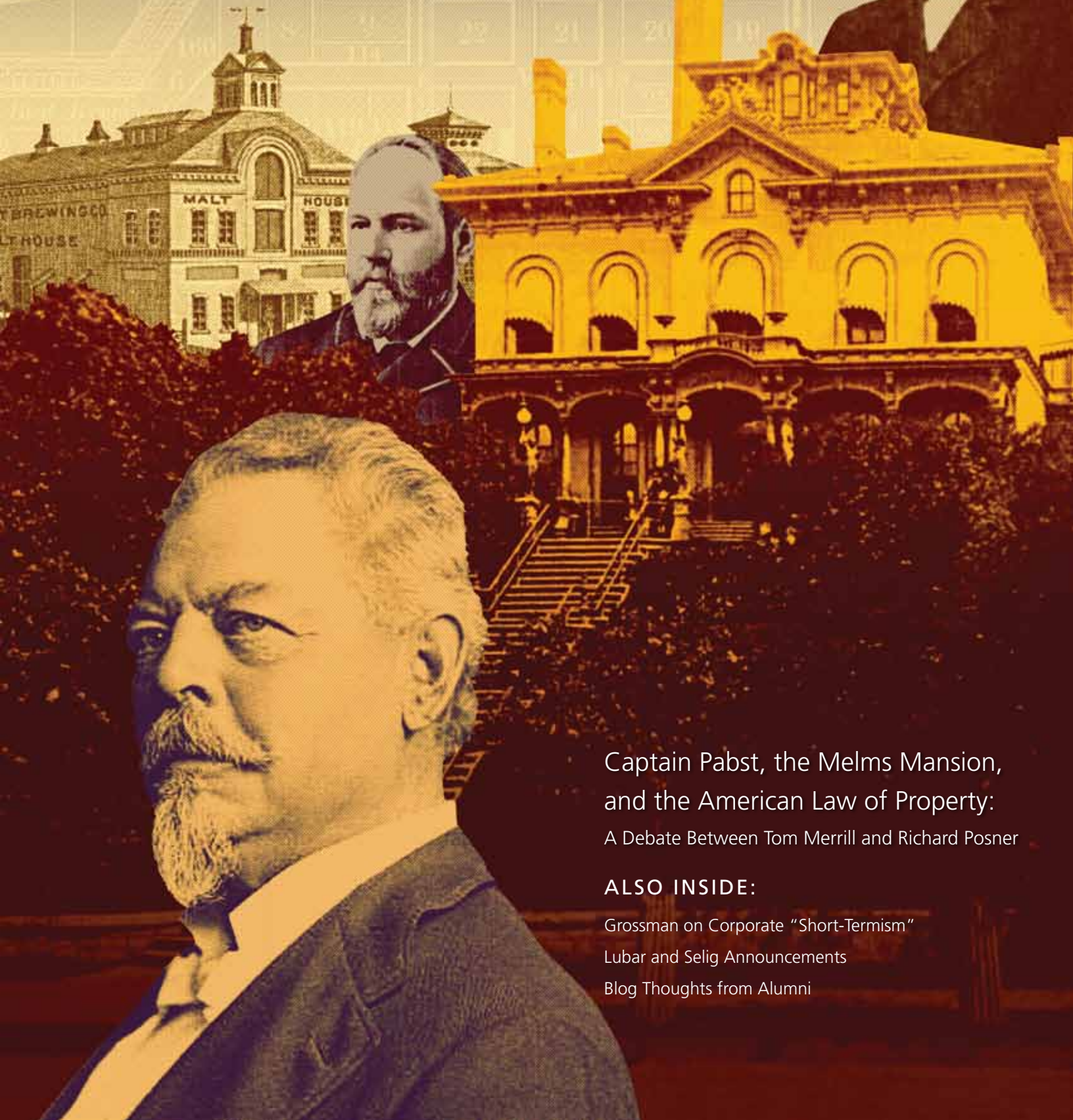


MARQUETTE LAWYER

MARQUETTE UNIVERSITY LAW SCHOOL MAGAZINE SUMMER 2011



Captain Pabst, the Melms Mansion,
and the American Law of Property:
A Debate Between Tom Merrill and Richard Posner

ALSO INSIDE:

Grossman on Corporate "Short-Termism"

Lubar and Selig Announcements

Blog Thoughts from Alumni

Bringing the World to Milwaukee

“Do you really have the Archbishop of Dublin here?” A Milwaukee lawyer asked me this one recent morning in Eckstein Hall. The answer was, “Yes.” Archbishop Diarmuid Martin was in our Appellate Courtroom, speaking to an international conference organized by Marquette Law School’s Restorative Justice Initiative (RJI). The lawyer was right to be impressed: Archbishop Martin has been a powerful, insistent voice for true reform in response to the clergy sex-abuse scandal and shame in Ireland. His interest in speaking at the conference demonstrates the Law School’s growing reach.

The RJI conference is one of many examples. Even in its first year, Eckstein Hall has delivered on my bold claim that it would be the best law school building in the country—partly because it has advanced our effort to help bring the world to Milwaukee.

Another example is this past year’s annual Hallows Lecture, delivered by Aharon Barak, former president of the Israel Supreme Court. While there was much to Justice Barak’s visit, my lasting specific memory is the final question from the floor after the Hallows Lecture: Othman Atta, L’94, a local attorney and leader

in the Milwaukee Muslim community, had a polite if pointed exchange with Justice Barak concerning the Israel Supreme Court’s treatment of Palestinians during Barak’s tenure. There was much else to the visit as well. For example, it became clearer to me (and no doubt others) how large the Holocaust looms in the backdrop of Israeli jurisprudence: one

must take account of it no less than one seeking to understand our federal law must appreciate America’s tragic history with slavery and race.

Tom Merrill’s Boden Lecture—which forms the cover story for this magazine—demonstrates how outside perspectives can illuminate. Merrill, who is the Charles Evans Hughes Professor at Columbia Law

School, uses original historical research to unpack the Wisconsin Supreme Court’s 1899 decision in *Melms v. Pabst Brewing Co.*, a staple of American property law and textbooks. His essay will be of interest both to those interested in Wisconsin history and to national legal academics. It also is the occasion for Judge Richard Posner’s return, of sorts, to the Law School. Posner, who was here a few years ago to deliver our Nies Lecture in Intellectual Property Law, is back virtually: specifically, in these pages (and those of the *Marquette Law Review*) to respond to Merrill’s critique of his work.

There are many other ways that Marquette Law School brings the world to Milwaukee. Surely this is so with our students. Some 40 percent of them are not from Wisconsin. This infusion of talent is to the benefit of our region. A similar thing could be said of our faculty, many of whom engage deeply in civic life upon their arrival here.

To be sure, we can scarcely claim a unique responsibility for bringing the world to Milwaukee. After all, news organizations, such as the *Milwaukee Journal Sentinel*, have been performing some of this function for decades. It is thus not happenstance that within the past half decade we have appointed to positions at the Law School two of the most respected broadcast and print journalists in the region. Their collaboration with their peers enabled us to be the center for political debate in Wisconsin during last fall’s election season.

We have a correlative interest in bringing Marquette Law School to the world. Our means include our extraordinary faculty blog, recently noted at volokh.com as the only law faculty blog with regularly updated content; our website more generally, where one can find our lectures and conference proceedings uploaded almost immediately upon occurrence; and, not least, this *Marquette Lawyer* magazine. I encourage you to read it—and to tell me whether you agree with Professor Merrill or Judge Posner.

Joseph D. Kearney
Dean and Professor of Law



Columbia’s Prof. Thomas W. Merrill and Marquette’s Dean Joseph D. Kearney in Eckstein Hall before the Boden Lecture this past fall.

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On the cover:

When Captain Frederick Pabst (bottom left) razed the Milwaukee mansion built by C. T. Melms (upper right) and subsequently occupied by Emil Schandein (middle), this late nineteenth-century action set in motion developments in legal doctrine about which scholars continue to disagree. Tom Merrill's essay begins on p. 8; Richard Posner's response follows.

Illustration by Sean McCabe

A Crossroads for Serious Discussion

Law. Politics. Education. Policy. Religion. Consumer protection. And, of course, baseball.

There were high expectations when Marquette University Law School moved into Eckstein Hall last summer. Most fundamentally, the University's leaders promised that Eckstein Hall would be an excellent setting for the study of law—and it is. They also promised that it would be a crossroads for serious discussion of major issues faced by the city, region, and points well beyond. The report card for the first year shows that this, too, is a promise kept.

In particular, during the past academic year, “On the Issues with Mike Gousha” saw the Law School's distinguished fellow in law and public policy moderate debates between the candidates seeking to be one of Wisconsin's U.S. senators, Wisconsin's governor, and the state's attorney general (last fall); the candidates in the Wisconsin Supreme Court election (this past spring); and the five candidates for Milwaukee County executive (in between).

Gousha also had guests such as U.S. Rep. Paul Ryan, chairman of the House Budget Committee, and Wendy Kopp, founder and CEO of Teach for America, for one-on-one discussions. Outgoing Gov. Jim Doyle joined Gousha for an hour of thoughts on his eight years as governor. And Rick Schlesinger, chief operating officer of the Milwaukee Brewers, talked about the off-the-playing-field matters that shape a Major League Baseball franchise.

There were other conferences, speeches, and gatherings. Leading figures from around the world,

led by Most Rev. Diarmuid Martin, Archbishop of Dublin, took part in a conference in April 2011 on issues related to sexual misconduct by priests; Prof. Janine P. Geske led this effort as part of the Law School's Restorative Justice Initiative. National experts joined in the annual public service conference in February 2011 to discuss new regulations in the financial sector. A panel of leading local educators joined with prominent innovators from Washington and Los Angeles for a conference last fall on successful ways to educate high-needs children. Milwaukee County District Attorney John Chisholm chose the Law School as the place for a speech on the future of criminal justice in Wisconsin.

The Law School's annual endowed lectures brought to Eckstein Hall experts on property law (Columbia Law School's Tom Merrill), punishment trends for murder (University of California–Berkeley's Jonathan Simon), and patent law (Mark Lemley of Stanford), as well as retired Israel Supreme Court President Aharon Barak.

And, among many other visitors, there were the 200 third-graders from Milwaukee schools who took part in a program combining the Law School's “Street Law” program, the local “Sam's Hope” reading-promotion campaign, and the Milwaukee Bucks. That included an appearance by Bango the Buck: the third-graders ensured that he received the warmest greeting of all this year. ■



Left to right: Distinguished Fellow Mike Gousha with Rep. Paul Ryan; Wendy Kopp, founder of Teach for America; Wisconsin Supreme Court candidates David Prosser and JoAnne Kloppenburg.

Lubar Gift to Accelerate Public Policy Role for Law School



Milwaukee civic leader and philanthropist Sheldon Lubar has provided a big boost to one of Marquette University Law School's priorities with a \$2 million gift toward work on public policy initiatives.

The Sheldon B. Lubar Fund for Public Policy, announced this past

December, will support policy research and initiatives, including conferences and symposia; curriculum development; and programs that enhance the teaching of public policy issues at the Law School.

"As Milwaukee's only law school, it is clear that Marquette can play a critical role in convening discussion on the most critical public policy issues of our day," Lubar said. "We are at a crossroads on some of the most pressing needs in our community, such as public education, transportation, and the future of fresh water. It is my hope that the Lubar Fund for Public Policy will further establish Marquette Law School as the place to discuss hard problems."

Lubar is the founder and chairman of Lubar & Co., a

Milwaukee-based private investment firm. He served as assistant secretary of the U.S. Department of Housing and Urban Development and as commissioner of the Federal Housing Administration under Presidents Richard Nixon and Gerald Ford, and as commissioner of the White House Conference on Small Business under President Jimmy Carter. He is also a past president of the University of Wisconsin System Board of Regents and has played a leading role in dealing with numerous local and state issues.

The opening of Eckstein Hall, the Law School's new home, sets the stage for expanding policy programming. Marquette leaders want people to regard the building as "the other Marquette Interchange," located next to the heavily traveled freeway crossroads and providing settings for civil discourse about important issues that affect the larger community.

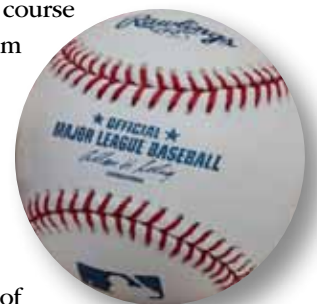
Marquette University President Robert A. Wild, S.J., praised Lubar's commitment, saying, "Shel Lubar has long been a driving force in Wisconsin, and he understands the importance of broad civic engagement on public policy issues and the role that our Law School plays in the region. We are truly appreciative of his confidence in Marquette Law School and grateful for all he does for the greater Milwaukee community." ■

Playing Ball on Sports Law with the Commissioner



Major League Baseball Commissioner Allan H. (Bud) Selig has been named to the adjunct faculty at Marquette University Law School as distinguished lecturer in sports law and policy. The appointment formalizes a teaching position that Selig has held at Marquette Law School since 2009, lecturing for several classes of the Professional Sports Law course each spring. The course is part of the nationally prominent Sports Law program at Marquette Law School, which is home to the National Sports Law Institute (NSLI), led by Marquette Law School Professor Matt Mitten. Selig has been a member of the NSLI Board of Advisors since its inception in 1989. "I have thoroughly enjoyed the lively dialogue with students in the classroom at

Marquette Law School over the past several years," said Selig. "It is very rewarding for me to pass on some of my experiences and hopefully enrich their legal education by discussing sports law and business issues affecting the historical development, structure, and operations of Major League Baseball." Selig brought Major League Baseball back to his native Milwaukee in 1970 and played a central role in the construction of Miller Park. ■



A Course on the Senate, Taught by a Senator

The subjects for the class this day included the debate over the constitutionality of filibusters in the United State Senate and consultation between members of the executive branch of the federal government and members of Congress.

Discussing the former, a pretty standard question from the professor: “Anybody got a sense of what Professor Gerhardt was saying about the constitutionality of the procedure?”

Discussing the latter, a not-at-all-standard comment from the professor (to illustrate a point): “Hillary Clinton called me before she decided whom to nominate as undersecretary for Africa.”

Some things are different when a class is about current legal issues involving the U.S. Senate and the professor is someone who served in the body for 18 years. That makes an elective course being taken by 30 Law School students this spring special: The professor is Russ Feingold, who was a member of the U.S. Senate from 1993 until 2011.

Feingold said that during the last couple years he was in the Senate, he would often go through the Marquette Interchange in downtown Milwaukee while traveling to events. “I drove my staff crazy every time we drove by here,” he said, because he would constantly remark about the new Marquette Law School that was being built adjacent to the highway. Eckstein Hall just kept catching his eye.

After the Democrat was defeated by Republican challenger Ron Johnson, Dean Joseph D. Kearney raised with Feingold the possibility of his joining the

Law School’s faculty during the spring semester as a visiting professor of law. Feingold was eager about it. “I think this is a special place,” he said. “It just seemed like a really exciting place for me to be right now.”



Feingold said that he has been impressed with his students, and he loves teaching. He is also working on a book about the involvement of the United States in global issues.

Feingold said he has focused the course on three issues related to the Senate: internal matters, such as how to fill vacancies and practices such as filibusters; matters involving the U.S. Constitution and the Senate, including what standards senators should use in assessing the constitutionality of a legislative proposal; and relations between the Senate and the executive branch, including the president.

Feingold continues to live primarily in Middleton, near Madison, but generally has spent several nights a week in Milwaukee.

Dean Kearney and Sen. Feingold have agreed to extend the appointment to the fall semester, with Feingold teaching a course in Jurisprudence as well, a subject that he studied while a Rhodes Scholar at Oxford. ■



December 2010 Graduation

A bagpiper led the processional down the central staircase as 300 people gathered on December 19, 2010, for the first Hooding Ceremony in Eckstein Hall. Another first was the participation of a service dog being trained by December graduate Marty Greer, a veterinarian. The dog, Bahari, wore a purple ribbon for the occasion. The graduates are joined here by Dean Kearney and Bahari.

Going on to Good Things: Honoring Four Alumni

Marquette University Law School recognized four alumni this past spring for their accomplishments. Whether it has been less than a decade or more than a half century since they graduated, these Marquette lawyers are exemplars of the Law School's ideals.

Alumnus of the Year Award

James P. Maloney, Arts '71, L'74



Even while practicing law, Jamie Maloney has spent the majority of his career spearheading outreach to

Milwaukee's Latino

community as board chair of Mitchell Bank. Established in 1907, the bank is located in a predominantly Latino area on the near south side. Thanks in large part to Maloney's work, the bank has received outstanding ratings for its outreach to the community. This outreach includes the initiation of multiple partnerships with religious, civic, and social institutions related to banking, mortgage, immigration, and home-ownership issues. Maloney is actively involved in multiple financial literacy initiatives and programs and has also served beyond the local community (e.g., as a member of the American Bankers Association's Housing, Community, and Economic Development Committee).

Lifetime Achievement Award

David J. Cannon, Bus Ad '55, L'60



Dave Cannon has prosecuted and defended hundreds of criminal matters in state and federal courts since beginning

his career in 1960 in Milwaukee. Cannon is a litigation partner at Michael Best & Friedrich LLP and often is called upon by firm clients to conduct sensitive internal investigations involving possible corporate wrongdoing. Before joining Michael Best & Friedrich in 1973, Cannon was Milwaukee County district attorney and U.S. attorney for the Eastern District of Wisconsin. He and brothers John, L'52, and Bob, L'54, began their careers by practicing on Milwaukee's East Side. Cannon deflects attention from himself and recalls the development of the Law School over the decades: "I was proud to become a lawyer in 1960 but am especially proud to be a Marquette lawyer today," he said.

Howard B. Eisenberg Service Award Ellen M. Escalera, L'02



Ellen Escalera has built her career on helping people who need an advocate: those likely to be ignored and neglected, those with limited English proficiency or disabilities, and those without health care. Escalera is a staff attorney for Disability Rights Wisconsin, a private nonprofit organization founded in 1977. She also serves on the board of directors for UNIDOS Against Domestic Violence, an organization to which

she offered legal services before joining Disability Rights Wisconsin in 2007. UNIDOS provides services to victims of domestic violence in Dane County, Wis., and 23 other counties. "At the end of the day," said Escalera, "if I have made someone's struggle less burdensome, then I feel I have succeeded professionally."

Charles W. Mentkowski Sports Law Alumnus of the Year Award Craig A. Pintens, L'01



For Craig Pintens, there's a fine line between a job and a dream. That's because he has what many sports fans consider a dream job: he is assistant athletics director of marketing at Louisiana State University (LSU). Before LSU, Pintens was associate athletics director for marketing and sales at Marquette, where he helped set attendance and revenue records in men's and women's basketball and attendance records in volleyball and soccer. Pintens has received eight awards from the National Association of Collegiate Marketing Administrators for his work in advertising, season-ticket campaigns, and corporate sponsorship. Pintens points to his legal education. "Marquette's sports law program is the best in the country," he said. "It automatically gives me an advantage over others in my field." ■

MELMS V. PABST BREWING CO.

The Doctrine of Waste in American Property Law

Thomas W. Merrill*

Melms v. Pabst Brewing Co., an 1899 decision of the Wisconsin Supreme Court, may be the most important decision ever rendered by an American court concerning the law of waste. And while the doctrine of waste does not loom very large in public consciousness these days, it has held a peculiar fascination for property theorists, for it touches directly on an important line of division in how we think about property. Does property exist primarily to protect the subjective expectations that particular owners have in particular things? Or is the central function of property to maximize the value that society ascribes to particular things?

To put it somewhat dramatically, but I think not inaccurately: Is property an individual right or a social institution?

Melms involved a mansion on the south side of Milwaukee that was demolished in 1892 by Captain Frederick Pabst, the brewer of Pabst Brewing Company fame. Pabst owned the surrounding property, and thought that he owned the mansion, too. It turned out that Pabst did not own the mansion in fee simple. Rather, according to another decision of the Wisconsin Supreme Court—handed down four years after the mansion was destroyed—he held it only for the life of an elderly widow named Marie Melms. After Marie's death, the Melms children would have inherited the mansion, if it still stood. The children sued Pabst, claiming that he had committed waste by destroying the home that was rightfully theirs.

* Charles Evans Hughes Professor of Law, Columbia Law School. This is an abridged version of an article that will appear in the summer 2011 issue of the *Marquette Law Review* and is based on the Robert F. Boden Lecture that Professor Merrill delivered at Marquette Law School this past fall.

The Melms mansion (as seen in this undated 19th-century photograph) faced south on Virginia Street in Milwaukee, slightly more than a block west of modern-day 6th Street.
Courtesy of the Milwaukee County Historical Society. ▶





Melms mansion and beer garden, pre-1876, viewed from the southwest. *Courtesy of the Wisconsin Historical Society. WHI-53917.*

The Wisconsin Supreme Court's 1899 decision rejected the claim that Pabst had committed waste in leveling the mansion. The decision contained path-breaking language seeming to say that waste disputes should be resolved by comparing economic values. In other words, the court appeared to adopt the view that property is a social institution, not an individual right. My central objective here is to ask whether this is the correct understanding of the case, or of the lessons that it holds for property law more generally.

I.

Waste is one of the ancient writs of the common law, dating back to the twelfth century. It applies when two or more persons have interests in property, but at least one of them is not in possession. A lease is the most familiar example; a life estate followed by a remainder would be another. For convenience, I will generally refer to persons in possession as "tenants," and those out of possession as "absent owners," with the understanding that these terms cover a variety of situations with more technical terminology.

Waste is an action by an absent owner to prevent the tenant from injuring the absent owner's interest in property. The action for waste has always been preventive in nature. The Statute of Gloucester, enacted in 1278, provided that the absent owner could recover treble damages against the tenant for committing waste. This was obviously designed to deter tenants from harming the interests of absent owners. Many states today still have statutes providing for multiple damages for waste.

Waste comes in three varieties. Permissive waste is a form of nonfeasance. Suppose someone dies, leaving the tenant the house for life and then to the absent owner. While the tenant is in possession, the roof develops a leak, but the tenant does nothing to correct the situation, causing the interior to suffer water damage. Here, the tenant's nonfeasance has harmed the absent owner's interest in the house. The absent owner has an action against the tenant for waste.

Voluntary waste, the second variety, is a form of misfeasance. A simple example: the absent owner leases a farm with a cherry orchard to a tenant. The tenant cuts down the cherry trees and sells them for wood. Here the tenant's misfeasance has damaged the interest

of the absent owner. The absent owner has an action for waste against the tenant.

The third variety, called ameliorative waste, is the least common but by far the most interesting. Suppose that the absent owner leases a warehouse to the tenant for 20 years. Several years on, the tenant wants to remodel the warehouse into a trendy restaurant. This clearly represents a fundamental change in the property. But, the tenant argues, with supporting evidence from real estate appraisers, the property would be worth much more, in market-value terms, as a restaurant than as a warehouse. Should the absent owner be allowed to enjoin construction of the restaurant, or recover multiple damages against the tenant for waste if the tenant remodels? Or should we regard such market-value-enhancing changes as not being waste at all?

Melms is a stark example of this third variety of waste. Although the life tenant, Pabst, demolished the mansion, the Wisconsin Supreme Court held that he was not guilty of waste. The court described how circumstances in the neighborhood had changed since the mansion was built. The surrounding land had been graded down, leaving the mansion standing on an isolated knoll. What was once a residential neighborhood had become an industrial district. Because of these changes, the court said, the property was largely worthless as a residence. It was worth much more, in economic terms, with the mansion razed and the land graded down to the level of the surrounding property so that it could be used for industrial purposes.

Melms proved to be a milestone in a transformation in the law of waste that took place in the twentieth century. Before *Melms*, all courts would have regarded the deliberate destruction of a house to be waste. Indeed, any material alteration of property by someone temporarily in possession was regarded as waste.

After *Melms*, the old rule began to break down. Beginning in the 1930s, the traditional rule was replaced in many states by a multifactor standard. The standard is expressed somewhat differently in different jurisdictions, but it looks to factors such as changed circumstances, what a normal owner would do with the property, and whether the tenant's actions had increased or decreased the economic value of the property. In practice, economic value tends to dominate everything else. If the economic value goes up, this confirms what a normal owner would do and where the neighborhood is heading.

If the value goes down, the opposite inferences are drawn.

The conventional rule of waste—that the tenant can make no material change in the thing without the permanent owner's permission—is consistent with the view of property as an individual right. If I temporarily transfer possession of something to someone else, through a lease or a life estate, I am entitled to receive the same thing back.

The newer view of waste, reflected in the Wisconsin Supreme Court's decision in *Melms*, is consistent with the view of property as a social institution. Temporary transfers of possession create a potential conflict of interest between the tenant and the absent owner. Such conflicts should not be resolved by insisting that the views and aspirations of the absent owner always prevail. We should instead ask whose views are more congruent with the interests of society. The answer will depend on the circumstances of each case. What we need is a flexible standard that allows courts to take into account a variety of factors, including, perhaps most importantly, economic value, in order to resolve these disputes in the way that is best for society.

The same fundamental question—whether property is an individual right or social institution—arises throughout property law. Consider the law of nuisance. When property is threatened by pollution, are owners presumptively entitled to an injunction, allowing them to insist on shutting the polluting factory down? Or must they be content with an award of damages, leaving it up to the factory to decide whether to stop polluting or to pollute and pay—whichever creates the greatest wealth for society? Or consider the law of eminent domain. Should the government be allowed to condemn property in return for payment of just compensation only in situations of strict necessity? Or can the government use eminent domain for any project that promises to make the social pie larger, generating more jobs and tax revenue than the compensation that the government must pay to the owners whose property is taken? This of course is the debate raised by the United States Supreme Court's decision in *Kelo v. City of New London* in 2005.

Ameliorative waste, the issue in *Melms*, presents the same fundamental question, yet in a simple context, typically involving only two parties. We can regard it as a bellwether for assessing our understanding of the basic purposes of property law. ►►

II.

The roots of the Melms dispute lie in the untimely death of Charles T. Melms, generally known as “C. T.” In 1843 at the age of 24,

Melms immigrated to the United States from Prussia and settled in Milwaukee. He married into a brewing family, becoming a partner with his father-in-law, Franz Neukirch. Around 1854, Melms and Neukirch purchased land along Virginia Street, in the Menomonee Valley (so named after the local river) on the near south side of Milwaukee. There they developed a state-of-the-art brewery complex, called the Menomonee Brewery. By 1860, it was one of the largest breweries in Milwaukee. In 1864, Melms constructed a handsome Italianate mansion on the site. The house was placed high atop a terraced and landscaped garden overlooking Virginia Street. The terrace extended well to the west of the house, where Melms placed a beer garden with a fountain and gazebo.

In 1869, Melms sat on a needle, and (in that era before antibiotics) developed an infection and then lockjaw. As he lingered before dying, Melms executed a will leaving all his real and personal property to his wife, Marie, and urging her to carry on the family business. Marie and two of C. T.’s brothers were named executors.

C. T. Melms’s death at the age of 50 left his young widow, who spoke mostly German, with seven minor children to raise. Marie wanted to keep the business going but quickly concluded that it was impossible. The estate had debts far in excess of the value of its assets. On legal advice, Marie decided to exercise her right to renounce the will, and instead to take homestead and dower rights in the property. The homestead rights consisted of a life estate in the mansion and a quarter acre of land surrounding it. The dower rights consisted of a one-third life estate in all other real property that her husband had owned, including the brewery complex. These marital property rights were subject to existing mortgages, but not to claims of unsecured creditors. Because Marie renounced the will,

the balance of C. T.’s property passed by intestate succession to his children.

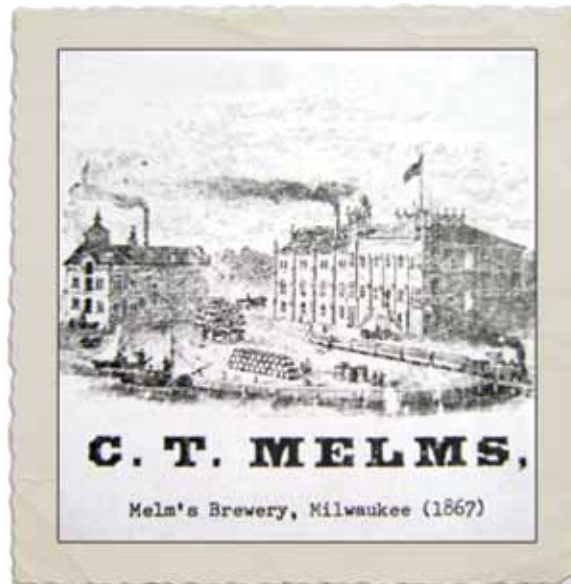
After Marie renounced the will and took homestead and dower rights, the executors petitioned the probate court for permission to sell the remaining assets of the estate. The court granted this request, and the assets were sold in multiple transactions. The property on which the mansion and the brewery stood, minus Marie’s homestead and dower rights and subject to existing mortgages, was sold to Jacob Frey, Marie’s brother-in-law, for \$379.50. The purpose of this transaction, almost certainly, was to strip away the claims of as many unsecured creditors as possible. If the unsecured creditors failed to object before the transaction was completed, there would be nothing but \$379.50 left in the estate to pay them.

Once the sale to Frey closed, Frey and Marie entered into a joint contract to sell all their interests in the Virginia Street property to Frederick Pabst and Emil Schandain, who were then doing business as the Phillip Best Brewing Company. Marie sold her homestead and dower rights, and Frey sold everything that he had purchased from the estate. The sale to Pabst was for \$95,000, minus assumption of mortgages, netting \$40,000 for Marie, which was paid to her over time

pursuant to a purchase money mortgage. Marie moved into humbler quarters, and used the money from the sale of the homestead and dower rights to support and educate her large brood of children. She eventually moved from Milwaukee and, ultimately, to Germany. Schandain and his family moved into the Melms mansion.

For the next almost 20 years, Pabst and Schandain operated the Melms brewery as the South Side Brewery of the Phillip Best Brewing Company, later to be known as the Pabst Brewing Company.

In 1886, Pabst and Schandain decided to consolidate their operations in an enlarged north side brewery, called the Empire Brewery. They closed the South Side Brewery and all its associated operations on Virginia Street. Schandain moved out of the mansion and died





The Melms brewery and mansion viewed from the northeast, pre-1870. *Courtesy of the Wisconsin Historical Society. WHI-53915.*

in 1888. In 1892, Pabst razed the mansion and graded the terraces on which it had stood, down to the level of the surrounding property. His apparent objective was to prepare the property for sale or lease as an industrial site, the judgment being that it would obtain a higher price if uniformly graded and without the mansion.

The site was eventually sold to the Pfister & Vogel Leather Company.

About the same time Pabst was tearing down the mansion, the Melms children learned from an uncle that the sale of property by the estate to Frey in 1870 was vulnerable because their mother—one of the executors—was a secret beneficiary of this transaction. They sued their mother (they previously had sued Pfister), as well as Pabst, claiming that the transaction from the estate to Frey was void, and hence Pabst had no valid title to the property. They also claimed that the only interest Pabst had acquired in the homestead was their mother’s life estate, and that the remainder after her death (she was still alive at the time in Europe) belonged to them.

The Wisconsin Supreme Court addressed these claims in separate opinions in 1896. The claim that the sale to Frey was void for fraud was assigned to Justice Silas Pinney.

He concluded that the sale was merely voidable, not void, and that Pabst was a bona fide purchaser for value without notice of any fraud, and hence had good title.

Justice John Winslow was assigned to deal with the homestead. The critical issue was whether the children’s remainders were included in the rights sold by the estate to Frey in 1870. If the remainders were sold to Frey,

then Frey had sold them to Pabst. If the remainders were not sold by the estate, they still belonged to the children.

The key document was the deed from the executors to Frey, executed on May 25, 1870, which was ambiguous on this point. It sold the entire parcel of land on Virginia

Street, together with “brewery, buildings & improvements thereon,” “excepting . . . that portion, which has been set apart as a homestead to the widow of the said deceased.”

This can be interpreted in two different ways.

By excepting “that portion” set aside for the homestead, did the deed except from the sale only Marie’s legal homestead rights, i.e., her life estate? Or did it except from sale both her life estate and the children’s remainders? If only the life estate was excepted, then the



ABOVE C. T. Melms. *Courtesy of the Milwaukee County Historical Society.* RIGHT Frederick Pabst. *Courtesy of the Wisconsin Historical Society. WHI-60078.*



remainders were included in the property sold to Frey. If both the life estate and the remainders were excepted, then the remainders were not sold to Frey and instead descended to the children.

Justice Winslow concluded for the court that Pabst had acquired only a life estate *pur autre vie* in the homestead property, which would expire upon the death of Marie. (She would die in late 1899.)

The conclusion that Pabst had acquired only a life estate was, in my view, almost certainly wrong. The deed to Frey (along with the License for Executors' Sale) was admittedly ambiguous. But the ambiguity should have been resolved in favor of Pabst, for three reasons. First, the deed that Marie and Frey executed when



Phillip Best Brewing Co.'s "South Side Brewery" along the Menomonee Canal, ca. 1880 (old Melms brewery in the background). Courtesy of the Wisconsin Historical Society. WHI-54326.

they sold their interests to Pabst was a warranty deed, promising that Marie and Frey jointly had sufficient interests to confer fee simple title on Pabst. Such a deed necessarily meant that Marie and Frey were selling both Marie's interest in the homestead and the remainder interests in the homestead. Second, Wisconsin law at the time provided that ambiguous grants of land should be construed as conveying "all the estate." All the estate here would mean both the life estate and the remainders. Finally, ambiguous deeds are construed against the drafter. Since Marie, as an executor of her husband's estate, had signed the deed to Frey, any ambiguity in that deed should have been construed in favor of the grantee, Frey, meaning that he received the remainders. For multiple reasons, then, the instruments should have been construed to mean that the estate sold the children's remainders to Frey, who in turn sold them to Pabst.

Did the estate have the authority to sell the children's remainders? Almost certainly it did. These were vested remainders, not contingent remainders, and vested remainders have always been regarded as being alienable inter vivos. When Marie rejected the will, electing to take a life estate in the homestead, the remainders in the homestead were inherited by the children, who were minors. The Wisconsin Supreme Court, in a case decided in 1884 (involving the children's suit against Pfister), had specifically held that Marie, as an executor of the estate and legal guardian of the children, was competent to act on their behalf.

The Wisconsin Supreme Court's erroneous ruling that Pabst had only a life estate in the homestead nevertheless gave the Melms children their third and final shot at securing some satisfaction from the Pabst Company. If Pabst had only a life estate, then Pabst had a legal duty not to commit waste to the injury of the remaindermen, i.e., the Melms children. Accordingly, the children sued Pabst yet again, this time for committing voluntary waste by demolishing the mansion on the homestead property in 1892. Under Wisconsin law at the time, a party who committed waste was liable for double damages.

It is not unlikely that the Wisconsin Supreme Court, when it heard the third *Melms* lawsuit in 1899, realized that it had made an error in holding that the Melms children had remainders in the homestead property. At the very least, it must have realized that it would be highly inequitable to penalize Pabst for acting as though he owned the mansion outright when he had every reason to believe, based on the representations of the parties from whom he had purchased the property, that he owned the mansion outright. The right thing to have done—the candid, forthright, courageous thing to have done—would have been to overturn the decision about title to the homestead, or at least to absolve Pabst from liability based on a good-faith error. But, perhaps to avoid an embarrassing reversal, the Wisconsin Supreme Court did not do the right thing. Instead, it fudged the facts, and, in so doing, transformed the law of waste.

III.

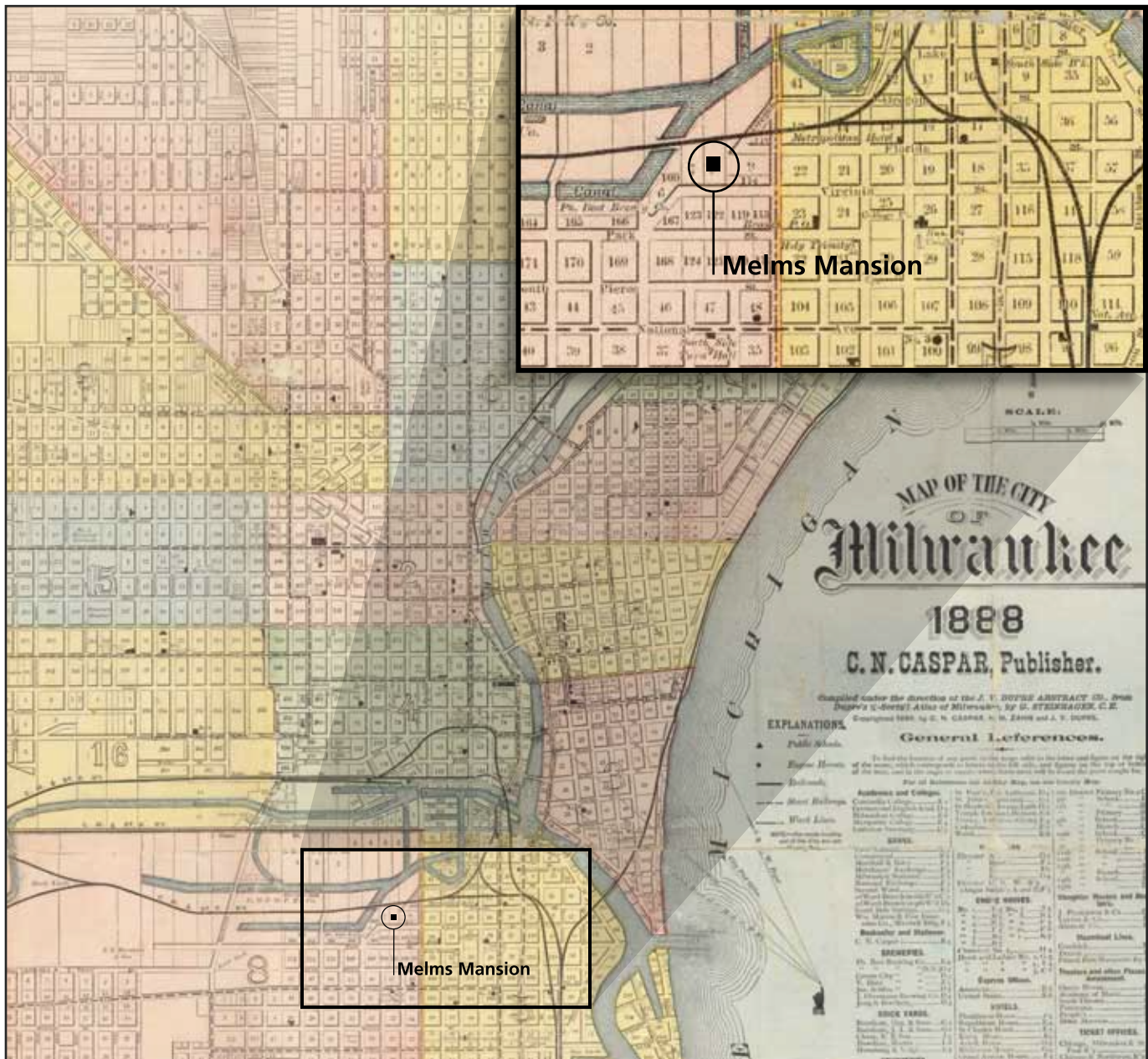
When the Melms children's waste action went to trial, the opposing sides presented very different views of the waste issue.

The children's theory was that they were entitled to inherit a specific thing—the mansion built by their father. In order to make them whole, Pabst was required to

pay an amount that would permit the mansion to be reconstructed. Their evidence thus went to the cost of reconstruction.

Pabst presented a very different view of the matter. In his view, the critical question was the market value of the mansion. The children were entitled to the land, but they should not be awarded damages for waste if the presence of the mansion added nothing to the value of the land. Pabst's witnesses therefore testified that the mansion, if it still stood, would have little or no rental value and would not be attractive to purchasers at

any price. Some witnesses said that the elevation of the structure high above the street meant that there were too many steps to climb. Others testified that the dominant use of property on the north side of Virginia Street had changed from residential to manufacturing, and that the highest and best use of the land would be as a factory site. The picture they painted was of a forlorn house perched on a high knoll, surrounded by industrial property. The circuit court ruled that Pabst had not committed waste. ▶▶



Courtesy of the American Geographical Society Library, University of Wisconsin–Milwaukee Libraries.

The Wisconsin Supreme Court unanimously affirmed. Justice Winslow wrote that there was nothing wrong with traditional definitions of waste. Nevertheless, it was important to recognize that application of these concepts was necessarily subject to “reasonable modifications as may be demanded by the growth of civilization and varying conditions.”

Thus, although the Wisconsin court had previously held that it was waste for a tenant to cut a hole in the roof of a boarding house to install a chimney, the present case involved “radically different” elements. What was so radically different about Pabst’s destruction of the Melms mansion? Simply put, the neighborhood had changed. The Wisconsin Supreme Court painted a picture of inexorable socioeconomic change sweeping the south side of Milwaukee:

“The evidence shows that the property became valueless for the purpose of residence property as the result of the growth and development of a great city. Business and manufacturing interests advanced and surrounded the once elegant mansion, until it stood isolated and alone, standing upon just enough ground to support it, and surrounded by factories and railway tracks, absolutely undesirable as a residence and incapable of any use as business property. Here was a complete change of conditions, not produced by the tenant, but resulting from causes which none could control.”

Under the circumstances, the court indicated, no reasonable person in Pabst’s position could ignore the new conditions in the neighborhood.

The Wisconsin Supreme Court said that when “there has occurred a complete and permanent change of surrounding conditions, which has deprived the property of its value and usefulness as previously used,” the question whether the tenant “has been guilty of waste in making changes necessary to make the property useful” was a question of fact, to be decided by the trier of fact.

It would be an overstatement to say that *Melms* unequivocally repudiated the understanding of property as the right to specific things, and substituted in its place an understanding of property as a storehouse of wealth measured by market prices. After all, the court insisted that, ordinarily, a tenant is obliged to return the thing in a substantially unchanged condition when the tenancy ends. But by creating an exception for changed circumstances, the court moved a long way toward embracing the understanding of property as economic value.



This map, primarily taken from *Rascher's Fire Insurance Atlas of the City of Milwaukee* (1876 as updated 1885) and combined with the 1888 *Rascher's*, depicts the Melms mansion and vicinity as they would have appeared at the time of the 1892 teardown. Note the neighborhood of houses on the other side of Virginia St. and continuing south toward Park St. (today Bruce St.) and farther south (beyond the margin of this excerpted image). *Courtesy of the Milwaukee Public Library.*

IV.

The decision of the Wisconsin Supreme Court in *Melms* rests on one of the oldest tricks in the appellate court playbook: changing the facts to fit the desired result. The Melms mansion was affected by changed circumstances before it was demolished, but the changes were not the product of urban growth or socioeconomic changes to the neighborhood. The changes were due to the actions taken by Pabst himself.

When Pabst and Schandain purchased the property, the mansion and the beer garden were an integral part of a valuable and fully functioning brewery operation. The mansion would be occupied by the brewmaster and his family, who would oversee the operations of the brewery, the malt house, the bottling plant, and the other associated facilities. The beer garden on the terrace, in common with other breweries operated by German families in Milwaukee in the nineteenth century, served as an important marketing tool in selling beer. The house and beer garden stood on an elevation facing a dense residential neighborhood and beckoned to thirsty customers on warm evenings.

The first action taken by Pabst that undermined the economic value of the mansion was the decision to open a new bottling plant in 1881, just to the west of the mansion. This required cutting down a large portion of the terrace that served as a beer garden. Several years later, Pabst closed the South Side Brewery and consolidated his operations in the Empire Brewery on the north side. Considering only access to transportation, this was a questionable decision. The South Side Brewery had an enviable location, abutting both water and a rail line. The Empire Brewery, which was landlocked, had neither



Former site of Melms Mansion

This modern aerial view (© Google) shows the site today. Note the houses on Bruce St. (formerly Park St.) and continuing to the south.

advantage, and thus incurred the additional expense of having its barrels hauled to a train station or docking facility. It is possible that changing demographics had something to do with the decision. The south side was rapidly being populated with Polish immigrants, and Pabst may have regarded the north side, which was more heavily German, as a more congenial location. The critical point is that the decision by Pabst to close the South Side Brewery was not forced on him by economic necessity but was a voluntary decision of uncertain motivation.

Closing the South Side Brewery set in motion a series of actions that led to the destruction of the mansion. Once the brewing operations were eliminated, it no longer made sense to keep a beer garden and brewmaster's house on the property. Sure enough, without a brewery to supervise, Schandein moved away, leaving the house vacant. The remaining terrace on which the beer garden stood was soon cut away, leaving "an isolated lot and building, standing from twenty to thirty feet above the level of the street." Critically, it was this point in time—when the house stood empty on an isolated knoll—that the Pabst witnesses used as their point of reference in commenting on the market value of the mansion. But the fact that the mansion had much-diminished market value because of its physical isolation and lack of a tenant was entirely due to decisions made by Captain Pabst.

What then about the neighborhood? The Wisconsin Supreme Court suggested that the neighborhood had been transformed from residential to industrial, and hence was no longer a fit place for a family to live. But a careful review of the testimony offered by the Pabst witnesses reveals that no one claimed the neighborhood in general was no longer residential. Maps from the era show that the south side of Virginia Street, directly opposite the mansion, remained fully residential, as did much of the area further to the south and east of the property. To the south of Virginia Street, the area was, and indeed

today still is (one short block farther south), completely residential.

There is a broader lesson in this mischaracterization of the facts. If demolishing the mansion was ameliorative waste, then the tenant himself created the condition that he was ameliorating. This suggests a serious complication in using economic value as a measuring stick for determining waste. What is the temporal baseline against which one measures changes in economic value? In the *Melms*

case, if the baseline is 1870, when the South Side Brewery was a fully functioning operation, tearing down the mansion would have reduced the market value of the property. If the baseline is 1890, after Captain Pabst had closed the brewery and excavated around the mansion, then tearing down the mansion presumably enhanced the market value of the property. By picking 1890 (or so) rather than 1870 as the baseline, the Wisconsin courts made it much easier to let Captain Pabst off the hook.

V.

The real transformation in the American law of waste occurred not in the nineteenth century, as Morton Horowitz and other scholars have suggested, but in the twentieth. That transformation was not a manifestation of inexorable social and economic change. Rather, it was a top-down reform influenced by the Legal Realist movement. Two decisions framed the argument for reforming the law of waste. One was *Melms*. The other was a New York decision, *Brokaw v. Fairchild*. The two decisions involved striking similarities in their facts, but very different outcomes.

At the center of both cases were large stately mansions constructed in the latter half of the nineteenth century. In both, life tenants wanted to tear down the mansion and replace it with a more economically valuable use: industrial property in the case of the Melms mansion, a high-rise apartment in the case of the Brokaw mansion. In both, persons with interests in remainders following the life estates objected to the destruction. In *Brokaw*, nieces and nephews who had a small chance of inheriting the property sought an injunction to prevent the life tenant from tearing down the mansion.

The orthodox view of the two cases, as it emerged in the 1930s, is roughly as follows. *Melms* was correctly

decided. The *Melms* court recognized that a rigid and unbending view of ameliorative waste is undesirable. Courts should not always insist on preservation of the property, but should take into account a variety of factors, such as changed circumstances of the neighborhood and relative economic values, before deciding whether ameliorative waste should be condemned.

Brokaw (the orthodox view continues) was wrongly decided. Isaac Brokaw, a wealthy New Yorker, built a complex of mansions on Fifth Avenue between 79th and 80th Streets. He left each of his children a mansion, to be held by them for life, and then inherited by their children; only if his children left no children was the property to be inherited by his other children's children, that is, the nieces and nephews. After Isaac's death in 1913, the preferred use of land on Fifth Avenue changed, with mansions coming down and apartment buildings going up. Isaac's son George, who had the mansion at the corner of 79th Street and Fifth Avenue, found living in the old mansion oppressive. It was large and drafty, and expensive to maintain. George tried to rent it out, but found no takers. He proposed demolishing the mansion and building a 13-story apartment building. When some of the nieces and nephews objected, the New York courts agreed that demolition of the mansion would be waste.

The *Brokaw* decision was widely condemned by leading law professors of the day, especially those influenced by the Realist movement. It was decried as rigid and unreasonable, an impediment to progress. A blue-ribbon panel of law reformers, the New York Law Revision Commission, recommended that the decision be overturned by the New York legislature. The commission's idea of a sound approach to the law was the Wisconsin Supreme Court's decision in *Melms*. The commission proposed a

five-part test for determining whether an action is waste, including whether the area has experienced changed circumstances and whether the modification would enhance the value of the property. The New York legislature adopted the proposed law in 1937, and it remains in effect today.

The New York reform proved to be highly influential with bodies like the American Law Institute, which also adopted a test consistent with *Melms* for inclusion in the *Restatement of Property*. Eventually, a majority of states adopted the *Melms* approach, looking to multiple factors

including changed circumstances and economic value in deciding whether voluntary transformation of the property should be regarded as waste. Only a minority—about ten states—continue today to adhere to the *Brokaw* approach, which condemns as waste any material alteration of the property.

At bottom, *Melms* and *Brokaw* embody conflicting views of the basic purpose of the law of property.

Brokaw views property as an individual right.

Isaac Brokaw had a right to specify that his grandchildren would inherit the mansions

he built. This is different from the right to say that they would inherit either the mansions or something else having equal or greater monetary value, like an apartment house. *Melms* is understood to embody the view of property as a social institution. The ultimate question is, what was the highest and best use of land? Is the site better suited for a mansion or a factory? If the correct answer is a site for a factory, then the law should facilitate the efforts of individuals to reach the correct answer, without regard to what particular individuals with possibly idiosyncratic views might think. *Melms* is the catalytic decision that began the process of remaking the doctrine in this fashion.



The Isaac Brokaw Mansion, 5th Avenue and 79th Street, New York City. Undated. The mansion was razed in 1965 in favor of a 25-story apartment building. Courtesy of the Museum of the City of New York. The Underhill Collection. B.1642.

VI.

The ultimate question, of course, is whether this was a change for the better. To help answer that question, we need to consider how the doctrine of waste actually functions in the modern world.

It turns out that it functions silently, and mostly in the background. The reason for this is that the issues governed by the law of waste are today largely handled by contract. The law of waste has always been understood to be subject to modification by contract. At common law, if a conveyance was made “without impeachment for waste,” this meant that the tenant was free to make modifications to the property that otherwise might be chargeable as waste. Over time, contractual provisions concerning the treatment of property by tenants have become ubiquitous, to the point where the action for waste is rarely invoked.

The reason for this is probably that the costs of contracting have steadily fallen, first through the widespread use of standard-form contracts, more recently through the use of easily copied digital files. As contracting has become cheaper, contractual solutions have increasingly squeezed out the solution imposed by the law of waste.

Take landlord-tenant relations. The law of waste provides an important background principle for landlord-tenant relations. But today, nearly every leasehold longer than a month-to-month tenancy is governed by a written lease. And nearly every written lease will spell out, in some fashion, the respective duties of the landlord and tenant in terms of maintaining the property, as well as the tenant’s obligation to obtain the landlord’s permission before undertaking any significant modification of the property.

Similarly, take family wealth settlements. Again, if someone wants to divide family property over two or more generations, the law of waste provides an important background principle in describing the respective duties of the present and future generations. But today, if specific assets are conveyed to one person for life and then to one or more remaindermen after that person dies, this is nearly always done by creating a trust. The trust instrument will spell out what powers the trustee has to sell, mortgage, or modify specific assets held in trust. When a dispute arises over whether to turn the family mansion into a bed-and-breakfast, it will be resolved by the trustee, subject to review for compliance with the trust instrument and general trustee duties, not under the law of waste.

Importantly, nearly every dispute over the tenant’s treatment of property presents not one but two potential opportunities to resolve the issue by contract. The issue can be resolved *ex ante*, by drafting appropriate provisions in the lease or the trust. But if the issue is overlooked, or the parties are not happy with the resolution that has been adopted *ex ante*, then there will be another opportunity to negotiate a contractual solution *ex post*. *Ex post*, the transaction costs of contracting will be higher, given that the parties are locked into a relationship with each other—a bilateral monopoly—and this can lead to extensive strategic maneuvering or even to bargaining breakdown. Nevertheless, contractual modifications of duties toward specific property can be and often are modified *ex post*. Landlords and tenants do renegotiate leases, and beneficiaries do persuade trustees to modify their management of property under trust.

Because the law of waste has been largely superseded by contract, the question about what form the law of waste should take can be seen as a question about the best default rule—that is, the best gap filler to apply when the contract is silent. If we view the doctrine as a type of contract default rule, what is the best version of the law of waste?

Given that nearly all disputes between tenants and absent owners are today resolved by contract, a simple, intuitive rule that is easy to apply without expert input may be the best default. The reason is simple: such a rule will reduce the cost of contracting. Let us assume that the parties to a potential waste dispute both understand the outcome that would maximize their joint welfare. Taking the *Melms* dispute as an example, let us say that the optimal outcome is to tear down the mansion and level the ground as an industrial site. In order to agree contractually on this outcome, however, the parties must agree on which party must make concessions to the other and in what amount. Must the life tenant (Pabst) make a side payment to the remaindermen (the *Melms* children) in order to obtain their permission to make the change? Or can the life tenant proceed without the permission of the remaindermen, and perhaps even demand a contribution from them as a condition of making the change (by eliminating the cost to them of future demolition)? If the default rule is uncertain or requires extensive investigation, then it will be more difficult for the parties to reach an agreement on these issues. A simple, intuitive, self-applying rule, in contrast, is likely to make the baseline of entitlement clear to both parties, and hence will facilitate the process of reaching a contractual solution that prescribes the optimal outcome. ▶▶

The commentary on the law of waste, in contrast, tends to assume that the rule should be designed not to reduce the costs of contracting, but to allow courts to reach the right outcome in litigated disputes. This would be the correct perspective if most or even a significant number of such disputes were resolved through litigation. But I have suggested that this is not in fact the case. The law of waste functions as a default rule or baseline for contracting, not as a decisional rule applied by courts—at least not very often.

Given their court-centered perspective, the commentators argue in effect that courts should adopt, as a default rule, the rule that the parties would have adopted for themselves if they had thought about the problem. This will presumably leave them better off than any other rule, and the objective of contracting is to enhance the joint welfare of the contracting parties.

One prominent suggestion along these lines, urged by John Henry Merryman, a Stanford law professor who wrote the chapter on waste for the *American Law of Property*, would ask the following in each individual case: what would *these particular parties* have agreed upon had they thought about the matter, based on their individual wants and desires? In effect, the question in every case should be one of intention: did the tenant's actions contravene or frustrate the intentions of the grantor? All the circumstances of the parties should be considered in answering this question. If no signposts of intention can be uncovered, then the grantor should be presumed to have intended that the tenant would engage in reasonable conduct, in light of all the facts.

Another approach, which also adopts a court-centered perspective, asks instead, what would *persons in general* have agreed upon in these circumstances? This is the approach urged by Judge Richard Posner in his *Economic Analysis of Law*. Judge Posner observes that the tenant and the owner have different time horizons. The tenant will generally want to maximize the return to the property during the time the tenant is in possession; the absent owner will want to maximize the return during the time after the tenancy ends. Posner argues that the best approach is to maximize the value of the property over both periods. This yields the largest net value, which the parties can divide among themselves as they wish. This is also the approach, Posner says, that an economically rational owner who holds an undivided interest in the property would adopt. The appropriate default rule for judging the actions of the tenant is thus whether the tenant has acted in the way an economically rational owner



Melms mansion viewed from the northeast. Undated.
Courtesy of the Milwaukee County Historical Society.

of an undivided interest in the property would have acted. Here we see the idea that the proper measure of property is social value, measured by market prices, adopted explicitly.

Neither approach, it seems to me, is likely to be optimal if it turns out that nearly all disputes between tenants and absent owners are resolved by contract. The most basic difficulty is that both approaches are relatively expensive, because they make waste turn on something that is invisible. The grantor's intention is not readily visible to the naked eye, nor is the market value of the property. I am not saying that these things are not real. But they cannot be observed by ordinary people. They require investigation and expertise.

This means, in turn, that using either grantor intent or economic value as a criterion for identifying waste will be relatively expensive. Merryman's intent test will often require a complicated inquiry into legal documents and personal circumstances that cannot be discerned by looking at the land. An investigation into the circumstances of the parties may be required, as well as consultation with legal experts about the proper interpretation of the terms in leases, wills, and trusts. Posner's economic-value approach is also expensive. Experts will have to testify about different uses of property and different market values for different uses.

Legal standards that require extensive fact-finding and expert advice are not always bad things. But in this context, they are misplaced. Given that disputes about tenant conduct are today overwhelmingly resolved by contract, the default rule should be one that makes it easiest to contract. Specifically, the rule should be one that ordinary individuals can discern and apply without having to resort to legal investigation or a real-estate appraiser. Such a rule will make it much easier for the parties to understand whether they want to deviate from the default rule, and what the contract must say if they want a different result.

Another problem associated with both the Merryman and Posner solutions is that there will likely be considerable uncertainty about their proper application. Under Merryman's approach, it is not always clear whose intention counts. In a landlord-tenant relationship, is it just the landlord's intention, or is it also the tenant's? Among other examples, in the life-estate context, do only intentions of the grantor count? What if a life estate is created by legal election, as in the case of the Melms estate? The root of the problem is that temporal divisions of property are not simple variations on conventional bilateral contracts. Property rights can be transferred and divided in a variety of ways, and it is far from clear that there is some unique set of intentions that attach to every decision to divide title over time.

Posner's economic-value test suffers from a different uncertainty in application, related to picking the appropriate baseline for comparing two different states of the world. Posner's discussion presupposes that each parcel of property will have a unique value-maximizing use, and that the rational owner will always adopt this use. But there will often be uncertainties about the proper unit of time or the proper physical unit for applying the economic-value test. For example, persons often acquire property intending to hold it for future expansion or development. This may entail holding it in a suboptimal use for a significant time until the development can take place. Likewise, persons may hold multiple parcels of property, which fit together in a general scheme or plan, even though individual parcels are deployed in ways that are suboptimal from a market perspective. These uncertainties generate even greater need for expert input and undoubtedly magnify the expense associated with the use of the test.

If disagreements about modifications of property by tenants were nearly always resolved by litigation, then I would agree that either Merryman's intent test or Posner's economic-value rule might be warranted. Such rules would be more uncertain and expensive to administer. But they would allow courts to reach judgments that would produce more satisfactory outcomes, from either an individual or a social-welfare perspective.

The extreme infrequency of modern cases applying the doctrine of waste, however, strongly suggests that contractual solutions are the norm, not litigation. Given the ubiquity of contractual solutions to the problem, the default rule should be designed to induce the parties to address the issue by contract. Jed Purdy, in writing about this issue, has used the phrase "bargain-inducing default rule," which seems to me to capture the idea nicely.

VII.

If the intention test and the economic-value test are too expensive because they require expert input and are uncertain in application, then does the traditional common-law rule—prohibiting material alterations in the premises—function better as a default rule in a context where contractual solutions are the norm? The answer, I think, is "Yes."

The critical facts under the traditional rule are the condition and use of the property when title is first divided, and the condition and use of the property when the tenant's custodial practices are challenged. These facts are visible to the naked eye. To determine these facts, one does not have to consult lawyers schooled in the interpretation of legal documents, or real-estate appraisers adept at assessing the market value of property. One need only examine the property itself or—in the event the property has been modified—consult architectural drawings, photographs, or evidence about its condition when title was divided. We do not need to take elaborate evidence about what the parties intended when they divided the property; what most owners would have done with the property under the circumstances; what the economic value of the property was before and after the tenant modified it; whether the neighborhood has changed and, if so, whether the source of the change was independent of the tenant's actions; and so on and so forth.

Given these features, the traditional common-law rule should function well as a bargain-inducing default rule. It is simple, intuitive, and self-applying. It sends a clear signal to the parties about their respective rights and obligations. If the parties want a different rule, they will know that they must contract for a different rule. The traditional rule will thus facilitate contractual solutions, and it will do so both *ex ante* and *ex post*.

The traditional rule also avoids knotty questions about application that arise under either the Merryman intent rule or the Posner economic-value approach. The condition and use of the property when the property is first divided set the baseline against which future tenant behavior is measured. If the tenant materially changes the condition, the tenant has committed waste; otherwise not. The condition when the dispute erupts is also a physical fact that exists with respect to every parcel whose title is divided. There are thus no conundrums about application, analogous to whose intent we consult under the Merryman test or what unit we use for valuation under the Posner approach. ▶▶

Admittedly, the qualifier “material” in the common-law rule injects a bit of wiggle room. What it means, I think, is that the rule is to be applied with a view to normal owner behavior (cf. Robert Ellickson’s employment of normal use, as measured by “contemporary community standards,” as a baseline in nuisance law). In other words, given the condition of the property at the time the title is divided, what actions would a normal owner take in maintaining the property in this condition? We do not ask whether a normal owner would *change* the condition of the property. We just ask what a normal owner would do in order to preserve the condition *unchanged*.

Let me offer an illustration. Some of the early common-law judges and commentators got tied up in knots trying to specify when a tenant is allowed to cut down trees. They said that cutting down trees to profit from the timber was waste, whereas cutting down trees for necessary repairs to the estate or for fuel was not waste; and so forth. A better understanding would be that courts should look to what constitutes normal behavior. If an agricultural tenant would normally cut some trees to repair fences and for firewood, then this would not be a material alteration. If an agricultural tenant would not normally cut trees for commercial sale, then it would be a material alteration. Most of the early cases about trees are consistent with this general understanding, whatever verbal formulations they may have adopted.

VIII.

There is still more to be said in support of the traditional common-law rule. In prohibiting the tenant from making any material alteration in the property, it broadly comports with the understanding that the purpose of the institution of property is to protect the subjective expectations that particular owners have in particular things. When possession is temporarily transferred, the owner is entitled to expect that what comes back is the same thing the owner had when possession was transferred. Not something else of equivalent value. The thing itself. The traditional rule is the kind of rule that we would expect a legal system to adopt that conceives of property as an individual right, not simply a social arrangement for maximizing wealth.

Wait a moment, you may object: if title is divided, then there are at least two people who have some stake in the thing—the absent owner and the tenant. The

common-law rule protects the autonomy of the absent owner about her thing, but it does so by disregarding the interests of the tenant regarding the thing. Why adopt a rule that protects one party at the expense of the other? Why not balance their interests, or adopt some kind of approach that tries to reach an accommodation by giving weight to both interests?

Part of the answer is that we are dealing here with probabilities. The law of waste makes the judgment that the absent owner is more likely to have a strong subjective attachment to property than is the tenant temporarily in possession. This is just a generalization. But the exceptional cases—for example, a tenant with a 99-year lease—are precisely those in which we would most expect to find a contract giving the tenant discretion to modify the use of the property. The common law, by giving the right to control to the absent owner, reaches the right result in the largest number of cases, and allows the smaller number of cases where this does not work to be handled by contract.

Another and more fundamental part of the answer is that we cannot balance interests between tenant and absent owner without abandoning the idea of property as an individual right. If property is a right of particular persons to protect their subjective expectations about things, then property must confer sovereign-like powers on those we regard as owners. This includes the power to give possession of your property to others and expect to get it back.

Waste is one area where we do not have to choose between the traditional understanding of property as an individual right and the rival conception of property as an institution for maximizing social value. We can retain the understanding of property as an individual right, and rely on the institution of contract to protect the societal interest in deploying resources to the greatest social advantage. There would seem to be little reason to abandon the idea of property as a source of protection for individual autonomy absent a strong justification for doing so. No such justification exists here.

The Wisconsin Supreme Court in *Melms* started us down the path toward a law of waste characterized by utilitarian balancing and economic valuations of competing uses of land. There was no need to do so. Captain Pabst should have been absolved of liability based on his good-faith mistake about title to the mansion. The law of waste should have been left unchanged. Had it remained unchanged, it is possible that it would remain unchanged today. ■

COMMENT ON MERRILL ON THE LAW OF WASTE



Richard A. Posner

Courtesy of The University of Chicago Law School.

Richard A. Posner*

I have been asked to comment on Professor Thomas Merrill's article about the doctrine of waste in the common law of property, and specifically about his criticism of the approach to that doctrine that I take in my book *Economic Analysis of Law*.

I discuss the application of the doctrine only to the competing interests of life tenants and remaindermen. The incentive of a life tenant is to maximize not the value of the property—that is, the present value of the entire stream of future earnings obtainable from it—but only the present value of the earnings stream obtainable during his expected lifetime. So he will, for example, want to cut timber before it has attained its mature growth even though the present value of the timber would be greater if the cutting of some or all of it were postponed; for the added value from waiting would inure to the remainderman. The law of waste forbids the tenant to reduce the value of the property as a whole by considering only his own interest in it.

I pointed out in my book that the doctrine might not be thought necessary because the life tenant and the remainderman would have an incentive to negotiate an optimal plan for exploiting the property, either when the property was first divided between them or when the life tenant thought he could make some alteration in the property that would increase the value of his interest without impairing the remainderman's interest more. Any alteration that improved the property in an economic sense would create surplus value for life tenant and remainderman to divide; both would be better off if the improvement were made, provided that they could divide the surplus value between them. But since tenant and remainderman would have only each other to contract with, the situation would be one of

bilateral monopoly and transaction costs might be high. Also, the remaindermen might be children, and children do not have the legal capacity to make binding contracts; they might even be unborn children. The problem of bilateral monopoly is less acute in the analogous case of landlord and tenant, I explained in my book, because the terms of a lease are established before the parties become locked into a relationship with each other. But a life tenancy is often created by a will, and the testator (for whom estate planning may be a once-in-a-lifetime experience) may not be alert to the potential conflicts between life tenants and remaindermen.

The law of waste, I further noted, has largely been supplanted by a more efficient method of administering property: the trust. By placing property in trust, the grantor can split the beneficial interest as many ways as he pleases without worrying about the inefficiencies of divided ownership. The trustee will manage the property as a unit, maximizing its value and allocating that value among the trust's beneficiaries in the proportions desired by the grantor. Of course, the trustee has to be given the proper incentives to do this. Both carrot and stick are employed to this end. The trustee is compensated, but he is also placed under a duty (a "fiduciary" duty, as it is called) to administer the trust as if it were his own property and he had the same preferences, including attitude toward risk, as the beneficiaries of the trust are known or can be assumed to have. ▶▶

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This is an abridged version of a comment that will appear in the summer 2011 issue of the *Marquette Law Review*.

I did not discuss in my book the fork in the road that Merrill emphasizes: the choice whether to forbid, as waste, the life tenant's making any material change in the property, or merely to forbid his making a change that reduces the overall value of the property. But the discussion of waste in my book implicitly favors the latter criterion, and this becomes the focus of Merrill's criticism of that discussion, as of the current law, which, he states, strongly supports the economic-value-maximizing approach, which I support.

Merrill discusses and rejects a third approach. That is to ask whether the tenant's proposed alteration of the property would comport with the intentions of the grantor of the divided interests in the property. As with many issues of intentionality in law, determining the grantor's intentions with respect to the rights of the respective interest holders is likely to prove indeterminate in practice, so I agree with Merrill's rejection of the intentions approach to determining waste, but we'll see that he brings intentions in by the back door.

Merrill doesn't like the value approach either (I should have expected him at least to like it more than the intentions approach). He calls it "expensive. Experts will have to testify about different uses of property and different market values for different uses." He adds that "there will often be uncertainties about the proper unit of time or the proper physical unit for applying the economic-value test. For example, persons often acquire property intending to hold it for future expansion or development. This may entail holding it in a suboptimal use for a significant time until the development can take place. Likewise, persons may hold multiple parcels of property, which fit together in a general scheme or plan, even though individual parcels are deployed in ways that are suboptimal from a market perspective."

These *could* be problems in particular cases, but Merrill doesn't discuss any cases in which they actually have been problems. In fact, he discusses only two cases, one the nineteenth-century case in the title of his article, another a case in New York from the 1920s. In both, it seems plain (in fact, it doesn't seem to have been disputed) that the tenant's proposed action—in both cases the demolition of an antiquated mansion in a modernizing city—would increase the value of the property.

Maybe the reason for the absence, as it seems, of cases in which the fears he expresses have materialized is that there are no such cases; or maybe it is simply "[t]he extreme infrequency of modern cases applying the

doctrine of waste." That infrequency would normally be thought a good thing; it suggests that the law is sufficiently clear, in application as well as in concept, to enable the vast majority of cases to be settled, probably, indeed, in advance of being filed. Nor does this appear to be an area in which asymmetry of discovery costs often forces settlement of cases that have no merit, as in class action litigation, or in which an asymmetry of stakes or resources in favor of potential defendants discourages the filing of meritorious lawsuits, as in some areas of consumer law. But Merrill argues that the reason for the dearth of cases is that persons sharing interests in property bargain to the optimal solution to their joint-maximization problem, and from this he infers that the "material alteration" criterion for waste is superior to the "value" criterion because it encourages a bargained-for resolution of the parties' conflicting interests.

This is a complicated argument. Actually I don't understand it. So here is how I would recast it. The trust, as I suggested earlier, is a more efficient way of dealing with the problem of conflicting interests in the same piece of property than the law of waste. It establishes a neutral third party—the trustee—to arbitrate the parties' competing claims. This avoids litigation except in the rare case where the trustee's resolution of the dispute can be challenged in court with a fair chance of success despite the broad discretion that trust law vests in trustees. The rise of the trust—a rise that is a broad-based phenomenon that has little if anything to do with the choice between material alteration and economic value as criteria of waste—may largely explain the decline in litigated waste cases. Merrill presents no evidence that the use of the trust in situations that would otherwise be governed by the law of waste is attributable to the adoption by most states of the value criterion, when once the material-alteration criterion reigned. Merrill himself suggests that nonjudicial solutions to traditional "waste" situations are attributable to declining costs of contracting.

Merrill is right that, other things being equal (an important qualification, but one I can ignore), a clear rule will reduce disputants' recourse to adjudication, and that is usually a good thing, though he does not discuss the complication introduced by my reference to bilateral monopoly. But if the courts have substituted, as he believes, a vague standard (economic value)—vague in application, he believes, not conceptually vague—for a clear rule (material alteration), why isn't that reflected in litigation? Maybe the answer is that its

vagueness drove parties to adopt contractual alternatives ex ante, such as the trust, so that if and when a tenant decided to alter the property there would be no occasion for litigation. Merrill does say that the infrequency of modern cases “strongly suggests that contractual solutions are the norm, not litigation,” but unless I have missed something he does not attribute this norm to the vagueness of the economic-value concept.

This may seem to make the choice of the standard for determining waste academic. In effect, holders of property interests have opted out of the law of waste. No cases—so no legal niceties to trouble the mind. But this is an overstatement. Cases of waste may be infrequent, but they do occur, as of course Merrill knows. He says: “The law of waste functions as a default rule or baseline for contracting, not as a decisional rule applied by courts—at least not very often.” He thinks that there would be even fewer cases (and that this would be all to the good) if courts would revert to the material-alteration criterion, because, he says, it is clearer than the economic-value criterion. But is it? He says that to apply the material-alteration criterion “[o]ne need only examine the property itself or—in the event the property has been modified—consult architectural drawings, photographs, or evidence about its condition when title was divided.” The property must have been altered, or there would be no dispute. The question is whether the alteration was “material.” Materiality is relative to some goal, interest, or value, and Merrill is unclear about what that goal, interest, or value is. He refers repeatedly to protecting the “subjective expectations” of the parties. Does he consider “subjective expectations” litigable? And what if the parties’ subjective expectations differ? In that case he says that it’s normally the owner’s subjective expectations that should govern. But he acknowledges that that doesn’t work if the grantor is different from the remainderman or if the lease has a very long term, such as 99 years, which is de facto ownership.

He does suggest, a little more concretely, that a tenant who “changes the condition” of the property has committed waste, and that the condition of the property is a “physical fact.” But not every change in the condition of property could plausibly be thought a *material* alteration. Is it waste to install central air conditioning? To convert a barn to a garage? To pave a driveway? Are all improvements that alter a property physically waste? Merrill retreats to “normal owner behavior,” or “contemporary community standards,” as keys to determining materiality.

Merrill gives a version of the timber example that I use in my book; he says that “[i]f an agricultural tenant would normally cut some trees to repair fences and for firewood, then this would not be a material alteration. If an agricultural tenant would not normally cut trees for commercial sale, then it would be a material alteration.” That’s fine, but Merrill should be pressed to explain *why* an agricultural tenant would not “normally” cut trees for commercial sale. Is this to be thought just some quaint rural custom, to be inferred from testimony by the locals? Isn’t the real point that if the tenant is allowed to go into the lumber business he will reduce the overall value of the property by cutting down the trees prematurely? And isn’t this point clear without testimony from the locals, or for that matter from the expert witnesses whose expensiveness bothers Merrill? I imagine that in practice the criterion of material alteration has always been implicitly economic and that all the courts have done is made its economic character transparent.

Merrill concludes with a short Richard Epstein-like paean to property “as an individual right” that “confer[s] sovereign-like powers on those we regard as owners.” He regards this “my home is my castle” concept of property rights as strongly buttressing his argument that the material-alteration criterion would minimize litigation. But from an economic standpoint, which is the standpoint (obviously) of *Economic Analysis of Law*, property rights are instrumental to achieving economic efficiency, rather than being ultimate social desiderata. Merrill has not shown that from the standpoint of overall efficiency (minimizing all costs) the material-alteration criterion is superior to the economic-value criterion for determining whether a life tenant or other holder of a property interest has unilaterally altered the property in a way that constitutes what the law forbids in the name of waste.

I am guessing that Merrill’s philosophical conception of property rights is the real motivation of his article, and not a desire to minimize waste litigation. The reason is that by his account there is almost no such litigation any more. If there are on average only three reported waste decisions a year, there cannot be very many waste cases filed, so trusts and contracts must indeed have displaced waste as the legal regime for regulating divided property interests. If as he believes this displacement is a good thing, why change the doctrine? Could a change in doctrine really be expected to reduce litigation to zero? Of course not: any new doctrine will promote litigation, at least initially, as judges and litigants expound and refine and interpret and apply the doctrine. ■



In It for the Long Haul

Boards of Directors Can and Should Switch Their Emphasis from Short-Term Profits to the Long-Term Vitality of a Corporation

So writes Nadelle E. Grossman, Assistant Professor of Law, Marquette University, in this edited excerpt from “Turning a Short-Term Fling into a Long-Term Commitment: Board Duties in a New Era,” which appeared in the summer 2010 issue of the *University of Michigan Journal of Law Reform*.

There is significant pressure on boards of directors, both from executives as well as from investors, to oversee businesses that generate profits in the short-term. That often leads to board decisions directed at producing profits over a short period of time, such as six months or a year, without regard to the ill effects of those decisions on the longer-term health of the business. This tendency to manage for the short-term, or “short-termism,” in large part explains the near collapse of institutions, such as AIG and Merrill Lynch, that seemed almost impregnable not long ago, as these institutions failed to address the long-term risks associated with their mortgage-related investments.

The pressure from executives on boards is widely believed to be due in large part to executive-compensation arrangements that reward executives for short-term profits. Yet executive-compensation arrangements alone may not explain excessive short-termism by boards. Rather, board short-termism also seems to be due to some investors, with short investment horizons, who use activism to influence boards to make decisions that yield short-term returns despite the longer-term impairing effects those decisions might have on the corporate enterprise.

Yet even with these pressures on boards to create short-term value, a director is supposed to have an unyielding fiduciary duty to act in the best interest of the entire corporate enterprise of which she is a director. This is reflected in the fiduciary duties every director owes to that corporation and its stockholders.

Thus we must ask—are directors, by furthering the short-term interests of investors and executives, meeting their fiduciary duties? Or do—or more importantly, should—fiduciary duties require that they oversee a corporation’s affairs with a view to furthering the corporation’s sustained success?

To implement the strong public policy in favor of corporations that are managed for the long-term, as well as the general coincidence of corporate interest in the long-term, I propose that directors be required to make decisions primarily for the purpose of advancing the long-term best interest of the corporation and its stockholders. That means that every time the board is faced with a business decision, it would need to consider how that would benefit the corporation and the stockholders in the long-term and make decisions that are aimed at achieving that objective. In effect that would mean that directors would need to determine how every business decision implemented the corporation’s business plan, for the business plan sets out the corporation’s long-term objectives as well as strategies to achieve those objectives. That would not mean that the board must shape corporate strategy such that a corporation forgoes all opportunities to make current profits—but it would mean that realizing on current profits could not undermine the corporation’s ability to generate profits in the future in accordance with its business plan.

Under my proposal, board decisions would continue to be protected by the business judgment rule. That would mean that directors would continue to be pro-

tected in deciding how to achieve long-term profitability under the business plan, as well as how to allocate profits among the various corporate constituents. But clarifying that fiduciary duties are mandatorily long-term in nature outside of the takeover context would force directors to conduct analyses (in compliance with their duty of care) that would enable them to decide whether each business decision would be primarily beneficial to the corporation and the stockholders in the long-term—and their failure to do so could amount to a conscious disregard of their duties and thus an act in bad faith. This, then, could lead to a breach of the duty of loyalty. That would likely mean that directors would have to increasingly consider nonfinancial factors in making decisions, for the long-term often cannot be summed up in a neat financial calculation. But the challenge of valuing the long-term effects of corporate decisions should not preclude their primary importance.

Because this reformulated duty would only require directors to primarily act in the long-term best interest of stockholders and the corporation, directors could, in compliance with this duty, consider the interests of short-term stockholders in making business decisions. This would give directors some flexibility in making business decisions that are intended to deliver short-term profits. However, it would not permit them to place those short-term interests above, or even on par with, the interests of stockholders and other corporate constituents in sustained corporate profitability. Because stockholder and non-stockholder constituents' interests converge in the long-term, this interpretation would also seem to more faithfully implement the longstanding construction of directors' fiduciary duties, which require that directors consider the interests of stockholders as well as the interest of the corporation.

One may ask why the board—rather than some other constituent—should as an initial matter be charged with implementing the corporate purpose of long-term profitability. For one, the board is the body that oversees adoption and implementation of a corporation's business plan. The business plan is the source of the corporation's long-term profit-making strategy. Thus it makes sense for the board to be charged with implementing the corporate purpose through its oversight of the business planning process. The fact that boards are generally composed of highly respected and knowledgeable businessmen and women would only make discussions about long-term profit-making strategies more meaningful. Moreover, the board is already charged with the duty to act in the best interest of the corporation and its stockholders under its fiduciary duties. To the extent that any constraints are imposed on what amounts to the best interest of the corporation and stockholders, they would necessarily need to be reflected through a modification to those fiduciary duties. And this proposal would be consistent with the notion from *Revlon* that any temporal limit on directors' discretion in making business decisions should be imposed on directors through their fiduciary duties.

A related question pertains to why the common law of fiduciary duties—rather than legislation—is the appropriate means to implement a long-term corporate agenda. Initially it is important to note that my proposal does not purport to “fix” in its entirety the “problem” of short-termism. There are undoubtedly complementary steps that could—and should—be taken to shift the focus of corporations toward long-term profitability. But my proposal is intended to be the first guiding step down that path, for it would seem backward to implement a long-term policy objective through spe-

“Are directors, by furthering the short-term interests of investors and executives, meeting their fiduciary duties? Or do—or more importantly, should—fiduciary duties require that they oversee a corporation's affairs with a view to furthering the corporation's sustained success?”

cific legislative or regulatory changes before that policy objective is manifested through corporate governance standards. Moreover, given the limitless ways in which corporations can achieve long-term profitability in light of their unique business structures and strategies, it seems to make sense to use, at least as an initial matter, the standards-based approach offered by fiduciary duties to implement the long-term mandate rather than a narrower, rules-based approach typically associated with legislation. This change would also ensure that state law regulating internal affairs remains relevant in the current environment of short-term investor activism. However, once my proposal is implemented, in my view it would then make sense to consider targeted ways—for example through tax incentives or penalties, new disclosure rules, or changes to the corporate voting mechanism—to implement the then-clear corporate objective of generating sustainable profits, at all times being sensitive to the welcome differences between corporations and the ways in which they may achieve that objective.

This reinterpretation of the corporate purpose would also provide directors with much-needed guidance as to how to discharge their fiduciary duties, particularly in an era where they are faced with pressures from executives as well as from investors to make decisions that generate short-term profits. As the Delaware Supreme Court has acknowledged, one of the objectives of Delaware fiduciary duty law is to provide directors with “clear signal beacons and brightly lined channel markers as they navigate with due care, good faith, and loyalty on behalf of a Delaware corporation and its shareholders.” This proposal would in fact provide some clarity as to what corporate purposes directors must seek to achieve. This, in turn, should enhance accountability of directors to shareholders, for removing an element of discretion from the board gives shareholders a more clearly defined standard to which to hold directors accountable. And since the reformulated duty would lead directors to act in the interest of both shareholders and the corporation, shareholders (at least long-term shareholders) would indeed serve as a proxy for the corporation in enforcing this duty, for doing so would be in the interest of both.

Still, this reformulation of fiduciary duties would not apply in all contexts. Specifically, because the reformulated duty would require directors to consider how to maximize profits under the corporation’s long-term strategy, it would not apply in the context where the board



Nadelle E. Grossman

was faced with a potential takeover or other similar sale transaction in which the future of the corporation was being questioned. Indeed, it is in that context that the board is deciding the very question of whether or not to scrap the corporation’s long-term strategy in favor of a sale. Thus in that context it makes sense to continue to permit directors to consider not only the long-term interests of stockholders and the corporation but also their short-term interests. Again, this might explain why the cases discussed elsewhere in this article give directors such broad discretion as to the temporal element of their fiduciary duties.

That is not to turn a blind eye to the fact that the market for corporate control plays a large role in the problem of short-termism that I have identified. But it is rather to acknowledge that different aspects of the short-termism problem may require different fixes, and that my proposed fix addresses one source (though not the only source) of the short-termism problem. It also has the added benefit of approaching the short-termism problem in an incremental way, with the goal both of increasing the chances of adoption and providing an opportunity to reflect on the impact of the proposal without too many major shifts in the law at once. Thus again, my proposal might complement other legal changes that would implement a policy promoting sustainable wealth-creation. ■

Will Life Without Parole Follow the Path of the Death Penalty?

This is an updated and abridged version of “The Beginning of the End for Life Without Parole?,” an article by Michael M. O’Hear that appeared in the *Federal Sentencing Reporter*. The full text of the original article is available at www.jstor.org/stable/10.1525/fsr.2010.23.issue-1. O’Hear is professor of law and associate dean for research at Marquette University Law School.

Across the past generation, the United States has quietly embarked on an extraordinary experiment in criminal punishment, filling its prisons with unprecedented numbers of inmates who can expect to spend the rest of their lives behind bars. By 2008, more than 41,000 inmates were serving sentences of life without possibility of parole—more than triple the number from just 16 years earlier. In part, this reflects the more general trend of increased severity in American sentencing. The “LWOP” story, however, also features its own unique dynamics. For instance, many states have adopted the LWOP sentencing option at the urging of death-penalty opponents, who view LWOP as a more humane alternative to capital punishment.

Whatever has caused legislatures increasingly to authorize LWOP and judges increasingly to impose it, the effects of this experiment will be felt for a very long time. Many of those serving LWOP sentences today will still be in prison many years—even decades—from now, consuming an ever-increasing share of corrections resources as they age and their health-care needs grow.

A number of recent developments, however, raise questions about whether LWOP might be entering a period of decline. Most dramatically, the Supreme Court declared LWOP unconstitutional for most juvenile offenders in May 2010, possibly inaugurating an era of more-meaningful constitutional limitations on very long sentences. More quietly, many cash-strapped states have been developing new early-release programs in order to reduce corrections budgets, some of which hold out hope even for LWOP inmates. Additionally, increasing international criticism of LWOP may put pressure on the United States to curtail its own use of the sentence. Finally, the slow but steady decline of the American death penalty may also diminish support for LWOP. Let’s consider each of these four developments in more detail.

New Constitutional Limitations

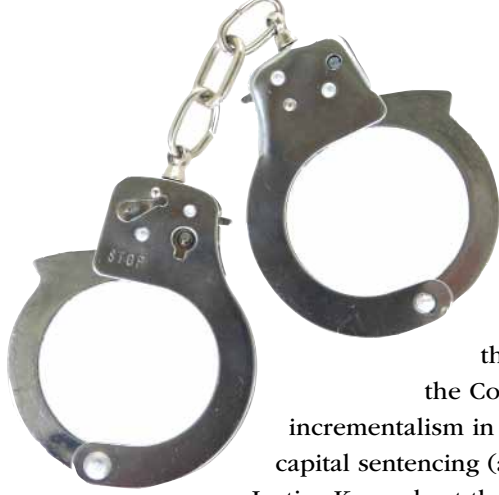
Graham v. Sullivan, the Court’s new juvenile LWOP decision, seems to strengthen the Eighth Amendment prohibition on disproportionately harsh sentences. In recent years, the Court has been quite active in using the proportionality requirement as a basis for regulating capital punishment. On the other hand, in *noncapital* cases, the Court has generally treated the proportionality requirement as so undemanding as to be nearly meaningless. In *Graham*, however, the Court for the first time employed its more rigorous capital sentencing methodology to evaluate the constitutionality of a noncapital sentence.

To defendants facing LWOP, what seems potentially quite beneficial about the *Graham* shift is the ability to draw on the body of precedent that has grown up around the capital-sentencing jurisprudence, which makes a variety of strong categorical distinctions for purposes of determining who can and cannot be executed—for example, distinctions between minors and adults, between homicide and other offenses, between the mentally retarded and the mentally fit, and between those with major and minor roles in the offense. Indeed, the first two of these distinctions were crucial in *Graham* itself, as the Court banned LWOP for minors who have committed nonhomicide offenses.

Based on the reasoning of *Graham*, a colorable constitutional argument against LWOP would seemingly apply in any case in which any two of the protected categories were present—for example, a mentally retarded minor who committed homicide, or a mentally retarded adult who committed an offense other than homicide, or a minor who was convicted of felony-murder but did not have a substantial role in the offense. Moreover, *Graham* can be expected to spur a growing number of Eighth Amendment challenges in noncapital cases, which might result in judicial recognition of new categorical distinctions, such as between violent and nonviolent offenses, between first-time offenders and recidivists, and among the various degrees of mens rea. If courts start to give Eighth Amendment significance to more of the distinctions that have long been recognized in criminal codes as bearing on offense severity, one could imagine the emergence of a truly robust set of Eighth Amendment restrictions on the use of LWOP.

In the end, though, *Graham* seems unlikely to provoke a dramatic expansion of Eighth Amendment protections in the near term. None of the recent personnel changes on the Supreme Court seem likely to alter the Court’s longstanding balance of power when it comes to the Eighth Amendment. Standing in the center of an evenly divided Court, Justice Kennedy’s views govern in this area. It is no accident that he authored the majority opinion in *Graham*, and nothing in that opinion indicates that Kennedy regrets his earlier opinion in *Harmelin v. Michigan*—an opinion that marked a crucial turning point in the early 1990s away from rigorous Eighth Amendment review of noncapital sentences.

In truth, the Court took on an easy target in *Graham*: Juvenile LWOP inmates were less than 5 percent of all LWOP inmates nationally, and only a



dozen states held more than 30 of them. *Grabam* thus calls to mind the Court's modest incrementalism in addressing capital sentencing (again, with Justice Kennedy at the helm), where the Court has targeted only practices that are relatively uncommon, leaving states with nearly unlimited discretion to execute adult murderers.

Fiscal Pressures and New Opportunities for Early Release

Since 2000, at least 36 states have enhanced early-release options for prison inmates, largely as a result of fiscal pressures created by burgeoning prison populations. Against the recent backdrop of economic turmoil and stagnant government revenues, policymakers have found early release to be an attractive option, particularly to the extent that it can be implemented without obvious public-safety hazards. Thus, many early-release programs have focused on inmates who are elderly or seriously ill, nonviolent offenders, and offenders who complete designated educational or therapeutic programs.

Will such programs provide much benefit to LWOP inmates, perhaps even reintroducing the functional equivalent of parole through the back door? Although some of the new programs are designed to screen out the most serious offenders, others do make LWOP inmates eligible for release. In 2009, for instance, Wisconsin expanded the opportunities for LWOP inmates to petition for release on the basis of age and infirmity. However, the experience thus far in Wisconsin and many other states has been that officials, presumably fearful of another Willie Horton, have been far more conservative than anticipated in granting petitions for release. These experiences leave considerable doubt as to whether the new early-release programs are capable of making a significant, lasting difference in the size of prison populations, and the most serious offenders with the most severe sentences seem the most likely to see their petitions denied as a result of political concerns.

If current LWOP inmates are unlikely to see much benefit from the current fiscal crisis, perhaps budgetary pressures will at least slow the growth of the LWOP population at the front end by forcing the adoption

of sentencing reforms that preclude or discourage the imposition of life terms. Such reform, however, does not seem to be a particular legislative priority at present. Although many states have indeed adopted sentencing reforms in the past couple of years, the reforms generally focus on lower-end offenders—for instance, by eliminating mandatory minimums for drug-possession defendants.

Other states have recently created commissions or other new bodies that are charged with studying sentencing practices, and it is possible that such bodies will serve to focus attention on LWOP sentences. However, to the extent that immediate fiscal pressures continue to drive the sentencing policy agenda, LWOP reform is not likely to be a priority: Because any offenders who are diverted from LWOP are still likely to get very long sentences, any savings from front-end LWOP reforms will not be realized for many years—well beyond the time horizons of legislatures facing short-term crises.

Developments in International Law

It is possible that LWOP will soon be banned in Europe as a matter of international human rights law. To the extent that LWOP is increasingly seen abroad as inconsistent with established norms of humane punishment, the United States may come under pressure to abandon LWOP, much as it has faced pressure to do away with the death penalty.

It is far from clear, however, that the United States is responsive to such pressures. There seems not to be much of a domestic constituency for conforming American penal practices to international norms. Moreover, the fractured, federal structure of American government further diminishes the likelihood that the interest of the United States in maintaining its standing in the international community will have much effect on its penal practices: Whereas the federal government carries the nation's diplomatic responsibilities, the vast majority of criminal prosecutions are carried out in state courts under state law.

However, international developments will not necessarily prove wholly irrelevant to the future of LWOP in the United States. For instance, other nations may take LWOP-eligibility into account when deciding whether to honor American extradition requests, much as is sometimes done already with respect to death-eligible offenders. Moreover, the Supreme Court's recent Eighth Amendment cases, including *Grabam*, have routinely (if

Perhaps budgetary pressures will at least slow the growth of the life-without-parole population at the front end by forcing the adoption of sentencing reforms that preclude or discourage the imposition of life terms. Such reform, however, does not seem to be a particular legislative priority at present.”



Michael M. O'Hear

controversially) looked to international law for guidance. It is possible that a growing international consensus against LWOP will lead the Court to move a bit more quickly and aggressively in extending *Graham* to some classes of adult offenders.

Decline of the Death Penalty

The American death penalty seems in long-term decline. The number of people executed decreased nearly every year from 1999 through 2010, falling from 98 to 46 in that time. Likewise, the number of defendants sentenced to death decreased nearly every year from 1996 through 2009, falling from 315 to 112 (the smallest number sentenced to death in any year since 1973). Moreover, in the past four years, three states (Illinois, New Jersey, and New Mexico) have repealed the death penalty, while a fourth (Maryland) dramatically restricted the circumstances in which it can be imposed. As of this writing in spring 2011, an abolition bill has just been passed by one house in Montana.

It is not clear whether or how these developments will affect LWOP, but one can hypothesize at least two possible consequences. First, at the level of legislative policymaking, the decline of the death penalty may diminish the support of liberal reformers for LWOP as an alternative to capital punishment, and perhaps even lead some death-penalty abolitionists to refocus their

reform efforts on rolling back LWOP. Second, at the level of individual cases, the diminished availability of capital punishment (as a matter of law in some jurisdictions and a matter of practice in others) will reduce the pressure on some defendants to accept plea deals that will result in LWOP sentences.

At present, though, there seems no reason to think that either potential effect will have dramatic consequences for the frequency of LWOP sentences, at least in the near term. For instance, two states that recently abolished capital punishment (New Jersey and New Mexico) did not actually use it very much; nor does either state have a sizeable LWOP population. If death-penalty abolitionists continue to have their greatest success in such states, there is likely to be little resulting reduction in national LWOP rates.

Conclusion

Against a backdrop of intense fiscal pressure, an emerging international consensus against LWOP, and long-term decline in use of the death penalty, *Graham* may mark the end of the growth phase of LWOP. Indeed, although dramatic reductions in the LWOP inmate population seem unlikely any time soon, it is possible that LWOP will enter a period of slow decline that echoes the recent history of the death penalty.

Whether such a trend should be welcomed is a difficult question. It is hard to say that LWOP should always be regarded as an excessive penalty for murder, and the sentence may even sometimes be appropriate for a small number of other extremely serious violent crimes. On the other hand, in our great experiment with high-volume LWOP, we have clearly not been reserving LWOP exclusively for the “worst of the worst,” or even the “second worst” (as might be appropriate if death is assumed to be available for the very worst). If a declining trend in LWOP sentences results in fewer aged inmates spending their final years of life in prison for offenses whose gravity falls well short of murder, then such a trend would almost certainly be a positive development. ■

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Richard M. Esenberg, “Never Let a Good Crisis Lead You Astray: The Lessons of Christian Realism and Subsidiarity for Public Policy,” 8 *U. St. Thomas L. J.* 370 (2010).

Edward A. Fallon, “Charters, Compacts, and Tea Parties: The Decline and Resurrection of a Delegation View of the Constitution,” 45 *Wake Forest L. Rev.* 1067 (2010).

Jay E. Grenig, *Wisconsin Elder Law* (Wisconsin Practice Series, 2010–2011 ed.).

Nadelle E. Grossman, “Turning a Short-Term Fling into a Long-Term Commitment: Board Duties in a New Era,” 43 *U. Mich. J. L. Reform* 905 (2010).

Lisa J. Laplante, “The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court’s Sphere of Influence,” 43 *John Marshall L. Rev.* 635 (2010).



Kali N. Murray

Property Law and the Struggle for Racial Justice

An ongoing narrative of struggle—that isn’t a phrase that would fit a lot of textbooks. But it is the way Kali N. Murray describes *Integrating Spaces: Property Law & Race*, which she coauthored with Alfred Brophy of the University of North Carolina School of Law and Alberto Lopez of Northern Kentucky University Chase College of Law.

Murray, assistant professor of law at Marquette University since 2007, said that her involvement in the book began with a conversation several years ago at a professional conference with Brophy, a leading scholar of issues involving race and property. Murray’s scholarly work had focused mostly on intellectual property law, but she and Brophy both regarded access to housing and nondiscriminatory credit practices as “a really compelling part of the African-American experience.”

Murray wrote two chapters for the book. One deals with the civil rights movement and property law, and the other focuses on international comparative material on race and ethnicity in terms of property law.

The book is intended to be used as a law school textbook, but Murray is pleased that it has drawn interest from historians and other academics. Murray’s involvement increased her interest in the intersection of property law and race. She hopes to pursue that in future scholarship.

Murray teaches courses in property, patent law, and advanced intellectual property. And, as readers of the Fall 2010 *Marquette Lawyer* magazine may recall, she is the best-qualified person on the faculty to discuss what the works of Lady Gaga, Janet Jackson, and the cast of *Glee* say about current intellectual property issues.

Vada W. Lindsey, “Encouraging Savings Under the Earned Income Tax Credit: A Nudge in the Right Direction,” 44 U. Mich. J. L. Reform 83 (2010).

Matthew J. Mitten, “‘Sports Law’: Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution,” 85 Tulane L. Rev. 269 (2010) (with Hayden Opie).

Matthew J. Mitten, “Targeted Reform of Commercialized Intercollegiate Athletics,” 47 San Diego L. Rev. 779 (2010) (with James Musselman & Bruce Burton).

Kali N. Murray, *Integrating Spaces: Property Law & Race* (Aspen Hill, 2010) (with Alfred L. Brophy & Alberto Lopez).

Michael M. O’Hear, “Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences,” 93 Marq. L. Rev. 751 (2010).

Matthew J. Parlow, “The NBA and the Great Recession: Implications for the Upcoming Collective Bargaining Agreement,” 6 DePaul J. Sports L. & Contemp. Probs. 195 (2010).

Matthew J. Parlow, “Professional Sports League Commissioners’ Authority and Collective Bargaining,” 11 Tex. Rev. Ent. & Sports L. 179 (2010).

Andrea K. Schneider, “Likeability v. Competence: The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers,” 17 Duke J. Gender L. & Pol’y 363 (2010) (with Catherine Tinsley, Sandra Cheldelin & Emily Amanatullah).

Paul M. Secunda, “Cultural Cognition at Work,” 38 Fla. St. U. L. Rev. 107 (2010).

Paul M. Secunda, *Mastering Employment Discrimination Law* (with Jeff Hirsch) (Carolina Academic Press, 2010).



Selected Additional Faculty Activities

Irene Calboli presented papers at Cumberland School of Law, John Marshall Law School, Santa Clara Law School, University of California–Berkeley School of Law (Boalt Hall), University of Stockholm, and Washington University Law School.

Patricia A. Cervenka was appointed to the American Bar Association Law School Facilities Committee.

Richard M. Esenberg presented papers at Chapman University Law School, St. John’s University Law School, and Liberty University Law School.

Edward A. Fallon was appointed to the Review Committee for the AALS Call for Scholarly Papers Competition.

Nadelle E. Grossman presented a paper at the Midwest Law and Economics Conference.

Lisa A. Mazzie was named a writer in residence by Ms. JD.

Michael M. O’Hear was appointed to the Milwaukee Fire and Police Commission. He has also begun a new criminal law blog focusing particularly on issues of sentencing and incarceration (lifesentencesblog.com).

Chad M. Oldfather presented a paper at American University Washington College of Law.

David R. Papke presented papers at Loyola University New Orleans College of Law and the annual meeting of the Center for the Study of Film and History.

Andrea K. Schneider presented papers at the University of Minnesota–American Society of International Law Conference on International Economic Law, International Biennale on Commercial Negotiation, and University of Oregon Law School.

Paul M. Secunda presented papers at DePaul Law School, Indiana University–Bloomington Maurer School of Law, Lewis & Clark Law School, University of Missouri–Kansas City School of Law, and Washington University School of Law.

Michael P. Waxman was named a contributing editor and member of the editorial advisory board for the new *ALR International*.

MORE THAN A FACULTY BLOG

The law, how it works, and how to practice it—students enroll in law school to learn those things. But after they graduate, they live those things: such experiences are invaluable. So each month, an alumnus is invited to be the guest blogger at the faculty blog. Here is a sample of what some of our alumni have offered in recent months. While these posts are abridged, they will give you a taste; the original posts remain available at law.marquette.edu/facultyblog.

Will Financial Regulation Make Us Safe?

Posted by Colin M. Lancaster



First, a bit about me. I have been very fortunate to have had a fantastic 15-year career in the hedge-fund business (which does make me a bit of a dinosaur in the industry). Most recently, I was the president and chief operating officer of Stark Investments, one of the oldest

hedge funds in the world. During my career working in the business, I have done about everything—from providing legal counsel to co-managing a large portfolio to ultimately taking responsibility for the execution of the strategic vision and the overall administration of a large organization. I am a 1993 graduate of Marquette University Law School (and have to say that I am thrilled at all of the very positive developments at the Law School—kudos to Dean Kearney and his team!). All of that said, I have had the fortune (or misfortune as the case may be) of having had a front-row seat throughout this period of financial crises. To boil it all down, the primary

culprit, in my mind, was a simple human behavioral characteristic: Greed.

What is the best way of policing greed and excessive risk-taking? A lot is being tried.

President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law on July 21, 2010. Among other things, the law will establish a new council of “systemic risk” regulators to monitor growing risks in the financial system, with the goal of preventing companies from becoming too big to fail and stopping asset bubbles from forming, such as the one that led to the housing crisis.

The new Financial Stability Oversight Council will have an incredibly broad and difficult mandate—essentially, its assignment is to monitor the entire financial landscape for risks that could spark another crisis; identify and supervise firms that could pose those systemic risks; and make sure they never grow so large, complex, and leveraged that their failure can wreak havoc across the globe.

The creation of the council reflects at least one important policy change. The strengths of the Securities and Exchange Commission (SEC) are in the areas of disclosure and antifraud enforcement—but not as a financial regulator that imposes capital requirements or sets leverage restrictions.

So, can the new Financial Stability Oversight Council be more effective in this role and can it effectively play the role as the “voice of reason” that will prevent future crises?



Unfortunately, I believe that the answer is, "No."

There are five key reasons for this:

1. Washington, by its nature, is a reactive and not a proactive type of decision-maker. The creation of the council was a political compromise, and its decision-making structure (representation coming from many different agencies with different agendas) will not provide for an efficient and effective means of decision-making. Greed, at the end of the day, is a very difficult thing to regulate. A council created by political compromise is not likely, in my mind, to be able to effectively control it.
2. Without the ability to influence monetary policy (e.g., interest rates)—a key ingredient in risk taking and overall speculative behavior—the council will be the tail wagging the dog. A better approach, in my mind, would have been to give a single agency—the Fed—the mandate to do the council's job.
3. International competitive pressures will limit effectiveness. Over the next decade (and remember that this new law will not be completely implemented until 2015 or later), some of the largest financial organizations in the world are likely to be outside of the United States. The largest banks will be in Asia or Latin America, where the reach of the new legislative provisions will not apply. This practical reality poses two problems: (a) the council will be under intense pressure to ensure that its requirements do not place U.S. institutions in an anticompetitive posture; and (b) due to the interconnectedness of the world, the next financial crises may be caused by institutions in other regions.
4. Policymakers and regulators will have great difficulty in keeping up with the pace of financial engineering. Notwithstanding the creation of the Office of Financial Research, I have a very hard time believing

that this group will be able to keep pace with Wall Street.

5. The next crisis is likely to look much different from the one we just lived through (we may be prepared for the last one, but we are not likely to be prepared for the next one).

Colin Lancaster, L'93, who lives in Chicago, recently joined Balyasny Asset Management, where he will be working to build a global macro trading business.

Advice on Appeals from Howard Eisenberg

Posted by Mary T. Wagner



Just like the prospect of being hanged in the morning, there's nothing like having 14 people over to Thanksgiving dinner to concentrate the mind. In my case, it's also the galvanizing principle to buckle down and clean house.

Last Thanksgiving, the task was truly daunting—the family room had become nearly impassable, swamped by pile after pile of paper and other detritus related to serial family emergencies and funerals of the past few years.

Much of the “cleaning” involved simply moving assorted stacks and boxes to another room and making more efficient use of vertical placement. But once in a while, curiosity would get the better of me.

For example, there was a colorful two-pocket folder sporting a picture of a red-eyed King Kong dunking a basketball with his index finger. There were only a few sheets of paper within. A bright turquoise one caught my eye. On one side was an announcement for a “classroom to courtroom” seminar at the law school dating to my last year as a student. Hoo boy. But on the other side was a set of handwritten notes. As I read, I realized that these were notes I'd taken listening to then-Dean Howard Eisenberg talking about appellate arguments.

As cosmic irony would have it, I was scheduled to speak to Prof. Melissa Greipp's Appellate Advocacy class just two days later. I smiled in gratitude and

recognition. The notes would be coming back to the Law School with me.

I recalled also the advice Howard had given me shortly after I graduated in 1999 when I was crafting my first brief to the Wisconsin Supreme Court and gearing up for my first oral argument. The case was *Sheboygan County DH&HS v. Julie A.B.*

I had not been out of law school all that long—and had been in my job as a prosecutor only nine months—when I drew the assignment of briefing a termination of parental rights case to the Court of Appeals. We had lost the case in the trial court. We followed with a loss in the court of appeals as well, and my boss gave me the green light to file a petition for review with the Wisconsin Supreme Court.

“Overwhelmed” would be too minor a word to describe my state of mind, and I sent an emergency appeal by email to Dean Eisenberg, who had taught my own Appellate Advocacy class. He responded with a cornucopia of assistance. We ended up meeting



face to face at the Law School and talked about the things that mattered in mounting a successful appeal. And when the Wisconsin Supreme Court granted the petition for review and I was quaking in my boots at the thought of stepping up to the podium for the oral argument, he volunteered to put together a moot court for me at the Law School to help me prepare for the big day. He sat on the panel, of course, along with the professor who, at Howard's passing soon after, would become the current dean, Joseph Kearney.

I can still remember the gratitude I felt both for Howard's advice and for the enthusiasm and generosity of spirit that accompanied it. And here, for the record, are some of the things I took to heart from Howard Eisenberg. Take them and use them well! I've followed them religiously in four more cases that made it to the high court.

- Think big. The Court granted your petition for review for a reason, and it's not about the individual merits of your case. It's to make some statement about the law. Try to figure out what it is.

- In the vein of "thinking big," don't be afraid to argue public policy. That can be extremely important.

- But while you're arguing public policy, leave the "I think" and "I believe" and "I feel" statements behind you. Nobody sitting on the bench deciding your case really cares what *you think* in this situation; they want to hear about what *the law requires*.

- Make your case seem as easy to decide as possible. And argue what will give you your best relief first.

- Sarcasm is out . . . and attempts at humor are pretty "iffy," too.

- Think through what the possible holes in your arguments could be and work this in somehow. And don't be afraid to concede what you can't win.

Mary T. Wagner, L'99, is an assistant district attorney in Sheboygan County, Wisconsin, and the author of *Running with Stilettoes: Living a Balanced Life in Dangerous Shoes*.

Time for Baseball to Accept Review of Umpires' Decisions

Posted by Donald W. Layden, Jr.



No one who knows me will be surprised that my first blog post will be about baseball.

The call last night (June 2, 2010) by umpire Jim Joyce denying Detroit Tigers pitcher Armando Galarraga a perfect game is yet the most recent example of the need for baseball

to adapt to the modern era and accept the use of technology in assisting umpires who make tough, close calls. In this case, there is no disputing that Joyce made a horrible call. He admits he blew it. The replays were clear.

Now it is time for Commissioner Bud Selig to demonstrate leadership and move baseball forward.

Holding fast to past practice is not the same as holding on to tradition. I hope that the commissioner is able to distinguish between the two. Baseball tradition was honored by the way that Armando Galarraga accepted the decision of the umpire and the rules under which the game is played. He is a class act. Baseball tradition was honored by the way that Jim Joyce accepted that he is human and acknowledged his mistake. Baseball is bigger than the egos of either one.

Now it is time for the commissioner to get over his misconceived notions of clinging to the past and accept that baseball should be able to adjust to the times and use technology to review calls like the one last night at first base. No fan would object to the delay, and no player or umpire would object to the review. Indeed, in a case such as Galarraga's, the focus would be on getting it right.

Donald W. Layden Jr., L'82, is a partner in Quarles & Brady, Milwaukee, and an advisor to Warburg Pincus, New York.



The New Miranda Warning

Posted by Michael D. Cicchini



I never thought the *Miranda* warning was all that useful. In fact, it actually raises more questions than it answers. For example, the warning tells a suspect that anything he says can be used against him in court. But asking for an attorney is saying something, isn't it? Could the prosecutor

later use such a request against the suspect? (After all, television teaches us that only guilty people “lawyer-up.”) And what if the suspect wants to remain silent? Could his silence be used against him in court? The *Miranda* warning fails to answer these and many other questions.

Making matters even worse for the would-be defen-

dant is the Supreme Court's 2010 decision in *Bergbuis v. Thompkins*. In a confidence-inspiring 5–4 split, the Court ruled that a suspect cannot actually exercise the right to remain silent by remaining silent—even if that silence lasts through nearly three hours of interrogation.

In response to all of this chaos, I've drafted a new and improved *Miranda* warning. Granted, this warning would be a bit more cumbersome for police to deliver and still wouldn't answer every possible question. But it would be an improvement. Here it goes:

“I first have to read you these rights before you tell me your side of the story, okay? First, you have the right to remain silent.

1. Actually, you really don't have the right to remain silent, unless you first speak. *Bergbuis v. Thompkins*, 130 S. Ct. 2250 (2010).

2. But if you choose to speak so that you can remain silent, you had better not be ambiguous. If you tell me, for example, ‘I don't got nothing to say,’ that is ambiguous to me, and not because of the double negative. Your ambiguity will be



construed in my favor, and I am allowed to continue my interrogation. *United States v. Banks*, 78 F.3d 1190 (7th Cir. 1996).

3. On the other hand, if I am ambiguous when I read you your rights, my ambiguity will also be construed against you. This is only fair. *Florida v. Powell*, 130 S. Ct. 1195 (2010).

4. If you refused to answer questions posed to you before I began reading you your rights, your pre-*Miranda* silence can be used against you at trial, should you testify in your own defense. So, you might want to talk to me now so you don't look guilty later. *Jenkins v. Anderson*, 447 U.S. 231 (1980).

5. But anything you say to me can be used against you in court. (I'm not sure if this includes the things that you say in order to remain silent.)

6. You have the right to an attorney.

7. But if you choose to exercise your right to an attorney, once again, you had better not be ambiguous about it. Don't ask me, for example, 'Could I get a lawyer?' This might seem like a reasonable request to you, since you're handcuffed and have no other way to actually get the nameless attorney that I just offered you. However, this statement is also ambiguous and is not sufficient to invoke your rights. *United States v. Wesela*, 223 F.3d 656 (7th Cir. 2000).

8. If you can't afford an attorney, one will be appointed for you, unless your income happens to be above the 1980 poverty line. Then you might be on your own.

9. And don't say 'I can't afford a lawyer, but is there any way I can get one?' As you might have guessed by now, that is completely ambiguous and lacks 'the clear implication of a present desire to consult with counsel.' The interrogation, therefore, must go on. *Lord v. Duckworth*, 29 F.3d 1216 (7th Cir. 1994).

Now, do you understand these rights as I have read them to you, and would you like to take this opportunity to help yourself, waive your rights, and tell your side of the story?"

Michael D. Cicchini, L'99, is a criminal defense lawyer in Kenosha, Wisconsin, and author of *But They Didn't Read Me My Rights! Myths, Oddities, and Lies About Our Legal System*.

What Causes People to Be Successful in Their Careers? The Three Essentials of Effective Communication

Posted by Claude L. Kordus



While I started my career as a corporate lawyer with the Miller Brewing Company, I early on moved into the business world, where my law degree proved to be useful. I spent 35 years at Hewitt Associates, helping companies set human-resource objectives and design human-

resource programs, including employee benefits, salary plans, incentive-pay systems, stock-option and stock-ownership schemes, employee-communication materials, and human-resource policies and practices.

In this and my following posts, I will focus on one question: What causes people to be successful in their careers? Whether you pursue a legal career or, like me, make the jump into the "business world," I believe that those who understand and develop their "soft-side skills," not just "technical skills," will be the most successful.

Clear evidence exists that career success stems as much from people skills as from technical skills. Researchers at Harvard, the Carnegie Foundation, and the Stanford Research Center have all concluded that 85 percent of job success comes from people skills—only 15 percent comes from technical skills and knowledge.

Effective communication represents one of the most significant elements in what are called the people skills. One-on-one conversation, coaching and mentoring, team leadership, group discussion, public speaking, persuasive writing, visual communication, and nonverbal body language are just some of the many elements that constitute effective human communication. Recently, the Internet has introduced entirely new forms of communication such as tweeting and blogging.

It is a mistake to conclude that communication effectiveness is of interest to businesses alone. Here

“Demonstrating respect, caring for others, sharing kindnesses, and acting humbly will move an organization and a career forward far faster than being focused strictly on efficiency, task correctness, and personal achievement.”

are some subjects featured in the recent *Law Practice* periodical of the ABA:

- “Law Firm Marketing Today: Moving Full Speed Ahead”
- “How to Use Social Media to Network and Build Relationships”
- “A Business-Minded Approach to Business Development: Targeting the Superstar Clients”
- “Marketing Resources”
- “Does Your Law Firm Need a Marketing Director?”
- “Essential Guide Unlocks the Secrets of Selling”
- “How to ‘Package’ Yourself in Job Search Documents and Interviews”

Researchers in the behavioral sciences, as well as communication educators, often suggest three fundamental characteristics that provide a foundation for communication: genuineness, respect, and empathy.

Genuineness is often considered synonymous with transparency. Jack Welch, the storied CEO of General Electric, says that holding a leadership position often becomes a power trip. People in management and executive positions believe that being a boss means exerting control over people and information, that keeping secrets enhances power. In reality, the more successful leader exhibits openness. Transparency is the basis for trust and the key to long-term organizational success.

A genuine or transparent person allows everyone to know what he or she is thinking and feeling. Being genuine provides the avenue for being viewed as a trustworthy person. Interaction, whether as coworkers, as manager and subordinate, or otherwise, will be smoother if the persons involved are open.

The need for transparency or authenticity in one-on-one relationships seems fairly obvious. But consider the importance of being genuine in delivering a speech. Studies have shown that people express who they are when making a public speech. Words, voice tone and rate, facial expressions, gestures—all send signals that

an audience picks up. How often have we listened to a speech and come to the conclusion that the person was genuine or, on the other hand, devious?

Respect is the second key to effective communication; this characteristic may also be labeled caring, acceptance, or people regard. The noted psychotherapist, Karl Menninger, talks of this quality as a person’s “patience, his fairness, his consistency, his rationality, his kindness, in short—his real love.” Theologians use the word *agape* or “concern for the well-being of others.” Respect stands as a core belief in many cultures and religions.

Unfortunately, many people in management don’t understand that a positive organizational culture is a climate in which all have respect for all. This comment is as true for the managing executive of a law firm as for an executive of a corporation. Demonstrating respect, caring for others, sharing kindnesses, and acting humbly will move an organization and a career forward far faster than being focused strictly on efficiency, task correctness, and personal achievement. In the world of work, people who are respectful of others generally receive the same treatment in return. Ralph Waldo Emerson said it well: “The only way to have a friend is to be one.”

Empathy is the final quality in the triad of essentials for effective communication. Achieving empathy is more difficult than becoming genuine and conveying respect. The first two qualities are behavioral. We can talk about our feelings. We can thank people for extra effort. We can show respect for people through active listening. Empathy, however, involves more heart, more intuition. Empathy is not feeling for someone but feeling with someone. Milton Mayeroff, in his book *On Caring*, notes: “To care for another person, I must be able to understand him [or her] and his [or her] world as if I were inside it. I must be able to see, as it were, with his [or her] eyes what his [or her] world is like . . . and how he [or she] sees himself [or herself].”

Empathy stems from deep psychological habits, attitudes, and beliefs. We can cognitively work on being more empathetic, but significantly shifting our feelings about ourselves and others is no small task. A friend, mentor, or coach can be useful for this undertaking. For example, ask a friend how you came across when he or she has been talking about a serious personal issue. The listening habits of a person impact greatly on a person's ability to feel and express empathy.

While the art of empathy is a difficult personal characteristic to improve on, we do get help from one source—our human nature. Neuroscientists have discovered “mirror neurons” that reproduce in our minds the actions of other people. If you watch a person writing on a pad of paper, mirror neurons light up, reproducing the feeling of writing within you. This reproduction provides a foundation for learning. When you watch the action of a top golf pro moving through his swing in slow motion, you are learning how to better swing a club. There is no guarantee you will eventually be a scratch golfer, but it is the basis for improving performance.

Unfortunately, in our culture many people do not effectively use the tools of communication. We read about these tools but find it difficult to apply them. Our education system, from grade school all the way

through college and post-college, spends little time teaching the methods by which we are able to talk and write more effectively with each other.

In the practice of law, there are many situations in which communication effectiveness is driven by much more than intellectual content. This includes, for example, law firm marketing, staff management and motivation, and internal personal relationships. One of the greatest challenges within any organization is getting all employees to focus on the same goals, the same strategies, and the activities that support these goals and strategies.

These qualities—genuineness, respect, and empathy—are foundations for effective communication and the foundations for being an effective participant in family, work, and the community.

Once a human being has arrived on this earth, communication is the largest single factor determining what kinds of relationships he makes with others and what happens to him.

— Virginia Satir, 1916–88,
U.S. psychoanalyst and therapist

Claude L. Kordus, L'56, heads Kordus Enterprises, a real estate investment company, and lives in Rancho Santa Fe, California. ■



Legal Research: Building the



So your client has a problem: As she was driving, she reached down to pick up her cell phone. She veered to the side and nearly hit a pedestrian. The pedestrian jumped out of the way but hit her head on a signpost as she did. The client drove on, since she hadn't actually hit anyone. But the pedestrian got her license plate number.

Now, the client fears she'll be charged with a hit and run violation. Did she commit a hit and run? What should you advise her?

This requires legal research. Good thing you developed a strong background in that when you were at Marquette University Law School. You had to take a first-year course involving legal research, as do just about all law students. But in 1997, Marquette led the way among law schools, making an advanced course in legal research mandatory. Marquette remains one of the few requiring that second course.

In fact, training people to become good at conducting legal research, as well as to become discriminating and careful users of the results they get, is a strength of Marquette Law School.

On a certain level, legal research is more accessible than ever because so much is available on the Internet, at both free and paid websites.

And in a certain way, legal research is more accessible than ever at Marquette Law School. The move in August 2010 into Eckstein Hall has put more volumes and resources within easy reach in the Ray and Kay Eckstein Law Library. It has also created excellent space for doing research, including places where an attorney, student, or other visitor can spread out material and work in quiet conditions. In fact, the library is one of the key features of Eckstein Hall. It is located in the northeast section of the building on all four levels. Access is unrestricted, once a visitor has been admitted to the building. And the Aitken Reading Room on the third floor is about as elegant a place for reading materials as you can find anywhere.

But the heart of legal research has not changed that much, and it has not necessarily gotten easier. It involves the hard work of doing it right. Learning how to do it right involves more than computers and nice space; it requires learning from excellent teachers.

Skills to Get Good Answers

That's another thing that has been on the rise at Marquette Law School: the quality of the people who teach legal research and who help those who come to the Law Library to work on research.

The roles of the Law School's librarians are changing, said Prof. Patricia A. Cervenka, director of the Law Library. The qualifications of the librarians are changing also. The six librarians who teach the research courses all have law degrees, as well as library degrees.

More emphasis is being placed on critical thinking about what legal research finds, according to Cervenka and members of the library staff. You need to know how to blend sources, how to weigh different sources, and especially what sources to regard as reliable and authoritative.

Marva Coward said, "For me, teaching legal research is a creative endeavor which requires developing scenarios that really challenge students to identify legal issues and find the most relevant resource to answer the legal question. Hands-on activities are required to reinforce classroom lectures and help the students to develop their research skills."

Leslie Behroozi, another of the teachers, said that she aims to provide a fact scenario in each of the seven weeks of the one-credit upper-level course. She aims each one to be a challenge "that puts students into a situation they might have in practice."

Elana Olson said that she likes to draw problems from real life. For example, after flooding damaged

numerous homes in Milwaukee in 2010, she created a problem involving legal issues for a client who experienced flooding in a home that he had recently purchased. In what circumstances is the previous owner liable? What is the best course of action for the lawyer?

Behroozi noted that students are required to do research using both traditional printed sources and sources available on the Internet. "Despite the extremely prevalent misconception, not everything is online," she said.

Students sometimes find that print sources are faster and easier to use than they assumed, she said.

Olson said a lot of students are using the library while sitting in their living rooms, thanks to the Internet. "We have more invisible library users," she remarked.

Julie Norton, who also teaches the advanced research course, said, "It just makes the service component of our job all the more important."

Megan A. O'Brien said, "Legal research is one of the skills that students will use immediately upon graduation as they head out into the legal profession. Our well-established Advanced Legal Research program gives Marquette law students an edge that allows them to hit the ground running."

Cervenka said that while technology was changing the way law librarians do their jobs, two things have not changed: One is that students need to learn how to do legal research well. And the other is that good teaching is an important part of the Law School's mission. ■



Adjunct Professors Megan A. O'Brien, International Law Librarian, and Marva Coward, Associate Law Librarian.

Opposite page: Adjunct Professors Leslie Behroozi, Associate Law Librarian; Elana Olson, Faculty Services Librarian; Julie Norton, Student Services Librarian; and Patricia Cervenka, Professor of Law and Director, Ray and Kay Eckstein Law Library.

PROFILE: Kimberley Motley

Building Justice in Afghanistan

Kimberley Motley is many things—lawyer, tireless advocate, wife, mother, former Miss Wisconsin. There is one thing she is not: afraid.

Motley is an international lawyer advocating in Afghanistan on behalf of foreigners held in Afghan jails. Though routinely threatened—both covertly and openly—she is unyielding in her representation and protection of her clients. But that’s only part of her story, a story that started a decade ago and continues to unfold half a world away.

While in law school, Motley tried to steer away from criminal work because it overwhelmed her. “But it kept calling me,” she said. “It is what I am supposed to be doing.” Fresh out of law school, she worked as an assistant public defender for six years in Racine and Milwaukee. In 2009, she was selected for a one-year-commitment position as a defense justice advisor in the Justice Sector Support Program in Kabul, Afghanistan. During this time, she was being trained—unbeknownst to her—for her life’s next big calling.

As a defense justice advisor, Motley worked closely with nongovernmental organizations, the Ministry of Justice, and the Attorney General’s office to increase the overall criminal-defense capacity in Kabul.

She accomplished much in her year in a country not well known, let us say, for its justice system. Motley immersed herself in the culture, working on gender-justice issues for incarcerated and accused women. She organized conferences, training sessions, roundtables, and special events to educate the Afghan government and public on access to justice, criminal defense, legal rights, and legal responsibilities. She conducted frequent training and mentoring sessions with criminal defense



Marquette law degree: 2003

Practice: Motley Legal Services, an international law firm based in Kabul, Afghanistan.

Family: Married to Claudiare Motley; three children

lawyers, specifically focusing on investigatory and trial advocacy skills.

Motley also provided technical assistance, training, and staff mentorship to nongovernmental organization boards engaged in criminal-justice issues. Her constant effort was to instill a culture of professionalism, excellence, and independence that would be resistant to political pressure and other interference—that is, to set standards for adherence to international norms in criminal justice.

In 2009, she decided to stay in Kabul as a juvenile justice consultant, first for Terre des Hommes, an

international organization, and then for the Italian Embassy, conducting field research on juvenile justice throughout Afghanistan, where children are often locked up and not properly represented. “This research has had a significant impact in having more judges being hired for juvenile matters and more oversight regarding juvenile justice,” Motley said. The following year, she worked for UNICEF, again doing research in Afghanistan, to draft internationally distributed publications regarding juvenile justice.

This work took her into the field where she conducted research by speaking (through a translator) to hundreds of people. What she learned became the basis for her own law practice. “I have witnessed so many human rights violations in Afghanistan—prisoners beaten and abused, going to court without translators, receiving exorbitant sentences—that I felt obligated to step in. It affected me as a human being that no one was helping some of these people,” she said. “I have some of the tools to help them within this embryonic system. I feel it is my duty to do this,” she explained.

It is often a struggle. Along with obvious language challenges (she has a professional translator), Motley also faces the cultural differences. “I am respectful to their culture while being true to myself,” she explained. “I do not assume the traditional dress nor do I wear a headscarf.” She finds it necessary to take on a culturally masculine role within Afghanistan so as not to be a detriment to her clients. “I am not overly aggressive, nor do I show skin, but I do look men in the eye and, in order to be perceived as a peer, do shake the hands of men in professional situations,” she explained, “both of which they traditionally do not do with women in their culture.”

So, what started out as a one-year commitment has turned into the establishment of one of the first international law firms in Afghanistan—Motley Legal Services. Motley is working on a book about her experiences in Kabul and law in Afghanistan in general.

Motley said that, no matter where her work or life finds her, she still thinks of Milwaukee as home. ■

1964

Joseph J. Roszkowski was named to the Board of Governors of the American Bar Association. He is managing partner of Zimmerman, Roszkowski & Brenner in Woonsocket, R.I.

1966

Robert O. Burr Jr. has been certified by the Florida Supreme Court as a circuit civil mediator.

1972

Jeffrey P. Aiken, Whyte Hirschboeck Dudek, Milwaukee, spoke to the Hungarian Parliament in November 2010 about the advantages of a bicameral legislature. He is also the author of “Construction Experts and Res Ipsa Loquitur: Bridging the Evidentiary Gap,” appearing in *Construction Lawyer* (Fall 2010).

1977

Roxanne J. Decyk has been elected to the board of directors for Alliant Techsystems, headquartered in Minneapolis, Minn. She is currently based in Washington, D.C., where she serves as the executive vice-president, Global Government Affairs, for Royal Dutch Shell.

Dean R. Dietrich, Wausau, Wis., has received the John L. Cook Memorial Award from the Wausau Region Chamber of Commerce for his years of service to Wausau-area residents. He is a shareholder at Ruder Ware.

1981

Jon Anderson, Madison, Wis., has been named to the Education Law Association board. He is a shareholder at Godfrey & Kahn.

Paul E. Bucher has formed Bucher Law Group in Delafield, Wis. The firm focuses on civil and criminal litigation, family law, social security and worker’s compensation matters, and municipal law.

Bush Nielsen is an author of *Commercial Real Estate Transactions in Wisconsin* (State Bar of Wisconsin PINNACLE, 2010). He is with the Waukesha office of Reinhart Boerner Van Deuren.

1982

Michael Ariens is the author of *Law School: Getting In, Getting On, Getting Out* (Carolina Academic Press, 2010). He is professor at St. Mary’s University School of Law in San Antonio, Texas.



PROFILE: Christine M. Wiseman

Rising to the Top by Serving Others

It is only fitting that Christine Wiseman is president of an institution founded by a strong and committed group of women. As president of Saint Xavier University, a coeducational institution established by the Sisters of Mercy and the oldest Catholic institution in Chicago, Wiseman works hard to continue the tradition in which she was educated, exuding the Jesuit mission of *cura personalis*—caring for each unique individual. “I am the woman the Jesuits educated me to be,” she said.

Wiseman—then Christine Giaimo—grew up in a strong Italian family in an ethnically diverse neighborhood on Milwaukee’s south side. She was salutatorian of her St. Mary’s Academy graduating class. When considering colleges, she sought a place that would offer an academic challenge. Marquette University was the answer. She commuted to and from Marquette during her undergraduate years and paid for her education herself, with assistance from some partial academic scholarships. Her intention was to major in drama or broadcast journalism. As with many other young people, Wiseman’s plans changed along the way: she ended up earning her bachelor of arts degree, with honors, in English and philosophy.

A legal situation in which a technicality prevented a family member from collecting death benefits gave Wiseman the idea that a law degree would allow her



Marquette law degree: 1973

Employment: President, Saint Xavier University, Chicago.

Family: Married for 38 years to William A. Wiseman; three adult children, Andrew, Nora, and Patrick.

Michael J. Gonring serves on the Wisconsin Access to Justice Commission,



Brady in Milwaukee focuses on product liability litigation.

which develops and encourages means of expanding access to the civil justice system for unrepresented low-income Wisconsin residents. Gonring’s practice at Quarles &

Kathleen A. Gray, Quarles & Brady, Milwaukee, has been elected to serve on the board of directors of the Waukesha County Community Foundation.

Steven J. Lownik has joined Bucher Law Group, Delafield, Wis.

Karen Goldman Zimmermann, Milwaukee, was inducted into the Wisconsin Law Foundation’s 2010 Class of Fellows.

1984

Charles G. Maris, Davis & Kuelthau, Brookfield, Wis., has been admitted to the Florida Bar.

Cheryl A. Gemignani, Waukesha, Wis., was inducted into the Wisconsin Law Foundation’s 2010 Class of Fellows.

1985

Timothy James Pruitt, Racine, Wis., has formed the firm Pruitt, Ekes & Geary.

to help those in need. She said she loved the challenge of law school, being an analytical thinker and good on her feet. “I learned along the way that I could synthesize different legal opinions and different rationales, bringing together many different strands of thought,” she said.

Upon graduating from law school in 1973, Wiseman worked for a year as an assistant attorney general for the State of Wisconsin in the Criminal Appeals Division. She then served as a law clerk for Robert W. Warren, Chief Judge of the United States District Court for the Eastern District of Wisconsin. She was appointed a full-time faculty member at Marquette Law School in 1980. She progressed from being a much-admired assistant professor to a full professor of law, ultimately becoming associate vice president for academic affairs for Marquette University.

Despite her deep love for Marquette, an opportunity arose at Creighton University in Omaha, in 2002, that offered personal and professional growth. “It is so helpful that you have experience at more than one institution,” she said. “The panoply of opportunities and experiences in the five years I served as vice president for academic affairs at Creighton University allowed me to hone my administrative skills.”

In 2007, her father became ill. As the oldest of three children, Wiseman wanted to be closer to her parents to care for them as they aged. She decided to look for a position closer to her Milwaukee roots. It was then

that yet another Jesuit institution contacted her. She served as provost of Loyola University Chicago for nearly three years, a position that not only brought her closer to her parents’ home but also gave her valuable professional mentoring.

All of these positions were preparing her for the role that she recently assumed. In May 2010, Wiseman became president of the nearly 5,000-student Saint Xavier University in Chicago. She acknowledges that it is not where she thought she would be when she first began her legal career in the 1970s. But it is not entirely a surprise to her. “There is no more malleable degree than a law degree,” she said. Legal education has taught her to focus on the issues, not just the people, and to see many sides of a situation, allowing her to arrive at a rational decision and articulate it.

“That is what I do now as president of Saint Xavier,” Wiseman said. “I’ve refined the skill of being direct and communicative, which is a valuable asset for any president.” Just as she viewed the practice of law, Wiseman sees her role now as one focused on service. “I am a resource to the people here,” she said. Her often-12-hour days include being the public face of the university at meetings, donor gatherings, and student, faculty, and athletic events.

She and her husband, William A. Wiseman, make their home in Chicago. That said, she hastens to assure folks that she remains an “absolute and rabid Packer fan.” ■

1986

Gary J. Van Domelen has been elected a shareholder at Wagner, Falconer & Judd, La Crosse, Wis. He leads the firm’s business service team.

1987

Robert Blazewick, captain, JAGC, U.S. Navy, has been named as the Navy JAG’s chair of international law at the George C. Marshall European Center for Security Studies in Garmisch, Germany. He reported

in August 2010, after completing three years as the commanding officer of the Navy’s Mid-Pacific Regional Legal Office in Pearl Harbor, Hawaii, where he served as the Navy’s chief prosecutor in the mid-Pacific and as the staff judge advocate to the commander, Navy Region Hawaii.

Scott M. Fabry has joined Reinhart Boerner Van Deuren in the Waukesha, Wis., office. As a shareholder in Business Law and Tax Practices, he focuses on business counseling and mergers and acquisitions.

Fabry also helps clients evaluate the use of tax credits, including new-markets tax credits and rehabilitation tax credits, as a means of financing. He is a member of the board of directors of Adoption Resources of Wisconsin and the Waukesha County Economic Development Corporation.

Peter M. Silver, Hartford, Wis., has joined Matthiesen, Wickert & Lehner. He focuses on defense of worker’s compensation matters and also handles national subrogation and civil litigation.



1988

Robert L. Jaskulski, Habush Habush & Rottier, Milwaukee, has been invited to join the International Society of Barristers.

Francis J. Hughes has been elected to the board of governors for the St. Thomas More Lawyers Society of Wisconsin. He is a shareholder at Fox, O'Neill & Shannon.

1989

Nicholas C. Zales received a President's Award from Wisconsin Bar President Doug Kammer at the 2010 bar convention for his work as chair of the state bar's finance committee. He was also unanimously approved by the bar's board of governors to serve a three-year term on the board of the Wisconsin Trust Account Foundation (WisTAF).



1990

Arthur T. Phillips has been elected as a shareholder at Whyte Hirschboeck Dudek. He is a member of the Human Resources Law Practice Group in the firm's Milwaukee office.

1991

David L. Borowski has been elected to the board of the Polish Heritage Alliance, Milwaukee. He is a judge of the Milwaukee County Circuit Court.

James C. Green, West Bend, Wis., has been appointed vice president—human resources, general counsel, and corporate secretary of Gehl Company, a Manitou Group subsidiary. He will have responsibility for all human resource and legal functions in the Americas region for Gehl Company and Manitou entities.



Stephen D. Zubiago has been named to the new leadership team of Nixon Peabody. He has been selected as chair of the firm's Business and Finance Department and is based in its Providence, R.I., office.

1992

Marilyn M. Carroll has joined Davis & Kuelthau as a shareholder in the firm's Brookfield office. Her practice focuses on health-care litigation.

Steven D. Mayer, Milwaukee, has formed Mayer Galligan Law. The firm focuses on business succession planning, mergers and acquisitions, estate and tax planning, business contract negotiations, charitable planning, family business transactions, and probate and trust administration.

Aidan M. McCormack has joined the firm of DLA Piper, New York, as a partner with its Litigation Practice Group. His practice focuses on insurance, reinsurance, and financial-services-related litigation, arbitration, and counseling. He has served as lead counsel for insurers and reinsurers across the world.

Jason F. Abraham, Milwaukee, was named "Lawyer of the Year" by the Milwaukee branch of the NAACP. He is managing partner of Hupy & Abraham.

1993

Lisa C. Paul has written a memoir of her relationship with a prominent Soviet refusenik in Moscow in the 1980s. The book, *Swimming in the Daylight: An American Student, a Soviet-Jewish Dissident, and the Gift of Hope*, was published in February by Skyhorse Publishing.

Timothy S. Trecek, Habush Habush & Rottier, Milwaukee, has been invited to join the International Society of Barristers.

Maria E. Gonzalez Knavel received the Community Involvement Award from the Association for Women Lawyers Foundation. She is with the Milwaukee office of Foley & Lardner.

1994

Sally A. Piefer, The Schroeder Group, Waukesha, Wis., was named one of the "2010 Women in the Law" by the *Wisconsin Law Journal*. She is also chair of the board of the Greater Brookfield Chamber of Commerce and a long-time member of the board of directors for the Elmbrook Humane Society and several other community boards.

1995

Susan C. Minahan has joined the Milwaukee office of Michael Best & Friedrich, as a partner in the Wealth Planning Services Group. She focuses her practice on estate planning, probate and trust administration, will contests and trust litigation, charitable giving, prenuptial agreements, and business succession planning.

Elise M. Neils has joined Ocean Tomo in Chicago, Ill., as a member of the Valuation Practice Group. She is responsible for brand, trademark, and naming-rights appraisals.

1996

Kelli Thompson was named Wisconsin State Public Defender in April. She started with the defender's office as a Law School intern and has been deputy state public defender for seven years. Thompson also has been elected to the National Legal Aid & Defender Association board.

1997

Chad W. Koplief graduated from the U.S. Army's Judge Advocate General's School of Law, cum laude (Commandant's List), and was awarded the Army Commendation Medal for Excellence in Legal Service Support, in 2010. He has joined Stafford Rosenbaum, Madison, Wis.

Debra E. Kuper was recognized as one of the most influential women in Georgia at the Georgia Conference for Women, where she received the Glass Ceiling Award for her dedication and hard work as a leader. She is vice president, general counsel, and corporate secretary of AGCO, headquartered in Duluth, Ga.



Lawyer. Mayor. Teacher. Family Man.

Kurt Dykstra wears many hats—a significant contrast, it seems, from his initial intention of wearing a collar.

Dykstra was born and raised in the predominantly Dutch-settlement area of Oostburg, Wis., near Sheboygan. He graduated, magna cum laude, from Northwestern College in Orange City, Iowa, having studied humanities with an emphasis in religion and history. A year later, after becoming married, he and his wife, Leah, set off to Princeton Seminary in New Jersey, where Dykstra intended to enroll to become a minister.

“We finished our final visit to the campus, and when we went out to dinner that night, I shared my doubts about wanting to enter the seminary,” he said. This was quite a surprise to Leah, whose father was a minister. (Dykstra’s great-grandfather also was a minister.)

And so their adventure began. The Dykstras headed to Milwaukee, where, a year later, Kurt attended Marquette Law School. “I had no idea what to expect,” he said. “I walked into the building pretty much petrified.” Three years later, he received his degree, summa cum laude.

Dykstra took advantage of the many seminars and courses offered. With a natural penchant for writing, Dykstra was selected as editor-in-chief for volume 81 of the *Marquette Law Review*. One issue of the journal included papers from a symposium at the Law School organized by Professor Scott Idleman regarding the role and influence of religious values in judicial decision-making. “This issue was unique and has been cited in various other types of non-legal research,” said Dykstra. The final issue of this volume marked Wisconsin’s sesquicentennial.

Upon graduation, Dykstra clerked for Justice Ann Walsh Bradley at the Wisconsin Supreme Court. He accepted a position with Reinhart Boerner van Deuren in Milwaukee in the fall of 1999.

After nearly four years at Reinhart, and with two young daughters and a desire to sink some roots, Dykstra and his family set out to find what would become their new home. He sent his resume to a large firm in Grand Rapids, Michigan, which also had an office in Holland, Michigan, another Dutch-settlement area, where his wife had been born. It was a perfect fit. The family moved to Holland in the spring of 2002, where Dykstra’s practice focuses primarily on commercial litigation, trade secrets, and real estate litigation.

Once comfortable in his new position and settled in the community, Dykstra served on the city council. After



Marquette law degree:

1998

Employment: Partner in law firm of Warner Norcross & Judd; Mayor of Holland, Michigan; Instructor, Hope College.

Family: Married to Leah; two daughters.

four years on the council, Dykstra was encouraged to run for mayor by a longtime official who had decided not to seek reelection. “I jumped into that race in 2009 and was elected Holland’s part-time mayor,” he said. Since then he has been serving as mayor while also maintaining his practice, which is four blocks from the Holland City Hall.

“The most challenging part of each day is to do a good job in two distinct roles. I am constantly trying to find extra hours in each day to do justice to both aspects of my career,” he said. “The rewards are many. I get to be a problem solver and conflict resolver in both roles. The decisions I make today will affect the trajectory of the community for generations. I try very hard for good and wise choices.”

In addition to these two positions, Dykstra also teaches a law-related class every semester at Hope College and serves on several community councils and boards. He maintains a connection to the Wisconsin legal system as a member of the Wisconsin Board of Bar Examiners.

Dykstra believes that it is important to treat people well, whether they are business associates, community members, or family. “Everyone deserves respect and to be heard,” he said. This is something that he recalls being reinforced in him while attending Marquette Law School. “The moral and theological dimensions and attitudes weren’t always overtly discussed, but they were demonstrated and woven into our teachings on how we do what we do as lawyers. I’ve really come to value that.”

So perhaps the career that Dykstra once considered really isn’t so different from what he does now, he said. “Some of the same skills that make a minister successful—listening, asking good questions, and being comfortable with and respectful to people—are the same skills required to be an effective lawyer.” ■

Daniel G. Radler has been elected chairman of the board of directors of St. Anne's Home for the Elderly. He is a partner in the Milwaukee office of Quarles & Brady.

Christopher M. Seelen, Eau Claire, Wis., has been appointed to the panel of Chapter 7 bankruptcy trustees for the Western District of Wisconsin. He practices at Ruder Ware and focuses on representing creditors in bankruptcy court and state court.

1998

Thomas R. Nolasco has joined the Phoenix, Ariz., firm of Engelman Berger as a partner. He practices in the areas of commercial litigation and professional liability, including trademark/copyright infringement, contract disputes, non-compete covenants, and franchise disputes.

David Rose has joined Wilson, Elser, Moskowitz, Edelman & Dicker as a partner in the firm's Stamford, Conn., office, working in the Government Affairs Practice Group. During the past four years, he served as an assistant counsel to three governors of New York State.

1999

Angela Champion has been recognized as one of the *Milwaukee Business Journal's* "Forty Under 40."

Daniel S. Galligan, Milwaukee, has formed Mayer Galligan Law. The firm focuses on business succession planning, mergers and acquisitions, estate and tax planning, business contract negotiations, charitable planning, family business transactions, and probate and trust administration.

Shawn Stevens has been recognized as one of the *Milwaukee Business Journal's* "Forty Under 40." He is a member of the firm Gass Weber Mullins.

2000

Jennifer Bolger has joined von Briesen & Roper, Milwaukee, Wis., as a shareholder in the environmental law and litigation section.

Evelyn L. Brown, Quarles & Brady, Milwaukee, has been appointed treasurer of the National Kidney Foundation of Wisconsin.

Elaine Sutton Ekes, Racine, Wis., has formed the firm Pruitt, Ekes & Geary.

Tyson A. Ciepluch has become a partner at Quarles & Brady, Milwaukee.

Patricia A. Lauten has become deputy city attorney in Madison, Wis. She focuses on labor, employment, and personnel issues.

Charles D. Schmidt has joined The Schroeder Group in Waukesha, Wis. He has ten years of civil litigation and appellate practice experience. He is also a co-founder and director of Sweet Water Foundation, a nonprofit organization promoting community education and involvement in sustainable urban agriculture, aquaculture, and aquaponics.

Stephan J. Nickels has been elected partner at Foley & Lardner. He is part of the firm's



Madison office and focuses his practice on business litigation and dispute resolution, as well as intellectual property litigation.

2001

Jennifer J. Kopp has joined the Brookfield office of Davis & Kuelthau as a senior associate. She is part of the firm's Health Care Litigation Practice.

Mark J. Andres, Elm Grove, Wis., has been elected secretary of the St. Thomas More Lawyers Society of Wisconsin.

Mollie A. Newcomb has been elected president of the St. Thomas More Lawyers Society of Wisconsin. Newcomb has served on the society's board of governors for three years and is its first female president. She is an attorney with Boyle Fredrickson.

2002

Eugene M. LaFlamme has been promoted to partner at McCoy & Hofbauer, Waukesha, Wis.

Daniel A. Kaminsky, **Geoffrey A. Lacy**, and **Matthew R. McClean**, Davis & Kuelthau, have each been promoted to shareholder in the firm's Milwaukee and Green Bay offices.

Thomas Simon has joined the Bucher Law Group, Delafield, Wis.

Gilbert F. Urfer has joined Nistler Law Office, Brookfield, Wis., as a senior associate.

Patrick McNally and his wife, Sarah, Whitefish Bay, Wis., welcomed their fourth child and second son, Charlie, on December 10, 2010.

Joseph W. Voiland, Reinhart Boerner Van Deuren, Milwaukee, was named one of the firm's Pro Bono Attorneys of the Year.

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.

Aaron J. Bernstein, Milwaukee, has joined Galanis, Pollack, Jacobs & Johnson.

Elizabeth P. Hanigan has been elected partner at Foley & Lardner. She is with the firm's Milwaukee office and focuses her practice on finance and financial institutions.

Patrick S. Murphy, Milwaukee, has been elected shareholder at Godfrey & Kahn. He is part of the firm's Banking and Financial Institutions Practice Group.

2003

Nathan K. Johnson has been named a shareholder at Reinhart Boerner Van Deuren. He is a member of the firm's Trusts and Estates Practice.

Adrienne J. Olson has joined the Milwaukee office of Quarles & Brady



as an attorney in the Corporate Services Group, where she focuses on providing legal counsel with respect to lobbying, campaign finance, ethics, procurement, and anticorruption

matters at the federal and state levels. She most recently was Pro Bono Coordinator at the Law School.

2004

Jane E. Appleby has been named in-house counsel in charge of litigation for Aurora Health Care, Inc. She also has been appointed to the Wisconsin State Bar's Diversity Outreach Committee and has rejoined the state bar's Professional Ethics Committee.

Jack M. Cook has become a partner at Quarles & Brady, Milwaukee.

John C. Gardner has joined DeWitt Ross & Stevens in Madison, Wis., as an associate with the Employment Relations and Litigation Groups.

Sharon M. Horozanieck, Minnetonka, Minn., has joined Morrison, Fenske & Sund as an associate. She focuses on product

liability, construction and insurance-coverage litigation, and collection law.

Rachel Monaco-Wilcox, Milwaukee, has been appointed to the State Bar of Wisconsin Dispute Resolution Section Board. Her solo practice focuses on elder mediation.

Matthew R. Rosek has been promoted to senior associate at McCoy & Hofbauer, Waukesha, Wis.

Robert W. Habich is an author of *Commercial Real Estate Transactions in Wisconsin* (State Bar of Wisconsin PINNACLE, 2010). He is with the Waukesha office of Reinhart Boerner Van Deuren.

Ryan L. Woody, Hartford, Wis., has been promoted to partner at Matthiesen, Wickert & Lehner. He focuses on nationwide large-loss subrogation, ERISA litigation, and insurance defense and coverage issues.

2005

Christopher G. Meadows has joined the Milwaukee office of Whyte Hirschboeck Dudek as part of the Products Liability Litigation and Risk Avoidance team.

Brad J. Sarna has joined Ocean Tomo in Chicago, Ill., as a member of the Valuation Practice Group.

2006

Anthony Murdock and **Andrea (Neuman) Murdock** welcomed their son, Ryan Kent Murdock, on August 28, 2010. Anthony and Andrea are both shareholders at Halloin & Murdock in Milwaukee, focusing on construction, real estate, and insurance coverage litigation.

Mathew Pauly has accepted the position of Medical Bioethics director with Kaiser Permanente, Fontana and Ontario Vineyard Medical Centers, Fontana, Calif.

Daniel R. Peterson has joined The Schroeder Group, as an associate in the business area.

Stephen J. Gardner has joined the Madison, Wis., office of Quarles & Brady as an associate in the Commercial Litigation Group.

Justin C. Longley, St. Francis, Wis., has been elected treasurer of the St. Thomas More Lawyers Society of Wisconsin.

Alexander W. Hansch, Milwaukee, has joined Godfrey & Kahn as a member of the Corporate Practice Group.

2007

Kerri A. Hutchison, Quarles & Brady, Milwaukee, is serving as president of the Wisconsin Retirement Plan Professionals for the 2010–2011 year.

Kristin A. Occhetti has been appointed to the associate board of the Zoological Society of Milwaukee. She is an associate in Quarles & Brady's Milwaukee office and a member of the firm's Trusts & Estates Group.

Melissa M. Stone, Hartford, Wis., has joined Matthiesen, Wickert & Lehner. She focuses on worker's compensation and personal injury insurance defense, national subrogation, and civil litigation.

2008

Megan K. Heinzelman has joined Ruder Ware's Wausau office as a member of the Business Transactions and Trusts & Estates Practice Groups.

Thomas E. Howard has joined the Peoria, Ill., office of Howard & Howard. He concentrates his practice in the areas of creditors' rights, bankruptcy, and commercial litigation.

Megan L. W. Jerabek has joined von Briesen & Roper, Madison, Wis., as an associate in the Business Practice Group.

Christopher J. MacGillis, Waukesha, Wis., has opened MacGillis Weimer LLC. The firm focuses on personal injury, labor and employment, criminal, and family law.

2009

David P. Knaff has joined von Briesen & Roper, Madison, Wis., as an associate in the Business Practice Group.

Amy L. MacArdy has joined the Milwaukee office of Reinhart Boerner Van Deuren in the firm's Litigation Practice.



From Tarpaper Shack to Trial Courtroom

Few people who hail from meager means are presented with or take such advantage of the opportunity to succeed professionally as has been true of Adrian P. Schoone. Born at home in a tarpaper shack in a small northern Wisconsin farming community, Schoone is the oldest of six children.

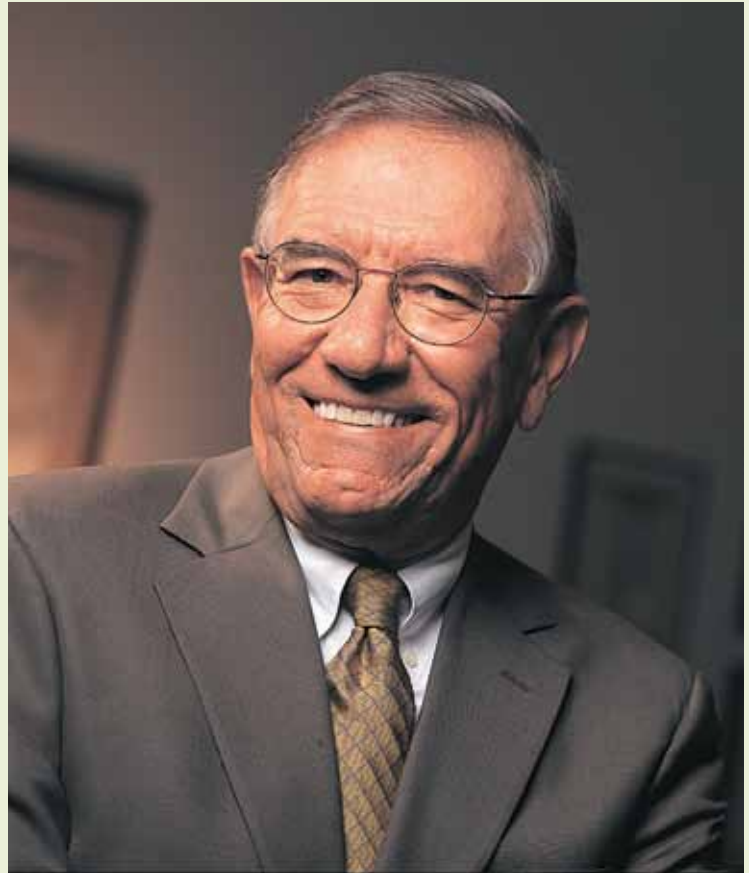
He attributes his career choice and subsequent success primarily to two people: “first, my hard-headed, brook-no-interference father,” and, second, Alfred E. LaFrance.

When recounting his career path, Schoone said, “Unlike 95 percent of lawyers, I was not inspired to be a lawyer for any other reason than the directive of my father. I didn’t know nor was I related to any lawyers.” While considering what to do after an admittedly underachieving stint in high school, Schoone asked his father to sign papers that would allow the young Schoone to join the navy, as his fellow classmate and next-door neighbor would do. His father’s verbatim response was, “What the hell are you talking about? You’re going to be a lawyer.” And so it would be.

Schoone suspects that proclamation stemmed from the fact his father was chairman of the Town of Harrison and had some interaction with Lincoln County attorneys during his comings and goings at the county courthouse.

In any event, Schoone packed his bags and was off to Milwaukee for college. Schoone enrolled in the Marquette University College of Business Administration in 1953 with a partial scholarship and about \$600 he had earned working all summer as a greenkeeper at the local golf course. He continued to finance his education by working during the school year on campus and during summer breaks as a woodsman and bricklayer’s helper.

In 1956, his father’s plan continued to unfold, as Schoone enrolled in Marquette University Law School. He applied for financial aid and the re-



Marquette law degree: 1959

Practice: Personal injury and business litigation with Schoone, Leuck, Kelley, Pitts & Knurr, Mount Pleasant, Wis.

Family: Married to Sally; four adult children and 9 grandchildren.

quired testing yielded a St. Thomas More scholarship. “Marquette has been good to me,” he said. “Marquette taught me to be a practicing Wisconsin lawyer,” a fact that catapulted him from near poverty to a position where he can now look out for others.

After two years with a Milwaukee firm, Schoone landed a job with the other person to whom he is forever grateful—the late Alfred E. LaFrance of Racine, a celebrated leader of the Wisconsin bar. “His first question to me, after we shook hands, was where I ranked in my law school class. When I told him that I had graduated first, he said that intrigued him and offered me a job.”

LaFrance offered Schoone a small office, a file cabinet, and \$10 an hour to conduct legal research and factual investigations for LaFrance and his partner, Ken Greenquist. Schoone had to pay for his own secretary and a percentage of the overhead. Within a month, LaFrance asked him to assume considerable insurance subrogation work, suing uninsured motorists for property damage. Schoone was immersed immediately in trial experience, which he parlayed into a successful career as a trial lawyer.

During the ensuing years, he established his own firm, Schoone, Leuck, Kelley, Pitts & Knurr, in Racine. Over the span of his career, he has tried more than 250 civil and criminal jury cases to verdict, “winning more than I’ve lost,” Schoone said. During his half-century plus in the profession, he has also served as president of the State Bar of Wisconsin in 1983–1984 and, by appointment of the Wisconsin Supreme Court, on the Wisconsin Judicial Commission and the former Board of Attorneys Professional Responsibility, both of which he chaired for two years.

With no intention of retiring as long as his law practice is rewarding and gives him pleasure, Schoone is most often at the office by 5:30 a.m. “If you are born poor,” he said, “you learn to work harder.”

Looking back on his 75 years with an uncanny memory for detail, Schoone is full of gratitude. This has manifested itself in several ways, most recently in a \$300,000 gift to the Eckstein Hall project, in honor of his parents, Adrian and Agnes Schoone, in addition to past gifts to the Law School.

Schoone and his wife, Sally (who is also the firm’s bookkeeper), make their home in Mount Pleasant in Racine County and, as of eight years ago, spend most of the winter in Georgia, where the golfing and horseback riding are plentiful, and the office is only a phone call (or two or three or four) away. ■

Alicia M. Augsburg, Monroe, Wis., has joined Duxstad & Bestul as an associate. She focuses on business law, estate planning, probate, and real estate transactions.

Dennis J. Elverman, Milwaukee, has joined Howard, Solochek & Weber as an associate. He practices creditors’ rights law.

2010

Marc J. Adesso has joined DeWitt Ross & Stevens in Brookfield, Wis., as an associate with the Business, Estate Planning, Tax, and Real Estate Groups.

Alyssa D. Dowse has joined von Briesen & Roper, Madison, Wis., as an associate in the Compensation and Benefits Section.

Jessica L. Farley has joined the Milwaukee office of Reinhart Boerner Van Deuren in the firm’s Litigation Practice.

Nathan S. Fronk has joined von Briesen & Roper, Madison, Wis., as an associate in the Litigation and Risk Management Practice Group.

Peter J. O’Meara has joined Catholic Charities of the Archdiocese of the Milwaukee as an immigration attorney.

Craig R. Nolen has joined Voegeli, Ewald & Bartholf Law Offices, Monroe, Wis. His focus is on real estate, agricultural law, municipal law, and tax law.

Peter J. Prusinski, Wausau, Wis., has joined Crooks, Low & Connell as an associate. He concentrates his practice on criminal and traffic cases.

Stacie M. Ringelstetter has joined the Milwaukee office of Reinhart Boerner Van Deuren in the firm’s Employee Benefits Practice.

Anique N. Ruiz has joined the Milwaukee office of Gonzalez Saggio & Harlan as an associate in the Litigation Group.

Amy K. Sholis has become a corporate compliance specialist at the Madison headquarters of Dean Health Plan.

Patricia A. Stone has joined McCoy & Hofbauer, Waukesha, Wis. ■

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