circuit court bench. That effort, opposed by the State of Wisconsin and the Wisconsin Trial Judges Association, ultimately failed.

Ashley, who in 1999 was the first African American elected to the Milwaukee County Circuit Court without first having been appointed, said of the earlier lawsuit, “Even though that venture was not successful, it opened up doors.” It brought to light the issue of whether or not the judiciary accurately reflected the community, he said, and in the end it resulted in support for more diversity on the bench.

Donald, who was appointed by Gov. Tommy Thompson in 1996, credited the discussions at the time concerning diversity on the bench as relevant to his appointment to the bench. “I think it was one of the factors that contributed to my appointment,” he said.

Subsequent developments have contributed positively. “I think that people have been encouraged that they could get support from the broader community despite the challenges faced in an election as a woman or as a minority,” White observed.

Mentors and teachers

These judges themselves brought different backgrounds to the legal profession and bench.

Rosa noted, “My background is not a lot different from that of many of the kids I see.” He grew up in a single-parent household in New York housing projects. One of the key difference-makers for him was the example his mother set. She started out working as a nurse’s aide, went back to school to become a nurse, and eventually ended up as a nursing administrator. Rosa and his



brothers learned by watching her efforts, he recalled, and they benefited from her strong guidance.

“My mother always said, ‘You work or go to school, but you don’t sit around and do nothing.’ I find myself saying that a lot out in children’s court,” Rosa remarked.

The example of strong parents who stressed the importance of education was a common theme among the stories of the judges.

Although White’s sharecropper parents had only grade-school educations—her mother the equivalent of eighth grade and her father the equivalent of third—they stressed the importance of education to their children. Given their impoverished situation, they were not sure how to provide their children with the opportunity to receive a quality education, but they were sure that it needed to occur. “It was extremely

important to them that we got an education,” White recalled.

In their home, she said, her parents acted like educational quarterbacks, directing the older siblings among the 11 children to share what they were learning with the younger ones. By the time the youngest ones started school, they were already reading.

Ashley noted that from a young age his parents established a strong educational foundation upon which he and his seven siblings built. When he was embarrassed about sweeping the steps in front of his classmates, as part of his work-study program to help pay for going to Marquette University High School, he said his parents simply told him to “stop being silly.”

Education was such an important thing for Donald’s parents that when the Milwaukee Archdiocese closed

HON. MAXINE ALDRIDGE WHITE

Born: Indianola, Miss.

High School: Gentry
(Indianola, Miss.)

College: Alcorn State University, Miss., 1973; University of Southern California (Master’s in Public Administration), 1982

Marquette University Law School: Class of 1985

Previous Legal Career: Assistant U.S. Attorney, Eastern District of Wisconsin, 1985–1991; Assistant Director, Attorney General’s Advocacy Institute, Glynco, Ga., 1991–1992

Judicial Career: Appointed 1992, elected 1993, reelected 1999, 2005, Milwaukee County Circuit Court

Mentors: Professor Phoebe Williams, Judge Stanley Miller, Barbara Holzmann (Judge Miller’s widow), Dean Robert F. Boden, Associate Dean Charles W. Mentkowski, Dean Frank C. DeGuire, Thomas L. Shriner, Jr.

Family: Married to Leonard Martin; daughter Jessica, 23



“It’s a question that urban judges, or judges in counties that don’t have resources, confront: Are law and justice the same? If I apply the law to the facts of this case and decide the outcome, I’ve done my job. But is it justice?”

— Hon. Maxine Aldridge White

St. Elizabeth’s and sold it to the local families, the Donalds were one of the original families involved in establishing the Harambee Community School on the north side of Milwaukee.

Mosley, who grew up on the south side of Chicago, also credited his parents for the successes in his life. Without their spiritual and educational guidance, the municipal judge says he would not be where he is today. They were very active in his life and in screening his friends. “I see kids every day who don’t have that,” he observed. “I saw them as a prosecutor, and I see them as a judge.”

Their parents were not the only ones who helped the judges get where they are today. All of the judges pointed to the mentors who encouraged them along the way and to the help that Marquette provided in getting their law degree. Many of them discussed the importance of scholarship support in drawing them to the Law School, but such assistance did not address all of the financial issues that arose.

Rosa recalled approaching Dean Robert F. Boden and Associate Dean Charles W. Mentkowski when work pay and student loans were not sufficient to cover law school costs. “It’s not an easy thing to go to the dean,” he remarked.

“But we all went to him,” White recalled.

The judges also noted some of the

challenges associated with being one of only a handful of students of color in the Law School. They ended up leaning on one another. In this regard, Rosa recalls Ashley, who was a year ahead of him in school:

“I would go to him and ask how I should prepare for a particular professor’s class. And Carl would say, ‘Well, here’s what you *could* do, but let me tell you what the *A* student would do.’”

Mosley and others noted the efforts that the Law School has made more recently. In particular, Mosley stressed the importance of having African-American lawyers and judges call minority law students who have been accepted for admission, in order to answer any questions the students have about the community and the school. He said that the Law School’s annual fall reception for new minority students with minority lawyers and judges as guests has helped students make connections and see their own potential.

That reception is frequently attended by not only the Marquette judges but also by U.S. District Judge Charles N. Clevert and Milwaukee County Circuit Court Judge Marshall B. Murray. As Dean Joseph D. Kearney has remarked, “Anyone interested in the diversity of the legal profession in this region has an interest in Marquette University Law School.”

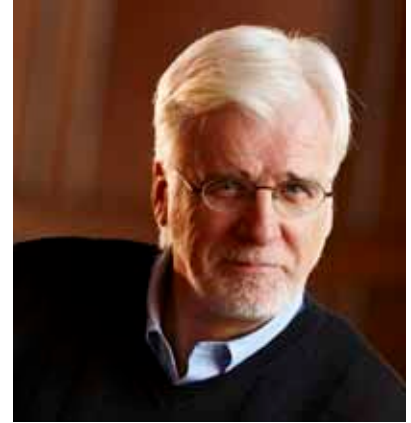
And vice versa. •



A Conversation

with Mike McChrystal on Eckstein Hall

Michael K. McChrystal, L'75, is Professor of Law and chair of strategic planning at the Law School. He has been a leader of the Eckstein Hall building project, from its earliest conception through the still-unfolding design details. This member of the Eckstein Hall Building Committee sat down recently to answer a few questions.



Q: Why a new building?

A: The Law School has been highly aggressive in recent years in strengthening its faculty, staff, curriculum, and research capabilities. In addition, we are positioning ourselves to make profound civic contributions, certainly in research and teaching and the quality of our graduates, but also as a dynamic intellectual crossroads for the University, for the region, and beyond. The rubber has long since hit the road in terms of the growth of our programs, and Sensenbrenner Hall is cramped beyond belief. Every year, space has to be carved up once again to house additional faculty, staff, or programs. And it is no longer possible for the 1924 gem that is Sensenbrenner Hall, together with its modest additions from 1968 and 1984, adequately to support our current programs, much less our vision for the future. As Dean Kearney likes to say, we are building a great law school, and we need a building that can house it.

Q: What will Eckstein Hall provide that Sensenbrenner Hall cannot?

A: Got a couple of days? Truly, the answer is our response to the substantial transformation in the past half century of American higher education and, in particular, legal education. Law schools are still an amalgam of classrooms, library, offices, and social activity, but the physical spaces needed to support these functions have changed substantially. The law library is a prime example. Law libraries used to be repositories for printed materials and places for quiet study; they are now also service-intensive on-ramps to vast digital resources. As a result of Professor Patricia Cervenka's vision and leadership, the Eckstein Library will be the first law school "library without borders." Library service points and materials will be easily accessible on all four levels of Eckstein Hall, so that a student can go from a classroom to the library, or a faculty member can go from his or her office to the library, without changing floors or passing through a security barrier. The physical integration in Eckstein Hall of the law library into the whole life of the Law School will be a major innovation nationally. (We have, of course, needed to tackle an array of acoustical, security, and collection-management issues to develop this plan.)

An aerial view of the construction of Eckstein Hall at the Marquette Interchange, taken on January 27, 2009, with the Haggerty Museum of Art in the foreground.

Student space is another good example. The heart of Eckstein Hall will be the Zilber Forum, which is a four-story crossroads providing easy access to all parts of the facility. The forum will feature a very large digital screen displaying information and events, and the layout of the forum is designed to create frequent encounters between students and faculty and comfortable space to allow those encounters to become opportunities for collaboration and learning. Students will also find an upscale café, a fitness center, expansive space for student publications and organizations, individual lockers that are more like spacious closets than the lockers of old, and an abundance of group study rooms. We want to immerse future Marquette lawyers in the study of law, so Eckstein Hall is designed to be a magnet for students, drawing them into the rich intellectual and moral life that defines a great Jesuit education.

Eckstein Hall's conference center will be another huge difference. The Law School is becoming a major player in addressing public-policy issues, and our programming in this area is sure to expand even further in the future. As we have been saying lately, there is reason after reason to come to Marquette Law School, and we plan to make our public programs informative and stimulating, and also comfortable and easily accessible. The fourth-floor conference center in Eckstein Hall will be a superb venue for a wide variety of events, and its dramatic architectural presence in the heart of Milwaukee, at the confluence of the freeways from Chicago, from Madison, and from the North, symbolizes the Law School's central role in the community.



Artist's rendering of Ray and Kay Eckstein Hall, currently under construction at the Marquette Interchange.

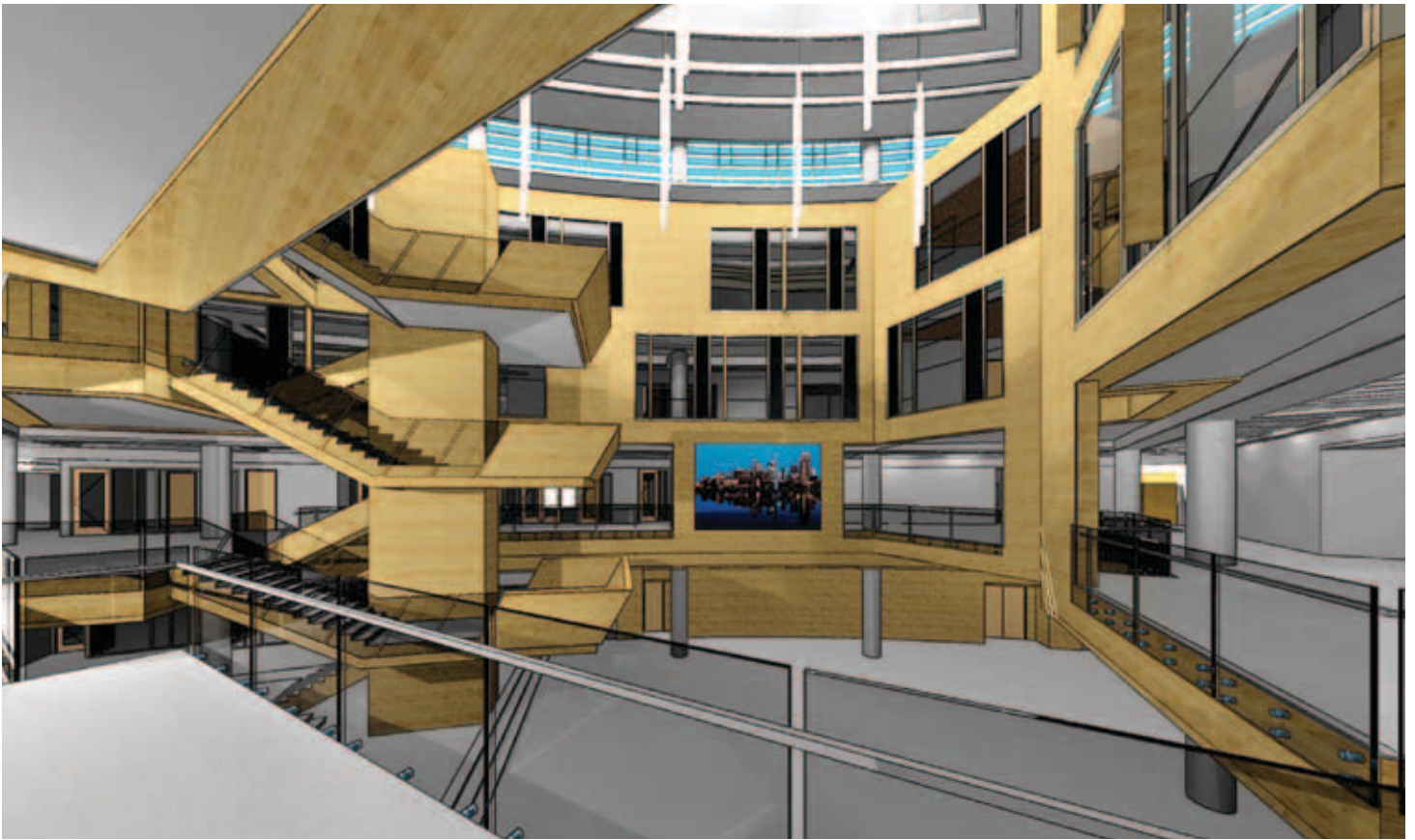
Q: What parts of the new building have been hardest to design?

A: The trickiest components seem to be the common areas, including the forum, the café, and the underground parking facility. There is a state of the art for many components of a law school building, including classrooms and offices and even many aspects of the library. We are delivering those parts of Eckstein Hall at a level of true excellence, but also in a disciplined, cost-conscious way. The forum and café are much more art than science. They will be like the town square of the Law School, and we are trying to capture in this space a number of qualities that sometimes seem to compete with one another, such as comfort and dynamism, exploration and refinement. The

underground parking facility—much of which is for visitors—has required a different kind of balance involving size, cost, and access policies. Tom Ganey, the University Architect, and Ralph Jackson, the design architect from Boston, have done wonders in developing our vision but keeping it within our budget.

Q: As Marquette lawyers, why would you and other alumni want to donate to the building fund?

A: The decision to provide financial support was easy for my wife, Alison Barnes, and me. We are both Law School faculty members who share an excitement about the direction and energy of the school and who experience firsthand the facilities problem. Our daughter Kate is a 2L at the Law School who, as a part-time student, may well attend classes in Eckstein Hall before she graduates. Plus,



Computer rendering of the Zilber Forum in Eckstein Hall.

The physical integration in Eckstein Hall of the law library into the whole life of the Law School will be a major innovation nationally.

our son Caz, our daughter-in-law Erin, and our son-in-law Jake are all Marquette lawyers, classmates in the Class of 2007. We are invested in and beneficiaries of the Law School in an extraordinarily substantial way.

But you don't have to be as close to the Law School as we are to be moved to support the Eckstein Hall project. Some fellow alums have observed that a Marquette law degree is a tremendous asset, and the new law building will only enhance its value. Others believe that an investment in the Law School is one important way that we can contribute to the community. Producing top-notch lawyers is a tremendous social good. Lawyers are essential to the development of good laws, the fair resolution of disputes, the responsible behavior of clients, and the ability

of economic actors to manage their risks and achieve their goals. Marquette Law School is increasingly understood to be a great civic institution because of what it contributes in all of these spheres; and the health of the state, the region, and the nation depends on the excellence of key civic institutions such as Marquette Law School.

Q: Have you picked out your new office in Eckstein Hall?

A: Yes, but I'm not saying which one it is. Jack Kircher, Jay Grenig, and Ralph Anzivino all have seniority over me, and I'm afraid one of them will choose it first, if I point out which faculty office is best. •

To discuss how your specific gift matters, please contact either John Novotny at john.novotny@marquette.edu or 414.288.5285 or Christine Wilczynski-Vogel at christine.wv@marquette.edu or 414.288.3167.



Groundbreaking Day The groundbreaking for Eckstein Hall, attended by more than 800 friends, staff, and alumni, was held this past May 22 on the site of the new law school, just south of Sensenbrenner Hall. Eckstein Hall will be completed in 2010.



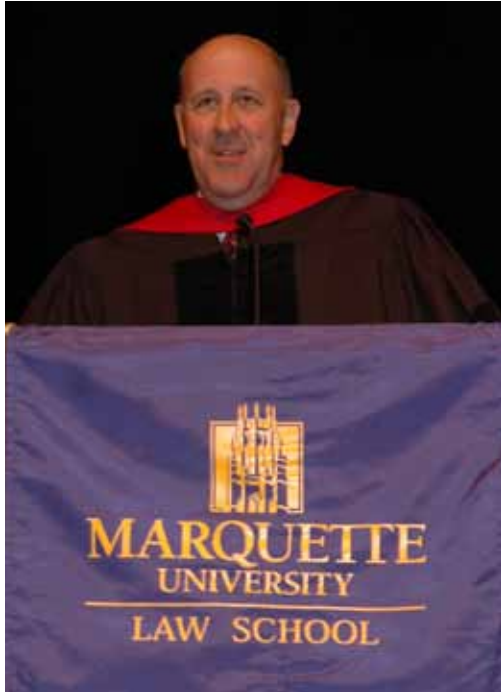
Chief Justice Shirley S. Abrahamson, Wisconsin Supreme Court, greets a well-wisher before speaking at the groundbreaking.



Below: Chief Judge Frank H. Easterbrook, U.S. Court of Appeals for the Seventh Circuit, addresses the crowd, flanked by Rev. Robert A. Wild, S.J., President of the University, and Dean Joseph D. Kearney. *Right:* Ray Eckstein, L'49, and Joseph Zilber, L'41.



2008 Commencement Ceremonies



The Honorable Jim Doyle, Governor of Wisconsin, spoke at the Law School's Hooding Ceremony at the Milwaukee Theatre this past May. Governor Doyle's remarks touched upon his own career as a practicing lawyer, the nature of the lawyer's work, and his impressions of Marquette Law School.

Dean Kearney's Introduction of Governor Jim Doyle

It is a great privilege for me to welcome and formally introduce our commencement speaker, the Honorable Jim Doyle, Governor of Wisconsin. Governor Doyle has had a long and distinguished career in the law and public service. This began when, upon graduation from college, he served as a member of the Peace Corps in Tunisia, together with his wife, Jessica, whose presence with us this evening I also wish to acknowledge. This career continued after Governor Doyle graduated from Harvard Law School in 1972: he worked for several years as an attorney in a federal legal services office on a Navajo reservation in Arizona. Upon his return to Wisconsin in the mid-1970s, Governor Doyle engaged in the private practice of law before serving three terms as Dane County District Attorney. After another term in private practice, he was elected, three times, Attorney General of Wisconsin, serving for 12 years. He was elected Governor in 2002 and reelected in 2006.

As this briefest of sketches reflects, Governor Doyle has remarkable experience in law and public service. Tonight he does us at Marquette University a tremendous honor by joining us for the hooding ceremony for our law graduates. I am very grateful that he accepted our invitation. Please join me in welcoming the Honorable Jim Doyle, Governor of the State of Wisconsin.

Law School Commencement Remarks of Governor Doyle

Thank you, Dean Kearney, for the very, very kind introduction. I am really pleased—and honored—to have the opportunity to be here for this great moment for the graduates of this great law school and to join with your families and friends in congratulating you on what you have done. I know that, for many of your families, this is a great moment. It really is the end of the tuition run for them, so I am sure that there are a lot of happy parents in the audience here today. But it is a happy moment for all of us in the state of Wisconsin.

Let me first say that you graduates are truly fortunate to have received a legal education at this remarkable institution. Marquette University Law School is rapidly emerging as one of the finest in the United States, and, with the imminent new building, obviously with the generous donors, with the outstanding faculty, this school has moved to a preeminent place among law schools in the United States. We are so proud of what you have done here and that a new class of graduating Marquette lawyers is going out into the world. You have worked very, very hard for this moment, and we are very proud.

This is a moment in your life that is incredibly special, and for all of us who have graduated from law school, it leads to some reminiscence and, of course, the usual lessons that a speaker is supposed to note for you. I think that I would rather just tell you a couple of stories about my earliest years as a lawyer and a few lessons that I learned, not so much in law school as afterward.

In particular, I remember so clearly the day about a month after my graduation from law school that my wife, Jessica, who is here tonight, and I went to the passport office in Boston because we were about to go to Africa for a month or so. In that passport office, for the first time ever, when I was asked what my occupation was, I wrote it into that form: *attorney*. I can remember that moment as if it were yesterday because it was the time that all the hard work had



Governor Doyle and Dean Kearney at the Milwaukee Theatre

paid off. Now, unlike you, we did not have automatic admission to the bar. I hadn't passed any bar exam, so it's a little questionable. Maybe I was being slightly fraudulent even in putting the word *attorney* into that form. But it was a moment, again, that I will remember, feeling that I was finally an attorney, a moment of great pride and one, I know, that you share today.

As the dean mentioned, in my first years after law school, I went to the Navajo Indian reservation, to what was then a small town, Chandler, Arizona. Some of you no doubt have been through that part of the world: it's where a beautiful canyon, Canyon de Chelly, is located. I served Navajo and Hopi clients, people who were unable to afford attorneys. It was an experience like no other that I have had in my life, and I learned a lot.

One of the things I learned was that I better be a little humble about this process. I had come out of law school ready to change the world. In Chandler, Arizona, most of my clients were Navajo-speaking people, did not speak English, and worked through interpreters. A client came in to see me, by the name of Little Redhouse. Now, Little Redhouse had bought a pickup truck in a small town in Utah on the edge of the reservation, and he had entered into a credit contract. With my great legal education, I was able to look at that contract and determine that it violated the federal Truth in Lending Act, and I was able to determine that every single contract that that automobile dealer had

entered into violated the federal law. In those days, a violation of the Truth in Lending Act meant that the plaintiff got \$2,000 in cash.

So what did do? I started a class-action law suit on behalf of every single person who had bought a truck from that car dealer, and it was a great case. It involved millions

of dollars. I went to a trial in Salt Lake City, Utah, the first trial of my life, and we won the trial. We went to the U.S Court of Appeals for the Tenth Circuit on very interesting legal issues, and I briefed them and argued them. It was a once-in-a-lifetime opportunity for me standing before the Tenth Circuit, barely out of law school, arguing a big case. We won the case, except that the Tenth Circuit said we had to go back down to the trial court for some more proceedings. So we did. Then we went back up to the court of appeals for some more proceedings.

After about two years of this, Little Redhouse came to into my office and sat down. He didn't speak English, so he asked through an interpreter, "*When am I going to get a truck?*"

And I realized that I had missed the whole point of what being a lawyer was. All my client wanted was a truck, and, believe me, that car dealer at that point would have been willing to give Little Redhouse 25 trucks to have me go away. I learned how important it is as a lawyer to really understand what the word *represent* means and to humbly represent your client and to listen to what your client has to say. Little Redhouse didn't care whether I was getting my name and case into the *Federal Reporter*. He didn't care whether we were making some kind of great new law. He wanted to have a truck, and, I'll tell you, it was a very happy day for me when we actually got that truck, delivered it to Little Redhouse, and I think that, maybe for the first time, I was on my way to being a pretty good lawyer.

Let me share with you another recollection. Early in my career, I represented a woman, 50 years old, in

"Let me first say that you graduates are truly fortunate to have received a legal education at this remarkable institution. Marquette University Law School is rapidly emerging as one of the finest in the United States . . ."

a criminal case, a hit-and-run matter—a woman who had never done anything wrong in her life. There was a significant factual matter about whether she was guilty or not, and, in fact, I really believe she was not guilty. We went to trial, and as I was sitting in the courtroom, in front of the jury with this woman sitting next to me, I

realized something else about being a lawyer that you're going to find out very soon into your careers, and that is that this really matters. This was not about a moot-court exercise or a trial-court exercise. This woman's life, how she saw herself, whether she would receive punishment, whether she would be tagged as a criminal for the rest of her life, depended on whether or not I knew how to do my job. It's a pretty frightening moment when you come to that realization—that it really matters.

But it does matter, and practicing law requires you to develop the craft and the skill of being a lawyer. It requires you to continue your education after this graduation. In fact, some of your most intense education is going to be in the coming months and early years of your life as a lawyer. Learn the skill, learn to do it well, but know that it is more than a craft. It is a profession. You, as lawyers, have a responsibility to do justice. So you have to make sure that you do it well, but it is also imperative that you do it right.

You have had the blessings of a legal education at a Jesuit school, and I hope, if anything, you have learned the Jesuit principle of service. A lawyer is a person who provides service. There are people who need your services. Some of them are rich, some of them are poor, and most of them are somewhere in the middle. Some of them will be able to pay for your services, and some of them won't. Some of them will have a cause that is popular, and some will have a cause that, however just, is reviled. Please serve them all. Please take and apply the great education that you have learned here. Please go out and earn a really good living, but also make sure that you take some time and donate some of your

time and your skills to people who really need you.

I know now—I know as I look out at you—that we are receiving in the State of Wisconsin another great, great group of graduates from this wonderful university. And I know that this state, for those of you who will work and serve here, and other states around

the country and other countries around the world will be the beneficiaries of the great education that you have received at Marquette. So, congratulations to the Marquette Law School graduates of 2008.

Thank you. •



December 2008 Commencement

In his remarks at the Law School's December 2008 midyear commencement, Professor Peter K. Rofes, Associate Dean for Academic Affairs, addressed whether there was "advice—perhaps even wisdom—germane to the broad spectrum of future courses that you have charted for yourselves." As reflected in the following excerpt, Professor Rofes's answer focused on the "skill of listening."

A partner in a business apprehensive about diminished revenue, undiminished debt, beckoning creditors, and loyal employees; a spouse trying to come to grips with the many implications of a marriage irretrievably broken; a corporate officer infuriated that the corporation's trademark is being infringed and bewildered about what to do in the face of such infringement; an elderly couple anxious that assets created through decades of hard work and frugality somehow will not make their way to the intended targets of the couple's largesse; a group of friends that has lost a substantial investment by virtue of what it believes to be a fraudulent scheme on the part of an overseas company; parents whose teenage child has been charged the night before with operating a vehicle while intoxicated.

Each of these clients will have her, his, its, or their own distinctive story. But the stories will not unfold in your offices like the cases in your law school casebooks. They will not be told to you in neat, organized, dispassionate paragraphs . . . Instead, your ability to listen—to what is said as well as to what is left unsaid, to the emotions that accompany the words conveyed no less than to the words themselves—your ability to listen with care, kindness, and discernment, your self-conscious cultivation of the skill of listening, will empower you to serve clients with increasing effectiveness over the course of your careers.

The skill will play a material role as well in other aspects of professional life. Colleagues with whom you share a practice, judges before whom you appear, coworkers in a corporation, the range of individuals you happen upon as you tackle the scores of transactions, cases, and matters that together add up to a professional career—these folks will form enduring impressions of you based in no small measure upon how committed they perceive you to be to the skill of listening to them and their stories, even, or perhaps especially, when the challenge of doing so is most daunting. In a world in which the volume at which speech is delivered is often mistaken for the amount of wisdom contained in the speech, the wise lawyer grasps that much can be accomplished through a closed mouth and adept deployment of the ears. In a world in which the modifier "value added" has begun to crop up all across our culture . . . , the wise lawyer grasps that in many professional circumstances truly substantial value can be added only after absorbing in all their nuances the words, sentiments, positions, and professed objectives of others.

In the arsenal of each of the truly superb lawyers I have had the pleasure to encounter is a highly refined commitment to listening. And so: Listen well, and carefully, to others. •

Associate Dean for Research Named and Blog Launched

The 2008–2009 academic year has included the creation of a new leadership position among the faculty: that of Associate Dean for Research. Dean Joseph D. Kearney appointed Michael M. O’Hear, Professor of Law, to the new position. In making the announcement, Kearney explained that the new associate dean would have a broad mandate to work with faculty, students, and others to enhance the research and scholarly aspects of the Law School’s mission. This entails both working with faculty and students to develop scholarly projects and seeking enhanced publicity and exposure for Marquette research and scholarly writing within the national legal academy, the bench and bar, and the media.

Since becoming Associate Dean for Research, O’Hear has organized faculty workshops on scholarship and worked with individual faculty members on some of their projects. But a primary focus of his efforts so far has been the development of the Marquette University Law School Faculty Blog. Among other objectives, it is hoped that the blog will become an important new medium for disseminating the research and analysis of Marquette faculty members on matters of law and public policy.

Only a half-dozen other law schools had faculty blogs when Marquette’s venture (<http://law.marquette.edu/facultyblog>) went online on September 1, 2008. The site now attracts several hundred unique visitors every day, and it includes posts expressing the opinions not only of a wide

variety of law faculty but also, each month, of a different featured “Student Blogger” and “Alumnus Blogger.” Readers of the blog are able, through its “comments” section, to provide their own takes on the matters discussed in the posts on the blog. Frequently a sort of conversation thus ensues on the blog between the author of the post and commenters.

A visitor to the faculty blog will get a window into the Law School today. The blog’s subject matter encompasses the full gamut of fields in which members of a law faculty take a professional interest, including law, legal practice, legal culture, legal scholarship, pedagogy, higher education, government, politics, public policy, and business. The blog devotes particular attention to the work of the Seventh Circuit and the Wisconsin Supreme Court, although there are also more lighthearted topics, such as a series on faculty members’ favorite law-related movies and novels. O’Hear hopes that the blog “will not only serve as a source of useful information and thought-provoking opinion but also enhance the sense of connectedness within the wider Law School community, including faculty members, students, administrators, and alums.” •



BLOG MESSAGE FROM THE DEAN

Welcome to the Marquette University Law School faculty blog. While I cannot guarantee similar longevity, this new undertaking calls to my mind the launch some 92 years ago of the *Marquette Law Review*. On the opening page of the journal it was maintained that “the institution which would expand and fulfill its mission must make known its ideals and communicate its spirit.” W.A. Hayes, Foreword, 1 Marq. L. Rev. 5 (1916). At that time it was clear that “[t]he most effective way of doing both is by means of a suitable magazine.” *Id.* Today Marquette Law School, which is expanding and fulfilling its mission in impressive and unprecedented ways, requires in addition to the *Marquette Law Review* (as well as our other journals and the *Marquette Lawyer* alumni magazine) other “effective way[s]” to make known our ideals and communicate our spirit. I believe that this blog will be one such, as it will highlight our talented and thoughtful faculty and others associated with the Law School. I commend Professor Michael M. O’Hear, our new (and first) Associate Dean for Research and Managing Editor of the blog, upon his leadership of this effort, and I look forward to both reading and contributing to the blog. I invite all with a stake in Marquette Law School and in law and public policy, especially in this region, to be frequent visitors.

— Sept. 1, 2008.

law.marquette.edu/facultyblog

Distinguished Lectures

Hallows Lecture

The annual Hallows Lecture will be delivered at the Law School by the Honorable Sarah Evans Barker on Tuesday, April 14, 2009, at 4:30 p.m. The lecture remembers the late E. Harold Hallows, a law professor at Marquette from 1930 to 1958 who served on the Wisconsin Supreme Court from 1958 to 1974, the last six of those years as Chief Justice. Past Hallows Lecturers have included the Honorable Shirley S. Abrahamson, Antonin Scalia, and Diane P. Wood.

Judge Barker has served for the past 25 years on the United States District Court for the Southern District of Indiana, including a six-year term as chief judge. She is chair of the Federal Judges Association and a former United States Attorney and lawyer in private practice.

It is her extensive experience as a federal trial judge that particularly prompted the Law School to invite Judge Barker. As Dean Joseph D. Kearney observes, “Over the past three years, the Hallows Lecture has received extensive national attention, from Judge Diane Sykes’s discussion of the Wisconsin Supreme Court to Judge Carolyn Dineen King’s observations on judicial independence to Judge Diarmuid O’Scanlain’s critique of the proper judicial role in textual interpretation. We are extremely pleased that for the first time the Hallows Lecture will feature the perspective of a distinguished sitting trial judge.”

The title of Judge Barker’s talk is “Beyond Decisional Templates: The Role of Imaginative Justice in the Trial Court.”

Boden and other lectures

The Law School annually hosts several other distinguished lectures. This past fall, Dan Kahan, the Elizabeth K. Dollard Professor at Yale Law School, delivered the lecture named after the late Robert F. Boden, L’52, who served as dean of Marquette Law School from 1965 to 1984.

Kahan selected as his Boden Lecture title “Cultural Cognition and Law.” *Cultural cognition* refers to the tendency of people to perceive disputed facts—e.g., whether global warming is a serious threat, whether the death penalty deters murder, whether gun control makes society more safe or less—in ways that reflect and reinforce their own cultural identities or their own preferred vision of the good society. Kahan identified four basic sets of cultural values and discussed social-scientific research that quantifies the relationship between these values



Mike Gousha, John Chisholm, and Dan Kahan participated in an “On the Issues” event during Kahan’s recent visit as the Boden Lecturer at Marquette Law School.

and the way people assess risk. For instance, those who share the “hierarchical-individualist” worldview tend to see the risks presented by global warming as much less serious than do those who share the “egalitarian-communitarian” worldview.

Kahan, who served as the president of the *Harvard Law Review* in 1988–1989 and clerked for Justice Thurgood Marshall of the United States Supreme Court, addressed not only theory, but also the intensely practical implications of his cultural-cognition thesis. His research suggests how lawyers in the courtroom and advocates for policy change can achieve greater success by presenting information in ways that appeal to the cultural values of the relevant decisionmakers. For instance, studies indicate that one is likely to perceive an expert witness as more reliable if the witness is thought to share one’s own cultural values.

Kahan’s visit included not only the Boden Lecture itself but also a discussion with a dozen or so community and law-enforcement leaders, including Chief Edward Flynn of the Milwaukee Police Department, and a joint conversation with Milwaukee County District Attorney John Chisholm, moderated by Mike Gousha, Distinguished Fellow in Law and Public Policy, as part of Gousha’s “On the Issues” series.

Other events this academic year include the twelfth annual Helen Wilson Nies Lecture on intellectual property law, with Jessica Litman, the John F. Nickoll Professor of Law and Professor of Information at the University of Michigan, addressing “Real Copyright Reform,” and the inaugural Barrock Lecture on Criminal Law, featuring Tracey G. Meares, the Walton Hale Hamilton Professor at Yale Law School, on “The Legitimacy of Police Among Young African-American Men.” •

Assistant Dean Casper Receives Excellence in University Service Award

This past April, Jane Eddy Casper received one of Marquette's Excellence in University Service Awards. Casper joined the Law School in 1997 as Assistant Director of Part-Time Legal Education, serving more recently also as Assistant to the Dean for Special Projects. In 2008, she became, more simply, Assistant Dean for Students. Because Dean Casper's remarks in accepting the University's award capture something about the Law School and, indeed, Marquette more generally, we reprint them here.

I start my remarks with a confession. For many years, I have prided myself on keeping professional life separate from personal life. But in preparing today's remarks, I must confess, I realized that it is a false pride. My Marquette life and the significant moments of my personal life have been intertwined for more than three decades.

In the early 1970s, when I was a teaching assistant in the French Department, it was Jack Paquette, a teaching assistant in the Political Science Department, and his wife, Mary (many of you know Mary Paquette in the College of Nursing), who set me up on a blind date with a nice young man named John Casper. I'd like to think that John was attracted to me solely for my charm, wit, and intelligence, but the fact that I had access to Marquette basketball tickets may have had a little something to do with my appeal.

Twenty-seven years ago, on this very date, April 15—indeed, at just about this exact time—I was close to finishing up my last day of work in the Admissions Office before starting what I thought would be a few relaxing weeks of maternity leave in advance of my May 1 due date. But those pesky lower backaches coming every five minutes convinced me to have John drive us to St. Joseph's Hospital at five o'clock rather than back to Dousman. The result of

those backaches was a baby boy, John Casper, Jr., born the next morning—and, yes, the birth was part of a clinical experience for a Marquette nursing student.

Later, as John and the nurse wheeled baby John and me to the newborns' nursery, we ran into Greg Olsen, giving a tour of the hospital to a prospective freshman. I asked her what high school she attended—sometimes, when you work in Admissions, you just can't help yourself. (She was from Cudahy High School.) Three years later, back again at St. Joe's, awaiting the birth of Martha, night nurse Mary Agnes O'Hearn Sullivan came on duty. I remembered meeting her nine years earlier when she was a high school senior at St. Joseph's Academy in Cleveland, Ohio. As Mary Agnes measured pitocin into my vein, my first thought was, "Did she have a good score on the math section of the SAT?" Of course she did, and just knowing she was a Marquette nurse put me at ease.

Dozens of the Christmas cards my family receives come from former students and colleagues now scattered across the country. I am known as "Aunt Jane" in the Registrar's Office because that's who I am for Associate Registrar Kerry Grosse. Graduations, weddings, birth announcements, and, sadly, even funerals are part of my many Marquette years.



Jane Eddy Casper with David L. Shrock and Rev. Robert A. Wild, S.J.

I am so very grateful to receive this award and to those who have blessed my life. First thanks go to my family, here today: husband John, son John (a Marquette graduate), and daughter Martha (a graduate of Loyola-Chicago). (Yes, all Caspers are most grateful for those generous tuition benefits.) Thank you, John-the-father, John-the-son, and Martha for putting up with me and my absences on evenings and weekends when I worked college fairs or scholarship competitions or information sessions, and now for the evening hours I keep at the Law School. John and Martha, special thanks for understanding the year your St. Nick's stockings were filled only with items from the Marquette Spirit Shop because Mom was too busy to stop at a toy store.

A sincere thank you to Leo B. Flynn, who took a giant leap of faith in 1974 when hiring Jane Eddy as an admissions counselor—my highly marketable skills being a master's degree in French and less than a year's experience writing country-western bar ads for a local radio station. Leo, you opened the door to a job, which became a career, which became a vocation. Thank you as well to Dave Buckholdt for his support and leadership during a year of transition in Admissions in the early '90s; to Sister Carol Ann Smith and Father Gene Merz and Father Dan McDonald for spiritual guidance and prayers; to Professor Peter Rofes, who also took a leap of faith when hiring me in 1997 to work with him at the Law School for the newly formed Program in Part-Time Legal Education. Peter, I have you to thank for bringing me to the Law School and for allowing me to work with my all-time-favorite kind of student: the nontraditional student. Thank you to Dean Joseph Kearney, for keeping me on my toes and giving me projects—"special projects"—I never imagined I'd be able to work on. And finally, my thanks go to the literally thousands of students I have had the good fortune

to meet and work with during the past 34 years: tour guides, shadow-visit coordinators, RNs returning for their BSN, Pre-Medical Scholars, Bradley Scholars, office workers, and of course, now, a truly great group of students—law students.

As warm and toasty as it has been to reflect on the past, it is the present and the future that get my heart pumping and the energy flowing. You all have noticed how active the Law School has become in the past few years. From Dean Kearney and Associate Deans Peter Rofes and Bonnie Thomson, along with my law school colleagues, the faculty, and the

"Be patient and kind, have faith in the basic goodness of the people around you, share your expertise and your skills, be the professional you know that you are. It's in those single moments of care and respect and service that we make a difference in the lives of people we touch."

students and alumni, there is an energy that is not just palpable, it is pulsating, an *esprit de corps*, an enthusiasm and excitement as we move forward. (*Esprit de corps*—that's French, not Latin, with apologies to the president and the dean.) You think the past few years have been active at the Law School?

Stay tuned—there's more to come.

I started my remarks with a confession, and I close with a favor to ask. If there is just one thing you take from today's event—O.K., one thing in addition to the leftover lemon bars—please take home this thought: Never forget for a single moment the impact you have on a student, a colleague, an unexpected visitor, a confused caller, a distraught e-mailer, or on someone like me who still is asking questions about our new phone system. Never forget the impact we have on each other. Be patient and kind, have faith in the basic goodness of the people around you, share your expertise and your skills, be the professional you know that you are. It's in those single moments of care and respect and service that we make a difference in the lives of people we touch. And it is those thousands and thousands of single moments that add up to 34 years of my deepest gratitude to Marquette University and to all of you.

Thank you. •

“True education, education really worthy of the name, is an organized effort to help people use their hearts, heads, and hands to contribute to the well-being of all of human society. Genuine education helps individuals develop their talents so they may become agents who act with others to make God’s liberating and transforming love operative in the world.”

— Very Rev. Peter-Hans Kolvenbach, S.J., then Superior General of the Society of Jesus (Speech at Xavier University, October 3, 2006)

Marquette University Law School

Public Service Report

Marquette University states as an essential part of its mission “the development of leadership expressed in service to others.” At Marquette Law School, evidence of this leadership abounds.

In Milwaukee and across Wisconsin—indeed, from Appalachia to Eritrea—our students, faculty, and graduates are serving the common good in ways that exceed measure. In this section, we offer a glimpse of the many opportunities for service in which Marquette lawyers, present and future, engage.

The recent gains are impressive. For example, more than 40 percent of our students now qualify for membership in the Law School’s Pro Bono Society by performing 50 hours or more of voluntary legal service by graduation. We expect that this percentage will continue to rise: thanks to the generosity of the Gene & Ruth Posner Family Foundation, Marquette Law School has added for at least the next several years a full-time Pro Bono Coordinator (Adrienne J. Olson, L’03), who will work with Daniel A. Idzikowski, L’90, Assistant Dean for Public Service.

There are as well numerous nonlegal volunteer activities in which Marquette law students engage, whether individually or as a part of student-organization initiatives. One example is the recent donation, as part of a larger national effort, of almost 2,000 pounds of law textbooks to African law schools; this effort was led at Marquette by the student Association for Women in Law and Professor Lisa Mazzie Hatlen.

While almost every aspect of our public service initiatives has grown within the past year, we are more excited about the future. Even within the next year, the Law School will offer several new pro bono opportunities for law students, including projects addressing the needs of military service members and legal issues that affect health outcomes. The Law School is laying the groundwork for an expanded public policy role as well, reaching out to nonprofit, government, and community leaders in an accelerated effort to connect the Law School’s resources with the community.

As we build the new Marquette Law School, we seek to be faithful to our Jesuit mission and the special ways that the Law School can serve that mission, offering law students not only the ability to serve today but an introduction to the broad opportunities that a legal education provides for service throughout their careers. In short, as the brief articles in this section reflect, we are seeking to develop Marquette lawyers who will follow the University’s injunction to “Be the Difference.”

A Different Kind of Spring Break

During the past two years, more than 30 Marquette Law School students have participated in the National Lawyers Guild's Alternative Spring Break program, traveling to New Orleans and providing pro bono assistance to the struggling communities of the Gulf Region. The trip has been organized by Marquette law students (some now alumni), including Tonya Turchik, Natalia Minkel-Dumit, Randy Sitzberger, Camille Monahan, Terry Mambu-Rasch, and Anne Jaspers.

In 2008, the law students joined forces with the Student Hurricane Network, a national association dedicated to assisting with the legal questions facing New Orleans residents after Hurricanes Katrina and Rita.

"This trip was a positive opportunity to experience out-of-the-box pro bono legal work," says Turchik, now a 3L. "Our work added greatly to the investigative research capacity of lawyers in the Gulf Region."

The 15 students on the most recent trip were split into three work teams, each with a different project focus. One of the teams worked closely with the Federal Emergency

Management Agency (FEMA) to monitor the conditions of FEMA trailer parks. Another assisted the Greater New Orleans Fair Housing Action Center with a canvassing project, surveying residents to report on the amount and type of relief that they had been provided through the Road Home Project. The final group of students worked as legal interns at New Orleans Legal Assistance, where they helped contact clients and researched current legal issues facing Gulf Region communities.

The students found lodging in the Episcopalian Diocese parish house during the trip and often cooked dinner and



The wake of Hurricanes Katrina and Rita left not only destroyed property but also myriad legal issues for residents of New Orleans.



Students and others from the Marquette Law School community on a recent trip to New Orleans.

explored the city together. Reflection is an integral part of the Alternative Spring Break experience, so each night the students were encouraged to share their thoughts and feelings about the work they were doing.

“It was important to us that we explore the city and give back to it by eating at local restaurants and experiencing its rich culture,” says Turchik. “We took a cemetery tour, watched the St. Patrick’s Day parade, and made time to interact with and learn about the people whom we were helping.”

During a similar trip in 2007, Marquette law students worked at Common Ground, a grassroots organization established in the aftermath of Hurricane Katrina. Common Ground includes medical clinics, rebuilding teams, and a legal clinic where, during their trip, the law students put their legal training to work. Professor Janine P. Geske, L’75, Louis J. Andrew, L’66, and Sue Andrew, Sp’66, accompanied the students.

Student organizers are currently planning future such trips.

“More than any other aspect of my law school career, this program has shown me the importance of service and giving back to the disadvantaged,” says Turchik. “I hope that it continues for years to come.”

Marquette Student Receives Public Interest Award from the State Bar of Wisconsin

Anne Jaspers, a 2008 Marquette University Law School graduate from Westmont, Ill., knew that she wanted to help people ever since watching her parents open their home to foster children while she was growing up. After college, while working alongside attorneys at Dane County’s Department of Human Services and at a homeless shelter in Cincinnati, she began to envision herself in a legal role.

“I wanted to be able to join the work that they were doing, to combine social work and the law,” says Jaspers. “Lawyers have a lot more power.” Jaspers was attracted to Marquette Law School because of its urban setting and public-service opportunities.

While she graduated with academic honors, Jaspers’s experiences extended far outside the classroom. She and a number of Marquette law classmates spent a spring break volunteering in New Orleans (see story on opposite page and above). Jaspers served two years as a student coordinator for the Marquette Volunteer Legal Clinic, helped found the student chapter of the National Lawyers Guild, was a two-time Public Interest Law Fellow, served as copresident of the Public Interest Law Society, and worked with the Street Law Program, providing education in the law to Milwaukee high school students.

In light of these undertakings, the Public Interest Section of the State Bar of Wisconsin recognized Jaspers with its Outstanding Public Interest Law Student Award this past May. Jaspers continues her service in the public interest as a lawyer for the Office of the State Public Defender in Oshkosh, Wis.



Marquette Volunteer Legal Clinic Renovates and Expands

Through a series of collaborative efforts, the Marquette Volunteer Legal Clinic (MVLC), regarded as one of the Law School's flagship public service programs, expanded its resources and broadened its reach into the community this past year.

Marquette Law School and the Capuchin House of Peace, at 17th and Walnut Streets, completely renovated the space occupied by the MVLC's north-side office. The project created private interview rooms, affording participants appropriate confidentiality, as well as space for an office, research area, and conference room.

Quite apart from this renovation, the Law School, in partnership with Quarles & Brady, LLP, expanded the MVLC to a second site, on Milwaukee's near south side, in order to serve the Latino community. Quarles & Brady agreed to provide the volunteer lawyers to staff this location (working with volunteer Marquette law students) and to provide financial support, including for Spanish-language interpreters.



Michael J. Gonring, L'82, a partner and national pro bono coordinator at Quarles & Brady, notes, "Marquette has been a terrific partner, and our lawyers are excited about volunteering their legal services in this new venue." Katie Maloney Perhach, L'00, is the Quarles partner who leads the south-side operation of the MVLC.

With support from the Marquette law library, both locations enhanced their legal research and computer capacity, while administrative services took a leap forward as the Law School hired Lori Zahorodny as the first MVLC program assistant.

Finally, MVLC lawyers and law students alike benefited from a new brown-bag Continuing Legal Education series at the Law School sponsored by Legal Action of Wisconsin. The series provides free 90-minute sessions each month on a legal topic that will help MVLC volunteers in their counseling of clients.

As a result of all of these enhancements, more than 800 clients were assisted by MVLC volunteers this past year (on Tuesday afternoons on the north side and Wednesdays on the south side), with a wide range of legal issues and a high level of satisfaction.

The Law School regards the MVLC as a joint undertaking with the legal community. "The MVLC is a highly successful model of limited legal-service delivery and a valuable training experience for our law students," says Dean Joseph D. Kearney. "We could not provide this opportunity without the volunteer efforts of lawyers from the community—many but not all of whom are Marquette lawyers—or without the financial support of Quarles & Brady for the south-side location and of our alumni through their contributions to the Law School's Annual Fund."

You can learn more about the MVLC and read its latest annual report by visiting www.marquettelegalclinic.org.

Katie Maloney Perhach, L'00, leads the MVLC/Quarles & Brady clinic on the south side of Milwaukee.



Attorney Karin H. Werner, adjunct professor of law, is director of the Milwaukee Legal Initiative for Nonprofit Corporations (M-LINC), a grant-funded project led by the Law School.

Law School Receives Grants, Leads “M-LINC” Program to Assist Nonprofits

Marquette University Law School has received grants from the Helen Bader Foundation and the Pro Bono Initiative Fund of the State Bar of Wisconsin to establish the Milwaukee Legal Initiative for Nonprofit Corporations (M-LINC), a new program designed to serve the legal needs of nonprofit corporations in Wisconsin.

During the past decade, the number of public charities in Wisconsin grew by nearly 65 percent. To support this growth, area leaders established several nonprofit-support organizations. But one significant area of need remained: the provision of legal services tailored to nonprofits. Nonprofit leaders expressed an interest in legal information and, in many instances, a need for pro bono legal assistance.

To fill this need, M-LINC, which has secured funding for three years, will facilitate pro bono legal services for eligible nonprofit corporations, host educational programs on pertinent nonprofit legal issues, and coordinate a clinical program each semester. The program will capitalize on the expertise of students and faculty at not only the Law School but also Marquette University’s College of Business Administration,

College of Professional Studies, and J. William and Mary Diederich College of Communication.

“We are thrilled to help advance the independent sector through this expansive coalition of partners at Marquette University,” says Daniel A. Idzikowski, the Law School’s Assistant Dean for Public Service, who led the successful effort to secure the lead grant from the Helen Bader Foundation. “M-LINC will provide transactional attorneys an opportunity for pro bono work in their areas of expertise and involve law students in a multidisciplinary approach to public service.”

Led by M-LINC Director, attorney Karin H. Werner, and a robust advisory council, law students help administer the pro bono legal services program in a variety of ways, including assisting volunteer attorneys with research on pro bono cases and participating in the nonprofit clinic. Nonprofits may inquire about pro bono legal services via e-mail to mlinc@marquette.edu or by calling M-LINC at (414) 288-6331 or toll free at (888) 530-5462. Visit M-LINC’s website at www.m-linc.org to volunteer, request assistance, or learn more about the program.

Making Peace with Milwaukee Public Schools: Marquette Law School's "Dispute Resolution College for Kids"

Working with the Milwaukee Public School's Violence Prevention Project, attorney Natalie C. Fleury, Marquette Law School's Program Coordinator for Dispute Resolution, has developed an interactive training program for peer mediators in select elementary schools. Over the past two years, this "Dispute Resolution College for Kids" has instructed more than 175 Milwaukee Public School (MPS) students in communication skills, mediation, basic negotiation, creative problem solving, and restorative justice.

The program debuted at Marquette in 2007, facilitated by then law students Kristi Hanson, Amy Burkhart, and David Angeluzzi, from the Class of 2007, and Teresa Mambu, of the Class of 2008. In training sessions with experienced peer mediators from five MPS schools, students learned basic negotiation principles, strategies of interest-based negotiation, and ways of formulating alternatives where agreement is not possible. The program also explored why simple problems can suddenly get out of control.

"Students learned basic negotiation principles, strategies of interest-based negotiation, and ways of formulating alternatives where agreement is not possible."

Last spring, the focus turned to providing a context for mediation outside of school, adding creative problem-solving tools for the peer mediators. Fleury presented examples of mediation in the "real world."

"You could tell that many of the students didn't realize all the different places mediation is used in the wider world," comments Fleury. "By highlighting areas that interest the students, such as entertainment and sports, we could make their understanding of mediation more meaningful." Students built upon



Attorney Natalie C. Fleury is adjunct professor of law and the Law School's program coordinator for dispute resolution.

their communication and mediation skills through active-listening exercises and other activities, followed by a discussion of steps the students can take to develop creative options for conflict resolution.

Based on the success of the program over the past two years, the Dispute Resolution College for Kids is set to expand. In collaboration with the Milwaukee Public Schools, Marquette's Center for Peacemaking, and the Marquette College of Education, Fleury is the lead investigator in a Brighter Futures grant awarded by the Wisconsin Department of Children and Families this January. The Brighter Futures initiative will offer conflict-resolution and peer-mediation training to additional inner-city schools and, for the first time, reinforce that training in neighborhood centers that serve these students through after-school programs.

Fleury is enthusiastic about the expansion. "When you give students the tools to communicate more effectively and solve conflicts more productively," she remarks, "the whole community benefits."

Eisenberg Legacy Continues Through Loan Repayment Assistance Program

When the late Dean Howard B. Eisenberg established Marquette Law School's Loan Repayment Assistance Program (LRAP) in the spring of 2001, he hoped that this allocation of "dean's discretionary funds" (i.e., fundraised dollars) would encourage more graduates to undertake legal careers in public service. The Law School subsequently renamed the fund the "Howard and Phyllis Eisenberg Loan Repayment Assistance Program," in memory of Dean Eisenberg and in honor of his wife, Phyllis.

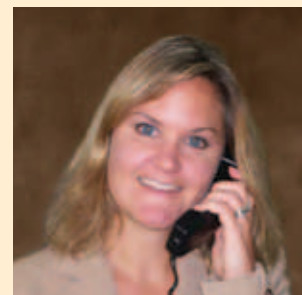
Some 20 Law School graduates now benefit from the fund. They include Lisa-Marie Line, L'05, an attorney with the Appalachian Research and Defense Fund (Appalred) in southeastern Kentucky. An interview with Appalred enkindled Line's desire to serve this impoverished region of the country.

Line handles a wide range of cases for Appalred clients, all of whom qualify for free legal services under stringent federal poverty guidelines. "The best aspect of being part of Appalred is that you are encouraged to practice in all areas of law, because our clients' needs are so diverse," she comments. Line was recently selected to work on foreclosure defense issues under a national grant from the Institute for Foreclosure Legal Assistance. "Appalred is a great place to work," says Line. "I believe that I am making a difference in my clients' lives."

Andrea M. Knudson, L'06, also benefits from the Eisenberg LRAP. Knudson is an Assistant Judge Advocate with the 1st Fighter Wing, stationed at Langley Air Force Base in Virginia. "Being a lawyer in the military was something I have always wanted to do," remarks Knudson. "Working for the federal government, especially as a military lawyer, has a lot of perks, but high income is not one of them. The Law School's LRAP helped make my dream of being a Judge Advocate in the Air Force possible."

Knudson recently returned from her first deployment to Baghdad, in support of a large joint operation in Iraq that oversees all detainee operations and control. Knudson worked in the Magistrate's Cell. Her duties there included reviewing detainees' files to determine whether to prosecute a detainee in an Iraqi court, release the detainee from custody, or keep the detainee in U.S. internment camps on account of posing a threat to the safety and stability of Iraq. "I found it a very rewarding experience to be able to make a direct contribution to help Iraq become a more stable country and also help ensure the safety of U.S. troops," comments Knudson.

Dean Joseph D. Kearney has worked with alumni to expand the resources available to the Eisenberg LRAP. "The legacy of Dean Eisenberg is important to the future of Marquette University Law School," comments Kearney. "Dean Eisenberg worked tirelessly to inculcate in students a sense of the important public interest that lawyers serve. The Howard and Phyllis Eisenberg LRAP is a way of helping some of today's students to secure the means of supporting their own work in public service."



Lisa-Marie Line



Andrea M. Knudson

Former Peggy Browning Fellow Advocates for Caribbean Women on PILS Fellowship

For third-year law student Camille Monahan, the pursuit of public service at Marquette Law School has exceeded her expectations and expanded her horizons. Monahan has used her time outside the classroom to gain remarkable experience in the area of labor law—and to make an impact abroad.

In the summer after her first year of law school, Monahan became the first Marquette student to win a nationally competitive Peggy Browning Fellowship, which she used in order to work with the United Auto Workers on pension-reform issues with Ford and General Motors.

By spring 2008, Monahan earned a Marquette Public Interest Law Society (PILS) Fellowship, underwritten entirely by donations, and secured a placement addressing labor issues in Barbados, where she

was attached to the Barbados Employers' Confederation (BEC), a registered union for employers.

While Monahan expected to attend union negotiation meetings and conduct legal research, she quickly became involved in a higher-profile experience.

"In Barbados, the workers' union has nearly unfettered power, which it exercises by calling national strikes," Monahan explains. "There are no laws governing labor relations. The union is free to call a strike at any time, and the only limit on the union's power is whether or not the workers at large agree to participate in the strike action."

"While I was in Barbados, a labor dispute arose between an exclusive hotel and the workers' union," she continues. "In this case, the union called a strike that the community of workers did not support. The union called off the strike, but the hotel believed that the workers had violated their duty of loyalty and could not be reemployed. The issue generated substantial media coverage, and both sides wanted a resolution."

Monahan suggested that the parties utilize a form of alternative dispute resolution, but this had never been tried in Barbados in this context. She was then asked to help represent the BEC and facilitate



"There are no laws governing labor relations. The union is free to call a strike at any time, and the only limit on the union's power is whether or not the workers at large agree to participate in the strike action."

negotiations with the union, the Ministry of Labour, and the Barbados Hotel and Tourism Association to craft a procedure that the government could use to mediate this dispute. Using experience gained through

Marquette Law School's Alternative Dispute Resolution program, she drafted an early-neutral-evaluation structure, a modified version of which was accepted by all of the parties.

Monahan also compiled the first census of women in leadership positions in publicly traded companies in Barbados. To present this research, the BEC held a half-day event. Two ministers from government, several members of parliament, and 30 of the country's highest-ranking women attended the event and roundtable that followed. The conference led the news for days, Monahan granted several interviews, and the modernization of gender roles continues to be a hot topic in the national press, with multiple articles appearing in the *Barbados Business Authority*.

Not every student enjoys this kind of spotlight on the international stage, but Monahan's experience reflects how Marquette law students creatively use fellowships both to enhance their legal education and to be of service.

Other 2008 PILS Fellows

Alicia M. Augsburger – *Wisconsin Department of Revenue*
 Scott M. Butler – *ACLU-Wisconsin Foundation*
 Jesse R. Dill – *Wisconsin Coalition Against Domestic Violence*
 Andrew J. Golden – *Centro Legal*
 Sara A. Kneevers – *Catholic Charities Immigration Project*
 Bethany C. Kroes – *ACLU-Wisconsin Foundation*
 Brianne E. Lannon – *Office of the Illinois Appellate Defender*

Gretchen E. Leeher – *North Carolina Coastal Land Trust*
 Scott S. Luzi – *Community Advocates, Inc.*
 Theresa M. Movroydis – *Tierra de Hombres*
 James L. Robinson – *AIDS Resource Center of Wisconsin*
 Michael R. Worhach – *Wayne County Prosecutor's Office*
 Allison N. Ziegler – *Wisconsin Department of Justice, Criminal Appeals*

Public Service Conference:

“Leaping the Gaps for Children with Special Needs” Draws Nearly 350 Participants

The 2008 Marquette Law School Public Service Conference, “Leaping the Gaps for Children with Special Needs,” explored how to improve the future for children with special needs through legal advocacy, public policy, and collaboration.

The conference reflected Marquette’s mission. “As a Jesuit law school, Marquette encourages lawyers and law students alike to look for opportunities to exercise a preferential option for the underprivileged,” explains Daniel A. Idzikowski, Assistant Dean for Public Service. “This conference reflected that commitment, as we brought together both those who nurture and serve children with special needs and those who must provide the infrastructure to help these children succeed.”

The conference featured an interactive case study, with participation from the Marquette University Players (a student theater group) and representatives of some 20 agencies, highlighting the difficulties that children with special needs can face while navigating between different systems of care. Afternoon breakout sessions addressed the need for high-quality advocacy, collaboration, and information-sharing among health-care, social-service, education, and justice systems. The sessions also explored how to best implement the protections afforded children under the Individuals with Disabilities Education Act.

Ann Yurcek, mother of 11 children and award-winning author of *Tiny Titan*, delivered the conference’s keynote address. When her sixth child, Becca, was born with a rare genetic disorder, Yurcek’s family tumbled into poverty, as Becca struggled to survive. Yurcek discussed her family’s journey out of poverty and its dedication to exceptional children, including the subsequent adoption of five siblings. Yurcek pointed out how systems intended to serve children often worked against one another and how persistent advocacy could make a critical difference.

Hosted at Marquette’s Alumni Memorial Union, the conference drew nearly 350 participants, including attorneys, educators, health and social-service professionals, and parents of children with special needs. Numerous participants expressed the hope that there would be further opportunities for collaboration among parents and representatives of the various professions, agencies, and disciplines involved.

The conference’s steering committee has continued to meet. A new website sponsored by Marquette, www.leapingthegaps.org, provides advocacy resources and materials from the conference, including video of the interactive case study. A course in Special Education Law has been introduced into the Law School curriculum, and Paul M. Secunda, a faculty member

“As a Jesuit law school, Marquette encourages lawyers and law students alike to look for opportunities to exercise a preferential option for the underprivileged.”

who joined the Law School this past fall after teaching at the University of Mississippi School of Law, expects to pursue an opportunity for students to be involved in special-education hearings, one of the recommendations stemming from the conference. Other collaborations have resulted outside of the Law School itself.

“Our hope is that this conference continues to generate new ideas and collaborations among those involved in the lives of children with special needs,” says Idzikowski. “As we look toward our future public-service conferences, we believe we have a great model to follow.”

Safe Streets: Reducing Crime in Milwaukee Neighborhoods

The *Milwaukee Journal Sentinel* recently called the Safe Streets program one of the “best ideas of 2008.” Under the direction of Professor Janine P. Geske, Marquette Law School’s Restorative Justice Initiative is leading a key component of this crime-reduction strategy in Milwaukee. This antigang and anticrime strategy on the north and south sides of the city is beginning to show positive results.

Safe Streets is a citywide partnership led by the offices of the mayor, the district attorney, the U.S. attorney, the chief of police, and numerous other law-enforcement, community, faith, and business partners; it is funded by a grant from the U.S. Department of Justice. Since the program’s inception, two community coordinators, serving at the heart of the project as Law School employees under the Restorative Justice Initiative, have met with more than 150 neighborhood groups, community-based organizations, faith and business leaders, public officials, school employees, residents, offenders, and crime victims to secure partnerships for the project.

The community coordinators, Ron Johnson and Paulina (Jasso) de Haan, take a variety of approaches to their work. Part of their effort is to help those involved in lower-level criminal activity obtain employment or



In November 2008, more than 300 people attended the Safe Streets conference, hosted by Marquette University Law School, to address the successes and challenges of the program so far.

services to help them turn their lives in a more positive direction. They have also held a total of 37 restorative-justice “community circles” with more than 400 participants in 20 different locations. In these circles, offenders hear directly from citizens about the impact of their behavior. Out of the 91 offenders who have attended restorative justice circles, there is thus far an 88 percent nonrecidivism rate. As part of the Safe Streets program, those who continue to offend despite the opportunities offered are arrested and prosecuted.

Two Alumni Receive Pro Bono Awards

Michele A. Peters, L’02, and Matthew W. O’Neill, L’91, received the 2008 Outstanding Pro Bono Participation Awards from Legal Action of Wisconsin’s Volunteer Lawyers Program last spring.

Over the past five years, Peters has provided pro bono representation to 11 Legal Action clients, primarily in unemployment insurance cases. In addition, she has helped the Volunteer Lawyers Program train dozens of volunteer lawyers in the area of unemployment insurance.

Peters is an associate with Hawks Quindel Ehlke & Perry in Milwaukee, where she represents employees in labor and employment matters. She relates that she drew inspiration for her service from the models of pro bono representation provided during her time as a Marquette law student, particularly by the late Dean Howard B.

Eisenberg and by Legal Action attorney Jeff Myer at the Law School’s unemployment appeals clinic.

O’Neill is a partner at Friebert, Finerty & St. John, also in Milwaukee. Over the past 10 years, O’Neill has handled a wide range of pro bono matters, including criminal, landlord/tenant, consumer fraud, and family cases.

For the past three years, O’Neill has been involved in significant pro bono litigation against a storage company that converted all of his clients’ stored belongings. A jury recently returned a verdict awarding the clients the full amount of the actual damages that they requested, plus \$100,000 in punitive damages. O’Neill remarks that, when the verdict came back, it was one of the best moments in his practice.

Dear Fellow Alumni,



On May 22, 2008, hundreds of alumni, faculty, staff, and friends of Marquette University Law School, together with distinguished community leaders, gathered on Tory Hill to break ground for Ray and Kay Eckstein Hall. During the ceremonies, I paused to contemplate the enormity of the day: I could not think of a more exciting and proud time for us all to be alumni of Marquette University Law School.

While it is easy to understand the many benefits that this magnificent new building will bring to the lives of faculty, staff, and future students, I believe that the building is almost as important for the alumni, for several reasons. It is not merely that the groundbreaking reflects the extraordinary generosity of Ray and Kay Eckstein, Joseph Zilber, and other alumni who made the day possible, or that the finished product will reflect, one hopes, the support of hundreds of other alumni—although both these things are true.

But beyond the financial matters, the building is significant for alumni because of its capacity to serve as a national showcase for the substantive aspects of Marquette University Law School. The facility will enable us to cast a spotlight on the academic excellence, community leadership, and outreach efforts that are increasingly occurring at the school. In other words, I believe that Eckstein Hall will help Marquette Law School to be known better throughout the region and the country.

As president of the Law Alumni Association Board, I would like personally to invite you to get involved in the Marquette Law Alumni Association, even before Eckstein Hall opens in 2010. We serve as ambassadors for the Law School, assist with recruiting and mentoring of students, provide opportunities for alumni networking, recognize and honor distinguished alumni, and much more. In short, we do whatever we can as law alumni to support the University's mission of Excellence, Faith, Leadership, and Service.

You can join in our mission by attending Law Alumni Association events, both in Milwaukee and other parts of the country, helping out on a committee, mentoring a student, submitting a nomination for our annual alumni awards, or in any number of other ways. Of course, with significant fundraising still needed for Eckstein Hall and with additional fundraising needs for scholarships, your financial contributions at every denomination are critically important and greatly appreciated.

If you have any questions about the Law Alumni Association, we list here all of the current members of the Board. Please feel free to contact any of us or Christine Wilczynski-Vogel, Assistant Dean for External Relations, at (414) 288-3167 or christine.wv@marquette.edu for more information.

We Are Marquette!

Peter Kujawa, L'02

President

Marquette University Law Alumni Association

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Gregory M. Weyandt, L'76

Michael A.I. Whitcomb, L'78



Dean Joseph D. Kearney, Hon. M. Joseph Donald, James T. Gray, Raeshaan D. Canady, Gregory B. Conway, Ralph J. Huiras, and Rev. Robert A. Wild, S.J.

Examples of the Marquette Lawyer

Marquette University conferred its 2008 Law Alumni Association Awards on four individuals who have distinguished themselves in the profession, in the business and academic communities, and in service to the public. Robert A. Wild, S.J., President of the University, helped to present the awards, together with Dean Joseph D. Kearney and the Hon. M. Joseph Donald, then-president of the Law Alumni Association. Several hundred individuals attended the awards reception, which (as always) occurred on the fourth Thursday of April, as part of the University's Alumni Awards Weekend.

Dean Kearney noted the significance of the awards ceremony: "In addition to giving us an opportunity to honor accomplished individuals, the occasion reminds those of us at the Law School and at the larger University of the importance of what we do. We allow ourselves this evening to infer from the individuals we honor that—some 4 or 18 or 38 or even 67 years from now—our successors at this great institution will find in the careers of our current students much that is laudable, even worthy as a model. This is what we most need from our alumni: their examples."

ALUMNUS OF THE YEAR

Gregory B. Conway, L'70, received the Law School's Alumnus of the Year Award. For almost four decades, the dean remarked, Conway has set the standard for excellence in the practice of law in Green Bay, Wis., and beyond. Even in the midst of extensive service to the profession and the larger society—including his election in 1984 as the youngest president ever of the State Bar of Wisconsin and his regular work on behalf of the United States Senators from Wisconsin in evaluating candidates for federal judgeships—there has been a professional constant.

Dean Kearney summarized it thus: “Greg Conway has been—is—a lawyer. He is unapologetic for, indeed proud of, the good that lawyers can do in society through their vigorous representation of their clients’ interests.” More broadly still, in the words of one of his nominators, “Through his dedication and commitment to the highest ideals of the legal profession, Greg’s life exemplifies the standard to which all Marquette lawyers should aspire.”

LIFETIME ACHIEVEMENT AWARD

Ralph J. Huiras, L'41, received the Lifetime Achievement Award. Huiras, who was born just as his father was graduating as a member of the Law School's Class of 1918, has had a remarkably varied career. Excused from his last set of exams in 1941 on account of having received a “summons” from J. Edgar Hoover to report to Washington, D.C., to join the FBI, Huiras returned to Wisconsin and his native Ozaukee County in 1948. For the ensuing six decades, he has practiced law (his office remains in Port Washington), successfully pursued business activities (running and expanding a set of banks in the area), and served as an elected official and otherwise engaged citizen (e.g., as a supervisor in Ozaukee County).

Yet it is Huiras's work within the past five years, as one of the earliest advocates for the construction of an entirely new law facility, to which Dean Kearney particularly pointed in presenting the award. As the dean remarked, “How easy it would have been for Ralph Huiras, who in recent years had underwritten important renovation and reconfiguration of the existing building, to oppose any proposal that might have had us walking away from it. But Ralph was, as I now know him relentlessly to be, focused on the future.”

ALL-UNIVERSITY ALUMNI OF THE YEAR AWARD

At the Alumni National Awards Dinner marking the conclusion of the 2008 Alumni Awards Weekend, **Ray Eckstein, L'49**, and his wife, **Kay, Sp'49**, were honored with the University's Alumni of the Year Award. The award was presented by Robert A. Wild, S.J., President of Marquette University, who cited, to be sure, the Ecksteins' transformative \$51 million gift in support of the construction of a new law facility, but also their inspiring example as parents, grandparents, entrepreneurs, and dedicated Marquette alumni. In accepting the award, the Ecksteins reiterated their hope that their gift would inspire others to do more for Marquette than they might once have thought possible.



HOWARD B. EISENBERG SERVICE AWARD

The Howard B. Eisenberg Service Award, which annually honors a recent alum who has demonstrated a particular commitment to the Law School, the profession, or the underserved, was presented to **Raeshann D. Canady, L'04**. Canady started in the Law School's part-time program (whose opening the late Dean Eisenberg led) and now practices with the Office of the State Public Defender (which Eisenberg headed and substantially expanded in the 1970s). This follows Canady's work, upon graduation, as a volunteer coordinator for Kids Matter Inc., where she recruited, trained, and supervised community volunteers to serve as court-appointed special advocates for children in foster care.

A nominator described Canady's spirit and approach to the law: "Rae and I shared an office. If she overheard me on the phone trying unsuccessfully to find a volunteer attorney for one of the Marquette Volunteer Legal Clinic's clients, she would always start asking questions about what kind of case it was and to let her know if I couldn't find anyone—in which case, she would help. The result was that I gave Rae several pro bono cases, and she has been relentlessly devoted to each of them. With all of her other big-picture endeavors in public service, Rae has that very personal, small-picture devotion to actual low-income clients that marked Dean Eisenberg."

CHARLES W. MENTKOWSKI SPORTS LAW ALUMNUS OF THE YEAR

James T. Gray, L'90, received the Charles W. Mentkowski Sports Law Alumnus of the Year Award. Gray was present at the creation of the Law School's National Sports Law Institute (NSLI), in which the late Associate Dean Mentkowski participated in the 1980s. In fact, upon graduation, Gray was the first assistant director of the NSLI, while also serving as an adjunct faculty member at the Law School.

But Gray has done much more in and for the field of sports law. His law practice has included representing Olympic athletes in the areas of drug testing, eligibility, and nationality and advising local and international organizations on a range of other legal issues in sports. Even in the midst of this practice, he serves as a faculty member in the department of sport management and media at Ithaca College in New York and a visiting fellow in a sports law program in England. Gray shares his knowledge of sports law, coauthoring with Martin J. Greenberg, L'71, the two-volume set, *Sports Law Practice* and *The Stadium Game*, and teaching internationally. As the dean concluded, "Jim exemplifies the success that students in the sports law program can achieve upon graduation and entry into the profession." •



MARQUETTE
UNIVERSITY

LAW SCHOOL

Please join us at the
Spring 2009
Law Alumni Awards.

Thursday, April 23, 2009
Alumni Memorial Union
Monaghan Ballroom

5:30 p.m., reception
6 p.m., program

Robert J. Berdan, L'75
Alumnus of the Year

Larry B. Brueggeman, L'69
Lifetime Achievement
Award

Kristi L. Schoepfer, L'01
Charles W. Mentkowski
Sports Law Alumna
of the Year

Robert E. Webb, Jr., L'97
Howard B. Eisenberg
Service Award

Once again, a Marquette lawyer—**Joseph J. Zilber, Bus Ad '39, L'41**—will receive the University's Alumnus of the Year Award at the National Alumni Awards Dinner, which will be held on **Saturday, April 25, 2009**.

In addition, **Richard M. McDermott, Eng'91, L'94**, will receive the University's Spirit of Marquette Award.

1939

Frank DeLorenzo is a retired captain of the U.S. Navy now living in Pensacola, Fla.

1958

Michael Patrick Murray, of South Riding, Va., does pro bono criminal and civil trials. His wife, Allene, children, Bryan and Laura, and five terrific grandkids collectively keep him young. In May 2008, Michael returned to Marquette to take part in the 50th reunion of the Class of '58 and to reconnect with one of his favorite teachers, Prof. Emeritus James D. Ghiardi.

1959

CLASS REUNION:
MAY 16–17, 2009

Reunion Committee

Members: Michael J. Barron and Steve Kailas, Chairs; Alfred A. Drosen, Jr., Robert Kauffman, Richard P. Perry, Eugene A. Ranney, and Robert A. Teper.

1960

Victor Manian, Reserve Circuit Judge in Milwaukee County, has recently been appointed by Governor Jim Doyle to the Government Accountability Board (GAB). The GAB was legislatively created in 2007 to serve as an independent, nonpartisan regulatory body administering and enforcing the state's election, campaign finance, and ethics laws.

1964

CLASS REUNION:
JUNE 5–6, 2009

Reunion Committee

Members: John D. Finerty and David J. MacDougall, Chairs; Peter S. Balistreri, Robert H. Bichler, Paul J. Burbach, Arthur H. Fink, Jr., Frederick A. Muth, Jr., James F. Janz, James F. Parks, Michael J. Pfau, Harry G. Snyder, and James B. Young.

1966

Michael W. Wilcox has been listed in the third annual edition of *Wisconsin Super Lawyers*. He is with the Madison office of DeWitt Ross & Stevens, practicing in estate planning.

1968

John E. Feldbruegge is a shareholder in the Litigation and Risk Management Practice Group at von Briesen & Roper, in Milwaukee. His practice is devoted to representing businesses and insurance companies in civil litigation. John and his wife live in Whitefish Bay, Wis.

1969

CLASS REUNION:
JUNE 5–6, 2009

Reunion Committee

Members: Michael M. Berzowski and Larry B. Brueggeman, Chairs; Arnold P. Anderson, Thomas J. Arenz, Henry A. Gempeler, Michael D. Guolee, Martin W. Harrison, Michael G. Malmstadt, Terry E. Mitchell, Frank J. Schiro, and Thomas M. Strassburg.

1970

William P. Croke is a shareholder in the Litigation and Risk Management Practice Group at von Briesen & Roper, in Milwaukee. His practice consists of trial and appellate work in state and federal courts. He and his wife live in Mequon, Wis.

1972

Timothy P. Crawford has been nominated to the board of the National Academy of Elder Law Attorneys.

Michael E. Hupy, president of Hupy and Abraham, has been accepted into the Multi-Million

Dollar Advocates Forum. His work with motorcyclists recently earned him the title of "Sidecar Counselor" from *Milwaukee Magazine*. He frequently speaks at special events, including the Sturgis Rally in South Dakota and this past year's Harley-Davidson 105th anniversary celebration in Milwaukee.

1974

CLASS REUNION:
JUNE 5–6, 2009

Reunion Committee

Members: J. Miles Goodwin and James T. Murray, Jr., Chairs; Kathleen Callan Brady, Timothy J. Elverman, Dennis J. Fitzpatrick, Thomas J. Flanagan, D. Michael Guerin, John W. Lohre, James P. Maloney, Michael J. Mulcahy, Thomas M. Olejniczak, Robert G. Pyzyk, William G. Schaaf, Lawrence A. Trebon, and Adrian T. Ulatowski.

1976

John T. Bannen, a partner with Quarles & Brady's estate planning team, has been appointed state chair for Wisconsin of the American College of Trust and Estate Counsel (ACTEC). ACTEC, a national association of leading estate-planning lawyers, has 53 members in Wisconsin and 2,700 members nationwide. John is listed in *The Best Lawyers in America*.

2009 CLASS REUNIONS: SAVE THE DATES

Class of 1959: May 16–17, 2009

Classes of 1964, 1969, 1974, 1979, 1984, 1989, 1994, 1999, and 2004: June 5–6, 2009

ALUMNI | CLASS NOTES

Patrick O. Dunphy secured a \$35 million compensatory jury verdict award for a client in Walworth County, Wis. He recently served as chairman of Marquette University High School's capital campaign, which raised more than \$20 million. His firm, Cannon & Dunphy, is marking its 23rd year, and Pat and his wife, Ginny, celebrated 34 years of marriage this past August.

Gregory M. Weyandt, a partner at Dorsey & Whitney, Minneapolis, Minn., recently received the Minnesota State Bar Association's Annual "David Graven Public Service Award," which is given to the lawyer who best exemplifies the high standards of the profession in combination with a commitment to public or community service. Greg's extensive pro bono legal work includes efforts on behalf of the Chrysalis Safety Project, an organization that provides legal representation to low-income, battered women seeking orders for protection

and others having a compelling need for legal assistance. Greg is a member of the Marquette Law Alumni Association Board.

1977



Patricia K. Ballman, a partner with the Milwaukee office of Quarles & Brady, has been recognized among the Top 25 Women Lawyers in Wisconsin by *Law & Politics* magazine. She focuses her practice on the area of family law, specializing in the issues of divorce, treatment of business interests, tax considerations, and drafting of premarital agreements. She also has substantial experience dealing with close corporations and trust interests.

CENTENNIAL SYMPOSIA

Visit law.marquette.edu to listen to a six-session series of symposia, led by Professor J. Gordon Hylton, addressing the Law School's incorporation into Marquette University in 1908 and its ensuing century.



Mike Jones's Milwaukee roots run deep and wide, and he's staying put. After almost 25 years with Miller Brewing Co., Jones was recently named vice president for corporate affairs for MillerCoors. Although the new conglomerate's corporate headquarters is in Chicago, Jones's new position will afford him the opportunity to stay in Milwaukee, the city he loves.

Jones is the ninth of 11 children, many of whom still reside or work in the Milwaukee area; their father, Robert Jones, who passed away last year, himself graduated from Marquette Law School in 1940. After studying history and philosophy at the University of Wisconsin—Madison, Mike Jones thought it would be interesting—and, regardless of his career path, beneficial—to study law. Though accepted by both Madison and Marquette, he relates, "being a Milwaukee guy, I thought Marquette the natural choice."

Jones entered law school in 1981 with an open mind and broad goals. "I didn't have specific plans about work or practice. I just knew that I wanted the knowledge and was open to where that would lead me," he says. It led him, rather quickly, to Miller Brewing Company.

"After my first year of law school, there happened to be an opening for a clerking position at Miller Brewery," Jones explains. "Wearing the only suit and tie I had (both of which I had borrowed from one of my brothers), I applied, interviewed, and was subsequently hired." Jones increased his

MIKE JONES

work at Miller after his second year of law school and, upon graduation in 1984, accepted a full-time legal position involving regulatory work.

Throughout the ensuing quarter-century, Jones worked in a variety of capacities and positions in Miller's legal department. These included several-year stints, first handling the legal aspects of human-resources issues and internal investigations and then working with the sales group concerning relationships and legal questions with Miller-brand distributors. A five-year tour of duty with the international division took Jones to places in South America, Asia, and Europe. Most recently, Jones served as Miller Brewing Co.'s general counsel for eight years, before his appointment as vice president of corporate affairs following last year's merger with Coors Brewing Co. and the creation of MillerCoors.

In this new capacity, Jones will focus on MillerCoors's investment in its communities, its workers, and its heritage. The position enables Jones to remain primarily in Milwaukee, whereas many other top executives have had to relocate to Chicago. "This is ideal for me," he says. "After 25 years of suing and getting sued, the fun of that wears off. I was hoping to make a transition into a different career path at this point in my life, so this is especially serendipitous."



While Jones quips that his in-house work means that he has not himself had to be in a courtroom since the day he was sworn in, he has found his legal education to be invaluable not only in his employment but also in his volunteer work on boards and groups associated with a number of Milwaukee-area nonprofit organizations. These include Marquette Law School, where Jones is particularly excited about the construction of Eckstein Hall and what it will signify about the Law School to the Milwaukee region. "It will be, foremost, a highly regarded academic and intellectual center," he notes, "but it will also be an architectural showpiece, visible from the new Marquette Interchange."

Jones lives in Delafield and has three young-adult children. He also maintains a condo in Milwaukee's Third Ward—he is, after all, a Milwaukee guy. •

BOB BERDAN AND RAY MANISTA

This past June, after 33 years as an attorney—the most recent 19 at Northwestern Mutual—Robert Berdan closed his files, packed up his armadillo collection (see sidebar below), and began the next phase of his life: retirement.

Berdan and his wife, Darlene, recently celebrated their 40th wedding anniversary and have three now-adult children. In the period between his undergraduate degree and the receipt of his J.D. from Marquette in 1975, Berdan served more than four years on active duty in the U.S. Army as a commissioned infantry officer, including a tour of duty in Vietnam. He remained in the U.S. Army Reserves for an additional seven years.

Berdan achieved success while still in law school. During his third year, he and fellow classmates Barb Berman and Carolyn Burrell won the regional moot court competition and went on to New York City for the finals. They ultimately finished second in the nation, following an argument before Justice William Rehnquist. “For our brief 15 minutes of fame, we were local celebrities, having received accolades from many state and local dignitaries on account of our school’s strong finish,” says Berdan. “It was an exciting time for Marquette, eclipsed only (in our eyes) by the NCAA championship in basketball that followed a mere two years later!”

Before joining Northwestern Mutual, Berdan practiced for 14 years at what is now Whyte Hirschboeck Dudek S.C. In 1989, after much consideration, he resigned from the partnership and joined the law department at Northwestern Mutual as an assistant general counsel. “I worked with the investment departments on Northwestern Mutual’s real estate and securities portfolios, but quickly branched out to handle various corporate projects,” he explains. He soon raised his hand to help take public Northwestern Mutual’s then-single-biggest investment—Mortgage Guaranty Insurance Company (MGIC)—and later to head up a project team to help draft Wisconsin legislation concerning mutual holding companies.

While working and raising a family, Berdan nonetheless carved out time to serve his community and alma mater. In 1978, he was elected to the Brown Deer Board of Education, where he served for 16 years before stepping down from public service in 1994. He also has been a director of the Marquette University Law Alumni Association, the Wisconsin Equal Justice Fund, the Milwaukee Kickers Soccer Club, Inc., Brown Deer Scholarships, Inc., and the American Lung Association of the Upper Midwest.

After serving for a time as head of the company’s compliance department, Berdan returned to the law department as Northwestern Mutual’s sixteenth general

An Army of Armadillos—by Robert J. Berdan, L’75

In 1978, while in the Army Reserves, I was at Ft. Sill, Oklahoma, for a two-week summer encampment. Late one evening, several of my Wisconsin cohorts and I found ourselves overserved. While in an admittedly fuzzy state of mind, the group turned its attention to the ubiquitous armadillo, and a consensus emerged that there was a pressing need to capture one. Phase two was to surreptitiously relocate the creature to our commanding officer’s bathroom. Lost with sobriety and the passage of time is why either of these decisions was necessary or prudent.

To make a long story short, the mission was accomplished, but not without a physical confrontation with a rather large, agile, and uncooperative clawed creature, the tripping of a security alarm, and a pat-down search by the military police.

On my first full day of employment at Northwestern Mutual, I told the armadillo story to my new colleagues (considerably embellished with more particulars than time or space now permits) during Northwestern Mutual’s famous free lunch. Why? I don’t know. The next day, a stuffed armadillo inexplicably arrived in my office. Since that first armadillo, I have been the recipient of literally dozens and dozens of armadillos of all shapes and sizes.

counsel and secretary. He served as head of the 75-lawyer department for eight years before his retirement last summer.

Becoming general counsel meant a dramatic shift of responsibilities. “It meant knowing a tiny little bit about everything going on, but no longer having the luxury of delving deeply into any single issue,” explains Berdan. “I describe the practice of law as a general counsel as being rather like Wisconsin’s very own Lake Winnebago—some 30 miles long, but only 15 feet deep,” he quips. “But the opportunity to nurture and develop the skills and talents of other lawyers replaced the satisfaction I previously derived from the depth and variety of case or transaction work. It was truly rewarding to have a hand in helping others grow and achieve their goals.”

It is this kind of helping hand and mentoring from Berdan that prepared his successor and fellow Marquette lawyer, Ray Manista, to take the reins as the company’s new general counsel and secretary. “Filling Bob’s shoes is a bit daunting,” Manista says, “but I’m honored to accept the challenge.”

Manista comes well prepared. In 1990, he received his law degree from Marquette, where he had previously graduated from college. Manista, too, left a partnership at a prestigious Milwaukee law firm to join Northwestern Mutual; he practiced commercial litigation at Godfrey & Kahn, S.C., from 1990 to 1998.

“The decision to move from private practice to an in-house position wasn’t an easy one,” says Manista. “I enjoyed private practice, and the firm had provided me with many opportunities to grow as a young lawyer. But I looked down the street and saw one of the world’s most-admired companies with a very sophisticated law practice. Once I took a closer look, I found people and a culture that suited me, and so I decided to make the move.”

Manista joined Northwestern Mutual as assistant general counsel. While in this role, he managed both insurance and investment-related litigation matters involving the company. His next position, from 2001 through 2003, was as director of planning and projects, coordinating Northwestern Mutual’s strategic and annual planning processes, and he also acted as secretary to the company’s management and strategic planning committees.



Bob Berdan and Ray Manista

Subsequent positions followed in the law department and elsewhere, and Manista assumed the role of head of the law department and the office of the corporate secretary upon Bob Berdan’s retirement in summer 2008.

One of the most valuable things Manista has learned during his career is that having a proper mind-set is vital. “It’s important to maintain a positive, constructive approach to problem solving, regardless of the circumstances,” he says. “We as lawyers are in a unique position to help our clients maintain perspective and to see opportunities in any situation, not simply the risks or obstacles.”

Manista and his wife, Dawne (an alumna of Marquette University with a degree in physical therapy), have been married for 19 years. Manista spends a great deal of time with their three children, including coaching Little League and basketball teams. But, like his predecessor, he finds time to give back.

“I served on two school boards, spent nine years on the Marquette Law Alumni Association Board, and recently joined the Law School Advisory Board. It’s been wonderful to see first-hand the progress that the school has made since I graduated,” says Manista. “I enjoy talking with others about this progress and seeing alumni reconnect with the school as it has been gaining new momentum over the years.” •

ALUMNI | CLASS NOTES

1979

CLASS REUNION:
JUNE 5-6, 2009

Reunion Committee

Members: Christine K. Nelson and Lee A. Riordan, Chairs; Virginia M. Antoine, Randall D. Crocker, Blaise Di Pronio, Judith M. Hartig-Osanka, Patrick J. Hudec, Nicholas A. Kees, Dennis E. Kenealy, Thomas J. Nichols, Kevin P. Reak, John A. Rothstein, and James A. Wynn, Jr.



Daniel T. Dennehy has been elected to serve as legal counsel to the Board of Directors of the Wisconsin Society of Healthcare Human Resources Administration. Dan's practice focuses on advising health-care providers on all aspects of employment, personnel, and labor matters. Dan is a shareholder at von Briesen & Roper, in Milwaukee, and resides in River Hills, Wis.



William J. Katt has been named a Fellow of the American College of Trial Lawyers. The

induction ceremony took place during the 2008 spring meeting of the college in Tucson, Ariz. Bill is a partner in the firm of Leib & Katt in Milwaukee.

Kenneth L. Kutz was appointed by Wisconsin Governor Jim Doyle to the Burnett County Circuit Court, as of August 2008 until July 31, 2009. Ken served as the Burnett County District Attorney for the previous 21 years. Ken and his wife, Patricia, live in Grantsburg, Wis., with their three children, Brian, Sean, and Brendan.

James A. Wynn, Jr., was elected this past November to a new term on the North Carolina Court of Appeals and recently concluded his term as Chair of the Judicial Division of the American Bar Association. He also has 30 years of military experience and served as commanding officer of the Naval Reserve Judicial Unit and as a captain in the Navy Reserve.

1980

John P. Macy received the 2008 Distinguished Member Award from the Waukesha County Bar Association. He was recognized for his years of service to not only the Waukesha County Bar Association but also the State Bar of Wisconsin and the American Bar Association. John is a shareholder in the law firm of Arenz, Molter, Macy & Riffle.

Timothy M. Schultz is a solo practitioner in Milwaukee, Wis. He relates his notable accomplishment as "surviving" his three daughters. Aurelia recently worked for the Nigerian

government in Africa and has returned to graduate from Vanderbilt Law School in May 2009; Wendy recently interned at the Field Museum in Chicago and will receive her master's degree in paleontology from the University of Colorado in May 2009; and Katrina is attending Transylvania University in Lexington, Ky.

Daniel G. Vliet, a shareholder in the Milwaukee office of Davis & Kuelthau, was appointed employer cochair of the Membership Development Committee for the Labor & Employment Law Section of the American Bar Association (ABA).

1981

William E. McCardell, an employment and labor attorney with an emphasis in construction law at the Madison office of DeWitt Ross & Stevens, has been named in *Wisconsin Super Lawyers*.

1982



Kathleen A. Gray has been recognized among the Top 25 Women Lawyers in Wisconsin by *Law & Politics* magazine, as well as listed among the Top 50 Lawyers in Wisconsin. She is a partner at the Milwaukee office of

Quarles & Brady. Kathleen focuses her practice on trusts and estates and family and domestic relations, including estate planning for executives, professional and business owners, probate and trust administration, estate, gift and fiduciary income taxation, as well as marital property.

Warren P. Kraft has been named director of human resources/assistant city attorney for the City of West Bend, Wis. He remains affiliated in an of-counsel capacity with the Murphy-Desmond law firm of Madison, where he continues to practice municipal law on behalf of government clients. Warren is a commissioned lay pastor for the Winnebago Presbytery and an active scout leader in the Bay-Lakes Council.

Donald W. Layden, Jr., recently received the Service in Administration Award from Archbishop Timothy M. Dolan during the annual Archdiocese of Milwaukee Vatican II Awards Ceremony at the Cathedral of St. John the Evangelist, Milwaukee. This award recognizes individuals who have assisted, enabled, or enhanced the mission of the Church through exemplary performance and service. As an advisor to leaders in Catholic education in southeastern Wisconsin, Don was cited for sharing his professional acumen with various initiatives, committees, and boards.

1984

CLASS REUNION:
JUNE 5-6, 2009

Reunion Committee

Members: Tracey L. Klein, Chair; James F. Boyle, Carol L. Browne, John F. Callan, Brian G. Carroll, Linda C. de la Mora, Robert H. Duffy, John E. Flanagan, Michael T. Jones, E. Vanessa Jones, Peter B. Kelly, Stephanie S. Mares, Linda Swagger Maris, Philip R. O'Brien, Jill M. Rappis, Frederick C. Rosa, Alan E. Seneczko, Paul G. Sherburne, Diane S. Sykes, Stephen J. Tomassi, and Joseph R. Wall.



Tracey L. Klein, equity shareholder in the Health Care Department of Reinhart Boerner Van Deuren, was named a "2008 Women of Influence" award-winner in the community-supporter category by the *Milwaukee Business Journal*. Tracey was recognized for her efforts on behalf of her clients and the community at large. She has devoted substantial time and effort to numerous community service organizations over the past 20 years and has held leadership positions with many of them.

Ramiro Manalich has been appointed by Florida Governor Charlie Crist to the Judicial Circuit Court. He had served as Collier County Judge since 2003 and as assistant attorney and chief assistant attorney for Collier County between 1989 and 2003.

1985

Kathy L. Nusslock is president of the Eastern District of Wisconsin Bar Association (EDWBA). She is a partner at Davis & Kuelthau and has been involved with EDWBA since its inception in 2002, where she has held various positions, including treasurer, member of the board of directors, and committee chair. The association is committed to improving the administration of justice and fostering professionalism, bench-bar relations, and civility among those who practice in the U.S. District Court for the Eastern District of Wisconsin.

1986

George L. Glonek, Circuit Court Judge since 2002 in Douglas County, Wis., recently received the Lifetime Achievement Award from the Superior Academic Hall of Fame. He serves in numerous civic organizations, including volunteering as a Superior High School mock-trial coach.

Richard V. Poirier recently retired from the U.S. Naval Reserves after 23 years of service. He was awarded the Meritorious Service Medal by the President of the United States for his work as the Commanding Officer of the Naval Justice School,

Newport, R.I. Poirier is a division senior vice-president for the Wausau Insurance Companies.

1987

Robert B. Blazewick, Capt. JAGC, U.S. Navy, assumed command of the U.S. Navy Region Legal Service Office Hawaii in Pearl Harbor in July 2007. As commanding officer, he is the chief prosecutor for the region and staff judge advocate for the Commander, Navy Region Hawaii.

Paul D. Christensen has been elected municipal Judge for Whitefish Bay, Wis. He practices with Ziino, Germanotta, Knoll & Christensen.

Ted A. Warpinski is serving a three-year term as an at-large member of the board of directors for the State Bar of Wisconsin's Environmental Law Section. He practices with Friebert, Finerty & St. John, Milwaukee.

1988



Patrick Cavanaugh Brennan joined von Briesen & Roper as a shareholder in the Litigation and Risk Management Practice Group. He has tried numerous complex, multidefendant criminal-conspiracy cases to jury in both the state and federal courts and

also devotes a substantial portion of his practice to the defense of white-collar criminal cases. He resides with his wife and children in Wauwatosa, Wis.



Peter L. Ramirez recently joined von Briesen & Roper as a shareholder in the Litigation and Risk Management Practice Group. He has a broad range of commercial, civil, and criminal litigation experience. He resides in Milwaukee, Wis., with his wife and children.

Ann M. Rieger, a shareholder in the Brookfield, Wis., office of Davis & Kuelthau, has been named president of the firm. She is the first female president of the firm. Ann focuses her practice in corporate law, nonprofit law, estate planning, and health law.

ROSALIE GELLMAN



Just about the time many people are figuring out how to retire, Rosalie Schlitz Gellman enrolled in Marquette Law School. “I decided to study law as an academic pursuit rather than to pursue a professional career,” she explains, “and I began classes very near to my 70th birthday.”

Gellman had previously earned bachelor’s and master’s degrees in English literature, at the University of Wisconsin–Madison and University of Wisconsin–Milwaukee, respectively. “I also studied dramatic art at New York University while working as a professional ventriloquist in New York City,” she says. For a matter somewhat more directly related to her decision to enroll in law school, Gellman also had obtained a sense of the study and practice of law because both her son and her daughter are attorneys and her brother is a retired trial judge.

When Gellman was accepted to Marquette Law School, she initially sought part-time enrollment but soon realized that she could study full time, while also helping to care for her husband, Edward, who was struggling with Alzheimer’s disease. He passed away eight months after Rosalie graduated from Marquette Law School in 2002.

Since graduation, Gellman has put her education to use, serving as an active volunteer in the chambers of a federal judge, at the American Civil Liberties Union, and currently with Legal Aid Society of Milwaukee in the area of elder law. Her career as a public service attorney and volunteer reaps many rewards for Gellman. This past Mother’s Day, she received an early-morning phone call from a former client for whom she had successfully advocated at Legal Aid. “She told me how grateful she was and vowed to call me every Mother’s Day for the rest of her life!”

Last winter, Gellman had fun in a different volunteer capacity, using another of her gifts. “I taught a weekly class in ventriloquism with the help of my friends, Jake and Cecil,” she explains. (They are pictured above with Rosalie.) “This was in a third-grade classroom in a Milwaukee public school. Some of my students became very proficient, and all of them honed their skills in articulation, projection, and presence.”

That is not the extent of Gellman’s civic involvement. She credits her Marquette Law School education with enabling her

to contribute to a number of philanthropic and other boards. “My understanding of how governments and courts operate helps me to be a more informed citizen of both my country and the world,” Gellman explains. “I especially value my studies in comparative law and international law.” She is an enthusiastic member of the American Constitution Society (Lawyers’ Chapter) and serves on the constitutional-issues task force of the Milwaukee Jewish Community Relations Committee. For the next two years, she will serve as the general chair of Wisconsin Israel Bonds.

Gellman has no intentions of slowing down and continues to turn to Marquette Law School for stimulation. “I appreciate the opportunities and try to attend the guest lectures on campus, including Mike Gousha’s ‘On the Issues’ interviews,” she says. She enjoys reunions with classmates and professors and meets monthly with four other Marquette law friends.

Gellman has been generous to the Law School. “I feel an attachment to the Marquette law community that I have never felt for other educational institutions,” she explains. “I am delighted with the plans for the new building and was happy to make a planned gift to support it.”

“Marquette Law School seems to me to have an important role in this wonderful community. Milwaukee is a fantastic city for entertainment and educational activities, and I enthusiastically take advantage of them,” she says. “I value the many surprises and special blessings that I am enjoying.”

And Marquette Law School values the special blessing of Rosalie Gellman. •

1989

CLASS REUNION:
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Reunion Committee

Members: Sonja Trom Eayrs, Virginia Regan Finn, George L. Glonek, Mary Polson Haefer, Ann Barry Hanneman, Patricia Johnston Hutchens, Joseph A. Kromholz, Patricia A. McGowan, Dale R. Nikolay, Francisco J. Olivera, Janeen Zimmer Olson, Irene Elizabeth Parthum, Ronald G. Pezze, Jr., Catherine S. Steinhafel, Michael W. Steinhafel, Cynthia Caine Treleven, Nicholas C. Zales, and Annette K. Ziegler.



Sonja Trom Eayrs, a family-law attorney with Lindquist & Vennum, Minneapolis, Minn., has been named a Fellow in the American Academy of Matrimonial Lawyers. Sonya cochairs the executive committee of the Hennepin County Bar Association Family Law Section. She also serves as a member of the Hennepin County judicial liaison committee and as a member of the planning committee for the Family Law Institute.

1990

Rodney W. Carter, has joined the law firm of Schott, Publitz & Engel, as a shareholder. He practices in the areas of corporate, real estate, and employment law, as well as related litigation. Rod and his wife, **Eileen Miller Carter**, L'90, who is a member of the Wauwatosa City Attorney's Office, have three children: Brent, Madeline, and Jack.

Lisa A. Wiebusch lives in Hudson, Wis., with her husband, Jon, and son, Jon James (JJ). She is a worker's compensation attorney and shareholder at Mudge Porter Lundeen & Seguin.

1991

Jeffrey J. Femrite has been elected a shareholder in the Madison, Wis., office of Godfrey & Kahn. His area of practice is real estate.

Michael D. Golden recently joined Derco Aerospace, Inc., Milwaukee, as vice president and general counsel.

Matthew W. O'Neill was recognized in June 2008 by the Volunteer Lawyers Project, a program of Legal Action of Wisconsin, Inc., with an award for exceptional pro bono advocacy for his services to the low-income community in Milwaukee and Waukesha. Matt is a member of the firm of Frieber, Finerty & St. John in Milwaukee.

John J. Prentice has become a shareholder at Simandl & Murray in Waukesha, Wis. He represents employers in labor and employment matters.

1992

Jason F. Abraham, a partner with Hupy and Abraham, Milwaukee, Wis., has been accepted as a member in the Multi-Million Dollar Advocates Forum.



Joseph T. Leone has been ranked as one of the top three intellectual-property attorneys in the state of Wisconsin by the international guide, *Chambers USA*. He concentrates his practice on intellectual-property matters, particularly trial and appellate litigation, chemical and biotech patent preparation, and trademark work. He is a member of the executive committee of DeWitt Ross & Stevens, Madison, Wis.



Kevin M. Long, a partner at Quarles & Brady, has been named the national chair of the firm's commercial-litigation practice. He will oversee Quarles & Brady's 100-plus commercial-litigation attorneys across six offices. Kevin lives in Fox Point, Wis., with his wife and three daughters.

Shawn G. Rice, Sheboygan, Wis., who practices in business and corporate law, was recently recognized in *Wisconsin Super Lawyers* and *Milwaukee Magazine's 2007 Top Up-and-Coming Wisconsin Attorneys*.

1994

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Members: Lee Anne Neumann Conta and Richard M. McDermott, Chairs; Cassandra J. Crall, Michael H. Doyle, Elizabeth M. Estes, Donna J. Fudge, Therese M. Henke, Virginia H. Jones, Thomas D. Klein, Amelia L. McCarthy, Joseph C. Niebler, Jr., MaryNell Regan, Kelly Brown Watzka, and Christine E. Woleske.

Norine C. Carlson-Weber is founder and president of Alpha Source Inc., Milwaukee. The company is a "women's business enterprise" (WBE) providing diversified medical products to health-care institutions,

ALUMNI | CLASS NOTES

the federal government, municipalities, and international distributors (a WBE is at least 51 percent controlled by women or, in the case of a publicly traded business, has at least 51 percent of the stock owned by women). The company's focus is on clinical-engineering departments and third-party maintenance organizations.

1995

Bradley J. Kalscheur has been elected to partnership with Michael Best & Friedrich, Milwaukee, Wis. He is a member of the Wealth Planning Services Practice Group. Brad is a certified public accountant whose practice involves such work as the transfer of closely held family businesses between generations.

Erik G. Milito and wife, Beth, have welcomed their second child, Helen Caroline. The family makes its home in Alexandria, Va. Erik is a senior attorney in the Office of General Counsel of the American Petroleum Institute in Washington, D.C.

Thomas M. Rose is chief counsel for ING Reinsurance Group in Minneapolis, Minn. ING offers group life, accident and specialty risk reinsurance, group long-term disability reinsurance, and medical and managed-care reinsurance products. Tom recently assisted in founding and organizing two nonprofit ventures: the Twin Cities Youth Choral, which is a new select children's choir, and MG Road Runners, which sponsored the inaugural Maple Grove Half Marathon and 5K.



Susan Minahan Ruppelt has been promoted to shareholder at von Briesen & Roper in Milwaukee, where her practice is focused on the areas of trust and estate planning, estate and trust administration, charitable giving, retirement planning, and estate, gift, and generation-skipping tax. She has lectured on various estate-planning topics and is a contributing author on the topic of wills for *West's Wisconsin Methods of Practice*.

1997



Derek R. Kritzer has joined the Madison, Wis., office of DeWitt Ross & Stevens. His practice is focused primarily on mergers and acquisitions, contract negotiations, real estate, securities, and intellectual-property law. He has handled a number of transactions involving the acquisition of hotel properties, dental practices, and other professional practices.

Debra E. Kuper has been appointed vice president, general counsel, and corporate secretary for the AGCO Corporation, a worldwide manufacturer and distributor of agricultural equipment based in Duluth, Ga. Debra has a broad range of legal experience in the corporate field.

Brad C. Fulton, DeWitt Ross & Stevens, Madison, has been named in the third annual edition of *Wisconsin Super Lawyers*. He is a litigator whose practice focuses on labor and employment issues, particularly in municipalities and the construction industry.

1998

Bryan M. Becker has become a partner at Howard, Solocheck & Weber, Milwaukee. Bryan practices creditors' rights law.

Kurt D. Dykstra, a partner with Warner Norcross & Judd in Holland, Mich., has been appointed to the Wisconsin Board of Bar Examiners. He serves as the nonresident attorney on the 11-member board, which is appointed by the Wisconsin Supreme Court. A native of Wisconsin, Dykstra is licensed to practice in Michigan and Wisconsin.

Daniel J. Finerty and wife, Christine, welcomed William Cornelius Finerty to their family in December 2007; the addition joins Daniel Joseph Jr. (2004) and Catherine Elizabeth (2006). Dan is with the firm of Godfrey & Kahn in Milwaukee, practicing in management-side labor and employment litigation.

Werner E. Scherr, recently joined Gruber Law Offices, Milwaukee, with a concentration in personal-injury litigation.

1999

CLASS REUNION:
JUNE 5-6, 2009

Reunion Committee

Members: Joanne Lipo Zovic and Lynn B. Martinec, Chairs; Scott D. Anderson, Jacqueline A. Beauprez, Steven M. Cain, Angela T. Champion, Jacques C. Condon, Kathleen M. Diedrich, Melissa L. Greipp, Jonathan R. Ingrisano, Daniel R. Johnson, Joseph T. Miotke, Jason E. Pauls, Brian C. Randall, Travis J. Rhoades, and Brian T. Vandervest.

Michael D. Cicchini, a criminal-defense attorney in Kenosha, Wis., has published two new law review articles on criminal law. *An Empirical Basis for the Admission of Expert Testimony on False Confessions* (with coauthors White and Chojnacki) was published in 40 *Arizona State Law Journal* 1 (2008). *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains* appears at 38 *New Mexico Law Review* 159 (2008). The full text of both articles is available at www.cicchinilaw.com.

Matthew J. Duchemin has been promoted to partner at Quarles & Brady, in the firm's office in Madison, Wis. Matt focuses his litigation practice on commercial disputes involving intellectual property, insurance-broker malpractice, insurance-agent regulation, and various contracts for goods and services.

Adam J. Forman has joined the national intellectual-property law firm Woodcock Washburn, in Philadelphia, as an associate. He cofounded the Chicago law firm Lempia Forman and has 11 years' experience in patent and intellectual-property matters. In addition to his private-practice background, Adam also previously served as patent counsel for Procter & Gamble Company.



Daniel R. Johnson is now a full partner at Ryan Kromholz & Manion, in Brookfield, Wis. Dan does trial and appellate work in patent, copyright, and trademark litigation. He has been listed in *Wisconsin Super Lawyers* for three consecutive years.

Tara Murphy Mathison has been promoted to shareholder in the Milwaukee office of Davis & Kuelthau.



Bradley W. Raaths has become a shareholder with DeWitt Ross & Stevens in Madison, Wis. He concentrates his practice in the areas of business and franchise law, focusing on mergers and acquisitions, contracts, and commercial real estate. Bradley has been listed in the third annual edition of *Wisconsin Super Lawyers*.

2000

Thomas L. Doerr, Jr., has relocated to the town of Esher, Surrey, in England with The Manitowoc Company, Inc., of Manitowoc, Wis. Tom serves as legal counsel with an emphasis on general corporate/commercial matters and global mergers and acquisitions. Tom and his wife, **Leslie Doerr, L'00**, have three young children: Will, Mackenzie, and Riley.

Cathy Ritterbusch Grogan is in her second year as a faculty member and chair of the Justice Department at Mount Mary College, a four-year liberal-arts institution on the northwest side of Milwaukee. Cathy is president of the Association for Women Lawyers and was recently elected to the State Bar of Wisconsin's Board of Governors.

Jonathan P. Groth was given the "BV" Rating by Martindale Hubbell Law Directory. This is the highest legal-ability and general-ethical-standards rating obtainable for attorneys practicing fewer than 10 years. Jon is currently an attorney with Pitman, Kyle & Sicola in Milwaukee, where he specializes in civil litigation.

Matthias D. Onderak, while remaining employed as an Assistant U.S. Attorney for the Southern District of Indiana, is currently deployed through the Department of Justice on a one-year detail to Husayniyah, Iraq. He is embedded with the military on a forward operating base in Karbala Province and is assigned as the Rule of Law Advisor for the Karbala Provincial Reconstruction Team (PRT). The PRT consists of civilian specialists, in several fields, who are charged with assisting in reconstruction and capacity-building in the province. Matthias is advising, assisting, and working with Iraqi judges, prosecutors, lawyers, and police.

Katherine Maloney Perhach, a partner with Quarles & Brady, Milwaukee, who focuses her practice on commercial litigation, was honored by the Association for Women Lawyers with the Pro Bono Award for her work as the firm's coordinator for the Marquette Volunteer Legal Clinic/Quarles & Brady site serving the Latino community on the south side of Milwaukee and at the Task Force on Family Violence's Restraining Order Clinic.

Rebecca A. Cameron Valcq and husband, Rob, welcomed their first child, Olivia Grace, on January 2, 2008. They are loving every exhausting minute of parenthood. Rebecca practices regulatory law at We Energies in Milwaukee.

2001

Stephen A. Gigot has been elected to partnership at Michael Best & Friedrich in Milwaukee. His practice focuses on all aspects of U.S. and international patent prosecution in various technical fields, including the heat transfer, security and safety, automotive, software, utility networking, residential ventilation, power tool, medical device, and financial transaction industries.

Julie A. Haut has been named a partner at Michael Best & Friedrich, Milwaukee. She is a member of the firm's Intellectual Property Practice Group, with a practice that includes preparation and review of intellectual-property licenses.

Michael F. Iasparro has joined Hinshaw & Culbertson in Rockford, Ill. He served for six years as an Assistant U.S. Attorney for the Northern District of Illinois, where he had substantial trial experience. His practice focuses on complex litigation matters, including commercial law, environmental law, medical-malpractice defense, and white-collar crimes.

CRAIG RANKIN

Despite relocation, extensive travel, and an evolving legal career, there are a few things that have remained constant (and closely intertwined) in the life of Craig Rankin—his dedication to his family, his love of the game of golf, and his gratitude to Marquette Law School.

Now living in Los Angeles, Calif., with his wife, Joan, their son, Jack, and Bella, their English Springer Spaniel, Rankin began in Wisconsin. After graduating from the University of Wisconsin–Milwaukee in 1988, where he studied English, philosophy, and accounting, he was accepted to Marquette Law School. In addition to the rigors of his legal studies, Rankin also prepared for and met the requirements to become a certified public accountant. He thereupon set about finding positions in which he could merge his interest in law and abilities in business and financial matters.

Soon after his 1991 graduation from law school, Rankin headed to the West Coast—where he had known he wanted to live since visiting there with a friend during college—and began his career as a law clerk to a now-retired bankruptcy judge in San Jose. “Even in California, a Marquette law degree does open doors,” says Rankin.

Rankin’s two-year clerkship gave him the opportunity to get to know the bankruptcy judges in the Northern District of California, as well as to gain experience in a field that is one intersection between business and law. “After I had been in practice a couple of years, which included a few hotly contested cases where we were on opposing sides, my current firm hired me, and I moved to Los Angeles,” Rankin explains.

He is now a partner at Levene, Neale, Bender, Rankin & Brill, a 17-lawyer bankruptcy firm that focuses on representing debtor corporations and assisting them to reorganize in and outside of bankruptcy proceedings. “The practice is extremely challenging because if I don’t do my job well, companies fail and people lose jobs,” Rankin notes. On the other hand, Rankin says, “the most rewarding aspect is that I really can make a difference by devising a way to restructure an entity or winning legal battles that allow a company to survive.”



While his practice does not often take him to Milwaukee, Rankin’s desire to see family and friends brings him back at least every year (as do the “incredible public golf courses,” he admits). He maintains a relationship with Marquette primarily through his friendship with Don Kynaston, a long-serving development officer for Marquette who is also a friend of his father, Rankin’s golfing buddy, and fellow survivor of some memorable on-the-links experiences. Most recently, the two stood by as the others in their foursome (first Rankin’s father and thereafter his fellow 1991 classmate George Mistrioty) drove six straight balls into the water on one hole.

Rankin remembers fondly his law school days and is grateful for the good friends he made and the many things he learned—from mastering all levels of Nintendo’s Mario 3 video game with Mistrioty, he says, to other skills. On the latter front, Rankin especially remembers learning trial skills from Professor Thomas J. Hammer: “I still use the organization process that he taught to prepare for trials.”

Marquette left an impression on him, too, regarding the importance of providing pro bono work. “All Marquette lawyers have opportunities to use their professional skills to give meaningful help to those in need,” Rankin says. He pursues this work in his core areas of expertise, working with debtors or defendants who cannot afford representation. And it is apparent that Rankin takes a real joy in his work, whether of the pro bono sort or for paying clients. He concurs in this assessment: “The practice of law should be challenging and is at times stressful, but it can also be enjoyable. At least that’s my experience so far.” •

Lori S. Meddings was recently elected to the partnership of Michael Best & Friedrich in Milwaukee. She is a member of the Intellectual Property Practice Group, working closely with clients to protect and enforce their trademark rights and copyrights worldwide.

Thomas J. Otterlee, practicing in the Intellectual Property Practice Group in the firm's office in Waukesha, Wis., has been elected to the partnership at Michael Best & Friedrich. His practice focuses primarily on patent prosecution.

Chad J. Wiener has been hired as an associate at Quarles & Brady, Milwaukee, with the corporate-services team.

2002

Shannon M. Elliott recently completed a six-month secondment working in Sheffield, England, with DLA Piper US. Shannon returned to the firm's Chicago office in November 2008. Her practice focuses on construction litigation and contract matters.

Michele A. Peters, of Hawks Quindel Ehles & Perry in Milwaukee, received the Outstanding Pro Bono Participation Award in June 2008 from Legal Action and the Volunteer Lawyers Project.

Jessica A. Zolp, a member of the Marquette Volunteer Legal Clinic's Steering Committee, was selected for the *Milwaukee Business Journal's* 2008 "Forty under 40," which recognizes young leaders in the Milwaukee area. Jessica is employed at MillerCoors Brewing Company.

2003

Lori J. Fabian became a partner at Hippenmeyer, Reilly, Moodie & Blum, Waukesha, Wis., in July 2008.

Cindy L. Fryda has joined The Schroeder Group, Waukesha, Wis. Her practice experience is in labor and employment law.

Kevin M. Kreuser has been in-house counsel at Intel Corporation since 2005. He acts as sole counsel for Intel's global construction and various other activities. Kevin also leads Intel's pro bono activities in Arizona, which were recently recognized by the Chief Justice of the Arizona Supreme Court. Kevin and his wife, Jessica, who were married in April 2006, recently welcomed their first child, a daughter named Brooklyn.

Matthew E. Mountin, a recipient of the National Sports Law Institute's sports law certificate, has been named interim athletic director at University of Wisconsin-Parkside in Kenosha, Wis. Matt had

served as the compliance coordinator and athletic facilities manager at Colorado State University-Pueblo, where he managed a \$12.5 million renovation of the school's athletic facilities.

2004

CLASS REUNION:
JUNE 5-6, 2009

Reunion Committee

Members: Timothy J. Casey, Paul J. Krause, and Vinita K. Paul, Chairs; Amanda K. Ashley, Christopher M. Eippert, Jay M. Englund, Daniel M. Foutz, Tiffany L. Highstrom, Sarah E. Kitzke, Krista E. Miller, Jackie Chada Nuckels, Sarvan Singh, and Jessica Stroebel.

Brandan J. Pratt has become an associate with Miller & O'Neill in Boca Raton, Fla. His practice is focused on the areas of estate, trust, guardianship, and fiduciary litigation.

2005

Michael S. Gibbs practices in civil litigation with Averbeck & Hammer in Fond du Lac, Wis. He and his wife are parents of three children.

Denise Greathouse

practices in the Labor and Employment Relations Practice Group at Michael Best & Friedrich, Waukesha, Wis. Prior to joining the firm, she was an assistant district attorney with the Waukesha County District Attorney's office.



Atheneé P. Lucas has been appointed to the State Bar's Board of Governors as a Building Bridges Liaison. She is also the immediate past chair of the Bar's Diversity Outreach Committee. Atheneé works in the legal department of Manpower Inc., in Milwaukee.

Laura M. Lyons recently joined the Madison, Wis., firm of Bell, Gierhart & Moore as an associate. She practices primarily in the area of insurance defense, including general defense litigation, worker's compensation, and medical malpractice.

Katharine A. Neugent has joined the family-law firm of Burbach & Stansbury in Milwaukee, as an associate. She previously served as a staff attorney in the guardian ad litem division of the Legal Aid Society of Milwaukee.

Gesina M. Seiler practices with Axley Brynelson, Madison, Wis., in the areas of litigation and labor/employment law.

Eric R. Wimberger lives in Kwakuni, Japan, where he is a Staff Judge Advocate with the United States Marine Corps.

2006

Kathryn A. Harrell has been hired as an associate with Bell, Glerhart & Moore in Madison, Wis. She concentrates her practice in insurance and medical-malpractice defense.

Emily McNally Horsfield has joined White and Williams as an associate in New York City. As a member of the firm's Life, Health, and Disability and Insurance Fraud Practice Groups, Emily focuses her practice on first-party insurance litigation, insurance fraud, disability law, third-party tort, products liability, and negligence litigation. She and husband, Nicholas, reside in New York.

Andrea M. Knudson is located at the United States Air Force base at Langley, Va., as an Assistant Staff Judge Advocate with the United States Air Force.

Jessica D. Poliner, an attorney with Metavante Corp., received the "Future of Change Award" at the 19th Annual Commitment to Justice Awards event sponsored by Community Shares of Greater Milwaukee in September 2008. She is the youngest board member at Centro

Legal, where she also serves on the board-development and operations committees. Jessica has coached the Law School's Philip Jessup International Law Moot Court Competition team and also mentors with Big Brothers and Big Sisters.

Matthew J. Weiss practices construction litigation with Cremer, Kopon, Shaughnessy & Spina, in Chicago, Ill.

Donna M. Wittig has joined the firm of Santoro, Driggs, Walch, Kearney, Holly & Thompson, in Las Vegas, Nev., where she practices commercial litigation. Donna recently completed a two-year clerkship with Chief Judge Roger L. Hunt of the United States District Court of Nevada.

2007

Mary Kathleen Doyle and **James B. Hanley** were married at Old St. Patrick's Catholic Church near downtown Chicago. Rev. (Professor) Gregory J. O'Meara, S.J., presided.

Amy K. Klockenga is serving as a law clerk for Judge James T. Moody, U.S. District Court for the Northern District of Indiana (Hammond). Amy recently completed a clerkship with Justice N. Patrick Crooks of the Supreme Court of Wisconsin.



Lindsay Potrafke has joined the firm of Faruki Ireland & Cox in Dayton, Ohio, as a business and commercial litigation associate. She is a member of the American, Wisconsin, Ohio, and Dayton Bar Associations, the Dayton Bar Association's Young Lawyers Division, and the Carl D. Kessler Inn of Court.

Andrew J. Sajdak married Natalie Ford on August 11, 2007, in San Mateo, Calif. They live in Chicago, Ill., where Andy practices with Belongia & Shapiro and Natalie performs professional musical theater and opera.

2008

James B. Barton is an associate in the Litigation Practice Group in the Milwaukee office of Michael Best & Friedrich.

Alan C. Cheslock has joined the Intellectual Property Practice Group at Michael Best & Friedrich, Waukesha, Wis.

Nadia Musallam practices in the area of business transactions at Ruder Ware, Wausau, Wis. She advises clients on a wide variety of business transactions, including the formation of business entities and the negotiation of contracts documenting real-estate acquisitions.

Colleen C. Nordin is an associate at the Brabazon Law Office in Green Bay, Wis.

Justin W. Pollnow recently joined the athletics department at Texas A&M University—Corpus Christi, as compliance coordinator.

Michael F. Tuchalski is an associate at Nistler Law Office in Milwaukee.



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Robert C. McKay Law Professor Award

Aaron D. Twerski, L'65, is the Irwin and Jill Cohen Professor at Brooklyn Law School and the former dean of Hofstra University School of Law. He recently received the prestigious Robert C. McKay Law Professor Award from the Torts and Insurance Section of the American Bar Association. The McKay Award recognizes an academic for his or her “commitment to the advancement of justice, scholarship and the legal profession demonstrated by outstanding contributions to the fields of tort and insurance law.” The award winners have included such luminaries as Professors Robert Rabin and Charles Alan Wright and Judges Robert Keeton and Richard Posner.

No law school counts more McKay Award winners among its alumni than Marquette University Law School: in addition to Professor Twerski, other winners include James D. Ghiardi, L'42, V. Robert Payant, L'57, and John J. Kircher, L'63. With thanks to Brooklyn Law School and to the *National Law Journal* (in whose pages some of the following previously appeared), we reprint Professor Twerski's remarks upon receiving the McKay Award in San Francisco. They bear a message not only about Marquette University Law School but, far more broadly (and rather more sharply), the obligations of legal academics and the extent to which those obligations are being met.

Remarks of Professor Aaron D. Twerski, L'65

I am deeply touched by this honor. To receive an award named for Robert McKay is cause enough to be both humble and proud. And when I look at the names of previous honorees, I feel nothing less than a sense of awe. The scholars who preceded me in receiving this award shaped the discourse in tort law for the last half-century. That my modest contributions are reckoned to be mentioned in the same breath with them leaves me almost speechless.

But there is a more significant reason that this is an occasion of great pride for me. The criterion for the award is “commitment to the advancement of justice, scholarship, and the legal profession” in the field of tort and insurance law. For reasons that escape me, that goal is not shared by many in the legal academy. I need not repeat here tonight

the controversy that has swirled around the content of law reviews. Judges and lawyers have been telling us for over a decade that they no longer read the law reviews because they lack relevance to the work that they do—that the reviews are too theoretical and too esoteric. In short, we are being told that scholars are out of touch.

Let me be clear. The infusion into the legal academy of professors with doctorates in economics, philosophy, psychology, and sociology has brought perspectives into the law school curriculum that have enriched the academy and brought new insights into the law. But the idea that the legal academy is a closed club whose members speak only to each other and not to the bench and bar is decidedly not healthy. If interdisciplinary work is to have an impact on the changing face of the law, it must be made accessible to the lawyers and judges who are not schooled in other disciplines. And the scholars must demonstrate that the theories they set forth have real-world relevance—that they make a difference.

One additional point. Courts are faced daily with issues of incredible complexity and sophistication, and they need the thinking of the best and the brightest to help

organize and wade their way through these problems. But young scholars today shy away from doing traditional doctrinal scholarship. The prestigious law reviews appear less interested in publishing such works, and the young

scholars are justifiably afraid that when tenure time comes around their articles will be viewed as pedestrian. I often wonder whether William Prosser would be tenured today at a great law school. And I am almost certain that his article, “The Assault upon the Citadel,” published in the *Yale Law Journal* in 1960, would not grace its pages today. It would be viewed as “too much case-crunching.” Never mind that it accelerated the demise of privity and the adoption of strict tort liability in less than a decade.

We are told that lawyers and judges have no time to read because of their heavy workload. But they have time to read and digest the Restatements of Law

and the lengthy comments that are appended to them, as well as the voluminous Reporters’ Notes. Whereas citations to law reviews have plummeted, this year alone there were over 3,000 court citations to Restatements. Ah!—but you may say—the Restatements are anti-intellectual and black-letter law, not the product of sophisticated analysis



“I often wonder whether William Prosser would be tenured today at a great law school. And I am almost certain that his article, ‘The Assault upon the Citadel,’ published in the Yale Law Journal in 1960, would not grace its pages today.”

of law and policy. I invite you to read the controversial sections of the Products Liability Restatement, such as sections dealing with defective product design and liability for drug products. They are the result of bitter hard work that took years to fashion. It is not necessary that all agree with them, but we framed the discourse for lawyers and judges for years to come. And when I read a majority and dissent of the highest court in a state that cites the Products Liability Restatement over thirty times, my heart swells with pride. Jim Henderson and I struggled with difficult issues of public policy. We did not slavishly follow authority when the authority made no sense. We heard many criticisms of our work. We received hundreds, if not thousands, of letters and comments from the bench, bar, and legal academy. But the one criticism we never heard was that our work was irrelevant.

In our travels as reporters for the Restatement, we were engaged by lawyers



Prof. Aaron Twerski and Prof. James Ghiardi

“[T]he idea that the legal academy is a closed club whose members speak only to each other and not to the bench and bar is decidedly not healthy. If interdisciplinary work is to have an impact on the changing face of the law, it must be made accessible to the lawyers and judges who are not schooled in other disciplines.”

and judges who had read our writings and debated us about our views. Our appearances then and now before the ABA seminars made us better teachers and scholars. If that is what the Robert McKay Award stands for, and I believe it is, I can only say that I hope to be worthy of it. If I have not fully earned it, I hope to do so in the future.

A final word. The second recipient of this award, in 1988, was Professor James Ghiardi, who recently celebrated sixty years on the faculty at Marquette Law School. Jim was my torts professor more than a few years ago, and I had the privilege of being his research assistant for a full year. For decades he taught law students that they had an obligation to master the law and to be advocates for its betterment. This award belongs as much to him as to me. Thank you once again for this marvelous evening for me and my family. •

Devolution of Milwaukee County Government

Sheldon B. Lubar is a businessman and philanthropist in Milwaukee, as well as a former presidential and gubernatorial appointee to a variety of positions; in short, he is a civic leader. In April 2008, he delivered remarks at the War Memorial Center to the Rotary Club of Milwaukee, in which he addressed the future governance of Milwaukee County. News accounts of the address have prompted considerable reaction and debate over the ensuing months. Mr. Lubar's specific proposal, and the general matter to which he addressed himself, are sufficiently important that we print his remarks here.

Remarks of Sheldon B. Lubar

Good afternoon, and thank you for this invitation to speak with you. From the introduction, you know that my career has been in business management and finance. I don't claim to be an authority on municipal finance or Milwaukee metropolitan politics, but, then again, many elected officials lack a background in business management and don't seem to have a record of understanding finance. So we'll call it even. I also believe that my record will show that I am a commonsense person with the ability to recognize changing circumstances and change with them.

During the past two years, I cochaired the Greater Milwaukee Committee's report on Milwaukee County finance. I also cochaired Governor Doyle's task force on Milwaukee County's fiscal crisis. In the time we have together here, I will share with you what I learned, the problems I perceived, why they occurred, and—most importantly—what I believe the solutions are.

First, I want to acknowledge that all of the county officials and employees I encountered were decent and intelligent people. Many want to do the right thing, but they're mired in a bureaucracy that won't let them. County governance has grown into a dysfunctional system that



wouldn't work if Jesus were the County Executive and Moses chaired the Board of Supervisors.

Let me start by giving you some background. During the last 16 years, despite closing County Hospital and shifting services for both welfare (W-2) and child welfare to the state, Milwaukee County's budget has grown by 50 percent. In 1990, the county spent \$857 million; by 2006, that budget ballooned to \$1.25 billion. The property tax has also grown by more than 50 percent, from \$147 million in 1990 to \$233 million in 2006. During that same period, the county's residential population has *decreased* by about 44,000 people.

But as Milwaukee County's budget and levy have risen, the portion of the county budget and levy dedicated to services that the average person cares about most—namely parks, transit, the zoo, the arts and cultural centers—has declined. Of the total budget, only about 13.5 percent is spent on these services. Almost half the budget consists of health and human-services spending.

Let's examine some of the county's problems and their causes in more detail:

1. Pensions. As recently as January 2001, the county's pension system was more than fully funded. In fact, it was 108.6 percent funded. So what was done? A series of irresponsible benefit increases was implemented. This surplus soon became a liability of almost \$500 million. You know we have a pension problem on our hands when an area reporter writes about our pension problems and how we got there and wins a Pulitzer Prize for it, as we just saw happen with Dave Umhoefer of the *Milwaukee Journal Sentinel*. (By the way, congratulations, Dave.) But Dave, like the rest of us, is now stuck paying to cover these pension obligations. The situation was recently addressed by the legislature and Governor Doyle, permitting Milwaukee County to issue 30-year pension-obligation bonds. This was a key recommendation of both the GMC's and the state task force's reports. While that does indeed help, this is still a liability that shouldn't have happened.

2. Rising health-care costs and early retirement of county employees. Unlike the pension problem, this is an issue for every American, whether you're in Milwaukee County or not. But with a fiscal crisis, a rapid spike of younger retirees, and a commitment of lifetime health insurance for all employees hired before 1994, the county is in a tougher position than most when it comes to funding health-care responsibilities. Again, some poor decisions of the past that we are paying for today.

3. State mandates that impose costs without full revenue-sharing to pay for them. In the past, the county has been burdened with costs mandated by the State of Wisconsin—mandates that require the county to provide a service or fulfill a duty without providing the funds needed to do it. In the case of Milwaukee County, the financial situation simply doesn't have the room for unfunded mandates. This is an example of how many in the county who want to do the right thing are put in a position of funding the priorities of others.

4. Costs imposed by independent authorities, many nonelected. Look at your property tax bill. There is not only an assessment from Milwaukee County and one from your local municipality. You also have MMSD, for water treatment. MATC, for technical schools in the area. Local school districts. And so on, and so on. Multiple, independent authorities, many of which do not face voters but have the power to add to the tax bill—and in too many cases have little or no oversight over what they do. Do you think that these independent taxing authorities pay close attention to the overall tax burden, or do they just focus on what their needs are?

5. Duplication of services. Fire, police, maintenance crews . . . in too many cases, multiple agencies are responding to a single need. A sensible way to lower the tax burden and increase efficiency would be to eliminate duplication of services. Consolidation of some services, as was done with the creation of the North Shore Fire Department in the early '90s,

is an example of a good way to go. The mentality of government should be to find these efficiencies and make cross-agreements to implement them.

6. Communication between the county executive and the county board. It's no secret that the relationship between County Executive Scott Walker and many members of the county board has been quite adversarial. Infighting and political maneuvers are certainly not productive and don't help the county and the taxpayer to get things done. I understand that the county executive is trying for better relationships, but the system is not built to create collaboration.

The result of all of this lack of expenditure control, high employee-costs, duplication of services, and past poor judgments is that we have one of the highest property-tax rates in the country. And despite these high tax burdens, Milwaukee County is not adequately supporting key assets and fundamental services to its residents, its businesses, or its visitors. I am talking about building maintenance and infrastructure needs in general.

Meanwhile, we're top-heavy with governance. The tax levy cost in 2007 for the Milwaukee County Board of Supervisors Department was about \$5.6 million. In a fully incorporated county, where there are governing municipalities covering every inch of ground, do we really need a 19-member board of supervisors who each get paid over \$50,000-plus per year with full benefits in what is essentially a part-time job?

Some may argue that other Wisconsin counties have more board members, and that's true—but they don't get paid this much and have unincorporated areas for which they are responsible. Let's look at Milwaukee County compared to other major urban counties in the United States. We have 19 supervisors and a population of about 900,000. Meanwhile, Hennepin County, Minnesota, which holds Minneapolis and a large number of suburbs totaling just over one million people, has 7 members on its county board. Alameda County in California, which holds Oakland and parts of the East

Bay with 1.4 million residents, has just 5. Fast-growing Tarrant County, Texas, which holds Fort Worth, has 1.6 million people and will soon have the headquarters of the United States Bowling Congress, but needs just 5 supervisors to oversee rapid growth and an increasing quality of life. Why do we need 19 supervisors?

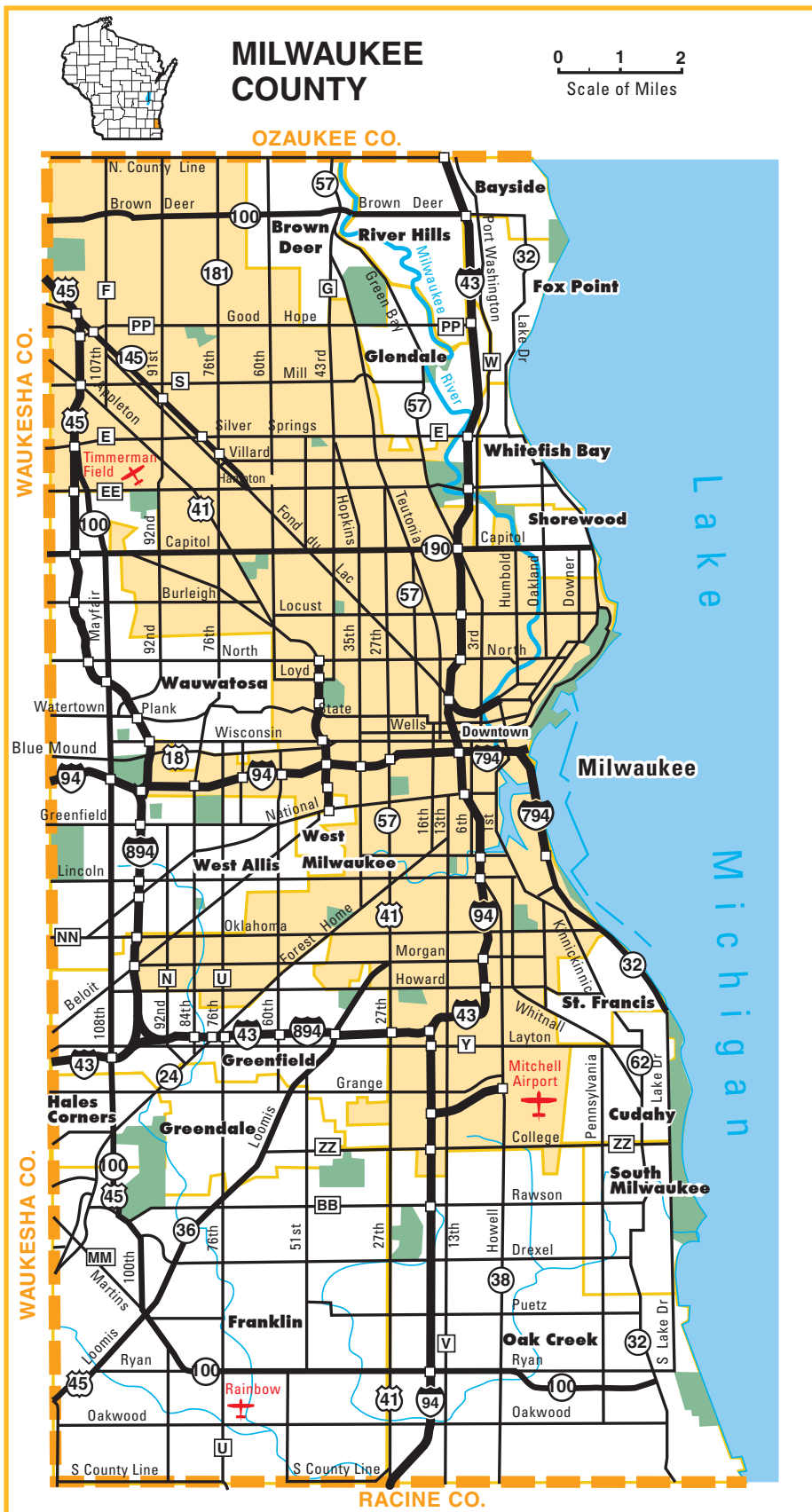
We haven't asked much from them, but even something reasonable like an ethics code—something much needed—meets with resistance. The *Journal Sentinel* editorial board noted on April 13 of this year, just over two weeks ago, "the Milwaukee County Board's trashing of a proposed and very much needed revamp of the county's ethics code was way over the top." We could save time with this ethics issue by not having a county board in the first place.

Meanwhile, Milwaukee is challenged economically, struggling to move ahead in a world where the speeds required to keep up continue to accelerate.

How can we keep up when we're bogged down with glaring redundancies and inefficiencies in a government that works with the speed of a horse and buggy in the age of the satellite? For Milwaukee, both the city and the county, as well as the seven-county region of which we are part, to have a prosperous future, we must break free of our outdated past and recognize the need to change and deliver.

Studies show time and time again that larger legislatures are positively correlated with higher government spending. One study found a close link between larger county boards and significant increases in county social and criminal justice spending. Perhaps that's not news to many of you, but this is just to prove that, upon true examination, the evidence is there that wherever you go, larger government bodies equal larger government spending . . . which means they need more tax money. Eventually, it grows to the detriment of the area it's supposed to serve.

The time has come for county government to retire itself in an orderly fashion, reduce the burden on area taxpayers, and reshape the way taxes are collected



Map provided courtesy of Wisconline® www.wisconline.com. Used by permission.

and services are delivered, and thereby lead to a better economy and quality of life in Milwaukee.

As promised, I come not only to point out the problems, but to offer solutions.

First, we can change the system by means of a process of devolution, and then develop a strong, accountable Fiscal Oversight Board to manage budgets for the area.

We can devolve and eliminate county government by passing down the various services for which the county is responsible to a combination of state, existing municipal, and certain independent authorities. The county is a child of the state and exists at the pleasure of the state. The state, through the actions of the legislature and the governor, can devolve what it has imposed but is no longer relevant or needed.

Nineteen municipalities in the county maintain all the key services locally, such as police and fire, and, through cooperative arrangements, services such as animal control. We could return the parks to local municipalities with the county's former share of the property tax to maintain them or, if municipalities desire, create a parks authority whose budget and taxing limits would be subject to the Fiscal Oversight Board. The state is able to assume administration over remaining social services that are now handled by the county. The state can also run public safety (sheriff, etc.) and corrections, along with social-

service functions such as income maintenance and food stamps. The governor's recent budget even included provisions for funding of the General Assistance Medical Program. The judicial system is currently split between the state and county, but the state could do it all. With respect to cultural assets, the county could cede to the various governing boards responsibility for their physical facilities and collections, along with funds/endowments to repair and maintain them. Better yet, other communities have created cultural districts governed by an authority composed of board representatives of the various cultural institutions. The legislation exists within current state law to create a cultural district within Milwaukee.

Independent authorities, requiring far less administration and expense, can take over transit, airports, and perhaps the parks, to bring a more comprehensive, regional focus that benefits not only City and County of Milwaukee residents, but those residing in other counties in the region. Coordinated planning and a larger view would be very beneficial.

For example, the regional transit authority can run the buses with a regional view or at least develop a memorandum of understanding with other adjoining communities, resulting in a system that works better for everyone and has a wider source of funding with lower administrative costs. Larger transportation visions such as commuter rail and

interconnecting modes of transport systems, including consideration of roads and highways, are also much better planned and executed on a regional scale.

Airports can be part of this also: a regional airport authority, perhaps as part of the regional transit authority, can handle not only Mitchell International Airport and Timmerman Field, but take in and coordinate nearby airports such as Crites Field in Waukesha, John Batten Airport in Racine, and Kenosha Regional.

These proposed solutions are based on three key assumptions:

1. That it is possible, and beneficial, to create an overarching mechanism to review and approve the budgets and taxing for those services provided by the county and the various authorities;
2. That there is a need to create a system that governs based on citizens' needs today—not on the distance that can be covered in a day's horseback ride by a circuit judge, which was the criterion for drawing county lines 150 years ago; and
3. That the appropriate services should be provided by a simplified, cost-effective system—we must unpeel the onion of multiple redundant layers of government.

This may sound radical to some, but only because it is a new and different structure. It would be designed to meet today's needs. And it's been done around the country, in one form or another, in a number of cities



and counties. Over the past two years, Wyandotte County and its county seat, Kansas City, Kansas, merged services and passed much of the savings back to taxpayers, who are repaying the area with increased investment, business activity, and economic growth. Jefferson County, Kentucky, merged with Louisville in 2003 and provides a wealth of good examples of how to consolidate a transit authority, park system, and school systems. Indianapolis and Nashville are also good examples of devolution and how consolidation of city and county government can work. And if you haven't noticed, all the cities and metro areas I just mentioned are doing quite well right now and have moved up the list of high-growth, top-50 municipalities. In May 1997, the county executive in Essex County, New Jersey, proposed abolishing his job, along with the entire county government.

We're struggling to keep up. In 1970, the City of Milwaukee ranked 12th-largest in the United States, with 717,000 people; today, the city has fallen to 22nd after losing over 110,000 of those residents. Even more illustrative of our situation, the Milwaukee metro area was 17th in the United States in population in 1970; today it has fallen to 37th. Our economic and political muscle has dropped proportionately. The cities and metros I just mentioned that have consolidated or devolved duplicative governments are doing well by comparison: Kansas City is seeing 6 percent growth; Louisville's metro has 4 percent growth. Meanwhile, Nashville is hot on our heels as a metro, ranking 39th, and will soon surpass us with its 8.4 percent growth. Austin, Texas, will also, since it's 38th with 14.3 percent growth. We currently have 0.8 percent growth, stagnant at best. But one of the reasons I'm talking with you today is because we want to change that.

"The time has come for county government to retire itself in an orderly fashion, reduce the burden on area taxpayers, and reshape the way taxes are collected and services are delivered, and thereby lead to a better economy and quality of life in Milwaukee."

It's quite evident that Milwaukee County can learn from examples such as these and realize that it can be done. In 2006, as a result of in-depth, inclusive research, the GMC published *Reforming Milwaukee County—A Response to the Fiscal Crisis*, which I cochaired. This report outlined causes and included specific recommendations to save taxpayers millions of dollars in 2007 and even more in future years. The ideas I have shared with you today represent a continuation of this GMC work.

The GMC remains committed to moving this issue forward, and an action plan will be developed in the next few months.

So, what's next? The involvement of the legislature, the governor, the local communities, and all citizens is critical.

This can't be done easily, but it can be done. A lot of entities and individuals must come together, agree in principle on what I have generally put forth today, and take the steps to make this happen. It would take the action of the state, Milwaukee County, the City of Milwaukee, and the municipalities in the county. It has been done before, and it can be done now. The time to make it happen is now.

This is our opportunity. We can change the future of Milwaukee County for the better. We've done it before. County government's last major structural overhaul came in 1960, when John Doyne was elected the first county executive. This is simply part of changing with the times: becoming more responsible with taxpayer money and more growth-oriented, adding opportunities to everyone's future, and ensuring that Milwaukee's next great era lies ahead. The most courageous among us will make it happen. Will you join us? •

The State of Judicial Selection in Wisconsin

With last year's electoral defeat of a sitting member of the Wisconsin Supreme Court—a result that had not been seen in the state for more than 40 years—there has been renewed discussion of the best means of judicial selection. The Honorable Diane S. Sykes, L'84, Judge of the United States Court of Appeals for the Seventh Circuit, contributed to the conversation with a speech at the Eastern District of Wisconsin Bar Association's 2008 annual meeting at the Milwaukee Athletic Club. We reprint here Judge Sykes's remarks, which also will appear in the *Marquette Law Review*.

Remarks of the Honorable Diane S. Sykes, L'84

My thanks to the Eastern District Bar Association for the invitation to address your annual meeting, and congratulations to Chief Judge Rudy Randa, U.S. Attorney Steve Biskupic, Nathan Fishbach, Dave Erne, and Robert Pledl for well-deserved achievement and service awards.

I had prepared a speech on the semi-interesting subject of circuit precedent—more specifically, on the rules and internal operating procedures that our court uses to help us maintain the consistency of our circuit case law. But I have been rethinking my choice of topics in the aftermath of the April 1 election, and when I read the cover story in the opinion section of this past Sunday's *Milwaukee Journal Sentinel*,¹ I decided to shelve that speech and take advantage of a captive audience of lawyers to say a few words about the state of judicial selection in Wisconsin. I recognize this is a federal bar association, but knowing many of you as I do, I suspect that you are as concerned as I am about the work of our state courts—especially our state supreme court—and that we share a



rising sense of alarm at the escalating expense and deteriorating rhetoric of elections to our state's highest court. So at the risk of disappointing those of you who were really looking forward to hearing about some of the internal operating procedures at the Seventh Circuit, I'm going to exercise my prerogative to change the subject.

This year's contest for a pivotal seat on our state supreme court was unusual for Wisconsin, and not just because, for the first time in 41 years, an incumbent justice was unseated. The election was predominated—some might say overwhelmed—by millions of dollars in saturation advertising on television, much of which was crass, misleading, and at times utterly inconsistent with the judicial role. Most of these ads were sponsored by third-party interest groups operating independently for or against the candidates, although one particularly base and deceptive attack ad was sponsored by the campaign of the victorious challenger. The candidate debates were generally unilluminating because the questions tended to focus on the subject of the negative advertising, as did much of the newspaper coverage of the race. Justice Louis Butler, who was defeated by Burnett County Circuit Judge Michael Gableman, did not himself engage in this sort of advertising, to his credit and the credit of the judicial office he holds but will soon relinquish.

This election, together with last year's (which had some of the same characteristics), has set off a debate about whether our system of judicial selection is broken, and if so, what should be done to fix it. Some—including all seven sitting justices of the supreme court—have strongly advocated campaign finance reform, including substantial public funding

“The debate over state-court judicial selection has been rekindled by recent trends in state supreme court elections around the country, which have come to resemble legislative- and executive-branch elections in their rhetoric and expense.”

of supreme court campaigns.² Others suggest doing away with judicial elections altogether. The *Wisconsin State Journal* editorialized in favor of replacing supreme court elections with so-called “merit selection” of supreme court justices.³

The *Milwaukee Journal Sentinel*

also endorsed the appointment of justices after taking up the “elect or appoint” debate in Sunday's newspaper.⁴ In a forum in the paper's opinion section, State Representative Fred Kessler promoted his proposal for a constitutional amendment that would replace supreme court elections with a system based on the federal model, only somewhat modified: he proposed that justices be appointed by the governor, confirmed by the state senate, and automatically reappointed after a 10-year term unless a supermajority of the senate votes against reappointment.⁵ Representative Kessler argued that shifting to an appointed supreme court would curb the “outlandish amounts of money” spent by outside interest groups on high-court elections and preserve the public's confidence in the impartiality of the judiciary.⁶

Marquette Law School Professor Rick Esenberg argued the other side.⁷ He maintained that judicial elections are imperfect but preferable to the alternatives and ought to be retained.⁸ He acknowledged that an appointment system may better serve the interest of impartiality but said protecting that interest would come “at the expense of accountability.”⁹ He also noted that appointment doesn't eliminate the politics, “it just moves it from the campaign trail to the hearing room and, of course, the back room.”¹⁰ The pitched partisan battles over nominees to the United

States Supreme Court—and some lower federal-court nominees as well—are evidence of that.

It is not my purpose nor is it appropriate for me to comment more specifically on the results of the recent supreme court election or the calls for campaign finance reform that have come in its wake. However, I do have substantial personal familiarity with both the appointment and election models of judicial selection, having navigated a contested countywide circuit court race, a gubernatorial appointment to a midterm vacancy on the state supreme court, a contested statewide election for a full term on the court, and the federal nomination and confirmation process for my present position on the Seventh Circuit Court of Appeals. After my campaign for the supreme court in 2000, I gave a series of speeches to law students and civic groups defending judicial elections. It has become increasingly difficult to do so, but as Professor Esenberg observed, the alternatives have their flaws, too. If we are about to have a public discussion on the subject of judicial selection—and I think we should—a little historical perspective might be useful.

We have been debating the issue of judicial selection for more than 200 years. At the Constitutional Convention in Philadelphia in 1787, there was a debate over the establishment of inferior federal courts, including the subject of who should appoint the judges of the lower federal courts—Congress or the President.¹¹ James Wilson of Pennsylvania argued in favor of presidential appointment, as with the Supreme Court, in order to avoid the “intrigue, partiality and concealment” that would attend appointment by the legislative body.¹² John Rutledge of South Carolina strongly disagreed, arguing that “[t]he people . . . will think we are leaning too much towards monarchy.”¹³ Catherine Drinker Bowen, in her classic *Miracle at Philadelphia*, describes how the impasse was broken:

As the debate mounted, Dr. Franklin interposed mildly. Only two modes of choosing the judges, he said, had so far

been mentioned; it was a point of great moment and he wished other modes might be suggested. He would like to mention one which he understood was practiced in Scotland. He then [according to an account contained in James Madison’s notes] “in a brief and entertaining manner related a Scotch mode, in which the nomination proceeded from the lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves.” Here in America, on the other hand, it was the interest of the electors to make the best choice.¹⁴

The author continues:

[W]hen this particular old man told a story it was impossible not to be diverted. Madison moved that in the ninth Resolve the words “appointment by the legislature” be struck out, and a blank left “to be hereafter filled on maturer reflection.” In [the] Committee of the Whole the states voted, approving nine to two.¹⁵

The framers of the Federal Constitution, of course, opted for presidential appointment for all federal judges, with the advice and consent of the Senate, and lifetime tenure in good behavior. This was thought to be the mode of judicial selection most conducive to the independence of the judiciary and the preservation of the rule of law. Alexander Hamilton described the rationale for presidential appointment and lifetime tenure in *The Federalist No. 78*:

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the

permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves; and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. . . .

That inflexible and uniform adherence to the rights of the Constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or [the] legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance

that nothing would be consulted but the Constitution and the laws.¹⁶

At the time of the ratification of the Federal Constitution, most state-court judges were appointed by one of two methods: legislative appointment or gubernatorial appointment subject to legislative confirmation.¹⁷ The latter method was similar to the federal model, although it was considered to be substantially more democratic since at that time neither the President nor the Senate was directly elected.¹⁸

By the time of Andrew Jackson's presidency, however, concern for judicial independence was being replaced by concern for judicial accountability.¹⁹ Jacksonian Populism, and its preference for direct democracy, took hold.²⁰ Insulating judges from political accountability was seen as antidemocratic and likely to produce an aristocratic, arbitrary, and unresponsive judiciary.²¹

Mississippi became the first state to provide for the direct election of appellate judges in 1832.²² Between 1846 and 1860 there were 16 state constitutional conventions; all but two provided for the popular election of both appellate- and inferior-court judges.²³ By the Civil War, most states had converted to direct election of state supreme court and lower court judges.²⁴ With the admission of Missouri in 1832, and continuing through 1958, every state that entered the Union provided by constitution for an elected judiciary, some partisan, some nonpartisan.²⁵

Wisconsin, of course, was among these, achieving statehood in 1848.²⁶ Our entire state judiciary is elected and nonpartisan. However, Alexander Stow, our first chief justice, was utterly opposed to an elected judiciary and accepted the position with the promise that he would not run for a second term.²⁷ He kept his word and left the bench after two-and-a-half years of service.²⁸

At least one observer of American democracy saw some danger in the shift toward elected judiciaries. Alexis de Tocqueville noted:

Under some [state] constitutions the *judges* are *elected* and subject to frequent reelection. I venture to predict that sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrates' independence, not judicial power only but the democratic republic itself has been attacked.²⁹

The Progressive reform movement of the early-twentieth century saw the development of yet another method of judicial selection, the so-called "merit-selection" process.³⁰ Motivated by a desire to protect the judiciary from the extreme partisanship, cronyism, and corruption that tended to pervade the other branches of government, Progressive reformers in bar associations and "good government" groups pushed a proposal first developed in 1914 by a professor at Northwestern University School of Law.³¹

The proposal called for judicial nominations to proceed from a committee of experts, mostly lawyers selected by the organized bar, or some combination of the organized bar and the appointing authority (typically the governor).³² The committee would screen candidates and develop a list of finalists for the governor, who would then fill judicial vacancies by appointing someone from the selection committee's list.³³ The appointee would take office, subject only to an up-or-down retention election in the next general election cycle and periodic retention elections thereafter.³⁴ In theory, the process would be nonpartisan, impartial, and merit based, maximizing the role of legal professionals who, it was thought, were better equipped than politicians or the general public to evaluate the qualifications of potential judges.³⁵ The retention-election feature of the system was designed to afford some level of public accountability.³⁶

Missouri was the first state to adopt the so-called merit-selection method of judicial selection in 1940.³⁷ For a while no other state followed

suit.³⁸ Then, between 1958 and 1976, 19 states converted to this method of judicial selection.³⁹ In addition, several others adopted some form of merit selection in combination with other methods.⁴⁰ So today, Benjamin Franklin's mischievous suggestion at the constitutional convention that the *lawyers* should choose the judges has in a sense come to pass in approximately half the states. Twenty-one states continue to select judges by partisan or nonpartisan direct election.⁴¹ The rest adhere to the gubernatorial- or legislative-appointment model.⁴²

The debate over state-court judicial selection has been rekindled by recent trends in state supreme court elections around the country, which have come to resemble legislative- and executive-branch elections in their rhetoric and expense. High-court races in many states have become multimillion-dollar propositions, with legislative-style rhetoric to match. Campaigns are increasingly run on exaggerated crime-and-punishment templates, to the exclusion of any broader discussion of legal philosophy. Special-interest organizations that used to involve themselves only in legislative- or executive-branch



racers have become intensely interested in state high-court politics and are prepared to spend enormous amounts of money to influence these races.⁴³

Judicial campaigns in Wisconsin have historically suffered from a different sort of problem: Most were low-interest affairs in which the candidates had relatively modest budgets and limited opportunities to communicate with voters about their qualifications, experience, and judicial philosophy. The media paid little attention. Lawyers and bar associations, elected officials, labor organizations, and civic groups such as the Rotary, Kiwanis, and local men's, women's, and senior-citizens' clubs were the typical stops on the campaign trail. Paid advertising was important, too, but it generally stuck to touting the candidate's experience and endorsements—especially endorsements from sheriffs and law-enforcement groups, prized for their ability to validate the candidate's law-and-order credentials, which most voters look for in a judge. These ads were typically illustrated by footage of courtrooms, gavels, handcuffs, jail cells, and pictures of the candidate talking with police officers. Not terribly illuminating on the qualities necessary in a good judge, but at least not harmful to the public's understanding of the judicial function. It could reasonably be argued that these old-style judicial elections provided so little information to the voting public as to make judicial elections nothing more than meaningless contests about name recognition.

We are now experiencing the opposite extreme. Throughout the 1990s, we saw increasingly expensive and hard-fought supreme court races characterized by sharper rhetoric on hotly contested legal issues and greater participation by third-party interest groups. Still, we managed to avoid the bruising, big-money battles over control of our supreme court that many other states were experiencing. Now they have arrived, and I suspect they're probably here to stay.

This development, I think, is a predictable byproduct of the increased litigiousness of our

society, and the legislative responses to it, and the expanding use of the courts to bring about public-policy change. Special-interest combatants in the legislative process increasingly look to the courts to block disfavored legislation or to impose public-policy preferences through litigation when they fail to accomplish their objectives through legislation. More fundamentally, these costly and rhetorically excessive high-court campaigns are a reaction to the struggle going on in state supreme courts around the country—ours included—over the proper role of the judiciary and the method of legal interpretation best suited to maintain the balance of power between the judiciary and other branches of government.

Broadly speaking, it is a struggle between conservative or “textualist” and liberal or “purposivist” judges. Labels are tricky, but to generalize, the former like to rely on neutral principles and sources of interpretation that operate to limit judicial discretion: the text, structure, and history of the state and federal constitutions and laws; precedent; and traditional rules of legal interpretation. This approach tends to be more restrained in the use of judicial power and therefore more sensitive to separation of powers and the prerogatives of the other branches of government. On the other side of the philosophical divide are those who subscribe to a more expansive view of the judicial role and see the law as a malleable instrument through which judges should try to achieve the “right” or “best” or “just” result. These judges are more inclined to look behind the language and structure of the law to discern and implement the purpose the judge ascribes to it, more willing to modify traditional interpretive methods, and less inclined to defer to the other branches of government. This struggle has obvious consequences for judicial politics.

To return to *The Federalist No. 78*, Hamilton famously said that the judiciary has “neither FORCE NOR WILL, but merely judgment,” and that “[t]o avoid an arbitrary discretion in the courts, it is indispensable

that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”⁴⁴ These “rules and precedents” operate as internal constraints on the judges to guard against any “deliberate usurpations on the authority of the legislature.”⁴⁵ The Federalists believed that because judges were bound by the requirements of traditional judicial method, and because the judiciary had neither purse nor sword, only a comparatively weak external check—the possibility of impeachment—was necessary to maintain the balance of power.⁴⁶

Federal judges, appointed for life and removable only by impeachment, enjoy the highest degree of decisional independence.

Not so an elected judiciary. My colleague Judge Posner has written a new book called *How Judges Think*.⁴⁷ I haven’t read the whole book yet, but in the opening chapters he discusses (among other things) an economic theory of judicial behavior that consists of evaluating the relative strengths of the internal and external constraints on judges.⁴⁸

Elections operate as an external constraint on state judges’ job performance. There is no question that this weakens judicial independence—that’s the whole point. Independence and accountability are important, but conflicting, values. In choosing an elected judiciary, Wisconsin has accepted a reduction in judicial independence in order to achieve a greater level of judicial accountability.

In the ordinary course, the internal constraints

on judges operate to prevent this from becoming too great a sacrifice. Most of the time, judges who do not stray too far too fast from the judicial mainstream are reelected, often without opposition. But if the judges start loosening the internal constraints on the use of their power by altering the rules of interpretation too much or too swiftly—and therefore expanding their own power—the other branches of government and those who have an interest in the work of the courts will take notice, and the external constraint of the ballot box will kick in.

The price of direct electoral judicial accountability may be too high. Judges do not represent constituents, nor do they implement the will of the people as other elected officials do. Professor Esenberg notes the countermajoritarian character of some of our most important legal rights—freedom of speech, for example, and the procedural rights of criminal defendants—and is rightly concerned about the possibility that elected judges are influenced by the ballot-box consequences of their decisions.⁴⁹ Judges cannot consult popular opinion in deciding cases but (to use Hamilton’s words again)

must “justify a reliance that nothing would be consulted but the Constitution and the laws.”⁵⁰ We do not know the extent to which the threat of defeat in the next election might inhibit judges from making unpopular decisions dictated by law.

The colossal amount of money now spent on state high-court elections also leaves the troubling impression

“Throughout the 1990s, we saw increasingly expensive and hard-fought supreme court races characterized by sharper rhetoric on hotly contested legal issues and greater participation by third-party interest groups. Still, we managed to avoid the bruising, big-money battles over control of our supreme court that many other states were experiencing. Now they have arrived”

of influence-buying. I am not suggesting there is anything inherently sinister about interest-group participation in electoral politics; the people have every right to organize for the purpose of influencing elections. I am also not suggesting



Disqualification decisions on a court of last resort are highly sensitive and difficult and sometimes affect the outcome of the case. The sideshow created by the clamor for justices to recuse themselves because of money raised and spent during

an election threatens to disrupt the work of the court and undermine the public's confidence in its decisions. That special-interest participation in a judicial election means the judge who happened to benefit from that participation is ethically compromised. This is a problem of perception more than reality; we are not living in a John Grisham novel,⁵¹ at least not in Wisconsin. Our ethics rules prohibit judges and judicial candidates from personally soliciting campaign contributions.⁵² Funds are raised by the judge's campaign committee, and contributions are limited in size and subject to reporting and other requirements of state campaign finance law. Receipt of a contribution from a lawyer or citizen does not automatically disqualify the judge from later hearing a case involving a contributing lawyer as counsel or a contributing citizen as litigant.⁵³ However, special-interest spending on state high-court races now far exceeds the candidates' own spending, and the staggering totals have prompted calls for new rules governing judicial recusal in cases involving direct contributors or third-party interests.

But remember that candidates for the supreme court have no control over the spending of outside interest groups; in Wisconsin coordination between a justice's campaign and third-party organizations is illegal.⁵⁴ Requiring recusal based on conduct over which the candidate has no control is ethically unnecessary and could subject the court to gross political manipulation.

an election threatens to disrupt the work of the court and undermine the public's confidence in its decisions.

Finally, the new era ushered in by this year's election also brings the danger that the ongoing, important philosophical clash over the role of the state supreme court will simply get lost in the political din. Crude, negative, and sometimes downright dishonest advertising appears to have overtaken our judicial elections, which have now descended into the partisan and special-interest power struggles that other states have experienced. This phenomenon certainly has the potential to exact too great a toll on judicial independence, distort the electorate's understanding of the judicial function, and shake public confidence in the impartiality of the judiciary.

But no method of judicial selection is perfect; all are prone to manipulation and politicization of some sort. The problem exists in federal judicial selection, too, which has in some cases pretty much deteriorated into raw power politics. Special-interest coalitions now routinely subject federal judicial nominees to ideological litmus tests and distort records and attack reputations in order to defeat some nominees.

We have basically three choices when it comes to picking judges: We can have the people do it directly by partisan or nonpartisan election; we can have the people

do it indirectly by executive or legislative appointment; or we can have lawyers do it, in combination with the executive by the so-called merit-selection approach. There are a number of problems with having lawyers do it. Merit-selection committees are totally unaccountable, and this method of choosing judges promotes a culture in which the bar—instead of the public and the rule of law—becomes the primary constituency for any judicial aspirant. The merit-selection committees in some states are susceptible of being captured and dominated by the more active and politicized elements of the organized bar and sometimes have an underrepresentation of prosecutors and those who represent businesses.

That said, however, there are plenty of drawbacks to judicial elections, as I have already noted, and the various proposals for campaign finance reform, from public financing to restrictions on independent expenditures, are legally and politically controversial and may create more problems than they solve.

It may be that the recent trends in our supreme court elections will abate. It is not impossible to elevate the level of discourse and still articulate the philosophical differences that exist between judicial candidates so that the public understands what's at stake. Drawing these philosophical contrasts does not require playing on voters' fears or hitting them between the eyes with images of bloody knives, dead bodies, empty swings, and mug shots of child molesters.

But if these trends continue, and if merit-selection systems are less desirable from an accountability standpoint, then it may be that the federal model of executive appointment with or without legislative confirmation will emerge as the best way to maintain judicial independence, along with at least some level of public accountability in the state courts. Governors, like presidents, will be inclined to appoint judges of conservative or liberal judicial

philosophy, depending upon their own philosophical approaches to government, which the voters have explicitly endorsed by electing them to office.

This is not always the case, however, and many a president and governor has been surprised by a judicial appointee. When Chief Justice Roger Taney died in 1864, President Lincoln was well aware that the greenback legislation, which had been used to finance the Civil War effort, as well as measures pertaining to emancipation, would eventually be challenged in the Supreme Court.⁵⁵ In deciding on his nominee, Lincoln is reported to have said to a confidant: “[W]e wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders. We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore we must take a man whose opinions are known.”⁵⁶ Lincoln made what he expected would be a safe choice: Salmon Chase, his secretary of the Treasury, who had been the architect of the greenback legislation.⁵⁷ Chief Justice Chase wrote the first opinion (later overruled) in the so-called “Legal Tender Cases,” striking down the greenback legislation as unconstitutional.⁵⁸ On the other hand, President John Adams, who appointed the great Chief Justice John Marshall, is reported to have said at his retirement, “John Marshall was my gift to the American people.”⁵⁹

I hope we have not reached the point of needing to overhaul the way we select our judges in Wisconsin. Although I don't travel around the state as much as I used to as a member of the state supreme court, I do not have the sense that the people of Wisconsin are so disgusted by our judicial politics that they are ready to disenfranchise themselves over the direct selection of judges. Time and circumstances, however, will give us the answer to that question. •

1. Frederick P. Kessler, Op-Ed., *Elect or Appoint? To Maintain Integrity, Appoint Justices*, MILWAUKEE J. SENTINEL, Apr. 13, 2008, at 1J; Rick Esenberg, Op-Ed., *Elect or Appoint? Judicial Elections Are an Imperfect, Best Option*, MILWAUKEE J. SENTINEL, Apr. 13, 2008, at 1J.
2. See Letter from Chief Justice Shirley S. Abrahamson et al., Supreme Court of Wisconsin (Dec. 10, 2007), available at <http://www.wicourts.gov/news/archives/2007/docs/campaignfinanceletter.pdf>.
3. Editorial, *For Supreme Court: Merit Reform; The Butler-Gableman Campaign Has Demonstrated How Money and Politics Have Tainted Wisconsin's Supreme Court Elections*, WIS. ST. J., Mar. 23, 2008, at B3, available at <http://www.madison.com/archives/read.php?ref=/wsj/2008/03/23/0803210314.php>.
4. Editorial, *Appointing Justices: After Two Nasty Campaigns That Have Harmed the Credibility of Wisconsin's Highest Court, It's Time to Change the Way That the State Selects Justices*, MILWAUKEE J. SENTINEL, Apr. 16, 2008, at 10A.
5. Kessler, *supra* note 1.
6. *Id.*
7. Esenberg, *supra* note 1.
8. *Id.*
9. *Id.*
10. *Id.*
11. See CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787*, at 65 (1966).
12. *Id.*
13. *Id.*
14. *Id.* at 66.
15. *Id.*
16. THE FEDERALIST No. 78, at 230–31, 232 (Alexander Hamilton) (Roy P. Fairfield ed., 2d. ed. 1966).
17. Stephen B. Presser et al., *Judicial Selection White Papers: The Case for Judicial Appointments*, 33 U. Tol. L. Rev. 353, 356 (2002).
18. *Id.* at 356–57.
19. *Id.* at 358.
20. *Id.*
21. *Id.* at 359.
22. *Id.* at 358.
23. *Id.*
24. *Id.*
25. *Id.*
26. PORTRAITS OF JUSTICE: THE WISCONSIN SUPREME COURT'S FIRST 150 YEARS 1 (Trina E. Gray et al. eds., 2d ed. 2003).
27. *Id.*
28. *Id.*
29. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 247 (J. P. Mayer & Max Lerner eds., George Lawrence trans., 1966).
30. Presser et al., *supra* note 17, at 361.
31. *Id.* at 360–61.
32. *Id.* at 361–62.
33. *Id.* at 362.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. Michael DeBow et al., *Judicial Selection White Papers: The Case for Partisan Judicial Elections*, 33 U. Tol. L. Rev. 393, 395 (2002).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. See Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 278 (2002).
44. THE FEDERALIST No. 78, *supra* note 16, at 227, 232–33.
45. THE FEDERALIST No. 81, at 245 (Alexander Hamilton) (Roy P. Fairfield ed., 2d. ed. 1966).
46. *Id.*
47. RICHARD A. POSNER, *HOW JUDGES THINK* (2008).
48. See generally *id.*
49. Esenberg, *supra* note 1.
50. THE FEDERALIST No. 78, *supra* note 16, at 232.
51. See generally JOHN GRISHAM, *THE APPEAL* (2008).
52. WIS. SUP. CT. R. 60.06(4).
53. WIS. SUP. CT. R. 60.03, 60.04(4), 60.06(4).
54. WIS. STAT. § 11.06(7) (2007–2008).
55. See 2 GEORGE S. BOUTWELL, *REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS* 29 (2d ed. 1968).
56. *Id.*
57. *Id.*
58. See *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869).
59. Chief Justice William H. Rehnquist, Supreme Court of the United States, Remarks at the Federal Judges Association 2001 Quadrennial Conference (May 8, 2001), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_05-08-01.html.

Lawmaking and Interpretation: The Role of a Federal Judge in Our Constitutional Framework

The Honorable Diarmuid F. O'Scannlain, Judge of the United States Court of Appeals for the Ninth Circuit, visited campus last academic year as the Law School's Hallows Judicial Fellow. Judge O'Scannlain delivered 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. On an annual basis a distinguished jurist spends a day or two within the Law School community. This is our Hallows Judicial Fellow, and the highlight of the visit is this Hallows Lecture.

It is appropriate to begin by recalling briefly the individual in whose memory this lecture stands. E. Harold Hallows was a member of the Wisconsin Supreme Court from 1958 to 1974 and was Chief Justice during the last six of those years. This service during a time of significant changes in legal doctrine itself merits remembrance. For an even longer time, though, Justice Hallows was Professor Hallows at Marquette University Law School—indeed, for 28 years before his appointment to the Wisconsin Supreme Court. Year after year, Professor Hallows taught Equity and Equity II to future Marquette lawyers; he made time for this undertaking even in the midst of his practice in Milwaukee and his extensive public service.

This year's Hallows Lecturer is the Honorable Diarmuid F. O'Scannlain, Judge of the United States Court of Appeals for the Ninth Circuit. Judge O'Scannlain is a native of New York and attended St. John's University there for college and Harvard for law school. After a two-year stint as a tax attorney on his native East Coast, Judge O'Scannlain moved across the country to Portland, Oregon. There he alternated between private practice and government service, the latter including positions as Oregon's public utility commissioner and director of the state's department of environmental quality. In 1986, he was nominated to his current position on the United States Court of Appeals for the Ninth Circuit by President Ronald Reagan and in short order confirmed to that post by the United States Senate. I wish to make sure that I note, given Chief Justice Hallows's connection with

the Law School (as I have described), that Judge O’Scannlain makes time every year to teach a semester-long course at Lewis & Clark’s law school in Portland.

Over the past couple of decades, Judge O’Scannlain has emerged as a leader on the Ninth Circuit. This includes the court’s most important work, its cases, where Judge O’Scannlain plays an unusually important role not only in his own docket but also in the court’s en-banc process. An O’Scannlain dissent from denial of en-banc rehearing frequently gets some attention across the country—in Washington, D.C. He is also otherwise engaged with the court, having been for many years the leading proponent, perhaps, and certainly within the court, of disaggregating the Ninth Circuit into two or more smaller circuits. He is willing to disagree with prevailing wisdom without being disagreeable—to my mind one of the most important attributes that a judge (or lawyer) can possess. It is also a valuable attribute for a young lawyer—say, a law clerk—to be able to observe early in his career.

Please join me in welcoming to Marquette Law School this year’s Hallows Lecturer, the Honorable Diarmuid F. O’Scannlain.

Hallows Lecture by Diarmuid F. O’Scannlain

Thank you for inviting me to speak with you this afternoon. It is a pleasure to visit this distinguished law school, especially since it is under the superb leadership of my former law clerk, Dean Joseph Kearney, whom I thank for his warm introduction and for his very kind invitation to be with you for these days.

As I have learned, the Hallows Lecture is always delivered by a jurist. As a consequence, I would like to take this opportunity to explore with you the proper role of a federal judge in our constitutional framework. All of us who have observed the increasingly combative judicial confirmation hearings in the U.S. Senate in recent years are quite aware that it has become popular for Americans



of all political persuasions to applaud the values of “judicial restraint” while criticizing so-called “activist judges.” But what, precisely, do we mean by “judicial restraint” and “judicial activism,” and why is the former to be preferred? More importantly, is the definition of a judicial activist simply a matter of political taste, or is there a principled basis upon which we can distinguish those jurists who faithfully exercise their constitutional function

from those who succumb to the ever-present temptation to legislate from the bench?

I believe such a principled basis does exist, and I suggest that judicial restraint, properly understood, reserves for judges only those responsibilities inherent

in the judicial branch of a tripartite system of separated powers. As all students of American government are aware, the legislative, executive, and judicial branches perform different functions and thus require different skills of their members. I would argue that some of the qualities that make the very best legislators—ingenuity, the willingness to take risks, and a creative approach to problem solving—are exceedingly dangerous in the hands of judges, yet lamentably common.

Before going further, I must emphasize that I speak only for myself, and not for the United States Court of Appeals for the Ninth Circuit, the court of which I am a member. In addition, I must also stress that these thoughts should not be construed as opining on the outcome of any matter that may come before me. Rather, my goal is to demonstrate how different philosophies judges bring to their job of deciding cases can advance or undermine the principle of separation of powers, as illustrated by several important cases in our history.

I will begin this discussion with the role of the federal judge as envisioned by the Framers of our Constitution. Next, I will suggest which theoretical approach is more consistent with that vision by examining cases in which federal judges have employed different approaches to constitutional and statutory interpretation. At the conclusion of that endeavor, I hope to demonstrate that a judicial philosophy that relies on text, structure, and history is not only consistent with what the Framers envisioned, and

therefore possessed of historical legitimacy, but, more importantly, that such a philosophy is essential to the maintenance of a vibrant democracy, in which the people shape the policy that determines their future, rather than a robed elite ruling from the federal bench.

I.

It might be said that the primary responsibility of a judge is to decipher legal text in a case or controversy that comes before him or her. Every day, we are presented with statutes and asked to answer two important questions.

First, we are asked to determine whether the substance of the contested legislation conflicts with superseding provisions of the United States Constitution. Second, and far more often, we are asked to interpret the meaning of a legal text the parties dispute.

The approach a federal judge brings to this task has critical implications for our system of separated powers. Article I, Section 1 of the United States Constitution makes clear that “All legislative Powers herein granted shall be

vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Correspondingly, Article III extends the judicial power to specific “cases” and “controversies.”¹ Thus, the Constitution places the power to legislate—to create law—in the people’s elected representatives. The judicial power, on the other hand, is merely a power of interpretation—the power to discern how a particular law applies to a specific set of facts. The Constitution entrusts this power to an unelected, life-tenured federal

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judiciary and, in my view, does so with good reason. The power to interpret requires judgment, careful study, and most importantly, independence, qualities best cultivated in public servants at least one step removed from the political sphere.

The success of this system of government, however, hinges on the judge's ability to apply the judicial power as it is, a power to *interpret*—to determine how a law applies to the facts of a particular case, not to speculate as to how that legal text *should* apply, or how the legislators who crafted it *would have wanted* it to apply in the case before the judge. The former exercise applies law, the latter creates it, and the power to legislate is wholly absent from the judicial powers set forth in Article III.

The Framers' writings illustrate why a judiciary confined to the task of interpretation is essential to a structure of separated powers. The system of government we enjoy today was influenced to an underappreciated degree by the French political philosopher Baron de Montesquieu, an Enlightenment thinker who first articulated the theory of a tripartite system of government.² Montesquieu described the concentration of executive, legislative, and judicial power in the same hands as the definition of tyranny itself, and the American states took up his arguments with enthusiasm after securing their independence, crafting state constitutions that separated the judicial and legislative powers distinctly.³

Quoting Montesquieu explicitly, Alexander Hamilton's *Federalist Paper No. 78* described the judiciary as the weakest branch in the new government, but quickly cautioned that the stability of this arrangement, and thus the "general liberty of the people," was contingent upon the judiciary remaining "truly distinct" from both the legislative and executive branches, for while "liberty can have nothing to fear from the judiciary alone," he wrote, "[it] would have every thing to fear from its union with either of the other departments."⁴

Acting on the same insights, the delegates to the Constitutional Convention rejected three separate proposals which would have given the Supreme Court an integral role in the legislative process. First, the delegates rejected a plan to establish a Council of Revision—a committee composed of federal judges and executive branch officials which would have been empowered to review and to amend legislative bills.⁵ Second, the delegates declined the suggestion to create a Privy Council composed of various executive department heads along with the Chief Justice of the Supreme Court, which would have produced written opinions on legal issues and provided other assistance upon the President's order.⁶ Finally, the Convention refused to adopt proposed language that would have authorized executive departments to obtain advisory opinions from the Supreme Court.⁷

This history demonstrates that in the system of government envisioned by the Framers and later ratified into our Constitution, the role of the judge is simply to judge—to interpret legislation rather than taking any active role in the creation of law itself.

Few, if any, students of the law would dispute this characterization of the judicial power. But, dissension soon erupts when the question becomes how a judge is faithfully to apply this power. Keeping in mind such definition of the judicial role in our constitutional framework, let us turn to this important debate.

II.

As I noted earlier, a federal judge regularly deals with legal text in cases before him. And, while issues of constitutional interpretation may grab the most headlines, the overwhelming majority of a judge's workload is consumed with construing federal statutes.⁸ In examining judges' approaches to this task, scholars have divided the various theories of interpretation into two broad categories. The first uses the text of the provision at issue as the point of departure and considers that text in light of structure and history in order to derive its meaning.

The second theory focuses instead on the purpose the enacting legislature had in mind when it drafted the provision and attempts to derive an interpretation consistent with it. Thus, perhaps not surprisingly, scholars have labeled these theories as “textualism” and “purposivism,” respectively.⁹ Both theories are designed with the same goal in mind—to equip judges with the tools necessary to interpret the law in the manner most consistent with the enacting legislature’s will, and thus preserve our lawmaking process as one controlled by elected representatives rather than the courts. Yet as I hope to demonstrate, only one of these theories is capable of achieving this goal, while the other, I suggest, directly undermines it.

A.

Although judges have relied on text for as long as there have been courts, “textualism” as a theory is of relatively new vintage. It is traceable to a backlash by a group of intellectuals against what they perceived to be the liberal and activist advances of the Warren Court.¹⁰ Supreme Court Justice Antonin Scalia, the most well-known proponent of the theory, outlined its foundational principles in his famous Tanner Lectures at Princeton.¹¹ Justice Scalia suggests that in order to reserve the task of lawmaking to the people’s representatives, judges must limit themselves to objective sources of meaning, such as text, structure, and history.¹² Thus, while judges following this approach may consider what Congress intended a particular word or phrase to mean, they only search for this intent in an objective sense. A hypothetical person guides this analysis. As Justice Scalia explained, the goal of the judge should be to discern “the intent that a *reasonable person* would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”¹³ In other words, the judge does not ask what the statute’s words mean to him or her alone, but what they would mean to “a skilled, objectively reasonable user of words” alive at the time of the statute’s enactment.¹⁴

In practice, this means that the judge first examines

the language of the statutory provision at issue, followed by the context of the entire statute, relying, if necessary, upon so-called linguistic canons to elucidate the meaning of ambiguous terms. Finally, the judge will consider history—the manner in which the statute’s terms have been used in other laws, or the contemporary meaning ascribed to those terms at the time the statute was passed, as dictionaries and other sources may reveal.¹⁵

On the other hand, judges who aim to interpret a statute consistently with Congress’s *purpose* begin from a very different starting point. While a judge focused on text asks what a reasonable person would understand the language of a statute to say, a judge focused on purpose asks what Congress *meant* to accomplish.¹⁶ The sources such judges rely on are myriad. For example, while they consider all the same sources as textualists—plain meaning, statutory context, and linguistic canons—they also include many others, such as the evolution of the statutory scheme, new practices and norms, and especially legislative history.¹⁷ By expanding the universe of relevant sources, these judges greatly increase their discretion and, in my view, allow themselves to encroach upon the power the Constitution reserves to the political branches.

Perhaps the best-articulated justification of the purposivist approach is Supreme Court Justice Stephen Breyer’s recent book, *Active Liberty*,¹⁸ which sets forth his philosophy and criticizes what he perceives to be the weaknesses of over-reliance on text.¹⁹ Justice Breyer’s theory conceives of judging as a search for congressional intent and, like the textualists, encourages judges to allow a hypothetical person to guide their inquiry.²⁰ This hypothetical person, however, is not a “reasonable user of words,” but a “reasonable member of Congress.”²¹ Further, this hypothetical congressperson does not require the judge to determine how an ordinary citizen would interpret a statute, but how a reasonable member of the enacting Congress “*would have wanted*” the court to interpret it.²²

Both hypothetical figures unquestionably afford judges some discretion. Yet the discretion permitted by a text-based approach is cabined by important restraints—the plain meaning of language, statutory structure, canons of construction, and history. The hypothetical reasonable member of Congress, however, invites judges to embark on a far more creative endeavor.

Indeed, if one merely asks what a reasonable member of Congress was trying to say, there is little to distinguish this inquiry from asking the judge what he thinks the statute *should* say—in other words, legislating from the bench.²³

To contrast these two theories, let us turn to a concrete example.

B.

Three terms ago, the Supreme Court considered the case of Gary Small, a defendant convicted and sentenced to five years in prison by a Japanese court for attempting to smuggle firearms into that country.²⁴ Shortly after his release, Small returned to the United States, where he promptly purchased a handgun.²⁵ After that, he was charged with and convicted of violating a federal statute that prohibited the possession of firearms by “any person . . . who has been convicted in *any court* of a crime punishable by imprisonment for a term exceeding one year.”²⁶ On appeal, he argued that the statute did not apply to him because Congress only meant for the term “any court” to prohibit the possession of firearms by defendants convicted in American courts. A 5–3 majority (Chief Justice Rehnquist did not participate) agreed with Small that “any court” was limited to this narrower definition. Writing for the majority, Justice Breyer noted that the

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plain language of the statute did not explicitly “mention foreign convictions” or implicate a subject matter such as immigration or terrorism, in which foreign convictions would be “especially relevant.”²⁷ Critical to his analysis was his insight that the natural reading of “any court” would create “anomalies” that, at least in

the majority’s view, produced unfair or inequitable results. Specifically, Justice Breyer worried that such a reading would permit individuals convicted in foreign courts of conduct that our country embraces (such as free speech) to be prosecuted under the statute, even though those who engaged in the same conduct on American soil would be immune.²⁸

The dissenters, led by Justice Thomas, were unmoved. Limiting themselves to the “plain terms” of the statute, they reasoned that the natural reading of the word “any” has “an expansive meaning.”²⁹

Consequently, they would have held that Small’s foreign conviction was within the scope of the statute.³⁰

What accounts for these divergent readings of this relatively simple phrase? The majority made clear that the “anomalies” the term “any court” would permit caused it to reject that reading. That is, they concluded that because the statute’s plain text would punish a person even if he was convicted in a foreign court for “conduct that domestic laws would permit,” no reasonable member of Congress could have meant “any court” to mean what it most naturally suggests.³¹

In my view, the majority presents some persuasive policy reasons as to why a law that treats defendants convicted in foreign and domestic courts identically

may be undesirable. But I believe strongly that such considerations are inappropriate for a judge faithfully exercising his constitutional role. First, as the dissent aptly pointed out, the majority's reading created its own anomalies. By limiting the definition of "any court" to only domestic courts, the majority's interpretation permits individuals convicted in foreign courts of violent crimes such as rape and murder freely to possess firearms in the United States, even though those convicted in domestic courts of entirely nonviolent crimes may not.³²

Thus, for me, the *Small* case exemplifies how the search for Congress's supposed purpose exceeds judicial competence, and, I suggest, judicial power. The Court in *Small* was forced to choose between two readings of a statute, each of which would create anomalies.³³ Determining which anomalies are tolerable and which are not is a project perfectly tailored to a legislative body vested with factfinding expertise and accountability to the people. Yet courts have no such expertise or accountability. The result reached by the majority in *Small* may have been socially desirable. But the reality remains that as judges, except when the most natural reading leads to unconstitutional or (in a narrow set of cases) absurd results, our responsibility is to apply the text as Congress wrote it, not to correct the anomalies Congress failed to foresee.

C.

Judges who emphasize text are often criticized as "wooden," or tone-deaf to practical consequences.³⁴ My first response is that such claim is overly simplistic, as textualism is not to be confused with literalism. Rather, we should interpret words according to their most reasonable meaning. Reasonableness presumes a limited

range of meanings, no interpretation outside of which is permitted.³⁵ In *Small*, the dissenters focused on the plain text to reach a reasonable result. But as textualists readily emphasize, sometimes "the most literal interpretation of a phrase is not always the most natural and reasonable one."³⁶ A principled textualist cannot read statutory language in isolation.³⁷ Sometimes, context renders the literal interpretation *unreasonable*, and points the way to the most natural meaning, the textualist's ultimate goal.

My second response to the criticism is that what some see as wooden, I would characterize as predictable. And, unlike the traits that make an effective legislature, predictability is among the greatest virtues of a court of law.

In some ways, judicial interpretation can be seen as a conversation between the courts and Congress.³⁸ When courts interpret legislation, they attach significance to Congress's linguistic habits. For instance, if Congress uses the same phrase multiple times, courts are likely to conclude that Congress's intended meaning was consistent. Similarly, Congress responds to judicial decisions. If courts interpret a phrase differently than Congress intended, Congress will amend the statute and clarify its meaning. Or, if courts interpret a phrase as Congress hoped, Congress is likely to employ that phrase again, knowing that the two branches now understand each other.

Such "conversation" comports with our governmental structure, but it does require a common language if the two branches are to understand each other. There are over 150 federal appellate judges and over 750 federal trial judges. They come from all sorts of different backgrounds and each of them, I would argue, has a slightly different concept of what a reasonable member of

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Congress would think. But when judges limit themselves to objective sources of Congress's intent such as text, predictability is appreciably enhanced. While discretion is not entirely foreclosed, I believe such approach enables judges to bring consistency to statutory interpretation, in case after case, regardless of the facts or the political values at stake.

In addition, judges who rely on text acknowledge that the "purpose" behind most laws is far from singular. For a bill to become a law, a majority of the 435 congressmen, a majority of the 100 senators, and the President must all authorize its passage. Each player usually has his or her own reasons for doing so. He or she might support the legislation on its own merits, or because it brings resources to constituents, or because strategists have tied its passage to the success of one of their own pet projects. The legislative process is full of these compromises, for better or worse. Indeed, as Otto von Bismarck once famously said, legislation is like sausage: while both can be enjoyable products, the process of making them is better left unseen.³⁹

Beyond the fact that legislative purpose is not singular, there is no objective source which captures such purposes *except* the law itself. While congressional committees issue reports and legislators make comments from the House and Senate floor, these isolated statements cannot reliably capture the "purpose" of the hundreds of individuals necessary to a statute's enactment. As judges, the only such indicator we have is statutory text.

Of course, some respond, with lamentable accuracy, that many members of Congress are not acutely aware of the linguistic niceties of the great volumes of federal legislation.⁴⁰ Moreover, they point out that many statutes are drafted by congressional staffers rather than elected representatives themselves. Thus, they argue that legislative history can be just as useful as text when discerning Congress's intent.

But whether or not these critics accurately describe

Congress's habits, the ever-increasing volume of federal legislation does not authorize judges to fill gaps they believe Congress was too busy or too distracted to close.⁴¹ Indeed, to the extent some believe Congress is overworked or simply incapable of carefully crafting each word that becomes law, perhaps this indicates that our law has become overly federalized, and that a robust central government, despite its benefits, has important costs as well. Whatever the connection, the important point is that the expansion of federal law does not authorize judges to lend Congress a helping hand in legislating.

Our Constitution separates the legislative and judicial powers to ensure that the people make the ultimate decisions. As a consequence, on all questions, especially the close and difficult ones, it follows that the judgments of our elected officials should prevail over the judgments of our unelected judges, no matter how wise we are (or might think ourselves to be).

III.

While judges are most frequently called upon to interpret statutory text, the exercise of judicial power is never more highly scrutinized than when the Supreme Court rules on the merits of a constitutional case. This is to be expected, as the stakes are particularly high—while the Court's interpretation of a federal statute can be overturned by a bare majority of Congress with the consent of the President, a constitutional decision by the Supreme Court can only be overturned through the rather extraordinary remedy of a constitutional amendment. Yet there, where the dangers of a judge-turned-lawmaker are particularly great, the judge's temptation to reach beyond objective sources for the Constitution's "purpose" or the socially desirable result is often greater still. Thus, as the rivers of ink spilled over the Court's most controversial decisions, such as *Roe v. Wade*,⁴² *Lawrence v. Texas*,⁴³ and *Lochner v. New York*,⁴⁴ can attest, constitutional cases render the need for a principled judicial philosophy all the more essential.

A.

I believe one decision that receives comparatively little attention (although I am sure you are all familiar with it) illustrates particularly well the undesirable consequences of a judicial approach that strays from text, structure, and history. As all followers of television police dramas are aware, the Court in *Miranda v. Arizona*⁴⁵ held that the government may not introduce into evidence at a defendant's trial any statement he made to police during a custodial interrogation unless the suspect was advised of the four now-famous *Miranda* warnings: "You have the right to remain silent, any statement you make may be used against you, you have the right to an attorney," and so on.⁴⁶ What those television viewers may not be aware of, however, is that the Court's decision in that case was truly unexpected.

In the decades before *Miranda* was heard, the Supreme Court had applied a rule that a suspect's confession would be admissible at trial so long as it was "voluntary," that is, not coerced by violence or threats of violence by the police.⁴⁷ The Court reasoned that the prohibition against involuntary confessions was required by the Due Process Clause of the Fourteenth Amendment, which "assur[es] appropriate procedure before liberty is curtailed or life is taken."⁴⁸ Increasingly, however, some Justices became concerned with the subtler pressures that arise from police questioning and came to the view that police interrogation can be "inherently coercive" even where the police never use or even threaten violence. Thus, by the time the *Miranda* case reached the Court, the majority of Justices had become quite skeptical of the constitutionality of post-arrest confessions.⁴⁹ This was consistent with the prevailing jurisprudence of the Court which, led by Chief Justice Earl Warren, has been labeled by historians as the most aggressive in its use of the judicial power to advance social progress, at least as the majority of the Court defined that term. And, as a result, those awaiting

the decision in *Miranda* wondered aloud whether the Warren Court would interpret the Constitution to prohibit the use of *all* post-arrest confessions.

In a split decision, the Court in *Miranda* said *yes*: The Constitution does prohibit the prosecution from using a suspect's confession against him at trial *unless* the suspect was advised of four specific warnings which it then proceeded to make up, for the first time, in *this* case. To the surprise of all, including the litigants,⁵⁰ the Court did not hold the warnings to be required by the Due Process Clause, but by the Self-Incrimination Clause of the Fifth Amendment (as applied to the states through the Fourteenth). That Clause states that "[n]o person . . . shall be compelled in any criminal case to be a *witness* against himself."⁵¹ And, prior to *Miranda*, few had read its text as vesting suspects with any rights *before* formal criminal proceedings began.⁵²

The majority, however, confidently proclaimed that the warnings were compelled by "the constitutional foundation underlying the privilege [against self-incrimination]," because, in the Court's words, that Clause requires government to "accord to the dignity and integrity of its citizens," and "to respect the inviolability of the human personality."⁵³ In other words, the police must produce evidence "by its own independent labors, rather than by the cruel, simple expedient of compelling it from [the suspect's] own mouth."⁵⁴

Appealing to constitutional values at a very broad level of generality (as courts often do when they wish to extend the Constitution's text into uncharted waters), the Court emphasized the policy value of the warnings in support of its novel holding. Chief Justice Warren noted that when suspects confess during police interrogations, only police are present. Even where there is no evidence that police employed coercive tactics, he argued, such interrogations are cloaked in "secrecy," which prevents the courts and the public from knowing what actually

occurs in the interrogation room.⁵⁵ As such, he concluded that the Constitution required police to advise suspects of their rights before the interrogation begins.

The dissenters vehemently disagreed, finding nothing in the text of the Constitution, its history, and nearly 200 years of precedent to portend the right newly discovered by the majority. As Justice White explained, the text of the Self-Incrimination Clause says what it says—“no person ‘shall be compelled in any criminal case to be a witness against himself’”⁵⁶—and, when considered in light of “grammar and the dictionary,” appears to state nothing more than that no person shall be compelled to testify against himself in open court.⁵⁷

Moreover, the dissenters viewed the social value of the Court’s decision as far less certain and worried that its reasoning would handcuff law enforcement in fulfilling its duties. At a minimum, they believed the Court’s prior rule, that confessions could be admitted at trial if “voluntary,” provided adequate safeguards against police coercion and that the Court’s discovery of a new right in the Self-Incrimination Clause was not supported by traditional tools of constitutional interpretation.⁵⁸

On balance, I find myself in agreement with the dissenters’ reasoning and, more importantly, in its interpretive approach. In my view, it is difficult to understand the majority’s decision in *Miranda* as anything more than a policy choice. Faced with a real and documented threat of coercive police practices, the Court created a solution—it tore away the cloak of secrecy it perceived as wrapped around the station house and imposed a bright-line rule requiring police to inform a suspect expressly of four enumerated and previously unarticulated rights (and to obtain the suspect’s affirmative waiver of those rights) before



questioning. Depending on one’s view, this might have been a reasonable solution to the temptations of police interrogation. Yet judges, as envisioned by Montesquieu and the Founders, are not responsible for creating solutions to social problems, however great. Instead, they are only asked to determine what our Constitution explicitly requires.

B.

Now that more than four decades have passed since *Miranda* was decided, let’s examine the consequences of the Court’s decision and its implications for the separation of powers. Subsequent to *Miranda*, the Burger and Rehnquist Courts scaled back the scope of that decision without explicitly overturning its holding. For example, the Court held that while a suspect’s unwarned confession could not be admitted as direct evidence against him, it could still be used for impeachment if he testified.⁵⁹ Later, the Court held that police confronting a public safety emergency could

question a suspect without reading him his rights and still use his confession at trial.⁶⁰ In these and several other decisions, the Court characterized the *Miranda* warnings as a “prophylactic” protection for the right against self-incrimination which were “not themselves rights protected by the Constitution.”⁶¹

So, if the warnings were not constitutionally required, why couldn’t Congress reject their use through legislation? Well, Congress sought to do precisely that in enacting 18 U.S.C. § 3501, which restored the voluntariness test and removed the requirement that warnings be given to defendants charged with federal crimes. Section 3501 was enacted only two years after *Miranda*, but the Justice Department declined to enforce it until 1999, when the United States Court of Appeals for the Fourth Circuit held that the statute indeed overruled *Miranda*.⁶²

The Supreme Court quickly granted certiorari, and was prepared finally to confront Congress’s determination to overrule *Miranda* in the case of *Dickerson v. United States*.⁶³ In a 7–2 decision, the Court concluded that even though the *Miranda* warnings were not constitutionally required, *Miranda* was nevertheless a “constitutional rule” with “constitutional underpinnings” which Congress could not overturn by statute.⁶⁴

Now that decision was quite unusual. Indeed, the concept of a constitutional rule with constitutional underpinnings was rather unprecedented, and some suggested that *Dickerson* was the product of a Court that had determined that even though the warnings

were not constitutionally required, they had become too embedded in our social fabric to undo.

Whether or not these observers accurately described the Court’s thinking, the lesson *Dickerson* teaches is that policy choices by judges are enduring. The *Miranda*

Court’s policy decision was precedent for 44 years and *Dickerson* has now affirmed that only the

extraordinary remedy of a constitutional amendment could displace it as

governing law. Even a Court that had long questioned the constitutional necessity of *Miranda*’s holding was unwilling to overrule its own act of judicial legislation—possibly because stare decisis and our national familiarity with the warnings made the stakes too high.⁶⁵

Perhaps the *Miranda* Court made the wisest policy choice possible. But in a government of separated powers, social policy should be irrelevant. The important result of *Miranda* is that voters and

legislators no longer need to concern

themselves with police interrogation because

the courts have solved that problem for them. I submit that there are certain fundamental rights, clearly defined in our Constitution’s text, which that document requires the courts to protect in such manner. But as for the remainder, a government of separated powers entrusts the people to devise the rules by which they will be governed. As my colleague Judge Andrew Kleinfeld so eloquently wrote, “That a question is important does not imply that it is constitutional. The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary.”⁶⁶

“In my view, judges who approach this task by focusing on text and other objective sources are most faithful to this responsibility. On the other hand, judges who instead interpret a law in search of its purpose or the ‘best’ social result morph themselves into legislators and encroach upon the role of Congress.”

“[T]he lesson Dickerson teaches is that policy choices by judges are enduring. The Miranda Court’s policy decision was precedent for 44 years and Dickerson has now affirmed that only the extraordinary remedy of a constitutional amendment could displace it as governing law.”

IV.

In conclusion, let me emphasize that, in our system of government, the people govern. Through their representatives, they make decisions that become law. Our Constitution entrusts judges to *interpret* these laws, and to refrain from correcting Congress’s missteps where necessary (or where the judges believe it to be).

In my view, judges who approach this task by focusing on text and other objective sources are most faithful to this responsibility. On the other hand, judges who instead interpret a law in search of its purpose or the “best” social result morph themselves into legislators and encroach upon the role of Congress.

We federal judges are appointed for life. We are neither directly chosen nor directly accountable to the people. And for good reason. The Founders believed that our democracy required a judiciary that would fairly and accurately apply the law. They also believed it necessary to insulate judges from the political pressures that face elected representatives. Yet these very same pressures enhance the performance of legislators. If legislators wish to be reelected, they must be attentive to their constituents’ concerns, and accountability is thereby assured. But when judges deviate from text to make law, the people cannot hold them similarly accountable, short of the cumbersome process of impeachment.

Even further, such judges relieve the people’s elected representatives of their own responsibilities. When judges interpret law by searching for its purpose, courts

become the fora in which our national policy is made. Knowing this, Congress can wait for the Supreme Court to bail it out of tough, or simply unpopular, decisions and congressmen and congresswomen can focus instead on posturing for reelection rather than rolling up their sleeves to legislate on the questions that truly matter.

In such an environment, it should be no surprise that the battles over the confirmation of judges have become so fierce. After all, when judges are viewed as policymakers, the confirmation process is no longer an effort to validate the credentials and temperament of the potential jurist but becomes an exercise to test the legislative policy instincts of the nominee who, if he cannot be trusted to implement the prevailing views of a Senate majority, can be rejected on such grounds alone. Overshadowing the multitude of important questions facing the nation, the question of whom we nominate to the federal bench, especially to the Supreme Court, becomes a political debate of the highest consequence, as judges, rather than elected representatives, become the authors of our nation’s laws.

Our Constitution, however, creates a government of separated powers. It reserves to the people the power to create the laws under which we live, and it entrusts the judiciary with the far more limited task of interpreting them. Our Constitution leaves the responsibility of making law to “we, the people,” through an elected Congress, and I believe it is indeed “we, the people,” not “we, the judges,” who must fully exercise it. •

1. U.S. CONST. art. III, § 2.
2. BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748).
3. *See, e.g.*, N.C. CONST. of 1776, Declaration of Rights, art. IV; MD. CONST. of 1776, Declaration of Rights, art. VI; VA. CONST. of 1776, Declaration of Rights, § 5; MASS. CONST. of 1780, Declaration of Rights, art. XXX; *see also* Carolyn Dineen King, *Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, 90 MARQ. L. REV. 765, 768 (2007) (describing the influence of Montesquieu on the formation of state constitutions).
4. THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
5. THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 4, at 499; *see also* THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 4, at 543–44.
6. 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 328–29, 342–44 (1911).
7. *Id.* at 334 (the proposal would have provided that “[e]ach Branch of the Legislature, as well as the supreme Executive shall have authority to require the opinions of the supreme Judicial Court upon important questions of law, and upon solemn occasions”).
8. The common law—the process by which judges essentially create law in the absence of a statute or other controlling authority—still governs a substantial body of state law. Yet in the federal courts (with one very limited exception) the common law does not exist. That exception is known as “federal common law.” In *Erie Railroad Co. v. Tompkins*, the Supreme Court famously announced that “[t]here is no federal general common law.” 304 U.S. 64, 78 (1938). Still, the Court has also explained that “federal common law”—federal rules of decision whose content is not derived from specific federal statutes or constitutional provisions—governs several small pockets of a federal court’s jurisdiction. *See* RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 685 (5th ed. 2003). These pockets include cases involving the rights and obligations of the United States, *see* *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), disputes between states, *see, e.g.*, *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838), cases that implicate international relations, *see, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), and admiralty, *see, e.g.*, *Nw. Airlines v. Transp. Workers Union*, 451 U.S. 77, 95–96 (1981). Importantly, federal common law is not a body of law that applies in federal courts but not state courts. Rather, the established theory suggests that federal common law preempts contrary state law by virtue of the Supremacy Clause. *See* U.S. CONST. art. VI, § 1, cl. 2. For an overview of the competing modern definitions of federal common law, and the tensions between them, *see* Jay Tidmarsh and Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585 (2006).
9. *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 348 (2005). Of course, the labels of “textualism” and “purposivism” are highly simplistic, but for the purposes of discussion, let us allow ourselves to remain at this level of generality. Consistent with what has become modern practice, I use the term “purposivism” as a synonym for intentionalism. However, some have distinguished the two approaches to interpretation. *See* WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 25–26 (1994).
10. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 641–50 (1990); Molot, *supra* note 9, at 24–25.
11. Justice Scalia’s lectures, delivered in 1995, were later collected and published in ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (Amy Gutmann ed., 1997).
12. *Id.* at 17.
13. *Id.* (emphasis added).
14. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434 (2005) (emphasis omitted) (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 61 (1988)).
15. A brief glance at the Supreme Court’s most recent decisions reveals the great assistance dictionaries can offer in interpreting a statute. *See* *Watson v. Phillip Morris Cos.*, 127 S. Ct. 2301, 2307 (2007); *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1755 n.11 (2007); *James v. United States*, 127 S. Ct. 1586, 1597 n.5 (2007).
16. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 85–91 (2006).
17. William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2042–43 (2006).
18. STEPHEN BREYER, *ACTIVE LIBERTY* (2005).
19. Justice Breyer’s theory of “active liberty” is built on three principles: (1) judicial restraint, (2) interpretation of text “as driven by purposes,” and (3) likely consequences. *Id.* at 17–18 (emphasis omitted). He explains that this theory of interpretation aims to increase the attention courts pay to “modern liberty”—defined as the individual’s freedom to pursue his own interests, free of unnecessary government interference. *Id.* at 3–5 (citing Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns* (1819), in *POLITICAL WRITINGS* 309, 309–28 (Biancamaria Fontana trans. & ed., 1988)).
- In extolling judicial restraint, Justice Breyer reminds us that “even if a judge knows ‘what the just result should be,’ that judge ‘is not to substitute even his juster will’ for that of ‘the people.’” *Id.* at 17. Yet Justice Breyer also suggests that the judge should interpret statutes in light of their “underlying purpose” and interpret the Constitution in light of the “great purposes” which that document was intended to achieve. *Id.* at 17–18. He then concludes that “judges, in applying a text in light of its purpose, should look to *consequences*, including ‘contemporary conditions, social, industrial, and political, of the community to be affected.’” *Id.* at 18.
- Like Justice Breyer, I believe restraint is critical to a principled judicial philosophy. Yet, in what follows, I suggest that an approach which allows judges to focus on purpose at the expense of text vitiates such restraint and leaves judges to become lawmakers themselves.
20. *Id.* at 8.
21. *Id.* at 88.
22. *Id.* at 88–91.
23. *See* SCALIA, *supra* note 11; Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism*, 119 HARV. L. REV. 2387, 2405 (2006) (reviewing BREYER, *supra* note 18 (2005)).
24. *Small v. United States*, 544 U.S. 385, 395 (2005).
25. *Id.* at 387, 396.
26. 18 U.S.C. § 922(g)(1) (2000) (emphasis added).
27. *Small*, 544 U.S. at 391. Justice Breyer further noted that other sections of the statute explicitly referred to “federal” and “state” convictions, and that, as such, Congress must have meant “any court” to refer only to those two types of convictions, not “any” convictions as its natural reading would suggest. *Id.* at 391–93 (quoting 18 U.S.C. § 921(a)(33)(A) (2000)).
28. *Id.* at 391–92.
29. *Id.* at 396 (Thomas, J., dissenting) (explaining that the word “any” has “an expansive meaning, that is ‘one or some indiscriminately of whatever kind’” (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976))).
30. Further, the dissent viewed the statute’s structure differently than the majority, concluding that the specific mention of “state” and “federal” convictions in other sections *confirmed* the view that the term “any court” should be interpreted without qualification, because Congress’s explicit use of such term elsewhere demonstrated that it knew how to specify such restrictions when it wanted to. *Id.* at 398.
31. *Id.* at 389–90.
32. *Id.* at 405.
33. As an aside, I note that these anomalies fall far short of absurdity (judges have a special tool to deal with these sorts of situations, such as when Congress commits an obvious scrivener’s error in drafting a statute). *See* SCALIA, *supra* note 11, at 23–25.
34. BREYER, *supra* note 18, at 19 (quoting LEARNED HAND, *THE SPIRIT OF LIBERTY* 109 (3d ed., 1960)).
35. SCALIA, *supra* note 11, at 24.
36. *Campbell v. Allied Van Lines, Inc.*, 410 F.3d 618, 623 (9th Cir. 2005) (O’Scannlain, J., dissenting); *see also* *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting) (“When someone asks, ‘Do you use a cane?’ he is not inquiring whether you have your grandfather’s silver-handled walking stick on display in the hall.”); SCALIA, *supra* note 11, at 24 (“[T]he good textualist is not a literalist . . .”).
- A case which actually came before me illustrated this reality. In *Campbell v. Allied Van Lines, Inc.*, a family who contracted with a moving company to ship its household goods sued the moving company when the goods arrived damaged. 410 F.3d at 619. A jury ruled in the shippers’ favor, and the trial judge granted them attorney’s fees, which thereupon gave rise to another dispute. *Id.*

The shippers had sued the moving company under a federal statute, the Carmack Amendment to the Interstate Commerce Act, which Congress enacted to preempt state law claims against carriers and to facilitate the use of arbitration to resolve such claims. The statute required carriers to offer shippers arbitration as a means of settlement, although it did not require shippers to accept. 49 U.S.C. § 14708(a) (2000). The statute further allowed shippers to collect attorney's fees from the carrier if three conditions were met: (1) the shipper prevailed in court, (2) the shipper submitted a timely claim, and (3) "a decision resolving the dispute was not rendered through arbitration" within the time allotted by the statute. *Id.* § 14708(d)(3)(A).

In the case before our panel, the shippers declined arbitration, went straight to court, and won a damage award. They argued that the statute still entitled them to attorney's fees, and the majority agreed. It read the third provision of the statute literally and held that because the text did not *explicitly* require shippers to arbitrate, shippers who proceeded to court could still collect attorney's fees. *Campbell*, 410 F.3d at 621.

I dissented. While I believed one *could* read the statute as the majority had, I believed its literal reading was not the most natural or reasonable one. *Id.* at 623 (O'Scannlain, J., dissenting). In my view, the majority's literalism ignored the statutory context. *Id.* The statute plainly indicated its design to promote and to facilitate arbitration. The attorney's fees provision was located in a section entitled, "Dispute settlement program for household goods carriers." 49 U.S.C. § 14708. Subsection (a) was entitled "offering shippers arbitration," subsection (b) listed "arbitration requirements," subsection (c) detailed the limitations on the use of arbitration documents, and subsection (d) provided the contested attorney's fees provision. *Id.* § 14708(b)(5).

I must emphasize that I was not concerned with how Congress *would have wanted* our court to interpret the statute. Instead, I believed my interpretation was compelled by what Congress *actually said* in the surrounding statutory provisions.

37. See *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 499–500 (2002) (rejecting a "plain-meaning argument [that] ignores the statutory setting"); *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994))).

38. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 62–65 (1994) (explaining how judicial interpretation of statutes responds to signaling from the legislature, even after the enactment of the provision in question).

39. See, e.g., Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 265 n.92 (1998) (crediting von Bismarck with the observation).

40. For example, the majority in *Small*, which held that Congress intended "any court" to mean domestic courts only, noted the fact that the statute's "lengthy legislative history" suggested Congress's ignorance of the implications of using such term as support for the majority's decision to "correct" Congress's omission with its own solution. 544 U.S. at 393.

Of course, that construction of the legislative history was contested (as construction of this ever-malleable source often is), as the majority conceded that a Conference Committee explicitly rejected language that would have defined predicate crimes in terms of state and federal offenses. *Id.* (citing S. REP. NO. 1501, at 31 (1968)).

41. Indeed, as the dissent in *Small* replied, Congress's failure to consider the consequences of using a particular word does not provide courts with license to disregard a statute's "unambiguous meaning." *Id.* at 405 (Thomas, J., dissenting) (quoting *Beecham v. United States*, 511 U.S. 368, 374 (1994)).

42. 410 U.S. 113 (1973).

43. 539 U.S. 558 (2003).

44. 198 U.S. 45 (1905).

45. 384 U.S. 436 (1966).

46. *Id.* at 467–69. Specifically, the Court held that unless some "other fully effective means are devised" by the police, any suspect subject to police interrogation must be advised of the following four warnings prior to questioning: (1) "that he has a right to remain silent"; (2) "that any statement he does make may be used as evidence against him"; (3) that "he has a right to the presence of an attorney"; and (4) that such attorney will be appointed if he cannot afford to retain one. *Id.* at 444.

47. *Watts v. Indiana*, 338 U.S. 49, 55 (1949); see also *Brown v. Mississippi*, 297 U.S. 278 (1936) (reversing defendant's conviction under the Due Process Clause of the Fourteenth Amendment because the defendant's confession was obtained by police coercion); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (same).

48. *Watts*, 338 U.S. at 55.

49. This was perhaps best evidenced by *Escobedo v. Illinois*, 378 U.S. 478 (1964), in which the Court made a profound shift away from reliance on the Due Process Clause. In *Escobedo*, the Court held that state police violated a suspect's Sixth Amendment right to counsel when they refused to allow his attorney to meet with him until they concluded a station house interrogation of the suspect. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy, [among other rights], . . . the Assistance of Counsel for his defence." U.S. CONST. amend. VI (emphasis added). Thus, the Court's reasoning, if not its result, was surprising, as never before had it been suggested that the Amendment's protection attached to a suspect who was not yet indicted and thus not subject to "formal, meaningful judicial proceedings," as the term "prosecutions" would suggest. *Escobedo*, 378 U.S. at 493 (Stewart, J., dissenting). To date, the question of when formal judicial proceedings begin has still not been fully resolved. Indeed, the Supreme Court has granted a petition for certiorari from the Fifth Circuit's decision in *Rothgery v. Gillespie* to consider precisely this question. See 491 F.3d 293 (5th Cir. 2007) (holding that a defendant's Sixth Amendment rights had not yet attached when he was brought before a magistrate judge because no prosecutor was involved in his arrest or his appearance before the magistrate).

50. The Self-Incrimination Clause was referred to only tangentially in multiple briefs filed in the Court, which all focused almost exclusively on the Sixth Amendment right to counsel instead. See, e.g., Brief for Petitioner, 384 U.S. 436 (1966) (No. 759), 1966 WL 87732.

51. U.S. CONST. amend V (emphasis added).

52. The Court did tip its hand, at least in some ways, in *Malloy v. Hogan*, 378 U.S. 1 (1964), decided just shortly before *Miranda*. In the course of incorporating the Fifth Amendment's Self-Incrimination Clause against the states, Justice Brennan's opinion for the Court suggested that "wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Id.* at 7. Whether the innovation was born in this phrase in *Malloy* or two years later in *Miranda* is of little moment, however, as it was an innovation nonetheless—in its numerous decisions implicating the admissibility of confessions in state and federal courts in the thirty years before *Miranda*, the Court never considered the possibility that the Self-Incrimination Clause had a role to play in the analysis.

53. *Miranda*, 384 U.S. at 460.

54. *Id.*

55. *Id.* at 448.

56. *Id.* at 526 (White, J., dissenting) (emphasis added).

57. *Id.* at 526–27. Moreover, Justice White found "very little in the surrounding circumstances" of the Constitution's adoption or historical practice "which would give the . . . provision any broader meaning," *id.* at 527, and further noted that "literally thousands" of convictions upheld under the Court's voluntariness test would fail under its new rule, *id.* at 529–31.

58. As Justice Stewart lamented, "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Id.* at 526 (Stewart, J., dissenting) (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 181 (1943)).

59. *Michigan v. Tucker*, 417 U.S. 433 (1974).

60. *New York v. Quarles*, 467 U.S. 649 (1984).

61. *Tucker*, 417 U.S. at 444.

62. *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999).

63. 530 U.S. 428 (2000).

64. *Id.* at 439, 440 n.5.

65. See, e.g., *Missouri v. Seibert*, 542 U.S. 600 (2004) (successive interrogations); *United States v. Patane*, 542 U.S. 630 (2004) (admissibility of derivative evidence obtained as a result of a *Miranda* violation); *United States v. Rodriguez-Preciado*, 399 F.3d 1118 (9th Cir. 2005) (special safeguards for foreign defendants); *United States v. Garibay*, 143 F.3d 534 (9th Cir. 1998) (same).

66. *Compassion in Dying v. Washington*, 79 F.3d 790, 858 (9th Cir. 1996) (en banc) (Kleinfeld, J., dissenting).

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