

MARQUETTE LAWYER

MARQUETTE UNIVERSITY LAW SCHOOL MAGAZINE

FALL 2011

Leading the League

Marquette's Sports Law Program Comes of Age
as the Premier Effort in the Field

ALSO INSIDE:

Can "Evidence-Based Decision Making" Improve
Milwaukee's Criminal-Justice System?

Archbishop Martin of Dublin on Clergy Sex Abuse

Lemley on the Patent Office; Simon on Punishing Murder

Marquette's New President; Dean Kearney as Lawyer of the Year



Welcome to—and from—Marquette’s New President

I have been invited to introduce myself to you, and I am delighted to do so. I am Scott R. Pilarz, S.J., and I have the privilege, beginning this academic year, to serve as president of Marquette University. It is humbling for me to join this community as the successor of Robert A. Wild, S.J., and our 21 other fellow Jesuits who have led this great university as president.

I come to this role with eight years of experience as president of the University of Scranton. So I understand the extent of the demands of Catholic, Jesuit higher education in today’s world. And I am coming to know the contribution of the Law School to Marquette University’s effort to meet those demands. Certainly there is a solid base: I visited Ray and Kay Eckstein Hall, the Law School’s extraordinary home of only one year, on one of my earliest visits to campus, and was inspired by the vision that Father Wild helped to bring to reality for Marquette Law School and the region.

While there was no law school at Scranton, I spent my undergraduate years at Georgetown University and returned there to teach after receiving my Ph.D. in English at the City University of New York. My years at Georgetown helped me to develop a sense of what a great law school can do for a university. So I have much to learn but, hopefully, something to offer as well.

I have been able to learn a number of things about Marquette Law School specifically, even apart from the wonders of Eckstein Hall. The Law School’s dean, Joseph D. Kearney, worked with me closely over the past year as the leader of the presidential transition within the University. I benefited from Dean Kearney’s insights and counsel during the process.

I believe that Dean Kearney learned from me as well. He took one lesson particularly to heart: I understand that he has more or less polled the faculty and students, looking for a connection with Camden, New Jersey, my hometown (the south side of Chicago connection that he had with my predecessor will serve him less well in this new world). The early returns have not been many, but there is time.



So I am excited to help lead Marquette Law School. Jesuit education for centuries has inspired people to “go and set the world on fire.” It is not a monastic education, but one that seeks to ensure that its teachers and students engage the world. Can there be any doubt that legal education is about inspiring men and women to engage the world, in all its glory and all its humanity, in all their forms?

I have travelled far fewer miles than Father Jacques Marquette, who left his family in France for the new world. But I feel a kinship with the University’s namesake as I begin my own journey at Marquette. This is a time of exploration and discovery for me. I look forward to meeting faculty, alumni, and students of Marquette Law School; to collaborating with you to advance the Law School; and to doing all this, as each of my predecessors would have said as well, *Ad Maiorem Dei Gloriam*.

Scott R. Pilarz, S.J.

President, Marquette University

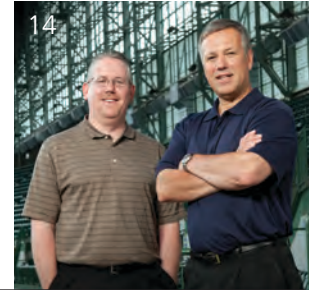
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On the cover: A group of faculty, students, alumni, and supporters of Marquette's sports law program, photographed at Miller Park, home of the Milwaukee Brewers (listed in alphabetical order): Ryan P. Albregts, Paul M. Anderson, Timothy J. Bucher, Teresa M. Covington, Carolina M. Dutriz, Ashley E. Fale, Martin J. Greenberg, Elise M. Harris, Jeremy D. Heacox, Charles I. Henderson, Matt Kleine, Lauren A. Malizia, Jaime L. McGaver, James T. McKeown, William S. Miller, Matthew J. Mitten, Sarah A. Padove, Matthew J. Parlow, Sarah A. Ponath, Michael J. Redding, Erica N. Reib, Richard A. Reider, Lindsay A. Ruch, Richard S. Schlesinger, Jenni E. Spies, Mary Alice Tierney, Joseph P. Trevino, Ante Z. Udovicic, Rebecca V. Watson, Edward Werner, and Marti L. Wronski. Photo by Tim Evans.

Eckstein Hall: Finding Success in the Details of Daily Life

Big lockers, more electrical outlets, better chairs, oh my!

Nuts and bolts. First-time visitors to Eckstein Hall, the home of Marquette University Law School, react to the beauty and spaciousness of the building. But ask the people who use it day after day—law students, particularly—and you are more likely to hear about the nuts and bolts, the small-scale things that have made the building a success.

A generous supply of electrical outlets. Classroom chairs that aren't attached to tabletops—and tabletops with ample room. Spacious lockers. Easy access to good food in the Tory Hill Café. An ample supply of bathrooms. Loads of technological pluses.

A year after the opening of the new building, more than 15,000 visitors later (that's visitors, not in any way counting law students or faculty), and with more than 425 events having been held, it is clear that the Law School made a great leap forward when it moved the short distance from its longtime home in Sensenbrenner Hall to the \$85 million Eckstein Hall. That is true both for the school's core function of educating law students and for its role as a catalyst and crossroads for public policy inquiries.

"The building is simply beautiful," said Stephanie Chavers, a second-year student. "The school really

tried to make the building a home for the students. You can really do everything in Eckstein."

Chavers pointed to pluses a casual visitor wouldn't consider. "The classrooms have enough gadgets for any technology-savvy student," she said. "I love the fact that when I go to class, I am not fighting to find an outlet to charge a laptop."

Eckstein Hall was designed with the expectation that students and staff would spend large stretches of time in the building in productive, positive states of mind. Peter Prigge, entering his third year as a student, said that he is often in the building from 7 a.m. to 9 p.m. The reasons he's able to do that include the general spaciousness of the building, the good settings for studying, the availability of food, and the fitness center, which he uses often. "It's like a home almost," he said. "Sensenbrenner wasn't a place where you wanted to be all day."

Amy Rogan-Mehta, a part-time student, said, "I've noticed that most students find the spot in Eckstein Hall that is comfortable for them. My space has been by the fireplace in the Tory Hill Café. I sit right there in the cafeteria. I prefer a little bit of sound. I get to see people as they come and go. It's really comfortable."



Cassandra Jones said, “A group of my friends and I use a conference room for most of our studying. It’s really convenient and usually quiet. When I’m not in class, that’s usually where I can be found.”

Pam Stokke-Ceci, a part-time student with 3L status, said, “The ergonomics of the classrooms are so much better. There’s room to spread out, unlike in the Sensenbrenner classrooms, and the acoustics of the rooms are a big improvement.”

One big improvement, in Stokke-Ceci’s view: “The number of bathrooms for women on each floor is something we were very pleased about.” In Sensenbrenner, the limited facilities created a time crunch, particularly between evening classes, she said.

Professor Michael McChrystal played an integral role in the planning and construction of Eckstein Hall. He is pleased with the way it turned out. “I enjoy arriving at it, I enjoy walking into the building,” he said. “It kind of gives me a good attitude about my work, just to walk in the door. There’s this quality of professionalism and excellence and comfort.”

“I find the classroom spaces to be just really well designed,” McChrystal said. “You have a sense of being close to the students, that they’re comfortable, that the

technology works, that stuff like acoustics and sight lines work exceptionally well. The main business of the building, holding classes for law students, I have found to be just a really good experience.”

McChrystal said he also is pleased with how the event space in the building has turned out. “I think the Appellate Courtroom works exceptionally well” for events such as the “On the Issues” sessions hosted by Mike Gousha, distinguished fellow in law and public policy. McChrystal described the room as “elegant, comfortable, and spacious. . . . It communicates that it’s in a law school building while still being able to fulfill a role that may not be a traditional law school role.” The room was the site of debates between candidates for U.S. Senate and for Wisconsin governor that were televised live statewide in October 2010.

“It’s pleasing that a lot of the things that were intended to be accomplished were in fact accomplished,” McChrystal said.

The new building took some getting used to, students said. Sensenbrenner Hall was small and crowded—but that also meant you saw anyone who was there. The student lockers were tiny and of limited use, but they were all in the same place. Eckstein Hall itself is





spacious, and, as students requested during the planning of the building, the lockers are almost as big as closets, but they're located in clusters around the building.

Jones said, "Now everything is so spread out. . . . But I wouldn't give up my huge locker for anything. So it's just a tradeoff."

Are there things to work on? Sure. McChrystal said he has some in mind, including improvements to the café's décor. Students suggested some things they'd like to see, such as more availability of coffee when the café is closed and more places to post notices of student activities. Several said that limiting the third and fourth floors of the building to Law School students and staff in the evening and on weekends was a big improvement—Eckstein Hall had become too popular among non-law students, presenting problems for getting study spaces. And everyone agreed they'd like more parking in the building—one wish that is not going to be granted (and some evidence of how quickly baselines change once one has even a little bit of something never dreamed of before).

But the sentiment that the building is a winner seems unanimous. And from outside the Law School community, Eckstein Hall has won recognition, including a Mayor's Design Award, a Wisconsin Builder's Award, and the *Milwaukee Business Journal's* Real Estate Project of the Year award. Dean Joseph D. Kearney received the Milwaukee Bar Association's "Lawyer of the Year" award, primarily for his work in leading the Eckstein Hall project (see separate entry to the right). The building has also received LEED Silver Certification as an internationally recognized "green" building. And WISN-TV (Channel 12 in Milwaukee) won a special commendation in the prestigious national Walter Cronkite Awards competition for the political debates hosted by Gousha last fall.

In Prigge's words, "This building sets the standard for law schools now." ■

Dean Kearney Urges "Attention

On June 14, 2011, Dean Joseph D. Kearney received the Milwaukee Bar Association's Lawyer of the Year Award, which recognizes "the lawyer whose activities and extraordinary accomplishments over the previous year reflect well not only on the award winner, but also on the profession in general." Michael J. Cohen, of Meissner Tierney Fisher & Nichols, presented the award, pointing particularly to the dean's leadership of the project of Eckstein Hall, which has occasioned much ongoing attention, enthusiasm, and activity on the part of the legal community in the region. Dean Kearney's acceptance remarks follow.

Thank you, Mike. I am very grateful for your kind comments. The award singles me out, but, as often, the Eckstein Hall project required great collaboration. So whether it is Tom Ganey and Mike McChrystal, respectively the University Architect and my faculty colleague who collaborated with me on this project from the beginning, or Christine Wilczynski-Vogel and John Novotny and Father Wild, administrative colleagues and the president of Marquette University, or Ray and Kay Eckstein or the other Marquette alumni and other lawyers or public citizens who contributed to this project, from Mike Grebe to the late Ralph Huiras and Joe Zilber to Jim Janz, Bob and Carol Bonner, Wylie and Bette Aitken, Natalie Black, Frank Daily and Julie Ebert, Joe and Sally Schoendorf, Stuart and Cindy Brotz, or any number of other folks whom time does not permit me to mention (truly), I am immensely grateful for the essential roles that so many in the Marquette Law School community, broadly conceived, played in the

to the Public Good” in Lawyer of the Year Remarks

implausible project of Eckstein Hall. On a more personal level, for my family—including my wife, Anne Berleman Kearney, a better lawyer than I, and our sons, Michael, Stephen, and Thomas, the first two of whom are here today—the support that it has given me has been indescribably magnificent.

To receive this award is a great privilege. Much of my work is only remotely comparable to the hard work that so many of you do in the legal profession on a daily basis. For example, my advocacy concerning Eckstein Hall has not been of the adversarial sort. In important respects, then, it has been easier than your own advocacy. Let me thus make clear the extraordinary admiration I have for those in the daily practice of law. My colleagues at Marquette, in the tradition of Jim Ghiardi, who is here with us today, feel similarly.

This is not to suggest that I think even my Eckstein Hall work to be wholly different from your work. The greatness of the legal profession lies not only in its practitioners’ primary activities—doing deals, righting wrongs, protecting freedoms—but also in their other pursuits. The lawyer is, frequently at least, a public citizen, keeping his or her eye on the public good.

The effort of and in Eckstein Hall concerns all aspects of the profession, including an attention to the public good even beyond the development of future lawyers. This is not a place to catalogue all the ways that we do this, but whether it is through our *Marquette Lawyer* magazine, our faculty blog, or our website more generally, I hope that we give you a sense of what we do. Moreover, I hope that you will join us in our efforts and our programs. So many have: it occurs to me that the three other individuals receiving awards today—Nathan Fishbach, Dick Gallagher, and Chief Judge Jeffrey Kremers, all of whom I want to congratulate—all have had occasion in the past 15 months, whether in the waning days of

“The greatness of the legal profession lies not only in its practitioners’ primary activities—doing deals, righting wrongs, protecting freedoms—but also in their other pursuits. The lawyer is, frequently at least, a public citizen, keeping his or her eye on the public good.”

Sensenbrenner Hall or the first year of Eckstein Hall, to be involved in panels or programming at the Law School.

Yet we are only scratching the surface. Greater accomplishment will require greater collaboration with many of you and with groups such as the Milwaukee Bar Association. For bar associations, such as this august one, are also illustrative of the dual phenomenon that I described concerning law schools: they seek to enhance the professional status, skill, and income potential of lawyers, yes, but they also tend to the larger public interest, welfare, and good.

Perhaps most prosaically, but not least importantly, Eckstein Hall and bar associations also provide occasions for us lawyers to gather. In this regard, I am reminded of another Milwaukee Bar Association event, which I always seek to attend. This is the Memorial Service, annually held on a Friday in early May, in which lawyers and others, including family members, gather at the Milwaukee County Courthouse to remember the careers and lives of lawyers who have died within the previous year. I warmly encourage all of you to join us at it next year. In any event, when Tom Shriner asked me some eight years ago to deliver the Memorial Address that particular year, because of my association with the late Howard

Eisenberg, I remarked in my address that I did not know that I would have a greater privilege as dean of the Law School. That remains true, but to receive this award—from the same impressive association of folks engaged in work that I so admire, the practice of law—comes awfully close.

Thank you. ■





The Street Law finals in Eckstein Hall's Appellate Courtroom: The trial may be moot, but the learning for the high school student participants is real.

Community Service

Opening the Door to the Legal System

Street Law program introduces high schoolers to law in daily life—and in a moot-court trial

The rhetoric of the attorneys for both sides was a bit overheated at times: “If there were no gun, Riley would still have fun,” the plaintiff’s attorney argued. The defendant’s attorney said, “Steven is a deadbeat father. . . . He wants his son to be the next Jeffrey Dahmer.”

But overall, the work of the attorneys, their clients, and the witnesses was nearly professional—and thus especially impressive, given that the participants were all Milwaukee high school students. The hour-long trial of *Steven Walker v. Lisa Brewster* before about 200 people in the Appellate Courtroom in Eckstein Hall ended with applause for the high-quality work of the teens. The

presiding judge, U.S. Magistrate Judge Nancy Joseph—the one “for real” person involved in the trial—praised the participants generously, including complimenting them on their professional attire and demeanor.

The trial was the final event in another successful year of the Milwaukee Street Law program at Marquette University Law School. Started in 2004, the program has given about 700 students at Milwaukee schools that generally serve low-income, minority students an introduction into how the legal system works and a chance to put what they have learned into action in a mock trial competition.

Notesong Srisopark Thompson, a lawyer who directs the program, summarizes the goals of Street Law in three words: “Expose. Inspire. Encourage.”

“We’re teaching them aspects of the law they’re going to see on the streets—hence the name, Street Law,” Thompson said. “We’re trying to teach them the reasoning behind the law.”

Street Law was launched at Marquette by Deanna Singh, a local lawyer who took part in such a program as a student at the Georgetown University Law Center, where Street Law was founded in the 1970s.

The program centers on law school students teaching three hours a week throughout a school

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—Notesong Srisopark Thompson, director of the Street Law program



year at participating Milwaukee schools. The first semester focuses on a general introduction to how the legal system works, often emphasizing subjects of particular interest to students, such as landlord-tenant law. The second semester is built around developing a team from each school to put on a mock trial. In the 2010–2011 school year, seven Marquette law students worked at six schools.

“Street Law has been the most significant thing I’ve done in law school,” said Matt Spangenburg, who worked last year at the New School for Community Service, a small Milwaukee Public Schools high school within walking distance of Eckstein Hall. Spangenburg said he signed up because “I thought it was a way to give back.”

Spangenburg, now a third-year law student, said he felt that his students learned a lot and left behind “wild ideas” that some had had before they got involved in the program. Spangenburg said that he gained, too, improving his ability to explain processes and legal terms, which is likely to be helpful in future work with clients.

Sheila Shadman taught Street Law at Tenor High School, a charter school in downtown Milwaukee, in 2009–2010. She built close relationships with students and called her involvement “a life-changing experience.” Teaching was much harder than she thought it would be, but she saw students who had felt they couldn’t succeed nonetheless accomplish a lot. “Ultimately, they challenged themselves and each other,” she said, and they won the mock trial competition that year.

The law students are themselves coached in their teaching by attorneys from several Milwaukee law firms, as well as by Thompson and Evan Goyke, a lawyer who helps direct Milwaukee Street Law.

The moot-court case from this past spring was built around a 13-year-old boy taking, without permission, a handgun belonging to his mother’s boyfriend and bringing it along on a weekend visit to the home of his father. While the father was at a neighbor’s house, the 13-year-old and his five-year-old half-brother scuffled over the gun. It went off, leaving the five-year-old a paraplegic. The father sued the mother, seeking compensation for past and future medical costs and loss of the boy’s companionship and services, on the grounds that the mother had been negligent in supervising the 13-year-old and in storage of the handgun in her home. The mother’s defense included claims that the father had not supervised the children properly at the time of the incident and that the father had been a bad parent to the 13-year-old and had encouraged the child’s interest in guns.

Sound complicated? In the finals, Spangenburg’s team faced off against a team from the HOPE School, a Christian school on Milwaukee’s north side. Each team took a side and effectively presented its case, including opening and closing arguments, testimony from witnesses to the incident and from expert witnesses, and introduction of evidence about Wisconsin law on storage of firearms. There was even an objection by one “attorney,” sustained by Judge Joseph. A jury, largely made up of Marquette law students, awarded the father 80 percent of what he had sought. And the championship went to the HOPE School.

“The students walk out of the mock trial feeling like scholars,” Thompson said. Those who watched this year’s final-round trial certainly agreed. ■



After the trial and before an awards luncheon, the winners—which is to say, everyone involved—pose for a photo in the courtroom.

Pro Bono Involvement Leads to Huiras Law School Citizen Award

Heidi Gabriel majored as an undergraduate in global cultures, French, and Spanish. She wanted to do something with an international connection after she graduated from the University of Wisconsin–Madison.

She became a travel agent in the Madison area, but that wasn't enough for her, and, after a few years, she pursued the idea of going to law school, which led her to enter Marquette University Law School in August 2010. With that, she found not only a program that she quickly came to love but, even immediately, the start of the kind of meaningful international connection that she had sought.

Gabriel got involved in the Law School's pro bono program, working in the Marquette Volunteer Legal Clinic at the Council for the Spanish Speaking on Milwaukee's south side. Using her fluency in Spanish, she assisted lawyers who worked with people whose problems ranged from family matters to small claims to immigration issues. "When I'm volunteering, I feel that I'm helping people with something really important to them," she said. "It reinforced the reason why I decided to go to law school. You can't put a price on it because you can't experience those same things in the classroom." Gabriel took a leading role in the pro bono program—she is a student coordinator of the program now that her second year of law school has started—and a leading role in her class.

One result: Last spring, she became the recipient of the first Ralph J. Huiras Law School Citizen Award, which includes a full-tuition scholarship for Gabriel's second year in law school. The late Ralph J. Huiras was an alumnus of Marquette Law School, and he and his family have a long history of great generosity to the school. The Huiras Lounge on the second floor of Eckstein Hall, just outside the dean's office, remembers Ralph, L'41, and his father, Peter Huiras, L'18. The new award is designed by the Huiras Foundation, led by Ralph's former law partner, Bill Farrell, L'68, as an annual tribute that will perpetuate Huiras's legacy of service to the legal profession and service to the community—and his affinity for the development of Marquette law students.



Gabriel was one of three students nominated for the award by faculty and administrators. She was selected in a vote among members of her first-year class.

Elliott Thron and Erika Frank Motsch, who were also nominated for the award, will receive partial scholarships for their 2L years.

"I'm not used to receiving awards like this," Gabriel said. "I'm so humbled that anyone would even consider me." She said that she hopes the award serves to spotlight pro bono work.

Gabriel, now 30, grew up in Waunakee, north of Madison. While in college, Heidi Hartung (as she then was) worked at the well-known Nitty-Gritty restaurant on the Madison campus, where she met Tony Gabriel, who worked there also. They were married last New Year's Eve.

Gabriel said she was concerned when she began law school that she wouldn't find many students who were starting "late," as she believed herself to be. But there were more than she thought, and she praised her classmates as friendly, supportive, and helpful. Law school, she said, "has exceeded my expectations by bounds and bounds." Now, with the help of the Huiras Award, she can pursue her goals, including involvement in internationally related issues, with less worry about the cost of her dream. ■

Recently Published Faculty Scholarship

Ralph C. Anzivino, “Drafting Restrictive Covenants in Employment Contracts,” 94 Marq. L. Rev. 499 (2010).

Alison Barnes, “Prevention Paradigms, Over-Diagnosis and Treatment, and Mad Men,” 12 Marq. Elder’s Advisor 1 (2010).

Daniel D. Blinka, “The *Daubert* Standard in Wisconsin: A Primer,” Wis. Lawyer, March 2011, at 14.

Irene Calboli, “The Case for a Limited Protection of Trademark Merchandising,” 2011 Ill. L. Rev. 865.

Irene Calboli, “Market Integration and (the Limits of) the First Sale Rule in North American and European Trademark Law,” 51 Santa Clara L. Rev. 1241 (2011).

Patricia A. Cervenka & Leslie Behroozi, *Wisconsin Legal Research* (Carolina Academic Press, 2011).

Edward A. Fallone, “Funding Stem Cell Research: The Convergence of Science, Religion & Politics in the Formation of Public Health Policy,” 12 Marq. Elder’s Advisor 247 (2011).

Jay E. Grenig, “Panning for Gold: Social Networking’s Impact on E-Discovery,” Wis. Lawyer, Feb. 2011, at 12 (with Richard J. Sankovitz and William C. Gleisner III).

Jay E. Grenig, *Fundamentals of Labor Arbitration* (American Arbitration Association and the Cornell University School of Industrial and Labor Relations, Scheinman Institute on Conflict Resolution, 2011) (with Rocco M. Scanza).

J. Gordon Hylton, *A Concise Introduction to Property Law* (Lexis Law Publishing, 2011) (with David Callies, John Martinez, and Daniel R. Mandelker).

J. Gordon Hylton, “The Over-Protection of Intellectual Property Rights in Sport in the United States and Elsewhere,” 21 J. Legal Aspects of Sport 43 (2011).

Kali Murray, “Dynamic Patent Governance in Europe and the United States: The Myriad Example,” 19 Cardozo J. Int’l & Comp. L. 287 (2011) (with Esther van Zimmerman).

Michael M. O’Hear, “The Beginning of the End for Life Without Parole?,” 23 Fed. Sent. Rep. 1 (2010).

Matthew J. Parlow, “Revolutions in Local Democracy? Neighborhood Councils and Broadening Inclusion in the Local Political Process,” 16 Mich. J. Race & L. 81 (2010).

Andrea Kupfer Schneider & Natalie C. Fleury, “There’s No Place Like Home: Applying Dispute Resolution Systems Design Theory to Create a Foreclosure Mediation System,” 11 Nev. L.J. 368 (2011).

Paul M. Secunda, “The Contemporary ‘Fist Inside the Velvet Glove’: Employer Captive Audience Meetings Under the NLRA,” 5 FIU. L. Rev. 385 (2010).

Paul M. Secunda, “Foreword: The Future of OSHA Reform,” 14 Employee Rights & Employment Pol’y J. 231 (2010).

Paul M. Secunda, “*Pickering v. Bd. of Education*: Unconstitutional Conditions and Public Employment,” in *First Amendment Law Stories* (Richard Garnett & Andrew Koppelman eds., 2011).



Selected Additional Faculty Activities

Bruce E. Boyden presented papers at Boston University Law School, Rutgers University, and the Global Privacy Summit of the International Association of Privacy Professionals.

Irene Calboli presented papers at the DePaul University College of Law, John Marshall Law School, University of Nevada, Las Vegas, and University of Tennessee Law School.

Jay E. Grenig presented at programs on electronic discovery and on mediation for the Milwaukee Bar Association.

Lisa A. Mazzie served as a panelist at the annual meeting of the Southeastern Association of Law Schools and delivered a presentation at the Southeast Regional Legal Writing Conference.

Matthew J. Mitten served as a moderator and reactor at the 2011 Scholarly Colloquium on College Sports and as a panelist at the Annual Spring Conference of the ABA Section of Dispute Resolution and at the LawAccord International Convention.

Kali Murray presented papers at McGill University and the annual meeting of the Association of Law, Property and Society. She also served as moderator and organizer for a panel presentation at the annual meeting of the Association of American Law Schools.

Michael M. O'Hear was reappointed to the Milwaukee Fire and Police Commission.

Chad M. Oldfather presented a paper at the Midwest Artificial Intelligence and Cognitive Science Conference.

David R. Papke presented a paper at the International Family Law Society Annual Conference.

Matthew J. Parlow presented a paper at the DePaul University College of Law.

Paul M. Secunda presented papers at Université de Paris Ouest Nanterre la Défense, Université Paris-Est Créteil, and Katholieke Universiteit Leuven Faculty of Law in Belgium.

Phoebe W. Williams was named one of the *Wisconsin Law Journal's* 2011 Women in Law.

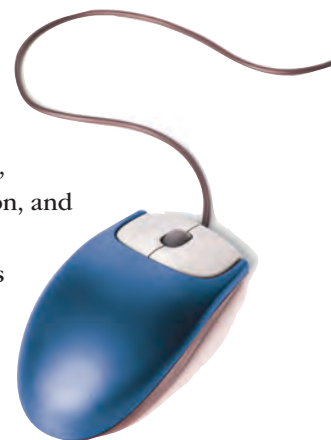
A New Home for the Law School—on the Web

Marquette University Law School has an impressive and exciting brand-new home. No, not Eckstein Hall—it's impressive and exciting, but it opened a year ago. This year, the new home is on the Internet. With the opening of the school year in August, the Law School debuted its redesigned Web site at law.marquette.edu.

Easier to navigate, more contemporary in look, the new Web site offers a wealth of resources for students, faculty, alumni, the legal community, and the community at large. Included are schedules of events in Eckstein Hall, information on everything from admission through graduation, access to information about how to benefit from the Eckstein Law Library online as well as in person, and the popular Faculty Blog with commentary on current legal issues.

Electronic versions of Law School publications, including the *Marquette Law Review*, publications of the National Sports Law Institute, and *Marquette Lawyer* magazine, are also available.

The Law School has aimed in recent years to be a crossroads for public discussion and programs; the new Web site will advance this. Information is easily accessible on upcoming events, including "On the Issues" programs hosted by Mike Gousha, distinguished fellow in law and public policy. Many of those events will be streamed live on the Web site, and there is an archive of recordings of past events. Please visit us. ■



Terry Evans: A Judge True to His Milwaukee Roots

As a judge, Terence T. Evans was widely known for his levelheaded wisdom and his ability to explain his decisions in commonsense language that was clear to non-lawyers as well as lawyers. As a person, Terry Evans was widely known for his humor, the zest he brought to all he did, and his love of family, friends, sports, and his work.

Evans, L'67, one of the most prominent graduates of Marquette University Law School, died in August, less than a month after being diagnosed with a lung disease, idiopathic pulmonary fibrosis. He was 71.

Evans served on the U.S. Court of Appeals for the Seventh Circuit from 1995 until his death. Previously, he was a federal judge for the Eastern District of Wisconsin and a Milwaukee County judge.

Evans was raised by his mother in meager economic circumstances in Milwaukee's Riverwest neighborhood, becoming a track star at Milwaukee Riverside High School and at Marquette University. He was loyal to his hometown. He continued to live in Milwaukee after joining the federal appeals court, based in Chicago, and took part in the life of the city in as many ways as he could, from his ardent following of the Milwaukee Brewers to his love for local golf courses to his close attention to local politics and news, and especially to his large network of friends.



Judge Terence T. Evans (foreground) is seen sharing a light moment with his fellow Seventh Circuit Judge (and former law clerk) Diane S. Sykes, L'84, and Mike Gousha, distinguished fellow in law and public policy, at Marquette Law School on April 16, 2008.

In a statement, Chief Judge Frank H. Easterbrook of the Seventh Circuit said of Evans, "People can reasonably debate whether he was better at golf or law; his friends know that he did both very well indeed." U.S. Sen. Herb Kohl said Evans "represented the best of Milwaukee."

The Law School joins his family and friends in mourning Terry Evans. ■

Vehicle traffic outside, idea traffic inside Eckstein Hall

The traffic in ideas at the Marquette interchange will be heavy this fall, not only in classrooms but in public policy sessions. Law, politics, urban issues, education—all will be on the agenda at Eckstein Hall.

Highlights of the popular "On the Issues with Mike Gousha" series of hour-long conversations at lunch time will include:

October 11: Abby Ramirez, executive director of Schools That Can Milwaukee.

October 18: Jim Santelle, United States Attorney for the Eastern District of Wisconsin.

October 25: Will Allen, founder and CEO of Growing Power, an urban agriculture program in Milwaukee. Allen is a recipient of a John D. and Catherine T. MacArthur Foundation "genius" award.

November 8: Ellen Gilligan, president and CEO of the Greater Milwaukee Foundation.

Gousha, the Law School's distinguished fellow in law and public policy, also will host a session with U.S. Sen. Ron Johnson, a Republican, and one with U.S. Rep. Gwen Moore, a Democrat. Robert Weisberg, a law professor at Stanford, will speak on "Reality-Challenged Philosophies of Punishment" in the annual Barrock Lecture on **October 6**, and Margaret Raymond, the new dean of the University of Wisconsin Law School, will give the annual Boden Lecture on **November 8**.

All sessions are free and open to the public. For more information, go to law.marquette.edu.



National Attraction

Vibrant and Mature, Marquette's Pioneering Sports Law Institute Draws Students from Coast to Coast

Tori Watson grew up in Texas. She got a bachelor's degree from Abilene Christian University and a master's degree from Baylor. Her first choice for her next destination? Milwaukee and Marquette University Law School.

Lauren Malizia got her undergraduate degree at Virginia Commonwealth University in her hometown of Richmond, Va., and had no connection to Wisconsin. She's now a second-year student at Marquette Law School. "It's great," she said. "I love it."

Sarah Padove grew up in northwestern Indiana and went to Indiana University. Next? "This was what I wanted to do," she said of Marquette Law School, where she is now a third-year student.

They are part of a wave that has been picking up momentum for more than two decades: students from across the country who have made the Law School their first choice because of its distinguished and distinguishing program in sports law.

Now 22, the National Sports Law Institute, which is part of the Law School, has come of age. It is closely bonded with the sports law program itself, which has its roots in courses that were offered in the decade leading up to the NSLI's formal establishment in 1989. Together, they are impressive, confident adults, with bright futures.

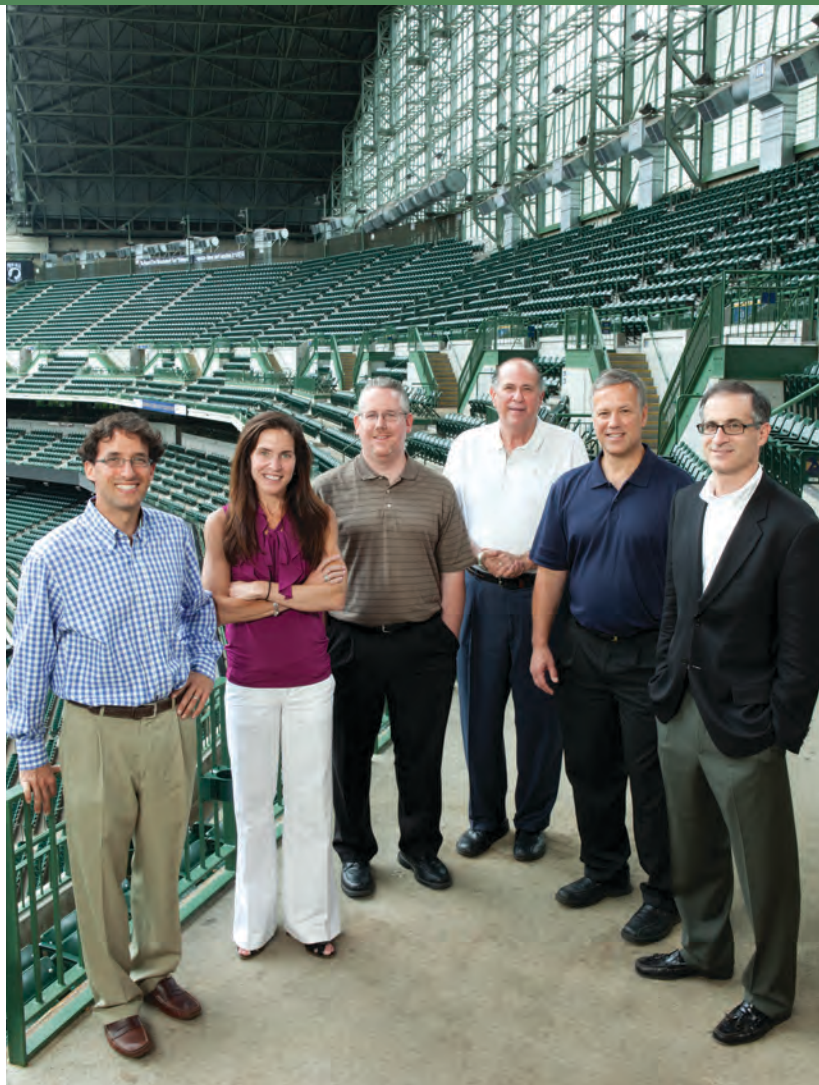
The heart of sports is competition. The heart of law schools is to help people form themselves into lawyers. But the law school world also has its competitive aspects. Having programs that make an institution stand out and that attract top-notch students from across the country is important. For Marquette University Law School, sports law is such a standout.

In many ways, sports law is simply a lot of fields of law applied to sports issues—contracts, torts, labor, intellectual property, taxation, antitrust, business law, and so on. Professor Matt Mitten, director of the Marquette's National Sports Law Institute, said that the course in amateur sports law which many second-year students take touches on some 12 areas of the law.

But with the always-increasing general interest in sports nationwide, the additional amounts of money involved, and the enhanced complexity of issues that arise, the need for legal involvement in sports has grown. What unfolds off the field, it seems, is often at least as important as what happens on the field.

Consider some of the major sports stories of this year: The National Football League dispute over a new collective bargaining agreement between owners and players, resolved in late July after a lockout that began in February; the National Basketball Association labor-contract dispute, which continues at this writing; the also-continuing saga of ownership and control of the Los Angeles Dodgers baseball team, which even has brought divorce law into the sports picture; and the deep troubles of numerous football teams, arising from violations of National Collegiate Athletic Association rules.

All of those situations—and many more instances, often routine—put lawyers in pivotal positions. "Sports, at bottom, rests on a series of agreements," Mitten said. Creating, interpreting, enforcing, renegotiating, and disputing agreements—all of this is the arena of lawyers. ▶▶



A successful season for the Milwaukee Brewers on the field, a successful relationship between the Brewers and Marquette University Law School off the field: Left to right, Teddy Werner, Brewers' senior director of business operations; Marti Wronski, vice president and general counsel of the team; Professor Paul Anderson, associate director of the National Sports Law Institute; Adjunct Professor Marty Greenberg; Professor Matt Mitten, director of the NSLI; and Rick Schlesinger, the Brewers' chief operating officer. The three Brewers' officials, all lawyers, teach a course, "Legal and Business Issues in Baseball," at the Law School.

THE ORIGINS OF MARQUETTE'S PROGRAM

The birth of the sports law program at Marquette can be traced to Martin J. Greenberg, L'71, a Milwaukee lawyer who has been an adjunct faculty member at the Law School since 1973, when he began teaching a real-estate law course. Greenberg was a passionate fan of Marquette sports and was personally close with people such as then-basketball coach Al McGuire.

Greenberg said that in about 1978, he went to a conference in Ft. Lauderdale, Fla., on regulation of sports, which brought together sports agents, officials from sports teams, and others. It hit him at the conference that sports law was going to be a big field in coming years. He came back to Milwaukee and told then-Dean

Robert F. Boden that the Law School "should get ahead of the game by offering a sports law course." Greenberg taught the first such course, "Negotiating and Drafting of Personal Service Contracts," in 1979.

As law became more central to sports through the 1980s, Greenberg worked to conceive the idea of a sports law institute. He took the idea to then-Dean Frank C. DeGuire and Professor Charles W. Mentkowski. Greenberg said that an institute not only could provide specialty courses, but could make the Law School a center of legal scholarship around sports issues and a resource on the subject for attorneys and others around the United States. DeGuire encouraged Greenberg to seek external funding for such a center.

With the help of Mentkowski and others, Greenberg solicited—and gained—the support of key sports leaders throughout the state, beginning with officials of the Green Bay Packers and including Allan (Bud) Selig, then president of the Milwaukee Brewers and now commissioner of baseball. The National Sports Law Institute, the first effort of its kind in the United States, was unveiled in February 1989, and Greenberg was its director for eight years. Initially met with some skepticism even within the

Law School and housed in a separate building, the NSLI came to be a central part of the Law School's identity.

Along the way, the program has also received support from others with longtime connections to the Law School and the larger University. For example, Joseph E. Tierney III, L'66, his wife, Kay, Journalism '66, and his sister, Mary Alice Tierney Dunn, Speech '72, support a number of partial scholarships for editors of the *Marquette Sports Law Review*. They are following a tradition established by the late Joseph E. Tierney, Jr., L'41, and his wife, the late Bernice Young Tierney, Journalism '37.

In the late 1990s, then-Dean Howard B. Eisenberg decided that if the program was to improve, it needed to

“The heart of sports is competition. The heart of law schools is to help people form themselves into lawyers. But the law school world also has its competitive aspects. Having programs that make an institution stand out and that attract topnotch students from across the country is important. For Marquette University Law School, sports law is such a standout.”

be headed by a full-time professor. Greenberg said that this “made all the sense in the world.” That led to Mitten’s leaving a tenured position at South Texas College of Law in Houston and joining Marquette Law School in 1999. “Matt Mitten has meant enormous things to the program, as far as growth,” Greenberg said. “I think we gave them a good foundation and Matt has taken it to the next level.”

A WIDE-RANGING AND VARIED PROGRAM

Mitten said that the program now offers 14 courses. A number of full-time faculty members offer one or more courses involving sports law, and the adjunct faculty is also extensive. The former include Professor Matt Parlow, associate dean for academic affairs, and Professor J. Gordon Hylton. The adjunct faculty includes three top officials of the Milwaukee Brewers. Rick Schlesinger, chief operating officer; Marti Wronski, vice president and general counsel; and Teddy Werner, senior director of business operations—all lawyers—are teaching a course this fall, “Legal and Business Issues in Baseball.”

The most prominent of the adjunct faculty: Bud Selig, who has led baseball since 1992. He was named distinguished lecturer in sports law and policy earlier this year. Selig has been a supporter of the National Sports Law Institute since its founding and has given several lectures to law students each spring since 2009. He teaches, together with Mitten, a course in professional sports law. In a recent conversation, Selig said that he enjoyed teaching at the Law School and has been impressed by the quality of the students and the quality of the questions he gets from them.

Baseball Commissioner Allan (Bud) Selig was named distinguished lecturer in sports law and policy at the Law School in 2011. Selig has supported the sports law program since its founding in 1989. ▶

Joe Trevino, current editor-in-chief of the *Marquette Sports Law Review*, said, “I can’t imagine there’s another school that has a professor anything like Bud Selig. His coming to class is just an unbelievable experience.”

“Marquette was an easy choice because it is far and away the best sports law program in the country,” said Trevino.

Course work is only part of the program. If you want the whole experience, and particularly if you want to be one of about 25 law graduates each year who earn a National Sports Law Institute specialty certificate, there are multiple aspects to the program, including:

Internships. More than a dozen professional sports teams, universities and colleges, and other organizations with involvement in the sports world regularly bring Marquette Law School students to work alongside professionals on the legal aspects of their businesses. Peter Prigge, for example, has worked in his first two years in law school in the athletic departments at Marquette and at the University of Wisconsin–Green Bay, and has taken part in research work of the National Sports Law Institute itself. He said that the internships are valuable ▶▶



not only for the experience, but for what they will do to improve his appeal to potential employers. “My experience will help separate me from other people,” he said.

Marquette Sports Law Review. The review publishes articles on sports law, business, and ethical issues written by law professors, sports lawyers, industry professionals, and students. Participation in the review is a requirement for receiving the specialty certificate. It is an established part of the program, having been set up in 1989.

The Sports Law Society. Some students refer to it as the social arm of the program. It is the largest such organization in the Law School, with more than 100 student members at any time. It offers frequent programs, including both professional-development sessions and social opportunities such as trips to sports events. Many first-year students who intend to become part of the sports law program get involved, even though they can’t begin taking sports law classes until their second year.

The annual conference on sports law. A major event for the program, the conference over the years has featured many of the leading experts on sports and law, discussing such matters as gender equity, labor, antitrust, and intellectual property law in sports. This year’s conference is scheduled for October 21 at Eckstein Hall.

Students interested in sports law are required to meet the same first-year requirements as other students. In their second year, they can take two courses that are prerequisites for enrolling in all other sports law courses. The two courses are introductions to amateur sports law and professional sports law. About a quarter of all students in the Law School take at least one of the introductory courses. Advanced courses include sports industry taxation, comparative and international sports law, and practical workshops in college sports, professional sports league governance, and sports marketing.

Mitten said he would like to see the program continue developing its international dimensions, noting that the sports industry is becoming more globalized. Pursuant to an agreement with the United States Olympic Committee, the National Sports Law Institute is creating an electronic digest and summary of Court of Arbitration for Sport awards, which are forming a body of Olympic and international sports law precedent

In pursuit of its international goals, the Law School also has

begun offering a one-year program leading to a master’s degree (LL.M.) in sports law, open to lawyers from other countries. So far, two people have completed the degree, one from Japan and one from Canada.

The research focuses for students involved in the program have included a database of contracts of college coaches, built under the leadership of Professor Paul Anderson, associate director of the sports law program. The database of more than 400 contracts is believed to be one of the most thorough of its sort in the country. When *USA Today* did a series of stories on compensation for college football and basketball coaches in 2010–2011, the National Sports Law Institute became a partner with the newspaper and the source for most of its data.

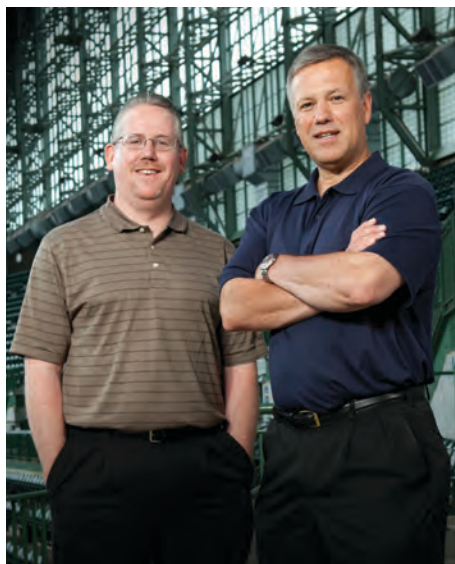
“College coaching contracts are unique,” Anderson said. “They are not typical employment contracts.” The compensation for coaches often includes pay for work connected to summer sports camps, athletic shoe deals, and television programs featuring the coach.

GRADUATION

As much as sports has boomed, the number of jobs in which a legal background is *required* remains relatively small. And entry-level jobs in the professional sports industry are especially difficult to find, mainly because sports entities rarely hire lawyers out of law school, drawing more often from lawyers with practice experience. The situation for jobs in collegiate athletics is more promising, Anderson said.

Many of the current students know it will be a challenge to get a good position. But they are also confident that what they are learning in the program can be valuable in positions not directly related to sports.

“The reality is that many value the program for adding to their training as future lawyers and for providing them with a way to learn about the law in the context of something they find interesting, the sports industry,” said Anderson. Mitten observed, “Most sports law program alumni are engaged in the practice of general or specialized law with firms, which may or may not have some sports-industry clients. But virtually all of the knowledge and skills learned in sports law courses can be readily transferred to representing clients in other industries.”



◀ Professor Paul Anderson and Professor Matt Mitten

“The Marquette University Law School sports law program is a world quality think tank relative to all sports—from amateur to professional to international.”

—Shawn Eichorst, L'95

Director of Athletics at the University of Miami

One often-valuable plus connected to the sports law program: Marquette's Sports Law Alumni Association, created in 1997. It is a resource for networking for both graduates and current students, not only in finding job opportunities but in staying in touch with what is happening in the field, based on other people's experiences, and in maintaining social connections among graduates.

Shawn Eichorst, L'95, recently named director of athletics at the University of Miami, called the National Sports Law Institute “a world quality think tank relative to all sports—from amateur to professional to international.” Eichorst termed his experience in the Law School exceptional. “The people, the coursework, and the city were outstanding,” he said. “I was exposed to a great environment, and we had passionate educators.”

Eryn Doherty, L'00, was deeply involved in the sports law program as a student and loved it. She is not involved in sports law now—she is assistant general counsel and executive director for labor relations for Sony Pictures Entertainment in Los Angeles. But she remains a big fan of the program. “It pointed me in the direction of the field I'm practicing in, which is labor law,” she said.

In her first year out of Law School, Erica Reib, L'11, is working for a small law firm in Mequon, Wis., doing employment law. She said that she likes both the job and living in the Milwaukee area, which would never have been the case if the Law School hadn't drawn her from her native Pennsylvania.

“It worked out really well,” Reib said of her Law School experience, which included being editor-in-chief of the *Marquette Sports Law Review*.

Jaime McGaver, L'07, is one of several graduates working in a growing field: overseeing compliance by college programs with both the law and the rules of the NCAA. She is assistant director of compliance for Marquette. McGaver said that she has seen a shift in compliance work in favor of hiring people with law degrees. “A lot of this stuff is written by lawyers for lawyers,” she said. With a law degree, “you're able to approach things with an understanding of what are the negatives and what are the right routes to go through in problem-solving.”

Her law degree and the sports specialty background allow her to bring a wider range of abilities to an employer, McGaver said. “The more hats you can wear, the more people are going to want to keep you around.” Sports law alumni also can be found overseeing other parts of collegiate athletics departments, ranging from marketing to academic success.

Michael Sneathern, L'02, grew up in southern California. “I'm one of the many who have been attracted from across the country,” he said. “The sports law program is the primary reason why people from outside the region, outside the Midwest and Milwaukee and the state of Wisconsin, come to Marquette Law School.”

Sneathern got an internship with the Milwaukee Bucks as part of his Marquette Law School experience, and he has stayed on. He is now associate general counsel for the basketball club.

“Having had no connection to it, Milwaukee might have been the last place I thought I'd live,” Sneathern said. “The sports law program and the school led me here.”

As the director, Mitten wants to see the sports law program build step by step on its success, continuing to attract people to Marquette and Milwaukee. With the opening of Eckstein Hall a year ago, the National Sports Law Institute is in a better physical setting than ever and is ready to pursue a path of steady growth and improvement in quality, Mitten said.

And that's what you'd want of a young adult, isn't it? To pursue quality, to show maturity and steadiness of purpose, to focus on accomplishing big things, to contribute to the world. At 22, the sports law program is doing those things.

“It's the best in the country,” said Craig Pintens, L'01, senior associate athletic director for marketing and public relations at the University of Oregon.

“I would call it a resounding success,” said Greg Heller, L'96, senior vice-president and general counsel of the Atlanta Braves. “It's been very well received nationally, and what it's done for the Law School and the University as a whole has been tremendous.” He said that he is glad he was part of the program and glad he's still involved with it.

For Greenberg, “It's all like a dream come true.” ■

Get Smart?

By Alan J. Borsuk

Milwaukee County moves to the front of a national effort to apply data from thousands of cases toward making better criminal-justice decisions, reducing incarcerations, holding down costs, and making the community safer.

When Milwaukee County District Attorney John Chisholm came to Marquette Law School's Eckstein Hall this past February to deliver what he considered a significant message on the future of the justice system in Milwaukee, he hoped to find or establish some common ground. "Both sides of the political spectrum must acknowledge that talking tough on crime has reached its limits," Chisholm said that day in February. "Being smart on crime is the solution."

Chisholm had specific proposals that he wanted to see adopted. But his speech also raised underlying broad questions:

What are the *smartest* ways to fight crime? How strong is the evidence that they are, indeed, smart ideas? Can we really hold down costs while maintaining and improving public safety? Do Milwaukee and Wisconsin have the political will to undertake changes, some of which might trigger strong political opposition? What if all of the leaders who have central roles in fighting crime and dealing with its aftermath worked together on finding ways to get the most beneficial results from what they are doing?

The last question is the one where the response is clearest. Chisholm is a key figure in a collaboration that has brought together judges, prosecutors, defense lawyers, law-enforcement leaders, politicians, and others involved in the criminal-justice system. They formed the Milwaukee County Community Justice Council in 2007

as part of the settlement of lawsuits resulting from overcrowding in the Milwaukee County Jail and the county's House of Correction.

The council has developed into the engine for efforts to find answers to the other questions.

Its efforts are attracting national support and praise from advocates of "evidence-based deci-

sion making," the jargony term for getting "smarter" in deciding what to do at key points in the criminal-justice process. In August, the Milwaukee effort was one of only three initiatives around the country to win a grant competition through the U.S. Department of Justice's National Institute of Corrections (NIC); the grant will provide technical assistance to develop projects such as improved screening of people as they enter the criminal-justice system. One of the two other winners is Eau Claire, Wis. (The third is Mesa County, Colo.)

Lori Eville, one of five members of the federal panel that selected the winners, said, "That both Eau Claire and Milwaukee counties were chosen for these awards



John T. Chisholm, Milwaukee County District Attorney





At an August meeting of the executive committee of the Milwaukee County Community Justice Council (clockwise from lower left): Milwaukee County Chief Judge Jeffrey A. Kremers; Kit Murphy McNally, retired executive director of the Benedict Center, a nonprofit agency; Milwaukee County Sheriff's Inspector Richard Schmidt; Milwaukee County Sheriff, David A. Clarke Jr.; Milwaukee County Supervisor Willie Johnson, Jr.; Thomas J. Reed, State of Wisconsin First Assistant Public Defender; Milwaukee County Executive Chris Abele; and (in the center) Milwaukee County District Attorney John T. Chisholm.



Chief Judge Jeffrey A. Kremers,
Milwaukee County Circuit Court

“We are on the cusp of making some pretty significant changes in the criminal-justice system in how we do business.”

is reflective of what they have been able to accomplish, which not many other jurisdictions across the United States have achieved.” Eville, a specialist with the U.S. Bureau of Prisons, manages the grant program.

Describing the initiative at a recent public-safety forum on the northwest side of Milwaukee, Chief Judge Jeffrey A. Kremers of the Milwaukee County Circuit Court told about 100 people, “We are on the cusp of making some pretty significant changes in the criminal-justice system in how we do business.”

Up to now, the Milwaukee council has worked with the National Institutes of Corrections on developing a framework for the council and setting priorities for its work. The new grant is aimed at implementing four projects that were at the top of the priority list: namely, more-extensive training of Milwaukee police officers in how to deal with people with mental illness; development of better ways to determine the risk and needs connected to diverting perpetrators into alternative programs; implementation of protocols now being developed for determining who should be released from jail without bail in advance of disposition of a case; and development of a “dosage-based” probation plan that would emphasize giving people with drug addictions or similar issues specified amounts of treatment rather than probation for specific periods.

Put the four together and justice council leaders believe that the number of people being held in jail or prison—already in decline in recent years—can be cut further, saving large amounts of money while maintaining or improving public safety. Judge Richard J. Sankovitz, presiding judge in Milwaukee County’s criminal division, said that the goal is to close the equivalent of one dormitory at the corrections facility in Franklin (previously known as the House of Correction).

But put them together and you also have a lot of sensitive issues and potential controversy.

Rob Henken, president of the Public Policy Forum, a nonprofit organization that researches and monitors government trends, said, “I have rarely seen this level of collaboration and this thoughtful an attempt to just step back and take a systemic examination of an important piece of local government.” Henken, who has assisted the justice council’s work, said that using data and factual information to drive decision making, rather than using intuition and political whims, could only lead to good things.

But calls such as Chisholm’s at Eckstein Hall for “smarter” decision making brought a strong reaction from Milwaukee County Sheriff David A. Clarke Jr., who responded with a column in the *Milwaukee Journal Sentinel*. It began: “Here they come again. Criminal sympathizers, armed with claims of ‘studies’ conducted by academic elites, are once again exploiting a period of declining crime rates to indoctrinate the public with their soft-on-crime agenda.” Clarke is a member of the justice council and has supported some—but obviously not all—of the council’s work.

Just what is “evidence-based decision making”? Ask a range of those involved in the issue and you’ll get varying definitions—and varying opinions on how strong the evidence is. In this context, the term “evidence” does not mean the case-specific facts that one might present during a trial. It means finding the historical outcomes of numerous analogous decisions made at key points in previous criminal-justice matters—decisions such as whether to release someone on bail and on what terms—and then using those outcomes to improve the decision in the next criminal case.

In short, evidence-based decision making rests on large-scale data analysis and making good use of what is learned from that analysis. For example, the council has been working with outside experts to develop a system for assessing people as they come into the criminal-justice system, in order to guide decisions on bond and conditions for

MILWAUKEE COMMUNITY JUSTICE COUNCIL

Milwaukee effort sets sights on better decisions at key points in criminal process

In its successful application to be selected as one of three places in the nation receiving advanced assistance from the National Institute of Corrections in pursuing initiatives involving evidence-based decision making, leaders of the Milwaukee County Community Justice Council outlined four goals they want to achieve by the end of 2013:

- Expand a program for training Milwaukee police officers in how to respond effectively to people with mental illness, including training dispatchers and booking officers. The goals: "Reduce by 25 percent the number of people with mental health needs who lose their benefits due to being jailed or losing housing and increase by 25 percent the number of individuals with mental health needs who are reconnected to the services they need within 20 days after arrest."
- Use risk/needs information to pinpoint cases for diversion or deferred prosecution. "The key to an effective strategy for diverting or deferring prosecution is knowing which cases are suitable for this expedited handling and which cases are not," the proposal says. The goals: "Safely release and/or supervise 15 percent more pretrial detainees in the community rather than in jail, generating at least \$1 million in savings . . . and at the same time reduce by at least 40 percent the already low rates at which defendants waiting for trial fail to follow pretrial rules."
- Adopt more rigorous risk/needs management of pretrial population. The proposal says that, currently, bail hearings include only two pieces of information: the charge and the defendant's criminal history. It says, "Bail decisions tend to be ad hoc and driven by intuition and unanchored professional judgment." Use of a more sophisticated "actuarial instrument" that has been developed for Milwaukee could change that. The goal: "Divert or defer prosecution in 10 percent more cases than we do currently . . ."
- Adopt a "dosage-based" probation plan. The proposal says, "There is a growing body of research that likens probation services to medicine and predicts that after a certain dosage, further services and supervision are unnecessary." The goal: "Demonstrate in a pilot project that by terminating probation as soon as an offender in need of treatment has received sufficient treatment, we can cut the cost of probation by at least 50 percent and at the same time reduce probation recidivism by 50 percent."

“The only thing the habitual criminal truly understands is the force of law through swift and certain consequences—and that means incarceration.”



David A. Clarke Jr., Milwaukee County Sheriff

pretrial release. Drawing from systems used elsewhere and from analysis of outcomes of pretrial decisions in hundreds of local cases, the council is close to launching a new protocol. It will call for making a risk assessment of each person: this will be based on factors such as the number of previous criminal-case filings against that person, the prior record of appearing in court, and whether the person is employed or is a primary caregiver. Points will be awarded based on the answers, and the total number of points will place each person in one of four categories for rating the risk he or she presents. That risk rating will then be weighed against the type of offense involved. Judges will be able to work from a grid in making decisions on bond and the conditions for any release (such as supervision levels ranging from “intensive” to “none”). A lesser offense but a high-risk factor could yield stricter release conditions than a more serious offense but a low-risk rating.

Kremers said judges now make their best professional judgments, but they have not had the guidance, based on track records from comparable cases, that the new system will give.

Kremers described an exercise he does when he leads training sessions for judges from around Wisconsin. He gives one group of 25 judges the facts in a hypothetical case and asks them to set bail. Their answers, he says, range from zero to \$50,000. The other 25 judges first hear an argument from a defense lawyer that the defendant should be released on personal recognizance and an argument from a prosecutor that he should be held on \$7,000 cash bail. When the second group gives its answers, the range is from zero to \$7,000.

“How is that evidence-based?” Kremers asked. He said neither approach uses anything more than professional guesses, whereas data based on similar cases could lead to better-founded outcomes.

There is little dispute about holding defendants in severe or alarming cases on high bail and, if they are convicted, giving them long sentences. Rather, the focus in the new effort is the large majority of cases that involve more-mundane circumstances.

The National Institute of Corrections listed 26 “meta-analyses” (summaries of research) in its April 2010 publication, “A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems.” It concluded that evidence-based alternatives to imprisonment and programs to reduce the chances of re-offending yield positive results overall.

But even some who support efforts such as the ones underway in Milwaukee said that analyzing outcomes of cases and turning the results into guidance for what to do in specific cases is an art form as much as it is a science.

Richard Frase, a nationally recognized expert in sentencing and a professor at the University of Minnesota Law School, said in an interview that he viewed evidence-based decision making as “another way of talking about smart sentencing.” Frase said, “It may promise more than it can deliver with our current knowledge base, but it’s certainly better [than current practice], especially if we view criminal law enforcement and punishment as primarily existing for the purposes of controlling crime as opposed to just punishing people because they deserve it.”

Frase added, “It’s not a science; it’s all probabilistic. That means you’re going to be judging people and making decisions based on what category they fall into. Some people have a problem with that.”

Michael Jacobson, president of the Vera Institute of Justice in New York, said, “In theory, it means there’s some validated empirical evidence on which to make some policy decisions.” He said that not all evidence yields conclusions that are as clear as would be ideal, but

“you’re not looking for perfection, you’re looking to do things better than we do them now.”

Professor Walter Dickey, a criminal-law expert from the University of Wisconsin Law School, said, “I’m a bit of a skeptic about all of the evidence-based stuff. . . . The problem is, the research is so weak.” He added, “This field is one in which ideology is so prevalent and there’s so much cooked research these days.” But asked whether Milwaukee should continue its exploration of the subject, Dickey said, “I think it’s absolutely worth pursuing,” given the problems of recidivism and costs related to the prison system and jails throughout the state.

Milwaukee County’s Judge Sankovitz agreed that the field is more of an art than a science now, but said that it has method, rigor, and measurability, which he is confident will lead to more-effective policies.

Professor Michael O’Hear, associate dean for research at Marquette University Law School and an expert on sentencing, gave the leaders of the local justice council credit for tackling major issues with dedication and commitment to making the system work better. “They’re doing creative things with some political courage,” O’Hear said. “They get flack, but they stick to what they’re doing.”

Chisholm said that he regards the community justice council as “a tremendous success,” simply based on its accomplishments to date in improving communications and practices involving all of the parties to the criminal-justice system. Each entity has its own sphere and practices, and there are disagreements, he said. “But we can agree on about 90 percent of things. That’s good.”

In his speech at the Law School in February, Chisholm emphasized the pressure to hold down public spending and the potential for savings if use of alternatives to imprisonment expands.

“Absent from discussion is how wisely and effectively we use scarce public-safety dollars,” Chisholm said. “There is a better way forward. Milwaukee’s recent experience offers a road map to success. We can protect the public, address the impact of neighborhood crime, and do so in a way that ultimately reduces the prison population, increases local accountability for corrections spending, and does so without raising taxes.”

Describing the evidence-based initiative of the community justice council, Chisholm said, “What it promises is simply this: When a person contacts the criminal-justice system, we try to objectively evaluate the offender’s risks and needs and respond with the right tools. The goal is for the person to change behavior and not come back

to the system again. Risk evaluation presumes that some offenders must be incapacitated and removed from the community in an appropriate way for an appropriate time, but it also allows, based on validated experience, that the majority of offenders can respond effectively to intervention and not consume justice resources without changing behavior.”

Chisholm also backed two ideas that so far have gained no traction in the political system. One is to allow judges to give either determinate or indeterminate sentences, with indeterminate sentences to be permitted in cases of “offenders whose behavior can be controlled at the community level.” If anything, the momentum in the state legislature has gone the opposite direction, with the repeal this year of legislation passed in 2009 that allowed early release of some prison inmates.

The other Chisholm proposal was to have the state split the savings with local governments as the number of convicts sent to state prison is reduced by using community-based programs. Chisholm said, “I make this offer to the governor and legislature: Milwaukee will continue to reduce crime and reduce the numbers of people in prison, maybe even enough to justify closing a prison. In turn, we want the savings from our efforts reinvested in Milwaukee so we can continue to do what we know works best for us.” There was no action on that idea as the state budget was adopted in the first half of 2011, but Chisholm intends to continue to advocate it.

Kremers and Sankovitz said that some of the strongest resistance they have encountered is from fellow judges who feel that, as with sentencing guidelines, evidence-based policies will cut into their latitude and independence.

Kremers and other council members have been taking the case for evidence-based decision making to the community. Why? At the recent session on the northwest side of Milwaukee, Kremers told the audience it was not enough to show that crime has gone down or that there are benefits to change in terms of saving money. People have to perceive that the results are good for them.

In its application for the new National Institute of Corrections grant, the Milwaukee justice council wrote, “Our sense of safety is often measured in terms of the crime rate, but the community’s subjective perception of its safety may be more salient. Our challenge as we move forward with EBDM [evidence-based decision making] in our system is to demonstrate progress both in reducing crime and enhancing community perceptions that its streets are safe.”





Judge Richard J. Sankovitz,
Milwaukee County Judge

“The field is more of an art than a science now, but it has method, rigor, and measurability, which I am confident will lead to more effective policies.”

Kremers told the audience that about 26 percent of individuals in jail awaiting trials in Milwaukee are there on bail of \$500 or less. Evidence shows, he said, that releasing these people would not be risky to the community. Yet the practice has been to lock them up by the hundreds. “These people are costing you \$141 per person per night,” he said, and the community is not really any safer for that.

Leaders of the justice council said that all-day sessions it held at Eckstein Hall in December 2010 and May 2011 were large steps forward in training key figures in a wide range of agencies on what “evidence-based” practices are and how to use them. The potential of politics heating up around the issue is clear. Leaders of the council have discussed the fallout that can occur in cases where someone who was released pending trial went on to commit a high-profile offense. The *Milwaukee Journal Sentinel* has been running an occasional series of stories, under the logo phrase “Dangerous and Free,” describing such cases. Kremers and Sankovitz said it is important when such instances occur to learn from them, but to remain united in advocating for “smarter” answers than incarcerating large numbers of people. The small number of such cases, disturbing as they are, makes for good sound bites, but bad public policy, Kremers said.

When it comes to opposition to the justice council’s effort, the local focal point is Milwaukee County Sheriff David A. Clarke Jr. In an interview, Clarke said he was one of the founders of the council and continues to support the goal set at the start of creating good ways to share information among agencies involved in law enforcement, from arresting-officers to judges, in order to improve coordination and efficiency. But he said the council’s purposes had morphed to focus on treatment programs and alternatives to incarceration. “We ended up with a different animal than we started out with,” he said. “That’s been my disappointment.”

Clarke said that those who enter the system are “mainly a population that has criminal behavior firmly ingrained in their being.” That contrasts with the view of people such as Kremers, who say that, with well-chosen treatment or

monitoring, a large portion could be put on paths where it is unlikely they would reoffend.

In his *Journal Sentinel* column, Clarke wrote, “The only thing the habitual criminal truly understands is the force of law through swift and certain consequences—and that means incarceration.” Clarke said the way to hold down prison costs is to give prisoners more bare-bones conditions and to pay less in salary and benefits to prison guards.

Kremers called winning the National Institute of Corrections grant in August “a huge, positive step for Milwaukee.” He added, “It says a lot about how well we’ve been working together to be good stewards of the community’s money.”

The grant will not bring money to the Milwaukee effort, but it will bring a substantial amount of technical assistance from nationally recognized experts in launching steps such as the universal screening protocol. However, a second grant that Milwaukee recently won, under the Justice Reinvestment Initiative of the U.S. Justice Department, is expected to provide funding for much of the work, with the goal of creating savings that can be converted to pay for programs.

People at the heart of the effort think it could make Milwaukee a leader in handling routine cases in ways that hold down spending while protecting safety. Paige Styler, attorney manager for the Milwaukee Trial Division of the State Public Defender’s Office, said, “We’ve missed the boat far too often on these rinky-dink cases.”

What does it mean to be smart on crime? Sankovitz answered, “The smartness is measuring and being accountable for results. That’s tough on crime.”

Morris Thigpen, director of the National Institute of Corrections, wrote in the 2010 framework document that the goal of evidence-based decision making is to realize “a vision of the communities of tomorrow—stronger and more vibrant as a result of less crime, fewer victims, restored families, and offenders engaged in healthy lifestyles.”

Leaders of the Milwaukee council think they can push the criminal-justice system toward that idealistic goal. ■

Alan J. Borsuk is senior fellow in law and public policy at Marquette University Law School.

Similar population, far fewer prisoners: What's the Minnesota difference?

Wisconsin and Minnesota have much in common. In addition to being next-door neighbors, the two have similar populations (between 5 million and 6 million) and are pretty close matches on important demographic matters—for example, the percentage of the population under 18, the percentage below the poverty line, and the percentage over 25 who have at least a high-school diploma. Unemployment rates in the two states have been fairly similar. Both states have histories of strong leaders on both the left and right and of control of state government moving from one side to the other. Of particular relevance, there is little difference in the crime rates in the two states.

One striking thing the two states do not have in common: the number of people in prison. In 2008, for example, there were 9,986 in prison in Minnesota and 21,110 in Wisconsin.

Michael O'Hear, Marquette Law School's associate dean for research and a nationally recognized authority on sentencing, posted on the Law School's faculty blog in May 2011 a statistical table of the similarities between the two states, along with that eye-catching difference in inmates. (He was assisted by researcher Joe Gorndt.) "For two states that are so demographically similar and have such similar crime rates, it's really extraordinary to see the difference in incarceration rates," O'Hear said.

The difference has its roots in policy decisions that go back to the 1970s. Some Wisconsin criminal-justice leaders say there are lessons from Minnesota that can be put into practice now which could save Wisconsin large amounts of money while maintaining community safety. "Minnesota is the template Wisconsin ought to be shooting for," Milwaukee County District Attorney John Chisholm said in an interview.

Richard S. Frase, a professor of criminal law at the University of Minnesota Law School, said that in the late 1970s,

Minnesota became the first state to implement sentencing guidelines that were intended to keep the prison population at targeted levels. While some states, including Wisconsin, have had unsuccessful efforts to follow such guidelines, Minnesota has stuck with its plan, refining it and using it as a planning tool.

"Because the system was becoming much more predictable . . . , you could model the system, and that allowed the state, starting with the sentencing commission and continuing on every time a major crime bill is proposed, to do projections based on what it would mean in terms of prison beds," Frase said. On both the political left and right, there has been wide agreement that Minnesota does not want to see prison population go up, in large part because of the cost. Frase described an episode several years ago when a particularly heinous crime triggered calls for sending more people to prison and projections of the cost led to the proposal's fizzling.

One impact, O'Hear pointed out, is that there are far more people in Minnesota on probation (127,627 in 2008) than in Wisconsin (50,418). "In fact, it turns out that Minnesota has far more total people under criminal-justice supervision than Wisconsin," O'Hear wrote on the blog. "The difference is that Minnesota keeps its offenders in the community while Wisconsin sends its offenders to prison."

Walter Dickey, a professor at the University of Wisconsin Law School, said Minnesota "made a decision, basically, about how much they were willing to spend on corrections, like they make a decision on how much they're willing to spend on a lot of things. . . . We in Wisconsin apply that to a lot of areas, but corrections isn't one of them. We give people blank checks." Why hasn't Wisconsin followed Minnesota on this front? Dickey said, "One of the answers is I don't think the political stars have ever been aligned in Wisconsin."

Restorative Justice Conference Address

Dublin's Archbishop Diarmuid Martin Reflects on the Clergy Sex-Abuse Scandal

On April 4 and 5, 2011, the Law School's Restorative Justice Initiative held an international conference, "Harm, Hope, and Healing: International Dialogue on the Clergy Sex-Abuse Scandal." The conference attracted a wide cross-section of individuals: victims, counselors, clerics, and others. Archbishop Jerome E. ListECKI of Milwaukee participated, as did Archbishop Diarmuid Martin of Dublin.

Martin became Archbishop of Dublin in 2004. He had long been away from the Church in Ireland, spending almost his entire priestly ministry in the service of the Vatican. Since his appointment as archbishop, he has become a forceful voice and actor for true reform in response to the clergy sex-abuse scandal and shame in Ireland. His words and actions thus have not pleased everyone. The following is an excerpt from Archbishop Martin's keynote address at the Law School's conference.

What is my experience? Restorative justice has shown striking results in many areas. But restorative justice is not cheap justice. It is not justice without recognition of wrongdoing. It is not justice without putting the balance right. Restorative justice may even be about forgiving an offender, but, again, it's not about cheap forgiveness.

In the case of serial sexual offenders, restorative justice is not about restoration to ministry. There can be admission of guilt on the part of the offender and even expression of forgiveness on the part of a victim, but the bishop has to establish a balance between the need to rehabilitate offenders and the duty to protect children. The bishop or religious superior has a fundamental responsibility to protect children and the most vulnerable in society. I have been told so many times, "As a bishop, you're the father of the priests. You should be a father of mercy." As a bishop, I am the father of every person in my diocese, and particularly of those who are vulnerable. And we should never overlook the



Archbishop Diarmuid Martin of Dublin in Eckstein Hall's Appellate Courtroom

fact that the words of Jesus regarding those who harm children are among his harshest and least conciliatory.

Without wishing to be unduly harsh, I feel that I can honestly say that, with perhaps two exceptions, I have not encountered a real and unconditional admission of guilt and responsibility on the part of priest offenders in my diocese. Survivors have repeatedly told me that one of

the greatest insults and hurts they have experienced is to see the lack of real remorse on the part of offenders even when they plead guilty in court. It's very hard to speak of meaningful forgiveness of an offender when that offender refuses to recognize the facts and the full significance of the facts.

But that does not mean that the reaction to the offender should be simply a punitive one. The sexual abuse of children is a heinous crime. There are no theological arguments and no norms of canon law which can alter that fact in the slightest. This does not mean that the offender be simply abandoned. The prison system on its part should have more than a pu-

nitive role. On release, the Church authorities—even if the offender is dismissed from the clerical state—have responsibilities to the offender.

The first responsibility is to ensure that the offender constitutes no risk to children. The primary responsibility in this regard, I believe, belongs to the public authorities, and regrettably the legislative framework in the Republic of Ireland still leaves a great deal to be desired. There are a number of laicized priest offenders living in Dublin—some of whom were incardinated in United States dioceses and have come back to Dublin and are barely known to us—who are still in total denial of their wrongdoing and must be therefore considered high risk. Some of those, for technical reasons, are not even on a sex-offenders list—they are totally uncontrolled.

There are others where the level of risk is lower. And it is important to ensure that priest offenders live in an environment that renders them as safe as possible and that they be monitored by the diocese or religious congregation. Negative scapegoating of offenders, or simply leaving them be, will in all possibility increase the level of risk that they pose. In the Archdiocese of Dublin, we have a specific member of our Child Safeguarding team who carries out the work of monitoring offenders, and a small committee supports him. In each case, a very strict regime is required of the offender, and hopefully any signs of resistance to such a regime would be recognized early. It must be remembered that some priest sex offenders will be very manipulative—very manipulative themselves and with their priest colleagues—in trying to be restored to some form of ministry and that they will be very manipulative in gaining access to children. (Unfortunately, I have no right to tag anybody—there is only a limited amount that I as bishop can do—but I would hope that the civil authorities would act, but they need a legislative framework in which they can do that, and it's not adequate in the Republic of Ireland.)

While victims—at least in Dublin—will rarely want to have anything to do with the offenders (in many cases, I would say, they rarely want anything to do with the Church), they do recognize when we establish a strict yet humane support approach to monitoring offenders. Such monitoring is in the interest of all, but, as I said, it's very difficult for the archdiocese to do this on its own without some collaborative framework with police and public authorities. (One particular person—he'd been in prison and is now back in prison—during

that interim period, I went to the police authorities at least three times, indicating that I had seen him in unusual circumstances with children. The answer I got is, “We'll send around two men to him tomorrow. We'll scare the wits out of him, but, remember, I have no authority to do that.”)

What does restorative justice mean for victims? This is the challenge that haunts me. I wish I could promise that magic term “closure” to victims. But I am aware that, even saying that, I can be offensive to survivors. I cannot determine when they find closure. There is no fast-track to healing. I can play my part, but I cannot achieve healing by decree. What I know is that I can make things worse and that at times I know that I do that. As was said this morning, promises must be kept. Deadlines must be respected. Established norms must be respected. To victims, any attempt at covering-up or backtracking on norms simply signifies betrayal.

Melissa Dermody, who is here today, will speak of the work that is being done within the Church in Ireland by our outreach service to victims, called *Towards Healing*. It is a service which provides counseling but goes beyond counseling. Victims need more than counseling alone. They have been robbed not just of their childhood but of that full sense of self-esteem without which deep wounds will remain open and will occasionally explode.

For a long time, there was little attention paid to the spiritual needs of victims. Counseling and financial help were provided, but the spiritual wounds were rarely recognized. A precondition for the Church's providing a service of spiritual healing to survivors is that the Church learns to be a truly restorative community, a community which welcomes and accepts the wounded into its community on their terms. Victims have told me of examples of their feeling that their priests, when survivors spoke to them, were somehow embarrassed by their presence. Their priest would prefer not to have to talk about what had happened.

As part of the recent apostolic visitation to the Archdiocese of Dublin, the archdiocese organized a liturgy of lament and repentance, which was prepared primarily by victims of abuse themselves in Dublin. There was an element of risk involved that a public event could be derailed. (Protesters entered my cathedral in Dublin during Easter Mass last year and littered the altar with children's shoes.) But the liturgy of lament in fact turned out to be, at least for some, a truly restorative moment for many who took part, because they felt that



they had encountered in it a Church which was beginning to identify with their hurt and their journey.

I was annoyed to read in newspaper reports, especially in the United States, that the liturgy of lament was “presided over” by Cardinal O’Malley or by myself. It was not led or presided over by any cardinal or any archbishop. By design, the entire sanctuary area of the cathedral was empty except for one large, stark wooden cross. It was my intention that the liturgy would be presided over by the cross of Jesus. There were to be no celebrities. Anyone who spoke came out of and returned to their place among the people of God in lament or in repentance.

But there are so many survivors who did not have that experience of being surrounded by a Church in lament, rather than by a Church still wanting to be in charge, feeling that it could be in charge even of their healing. Lives have been destroyed, people are still left alone with their nightmares and their flashbacks and their fears. Many victims were sought out by their offenders because the offender had seen some vulnerability in them, and their vulnerability has been magnified as a result of the abuse.

For restorative justice to work in a church environment, then, as I said, the Church must become a restorative community—a restorative community for all. Priests who have dedicated their entire lives to ministry and witness feel damaged and wounded by the sinful acts of others. They need new encouragement and enhancement, but always rejecting any sense of denial of what happened or feeling by priests that they are the primary victims.

The culture of clericalism has to be analyzed and addressed. Were there factors of a clerical culture which somehow facilitated disastrous abusive behavior to continue for so long? Was it just through bad decisions by bishops or superiors? Was there knowledge of behavior that should have given rise to concern and which went unaddressed? In Dublin, one priest built a private swimming pool in his back garden, to which only children of a certain age and appearance were invited. He was in one school each morning and in the other school each afternoon. This man abused for years in that parish. There were eight other priests in that parish. Did no one notice? More than one survivor tells me that they were jeered by other children in their school for being in contact with abuser priests. The children on the streets knew, but those who were responsible seemed not to notice.

The question has to be asked as to what was going on in the seminaries. The explosion of abuse cases took

place, it would seem, in the 1970s and early ’80s, immediately after the Second Vatican Council. But the problem existed long before the council, and some of the serial abusers identified in the Murphy Report were ordained and were abusing long before the Second Vatican Council.

Certainly in the post-conciliar years there was a culture which thought that mercy rather than the imposition of penalties would heal offenders. I believe that there was here a false understanding of human nature, and of mercy. Meanwhile, serial sexual abusers manipulatively weaved their way in and out of the net of mercy for years, when what was really needed was that they be firmly blocked in their path.

There is need of a formation regime for future priests which will more effectively foster the development of rounded human beings, not just in the area of human sexuality but in overall mature behavior and relationships. Being a priest today requires a high level of human and spiritual maturity to be able to face the challenge of truly serving the community. My fear is that some young men who present themselves as candidates for the priesthood may not be looking to serve but for some form of personal security or status which they believe priesthood may offer them.

The formation of future priests requires that it takes place in a spiritual environment in a specific setting for priests. But I am particularly anxious to ensure that my future priests carry out some part of their formation together with laypeople, so that they can establish mature relationships with men and women and do not develop any sense of their priesthood as giving them a special status. There are signs of renewed clericalism, which may even at times be ably veiled behind appeals for deeper spirituality or for more orthodox theological positions. What we need are future priests who truly understand the call of Jesus as a call to serve, to self-giving, nourished by a deep personal relationship with the Lord and by constant reflection on the word of God in a life of prayer and continual conversion.

For seven years, I have been Archbishop of Dublin, and I inevitably attempt to draw a balance sheet of where we are. Mistakes were made. It was thought best for the Church to manage allegations of abuse within its own structures and to use secrecy to avoid scandal. That type of avoidance of scandal eventually landed the Church in one of the greatest scandals of its history. Such an approach inevitably also led to those coming forward with allegations to being treated in some way as “adding to the problem” (“here is another one”). Some were never given the impression that they were believed. The norms and procedures which the national office in Ireland publishes

and updates will hopefully change that approach to victims. But it is very hard to turn around the culture of an institution.

A restorative-justice approach which admits and addresses the truth in charity offers a useful instrument to create a new culture, within the Catholic Church, which enables the truth to emerge not just in the adversarial culture which is common in our societies, but in an environment which focuses on healing. At our service of lament and repentance, I stressed that the scandal of the sexual abuse of children by clergy means that the Archdiocese of Dublin may never be the same again—or should never be the same again. But that is more easily said than

achieved. After a period of crisis, there is the danger that complacency sets in and that the structures which we have established slip down quietly to a lower gear.

A Church which becomes a restorative community will be one where the care of each one of the most vulnerable and most wounded will truly become the dominant concern of the 99 others, who will learn even to abandon their own security and try to represent Jesus Christ, who seeks out the abandoned and heals the troubled.

I hope that these rather personalized reflections will be of some use to you today and in our renewal and in our commitment and will give us all new hope. ■

Barrock Lecture

How Should We Punish Murder?

On January 24, 2011, Jonathan Simon, the Adrian A. Kragen Professor at Boalt Hall, the University of California–Berkeley School of Law, delivered Marquette Law School’s annual George and Margaret Barrock Lecture on Criminal Law. Simon’s speech—“How Should We Punish Murder?”—appeared in expanded form in the summer issue of the *Marquette Law Review*. This is an excerpt from that article.



Jonathan Simon

The disproportionate role that murder plays in the media and popular culture reflects its role in ordering our broader conception of crime and its appropriate punishment. Because of its role at the penal summit of crime where life is most threatened, murder establishes the top of the penal scale. At the

very least, a flat and severe sentence for murder has an inflationary effect on the whole structure of punishment through adjusting the scale of pricing of criminal penalties overall. Thus, the high price for murder, at the very least, makes it far easier to set high sentences for all manner of less serious offenses. If murderers serve 10 or 20 years, one is not likely to see repeat burglars or drug traffickers serving for decades. It follows that

where murder punishments are extreme, there is the potential and perhaps an inexorable pull toward more severe punishments for all the lesser crimes; and where murder punishments are moderate, the overall array of punishments will be moderate.

In modern society, this price logic is accelerated by a criminological logic that extends the threat of murder into the larger structure of crimes. In the past, the law of crimes reflected a variety of social functions, including the protection of religious values (blasphemy was a capital crime), status hierarchies, and property. In modern society, however, the preservation of life has become the overwhelming value expressed through the criminal law. Herbert Wechsler and Jerome Michael in their seminal analysis of the law of murder, written at the end of America’s first great wave of violence in the mid-1930s, captured this sense that all of criminal law, and not just the law of homicide, was concerned with preservation of human life. They wrote:



It will be well, in closing this brief survey of the law of homicide, to recall that the rules defining criminal homicides are not the only rules of the criminal law which have for their end or among their ends the protection of life. Even though life is not destroyed, a multitude of acts entailing unjustifiable risk of death is made criminal by the law governing other common law offences, arson, burglary, robbery, assault, battery, mayhem and rape, as well as by the general law of attempts, solicitation, conspiracy, riot, disorderly conduct and the heterogeneous mass of lesser offences created because the behavior involved is deemed to be dangerous to life or limb. Indeed, most behavior which is inspired by an intention to kill, or is characterized by an unjustifiable risk of killing, conscious or inadvertent, falls, where death does not ensue, within some wider or narrower, more or less specific category of criminal behavior, calling for the treatment which may be as drastic as that for homicide or as gentle as a stereotyped fine. Moreover, any provision of the criminal law serves the end of protecting life in so far as it makes possible the incapacitative or reformatory treatment of persons who, unless they were subjected to such treatment, would engage in behavior threatening life.

Instances of less serious crimes, such as vandalism, minor theft, or drug possession, can be viewed as legal violations calling for only modest punishment from either a retributive or a deterrence perspective. However, they can also be viewed as evidence of “criminality” for which the present modest offense may be part of a potentially escalating pattern of crime whose increase tends toward violence and murder. Thus, a flattening of the law of murder, especially at a severe level, will tend to create pressure to revalue all criminal punishments upward. . . . [T]he job of the law of homicide is to dissipate penal heat through the measured separation of terrible violence into morally meaningful substantive crimes, and to link these crimes through a ladder principle to the severity of punishment. When the law of homicide fails at that job, penal heat builds up as fear and outrage at the worst crimes infects the public response to all crime.

Mass incarceration might be thought of as the visible symptom of an underlying problem in our penal culture. Just as obesity can mean that a person has lost

the ability to regulate their own appetite for food, mass incarceration is evidence that our collective appetite for punishment is out of whack. Earlier I suggested a thermal metaphor for this function, the law of murder as a kind of radiator. Here, I suggest a somewhat different consumption-based metaphor of appetite, where murder functions as a key anchor for changes in our overall appetite for punishment. The ability to set a proper scale of punishment when it comes to murder is crucial then to establishing an overall sense of proportionality for punishment.

I am not suggesting that the law of murder alone drives over punishment in contemporary society. We know from extensive scholarship by now that many features of contemporary U.S. society help to drive mass incarceration. One of the most important features includes the political structure of crime policy, which is extremely decentralized, and creates pathological incentives for both individual lawmakers and individual prosecutors. The U.S. and the UK have also experienced a significant increase in economic inequality over the past generation and growing insecurity of working and middle-class families, and both societies continue to struggle with an incomplete resolution of our history of organized racism. A long-term crisis of the conditions under which liberal governance is carried out has made government appear weaker and less legitimate. But while all these factors may contribute to the heating up of the crime policy field, the law of murder represents a unique mechanism within the substantive law of crimes that permits a kind of internal effort at homeostasis by dissipating and channeling penal heat. Perhaps only at the margins, a well delineated and differentiated law of murder permits a cooling process. This process occurs by describing morally meaningful and culturally resonant differences between events that, from the victim perspective, are identical, and by creating pathways of responsibility. These pathways channel popular outrage about the legal response to violent crime away from the centers of political power and toward judges, parole boards, and juries. Likewise, and perhaps at the margins, our garbled and incoherent law of murder contributes to this epic problem.

Could this be the right time to look for a major rethinking of the law of murder? The last great recasting of the law of homicide (and the criminal law more generally) began more than 80 years ago in the scholarship of figures like Rollin M. Perkins and Herbert Wechsler. Today we are once again in a time when criminal law

theorists are returning to fundamental questions about the law of murder. There are a number of reasons this is a promising moment for such a return.



the offender as, at least in part, due to factors beyond his or her control, and promises to utilize the punishment experience to address

First, the law of murder today comes into question in a time of “mass incarceration” in the United States, and arguably in England as well. Between the 1930s, when Wechsler began thinking about the rationale of the law of homicide, and the mid-1970s, when he produced his last revised edition of the Model Penal Code, the imprisonment rate for the United States had declined from around 118 prisoners per 100,000 free adults, to around 96. In 2009, the national imprisonment rate was leveling off for the first time in decades, at around 504 per 100,000 free adults. Broad agreement exists among criminologists that current levels of imprisonment are unneeded to control crime, which is at a level much reduced from the heights of the 1970s and 1980s, and that states cannot afford to maintain these high levels of imprisonment, especially as aging prisoners drive up healthcare costs. While homicides are down considerably, the life sentence for murder, and the very long prison sentences that it produces, are becoming a major part of that cost in at least some jurisdictions (California in particular).

Second, there has been a sea change in penal rationales. When most of the modern reforms of the law of murder were developed in the middle of the 20th century, the dominant penal rationale in both England and California was rehabilitation. By the 1980s, a comparatively extreme version of penal incapacitation had emerged as the dominant rationale for the law of homicide (and everything else) in California. England has also increasingly embraced incapacitation as the master rationale governing punishment (and especially the punishment of murder). From a penal-heat perspective, the dominance of incapacitation is critical because it has removed any potential for the correctional enterprise to contribute to a cooling of emotions generated by crime in society. Appeals to rehabilitation, or retribution understood as just deserts, point to factors that can encourage sympathy for the offender and acceptance of limits to punishment. Rehabilitation helps define the violence of

those factors and reform the likely future behavior of the offender. Just deserts presents the offender as an equal member of the community who must be called to account for his or her usurpation of the victim’s rights, but who can “pay their debt” to society through the expiation of just punishment. In contrast, incapacitation calls attention only to the dangerousness of the offender and promises only to contain that threat, not redress it.

Third, the rise of human rights law internationally, and the growing significance of international human right treaties like the Universal Declaration of Human Rights and the Torture Convention, highlight dignity as a central positive value that must be protected by the law, including the law of murder. In England today, the law of murder is also determined in important respects by the European Convention of Human Rights and by the European Charter of Human Rights. As enforced by the European Court and Commission of Human Rights (respectively) and promoted by European Community administrative organs like the Committee for the Prevention of Torture and Degrading Punishment, the law sets limits on the severity of punishment and requires an institutional commitment to resocialization, individualization, progressivity, and potential for release. In the United States, the emergence of dignity as an influential substantive norm for the criminal law has only just begun and is likely to move more slowly, as it is limited to the interpretation of the “cruel and unusual” punishment ban under the Eighth Amendment and the meaning of “degrading and inhumane” punishments under the Torture Convention.

Fourth, there are signs that some process of reevaluation of punishment and the law of murder is already beginning. England, which has experienced a less extreme but similar pattern of escalating punishment in recent decades, is, after a long period of increasing its penal severity and incapacitation orientation of its justice system, in a period of reconsidering its heavy reliance on imprisonment—the law of murder in particular has come under scrutiny. In 2005, the Law Commission, a chartered



expert body on law reform, published its consultation paper, *A New Homicide Act for England and Wales?* The consultation paper specifically cited the harsh minimums for life sentences established by the 2003 Criminal Justice Act as requiring an effort to reform and rationalize the law of murder. The Law Commission published its final report in 2006 recommending a three-tier structure to the law of murder. There is more than irony in the fact that England would consider adopting American-style degrees of murder after more than 200 years; additionally, there is an invitation to consider whether we have lost something in the emergence of a flat and high de facto single degree of murder in California.

In the remainder of this article I will describe in more detail the evolution of the law of murder in the England

and the United States from the penal-heat perspective. Specifically, I will examine four change points: the emergence of the murder-manslaughter distinction in the 17th century; the emergence of degrees of murder at the end of the 19th century; the emergence of parole in the 20th century; and the abolition, or near abolition in the case of the U.S., of the death penalty in the last third of the 20th century. Next, I consider the present, when in both England and at least some jurisdictions in the United States there is a collapse of the law of murder toward a higher, flatter grading. In the final section, I will offer some tentative propositions toward reform on questions considered by the English Law Commission consultation paper: How many crimes of murder? And how should these crimes articulate into the structure of punishment? ■

Nies Lecture

Can the Patent Office Be Fixed?

Through its Helen Wilson Nies Lecture, the Law School annually hosts a distinguished scholar of intellectual property law. This past spring, the Nies Lecture was delivered by Mark A. Lemley, who is the William H. Neukom Professor at Stanford Law School and a partner in Durie Tangri LLP. The following is an excerpted version of the lecture as subsequently published in the *Marquette Intellectual Property Law Review*.

The excerpt picks up after Professor Lemley's exposition of "the problem of bad patents." In particular, the preceding section describes "the vise" in which the Patent and Trademark Office (PTO) is caught. On the one hand, it has been issuing a large number of dubious patents over the past 20 years, particularly in the software and electronic-commerce space. On the other hand, Lemley writes, it is not clear that we can or should weed out bad applications at the PTO. For the vast majority of patents are never litigated or licensed, so spending a lot of money to ensure their validity would be wasted. The preceding section also describes recent research and empirical studies that variously suggest that we need to pay attention not only to legal rules but also to examiner behavior and reward systems.



Mark A. Lemley

How, then, can we fix the PTO, allowing examiners to distinguish between patentable and unpatentable inventions effectively, without slowing the process to a crawl or wasting a bunch of money?

What Won't Work

First, some things that likely won't work.

1. Preventing fee diversion.

The PTO is funded through user fees imposed on applicants and owners of issued patents. For much of the last 20 years, some of that fee revenue (typically 10 to 20 percent of it) has been diverted by Congress to general federal revenue. It is a commonplace among patent lawyers that the way to solve the PTO's

problems is to stop fee diversion, “fully funding” the PTO.

Stopping fee diversion is certainly a good idea. Whatever the merits of government user fees over taxes as a general matter, it seems particularly foolish social policy to tax innovators in particular to raise general revenue. But stopping fee diversion is hardly a panacea. In the last several years, the PTO has been fully funded—that is, Congress didn’t divert fees. Nonetheless, the backlog grew. The addition of 10 to 20 percent of operating revenue wasn’t enough even to enable the PTO to hold steady.

2. Fee-setting authority.

In recent years the PTO’s efforts have shifted to seeking permission from Congress to set its own fees. This would allow the PTO to raise fees on applicants and patentees, using the money to pay for a more intensive examination. There is some reason to believe that fee-setting authority, if nothing else, may result from the six-year patent reform effort in Congress.

Giving the PTO the authority to set its own fees might or might not be a good idea, depending on the relative incentives the PTO and Congress have to set fees rationally. But as noted above, it is likely not a good idea simply to spend more money to weed out bad patents. Most of that money will be wasted on applications that are of no consequence to anyone. And because of the structure of the examination system, it might not even succeed in weeding out bad patent applications.

Even if it did, however, the current fee structure makes patent quality self-limiting. The PTO is paid by applicants to process their applications at each stage. But those payments are not enough even to sustain the limited examination that now occurs. The difference is made up by patent “maintenance fees”—periodic payments made by the owners of issued patents to keep those patents in force. Because the PTO’s ability to examine new applications is dependent on revenue from previously granted ones, the PTO faces a problem: the more bad applications it rejects, the fewer patents will pay maintenance fees, and the less money it will have to conduct a detailed examination. The PTO ran into this problem in the late 2000s, when—as a result of a lowered grant rate coupled with companies abandoning patents during the recession—it found itself in a financial crisis. The broader lesson should be clear: the current system for funding the PTO works only if the PTO continues to issue patents on a large percentage of the applications it receives.

The PTO might begin to address this problem by changing the way it collects fees. At one extreme, it

could abandon maintenance fees altogether, and pay for enhanced examination through higher application fees. That solves the self-limiting problem, but it raises the cost to startups seeking patents at an early stage of development, which may not be ideal. Alternatively, the PTO could simply raise the maintenance fees significantly, to perhaps ten times their current rate. Doing so might make the weeding out of bad patents revenue neutral, though as more bad applications are rejected, the tax on those who actually obtained patents would have to increase further to compensate. And as the PTO raises its maintenance fees, fewer people will choose to maintain their patents. Depending on the elasticity of demand, paying for examination out of higher maintenance fees may or may not work.

Some have suggested raising maintenance fees for a different reason—to prevent patent lawsuits by trolls who buy up patents in order to enforce them. But that is unlikely to work. According to a 2009 American Intellectual Property Law Association (AIPLA) report, the median cost of taking a major patent case to trial is \$5.5 million per side in attorney’s fees. A maintenance fee of \$40,000–\$50,000—ten times the current fee—may weed out more patents that aren’t being used, but it is unlikely to deter someone considering spending perhaps 100 times that much to litigate a patent. And the patents that aren’t being used aren’t really the problem.

3. Retaining patent examiners.

Another problem commonly cited by patent lawyers is the high rate of turnover at the PTO. Being an examiner is not an easy job, and it doesn’t pay all that well. Not surprisingly, examiners often leave relatively quickly for jobs in engineering, law firms, or to go to law school. Indeed, one recent study found the median examiner had been at the PTO for just over three years. The high rate of turnover means that the PTO needs to hire more than 1,000 examiners a year just to keep even with attrition. In recent years, the PTO has found it virtually impossible to grow the examining corps. And, of course, those new examiners must be trained. Perhaps the solution to the PTO’s problems, then, is to find ways to keep those examiners from leaving.

There may well be benefits to reducing examiner attrition. But the evidence suggests that weeding out bad patents is not among them. Empirical research by Lemley and Sampat shows that the longer examiners spend at the PTO, the less searching they do, the less likely they are to issue initial rejections or demand claim amendments, and the more likely they are to ultimately grant a patent. It is the most junior examiners



“The problems with the PTO are deeply rooted. Increased funding won’t solve the problem of bad patents, and a variety of other commonly suggested fixes for the PTO are unlikely to solve the problem, and indeed could even make it worse.”

ers who are most likely to reject applications. The reason is not precisely clear, but may have to do with increased workloads on senior examiners, or with acculturation into a corps whose ethos is to grant rather than deny patents. Either way, keeping examiners around longer may hurt rather than help the cause of weeding out bad patents.

4. Outsourcing search.

Reacting both to workload and to a sense that examiners don’t find the most important prior art, a number of initiatives both within and outside the PTO have tried to relieve examiners of the burden of searching for prior art. They have variously proposed to require the applicants to do their own search for prior art, to invite the public to review applications and submit prior art, or to share the burden of searching with patent examiners in other countries. These initiatives seem promising because they outsource a function examiners don’t seem particularly good at—finding the most relevant information on the ground—to others who are positioned to do it better.

But recent empirical evidence suggests that it might not work. Cotropia et al. studied the behavior of patent examiners in responding to applications and found that they rely almost exclusively on art they find for themselves, not art submitted by applicants. And that doesn’t appear to reflect either applicants drafting around the art they found or the weakness of that art; U.S. examiners largely ignored even art that was submitted because it was found important by a foreign patent examiner during examination of a counterpart application. If examiners are psychologically primed to rely principally on things they find for themselves, it won’t help to have others provide them with the best art. And it might even hurt, causing examiners not to focus on the best prior art.

What Might Work

The problems with the PTO are deeply rooted. Increased funding won’t solve the problem of bad patents, and a variety of other commonly suggested fixes for the PTO are unlikely to solve the problem, and indeed could even make it worse.

Other proposals have a greater chance of addressing the problem of bad patents, though they come with their own uncertainties.

1. Second pair of eyes.

Shortly after the Federal Circuit held business methods patentable in 1998, the PTO was inundated with business method patent applications. Most of those applications went to Class 705, which refers to the collection of patent examiners who focus on business methods. Indeed, by 2001, Class 705 had the largest application volume. In response to this flood, the PTO initiated a specific “quality control” measure in this class in March 2000: the “second pair of eyes” review (SPER), under which applications are subjected to mandatory assessment by more than one examiner before being allowed. Requiring two examiners to agree seems to have had a dramatic effect: a 2008 study found that class 705 has the lowest grant rate among high-volume classes. One possible explanation for the low grant rate in this class is that the second pair of eyes is working, and that the grant rate reflects better rigor during examinations, rather than application volume.

The fact that SPER leads to more rejections in Class 705 doesn’t mean it is an unalloyed success, however. Allison and Hunter demonstrate that its adoption in Class 705 led applicants to try to characterize their business method patents in ways that got them out of Class 705. It is possible that the applications that were not so characterized were systematically weaker (or their lawyers systematically less skilled) than the ones that avoided Class 705. The differences Lemley and Sampat found were so striking, however—a 16.1 percent grant rate in Class 705 compared with 72 percent on average—that it seems unlikely this can explain the full difference.

Allison and Hunter’s objection is significant. But it applies only to a class-specific use of SPER, and wouldn’t condemn a broader application of the policy to all art units. Nonetheless, there are reasons to think carefully before expanding SPER to all patent applications. Doing so would roughly double the cost of patent prosecution across the board. It would also delay the prosecution process further; Class 705 applications are among the slowest to be processed. Further, at least as currently configured, SPER is asymmetric: it requires a second hurdle before allowing patents but not before rejecting applications. As a result, it is likely to weed out bad patents but also to catch some good ones within the net of rejected applications. Given the PTO’s historic bias in the other direction, perhaps that

is a risk worth taking, but it is still a social cost we should avoid if we can. If SPER or some other review process is to be adopted, it should apply evenhandedly to grants and rejections.

Interestingly, the PTO recently shut down the SPER program in business methods. Too much success, it seems, carries its own risks.

2. Changing examiner incentives.

Recent empirical evidence suggests that much of the problem with patent examination revolves around examiner incentives and human-resource policies. Examiners do less well at policing bad patents the longer they stay at the PTO. The problem could be their distance from the technology, or a tenure effect, or their increased workload. In any case, changes in training, workload, or promotion rules could affect those incentives. Examiners pay attention to their own searches, and not prior art submitted by others. The problem could be overconfidence bias, or simply triage. Either way, human-resource policies could be brought to bear, training examiners to search better, giving them more time, or finding other ways to eliminate bias. And it seems obvious—though likely politically infeasible—that the rules should not treat allowances differently from rejections.

These are good ideas, and they are worth exploring further. But implementation may be politically difficult. And some of the possible explanations point in different directions: should we give examiners more time to search, or less, for example?

3. Tiered review.

The problem is not precisely that the Patent Office issues a large number of bad patents. Rather, it is that the Patent Office issues a small but worrisome number of economically significant bad patents and those patents enjoy a strong, but undeserved, presumption of validity.

Framed this way, the solution naturally follows: the Patent Office should focus its examination resources on important patents and pay little attention to the rest. But it is difficult for the government to know ahead of time which patents are likely to be important.

There are two groups, however, that have better information about the likely technological and com-

mercial value of inventions: patent applicants and competitors. To harness information in the hands of patent applicants, we could give applicants the option of earning a presumption of validity by paying for a thorough examination of their inventions. In other words, “applicants should be allowed to ‘gold plate’ their patents by paying for the kind of searching review that would merit a presumption of validity.” By contrast, “[a]n applicant who chooses not to pay could still get a patent. That patent, however, would be subject to serious—maybe even de novo—review in the event of litigation.” Predictably, “applicants would pay for serious review with respect to their most important patents but conserve resources on their more speculative entries.” Thus, “the Patent Office may focus its resources” and thereby “benefit from the signal given by the applicant’s own self-interested choice.” The

Obama campaign proposed this sort of tiered review, and the PTO has recently taken a step toward implementing a scaled-down version, in which applicants can choose the speed but not the intensity of review.

Tiered review is only as good as the examination process that creates it, however, and if “gold-plated” patents are too easy to obtain, the point of the system will be lost. If they are too hard to obtain or too expensive, no one will use the system. Further, tiered

review can at best be only a partial solution, because applicants do not always have accurate information about the future value of their applications. These are real objections, but they do not undermine the value of some sort of targeting in the use of PTO examination resources.

4. Oppositions and adversarial evaluations.

Competitors also have useful information about which patents worry them and which do not. A post-grant opposition system would seek to harness that information. Post-grant opposition is a process by which parties other than the applicant would have the opportunity to request and fund a thorough examination of a recently issued patent. A patent that survives collateral attack would earn a presumption of validity similar to the one available through tiered review. The core difference is that the post-grant opposition would be triggered by competitors—presumably



competitors looking to invalidate a patent that threatens their industry.

Like tiered review, “post-grant opposition is attractive because it harnesses private information; this time, information in the hands of competitors.” Armed with this information, the PTO can better “identify patents that warrant serious review, and it also makes that review less expensive by creating a mechanism by which competitors can share critical information directly with the Patent Office.” A post-grant opposition system is part of proposed patent reform legislation.

The success of post-grant opposition depends on the willingness of third parties with good information about the validity of a patent to challenge that patent in a public forum rather than settling privately. Some commentators are skeptical, pointing out that invalidating patents is a public good that the challenger would share with every other competitor.

Patent law already has mechanisms that could be used to achieve the same goal. Some issued patents are returned to the PTO after issuance and are reevaluated through an adversarial process known as *inter partes*

reexamination. This is an evaluation to which some deference is appropriate, though today the law gives complete deference to that determination. Even traditional *ex parte* reexamination, while not truly adversarial, allows the filer to submit an initial explanation of the reasons for reexamination, and the result has been that in recent years patents fare worse in reexamination than applications do in initial examination.

The biggest risk with post-grant opposition and related systems is that we give challengers too many bites at the apple, allowing them to inundate patentees with an endless set of challenges. To solve that problem, it is appropriate to place some limits on the number and perhaps the timing of challenges, and to imbue patents that survive those challenges with a strong presumption of validity.

Can the patent office be fixed? Well, maybe. Certainly it can be improved, and the current administration is taking innovative strides in that direction. But there may be systemic reasons to think that the PTO will never be all that we might hope. ■

Oldfather and Peppers

Till Death Do Us Part: Chief Justices and the United States Supreme Court

This is an excerpt from an essay forthcoming in the *Marquette Law Review*. The excerpt picks up after the authors’ account of Chief Justice William H. Rehnquist’s death in office and concludes before their focus on the administrative role of the Chief Justice of the United States, which is unique among members of the Supreme Court, and their proposals for reform. Todd C. Peppers is the Henry H. and Trudye H. Fowler Professor of Public Affairs at Roanoke College and currently a visiting Professor of Law at Washington & Lee University School of Law. Chad M. Oldfather is Professor of Law at Marquette University.

The final illness of Chief Justice Rehnquist, and his decision not to retire in the face of a terminal illness, are undoubtedly a poignant story of an individual who gave his last full measure to an institution that he loved. There is, however, another dimension. Placed into historical context, the episode illuminates an additional troubling aspect of lifetime tenure, namely, the lack of institutional norms regarding when chief justices should release the reins of power.

Article III, Section 1 of the United States Constitution states that all federal judges “shall hold their offices

during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.” In short, judges can only be removed from office by impeachment. Such judicial independence is necessary, explains Alexander Hamilton in Federalist No. 78, if federal judges are to fulfill the critical role of protecting the Constitution from overreaching by the other branches of government and to protect minority rights from the momentary whims of the majority. It has proven to be an effective shield. Since the ratification of the Constitution, only one

Supreme Court justice has been impeached. Associate Justice Samuel Chase was impeached by the House of Representatives in March of 1804, but was acquitted by the United States Senate. While House Republicans threatened to hold impeachment hearings regarding Associate Justice William O. Douglas (mainly due to the Justice's messy personal life), no hearings ever materialized.

Historically, the primary danger associated with the substantial independence of the federal judiciary resulting from life tenure is a lack of accountability. Reduced to its essence, the strong form of this argument runs that the independence engendered by lifetime tenure in turn empowers federal courts to substitute their own policy preferences for those of duly elected legislators.

Yet, as developed in the debates referred to above, lifetime tenure also raises concerns about the competence and ability of aging jurists. Indeed, the history of the United States Supreme Court is filled with examples of justices who remained on the bench as their physical health deteriorated and their mental acuity declined. These concerns about judicial competency should be greater when it comes to chief justices. The chief justice bears a host of responsibilities beyond those of an associate justice, which increases the potential consequences of an inability to serve. What is more, when compared to associate justices, chief justices show even a greater reluctance to leave the Supreme Court.

Political scientist David N. Atkinson has documented Supreme Court justices "at the end," and his accounts offer an important warning that lifetime tenure comes with the additional cost of judicial infirmity. Moreover, a close examination of the history suggests that the dangers of infirmity are more likely to arise with respect to chief justices. According to Atkinson's research, only four of the last sixteen chief justices have retired from the Supreme Court while in good health: John Jay (chief justice from 1789 to 1795), Charles Evans Hughes (1930 to 1941), Earl Warren (1953 to 1969), and Warren Burger (1969 to 1986). Historically, the norm has been for the chief justice to die on the bench. John Marshall (1801



John Jay (1745-1829), first Chief Justice of the United States. Engraving by Hall, undated.

to 1835), Roger Taney (1836 to 1864), Salmon Chase (1864 to 1873), Morrison Waite (1874 to 1888), Melville Fuller (1888 to 1910), Edward Douglass White (1910 to 1921), Harlan Fiske Stone (1930 to 1941), and Fred Vinson (1946 to 1953) all died while still holding the position of chief justice, while William Howard Taft (1921 to 1930), who was battling multiple health problems, resigned shortly before his death and Oliver Ellsworth left the bench while facing a chronic health condition. While the second chief justice of the Supreme Court, John Rutledge (1795), was only a recess appointment, there is evidence to suggest that the

Senate voted against confirming him based on concerns about his sanity.

Of the chief justices who died while on the bench, only the deaths of Harlan Fiske Stone and Fred Vinson were sudden and unexpected. The remaining chief justices suffered from significant health problems over a sustained period of time, and their physical decline was known to court insiders. Oliver Ellsworth submitted his resignation to President Thomas Jefferson after developing a painful kidney disorder. The last three years of John Marshall's life saw the legendary Chief Justice battle what was likely liver cancer. Shortly before he died, friends described the 79-year-old Marshall as "very emaciated, feeble, & dangerously low" but alert and clear-headed. Two years before his death, a sickly Roger Taney had a "premonition of death" and said goodbye to his fellow justices. Still alive one year later, Roger Taney told a friend that he "hope[d] to linger along to the next term of the Supreme Court." Linger he did, remaining on the Court until his death on October 12, 1864, at the age of 88. A stroke rendered Chief Justice Salmon P. Chase "barely able to function" during October Terms 1871 and 1872, but a colleague noted that Chase's daughters—including the politically ambitious Kate Sprague—"will never consent to his retiring to private life." In a letter written shortly after October Term 1872, Chase wrote that "I am too much of an invalid to be more than a cipher. Sometimes I feel as if I were dead, though alive." Chase, who had once served as Abraham Lincoln's



treasury secretary and whose transparent political ambition resulted in his banishment to the Supreme Court, died two days later at the age of 65.

A nervous breakdown in 1885 started a downward spiral for Chief Justice Morrison Waite, and during one of his last appearances on the bench Attorney General Alexander Garland observed that “it was evident to the observer death had almost placed its hand upon him.” Chief Justice Melville Weston Fuller remained in fairly good health until October Term 1909, when the diminutive jurist’s own declining health and the illness of other justices made it difficult for him to carry out his duties. After Fuller’s death by heart attack on July 4, 1910, Justice Oliver Wendell Holmes wrote that the 77-year-old “Chief died at just the right moment, for during the last term he had begun to show his age in his administrative work.”

Less than a week after the Court ended October Term 1921, an obese, 76-year-old Edward Douglas White died after undergoing gallbladder surgery—thus enabling William Howard Taft to fulfill his dream of becoming the next chief justice. While Taft had lamented the fact that the aging and infirm White would never vacate the center chair, eight years later Taft would be bemoaning his own physical decay. Describing himself as “older and slower and less acute and more confused,” Taft wrote to his brother that he “must stay on the court in order to prevent the Bolsheviki from getting control.” Plagued with cardiac disease, high blood pressure, insomnia, and anxiety during the last year of his life, William Howard Taft reluctantly resigned his position on February 3, 1930—only to die approximately one month later. While his successor, Charles Evans Hughes, would leave the Court in good health, Hughes’s successor, Harlan Fiske Stone, suffered a fatal cerebral hemorrhage while reading an opinion from the Supreme Court bench. The man selected to replace Stone, Fred Vinson, died of a sudden heart attack at the age of 63.

As noted above, the clear historical pattern of dying while holding the center chair was broken by Earl War-

ren and Warren Burger, who both left the Court while in good health. Ironically, it would be an avid student of Supreme Court history, William Rehnquist, who would reestablish the controversial tradition of chief justices holding onto power after illness had clearly rendered them unable to perform their duties.

When it comes to the associate justices, a slightly different pattern emerges, and it suggests that they are less likely to continue to serve despite faltering abilities. In the 19th century, the majority of associate justices died in office. But the numbers change dramatically in the 20th century, during which only four associate justices died on the bench while battling significant physical or mental infirmity (Rufus W. Peckham, Joseph R. Lamar, Benjamin Cardozo, and Robert H. Jackson). In contrast, a relatively large number of associate justices were forced from the bench due to illness or cognitive decline, including Horace Gray, Henry Billings Brown, William Moody, William



Portrait of U.S. Supreme Court Chief Justice Morrison Remick Waite (1816-1888). Photograph ca 1875.

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R. Day, Mahlon Pitney, Joseph McKenna, Oliver Wendell Holmes, Jr., Sherman Minton, Harold Burton, Charles Whittaker, Felix Frankfurter, Hugo Black, John Marshall Harlan II, William O. Douglas, William J. Brennan, Jr., and Thurgood Marshall. In addition, and in further contrast to the chief justices, a substantial number of associate justices have left the bench while in relatively good health. In the 20th century, these justices include George Shiras, John H. Clarke, Willis Van Devanter, George Sutherland, Louis Brandeis, James C. McReynolds, Owen J. Roberts, James Byrnes, Stanley Reed, Arthur Goldberg, Tom Clark, Abe Fortas, Potter Stewart, Lewis Powell, Byron White, and Harry Blackmun. We can now add Sandra Day O’Connor and David Souter. All in all, fewer than 30 percent of the associate justices who have served in the 20th century have died in office.

Although the numbers involved are too small to permit certain conclusions, the patterns nonetheless invite consideration of whether chief justices are more likely to die in office than associate justices, and what factors might lead to such a differential. Of course, the decision

to leave the court is complex. Atkinson suggests that there are a host of reasons why the justices hang on to the bitter end:

Supreme Court justices do not voluntarily leave office for the following reasons: (1) financial considerations; (2) party or ideology; (3) a determination to stay; (4) a sense of indispensability; (5) loss of status; (6) a belief that they can still do the work; (7) not knowing what else to do; and (8) family pressure to stay in office.

Political scientist Artemus Ward believes that politics primarily explains the retirement choices of modern Supreme Court justices. Ward writes that while justices' retirement decisions were once "primarily concerned with institutional and personal factors" (including how to survive without a judicial pension, which would explain why so many associate justices died in office in the 19th century), "generous retirement benefits coupled with a decreasing workload have reduced the departure process to partisan maneuvering."

This does not explain, however, the tendency for more chief justices to die in office (or remain until illness forces their hand) than retire. The answer may lie in the unique role and powers of the chief justice. As

we explore below, the chief-justice role has evolved to encompass a much greater range of responsibilities than possessed by the associate justices, which may add to the allure of the job to such an extent that its holders are more reluctant to leave. But it may be another aspect of the chief-justice role that is primarily responsible for the seeming differential in the likelihood that justices will serve beyond their ability to do so effectively. At various points in history, it

has been the chief justice—often with the consensus of the Court—who has approached ailing justices and suggested retirement. "The chief justices have traditionally borne the principal burden of dealing with incapacitated colleagues, which has all too frequently proved to be trying," observes Atkinson. "They have been least successful when a justice is reluctant to leave or determined to stay. Although the chief justice is *primus inter pares*, or first among equals, his principal power is that of persuasion."

Atkinson provides three examples of the chief justice's power of persuasion at work. He writes that Chief Justice William Howard Taft felt "great consternation" about Justice Joseph McKenna's dwindling mental acuity, and that the poor quality of Justice McKenna's work product forced Taft to approach McKenna's family (and eventually McKenna himself) in hopes of persuading him to resign. The Chief Justice, however, did not rely upon tact alone in pushing McKenna off the Court. The justices themselves had secretly decided to not decide any cases in which McKenna was the deciding vote. Chief Justice Charles Evans Hughes paid a similar visit to a 90-year-old Oliver Wendell Holmes, Jr., but Holmes—unlike McKenna—graciously accepted the gentle nudge. Approximately 50 years later, Chief Justice Warren Burger followed Taft's lead and used a similar tactic, when he convinced the other justices (save a protesting Byron White) to allow him to schedule for reargument cases in which ailing and confused Justice Douglas cast the deciding vote. Similar steps were taken to guarantee that Douglas would not determine on which cases the Court would grant cert.

Consider now Chief Justice Rehnquist's decision to remain in office. The standard explanations do not apply. Clearly, partisan considerations cannot account for his decision; President George W. Bush had just been reelected to office, and the Chief Justice had several years in which to retire from the Supreme Court with the assurance that a Republican president would pick his successor. Given the Chief Justice's length of service, he could have retired at full salary—so monetary considerations cannot explain his behavior. Moreover, Herman J. Obermayer's description of his late friend's love for the Court, and his loneliness at the death of his wife, suggests that Rehnquist enjoyed his status as chief justice and did not relish the notion of retirement. Finally, the Chief Justice's own press releases demonstrate that he felt that he was still capable of performing his duties.

Yet Atkinson's comments about the role of the chief justices in pushing colleagues to retire suggest another



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U.S. Supreme Court Chief Justice William H. Rehnquist, June 2005.



answer—there are no norms or historical precedent dictating that associates justices can, or should, approach a disabled chief justice and urge him to resign. Granted, the fact that Chief Justice Rehnquist’s own colleagues did not know the extent of his illness meant that they did not have the relevant information necessary to make such an overture. Even if they had, however, they faced several hurdles in doing so. Because none of them had a formal administrative role, they faced a coordination problem in deciding to act, especially if they did not all agree that action was warranted. Moreover, even if the associate justices were willing to discuss the chief justice’s disability with him, they lack the institutional levers to give the chief justice a necessary push. Unlike Chief Justices Taft and Burger, the associate justices cannot schedule cases for reargument or suspend the “rule of four” in order to divest an ailing chief justice of his vote. Without such institutional norms and powers, the associate justices do not have the wherewithal to make a chief justice candidly and objectively assess his own disability.

For all this, one might still ask whether judicial disability is that pressing of a concern. To be sure, as Atkinson aptly demonstrates, history is filled with examples of disabled justices. David Garrow has argued that the

problem of “mental decrepitude” occurred more frequently during the 20th century than the 19th and that it remains “a persistently recurring problem that merits serious attention.” Yet, as Ward Farnsworth has observed, the periods of time in the 20th century during which justices worked while suffering from some degree of mental deterioration constituted at most two percent of the aggregate service time of all the justices during that century. Farnsworth further contends that the effects of disability are mitigated by the presence of the other justices, as well as by the presence of a justice’s law clerks, “who generally can keep a chambers running without a drop-off in quality remotely commensurate with the justice’s drop-off in functionality.”

We are inclined to side with those who view mental and physical deterioration among the justices as a matter of concern. Even were we to accept the arguments of those who maintain that the problem is not significant, however, we believe that the chief justice presents a different case. The reason why we should be concerned about the variation in retirement rates between the associate and chief justices, and about the corresponding increase in the likelihood that a chief justice will continue to serve while disabled, has to do with the unique powers of the center chair. . . . ■

Remarks of Dean Kearney

Investiture of the Hon. James A. Wynn, Jr.

On April 12, 2011, there was a formal investiture, in Raleigh, N.C., of the Hon. James A. Wynn, Jr., as a judge of the United States Court of Appeals for the Fourth Circuit. Judge Wynn, L’79, previously served as a judge of the North Carolina Court of Appeals and on the North Carolina Supreme Court. The following are the remarks of Dean Joseph D. Kearney before the Fourth Circuit en banc and a large assemblage of other judges, members of the bar and community, and Judge Wynn’s family and friends.

Thank you, Chief Judge Traxler, and May It Please the Court. I am qualified to bring but *thanks* and *greetings* to this event. For, while I have been dean of Marquette University Law School for going-on eight years, I can claim no credit for Judge Wynn’s accomplishments. I was a barely tenured faculty member when I first met him at Marquette. He and I had a public discussion then concerning the best modes of judicial selection: I was young, but wise enough not to make it a

debate. My poor powers of oratory are no match for Judge Wynn’s. In all events, the thanks are to Judge Wynn, not simply for the invitation to speak today but for always remembering us at Marquette, in active ways, whether



Hon. James A. Wynn, Jr.

Photo: North Carolina Bar Association



Dean Kearney speaks at Judge Wynn's investiture.

it has been delivering our distinguished Hallows Lecture, judging a moot-court final, speaking at commencement, or simply attending this past fall the dedication of Eckstein Hall, our new home to which Chief Judge Traxler has graciously referred. Judge Wynn, we are so grateful for your continued association with us. Those are the thanks.

The greetings come from a variety of places. Some of them are from Wisconsin. To be sure, there are several Wisconsinites with me today: Judge Diane Sykes, a Marquette lawyer who serves on the U.S. Court of Appeals for the Seventh Circuit; my colleague, Professor Michael McChrystal, who was on the staff when Judge Wynn was a student; and two other Marquette lawyers, Judge Wynn's classmates, Dan Dennehy and John Rothstein. Also with us is Joseph Yana, another classmate and, indeed, the person who sat next to the judge in their first-year classes (the judge was surprised, having always been last in the alphabet with the "Wy" last name, to find names after his, beginning Y and Z, once he arrived to the upper Midwest). Commissioner Yana was a prolific note taker but with a doctor's handwriting, while Judge Wynn was a decent typist and decipherer (journalism school at UNC, after all), so together they produced some fine class outlines. I speak as well for Reuben Daniels, head of the EEOC office in Charlotte, a North Carolinian who preceded Judge Wynn at Marquette Law School by a year; Florence Johnson Raines, of our class of 1991; and Chuck Svoboda, a Marquette trustee and North Carolinian—all of whom also are here today.

Other greetings come from folks back home. They include Judge William Griesbach, U.S. District Judge in Wisconsin and another of Judge Wynn's classmates, and indeed the entire Marquette community.

But I am presumptuous enough to bring greetings from the past. For I have brought Judge Wynn's student file with me: I would say that I do this by the power vested in me as dean, but I may be about to violate the FERPA law concerning educational

privacy. Fortunately, Judge Wynn's expertise to date has been in state law (although, Judge, I need to get a word with you later about this licensee/invitee matter that Chief Justice Frye was describing).

In the file, one finds, duly listed on Judge Wynn's application, the names of his parents and brothers and sisters, as for some reason we then required. I am not so bold as to speak for them.

Yet I do regard myself as entitled to speak for those who contributed to the file. I thus bring greetings not only from my predecessor, the late Dean Robert Boden, and his colleague, the late Associate Dean Chuck Mentkowski, who would be so proud of Jim Wynn, but also from those from the North Carolina of the past, Judge Wynn's native state—those, more specifically, whose letters of recommendation in the mid-1970s made the case for the admission of James Andrew Wynn, Jr., to Marquette Law School. And here I refer to Daniel T. Earnhardt, still with us, and Andrew M. Scott and Olin T. Mouzon, late UNC professors who speak of Judge Wynn and to us across the decades. I conclude where Professor Scott concluded his letter of recommendation, some 35 years ago. I cannot improve upon his words, written at Chapel Hill on 27 February 1976: "Jim Wynn has a good mind and a clear one. He writes well and is a frank and likeable person. He is strongly motivated and works hard. He has come a long way—and wants to go further. I recommend him to you strongly and confidently."

So, Judge Wynn, from across the country, across the decades, and perhaps across an even greater divide than space and time, I bring you greetings—and congratulations. ■

PROFILE: Jane Appleby

A different route to a fulfilling career

The shortest distance between two points, as we all know, is a straight line. But it is rarely the most interesting. Jane E. Appleby is senior counsel at Aurora Health Care in Milwaukee, the type of job she had in mind when she was first accepted to law school 20 years ago. But her journey to get there was a bit circuitous.

Appleby grew up in Salt Lake City, Utah, and after earning an undergraduate degree in philosophy with an emphasis on ethics, she intended to go to the University of Utah Law School in 1991. Instead, she said, “I gave birth to twin daughters Molly and Kate, on my own birthday.” She delayed law school in order to raise her daughters. The family relocated to Wisconsin for a career move of her then-husband when the girls were four years old.

She applied to Marquette Law School’s part-time program in 1999 because it offered her the opportunity to homeschool her daughters during the day and attend class in the evening. “It was a challenging but exhilarating time,” she said. On a few occasions when childcare was an issue, her young daughters joined her at the Law School, sitting outside the room while she attended class. “They have fond memories of the wonderful treatment they received from professors, staff, and students alike,” said Appleby.

After graduating in 2004, Appleby began her career at Halling & Cayo, defending attorneys in disciplinary matters brought by the Office of Lawyer Regulation. In 2006, she moved to Quarles & Brady, where she practiced commercial litigation, developing a focus on healthcare-related litigation. She joined Aurora Health Care as senior counsel this year.



Marquette law degree: 2004

Employment: Senior Counsel, Aurora Health Care, Milwaukee.

Family: Twin daughters, Molly and Kate, 20.

“At Aurora, I am involved in all things litigation-related, including overseeing outside counsel handling such things as labor and employment cases, medical-malpractice claims, subrogation claims and collection actions brought on behalf of Aurora, worker’s compensation cases, and breach of contract claims,” Appleby said. Additionally, she provides counsel to Aurora’s caregivers on responses to third-party subpoenas, medical-staff disciplinary proceedings, and professional ethics. Aurora is the state’s largest private employer with more than 40,000 employees.

It is a broad and intense set of responsibilities, but Appleby has found an effective way to deal with the stress. “I have an overactive conscience,” she said, “and have always found it challenging to let go of my work at the end of the day. But yoga and meditation have helped me with that.”

A 16-year resident of Shorewood, she is an avid amateur naturalist and serious dog-lover. She enjoys cycling and whitewater rafting, and is a live-music enthusiast.

Appleby is also dedicated to the Law School. She is serving her second term on the alumni board, enjoys mentoring law students, and welcomes opportunities to speak at the Law School. She recently obtained Aurora’s approval to create a legal clerkship; the first student started this summer.

Appleby also is serving a second term on the State Bar’s Professional Ethics Committee and is the vice chair this year. She supports the work being done at Centro Legal and continues to work on pro bono matters as opportunities arise. “My first teacher at Marquette was Dean Howard Eisenberg, and his passion for access to justice (which I share) was immediately evident,” she said. “When I began at Marquette Law School, I felt as though I had landed exactly in the place that I needed to be.” ■

1966

James R. Scott, Madison, has been nominated and confirmed as a commissioner of the Wisconsin Employment Relations Commission and designated as WERC chair.

1969

Frank J. Schiro, Milwaukee, is the incoming president of the National Italian American Bar Association.

1972

Jon G. Mason has been appointed court commissioner for criminal intake in the Kenosha County Circuit Court.

1976



Mary Pat Ninneman has been included in the 2011 *Chambers USA*. She is with Quarles & Brady’s Milwaukee office and focuses on labor and employment law.

1977

Steven R. Sorenson has joined the Oshkosh, Wis., office of Davis & Kuelthau.

1978

William Evenson, De Pere, Wis., has been elected to the executive committee of Hawkins, Ash, Baptie & Co.

1979



John A. Rothstein has been included in the 2011 *Chambers USA*. He is with Quarles & Brady’s Milwaukee office and focuses on contract litigation, corporate disputes, product liability, probate, and real-estate matters.

1980

Gary M. Ruesch, Waukesha, Wis., has joined Buelow Vetter Buikema Olson & Vliet. He is part of the firm’s school-law practice.

1981

Mary Lee Ratzel has joined Von Briesen & Roper as a shareholder. She is a member of the firm’s healthcare practice group.

1982

Kathleen A. Gray has been elected to the board of the Waukesha County Community Foundation. She will also serve as the board’s secretary.



Warren P. Kraft received the inaugural Brad D. Bailey Assistant City/County Attorney Award from the International Municipal Lawyers Association. He is

assistant city attorney and human-resources director for the City of West Bend and also serves of-counsel to the Murphy-Desmond law firm, Madison.

1983

Carl Ashley, a judge of the Milwaukee County Circuit Court, was recognized by the State Bar of Wisconsin with its Judge of the Year award in June.

Thomas P. McElligott has been included in the 2011 *Chambers USA*. He is with Quarles & Brady’s Milwaukee office and focuses on environmental law.

1984

Robert H. Duffy has been included in the 2011 *Chambers USA*. He is with Quarles & Brady’s Milwaukee office and focuses on labor and employment law.

Mary Fons, Stoughton, Wis., has been recognized by the State Bar of Wisconsin for her lifetime commitment to the public interest. She received the 2011 Dan Tuchscherer Outstanding Public Interest Law Attorney Award at the bar’s Member Recognition and Networking Celebration on June 9 in Wisconsin Dells.





SUGGESTIONS FOR CLASS NOTES may be emailed to jonathan.leininger@marquette.edu or christine.wv@marquette.edu. We are especially interested in matters that do not recur annually (e.g., “Best Lawyers” lists). Personal matters such as wedding and birth or adoption announcements are welcome. We update postings of class notes weekly on the Law School’s website, law.marquette.edu.

1985

David J. Wambach, Madison, Wis., has been named the 2011 Prosecutor of the Year by the Wisconsin Association of Homicide Investigators for his successful prosecution of a 30-year-old cold-case murder. The case, featured in an episode of the CBS television series, *48 Hours: Mystery*, also occasioned Wambach’s receiving a Certificate of Achievement from Governor Scott Walker for his “strong commitment to public service and safety.”

1986



Kathryn M. Buono has been included in the 2011 *Chambers USA*. She is with Quarles & Brady’s Milwaukee office and focuses on corporate law and mergers and acquisitions.

1987

Kevin H. Govern has been promoted to associate professor of law at the Ave Maria School of Law, Naples, Fla.

1989

Eric J. Goelz, Hartford, Wis., has joined Matthiesen, Wickert & Lehrer. He focuses on civil-litigation defense.

Ann Barry Hanneman, Waukesha, Wis., has joined Simandl & Prentice as a shareholder. She focuses her practice on employer-side employment law.

Alan C. Olson & Associates received the 2010 Outstanding Pro Bono Law Firm Participation Award from Legal Action of Wisconsin.

1990

Kristin A. Hess, Green Bay, Wis., has joined the Department of Natural Resources. She will

provide counsel on real estate, remediation and redevelopment, and Chapter NR 45 property issues as the real-estate specialist for the northeast region of the state.

1991

Matthew W. O’Neil, Milwaukee, has joined Fox, O’Neil & Shannon. He focuses his practice on commercial litigation and appellate work.

1992

Marilyn M. Carroll, Brookfield, Wis., has joined Davis & Kuelthau as a shareholder.

1994



Christopher P. Banaszak has been named chair of the Labor and Employment Practice at Reinhart Boerner Van Deuren, Milwaukee.



R. L. McNeely gave a presentation, titled “A Few Counter-Intuitive Facts, Common Misconceptions and Ironies About Intimate Partner Violence, Based on Social Science Research,” at the State Bar of Wisconsin’s Domestic Litigation: Practical and Legal Implications CLE on April 8, 2011.

1994

Othman M. Atta has been named executive director of the Islamic Society of Milwaukee.

1995

Shawn M. Eichorst has been named director of athletics at the University of Miami. He previously served as deputy athletic director at the University of Wisconsin–Madison.

1997

Debra E. Kuper, Duluth, Ga., accepted the “Employment Law Team of the Year Award for 2011.” She received the award in June at the fifth annual Global Counsel Awards gala hosted by the International Law Office and the Association of Corporate Counsel in New York. Kuper is vice president, general counsel, and corporate secretary of AGCO.

1998

Bryan M. Becker, Milwaukee, has joined von Briesen & Roper. He is a shareholder in the banking, bankruptcy, business restructuring, and real estate practice group.

Ellen Nowak, Madison, has been appointed to the Public Service Commission of Wisconsin. She will serve as one of the agency’s three commissioners.

1999



Jeanette Corbett has joined First, Albrecht & Blondis, Milwaukee, and focuses on plaintiffs’ personal-injury matters, worker’s compensation, and civil-rights litigation. She was previously a

team captain in the violent crimes unit of the Milwaukee County District Attorney’s Office.

Kim S. Magyar has joined the Phoenix, Ariz., office of Farhang & Medcoff as a partner. She focuses her practice on the defense of labor and employment matters, products liability, and commercial litigation.

Finding and meeting challenges, coast to coast



Marquette law degree: 1982

Employment: Mundell, Odlum & Haws, LLP, San Bernardino, Calif.

Family: Married to Laurie; three adult children: Nick, Jack, and Margaret.

James A. Odlum's life has taken him from one coast to the other, with a stop in between for law school.

He grew up in Hartford, Conn., and earned his bachelor's degree, cum laude, from the University of Connecticut in 1979. Deciding that he wanted some different scenery, he set out to go to law school in a different area of the country. He had friends in Wisconsin and knew all about Al Maguire and basketball, so decided to check out Marquette Law School. "I liked what I saw and was lucky enough that they decided to give me a shot."

During his years at Marquette, Odlum was a University Scholar, a St. Thomas More Scholar, and a member of *Marquette Law Review*. During his third year, he met his wife, Laurie, who was in the M.B.A. program at Marquette. Now married for 28 years, they have three adult children, who all live in California.

After graduating in 1982, Odlum clerked for Judge John Coffey, L'48, of the U.S. Court of Appeals for the Seventh Circuit. He then continued his adventure west. "Life takes funny turns you don't always expect," he said. Odlum was invited to interview at a firm in Los

Angeles. "I didn't have my heart set on moving west, but the Midwest was in the midst of a recession, and I thought there might be better opportunities on the West Coast," he recalled. It didn't hurt that the firm flew him out of Milwaukee on a gray, slushy November day, into sunny Beverly Hills. In 1983, he joined Gibson, Dunn & Crutcher, a 1,000-lawyer firm, where he spent seven years in the labor-law department.

In 1990, Odlum and a friend hung out a shingle 60 miles east of Los Angeles in San Bernardino. Twenty-one years later, Mundell, Odlum & Haws is a thriving firm, with 10 lawyers and an equal number of support staff. It serves small and medium-sized companies in labor and employment and business litigation. "I love being my own boss and the security and flexibility that come along with it," Odlum said. "I can't get laid off, don't have to deal with a boss, and I can wear jeans, sneakers, and a golf shirt some days if I want. Also, it's never boring. The practice is challenging, and I always have interesting stories to share."

Odlum is grateful for his years at Marquette Law School. "I have a lot of respect and fond feelings toward the law school. I was taught that being a lawyer—a Marquette lawyer in particular—carries responsibility to conduct myself honestly and ethically. It was woven into who I am," he said.

He remains dedicated to the school and is a member of the Woolsack Society. Watching the Law School's transformations from afar, Odlum is pleased with the national attention the school is getting and with the way it is attracting faculty and students from around the country. ■

PROFILE: Onnie Smith

Law, business, community service are all in her genes

Onnie Leach Smith's business acumen may very well be coded into her DNA. She is a direct descendant of a storied Wisconsin business family. Her mother, Mary Leach, was a business owner, and her father, Mowry Smith, is the great-grandson of Elisha D. and Julia Smith. The extended family has owned and operated the Menasha Corporation for nearly 160 years.

Born and raised in Neenah, Wis., Smith expected to go into business. In preparation, she got a degree from the University of the Pacific in California, followed by an M.B.A. from the University of Wisconsin–Madison. She worked in sales and marketing in the corporate world for several years until, at 32, she sought something different. “I was ready for a change, a challenge, and decided to pursue what I had long considered—law school.”

“I really owe a debt of gratitude to Marquette Law School,” said Smith. “They took a chance on me, and I hope they are glad they did. I love being a lawyer.”

Upon graduating from law school in 1990, Smith started at Reinhart Boerner Van Deuren in Milwaukee, where she worked in estate planning for two years. She then moved to a midsized firm in Brookfield before opening her own solo practice in 1994.

She has melded some of her life's passions into a successful and fulfilling law practice in Delafield, where she handles a wide variety of matters involv-



Marquette law degree: 1990

Employment: Delafield Law Offices, Delafield, Wis.

Family: Daughter, Mary, a senior in high school

ing estate planning and juvenile advocacy. Her practice focuses on business succession planning, wills, trusts, powers of attorney, charitable giving, marital-property agreements, probate and trust administration, adoptions, and guardianships. “I find this work very

Bethany C. McCurdy, Milwaukee, has been promoted to partner at Gonzalez Saggio & Harlan. She is with the firm's employment group.

Bradley W. Raaths, Madison, has been appointed president and managing partner of DeWitt Ross & Stevens. His practice is focused on representing business clients in all manner of complex business transactions, including mergers and acquisitions, private equity offerings and corporate-governance issues.

Mary T. Wagner's *Fabulous in Flats*, her third collection of essays, has been published by iUniverse.

2000

Scott Baumbach, Madison, has been named secretary of the State of Wisconsin Department of Workforce Development. He had been interim secretary since May 2011 and, previously, deputy secretary.

2001

Brad L. F. Hoeschen, Milwaukee, has joined Chernov Stern & Krings as a shareholder.

Jennifer Kopp, Brookfield, Wis., has joined Davis & Kuelthau as a senior associate.

2002



Dillon J. Ambrose has joined the Milwaukee office of Davis & Kuelthau as a litigation associate.

John R. Schreiber, Milwaukee, has been elected shareholder at O'Neil, Cannon,

Hollman, DeJong & Laing. He focuses on banking and creditors' rights.

Mark P. Tilkens has been chosen to lead Constangy, Brooks & Smith's recently opened Madison office.

rewarding,” she said, “I enjoy working with families and helping to provide positive resolutions in financial and personal matters.” She shares office space and a paralegal with a friend, and fellow Marquette lawyer, Kimberly Haines, L’90.

“I opened my own practice after I adopted my daughter as a single parent shortly after law school. Having my own practice allows me the flexibility to be very involved in my daughter’s life,” said Smith. Her daughter, Mary, who is now a senior in high school, is named after Smith’s mother, who passed away a few months before Mary was born.

“My mom was a wonderful person. She was independent and a bit of a nontraditionalist for her time. She was supportive of everything I did,” Smith said. To further honor her mother and the ideals she stood for, Smith established the Mary Leach Smith Memorial Scholarship at the Law School, providing funds for women who are attending law school as a second career. Another recent gift she made to the Law School honors a colleague and mentor, the late Michael R. Smith (no relation). Onnie Smith’s parents are also honored with their names on a study room at Eckstein Hall.

Smith’s philanthropic spirit and commitment to service extends beyond the Law School into the community. She serves on the board of the Pregnancy Support Connection in Waukesha, Wis. She also is a past president of the Board of Directors of Betty Brinn Children’s Museum and a former board member of the Kettle Moraine Education Foundation, Gift of Adoption Fund, and the Menasha Corporation Foundation. She also was recently appointed to the board of directors of the Menasha Corporation—continuing a family leadership tradition established by her great-great-grandfather. ■

2003

Kirk Deheck, Milwaukee, has been promoted to shareholder at Boyle Fredrickson. He focuses his practice on preparation and prosecution of patent and trademark applications.

Kathleen Healy, Neenah, Wis., has been promoted to partner at DiRenzo & Bomier. She focuses on family and employment law and civil litigation.

Eric Lalor, Milwaukee, has been promoted to shareholder at Boyle Fredrickson. He focuses his practice on strategic intellectual property portfolio development.

2004

Tim Casey has been appointed senior counsel for Global X-Ray, a part of GE Healthcare.



Rhyhan J. Lindley has joined Melli Law, in Madison. He focuses on construction law, business transactions, insurance law, and litigation.

2005

Samuel C. Hall, Jr., Milwaukee, has joined Crivello Carlson as an associate with the firm’s litigation team.

Jessica S. Johnson and Nathan R. Michalski have opened The Spruce Roost Vacation Rental in Anchorage, Alaska.

Andrew P. Beilfuss, Milwaukee, has been elected as a district representative on the State Bar of Wisconsin’s Board of Governors.

2006

Jonathan G. Gonzalez has joined the Baltimore/Washington office of Offit Kurman. He is an associate with the firm’s employment group.

Meghan Healy, Milwaukee, has been promoted to partner at DiRenzo & Bomier. She focuses on family, employment, guardian ad litem, and worker’s compensation matters.

James J. Wawrzyn, Milwaukee, has joined von Briesen & Roper. He is part of the business practice group.

2007

Kendra Fisher, Sturtevant, Wis., has joined the state’s Department of Natural Resources. She will provide counsel on air, hazardous waste, and hazardous substance spill issues as a DNR air management engineer.

Jeremy Geisel, Waukesha, Wis., has joined Walden, Schuster & Vaklyes as an associate. He focuses his practice on business and corporate law, real estate, estate planning, and personal-bankruptcy representation.

Timothy M. Johnson, Milwaukee, has joined Crivello Carlson as an associate with the firm’s litigation team.

William E. Keeler III, Milwaukee, has joined Crivello Carlson as an associate with the firm’s litigation team.

Joseph F. LaDien has joined Pitman, Kyle, Sicula & Dentice in its Watertown office. His practice is in personal-injury and general litigation.

Alyson Rieser Lynch has joined Stafford Rosenbaum, in Madison, as the firm’s marketing coordinator and law librarian. ▶▶

Making things better in her corner of the world



Antoinette Robbins has been a go-getter and trailblazer all her life. She was promoted from first to second grade in a matter of weeks and took sixth-grade math in third grade, as she advanced beyond a point where her neighborhood school could further her learning. In fourth grade, she began attending the prestigious Julia Reynolds Masterman Laboratory and Demonstration School in Philadelphia. She studied there through high school and then became the first person in her immediate family to go to college.

Robbins graduated from Cornell University in Ithaca, New York, in 1985, where she studied industrial and labor relations, with the intention of going to law school.

But first she went to work to earn money to pay off her undergrad education debt. She worked for a union as assistant to the president and also worked as an office manager for a city councilwoman. After this exposure to the work world and meandering around a sundry of jobs, something didn't feel right. "I realized I wasn't being the best me I could be, and so I decided it was time to apply to law school," she said.

Robbins inquired at Marquette, initially as a courtesy to a friend who was an alum. "I found that it met a lot of my needs, and I realized that I could thrive in the practical legal environment it offered. With the alumni support and Thomas More scholarship, it soon became my first choice for law school," she said.

Robbins arrived in Milwaukee with only a few personal belongings and a lot of determination. "I was very

• **Marquette law degree:** 1990

• **Employment:** Senior Compliance Officer, Delaware Investments, Philadelphia, Pa.

serious about being a student. I was a true consumer of education—I was there to get something, and I was ready to knock on every door until I got it," she recalled.

As a student, she clerked at Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman and also was an intern with the National Labor Relations Board in Milwaukee. During her first summer home in Philadelphia, she worked in a general-practice firm of the alum who had referred her to Marquette Law School. "I thought I would come out of law school and be an employment lawyer," she said. "I took trial practice, appellate practice, and a smorgasbord of litigation courses, and was on the National Moot Court team."

Robbins said, "Once you learn to think like a lawyer, you can do anything." Upon graduation in 1990, she had three job offers: one at a Milwaukee law firm doing worker's compensation law, another in Chicago in litigation, and a third at the New York Stock Exchange as an enforcement attorney. She accepted the position in New York and began her career as a regulatory litigator.

While at the Exchange, she lived through the horror of the 1993 terror attack at the World Trade Center. "During the evacuation, I had to walk down 44 flights in a smoke-filled stairwell, not knowing exactly what had happened. I thought, 'I'm not ready to go yet. . . . I've never even traveled outside the country.'" Later that year, she traveled to Spain alone—her first trip out of the United States. She has since been to South America, other countries in Europe, and the Caribbean.

After more than five years, Robbins left the stock exchange for a position as a compliance attorney with AXA/Equitable Life in New York. During this time, her father became seriously ill and she found herself commuting frequently between New York and Philadelphia. "My life balance was off and I decided to take a job in the nonprofit sector. I worked briefly for the ACLU in its development office and then resigned after a few months to care for my dad," she explained.

He died in August 2001, and Robbins decided to

take a little time before going back to work in financial services. “His birthday was September 11, just days after his funeral. I woke up that morning thinking—hoping—I could just make it through the day and through my grief,” she recalled. And then the world changed with the attacks on the World Trade Center.

Finding work post-9/11 was difficult. “Not only was the physical site of the financial district in disarray, but the impact of the attacks was felt throughout the industry,” she explained. People’s psyches were impacted, and she was not exempt. “I went into my hole for a while and didn’t care about working much,” she said. In spring 2002, Robbins set out to get back to Wall Street. Over the next several years, she held various jobs in compliance in the Philadelphia area. She attended the Financial Industry Regulatory Authority Institute at Wharton, obtained her designation as a Certified Regulatory and Compliance Professional, and developed into what might be termed a multidisciplinary compliance generalist.

Robbins accepted a position in 2008 as a senior compliance officer with Delaware Investments. “My life

has taken the trajectory I wanted,” she said. “Though I didn’t become an employment attorney as I had thought, my interests morphed over time to my desiring to do exactly what I am doing now.”

Robbins is generous with her time and her resources. She has financially supported the Eckstein Hall project, saying, “The beautiful new building is an outward manifestation of the seriousness that the professors and students bring to the study of law.” Additionally, she endowed a scholarship to help economically disadvantaged students from the Philadelphia area attend Cornell. She is a volunteer mediator in a neighborhood justice program in Philadelphia where she serves as its board president. She is also in the process of rehabbing a house in Savannah, Ga., so that it is accessible to those with physical disabilities.

Robbins is a jazz enthusiast, supporter of the arts, and “trying,” she said “to become a better golfer.”

“I acknowledge that I cannot single-handedly change the world, but I think I am making valuable contributions and managing my corner of it,” she said. ■

2009

John S. Bennett, Wauwatosa, Wis., has been appointed to the board of directors of Supportive Community Services.

Thomas W. Moniz has joined the Oshkosh, Wis., office of Davis & Kuelthau.

Michael Rust has founded Strategic Conflict Resolution Services, LLC, to serve Green Bay, the Fox Valley, and Wisconsin with mediation, conflict-resolution, and training services for individuals and companies. He was also appointed to the board of the Wisconsin Association of Mediators.

Dustin F. Von Ruden has joined the Eau Claire, Wis., office of Weld, Riley, Prens & Ricci. He is with the firm’s business and real estate sections.

2010

Scott S. Luzi has joined Heins Law Office, Mequon, Wis. He focuses his practice on plaintiff’s employment law and litigation.

Kate McChrystal, Milwaukee, has joined Gagne & O’Halloran. She focuses on family law.

Sara C. Mills, Milwaukee, has joined Crivello Carlson as an associate with the firm’s litigation team.

Meghan C. O’Connor has joined von Briesen & Roper as a member of the firm’s health care practice group. She focuses her practice on managed care and providing contracting, risk management, and regulatory compliance for hospitals and healthcare systems.

Tim Schoonenberg has joined Houseman & Feind, Grafton, Wis., as an associate. He focuses his practice on commercial

transactions, employment, small business, municipal, and family law matters.

Michael R. Soule has joined Consigny, Andrews, Heming & Grant, Janesville, Wis., as an associate.

2011

Meghan M. Coffey has joined Ryan Kromholz & Manion, Brookfield, Wis., as an associate.

Nicole S. Rosen, Milwaukee, has joined Reinhart Boerner Van Deuren as part of the firm’s healthcare practice.

Sarah J. Knutson, Milwaukee, has joined Urban & Taylor as an associate trial attorney. She focuses her practice on plaintiff personal-injury and employee-rights litigation.

Celebrating Judge Wynn's Fourth Circuit Investiture



Photo: North Carolina Bar Association

(From left to right) Dan Dennehy, L'79, Joseph Yana, L'79, Patti Yana, Jim Wynn, L'79, Jennifer Rothstein, and John Rothstein, L'79, gather in Raleigh, N.C., at a reception following Judge Wynn's investiture this past spring as a judge of the United States Court of Appeals for the Fourth Circuit. Marquette University Law School congratulates Judge Wynn on his appointment. More on the investiture is inside (p. 42).