

MARQUETTE LAWYER

MARQUETTE UNIVERSITY LAW SCHOOL MAGAZINE

FALL 2013

PAUL CLEMENT ON THE RECORD

A leading Supreme Court lawyer on national security cases, preparing for arguments, and his Wisconsin hometown

ALSO INSIDE:

The complex legacy of the landmark
MPS special education lawsuit

Arti Rai on DNA patenting

Phoebe Williams on change

Don Layden on Marquette



An Old Medium in the Midst of the New

The opening page of the *Marquette Law Review* in 1916 observed that “the institution which would expand and fulfill its mission must make known its ideals and communicate its spirit,” and it suggested that “[t]he most effective way of doing both is by means of a suitable magazine.” In the ensuing century, the media available to institutions and individuals have multiplied.

Much of this multiplication has occurred within my time in the legal profession, and some of it even during the 10-plus years of my deanship. The Internet has been the primary driver, of course, and blogs, Facebook, and Twitter have

supplemented means such as home pages and email.

The Law School is no stranger to any of these technologies or applications. If email were a form of currency, I would be wealthy, indeed. For another

example, we maintain what I believe to be the most consistently updated law faculty blog in the country: Professor Michael O’Hear recently completed his fifth year of leading us in that important initiative.

Various of my colleagues are entirely comfortable with newer media. The Marquette Law School Poll has benefited from tweets by faculty and staff colleagues. While Twitter and I thus far are strangers to one another, it is important to the Law School that others step up to expand our media competency. For example, Associate Dean Matt Parlow is leading an initiative to ensure that we deploy social media in ways that help us connect with alumni, students, and prospective students.

Yet even today the role of print media remains important. Consider, again, the development of the *Marquette Law Review*. Its citation by Wisconsin courts countless times in just the past three decades should make plain that the publication continues to help the Law School “fulfill its mission.” At the same time, over the decades, the journal has ceased to be a “magazine” in the precise sense originally envisioned.

In these circumstances, we have great confidence in the importance of this magazine, *Marquette Lawyer*. It is a rich, substantive publication, which the Law School uses to “make known its ideals and communicate its spirit” not just to Marquette lawyers but also to federal judges, legal academics, and thousands of members of the practicing bar. To take just that last group, non-Marquette alumni hire our students and graduates and send their children to school at Marquette; surely we wish such friends and consumers to know our ideals and feel our spirit.

Yet these individuals are not likely to receive emails from me, sign up as Facebook friends of the Law School, or follow us on Twitter (I do not know what verbs go along with Instagram or Tumblr). Thus we can send them “a suitable magazine,” and I believe that a number of folks otherwise without connection to the Law School welcome this publication twice a year. Indeed, one retired dean of another law school wrote me (by email) after the last issue, saying that *Marquette Lawyer* is an exception to his unsolicited mail: “Let it be said that there is one [publication] I not only enjoy but anticipate enjoying. It is *Marquette Lawyer*.”

We believe it to be a suitable magazine, perhaps to understate our view, and we invite you once again to take a measure of the ideals and spirit expressed herein. Thank you.

Joseph D. Kearney
Dean and Professor of Law



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Charles Franklin Joins Marquette Law Faculty

Charles Franklin, director of the groundbreaking Marquette Law School Poll, which since its launch at the beginning of 2012 has become the definitive source for an accurate read on public opinion in Wisconsin, has joined the law faculty on a permanent basis, Marquette University announced this past May.



Franklin, a nationally recognized government scholar and pollster, was a visiting professor at Marquette in 2012. With his full-time appointment at Marquette, he continues in his role as poll director and becomes a professor of law and public policy. Franklin had been a political science professor at the University of Wisconsin–Madison since 1992.

“Professor Franklin brings a unique set of skills,” said Joseph D. Kearney, dean of Marquette Law

School. “He is both a nationally renowned polling expert and a first-rate scholar of government and public opinion; he is thus able to communicate helpful information to the media and to engage in the academy on a high level.” Kearney added that he anticipates “the continued success and even expansion of the Marquette Law School Poll under Professor Franklin’s direction.”

Franklin has eagerly embraced the new position. “Marquette Law School has created a unique opportunity to contribute to the public conversation about issues facing our state and nation through both the polling and policy discussions it convenes,” he said. The Marquette Law School Poll accurately captured voter attitudes before every major election in 2012, including the gubernatorial recall, U.S. Senate, and presidential races.

“I look forward to collaborating with colleagues across the university to educate the next generation of leaders and to ensure that Marquette is a resource for the region,” said Franklin. ■

Conference Focuses on Looming Question of New Arena in Milwaukee

While most people seem to agree that the National Basketball Association (NBA) Bucks are a significant asset to Milwaukee, consensus on the wisdom of building a new arena to keep the team in town—and how to pay for it—was in short supply during a recent conference at Marquette Law School.

The future of the BMO Harris Bradley Center, Milwaukee’s indoor arena, was the central theme of the conference, which was sponsored by Marquette Law School and the *Milwaukee Journal Sentinel* and supported by the Law School’s Lubar Fund for Public Policy Research. The Bucks owner (and former U.S. senator) Herb Kohl has deemed the Bradley Center outdated and is working with local business leaders on a public-private partnership to replace it before the team’s lease expires in 2017.

Conference presenter Roy Williams, president and CEO of the Greater Oklahoma City Chamber, cited the NBA’s Thunder as a cornerstone of his city’s renaissance. Tim Sheehy, president of the Metropolitan Milwaukee

Association of Commerce, touted similar big-league benefits for Milwaukee.

Meanwhile, Andrew Zimbalist, a Smith College economics professor, gave a somewhat more skeptical view of new sports facilities’ economic benefits. And a panel of local politicians that included Milwaukee County Executive Chris Abele, Milwaukee Common Council President Willie Hines, Wisconsin Assembly Speaker Robin Vos, Milwaukee County Board of Supervisors Chair Marina Dimitrijevic, and Milwaukee Alderman Michael Murphy noted that public funding would be a tough sell—a showing of bipartisan agreement that ultimately could be discouraging for fans.

Other speakers included Marquette Law School’s Professor Matthew J. Parlow and Adjunct Professor Martin J. Greenberg, both of whom have written on the financing of sports facilities. Mike Gousha, distinguished fellow in law and public policy, led the work on the conference for the Law School. ■



Summer Youth Institute Takes Students a Step Forward

Three judges listened carefully to arguments on whether a strip search of a student entering a school was justified. Advocates debated whether an anonymous tip to the principal justified heightened security and whether the nervous conduct of a student provided enough reason for the strip search even after the student had passed through a metal detector without problem.

The two pairs of advocates were composed and articulate as they cited comparable cases and reasons for and against considering the search reasonable.

Yes, a viewer could pick up signals that the advocates were not as well versed as most who present such arguments. But they *were* impressive—especially considering they were eighth-, ninth-, and tenth-grade students from about a dozen Milwaukee-area schools, taking part in a weeklong program offering them knowledge, experience, and mentoring that might interest them in careers in the law. On Monday morning of this week in July, most of the students probably had little or no idea what an appellate argument involved. Now it was Friday morning. With Eckstein Hall as their base, they had attended a wide range of sessions, including visits to courts and law firms. The arguments were the capstone of the week. The teens had worked with lawyers and Marquette Law School students to get ready.

Twenty-two students from a wide range of backgrounds took part in the Summer Youth Institute, the first of what sponsors hope will be an annual program. The sponsors were Marquette Law School and the Eastern District of Wisconsin Bar Association (EDWBA). Collaboration and support came from the Just the Beginning Foundation; Johnson Controls, Inc. (through the work of one of its in-house counsel, Gil Cubia); Kids, Courts, and Citizenship; and the Association of Corporate Counsel Wisconsin Chapter (through Atheneé Lucas, in-house with ManpowerGroup). The steering committee included U.S. Magistrate Judge Nancy Joseph, who had suggested this program a year earlier; Marquette Law



School Pro Bono Director Angela F. Schultz; Melissa L. Greipp, associate professor of legal writing; Anne Berleman Kearney, adjunct professor of law and principal in Appellate Consulting Group; and Katy Borowski, executive director of the EDWBA.

Sessions stressed the commitment that students need to make to education and to improving themselves in both the short and long term. At lunch one day, Milwaukee attorney Cory Nettles told them that one of the best pieces of advice he ever received was to be “helpable”—someone who benefits from coaching. Jerome Okarma, general counsel for Johnson Controls, Inc., told the students, “If you don’t like reading, you don’t want to be lawyer.” The week included a session for parents with tips for getting children into and through college.

“I think the kids got a chance to be pushed out of their comfort zones,” said Max Wright, a teacher at Hmong American Peace Academy who was one of the institute’s instructors along with Barbara J. Janaszek, a Milwaukee attorney and former teacher. “Their horizons have been broadened.”

One of the students said as the week concluded, “I took a step forward in my life.” ■

Sensenbrenner Hall Gets Update

The rendering below of Marquette's Sensenbrenner Hall projects the east side of the building as it will look in 2015. The brick-clad area to the right, the former home of the Law School, was designed by Alexander C. Eschweiler and dedicated in 1924. The former legal research center (opened in 1967) and the office and classroom area (opened in 1984) connecting these newer segments with the 1924 building were demolished this past summer. The glass-fronted area to the left

in the rendering will be added and contain mechanicals and facilities for the upper floors of the refurbished Sensenbrenner Hall. It will also ensure that any future construction to the south of Sensenbrenner Hall will not crowd the original building. Sensenbrenner Hall has been vacant since 2010, when the Law School moved to its new home, Ray and Kay Eckstein Hall. The refurbished Sensenbrenner is expected to house departments of the Klingler College of Arts and Sciences. ■



Doug Frohmader Receives 2013 Excellence in University Service Award



Doug Frohmader, creative director in Marquette University's Office of Marketing and Communication, was one of four Marquette employees recently honored

with the 2013 Excellence in University Service Awards. Frohmader's work extends throughout the university and includes a leading role in the planning, design, and production of *Marquette Lawyer*.

Frohmader, a Marquette employee since 1985, has been honored for his work multiple times by the Council for Advancement and Support of Education, the country's leading education organization for professionals who work in alumni relations, communication, development, and marketing.

Multiple nominators wrote about Frohmader's professionalism, patience, work ethic, and commitment to *cura personalis*. ■

Judge Carolyn Dineen King Addresses Graduates

Judge Carolyn Dineen King, of the U.S. Court of Appeals for the Fifth Circuit, is flanked by Provost John J. Pauly (left) and Dean Joseph D. Kearney (right) and other faculty as she addresses graduating students at Marquette Law School's Hooding Ceremony at the Milwaukee Theatre on May 18, 2013. King's remarks included an exhortation to the 215 graduates "to participate in the public life of our communities"; she termed this "a special responsibility of lawyers."



Soliciting Study and Critiques of Wisconsin Law

Marquette University Law School invites proposals for research and publication to be supported by the Adrian P. Schoone Fund for the Study of Wisconsin Law and Legal Institutions. The Law School created the fund this past academic year to recognize a gift by Adrian P. Schoone, L'59, of more than \$500,000.

With the Schoone Fund, the Law School hopes to engender greater dispassionate research and study of Wisconsin law and legal institutions. “We have expanded our geographic footprint over the past several decades, increasing our recruitment of students from different regions, establishing the National Sports Law Institute in 1990, and, most recently, launching the Marquette Law School Poll,” said Dean Joseph D. Kearney. “At the same time, Wisconsin is our home, and we have an intense interest in the teaching and learning of Wisconsin law. We will use the Schoone Fund to support

proposals for research by faculty, students, and members of the bench and bar.”

Schoone received his undergraduate degree from Marquette University’s College of Business Administration and went on to graduate first in the Law School’s class of 1959. The Law School recognized him last year with its Lifetime Achievement Award. “We are proud to call Mr. Schoone a Marquette lawyer,” said Kearney, “and we are most grateful for this innovative gift.”

Schoone practices personal injury and business litigation with Schoone, Leuck, Kelley & Pitts, in the Village of Mount Pleasant in Racine County, Wis. He has tried more than 250 cases to verdict over his career in 10 different Wisconsin counties and in other states.

Proposals may be directed to Christine Wilczynski-Vogel, associate dean for external relations (christine.wv@marquette.edu). ■

Exploring Constitution Making Past, Present, and Future

On June 6, 2014, Marquette Law School will host a full-day event exploring the past, present, and future of constitution making in occupied states in the aftermath of war—be it “civil” war or “external” war. Central to this event will be consideration of the lessons experience has imparted concerning this seemingly timeless endeavor. Through the anticipated contributions of distinguished speakers with expertise and publications ranging across disciplines as diverse as linguistics, history, cultural studies, the military, and law, the event will probe efforts from that of General Douglas MacArthur in immediately postwar Japan to those unfolding around the globe at the dawn of the twenty-first century, including in Iraq, Afghanistan, Egypt, Tunisia, and, looking ahead, Syria.

The Law School’s event is part of a week in and around the Milwaukee community that will feature programs and activities that also concern the impact of General MacArthur on Australia, the Philippines, and South Korea, including an assessment of that impact against the backdrop of the current international community.

Consider joining us for this provocative event, which is being organized by Peter K. Rofes, professor of law, and Charles C. Mulcahy, L'62. For additional information, contact Christine Wilczynski-Vogel, associate dean for external relations, at christine.wv@marquette.edu or (414) 288-3167. ■

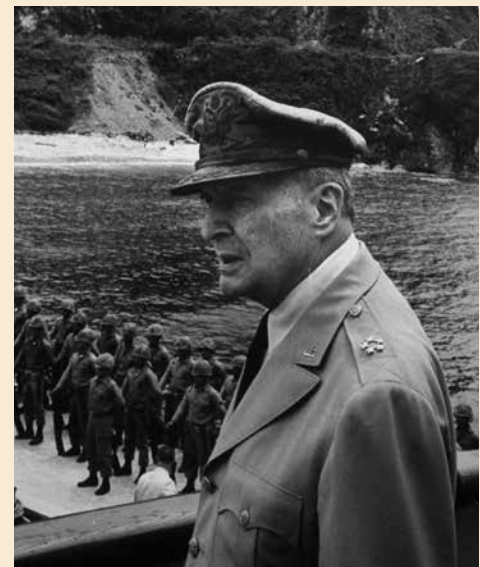


Photo by Carl Mydans/Time Life Pictures/Getty Images

Gen. Douglas MacArthur, January 1961, revisiting the island of Corregidor, from which he had been evacuated in 1942 before it was overrun by Japanese troops during World War II.



PREPARE.
PREPARE.
PREPARE.

Paul Clement offers his perspective after dozens of Supreme Court arguments, including cases on the Affordable Care Act, Guantánamo, and gay marriage.

National Public Radio Supreme Court reporter Nina Totenberg calls Paul Clement

“a walking superlative.” Former U.S. Attorney General John Ashcroft compares him to Michael Jordan. Tom Goldstein, publisher of the widely read *SCOTUSblog*, says, “My opinion remains unqualified that he is the best.” So, as a matter of opinion, Clement is to many the leading member of the Supreme Court bar. In all events, as a matter of fact, since 2000, Clement has argued some 65 cases before the U.S. Supreme Court—more than anyone else throughout this time.

Clement, 47, is a native of Cedarburg, Wisconsin, and a graduate of the Cedarburg public schools. He received a bachelor’s degree from Georgetown University’s School of Foreign Service and a master’s in economics from Cambridge University before graduating from Harvard Law School. He clerked for Judge Laurence H. Silberman of the U.S. Court of Appeals for the District of Columbia Circuit and Justice Antonin Scalia at the U.S. Supreme Court. He was deputy solicitor general before becoming solicitor general of the United States. He now is in private practice with Bancroft PLLC in Washington.

Clement delivered the annual E. Harold Hallows Lecture at Marquette University Law School on March 4, 2013, a talk titled “The Affordable Care Act in the Supreme Court: Looking Back, a Year After.” Earlier that day, he took part in an “On the Issues with Mike Gousha” session for Marquette law students. The following are individual excerpts from his remarks at those two events, with minor editorial changes. ►►



Paul Clement

National security legal issues in the aftermath of the September 11, 2001, terrorist attacks

I was at the Justice Department on 9/11 as a deputy, and my boss, Solicitor General Ted Olson, lost his wife on one of the planes. We learned that while we were in the office. To say that all of this impacted us personally is an understatement. The attacks had a really transformative effect professionally because, in addition to a broader stewardship over the whole process, on a number of the 9/11-specific issues, it was so clear to everybody that these issues were going to eventually find their way to the Supreme Court. . . .

We had some World War II-era precedents that were the closest thing even on point. Yet World War II was obviously such a different situation, of formal, declared war and all that, that it was really trying to construct legal positions and defend the president's prerogative based on some legal materials that didn't fit 9/11 and the post-9/11 world very directly. If you look at the trajectory of these 9/11 cases, the administration tended to do very well in the lower courts, in part because these World War II-era cases, maybe reflecting the nature of World War II, were pretty deferential to the executive branch. Then, when they got to the Supreme Court, the Bush administration lawyers, myself included, tended not to be as successful. I mean, usually not losing outright—more like, okay, you need to remand for more process or a little more of this. I think all of that was a healthy process that's still playing out.

How the Bush and Obama administrations have handled national security cases

It's been a healthy development that you now have a Democratic administration that's wrestling with the same basic problems, because in the Bush administration, we got a lot of criticism for some of our policies in the war on terror. I think if you would have looked only at the campaign rhetoric from the 2008 election, boy, you would have thought that things would be fundamentally different now. Guantánamo would be closed within a year and all that. You look around and, boy, things haven't changed that much. The legal positions have not really changed that much. Both political parties have had an opportunity to wrestle with these issues, and I think they recognize that they're fundamentally difficult issues. It's one thing if you had a constitution

that was focused like a laser beam on these problems, but instead you have very general guarantees and you have this recurring problem, which is basically, under our system, if we're not on a war footing on these legal issues, almost everything the executive's doing is completely wrong—right? Generally, if you hold a suspect, you have 72 hours to charge or release, and that's not what we are doing down in Guantánamo, obviously. That has required both administrations to make the argument that, well, this is an exercise in the war power. . . .



Paul Clement was welcomed to Marquette Law School for the E. Harold Hallows Lecture on March 4, 2013, by an overflowing crowd that included students, faculty, alumni, and other practicing lawyers and judges.

It continues to be very interesting and really historic. I think when we look back on this period, we will see these judicial decisions and executive decisions as really being fundamentally important about how we constitute ourselves as a society and how we deal with these situations. I think it's been a little bit of a frustration for the justices and, to a certain extent, for the executive branch as well that, under both parties, Congress is not addressing these problems very specifically.

On the claim that the rulings of judges in the Affordable Care Act cases matched the politics of the presidents who appointed them

Commentators drew one conclusion from the various district court rulings: That you needed to know one thing about the district court judge to know how the district court ruled. If the district court was appointed by a Republican president, they held that the act was unconstitutional. If the district court judge



was appointed by a Democratic president, they upheld the law as constitutional. This was a particularly sort-of-pernicious conclusion, if you ask me, for people to draw. It's accurate but pernicious. Because in many ways, the health care case, for a variety of reasons, was a case that was unusually closely watched not just by legal commentators, but by the general public. And so for the general public to be told that constitutional law is really just politics by other means and all you need to know is the party of the president who appointed a district court judge to

know how [that judge] will rule, that's a dangerous thing for people to have in mind.

Fortunately, there was a tonic for this line of description of these cases. And the tonic was the courts of appeals. . . . The Eleventh Circuit's was a case that I was involved in. And, importantly, there a two-judge majority that involved both a President Bush 41 appointee and a President Clinton appointee struck down the law's individual mandate as unconstitutional. Conversely, in the Sixth Circuit and D.C. Circuit cases, you had very distinguished, very well-respected court of appeals judges appointed by Republican presidents, such as Jeff Sutton, last year's Hallows lecturer, and Judge Laurence Silberman, for whom I clerked on the D.C. Circuit, voting to uphold the law's constitutionality. So this sort of simple narrative, that all you need to know is the president that appointed the judge, did break down. And I think that was every bit as healthy as the prior sort of explanation was pernicious.

Moot court work before the Affordable Care Act arguments

In one of my moot courts, I was berated by one of the justices. At the time, you never like your moot justices berating you. But you always thank them after the fact. I was berated by one of the justices about why wasn't this Necessary and Proper Clause issue decided in *McCulloch*, the case involving the Bank of the United States? . . . I thought long and hard about that series of questions. And it occurred to me in part of the discussion after the moot that the best answer to that line of questions was to remind the Court that, you know, there has to be a limit on the necessary and proper power, just like there has to be a limit on all of the powers granted to Congress in Article I, Section 8. And no matter how broad the power was in the *McCulloch* case, that maybe the Supreme Court would have had a different perspective if people had actually been forced to put deposits in the Bank of the United States—which would be far more comparable to the individual mandate. And, sure enough, at the actual argument, Justice Breyer asked me a question that only Justice Breyer could ask, which is to say it had many parts. And one of the parts focused on the *McCulloch* case and the Bank of the United States. And thanks to that moot court, I was able to give exactly that answer. ▶▶

“I think it is a very fair statement and a very fair summary of the health care case that the individual mandate was struck down as unconstitutional. Now, you may say that is delusional thinking from a lawyer who argued the case unsuccessfully.”

The challenge of trying to win the Affordable Care Act case

There were four separate cases, essentially, before the Court. But even that understates it a little bit because there were really six separate issues. There were the four I mentioned: jurisdiction, or the Anti-Injunction Act; constitutionality, or the individual mandate; severability; and Medicaid. But on the individual mandate, there really were three separate issues, because the government had sort of three strings to its bow, if you will. They had three arguments about what constitutional power supported the individual mandate. They said it was a valid exercise of the commerce power. They said it was a valid exercise of the necessary and proper power. And, at the very back of their brief, they mentioned the taxing power as an additional authority that would support the statute.

So one way of thinking about the challengers' burden in this case was they really had to run the table on those three issues because any one of those powers would be sufficient to sustain the constitutionality of the individual mandate. And to make the challenge even more daunting, four justices had made pretty clear in prior cases that they were not going to be receptive to an argument that limited Congress's power in this area. So there were really five justices who might be receptive to arguments for limiting the commerce power and the necessary and proper power. And so with five justices and three issues, the challenge for the challengers was, essentially, to run the table to the tune of going 15 for 15. The good news is the challengers went 14 for 15. The bad news, from the perspective of my clients, is 14 out of 15 isn't good enough.

Winning on the individual mandate issue

I think it is a very fair statement and a very fair summary of the health care case that the individual

mandate was struck down as unconstitutional. Now, you may say that is delusional thinking from a lawyer who argued the case unsuccessfully. But, in reality, the Court's decision on this point and, particularly, the chief justice's opinion, which was the decisive opinion on this, really does support the proposition that the statute that Congress actually passed, which put a mandate on individuals to purchase health care insurance, was, in fact, struck down as in excess of Congress's power under the commerce power and the necessary and proper power. And only by, essentially, reinterpreting the provision not as a mandate on individuals to buy insurance but as a tax on those who do not buy insurance, was the Court able to save the statute.

On Chief Justice John Roberts's unanticipated holding that the mandate could be upheld as a tax

How remarkable is that? The Supreme Court had six hours of argument on this case. And the taxing power argument got maybe, generously, three minutes of the six hours. . . . I guess another takeaway from today's lecture is, six hours was not enough. They needed more time to talk about the taxing power argument. . . .

Obviously, knowing what I know now, would I do things differently? Sure. I'd start with the taxing power. And, you know, every time somebody tried to ask me about the commerce power, I'd say "No, that's easy. Don't worry about that. But let me tell you about the taxing power. . . ." But, I have to say, if I would have told my clients, not knowing what I know now, that, "Guys, I think, you know, this case is all going to turn on the taxing power, and we've got to sort of stop focusing on the commerce power and just flip the order of the brief around," I think I would have been fired. 'Cause, you know, you have to remember . . . , none of the lower court decisions went off on the taxing power. >>



The spending power aspect of the Court's ruling

This was sort of the silent part of this case, the part nobody really focused on that much, which may turn out to be the single most important part of this case. On that, seven justices—not five, not four—seven justices said that the statute exceeded Congress's power under its spending power because it was too coercive of the states. The states effectively had no realistic choice but to accept the Medicaid funds because of the way that Congress structured the program—particularly, the fact that Congress tied the new expanded Medicaid program to the old program. So even states that wanted nothing to do with the new program and the new money, but were perfectly happy with the program they had and had had for 35 years, they faced a choice of losing all their Medicaid funds if they didn't take the new money. And seven justices said that was a bridge too far.

Now, the reason I think this is so significant is because, for small “p” political reasons, I rather doubt we're going to have a lot of new individual mandates. I mean, whatever you think about the constitutional issue, I don't think politically that played that well in the long run. But spending power legislation permeates the federal statute books. The United States Code is full of spending power legislation. And if you care about federalism, spending power issues are very important because the basic doctrine of the Court is that the very few things you can't do through the commerce power and the necessary and proper power, you can still get states to do if you make it a condition of receiving federal funds. . . . If you can, basically, without limit, put conditions on the states and say if you want this bucket of federal funds, you must agree to the following conditions, then there's no practical limit on federalism at all. The Court, by saying that there is a step that Congress can go that's too far, has, I think, breathed some life into federalism and the spending power.

The impact of the Affordable Care Act decision

Given the amount of attention paid to the case, there's an argument that it was a real constitutional moment. But I think, in some respects, it was a constitutional moment averted because the Court, in a decision that is five to four on virtually all aspects, except the spending power, ultimately upheld the statute under

the taxing power rationale. But in the process, the chief justice, joined by the four dissenting justices, imposed substantial limits on the commerce power and the necessary and proper power. . . . If they'd gone the other way and basically said, as four justices were willing to and a lot of commentators thought the Court would be willing to, and said basically, but for a few unusual circumstances like the *Lopez* case and maybe the *Printz* case, there are really no limits on federalism, then I think that would have really been the constitutional moment and the momentous holding of the Court. . . .

Although the health care case, in the end, was not decided exactly the way the challengers had hoped, I do think, in some respects, the single most important takeaway from the decision was there were not five votes to say that there really is no meaningful judicial review of federalism constraints on Congress. There are constraints. Again, the power is very substantial, very broad in the wake of the New Deal precedents of the Court. But it remains a limited power. And the challenge for the federal government in future cases will remain putting a limiting principle on an assertion of Congress's power.

His reaction to descriptions of him as “the go-to guy” for Republicans or conservatives for big cases

My aspirations would be to be the go-to guy for people who have Supreme Court cases or important court of appeals cases, without respect to the political aspects of the case or whether you think this is a Republican position or a Democratic position. My interest in the law is very broad. I say that appellate law is a great profession for people with short attention spans. I mean, last week, I was arguing a case about arbitration. The week before, I was arguing a case about taxes. There are plenty of people who are tax lawyers, spend their whole life in the tax code, and that's great for them. But for me, I wouldn't want to do that. . . . It really is my aspiration to have a much broader spectrum of cases and clients than would be suggested by this “go-to guy” for the Republicans. The good news from my standpoint is I think my practice does bear that out.

Winning and losing Supreme Court cases

As an appellate lawyer, you tend over time to get less and less focused on wins and losses. You can't not be focused on them, especially because you have clients and clients are excessively focused on wins and losses, and

you can't lose sight of that. But there are certain cases where you could write your brief in crayon, and you are still going to win—I mean, somebody came to you with a winning case. There are other cases where somebody came to you with the case that most lawyers would just get crushed on and you put every bit of your skill and trade into it. Another lawyer might have a 10 percent chance of success, and you get it up to the point where it's got a 40 percent chance of success, and then, percentages being what they are, you still lose. I don't at the end of that say, "Well, that was all wasted effort." I sort of feel like, no, it was great effort and, in some ways, I feel that's a much greater contribution than if I have a case that starts with an 80 percent chance of success and I get it to 85 percent. . . . If I can take a case that might look kind of one-sided and get it to the point where it seems like a much closer call, maybe that manifests itself in the decision they write, maybe it's a more nuanced decision, maybe it leaves open something that would otherwise be closed off. I feel like that's where I'm really adding some value.

Whether he still gets nervous before Supreme Court appearances

I've always said if I ever get to the point where I'm no longer nervous, I'm going to find something else to do. . . . One of the things that you just absolutely have

to do before you go in front of the Supreme Court is to prepare and prepare and prepare and prepare. What keeps you going that final mile is the nerves. I mean, if you got to the point where you're like, "I can do this. I'm not going to embarrass myself," you'd eventually embarrass yourself.

Preparing for a Supreme Court argument

I'm a big believer in the moot courts. It's like the old American Express commercial: I wouldn't leave home without them. I wouldn't go into the Supreme Court of the United States without having done at least two moot courts, where you get a group of individuals, colleagues who are really smart, and you try to basically simulate the kind of questions the justices are going to ask. Even if you've heard the question before, it's hard to answer a question coherently from a Supreme Court justice. If you've never heard the question or a question like it before of that type, it's well-nigh impossible. . . .

The other thing that I've learned over time is you can't really be over-prepared for a Supreme Court argument, so you really have to acknowledge the fact that you're not going to have quite as much time as you'd like. You're not going to be able to turn over every stone in the process of preparing. So what I've found over time is that you want to figure out, "All

right, what kind of case is this, and what kind of preparation is going to be rewarded?" Some cases are very record intensive, so you really have to bear down in the record. Some cases are precedent intensive, so what you need to do is really read every Fourth Amendment ►►



Eckstein Hall's Appellate Courtroom on the occasion of the 2013 Hallows Lecture presented Paul Clement with more than his usual group of nine people asking questions.

case the Supreme Court has decided in the last 20 years or something. Sometimes, it's the administrative regulations that you really have to understand inside and out, so you can see how this whole seemingly complicated web of regulations fits together.

Whether he focuses on specific justices in arguments before the Supreme Court

One way to define a Supreme Court advocate's job is to get to five for your client. It can be very satisfying to have four justices give a ringing endorsement to your position, but it's still called a loss, last time I checked. . . . In most cases, you have a theory as to how you're going to get to five, and sometimes it involves one justice playing a critical role. Very often, it's building a coalition where you were going to have some justices adopting one position and another justice or two adopting a different position. Those are the hardest cases because, any time you are building a coalition, you have to figure out how to get these additional people on board without losing the people you started with. In some ways, that can be the most challenging. One thing that's a little bit different about arguing cases in the Supreme Court relative to the courts of appeals is that in the Supreme Court, all nine justices are free to have their own view of a particular area of the law. In the lower courts, if there's a Supreme Court case on point, even if they don't like it much, they might grouse about it a little bit, but they're going to follow the Supreme Court case.

Why he doesn't use notes while appearing before the Supreme Court

Most people bring notes to the podium, but they're there more as a security blanket. At the Supreme Court of the United States, if they ask you a question and you are standing there paging through some notes trying to see what you wrote down, you are not serving your client well. I'm probably one of a handful that goes up there without any notes, but most of the lawyers, certainly the good lawyers there, they're not looking at what they brought up there. That's just something that kind of helpsthem sleep a little better the night before. . . . The questions are so important, and you really don't want anything to distract you from trying to pick up on the nuance.

Sometimes people have this idea that the ideal argument would be: you get up there and you say everything you wanted to. You use some lofty rhetoric.



U.S. District Judge Charles N. Clevert, Jr., Milwaukee Mayor Tom Barrett, and Paul D. Clement talk after the Hallows Lecture.

If you were to do that, and the justices weren't asking questions, I mean, you might as well just be talking to a wall, right? Even though it makes your job harder, you want lots of questions.

The effect of public and news media attention to a case

You can't just block it out and ignore it because it's a part of the overall system in which your cases are being litigated. I don't think the justices are terribly swayed by what's in the press, but, on the other hand, would you want your client to just get beaten up in the press completely and there to be no counter response? Of course you wouldn't want that. And would you want to make an argument on behalf of your client that's just going to be low-hanging fruit for somebody to pick on in another forum? No, you want to try to make your arguments in a way principally directed at the court, but you don't want to ignore everything that's going on entirely. . . . I don't think I'd do what I do if I thought it was just politics by other means. So you don't ignore it, but you don't get caught up in everything that's going on around you.

On leaving a major law firm, King & Spalding, over a matter of principle

Probably the most difficult and challenging professional decision I had to make came in private practice. I was retained by the House of Representatives to represent them in the challenges to the Defense of Marriage Act, which occurred after the Obama administration decided they were no longer going to

defend the statute. At that point, the House was thrust into the role of defending the statute and in many respects, it struck me as a very familiar role because, as the solicitor general, you are responsible for defending the constitutionality of acts of Congress without regard to whether you think they're good policy or not. . . .

I undertook that representation, and there was a big outcry because, in certain quarters, it's a very unpopular position to be defending that statute. Ultimately, the firm made a decision that it wanted to drop the representation and, at that point, I really had a fork in the road. I could either stick with my firm, where I had been even before my government service and had a lot of friends and had been building up an appellate practice for a couple of years. Or I could stick with my client.

I [had] told them I will represent them and made the commitment to represent them and, as much as on a personal level it probably would have been easier to stick with the firm and steady paycheck and all of that, my conception of what the lawyer's role is is that you don't walk away from a representation because it's proven unpopular in a particular quarter. I mean, you make a commitment to a client and, absent some sort of ethical reason that you have to withdraw, you should stick by your client, and that's what I did.

I was really heartened by the response out there in the profession. It really was, I think, a great moment for the profession. At some level, you can't expect non-lawyers to fully get it because I think non-lawyers always have a little bit of trouble understanding the idea that the lawyer represents the client. That doesn't mean the lawyer thinks the client is awesome. It doesn't mean that the lawyer even thinks that the client is, say, not guilty. It just means that you are honor-bound to represent that person zealously and to the best of your ability and to try to discharge your responsibilities to the client. . . . This whole system doesn't work if people don't defend clients who are unpopular for whatever reason, for one reason or another. I like to say that people who are popular in all corners generally don't need legal representation. . . .

What drew him to the law

One thing is I have a brother who is 12 years older who went to law school when I was all of about nine years old or something. So the idea of going to law school was something that was presented at a pretty early age as a distinct possibility. Then, as I got to the point of really deciding whether I wanted to go to law

school, I thought that it would be a great way to engage in public service in kind of an active way. But I really didn't know quite what to expect. When I first went to law school, I probably assumed I would be some kind of corporate lawyer, not quite knowing what that meant. I went to Harvard Law School, and the vast majority of my classmates seemed very down on corporations, and I was sort of a Republican, and I kind of liked corporations, so I figured this would be good—go be a corporate lawyer. But as I got more and more into understanding the profession and the way that it worked, I was more and more drawn to the litigation side of the house.

His experiences as a law clerk for Judge Silberman and then for Justice Scalia

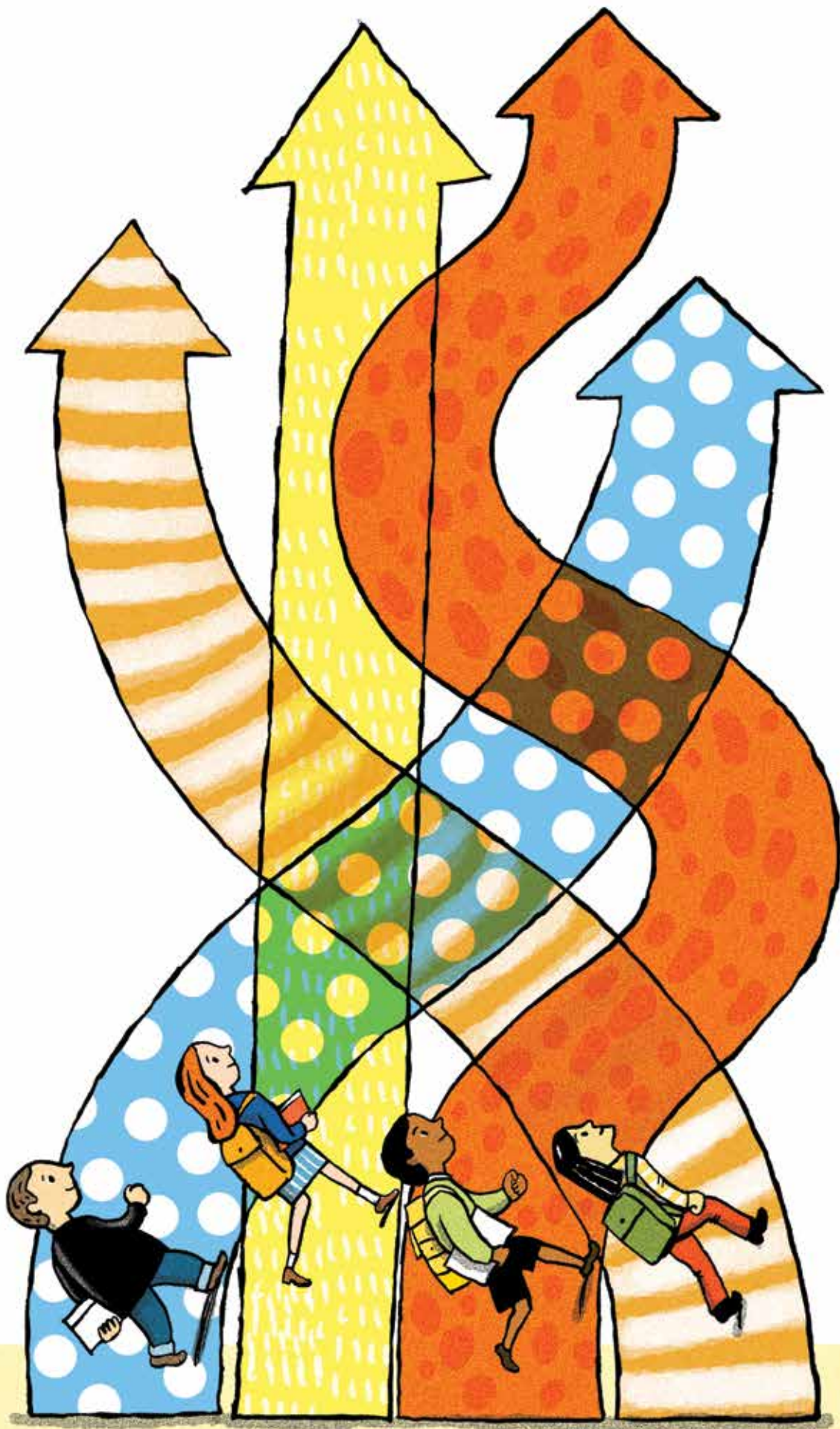
I would recommend a judicial clerkship to anyone who has any interest in the litigation side of the profession. But if you decide to have a clerkship, the single most important variable as to whether it's going to be a merely good experience or just an unbelievably great experience is for whom you clerk. You often don't have a lot of control over that. You put your applications out and see if anybody's interested. I was very fortunate because both of the individuals for whom I clerked were not only tremendous people, not only great intellects, but they had a lot of Washington experience, a lot of different service in the executive branch as well as the judicial branch. They were also people who were really interested in engaging orally. . . . Not much else is that intimidating when you've mixed it up with Justice Scalia and been told, "That's absolutely wrong. What are you thinking?" and you actually push back a little bit and say, "Well, then, boss, think about it this way."

Getting back to Wisconsin

My wife and I have three boys, and we make a point of getting back to Wisconsin every summer because we think it's important for them to understand that Washington is not entirely normal.

On the state of Marquette Law School

It is unfortunate to have a White Sox fan at the helm. [Interruption noting that Dean Kearney's predecessor was a Cubs fan.] Right, there is that—moving in the right direction, right. . . . But it is a shame. I mean, with this beautiful view of Miller Park, you really ought to have a Brewers fan at the helm. ■



The complex legacy of *Jamie S.*



Special education in Milwaukee schools has improved, even as plaintiffs lost a landmark class action case launched in 2001.

by Alan J. Borsuk

On the face of the matter, no one can doubt that the plaintiffs lost the Jamie S. case. More than a decade after a class action suit was filed challenging many aspects of how the Milwaukee Public Schools (MPS) system handled its obligations related to special education, *Jamie S. et al. v. Milwaukee Public Schools et al.* effectively ended in January 2012. That was when a decision by the U.S. Court of Appeals for the Seventh Circuit wiped out a string of victories for the plaintiffs before Magistrate Judge Aaron Goodstein in the federal district court in Milwaukee.

Even more generally, the Seventh Circuit opinion, combined with a June 2011 Supreme Court decision (*Wal-Mart Stores, Inc. v. Dukes*), means it is likely that Jamie S. already has played a significant role in ending a period in which class action challenges to special education systems in school districts around the United States were relatively frequent.

At the same time, the legacy of the Jamie S. case appears more complex. The litigation brought what can be called practical victories for the plaintiffs. In particular, improvements they sought in the systems and practices of the Milwaukee Public Schools came to pass. Indeed, every party involved in the issue agrees that MPS is doing better now than in 2001, when the case was launched, in complying with special education requirements. For more than a decade, the suit was a factor in shaping MPS policy. It continues to touch daily life for thousands of Milwaukee children. This may be one of those situations in which the impact of a lawsuit even on the parties cannot fully be measured by the final decision in court.

These various effects of Jamie S. are worth exploring. This requires, first, a look back. ▶▶



Illustrations by Robert Neubecker

Defining the Class

Perhaps the filing of the case—then known as *Lamont A. et al. v. Milwaukee Public Schools et al.*—was a sign of how much effort it would take to move the case forward. Lawyers for a nonprofit organization called the Wisconsin Coalition for Advocacy (which later became Disability Rights Wisconsin) decided to file the suit in federal court in Milwaukee on September 11, 2001. They found the courthouse closed—that was, of course, the day of terrorist attacks on the east coast. The suit was filed September 13.

The suit was a broad challenge to how MPS dealt with students who had or might have special education needs. The complaint portrayed a system that, in a nutshell, was failing to provide what a large number of children were entitled to under the federal Individuals with Disabilities Education Act (IDEA). It sought to include thousands of children in a class represented by the plaintiffs. It named as defendants not only MPS but also the Wisconsin Department of Public Instruction, which, the suit said, had not adequately used its authority to assure that Milwaukee was implementing IDEA. The parties consented to allow Goodstein, a magistrate judge (not a district judge), to handle the case.

In November 2003, after several rounds of proceedings and more than two years after the case was filed, Goodstein issued a decision granting the plaintiffs' request to make the case a class action and defining the class. His ruling narrowed the class to focus on an aspect of the IDEA called Child Find—basically, the process for identifying children who are entitled to special education help and getting them on course to receive such help. Goodstein defined the class as “[t]hose students eligible for special education services from the Milwaukee Public School System who are, have been or will be either denied or delayed entry or participation in the processes which result in a properly constituted meeting between the IEP team and the parents or guardians of the student.” An IEP is an “individualized educational plan.” Developing an IEP is a crucial process in special education.

Goodstein's decision was crucial to the course of the case. It also made a young girl, identified only as Jamie S., the lead plaintiff, since other children who were initially among the named plaintiffs didn't fit within the class. Goodstein described Jamie S. in a later opinion as a girl with cognitive problems that were spotted

in kindergarten. Her teacher at that point told Jamie's mother to see what happened as time passed. By age nine, Jamie was unable to multitask and needed help with hygiene and dressing. Her mother's further requests for testing Jamie weren't acted on. Finally, Jamie was given an IEP evaluation, but her mother was not present, a violation of the law. It was determined Jamie had a low IQ and was eligible for special education.

Goodstein set a schedule in which the case would be tried in phases. The first, in fall 2005, involved testimony by several expert witnesses for each side and focused on MPS's overall record in handling special education determinations. The second phase, in April 2006, focused on the specifics such as the histories of the named plaintiffs.

Even as the case was unfolding, it began to have an impact. MPS officials were determined to fight the plaintiffs all out. For one thing, both administrators and Milwaukee school board members argued that MPS did not have the money to do all that the plaintiffs wanted and was already financially pressed by the high cost of special education. That was especially so, officials said, because the federal government had never lived up to suggestions made when the first version of the IDEA passed in the 1970s that it would pay 40 percent of the cost of special education nationwide.

But, at the same time, MPS began changing in directions that the plaintiffs sought. MPS leaders felt under pressure to show that they were complying with requirements, and several say that, from top to bottom, orders were to meet all the rules. The *Jamie S.* case “was the biggest thing on my mind, all day, every day,” Patricia Yahle, MPS special education chief from 2002 until her retirement in 2011, said in a recent interview. Jeff Moulter, a special education administrator throughout the period (he now holds the title of “equitable educational opportunities coordinator”), said that meeting deadlines and paperwork requirements became very important. “I think we got pretty good at that,” Moulter said.

Goodstein issued a decision on September 11, 2007, that came down strongly on the side of the plaintiffs. He found liability on the part of MPS and DPI for not meeting the requirements of Child Find. For MPS, that included too-often missing deadlines for conducting IEPs; for DPI, that included not putting enough teeth into orders to MPS to improve its record. “It is the opinion of the court that the plaintiffs have satisfied their burden to establish a systemic problem with the MPS program,” Goodstein wrote.

A partial settlement, a lot of change

Goodstein decided the case would move to the third stage of trial, focusing on remedies—unless, as he urged in his decision, the parties settled out of court. He got half of that. In a dramatic turn, DPI and Disability Rights announced in July 2008 that they had agreed on a settlement that included imposing on MPS expectations of close to 100 percent compliance with IDEA requirements in each school in the system. Jodi Searl, a lawyer employed by MPS who worked extensively on the case, said MPS officials were waiting for a fax from DPI when they got word of the settlement. “It was a difficult blow,” she said.

Coulter stepped into the action as other circumstances surrounding MPS were changing. The federal No Child Left Behind education law was bringing escalating sanctions against schools and school districts that hadn’t met expectations. For MPS, that meant the state was gaining more power to order sometimes-sweeping “corrective actions” in Milwaukee. Much of what the DPI–Disability Rights settlement called for became part of these corrective actions, which gave the specific ideas force even against the non-settling defendant, MPS—and a source of authority independent of the partial settlement.

In addition, the Council of the Great City Schools, a peer organization of leaders of urban school districts, conducted analyses of several aspects of MPS’s work,



The partial settlement changed the dynamics and course of the case. DPI was now on the other side from MPS. As part of the settlement, DPI agreed to pay for an outside “special expert” to be appointed by the court to oversee MPS’s work on carrying out the settlement.

Goodstein approved the settlement and the naming of W. Alan Coulter, a professor at Louisiana State University Health Sciences Center in New Orleans, as an independent expert, with broad powers to shape what the partial settlement meant. Coulter had a long record of involvement in monitoring special education programs for the U.S. Department of Education and others. He quickly emerged as a key figure in determining the long-term impact of *Jamie S.* His vision for what needed to be done in Milwaukee went well beyond special education, and he would view his role under Goodstein’s order as putting him nearly on a par with both MPS Superintendent William Andrekopoulos and Wisconsin Superintendent of Public Instruction Tony Evers.

delivering strong criticisms. One report pointed to decentralization of academic decision making in MPS, which allowed 18 or more reading programs to be in use in the schools, as a big reason that reading education was ineffective. In short order, control of what was going on in the schools began to shift from individual buildings to the MPS central administration. The centralization process accelerated after Gregory Thornton became MPS superintendent in 2010.

Another Great City Schools report criticized the heavy use of student suspensions. MPS may have had the highest suspension rates in the country, the report suggested, while steps short of suspension were rarely used and could be more constructive. Subsequently, central administrators directed principals to reduce use of suspensions—a step also accelerated under Thornton. Excessive suspensions were one of the original concerns of the plaintiffs in *Jamie S.*, and Coulter was also a critic of them. ▶▶

With the class determination thrown out, all the rest of the action fell with it. MPS, which had pretty much lost every round of the case for a decade in the district court, was suddenly the full winner.

MPS also was making an internal change that advocates on all sides agree was important: a big push to improve data collection and use. This change occurred partly because it was important in the *Jamie S.* proceedings to demonstrate progress in meeting IDEA requirements. To be sure, there were other reasons as well that good data became a priority in MPS, including that there was so much need for good data to meet other accountability demands and (most generally) that such data collection had come to be regarded nationwide as such a valuable element of efforts to improve education.

There was, in addition, growing nationwide support for education practices such as Response to Intervention (RTI), a strategy that includes screening children at early ages and when there are early signs of a child's getting off a good academic track. Coulter was a big advocate of RTI, DPI leaders also liked the approach, and soon it was high on the agenda for use in Milwaukee and, subsequently, throughout Wisconsin.

The change in MPS leadership from Andrekopoulos, superintendent from 2002 to 2010, to Thornton, who was new to Milwaukee, was also important. Whereas MPS leaders until then largely had fought the plaintiffs and then DPI, Thornton wanted to cooperate, at least on many fronts. Whereas Andrekopoulos and Coulter butted heads, Thornton and Coulter hit it off. Coulter said, "It just completely changed the chemistry." Thornton, Coulter, and DPI chief Tony Evers met in person every month for about two years; while they didn't agree on everything, the atmosphere improved and the pace of change increased.

The total effect: MPS has launched a wide array of changes since 2008, with accelerating change since 2010. The changes have not yet borne notable fruit in terms of improved student achievement, including for special education students, but there are signs of progress. They also continue to address key concerns that prompted the *Jamie S.* suit in the first place.

Going beyond special education

By this point (2008 or so), *Jamie S.* had become part of changes that went well beyond special education issues to address the way MPS served all its students—and one of the biggest boosters of this was the court-appointed expert, Coulter. He viewed the way reading and math were taught and the way behavior and discipline were handled for all students as areas where he should express himself—and he did, with effect.

But everything was not clear sailing. MPS was still fighting Goodstein's decisions, and the opposition escalated in 2009 when Goodstein ordered the development of a plan for MPS to search out people who as students between 2000 and 2005 might not have received special education services they were entitled to. Many of them were now adults. They were to receive "compensatory education" to make up for what they hadn't gotten back then. What that meant was not specified, but angry MPS leaders argued that this could cost them large amounts of money that they did not have.

With Goodstein's approval of the DPI-Disability Rights settlement and the order to create a compensatory education plan, the case seemed, for the first time, appealable to the Seventh Circuit. The case was argued before Judges Joel Flaum, Ilana Rovner, and Diane Sykes on September 7, 2010. It was 16 months until the panel issued its decision—a period during which the Supreme Court issued a decision that strongly influenced the final ruling.

Wal-Mart v. Dukes was a case alleging violations by Wal-Mart of Title VII of the Civil Rights Act of 1964 through the discretion exercised by the company's local supervisors over pay and promotion matters. In a 5 to 4 decision, the high court ruled in 2011 that as many as 1.5 million women who worked for Wal-Mart did not constitute an appropriate group for a class action because their claims did not meet the requirement of depending on "a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

The appeals court's decision on *Jamie S.* was premised firmly on the *Wal-Mart* ruling. The opinion, written by Sykes, rejected Goodstein's definition of the class involved in the suit, as well as his acceptance of conclusions reached by expert witnesses for the plaintiffs.

"Like the Title VII claims in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the IDEA claims in this case are highly individualized and vastly diverse, making this case unsuitable for class-action treatment under Rule 23 of the Federal Rules of Civil Procedure," the decision said.

"In short, a class of unidentified but potentially IDEA-eligible students is inherently too indefinite to be certified," it continued. "To bring individual IDEA claims together to litigate as a class, the plaintiffs must show that they share some question of law or fact that can be answered *all at once* and that the *single answer* to that question will resolve a central issue in all class members' claims." That was not the case for *Jamie S.*

Flaum joined Sykes in the opinion. Rovner wrote separately that she agreed that Goodstein had not defined the class in an acceptable fashion, but that she was not sure there was no valid way to define a class in cases such as this.

With the class determination thrown out, all the rest of the action fell with it. MPS, which had pretty much lost every round of the case for a decade in the district court, was suddenly the full winner. The DPI-Disability Rights settlement was erased. Coulter's role ended almost immediately. The "compensatory education" dispute was dead. Years of what looked to some like futile resistance by the school board and MPS administration in court were suddenly vindicated.

The big-picture influence of *Jamie S.*

Searl, the long-time MPS lawyer and administrator, now works for Harley-Davidson. In 2012, she completed a dissertation about the *Jamie S.* case and other special education class action cases from around the country, as part of completing a Ph.D. from the University of Wisconsin-Madison in educational leadership and policy analysis. She downplayed any sense that the suit helped accomplish the plaintiffs' goals.

"The plaintiffs' use of class action litigation was not successful to advance resolution on the issues that originally caused them to turn to the court system for relief. Based upon the Seventh Circuit's ruling, the plaintiffs were returned back to their pre-class certification status," Searl concluded. "After almost 11 years of litigating through the federal court system, the plaintiffs ultimately lost the case in its entirety."

On the other hand, she wrote, "there was a certified class of plaintiff students for almost nine years, a liability decision that stood for over four years before being overturned, and a settlement agreement between the plaintiffs and the state department of education that was in effect for almost four years of the litigation. All of this required the ongoing attention and resources of the DPI and the school district."

In an interview, Searl maintained that the practical effects of the case did not play much of a role in making things better for MPS students. In fact, she thought the case may have slowed down MPS's own efforts to improve. ▶▶



The changes have not yet borne notable fruit in terms of improved student achievement, including for special education students, but there are signs of progress.

But others differ. Yahle, MPS's special education chief throughout almost all of the period, said, "The lawsuit gave us an enormous opportunity" to do more for kids both with and without IEPs. The lawsuit emphasized that everybody was responsible for every kid, she said, and it led to the first time she felt all systems in MPS were aligning to help all kids.

Yahle listed three aspects of the *Jamie S.* legacy: "the spit shine that we put on the compliance process"; the positive impact of cooperation between MPS and DPI in improving special education work, which offered DPI lessons it applied statewide; and what she called the biggest impact, improving the overall education picture through more-effective attention to the needs of all students.

Yahle said of the fight's unfolding, "You never want to say to the other side, 'Thanks for the lawsuit because we've grown.'" But she believes that to be the case. "It definitely made us look at early intervention in a different way, in a practical way."

Coulter agreed that the impact of *Jamie S.* on education in Milwaukee was positive. He said that when he first got involved, it was "somewhat disappointing" to see that Wisconsin, especially Milwaukee, was behind other places in implementing ideas such as early screening and intervention. "*Jamie S.* became an opportunity to introduce a number of the reforms that had been happening in other places for a much longer time," he said. At least when his Milwaukee duties ended in 2012, he said two things required by the IDEA were clearly being achieved: Kids were being evaluated in a timely manner, and parents were being invited to participate in those evaluations and the planning for those children.

Nothing suggests that there has been backsliding since then. DPI data for the 2011–2012 school year show that Milwaukee completed 99.93 percent of special education evaluations in a timely manner, compared to 98.91 percent for the state. Jennifer Mims Howell, director of specialized services for MPS, said, "*Jamie S.* has made us hyper-vigilant on timelines and

compliance." Troy Couillard, a DPI official who worked with MPS officials, said, "There are a lot of systems in place now that Milwaukee is using more effectively."

Sue Endress, an advocacy specialist for Disability Rights, agrees that the overall special education picture is better now than a decade ago. "Are there still struggles? Yes," she said. "It takes a lot of years to turn a train around." There are, for example, too many inexperienced teachers, she said. But the trends have been toward the better.

Jeff Spitzer-Resnick was a staff attorney for Disability Rights throughout the course of the case; he is now in private practice. Asked whether things have gotten better, he said, "I would say that both the nature and the number of violations of the law—there's no scientific way to count that—but I think they're reduced."

Monica Murphy, managing attorney of the Milwaukee office of Disability Rights, said, "I don't think *Jamie S.* did anything for the plaintiffs." Their lives "continued down the dismal paths" they were on. But the case made some difference to kids who came after them, she said.

Lessons from the legal proceedings

From the standpoint of the legal process, the legacy of *Jamie S.* reflects some significant truths:

- **The judge matters.** One can never know to which of six active or senior district judges the case would have been assigned if the parties had not consented to Goodstein's presiding over the case as a magistrate judge. But there can be no doubt that, rightly or wrongly, at least some of them would have been less receptive to a class action of this sort even before *Wal-Mart v. Dukes*. It is also likely that the case would come before the Seventh Circuit much more quickly now, as federal law [Rule 23(f) of the Federal Rules of Civil Procedure] changed only a month after Goodstein's 2003 decision, making it considerably easier to appeal class certifications from the outset. And Rovner's partial dissent—she was open to the possibility that a more narrowly defined class could be appropriate in the case—suggests that a different panel of the Seventh Circuit

might have gone in that direction. It takes only one vote for a 2–1 decision to come out the other way.

- **Court rulings are implemented in the context of broader realities.** To turn from the courts to the larger world, *Jamie S.* played a part in improving MPS’s work with special education students. But that came in the context of a machine with a lot of moving parts. In the real life of a system as big and complex as MPS, change is not simple, a court order doesn’t necessarily work out the way it was intended (consider the impact of desegregation of Milwaukee schools in the late 1970s and the accelerated white flight in that period), and identifying winners and losers requires more than reading or knowing direct decisions. Anyone considering undertaking a major legal challenge needs to consider context that goes well beyond the courtroom and is likely to be unpredictable in its development.

- **Cooperation is a lot better than confrontation (at least sometimes)—and it’s often all about people.** The changes that seem to be working out well were propelled in large part by two events: First, the DPI, which was a defendant in the lawsuit, settled with the plaintiffs, and, in effect, joined forces with them against MPS. Second, the change in MPS superintendents from Andrekopoulos to Thornton in 2010 improved the way key players interacted, in a way that bore fruit. The most positive results have arisen from positive environments.

- **The forecast for class actions of this kind is not rosy.** The Supreme Court’s *Wal-Mart* decision, and its application to special education class actions by the Seventh Circuit, have slowed, if not halted, such cases nationwide, according to several people who follow the national scene. Coulter said, “*Jamie S.* has had a national chilling effect on litigation as it relates to kids with disabilities in public schools because of the circuit’s decision around definition of a class.” The case is often mentioned, he said, in discussions of the advisability of litigation concerning special education.

Class actions were a major strategy of special education advocates in the last 15 to 20 years. Searl describes the mixed success of several of those large cases in her dissertation. But, overall, school systems that were defendants improved their records on the ground, even if, in some cases, they won in court. With the class action route stymied and with few people having the resources to go to court over individual situations, the likelihood that courts will influence special education policy is diminished.

Spitzer-Resnick said he is troubled by the poor forecast for class action suits after they had been used well to deal with systemic problems. “You can’t do it one at a time,” he said. “You need at least the threat of a class action to get action.”

Looking forward in Milwaukee

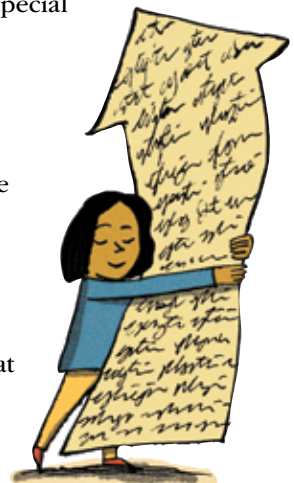
The difference between winning some gains in the schools and losing in court is not a small one for Disability Rights Wisconsin itself. As part of the 2008 settlement between the organization and DPI, DPI agreed to pay \$475,000 for the organization’s attorneys’ fees and costs. As part of his remedies order, Goodstein required MPS to pay the organization \$459,123.96. But when the appeals court’s decision came, Disability Rights was no longer the “prevailing party.” In August 2012, Judge Rudolph Randa of the Eastern District of Wisconsin ordered the organization to repay MPS. He ruled that the DPI payment was a matter for state courts. DPI filed suit in Dane County in March 2013, seeking repayment. Disability Rights has appealed Randa’s order to repay MPS to the Seventh Circuit. The organization has reduced its staff and spending.

But what about the special education students? In Milwaukee and beyond, *Jamie S.* was part of a period in which compliance with the Individuals with Disabilities Education Act was the priority. There seems to be general agreement that compliance has improved, and no one is in favor of going backward on that.

Even so, overall achievement for special education children has not improved and remains generally poor. MPS special education leaders say now that the emphasis needs to be put on improving actual achievement for students. They believe all the changes that have been made in recent years will pay off on that front.

Stephanie Petska, director of the special education team at the state DPI, said federal education officials also have acknowledged that emphasis solely on compliance has not produced adequate academic gains and that the focus needs to be put on success in learning. She said she is excited for the potential for steps that are being taken now to bring benefits.

But she added a crucial thought that goes beyond court orders or formal policies. “There has to be sustained will,” she said. ■



Changing Things



Phoebe Williams remembers her father coming home from his job as a schoolteacher in an unusually happy mood on May 17, 1954, the day the U.S. Supreme Court issued the historic *Brown v. Board of Education* decision on school segregation. Williams was eight years old and living in thoroughly segregated Memphis, Tennessee.

for the Better, Step by Step

“When Dad announced the Supreme Court stated that segregated schools were unlawful, I expected immediate improvements,” she wrote in an essay published 55 years later. She was firmly aware, even at that age, that white people were getting privileges and opportunities that black people weren’t getting. She asked her father if she now would be able to go to the white kids’ school or if white kids would come to her school.

“I wanted and expected change immediately,” she recalled.

She didn’t get it, of course, and neither did Memphis or the rest of America. But ultimately, change, at once sweeping yet incomplete, occurred across the United States. The *Brown* decision became a landmark for helping identify all that changed and all that didn’t in the following decades.

And change became a pivotal element in the life of Phoebe Williams, a woman who to this day wants and expects change for the better—and immediately would be nice. Williams, a Marquette lawyer herself and a member of the Marquette Law School faculty since 1985, has been an initiator of change, a participant in change, a witness to change—and a witness to the frustration of hopes for change.

If you want to understand this gentle yet demanding agent of change, a woman who has become a key figure in the life and character of Marquette Law School, you need to look at a few pages from the chapters of her life story.

Chapter 1: Memphis, then and now

In *Law Touched Our Hearts: A Generation Remembers Brown v. Board of Education* (2009), a collection of essays by law professors born between 1936 and 1954, Williams’s contribution described the realities of the segregated city of her childhood. Not only schools and public buses, but also restaurants, parks, the zoo, public bathrooms, and so on—all treated black people as inferior, often in the most demeaning ways.

But if the schools Williams attended didn’t have a lot of the things that the white kids’ schools had, the emphasis of her parents and grandparents made education a dominant factor in Williams’s life. She says she knew that she would graduate from college “because I didn’t think my parents were going to give me any other choice.”

Her hopes for change in Memphis while she was a child were dashed. The white power structure was entrenched, powerful, and strongly opposed to change. By the time Williams graduated from high school in the 1960s, the change she expected to result from the *Brown* decision had barely happened.

But change did come to Memphis, where Williams’s mother and other family members still live. Now, she says, “it’s a very, very different place.” African Americans hold a range of powerful positions in the city, and integration of public places and services has long been the norm. But there is still much more change needed. “Some of the same issues of poverty, crime, and lack still occur in areas ▶▶

Realities for African Americans in Milwaukee have changed greatly in the nearly half century since Williams followed family members to Milwaukee.

of the city,” she says. “It’s evident that social problems still fall along racial lines.”

Chapter 2: From Memphis to Milwaukee

As part of an historic tide of African Americans, an uncle of Williams moved from Memphis to Chicago and then to Milwaukee in the 1950s. He got a job at A. O. Smith, the then-giant manufacturing complex on the city’s north side. Other family members joined him, several of them also taking positions at the factory.

In that era, Milwaukee’s black community was small and confined to a specific area just north of downtown. But it was growing quickly.

Realities for African Americans in Milwaukee have changed greatly in the nearly half century since Williams followed family members to the city. “Those types of jobs are gone,” she says of the factory work her relatives did. “Milwaukee now has people who want to be middle class but don’t have jobs or education for it. . . . It creates a lot of frustration and despair.”

Williams has been part of efforts to change things for the better, including past service on the city’s Fire and Police Commission and involvement in community groups and causes.

Chapter 3: Marquette University

Williams’s destination in Milwaukee was not a factory. It was Marquette University. She became one of the few African Americans on the campus at that time, and it was a big adjustment. A decade ago, a U.S. Supreme Court decision on affirmative action referred to the value of having a “critical mass” of students of different racial and ethnic groups at a university. “I can appreciate what the Supreme Court meant about the value of critical mass,” Williams says.

With strong support from family members, she succeeded in adjusting to the academic demands of Marquette and in getting to know people from much different backgrounds. “I got to Marquette and found that there were ethnicities among white people,” she says with

a laugh. Beyond racial issues, she also had to adjust to winter (“a major challenge”) and the firm rules Marquette had at that time for female students (for example, slacks were allowed only in extreme weather). But she appreciates not only the quality of the education she received but also the exposure she got to new experiences and people.

The realities of being an African-American student at Marquette have improved substantially since that era, Williams says, although there is “absolutely still room for improvement.” She has been an advocate for that, serving on various university task forces and committees over the years.

Chapter 4: Marquette Law School

In the 1970s, Williams read the best-selling personal-development book *Passages* by Gail Sheehy. At the time, Williams was managing a Social Security branch office in Milwaukee. The book helped catalyze her desire for something more, for a major change.

“I decided that law school would be that major change,” she says. She was accepted at Marquette Law School. As in her undergraduate days, she was one of the few black students: there were three in her class. And there were no minority faculty members. But Williams’s determination to overcome challenges carried her through. “Mentally, I could not embrace the thought of failing,” she says. Williams graduated in 1981.

She practiced at a Milwaukee firm, representing management in labor and employment matters for four years, before making another change—she joined the Law School faculty in 1985.

Both the Law School itself and the situation of minority students in the school have changed for the better over the years, Williams says. The school has more diversity both among the students and in the faculty and staff, although, she says, plenty of room for improvement remains.

As for the Law School more broadly, Williams says that teaching techniques have changed substantially, with less emphasis now on putting students on the spot in a class to

present material and more emphasis on legal theory and the application of legal concepts to practical situations.

The Law School has, of course, moved into Eckstein Hall and taken on a much-expanded role in the life of Milwaukee and Wisconsin with its public policy efforts. Williams has been a strong supporter of those efforts. She says that Eckstein Hall has become a place where civil discourse addressing major issues is promoted and practiced. The public comes to the Law School in a way that never happened before.

“There’s an energy here that to me is exciting and inspiring,” Williams says, adding that Marquette Law School “has evolved into the place I hoped it would become.”

Chapter 5: Change and the law

Williams has an unusual legal distinction: Her maternal grandfather was a named party in a Supreme Court case, *Brotherhood of Railroad Trainmen v. Howard*, a 1952 decision that barred an all-white union from taking action under its contract to keep African Americans from doing the same work.

“As a young child, I was always fascinated by the law and what the law could do,” Williams says. “I was also made to appreciate the role law could play in the operation of racial discrimination.”

The segregation that shaped Williams’s life as a child was sanctioned by the law at the time. Yet much of the change for the better that has occurred in her lifetime was propelled by the law. And at the root of some of the biggest factors behind America’s racial problems lie things that the law cannot control.

Put those three facts together, and you can see how Williams has come to have a deep involvement with the law as a career and passion, even as she has a strong sense of its limits.

She recalls a white doctor in Memphis during her childhood years who went against social convention and started serving black people on the same basis as white people. Within a short time, his patients were all black—white people fled his practice. That was something the law could not stop. Similar forces today, on a larger scale, shape realities in places such as Milwaukee, where discrimination in housing is illegal, of course, but housing patterns remain largely segregated. “No law can stop certain social processes from occurring,” she says. “The inequality continues.”

That’s why, beyond her role as a lawyer, Williams is an advocate for efforts that build relationships across racial, ethnic, and class lines and efforts to expose people to other cultures. “There’s a role for religion,” she adds—and that is an area where change has also been a part of Williams’s life. Her childhood included Lutheran schools, she has been a practicing Catholic and Methodist, and she currently is a member of a Baptist church. She says that faith has been a source of strength when she has needed to meet challenges and obstacles.

Chapter 6: Change accomplished by great humanitarians

Williams was the Law School’s representative in planning Marquette’s Mission Week in February 2013. “It was an awesome experience,” she says. Marquette brought to the campus most of the winners of the Opus Prize, a \$1 million annual award launched in 2004 and presented for faith-based humanitarian work around the world.

Mission Week brought Williams into contact with people of extraordinary accomplishment, people whose work is benefiting tens of thousands of other people in some of the world’s most impoverished places. Williams’s work included arranging “On the Issues with Mike Gousha” sessions in Eckstein Hall with Father Rick Frechette, C.P., who leads efforts to help large numbers of children in Haiti, and Marguerite “Maggy” Barankitse, whose Maison Shalom in Burundi (Africa) assists families; both are previous winners of the Opus Prize.

“Just to have that type of courage—you don’t see that type of courage very often,” Williams said. “They were inspiring beyond measure.” Her involvement with the Opus Prize winners led Williams to consider what more she can do. She doesn’t know yet where that will lead her, but she says she knows she needs to do more.

Williams wanted change immediately as a child. She has learned how to be part of pushing productively to make things better but not to expect problems to be solved so fast. “When I reflect on how long I waited for the 1954 *Brown* decision to make a difference in my life, I can appreciate the frustration of those who still wait and hope,” Williams says.

She still waits and hopes. She still has frustrations. But as a professor, as a lawyer, as an advocate, and as an African-American woman, she also still pushes for change for the better. ■

Nies Lecture | Arti K. Rai

Diagnostic Patents at the Supreme Court

Arti K. Rai is the Elvin R. Latty Professor of Law at Duke Law School and a faculty affiliate of the Duke Institute for Genome Sciences & Policy. On April 10, 2013, Professor Rai delivered “Patents, Markets, and Medicine in a Just Society” as Marquette Law School’s annual Helen Wilson Nies Lecture in Intellectual Property. Her lecture anticipated the arguments the next week before the U.S. Supreme Court in *Association for Molecular Pathology v. Myriad Genetics, Inc.* This essay looks forward now that *Myriad* has been decided. A version of this essay with footnotes will appear in the forthcoming issue of the *Marquette Intellectual Property Law Review*.

This past June, the United States Supreme Court handed down a highly anticipated decision on DNA patenting, *Association for Molecular Pathology v. Myriad Genetics, Inc.* Overturning the determination reached by the U.S. Court of Appeals for the Federal Circuit, but in line with the position of the U.S. solicitor general, the Court distinguished between DNA that has merely been isolated (genomic DNA, or “gDNA”) and DNA that has non-protein-coding regions excised (complementary DNA, or “cDNA”). The Court held that, while gDNA is a patent-ineligible “product of nature,” cDNA is patent eligible. The upshot of the Court’s decision is that certain patents (gDNA) generally associated with diagnostic medicine are invalid, but patents typically associated with therapeutics (cDNA) are valid.

The Court’s decision in *Myriad* came on the heels of its unanimous decision a year earlier in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.* In *Mayo*, the Court similarly overturned the Federal Circuit’s approach to deciding whether subject matter associated with diagnostic medical practice should be eligible for patenting. There the Court struck down method claims on measuring a thiopurine drug metabolite to adjust doses of a thiopurine drug, stating that the claims in question merely added routine

activity to the law of nature that individuals metabolize thiopurine drugs differently.

The Court’s recent interest in diagnostic patents comes after years of heated public controversy over whether such patents pose an impediment to patient access and control of medical decision making. This controversy encompasses, but is also broader than, the controversy over DNA patenting.

Some critics of the *Myriad* and *Mayo* decisions fear that the Court was improperly swayed by concerns over access and patient control. In this view, conventional among patent lawyers, validity doctrine exists to promote innovation—and only innovation. The *Myriad* case, involving patents on BRCA1 and BRCA2 genes associated with breast cancer, is particularly troubling, as the momentum behind the case was clearly driven in part by concerns unrelated to innovation.

At least some critics of the decisions might concede that patents were not essential for innovation in the specific factual scenarios raised by those cases. Even so, they would argue that the Court’s decisions are likely to have unintended consequences in areas where patents are more necessary. These include not only therapeutics but also diagnostic research that is more complex, or less enmeshed in federal funding, than the research in *Myriad* and *Mayo*.

“As a functional matter, patent validity is a blunt and over-inclusive mechanism for policing concerns about access. In many cases where access concerns are raised, problems could be alleviated by the patent owner’s being forced to adopt a different enforcement strategy.”



Arti K. Rai

In line with the conventional frame, this essay agrees that interpretation of patentable subject matter and other validity doctrines should be guided by innovation goals. Although innovation and access cannot be entirely separated in the case of physician-researchers who also provide clinical care, the conceptual emphasis should be on innovation. Promoting access should rely not on validity doctrine but rather on the carefully calibrated tools of infringement exemptions that borrow from antitrust principles, from agency use of background government rights to persuade those who receive federal funding to engage in appropriate licensing practices, and from insurer bargaining over price.

Myriad and *Mayo* need not, however, be interpreted in a manner that is antithetical to innovation. This essay lays out a path forward from these cases that is compatible with innovation goals.

Innovation, Access, and Validity

As an historical matter, U.S. patent validity doctrine has focused on innovation. The Constitution's intellectual property provision, which discusses patents as promoting the "Progress of the . . . Useful Arts," puts the spotlight squarely on innovation. Moreover, although the Supreme Court has given Congress broad leeway to interpret this constitutional provision, U.S. patent legislation, unlike legislation in other jurisdictions (e.g., Europe), rarely imposes nonutilitarian limits on patent eligibility.

This historical focus is reinforced by functional considerations. As a functional matter, patent validity is a blunt and over-inclusive mechanism for policing concerns about access. In many cases where access concerns are raised, problems could be alleviated by the patent owner's being forced to adopt a different

enforcement strategy. In the *Myriad* case, for example, one very significant complaint was Myriad's alleged use of its patent to deny women the option of a second opinion after having received Myriad's test. In that situation, principles of patent exhaustion drawing upon antitrust law suggest that patients who have already given Myriad a monopoly profit by using its services should have the option of using another provider to get a second opinion. Conversely, providers who offer those second opinions shouldn't be liable for patent infringement. Efforts to create a safe harbor from infringement liability for second-opinion testing reflect these exhaustion principles.

Additionally, in many diagnostic-testing cases, including *Myriad*, flows of public funding from the National Institutes of Health ("NIH") to universities were heavily involved in the research that led to patenting. In *Myriad* itself, the relevant university was the University of Utah. Unlike the University of Utah, most universities have endorsed, and tend to follow, norms for licensing diagnostic patents similar to those suggested by NIH. These norms include using exclusive licensing of diagnostic patents only in the subset of cases where substantial additional development is needed and exclusivity will provide the economic motivation for such development.

In cases like *Myriad*, where testing is relatively straightforward and does not need to be approved by the Food and Drug Administration (FDA), the rationale for exclusive licensing is much less clear. Moreover, even in cases of exclusive licensing, university norms endorse preserving the option of second-opinion testing and shielding physician-researchers from the threat of infringement liability. In this regard, the University of Utah and its exclusive licensee Myriad have been outliers. Outlier cases are not a reason to revise validity doctrine.

In addition, insurance carriers, private and public, can and should bargain with patent owners over conditions of access. The current reimbursement regime for diagnostics, in which insurers require proof of clinical efficacy before they provide coverage, may have limitations, but it gives insurers bargaining leverage. Notably, in other countries, purchasers have exercised bargaining power to promote access to diagnostic testing.

After the Supreme Court's decision, Myriad pledged formally for the first time that it would not assert its patents against noncommercial academic research. It



also pledged that it would not interfere with the ability of patients to secure a second opinion. Had institutions such as NIH, other universities, and insurers applied pressure earlier, Myriad might have been forced to make this pledge earlier.

Innovation and the Court's Recent Subject Matter Decisions

Let us consider next the issue of innovation. Although critics are right to argue that the Court's decisions on patentable subject matter should focus on innovation, they mistakenly suggest that the recent decisions must be read in a manner that hampers innovation substantially. The following discussion of *Mayo* and *Myriad* suggests how the decisions can be interpreted through an innovation-focused lens.

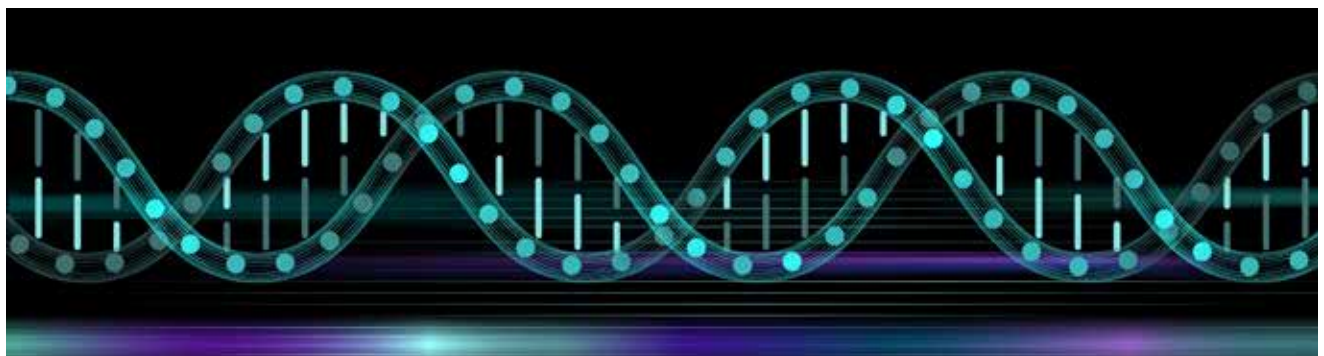
For many decades, the Court has repeatedly stated that “abstract ideas,” “laws of nature,” and “products of nature” categorically fall outside the realm of patentability. However, since many inventions could be seen as obvious applications of laws or products of nature, the Court has the responsibility to articulate what the categories mean and why they are off limits. Unfortunately, the Court's decisions have often been quite unhelpful in this regard. Indeed, decisions such as *Funk Brothers Seed Co. v. Kalo Inoculant Co.* (1948) fail to clarify whether the Court is actually addressing eligible subject matter or is instead referring to some other validity requirement. The problem of precisely parsing the Court's discussions is particularly acute for cases decided before the 1952 Patent Act, which first codified the obviousness requirement. Unfortunately for the current Court, it must contend with this old precedent as it goes forward.

One obvious option would be to overrule or narrowly limit past precedent. Instead, in keeping with the Court's general reluctance to declare prior decisions wrong, the Court's recent decisions have, at least to some extent, tried to shape this past precedent into an economic, innovation-oriented framework.

The 2012 *Mayo* case shows both the promise and limitations of the Court's efforts. In the opinion, the Court repeatedly focused on pragmatic consequences, most notably the possibility that claims on laws of nature—even claims that satisfied all requirements of patentability *other* than subject matter—could “preempt” future research. It also recognized arguments made by the patentee and by various academics that a pragmatic approach should distinguish broad laws of nature that interfere with large areas of future innovation from narrower laws. After recognizing these arguments, the Court further acknowledged that the law of nature it was addressing—that individuals metabolize thiopurine-containing drugs differently—was in fact quite narrow.

Unfortunately, the Court did not follow through on the promise of its reasoning. Instead, it insisted that it needed to enunciate a “bright-line prohibition” striking down all patents covering laws of nature, no matter how narrow. Although the Court invoked institutional-competence considerations, specifically the inability of the judiciary to distinguish between broad and narrow laws of nature, it was likely mindful of the reality that prior case law had failed to draw such policy-laden distinctions.

The patents affected by *Mayo* could include many that relate to the burgeoning field of personalized medicine. Personalized medicine revolves around “natural” associations between biomarkers such as DNA variations and patient prognosis or drug response. Like the association at issue in *Mayo*, personalized medicine associations typically cover narrow laws of nature. Unlike the association in *Mayo*, however, some of these associations may be quite difficult to find and validate clinically. In those cases, patents may be necessary to induce development of relevant evidence. On its face, then, *Mayo*'s reasoning is in tension with an economically oriented approach.



“ In addition, insurance carriers, private and public, can and should bargain with patent owners over conditions of access. The current reimbursement regime for diagnostics, in which insurers require proof of clinical efficacy before they provide coverage, may have limitations, but it gives insurers bargaining leverage.”

From the standpoint of those who care about innovation policy, all is not lost, however. In the context of conceding that the law of nature in question was narrow, the *Mayo* Court did emphasize the relatively trivial contribution made by the patentee. Studies had already indicated that measurement of thiopurine metabolite level was important for predictions of efficacy. The patentee had simply quantified the precise correlation between metabolite levels and effectiveness. In contrast, certain advances in personalized medicine—for example, the development of tests that analyze the expression of multiple genes in a tumor sample as a guide to prognosis and future treatment—could be distinguished as much more complex than the simple test in *Mayo*. In other words, all diagnostic associations are not alike, and perhaps the reasoning in *Mayo* can be restricted to the simple category.

The Court’s reasoning and ultimate result in *Myriad* in 2013 can also be interpreted as tracking relevant economic considerations. Yet, as with *Mayo*, one’s reading of the case has to be oriented in that direction.

In *Myriad*, the Court began by observing that under the “well-established” balance that patent law tries to strike between creating incentives for innovation and blocking future innovation, gDNA claims covering broad categories of information, rather than “the specific chemical composition of a particular molecule,” are suspect. Informational content is, however, only one factor in the calculus. Although the Court indicated that cDNA claims also cover information, it ultimately held that the removal of noncoding DNA makes cDNA molecules patent eligible.

The Court’s analysis failed to enunciate *why* claims to information in the form of cDNA are less problematic than claims to information in the form of gDNA. This failure is significant and renders the opinion less useful as a stand-alone document. Nonetheless, lower courts could certainly read the Court’s distinction through the economic lens invoked by the two amicus briefs that called the distinction to the Court’s attention—those of the solicitor general and of the prominent geneticist Eric Lander. Both of these briefs emphasized that while

gDNA claims could interfere with a broad range of downstream uses, cDNA claims had narrower application specific to therapeutic development and could be worked around for other purposes.

With gDNA patents now out of the picture, concerns that the platform technology of whole genome sequencing could be impeded by such patents are now gone. Some have argued that these patents would not have posed a major obstacle. But dissipating the shadow of infringement liability to the greatest extent possible was important for officials at NIH and the U.S. Office of Science and Technology Policy. They successfully convinced the solicitor general to reject the U.S. Patent and Trademark Office’s position, which allowed claims on “isolated” DNA molecules.

As it happens, NIH has a long history of helping to shape validity requirements in the context of DNA patents. Befitting its role as a research funder, its concerns have been innovation, not access. NIH played that role again in the *Myriad* case.

To be sure, the Court’s decision may also weaken the diagnostic service monopoly model of firms such as Myriad, at least to the degree that this model relies on patents. The day the opinion was announced, Ambry Genetics, GeneDx, DNA Traits, Quest Diagnostics, and Pathway Genomics, as well as a number of academic institutions, stated that they would begin testing for BRCA1 and BRCA2 mutations. That said, the opinion leaves Myriad room to sue on a variety of claims, particularly method claims, not at issue in the Supreme Court case. And Myriad has in fact sued several firms, including Ambry Genetics and Gene by Gene.

NIH, which appears to have funded research that led to at least some of the patents in the suits against Ambry and Gene by Gene, would be well-advised to track these lawsuits closely. Under the Bayh-Dole Act of 1980, agencies can force additional licensing of federally funded patents where such “action is necessary to alleviate health or safety needs which are not reasonably satisfied” by the federal grantee or its licensee. In its briefing seeking a preliminary injunction, Myriad is making the perhaps counterintuitive argument that



such relief would *promote* public health by prohibiting patients from using diagnostic laboratories that don't have its track record in interpreting mutations. If a court were to agree with these arguments (and of course agree with Myriad's argument that its claims are likely to be valid, also a contested proposition), NIH should consider counterarguments that the Myriad track record is not as unequivocally superior as the firm claims. If these arguments appear meritorious, NIH might evaluate whether licensing to other firms would promote Bayh-Dole's objectives with respect to health and safety. Even though NIH appears to have background rights in only some of the patents that are being asserted, even an incomplete stake might provide some leverage.

Beyond Diagnostics

For many in the biopharmaceutical industry, the concern raised by *Myriad* is not invalidation of gDNA patents but instead unintended consequences for patents associated with therapeutic molecules. All therapeutic molecules require approval by the FDA, and most analysts agree that patents provide important incentives for expending the resources necessary to secure such approval. The amicus briefs filed by the solicitor general and Eric Lander called specifically for upholding cDNA claims typically associated with therapeutics.

Therapeutic products that could be affected include proteins and antibodies. Although many protein and antibody patents now claim molecules that are

clearly synthetic, certain claims could be seen as encompassing naturally occurring molecules. Even in these cases, however, the claims wouldn't necessarily be invalid. Presumably the antibodies and proteins would, in the words of the *Myriad* Court, be claimed as something closer to "specific chemical compositions" than to information. Lower courts could focus on this aspect of the *Myriad* opinion in upholding such claims. Similarly, in addressing patents covering small molecule chemicals with important therapeutic uses that have been isolated from nature, courts could focus on the fact that these patents typically claim "specific chemical compositions."

In the wake of *Myriad*, some analysts have also expressed concern about an inability to patent prokaryotic DNA, which lacks noncoding regions, or DNA products based on sequences found in nature. However, if DNA molecules do prove directly useful as therapeutic products, they will likely not be claimed as "merely isolated." Rather they will have been combined with some other material, such as a vector.

Conclusion

Without a doubt, the Court's recent spate of activity in the area of diagnostic patenting has caused considerable anxiety for those concerned about innovation. To some extent, the anxiety is justified. But lower courts could choose to read the Court's opinions in a manner that is friendly to innovation. This essay has attempted to provide a path forward for lower courts. ■

Joseph D. Kearney

Remarks at the Investiture of Judge G. Michael Halfenger

On April 12, 2013, in the federal courthouse in Milwaukee, G. Michael Halfenger took the oath of office as a U.S. bankruptcy judge, with various federal judges on the bench, including Seventh Circuit Chief Judge Frank H. Easterbrook. Eastern District of Wisconsin Chief Judge William C. Griesbach, L'79, presided. Judge Halfenger's former law partner, Thomas L. Shriner, Jr., of Foley & Lardner, made the motion to administer the oath of office, which Dean Joseph D. Kearney seconded. Here are Dean Kearney's remarks.

Thank you, Chief Judge Griesbach, and May It Please the Court. Mr. Shriner and I are accustomed to sharing a podium: we do so a couple of times a week in the various courses that we teach together each semester at Marquette Law School. So if, at any moment, I pause or flinch, it is because I expect Mr. Shriner, in our usual classroom

style, simply to interject whenever it pleases him to do so—and I will hope, as always, that his purpose will be to elaborate rather than to correct.

I am glad for my specific role here: left to my own discretion, I might wander too far afield. Indeed, when I asked Mr. Halfenger whether two speakers were too few, he related that he thought that Chief

“When Mr. Halfenger is with you, he is with you: you have his attention, his engagement, his patience. He is not hurried, and you know that his purpose is to work through an issue with you—not to comply with your request in some formal but not especially helpful way, so that he may return to ‘his’ case. What a great thing this is in a judge: the capacity and the affinity to listen, to converse, to attend.”



Photo by Ellen Cook

Joan Halfenger and Melissa Halfenger look on as Mike Halfenger, respectively their son and husband, takes the oath of office as a U.S. bankruptcy judge.

Judge Easterbrook had limited the speakers at his own investiture to one, asking Dean Gerhard Casper of the University of Chicago Law School to say a few words, perhaps about a law review article.

I liked it. This suggested that today might be an opportunity to talk about an essay that I wrote last year marking the 125th anniversary of the Interstate Commerce Act. That was an historical occasion that it seemed (to me and to a few others) noteworthy.

After all, to talk about the Interstate Commerce Act would have enabled me to talk about the filed rate doctrine—the precept that a railway, telephone, or trucking company had to embody its rates in tariffs filed with the federal government and could not depart from the filed rates under any circumstance, lest there be discrimination or favoritism. It would not even have been hard for me to tie this into bankruptcy, as the Supreme Court’s great modern filed rate doctrine case of 1990, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, arose from a bankruptcy case. There, trustees in bankruptcy of failed trucking companies went after shippers that had made the mistake of thinking

themselves to be in an ordinary marketplace and had paid only the rates that they had negotiated with the carriers, not the filed rates. Such a discussion was all in front of me.

Imagine my disappointment, then, to learn later in my conversation with Mr. Halfenger that the law review article discussed back in 1985 had not been Dean Casper’s own but rather one by the subject of the motion, Judge Easterbrook. This was a problem beyond depriving me of the Interstate Commerce Act: Mr. Halfenger has not been about writing law review articles during the more than 20 years that I have known him. Rather, he has been hard at the practice of law.

And this he has done most impressively and well. I know this from having worked with Mr. Halfenger starting in 1992: after clerking for Judge Easterbrook, he arrived to Chicago’s Sidley & Austin (before the firm lost the ampersand). Mr. Halfenger made his mark quickly: I can demonstrate this by a reference to now-Professor Jim Speta of Northwestern University. The latter graduated from law school the same year as Mr. Halfenger but joined the firm a year later. Mr. Speta was dispatched for his first assignment to help out in a pending case. He looked forward to meeting the important partner for whom he no doubt would be working—only to discover that his task was to review several boxes of documents that the not-much-earlier-arrived Mike Halfenger had in his office. So Mr. Halfenger was on his way to success at the firm: passing off discovery to anyone, let alone after only a year and to someone not junior to you, hints at *greatness*.

Imagine, then, our surprise at Sidley in 1994, when Mr. Halfenger moved to Wisconsin, which was where he and his wife, Melissa, had first met



“When a panel of a federal court of appeals a few years ago began, rather strangely, to question whether the law schools at Marquette and Madison especially taught Wisconsin law (a matter of some relevance to the diploma privilege then under attack), we at Marquette retained Mr. Shriner and Mr. Halfenger. That few other lawyers in town might have wished to deal with me as a client—and that no others would have permitted me to sit at their kitchen table, until three in the morning, finishing a brief with them—may have had something to do with the selection.”

(as undergraduates at Lawrence University), and was the home of Melissa’s parents. Mr. Halfenger then joined Foley & Lardner, as Mr. Shriner has described. I myself already knew Mr. Halfenger to be an excellent lawyer—something that I would like to think is correlated with success as a judge. And the testimony in this regard by his longtime law partner, Mr. Shriner, is sufficiently powerful that I do not feel the need to elaborate. Yet I do wish to relate that this esteem for Mr. Halfenger soon became the judgment also of my wife, Anne Berleman Kearney, when we followed Mike and Melissa to Milwaukee some three years after them, and Anne, having left the Corporation Counsel’s Office of the City of Chicago, joined him as a lawyer at Foley.

Anne, who worked with Mr. Halfenger closely, has noted to me that it is not just native intelligence that drove his success as a lawyer. In addition to this, Mr. Halfenger has always been willing to help his colleagues wrestle with difficult issues in cases that they were handling—and not merely in some offhand sort of way. When Mr. Halfenger is with you, he is with you: you have his attention, his engagement, his patience. He is not hurried, and you know that his purpose is to work through an issue with you—not to comply with your request in some formal but not especially helpful way, so that he may return to “his” case. What a great thing this is in a judge: the capacity and the affinity to listen, to converse, to attend. Anne, who still practices at a high level even though she now has only me (of counsel) as a professional colleague in her otherwise solo practice, suggested that she and other women lawyers at the firm especially valued Mr. Halfenger’s approach.

So the Kearney family knows Mike Halfenger. Indeed, as Your Honor has suggested, we are practically neighbors—separated by some six or eight houses. This is because Melissa Halfenger found us our house when we had unusual criteria, and it has been to the advantage of Michael, Stephen, and Thomas Kearney to have such ready access to Matt and Kyleigh Halfenger, and to all of us to get to know the larger Halfenger and Wagner families. And more than once the Kearney family has called on Mike for help, from routine matters to rather more unusual ones. I will not embarrass Mike, for example, or more likely myself by recounting how I have not hesitated to ask him to go to the store to get me some Gatorade when I was sick in bed. But we can agree, I should hope, that some kindness can be appropriate in a judge—whether in a bankruptcy judge especially, I will leave to others.

The relationship is not all personal. Marquette University Law School has relied on Mr. Halfenger for both legal representation and other support. When a panel of a federal court of appeals a few years ago began, rather strangely, to question whether the law schools at Marquette and Madison especially taught Wisconsin law (a matter of some relevance to the diploma privilege then under attack), we at Marquette retained Mr. Shriner and Mr. Halfenger. That few other lawyers in town might have wished to deal with me as a client—and that no others would have permitted me to sit at their kitchen table, until three in the morning, finishing a brief with them—may have had something to do with the selection. All ended well—and a good thing, too, for otherwise someone else might be here as dean (I mean,

Eckstein Hall is nice and all, but it's not the diploma privilege).

Mr. Halfenger had long before invested in Marquette Law School. The job of reading the draft case problem in our Jenkins Honors Moot Court Competition became his permanently almost a decade ago, when in this courtroom Judge Easterbrook inquired, from the bench, of the hapless student advocate why the defendant named in the moot court problem was a public school and not a school district (as would have been the case in the real world and as would have avoided the mootness issue in the case). Mr. Halfenger, who was in the courtroom that evening, allowed to me afterward that that had occurred to him as well. I would ask Your Honor, as an alum of Marquette Law School, to consider whether to clarify in ruling on the motion that, unlike a defense of the diploma privilege, this sort of work remains available to Mr. Halfenger to do.

Certainly, the evidence that a non-alum in Mr. Halfenger's position should be interested in Marquette Law School is ample. Judge Shapiro was a friend of the Law School even before I became dean. This is a large robe to fill in many ways, as both Your Honor and the bar of this Court well know.

My confidence in Mr. Halfenger is without limit. Some years back I delegated to him my position on the Wisconsin Supreme Court's Appointment Selection Committee, which Mr. Halfenger went on to chair. And when the Court told me that his term was up and that under the rules I needed to appoint someone else, I instead suggested to the chief justice that such a small matter as the end of a term or even a term limit should not get in the way of a good idea. Mr. Halfenger was reappointed.

Let me not continue. I respectfully submit that the Court should consider itself adequately informed in the premises of the motion. The Court has heard representations by members of its bar concerning Mr. Halfenger's intelligence, his outstanding work habits, his great knowledge of the law, his interest in people, his appreciation of public service, and many other qualities and characteristics that commend him for the awesome position of judge. Thus, to appear on behalf of Marquette Law School (which I get to do frequently), to represent the local legal community (as I do only on occasion), and to speak both for myself and (for the matter where I am perhaps most careful) for my wife, I respectfully second the motion that the Court administer the oath of office to Michael Halfenger. Thank you. ■

Sports Law Banquet | Gary D. Way

Nike's Gary Way Receives NSLI's Joseph E. O'Neill Award

On April 26, 2013, at the annual Marquette Law School Sports Law Banquet, Gary D. Way received the National Sports Law Institute's Joseph E. O'Neill Award from Professor Matt Mitten. The award, remembering a late partner at Davis & Kuelthau, has been given annually over the past 20 years to an individual who has made a significant contribution to the field of sports law while exemplifying the highest ethical standards. Mr. Way is Vice President & Global Counsel, Sports Marketing at Nike, Inc. He used the opportunity to share some advice for Marquette law students interested in sports law.



Gary D. Way

Thank you, Professor Mitten, for that generous introduction. When you describe my work, it sounds much better than the way I think about my job. If I were asked at the Pearly Gates about how I have used my law degree to better the world, I would be at a loss—because, in essence, my work is based upon helping to give away money and free shoes to millionaires.

Anyway, I'm thankful for this opportunity. I would like to take a few minutes to continue in the thank-you mode. First, I would like to thank the Marquette Law School community for the tremendous hospitality it has shown me throughout the day. ▶▶

Next, I would like to thank alumnus Tim Kraft for joining us today all the way from Colorado. Tim was the inaugural Marquette extern in the Nike Sports Law Practice Group back in 2004, when we undertook this extern experiment. Tim set the bar incredibly high. Although many who have followed him have tapped the bar, Tim is still the measuring stick. And that initial big success story paved the way for this now-signature Marquette–Nike partnership.

Last, and most importantly, I would like to thank the O’Neill family, the Davis & Kuelthau law firm, and Marquette’s National Sports Law Institute for sustaining the many legacies of Joe O’Neill.

Unbeknownst to anyone in this room, in my prior career, in the NBA league office, I had a number of opportunities to engage with Joe, as we worked to bring the inaugural McDonald’s Open tournament to Milwaukee in 1987. It was a breakthrough deal that brought the first NBA international basketball tournament to the United States, and it was won by the hometown Milwaukee Bucks, who beat the Soviet Union national team in the championship game by 27 points.

Joe was a practitioner of the first order. More importantly, I can say from personal experience, he was a gentleman of the first order. I’m flattered to be mentioned in the same breath as Joe and truly honored to be joined with him through this award.

Left to my own devices, I would take my seat on that last note. However, Professor Matt Mitten counseled me that this occasion calls for at least a few words targeted at the students in the sports law program.

It immediately hit me—three top things that students most want to hear from me: No. 1, “You’re hired!” Maybe one of you will hear that from me another day. No. 2, war stories. Unfortunately, attorney-client privilege prevents me from telling the stories you really want to hear. That leaves me with

No. 3, my most reliable “go to”: career advice on how to get into “sports law.”

My advice to you all is the same you probably get from your parents—just get a job! Please don’t laser focus on getting a job in sports. Getting to a top job in the sports industry isn’t a climbing-the-ladder proposition, where there is only one way up. Rather, it’s a jungle gym. There are lots of ways to get to the top of a jungle gym. But it all starts with one fundamental. Don’t waste your energy trying to become a sports lawyer. Focus on becoming a good traditional-practice lawyer—period.

If you ask any lawyer with a bona fide practice involving sports issues, none of them will self-identify as a sports lawyer. Each will identify as a traditional practitioner.

Former NFL Commissioner Paul Tagliabue will tell you that he was an antitrust lawyer and ended up at the NFL because it had a lot of antitrust issues.

NBA Commissioner David Stern, a former law firm partner, will tell you that he was a litigator and was initially hired (to be the NBA’s general counsel) because of his litigation skills.

NHL Commissioner Gary Bettman, who also was formerly the NBA’s general counsel and the person who hired me, describes himself as a transactional lawyer. When hired as the NHL commissioner, he famously replied to criticisms that he wasn’t a “hockey guy” by saying that he was hired because he knew how to negotiate TV deals, not because of how well he could skate.

NFL Players Association Executive Director DeMaurice Smith was a litigator and had no sports experience, but the Players Association had a need for someone who could lead and manage litigation against the NFL.

Former NBA Players Association Director Billy Hunter was, ironically, a U.S. attorney.

“Getting to a top job in the sports industry isn’t a climbing-the-ladder proposition, where there is only one way up. Rather, it’s a jungle gym. There are lots of ways to get to the top of a jungle gym. But it all starts with one fundamental. Don’t waste your energy trying to become a sports lawyer. Focus on becoming a good traditional-practice lawyer—period.”

Gary Gertzog, the general counsel of NFL Properties, was formerly a trademark lawyer at a New York law firm.

I myself am a licensing attorney by training. I used to license NBA team trademarks; now I license publicity rights; tomorrow I could get a job at Disney licensing Mickey Mouse and Goofy. I'm a licensing transactional attorney.

The list goes on and on.

The point is this: Sports organizations don't need lawyers who can cite *Moneyball* chapter and verse, or know a sport inside and out, or have encyclopedic knowledge of every player in a league, or even have a passion for sports.

They already have people like that. They're called general managers, coaches, agents, and fans.

What employers in the sports sector need are good lawyers who can do the work that is required of these organizations: licensing of trademarks, labor law advice, antitrust counseling, litigation, real estate financing, commercial transactions, etc.

So my advice to you is summarized in the thank-you email that you'll find on the back of your program. I received it a few months ago following a



A quilt given as a gift to Gary Way by Margaret Murphy, L'13, former Marquette–Nike extern.

long lunch I had with a recent law school grad, named Joseph, from a Midwestern law school. Joseph was in the Portland area for military-reserves training before being deployed to Afghanistan. He looked me up, and I knew that this was a guy I was going to make time to see: he had me at the word *deployed*.

I first tried to get him to focus on his job at hand, which was slightly more important than sports law jobs: being a platoon leader in a combat zone. Then I talked through with him what I have outlined for you all:

Don't seek to be a sports lawyer. Simply aspire to be a good lawyer, doing things of relevance to a sports organization, and trust that a prospective sports industry employer will recognize from your résumé how your conventional practice experience can translate into its world.

Joseph clearly got it. He wrote, "I will take the best job I can find and strive to be the best lawyer I can be." And he maintained the conviction that he would make it into sports—and the hope that our paths will cross sometime down the road.

I hope that that's your takeaway, also. Thank you. ■

Joseph D. Kearney

Remarks at Memorial Ceremony for Judge John L. Coffey

The U.S. Court of Appeals for the Seventh Circuit convened in Ray and Kay Eckstein Hall, the home of Marquette Law School, on April 17, 2013. The court's session included a ceremony remembering the late Judge John "Jack" L. Coffey, L'48. Chief Judge Frank H. Easterbrook presided at the memorial session and was joined by eight of his Seventh Circuit colleagues and more than 200 guests. These are the remarks of Dean Joseph D. Kearney, who was among the speakers.

Thank you, Chief Judge Easterbrook, and May It Please the Court. Marquette Law School looks a little different since Your Honor stood in a field, on this spot, shovel in hand, almost five years ago, helping us break ground for this building. Hopefully,

Eckstein Hall does *not* look terribly different from *three* years ago, when Judge Diane Sykes helped us dedicate the building, let alone two weeks ago when she was here for our Jenkins Honors Moot Court Competition, so named after the late James Jenkins who served as



“ Jack Coffey focused relentlessly on the future. For example, when he called me as dean (as he often did), it may have been to recall a relationship or an acquaintance, but only so that he could tell me not about his past with that person but rather of the judge’s latest idea about what that person could do for Marquette.”

the first Seventh Circuit judge from Wisconsin before being appointed to—none dare say promoted to—the inaugural deanship of Marquette’s law school. The Law School has long benefited from Judge Richard Cudahy’s various contributions, from his days as a faculty member to his essay last year, joining Tom Merrill, Randy Picker, and a number of others, in marking in the *Marquette Law Review* and *Marquette Lawyer* magazine the 125th anniversary of the Interstate Commerce Act. And, for all we know, one of the students in this room is the beneficiary of the scholarship recently created by his friends in memory of the late Judge Terry Evans. In short, even if we might always wish for greater success at the Court in that especially important sphere, applications of our students and graduates for judicial clerkships, let no one doubt that the Seventh Circuit and Marquette Law School have supported one another in a variety of ways almost since the Evarts Act in 1891 and the establishment of the Milwaukee Law Class the next year.

No one played a larger or longer role in this respect than the late Judge Jack Coffey, whom we remember today. I cannot adequately detail Judge Coffey’s career. For Jack Coffey graduated from Marquette Law School in 1948: while more than 20 of that year’s Marquette lawyers would become judges, none had a greater variety of roles or achieved greater prominence than Jack Coffey, who was a trial judge for almost a quarter-century, a member of the Wisconsin Supreme Court for some four years, and a member of this Court for longer than those two periods combined.

Nor is it really necessary for me to summarize his career. One will be able to read his work, as an appellate judge at least, for years to come. What is more, no doubt Judge Coffey would have regarded,

as his *greatest* legacy, his family, whom it has been a privilege for me as dean to come to know. It is thus appropriate that the Court will soon hear from his son, Peter Coffey, a Marquette lawyer, who had the good judgment to marry Kris Cleary, another Marquette lawyer, and from Peter Robbins, the son of Judge Coffey’s daughter, Lisa Robbins, who together with her husband, Stephen Robbins, and son-in-law, my former student, Jeff Ruidl, has shown great kindness to my family and me over the years. To give a further sense of the matter, only good judgment (grounded, admittedly, in the Establishment Clause) deterred me from suggesting to Collins Fitzpatrick that Judge Coffey’s nephew, Father Gregory O’Meara of the Society of Jesus and a tenured faculty member here, open today’s court session with a prayer. So, in a most important sense, concerning his family, Judge Coffey’s legacy is a living one, with all the dynamism and hope for the future that that implies.

But this does bring me to the one central attribute of Jack Coffey that I want to remember—even promote—today: *my* Judge Coffey, if you will. Jack Coffey focused relentlessly on the future. For example, when he called me as dean (as he often did), it may have been to recall a relationship or an acquaintance, but only so that he could tell me not about his past with that person but rather of the judge’s latest idea about what that person could do for Marquette. To the extent that the call was not about a person, it was about the Law School’s program: how in the judge’s estimation we might improve it (Judge Coffey was an early promoter of judicial internships and of a professionalized legal writing program), or what another law school was doing based on promotional

material that he had received as a federal judge. Nor did he expect each of his ideas to be immediately or even ever accepted or acted upon. No matter: he likely was on to his next idea for Marquette Law School.

One conversation made a particular impression on me. Early in my deanship, in 2003 or so, when the solution to our facilities problem looked more likely to be a third addition to our 1924 building than an altogether new facility, I allowed to Judge Coffey over the phone that I was disinclined to be the dean who led us out of Sensenbrenner Hall. To this the judge said, “I don’t know why not. If you have a chance to get the hell out of there, you should do it.” In fact, his particular reaction reassured me that



Portrait of Judge John (“Jack”) L. Coffey in Eckstein Hall’s Appellate Courtroom

our alumni more generally knew that Marquette Law School is about the university’s *mission*—Excellence, Faith, Leadership, and Service—in the context of the law and is not bound up in a building. Judge Coffey was a conservative, but in this regard, at least, about the substance not the form. And his interest was in the future.

In concluding remarks at the groundbreaking in May 2008, Your Honor, as chief judge of this court, said, simply but elegantly of this law school, “I anticipate great things to come.” For more than six decades, Judge Coffey concurred in this. We are fortunate to have

counted him among our alumni and to remember him, in any number of respects, today and hereafter. Thank you. ■

Alumni Awards | Donald W. Layden

Marquette University Alumnus of the Year Remarks

Marquette University recently presented its highest alumni honor—the university’s Alumnus of the Year Award—to Donald W. Layden, Jr., Arts ’79, L’82. Mr. Layden’s many contributions to the university include his current service as chair of the dean’s advisory board at the Law School. Here are his remarks in accepting the award at a dinner on April 27, 2013, held in the Alumni Memorial Union and concluding the Alumni Awards Weekend.

Thank you. I am overwhelmed and humbled by the extraordinary grace you have given to me in recognizing me as the Alumnus of the Year. As I listen to the stories and contributions of my fellow awardees, and as I consider the countless contributions made by over 100,000 alumni every day, I am struck by a sense of overwhelming humility and gratitude that you would choose to recognize me and my accomplishments. Thank you very much.

Many people have encouraged me on this journey, and I am so very pleased that many of you chose

to be here tonight to celebrate with our family and me. When I told the people closest to me about this recognition, their responses provided an interesting insight into our relationship. Mary Jo dismissed my surprise, suggesting that my contributions to the communities in which we live and my professional accomplishments make me a natural choice. Her confidence in my ability to make change happen and to take risks has made those choices easy. She has been a remarkable partner, friend, and the love of my life. My parents were of course very proud, and I



believe that there has probably not been a bridge partner of my mother or a golf partner of my father who is unaware of Marquette's decision. Our children, at least the boys, unanimously agreed that this was an event worthy of a party. Thank you, Marquette, for accommodating their request with such a magnificent event. And our daughter made it very clear that Marquette would have to be told to delay my award one year, as she is in London studying abroad and would not be able to be here in person. After all, she reasoned, she is the only one of our children intelligent enough to follow her parents to Marquette. Thank God for FaceTime so she can be with us virtually.

You know, Marquette was not my first choice of colleges. I had been accepted at Georgetown and Brown and was preparing to matriculate at one of the two, probably Georgetown. After all, I grew up in New York, and my parents had just transported us across the country as a result of an important promotion for my father. I viewed Milwaukee as a flyover city, and I did not plan to stay very long. As providence has it, I started dating Mary Jo, and I was not sure I really wanted to be a thousand miles away. Almost as importantly, my father met Al Maguire, and they both insisted I consider Marquette.

And so I did, and that decision has made all the difference. Milwaukee is our home, and I enthusiastically share with colleagues around the world all of the many advantages Milwaukee has over almost any other place in the world you might want to live, work, and raise a family.

At Marquette, Mary Jo and I found that the values instilled in us by our parents were reinforced. Most



Don and Mary Jo Layden on April 27, 2013.

importantly, our experience reinforced the message that our faith calls us to be active in the world as an agent for good and for change. In Ignatian spirituality, we found a framework for living, for reflecting and taking stock, and for making decisions that allowed us to let go of those things that were not essential. By working hard to identify and avoid unimportant attachments, we have had a great ride.

In my professional career, I have been blessed to work with folks who have encouraged me and enabled me to undertake a diverse set of roles. Some have looked at the diversity of my career—going from practicing law with some of the best lawyers in the country; to running businesses in fields as varied as

“ At Marquette, Mary Jo and I found that the values instilled in us by our parents were reinforced.

Most importantly, our experience reinforced the message that our faith calls us to be active in the world as an agent for good and for change.”

“And that is what I am most proud of. I believe that finding love, being in love, staying in love is the most important thing we can do in our lives. I am most proud and grateful for the relationship I have with each of our children. They know they are loved.”

banking, financial technology, and marketing services; to investing and advising early-stage companies and their owners to find their potential—and concluded that I am simply not capable of keeping a job.

For me, it is about being open to exploring every door that opens, asking whether this is where I am called to use my skills at any particular time, and having a partner who has encouraged me to explore opportunities.

Let me end with a quick story. In preparing for tonight, Marquette asked me to reflect on the accomplishment I am most proud of.

Mary Jo and I recently returned from visiting the Philippines. While there, we experienced the hardships faced by many Filipinos to survive each day and the horrible stories of children who have been abused and neglected as their families are trapped by poverty and escapism. During a visit to one of the shelters, a young girl asked if I had any children, and her face lit up when I told her that I had three sons and a daughter. She was 14 and had been abused by family members and sold into prostitution until Sister Nida saved her and brought her to Serra Center. Serra Center is a home for sexually exploited and abused street children run by the Oblate Sisters of the Most Holy Redeemer. Sister Nida has been a friend for over a dozen years. She is a four-foot bundle of energy with an infectious smile and a dogged determination to fight for children. She has a master's in social work and uses all of the modern intervention and treatment methodologies

but builds upon a foundation of love, so it was not surprising to me when the young girl asked if I loved my daughter. Upon hearing my affirmation, she asked a follow-up question: “Does she know?”

This young girl knew how important it is to have parents who love their children—to have adults in our lives who care about us as individuals with the potential to do great things.

And that is what I am most proud of. I believe that finding love, being in love, staying in love is the most important thing we can do in our lives. I am most proud and grateful for the relationship I have with each of our children. They know they are loved.

Thank you again for this fantastic recognition, and I hope you will indulge me by joining me in this toast to Marquette and its alumni:

For its rigorous commitment to the education of the whole person, including a core curriculum that allows students to gain a global perspective, an appreciation for the aesthetic—in art, in nature, and, most importantly, in each other—and a grounding in the existential, we look forward to continuing the journey you sent us on at commencement: to live lives based on Excellence, Faith, Leadership, and Service. To Marquette and its alumni!

We Are Marquette. ■

Criminal Law

COMMUNITY

GIDEON

Evidence-based

DECISION

Zimmerman verdict

Justice

THE PROMISE

THE MARQUETTE LAW SCHOOL

Faculty Blog at Five Years Old

Since its establishment on September 1, 2008, the *Marquette Law School Faculty Blog* has flourished. It has welcomed more than 2,300 posts touching on law, the legal profession, public policy, and any number of other matters. Most posts are by faculty members, but the blog also regularly features an alumnus and a student blogger of the month. The blog is updated year-round, usually daily, as the following excerpts from the past spring and summer will give a sense. They are variously by Daniel D. Blinka, professor of law; Mike Gousha, distinguished fellow in law and public policy; and Kelli S. Thompson, L'96, Wisconsin's state public defender. **Visit the blog at law.marquette.edu/facultyblog.** ▶▶

Posts by
Daniel D. Blinka

June 28, 2013

Who Screamed? Experts, Rules, and the Zimmerman Trial

The Zimmerman homicide trial in Florida is an important bellwether on many levels. My colleague David Papke remarked in a previous blog post on the jury's composition and its possible effect on the outcome. The evidence, too, is controversial and contested. The notorious 911-call recording is deemed critical, yet the trial judge excluded expert testimony on voice identification as unreliable. Her ruling rippled across the country and may even hold lessons here in Wisconsin.

The 911 call recorded a man's voice "screaming" for help. The screamer's identity is disputed. George Zimmerman has claimed self-defense. Prosecution experts asserted, however, that the plea came from the victim, Trayvon Martin, moments before he was shot dead. A bevy of defense witnesses, including specialists with the FBI and the NSA, attacked the methods used by the state's experts.

The judge ruled that those techniques were not "generally accepted" by competent experts in the field. Put differently, she found the state's expert testimony unreliable. The jury thus will be on its own in divining whether Martin or Zimmerman screamed for help moments before the shooting.

By happenstance, the judge's ruling coincided with Florida's adoption of the *Daubert* "reliability" standard

for expert testimony just several weeks earlier. Tort reform motivated the change. The new rule, which takes effect in July, replaces the "general acceptance" standard that governed her ruling on voice identification. Does the standard applied—"general acceptance" or *Daubert*—make any difference? Probably not.

Wisconsin also adopted the *Daubert* standard, as part of tort reform in January 2011. It is remarkable that nearly two and one-half years later we have yet to see a published case on this issue, despite the ubiquity of expert testimony in civil and criminal cases. Why the dearth?

First, evidence law is not algebra. Admissibility rulings are quintessentially discretionary; the choice of standard is rarely outcome determinative, and appellate courts defer to trial courts. The Zimmerman trial judge would have almost certainly excluded the evidence under either test. And to speculate what a Wisconsin judge would have done is no more revealing than asking what a different Florida judge might have done.

Second, since January 2011, Wisconsin lawyers and judges have tried cases in the same competent manner as before the switch. *Daubert* has made little or no difference here because there was no "junk science" problem to begin with. Rulings have been restyled to accord with the new rule's language, but the end result—in or out—is likely the same.

Finally, Florida and Wisconsin both exemplify that *Daubert* is more about the politics of tort reform than the imperative of assuring reliable evidence. Florida's venerable *Frye* test (general acceptance) worked just fine here. Time and money are better spent on improving forensic sciences and the quality of expert testimony in court, especially in under-resourced criminal cases, than on bromides masquerading as evidence rules.

"Time and money are better spent on improving forensic sciences and the quality of expert testimony in court, especially in under-resourced criminal cases, than on bromides masquerading as evidence rules."

July 10, 2013

Do I Need to Draw You a Picture? The Zimmerman Trial and CGI Evidence

The Zimmerman trial nicely illustrates how messy trials can be. Witnesses contradict one another on most critical issues. For example, a bevy of witnesses have split over whether it was the victim, Trayvon Martin, or the defendant, George Zimmerman, screaming for help on the 911 recording. Moreover, the split among witnesses is, predictably, along party lines: friends and relatives of each claim the voice for their side. To make things messier, some of these witnesses seem to have contradicted themselves, asserting earlier that they couldn't recognize the voice but offering trial testimony that now positively identifies it. Adding to the confusion, some witnesses deny making the earlier inconsistent statements.

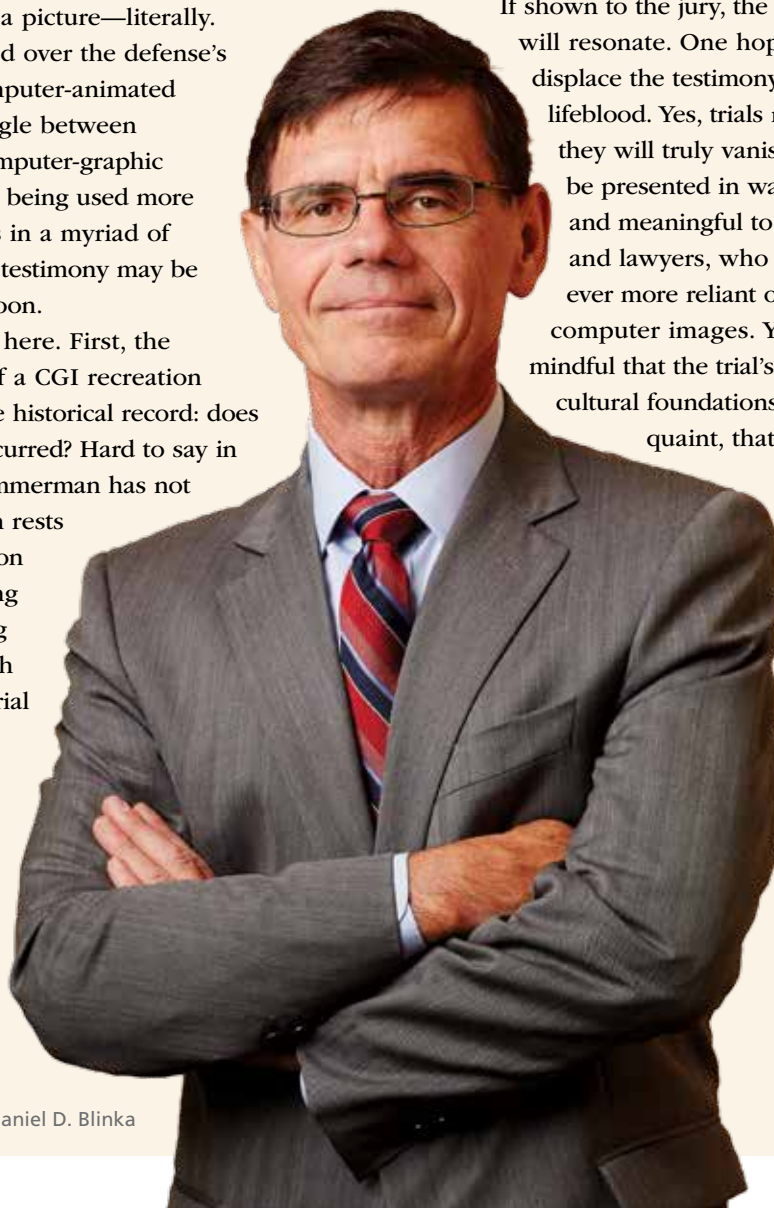
So, what's the jury to make of this morass? The defense solution is to draw a picture—literally. Yesterday the parties sparred over the defense's attempts to introduce a computer-animated recreation of the fatal struggle between Zimmerman and Martin. Computer-graphic imaging (CGI) technology is being used more and more to recreate events in a myriad of cases. A week of conflicting testimony may be reduced to a 60-second cartoon.

There are two problems here. First, the accuracy (authentication) of a CGI recreation depends on its fidelity to the historical record: does it accurately reflect what occurred? Hard to say in this case. Martin is dead. Zimmerman has not testified. The CGI recreation rests on the creators' reconstruction of events based on conflicting pretrial statements, including Zimmerman's, some of which have been contradicted by trial testimony, itself no model of clarity.

Put differently, the CGI recreation is the animators' version of the shooting, resting heavily on the defense version of events. It is tantamount to Zimmerman's story of what occurred with one crucial difference: Zimmerman does not have to take the stand and face cross-examination under oath about any of it. My own view is that it should be excluded unless Zimmerman takes the stand and testifies that it "fairly and accurately" depicts what happened.

And this underscores a second problem. Trials are predicated on testimony: oral statements made under oath in the presence of the trier of fact in the courtroom. Trial lawyers have long used demonstrative evidence to illustrate testimony, but diagrams and pictures of a crime scene are of a different order from a CGI reconstruction. Trials depend on word pictures: testimony by witnesses and persuasive arguments by lawyers. The jury's deliberation and verdict, we hope, embody its picture of what happened, assuming any comes into focus.

If shown to the jury, the CGI reconstruction will resonate. One hopes it doesn't displace the testimony that is the trial's lifeblood. Yes, trials need to change, or they will truly vanish. Evidence must be presented in ways understandable and meaningful to jurors, witnesses, and lawyers, who have become ever more reliant on technology and computer images. Yet we must be mindful that the trial's constitutional and cultural foundations are in a time, now quaint, that valued people coming together, face-to-face, so that they could publicly answer questions. Not a bad idea. ▶▶



Daniel D. Blinka

July 15, 2013

Lessons from Zimmerman?

Predictably, the Zimmerman verdict has triggered headlines, sharp controversy, and protests. This was bound to happen regardless of whether he was acquitted or convicted. I leave it for others to tell us about the grand lessons this trial teaches about race, violence, and firearms. I will note, however, that the trial was not about any of these larger themes, and the jury's verdict spoke only about Zimmerman's conduct when he shot Trayvon Martin to death. It was not, in short, a show trial of any sort.

The trial's meaning for me reaches backward and forward in time. It reaches backward to a moment in my professional life when I was on the receiving end of the same verdict as a prosecutor—an acquittal in a highly publicized murder case in which the defendant claimed self-defense. As for the forward look, its lessons will undoubtedly permeate my One-L Criminal Law class in the fall (students are hereby placed on notice). The lesson is not one that dwells on the sensational publicity the Zimmerman trial garnered or the emotional devastation suffered by the Martin family but, rather, on its banality as an exemplar of a criminal trial—how it illustrates workaday principles relating to the definition of crimes, the elements of defenses, and, most important, the burdens of proof.

Zimmerman's defense lawyer was quoted as saying, "We proved George Zimmerman was not guilty." Assuming a correct quote, the statement is nonsense on about every level. The defense proved no such thing and was under no duty to do so.

In a murder case like this one, where there are no true eyewitnesses and nary a surveillance camera, only two people know what happened. The state's best witness, the victim, is dead—killed by the only surviving witness, the defendant. And the latter cannot be compelled to testify, unless, of course, it is in his best interest to do so. Let's agree that this creates some serious hurdles for the prosecution.

Proving the murder charge here is relatively straightforward: it is undisputed that Zimmerman shot

Martin to death. The proof problems relate to the self-defense. Once self-defense is raised, as Zimmerman did through his police-conducted interviews and some physical evidence, the burden is on the prosecutor to "rebut" it beyond a reasonable doubt. Like many jurisdictions, Florida law (apparently) authorizes deadly force whenever the defendant "reasonably believes" he is in danger of death or great bodily harm. What was Zimmerman thinking the moment he pulled the trigger, taking Martin's life? Did he "really" believe he was in grave danger, or was he enraged by Martin's defiance? Self-defense also asks what a "reasonable person" in Zimmerman's shoes would have done—which, of course, begs the question of whether any reasonable person would be on such a patrol to begin with.

The difficulty of negating Zimmerman's asserted beliefs beyond a reasonable doubt cannot be gainsaid. The best way is to catch him in a lie. But where the defendant elects not to testify—which is his constitutional right—the state is left with the slim pickings from his prior statements or other evidentiary scraps. Perversely, then, the State's objective was to prove that Zimmerman lied—a heck of a way to prove he murdered Martin. The very difficulty also tempts prosecutors to overcharge cases in an effort to coax a guilty plea from the defendant or a compromise verdict by the jury. Neither happened here, but the temptation is omnipresent.

As the nation obsesses about the verdict's meaning, perhaps we should think about the banalities of self-defense law along with race and firearms policies. In insanity cases, for example, most jurisdictions now impose the burden of proof on the defense, a procedural innovation sparked by outrage over the John Hinckley verdict (remember?). In light of the nation's passion for firearms permits, perhaps it's time to talk about restructuring who must prove what in self-defense cases. In the end, though, I'm glad the case was tried to a jury. In a system dominated by plea bargaining, it's institutionally healthy for us to know that the trial is a viable option for both defendants and prosecutors. As distraught as the Martin family surely is, I can't imagine they would have felt better had the prosecutors finagled a guilty plea to a "reckless-something" charge.

"As the nation obsesses about the verdict's meaning, perhaps we should think about the banalities of self-defense law along with race and firearms policies."



Posts by
Mike Gousha

April 16, 2013

Metro Milwaukee Is Doing Better Than a Lot of Residents Think

A couple of years ago, I was talking with one of the boosters of the effort to brand the Milwaukee area as a global water technology hub. He told me the biggest challenge the initiative would face would be Milwaukee's inferiority complex, or at least our unwillingness to brag about our assets.

I was reminded of that conversation recently, when the Law School collaborated with the *Milwaukee Journal Sentinel* on two major projects. On April 8, we hosted a conference in Eckstein Hall exploring the pros and cons of building a new downtown sports and entertainment facility. Those in attendance heard the president of the Oklahoma City Chamber of Commerce describe how his city had been dramatically transformed by a series of projects that had broad community support. Then, this past Sunday, the newspaper published the first in a four-part series examining the economic future of metropolitan Milwaukee. Called "A Time to Build," the series was reported by Rick Romell of the *Journal Sentinel*, under a six-month Law School fellowship established through the school's Sheldon B. Lubar Fund for Public Policy Research.

As part of that current series on the metro area's economic prospects, the newspaper created an interactive graphic that allows the reader to compare the nation's top 50 metropolitan areas. It's easy to use, and educational, too.

After hearing so much about the Oklahoma City success story, I thought it might be interesting to see how metro Milwaukee stacks up against Oklahoma City in several key categories. It turns out we do pretty well. We have more college graduates, higher per capita income, and a slightly lower poverty rate. I then added the metropolitan Dallas area to the mix, given Dallas's reputation as one of the stars of the Sunbelt. Again, the comparison was favorable. Milwaukee and Dallas had remarkably similar numbers in several key indices. The comparative data are available [here](#).

The major differences came in categories that looked at population growth (we're growing, but slowly compared to Oklahoma City and Dallas) and at residents who were born in the same state (we win that competition hands down). Does that "born here, stayed here" factor explain our inability to acknowledge Milwaukee's virtues? Does it create an insular way of thinking, more focused on problems than possibilities?

Metro Milwaukee faces some major challenges. We have a jarring income and education disparity. Our suburbs are prosperous, but our central city is poor. And unlike Oklahoma City, we struggle for consensus on what's best for the region. Still, the census data suggest this area, as a whole, is faring better than some observers might think, its residents included. ▶▶

April 23, 2013

The Mayor and His Map

The next time you see Milwaukee Mayor Tom Barrett, ask him about his map. It's the mayor's latest weapon in his battle to stop the state from eliminating residency requirements for municipal employees in Wisconsin. More than 120 municipalities have rules spelling out where their employees can live. But Governor Walker wants to change that. He says residency requirements are unnecessary and outdated, even counterproductive, and he has included language in his state budget that would end them.

Mayor Barrett says the governor's proposal doesn't belong in the budget, since it's not a fiscal item. But Barrett's concerns go much deeper. In a recent email to supporters, Barrett said an end to the city's 75-year-old residency requirement could "destabilize" Milwaukee. I pressed the mayor on that claim in a recent television interview. He said that philosophically he agrees with the notion that people should be able to live where they want, but that local municipalities should be able to determine the conditions of employment for the people they hire. In Barrett's world, that translates into a simple reality. If you don't want to live in Milwaukee, don't apply for a job with the city. He said there's been no shortage of applicants.

Perhaps more important, Barrett said the value of assessed property in Milwaukee had fallen \$5 billion because of the economic downturn. He argued that based on experiences in other cities, such as Detroit, Minneapolis, Baltimore, and Cleveland, significant numbers of city employees were likely to leave the city should the residency requirement be lifted. Barrett was making the case that there was great risk to his city, and he wanted to show me a map he carried with him into the television studio. You can see it [here](#). Because of the amount of data in the file, it takes about 10–15 seconds to present itself.

The map shows the gravity of Milwaukee's foreclosure crisis. Foreclosed properties are in red. As of last week, there were nearly 2,600. Blue represents where the more than 7,000 city employees live. Besides helping stabilize struggling sections of Milwaukee, city employees are the backbone of a number of healthy, middle-class neighborhoods, including Bay View and the southwest, far south, and far west sides. These neighborhoods are home to hundreds of police officers and firefighters. But

what happens if, as the mayor believes, 40 to 50 percent of those blue dots—city employees—move outside the city? Will there be a dramatic downward pressure on property values?

The mayor contends the end of residency was a promise Governor Walker made to the Milwaukee police and firefighters unions in an effort to gain their support during his bid for governor. Walker argues that personal freedom should trump conditions of employment, and that, at the end of the day, it's up to the city to become a more attractive place to live. Neither man knows exactly what will happen should the requirement be eliminated. Nor do they know what Mayor Barrett's map will look like 10 years from now. But if Barrett is right, it will be a lot less blue, and Milwaukee could be a very different city.

June 4, 2013

That's the Way It Was—and Is

When I was studying journalism at UW-Madison, we would sometimes end our day at Vilas Hall by grabbing a cold one at a nearby tavern on University Avenue. Bob and Gene's is no longer there, but a particular memory remains. One of the television sets at the bar was tuned each night to the *CBS Evening News*, and when anchorman Walter Cronkite came on the air, the place got quiet and remained that way until Cronkite's signature sign-off: "And that's the way it is." On the heels of Watergate and a long war that threatened to tear the nation apart, there was a sense that we had witnessed history.

We witnessed history again in Wisconsin last year, and this time it threatened to tear the state apart. One year ago—June 5—Wisconsin went to the polls in the recall election for governor. The protests of 2011 had been replaced by a political movement aimed at ousting Governor Scott Walker from office. It was an election that divided not just Republicans and Democrats, but friends and families, some of whom simply stopped talking about politics rather than run the risk of a nasty argument. Bitter and contentious, there was little middle ground. In the waning days of the race between Governor Scott Walker and Milwaukee Mayor Tom Barrett (a rematch of 2010), the Law School found itself in the middle of the fray. We released our final Marquette Law School Poll of the election cycle, showing Governor Walker leading by seven points (ultimately, his margin of victory). The Law School also played host to the final

debate of the campaign. As I moderated the event, I was struck not only by the sharpness of the exchanges between Barrett and Walker, but by how the evening had a certain rhythm to it, each candidate giving as good as he got. The two men knew each other well. They had done this several times before, and their familiarity along with their fundamentally different visions for the state produced an hour of compelling conversation. But I also remember the overwhelming silence in a packed Eckstein Hall when both Barrett and Walker would briefly pause to collect their thoughts. *Intense* doesn't begin to describe it.

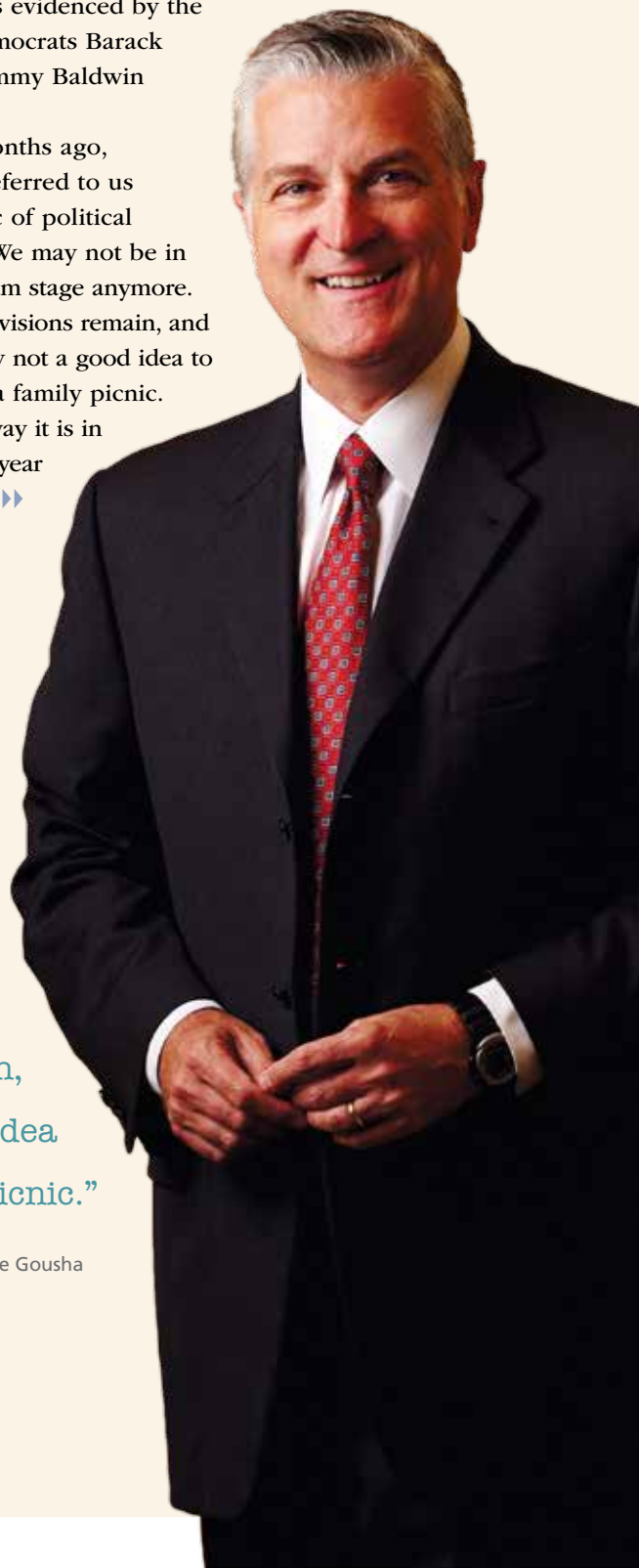
When Election Day was over, Scott Walker had won. Again. And life went on in Wisconsin. So what has happened in the year since the historic recall? In some ways, the debate seems remarkably familiar. We're still arguing over jobs numbers and the performance of the state's economy. According to our latest Marquette Law School Poll, the governor's job approval rating remains about the same, slightly more positive than negative. But one fact is beyond dispute: Wisconsin continues to undergo a rapid and fundamental transformation, one that could change its future course for not only years, but decades. With Republicans in control in Madison,

the state is quickly moving away from its progressive past, plotting a future built on a philosophy of lower taxes, less government assistance, fewer regulations, and more school choice. Election laws are also likely to change in ways that could benefit Republican candidates. For now, Democrats can do little but watch and wait for 2014, the next major election cycle. And yet, in many respects, Wisconsin is still a purple state, neither red nor blue, as evidenced by the victories of Democrats Barack Obama and Tammy Baldwin last November.

About 18 months ago, *Businessweek* referred to us as the "republic of political unhappiness." We may not be in the primal scream stage anymore. But our deep divisions remain, and it's still probably not a good idea to talk politics at a family picnic. And that's the way it is in Wisconsin, one year after the recall. ▶▶

"About 18 months ago, *Businessweek* referred to us as the 'republic of political unhappiness.' We may not be in the primal scream stage anymore. But our deep divisions remain, and it's still probably not a good idea to talk politics at a family picnic."

Mike Gousha



June 18, 2013

Milwaukee: The \$5,000 House and Other Thoughts

I was having lunch the other day with someone who works in city government, and we were talking about the serious foreclosure problem in Milwaukee. He was lamenting the fact that in some of the poorest sections of the city, the housing market is fundamentally broken. Homes, now owned by the city, can be purchased for as little as \$5,000, and yet they still aren't selling. If you want some sobering evidence of the magnitude of the nation's housing market collapse and the impact of the Great Recession, check out the listings [here](#). They're stunning, really.

Mayor Tom Barrett estimates the foreclosure crisis has cost Milwaukee \$5 billion in assessed value. The city has tried to get a handle on the problem, but it persists, eating away at once-stable neighborhoods. In 2008, the mayor helped launch the Milwaukee Foreclosure Partnership Initiative, which tries to prevent foreclosures and stabilize neighborhoods. There's a branch of city government that directly addresses housing issues. And last week, the mayor announced he would be committing another \$2.3 million to address the foreclosure problem. As part of that initiative, scores of empty homes will be torn down because they're a blight on city neighborhoods. As a longtime Milwaukee resident, I'd be less than honest if I didn't say the specter of Detroit came to mind when I heard the news.

But the next Detroit is hardly the image thousands of newcomers have of my hometown. After losing 20 percent of its population from 1960 to 2000, Milwaukee is growing again. It's not a population explosion, but it's growth. Recent census numbers show that from 2010 to 2012, the city added 4,000 residents. What's most interesting is who's choosing to live in Milwaukee. Reporting by the *Milwaukee Journal Sentinel* (part of a collaboration with Marquette Law School) found that, in the last decade, there has been a migration of young people to the city. Many are college graduates. They live downtown, on the city's east side, and in "hot" neighborhoods like the Third Ward, Walker's Point, Bay View, Brewers Hill, and Washington Heights. Their presence has brought a new energy and economic vitality to parts of Milwaukee, with restaurants and shops racing to meet the demands of younger consumers. These newcomers are helping fuel a change in Milwaukee's risk-averse entrepreneurial culture and

have created a dynamic arts and entertainment scene. Their arrival is also welcome news to established Fortune 500 companies like Northwestern Mutual, which is planning a new skyscraper for its downtown campus, along with hundreds of news jobs.

To be sure, none of this diminishes the enormous challenges our city faces. Can a city truly be great when some neighborhoods are so undesirable that homes sell for \$5,000 or less, while others are so prosperous that apartments regularly rent for \$2,000 a month or more? It's hard to make the case for greatness when you have such jaw-dropping disparity in income and housing.

So what role, if any, should government play in addressing the challenges facing Milwaukee? During the last gubernatorial race, Governor Walker said other towns and cities in Wisconsin "don't want to be like Milwaukee." It's true that you don't have to travel far outside the city to hear that sentiment expressed, sometimes a bit more bluntly. It's also true these other places can't be like Milwaukee. We're simply bigger and more diverse, our problems larger and more complex. But no matter how people feel about Milwaukee, its future matters. In a recent interview with the *Cap Times*, the retiring director of the University Research Park in Madison, Mark Bugher, said, "The secret to the Wisconsin economy is still Milwaukee." Bugher is a Republican, a former member of Governor Tommy Thompson's administration. "My advice to elected officials," he said, "is to do all you can to help the Milwaukee economy, the school district, the infrastructure there. That will pay dividends for the balance of the state."

There are no easy answers to Milwaukee's foreclosure crisis. But Bugher's larger observation is worth noting: Milwaukee, with its chaotic mix of dirt-cheap houses and million-dollar condos, its Fortune 500 headquarters and underemployed workforce, offers plenty of challenges. But it also offers plenty of potential. And it may offer Wisconsin its best chance for economic success in the future.

July 17, 2013

The Promise

The promise. It's long been a staple of political campaigns, and it's easy to understand why. Candidates need to find a way to connect with voters, to cut through the messaging clutter, and nothing does the trick quite like a simple, direct "This is what



I'm going to do" statement. The promise, after all, is about much more than words. It reflects a candidate's vision and confidence. I mean, who wants to vote for someone who's not so sure what the future holds? We want our candidates to be bold, decisive, and optimistic.

There's just one danger. What if a candidate gets elected and fails to deliver on a promise or falls short of it? Is a broken promise fatal, or do voters today see the promise as a different animal: more a statement of goals and aspirations than a contract with (as we say in television) no "outs"?

They're questions worth asking, because in Wisconsin's 2014 race for governor, a promise will almost certainly be front and center. It's the one Governor Scott Walker made in February of 2010, when he said Wisconsin would create 250,000 new private-sector jobs in his first term in office (fewer Wisconsinites are likely to remember Democratic candidate Tom Barrett's goal of creating 180,000 new jobs). Then-candidate Walker based his pledge on numbers that had been achieved by former Republican Governor Tommy Thompson in his first four years, and he repeated it again and again to voters and media around the state. When Walker appeared on my *UpFront* television show late that February, I asked him, "Is this a campaign promise? Something you want to be held to?" Walker didn't hesitate. "Absolutely," he replied. "To me, 250,000 is a minimum. Just a base."

The governor is now more than halfway through his first term. At the current pace, businesses in the state would create about half of the 250,000 jobs he promised in his first four years. Walker says he's making progress and still working to achieve the 250,000 goal but has acknowledged it won't be easy.

So here's the question. What would be the political fallout if the governor fell short of his goal? While he still has another 18 months in his term, Democrats are already hammering Walker on his jobs record, accusing him of backing away from his pledge. To be sure, the state's job performance will play a major role in next year's race, but will "the promise" be a make-or-break issue?

Recent history provides some interesting food for thought. In 1988, Republican presidential nominee George H. W. Bush brought down the house at the GOP national convention by promising, "Read my lips: no new taxes." But by 1990, President Bush had been forced to raise taxes, and by 1992, his opponents in the fall election, Democrat Bill Clinton and independent Ross Perot, were questioning Bush's trustworthiness. While a slumping economy may have had more to do with his defeat, the "read my lips" promise dogged Bush throughout the fall campaign, hurting him with conservative and independent voters.

Breaking a political promise may have kept the Brewers in Milwaukee, but it cost former Republican state Senator George Petak his job. It was 1995, and Petak had promised his Racine County constituents that ►►



Mike Gousha welcomes Governor Scott Walker and Mayor Tom Barrett to Eckstein Hall's Appellate Courtroom on May 31, 2012, for the gubernatorial recall election debate.

he would oppose any bill that included their county in the stadium tax district. But at the last minute, with the Miller Park funding legislation in jeopardy, Petak had a change of heart. He voted for the legislation. Voters were furious, and their punishment was swift. Petak faced a recall election in June of 1996, and his Democratic opponent, State Representative Kimberly Plache, pummeled Petak with his *promise*. His political career was over. Petak would have the distinction of being the first Wisconsin legislator to be successfully recalled from office.

In contrast, what was perceived as a broken promise did not prove fatal in the 2012 presidential election. In January of 2009, Obama administration officials projected that because of the \$825 billion stimulus spending package, unemployment would not climb above 8 percent. By October of 2009, unemployment stood at 10 percent. It was still above 8 percent as the 2012 election year began. Republicans claimed the president had broken his “promise.” While the report from his administration referred to “significant margins of error” in its projections, and Obama didn’t specifically use the word *promise*, it was viewed as such by millions of voters. But Obama overcame the criticism to win reelection. He won easily in Wisconsin, by seven percentage points.

Which brings us to 2014 and how the Walker promise of 2010 might play with voters. First, Walker’s promise is somewhat different from the ones made by Bush and Petak. They pledged specifically not to do something, and then did it. For some voters, the flip-flop—no matter what the explanation—is unforgivable. Combine that with a red-hot issue (tax hikes or Miller Park), and you have an enraged, engaged electorate. But would Walker’s failure to deliver on his 250,000-jobs pledge generate the same

intense voter reaction? Or have most voters already made up their minds about the governor? Polling suggests that Walker supporters are fiercely loyal to the candidate. The question is whether failure to hit his 250,000 target would sufficiently motivate enough dissatisfied Democrats and independents to impact an election.

Second, the broken promise as a campaign weapon is only as effective as its Democratic messenger. In the hands of Bill Clinton, George Bush’s “read my lips” promise was a gift from the political gods. It’s not clear who Walker’s Democratic challenger will be, but he or she will have to articulate not only a convincing critique of Walker’s promise, but an appealing economic roadmap for the future.

Finally, whether some Wisconsin voters are in the mood to overlook an unkept promise will depend on what happens to the state’s jobs numbers in the next 12 months. If the pace of job growth improves, the 250,000 pledge may seem less important to voters. The governor is already beginning to use a “We’re on the right track, don’t turn back” theme in interviews and speeches. He makes no apologies for aiming high, and says that initial job growth was slowed by the recall turmoil. But if Wisconsin continues to trail its Midwestern neighbors in job creation, his explanation could ring hollow with voters. Ironically, the governor may have to hope that Wisconsin residents come to the same conclusion about him that they did about President Obama: that enough progress has been made on the jobs issue to warrant a second term in office.

There is a certain peril in the political promise. But for most candidates, it’s a risk worth taking. The promise Governor Walker made three and one-half years ago helped lead him to victory. And as any political strategist will tell you, you can’t govern unless you win.

Posts by

Kelli S. Thompson

July 3, 2013

The Legacy of *Gideon v. Wainwright* in Wisconsin

I'd like to take the opportunity through my posts this month to talk about some of the trends and milestones that I see in the field of law, particularly as it pertains to our criminal justice system.

Gideon v. Wainwright, the landmark 1963 U.S. Supreme Court case, started with a handwritten petition from Clarence Gideon. The decision in *Gideon* set the country's criminal justice system on a different course: defendants who could not afford legal counsel have the right to be provided with such representation.

Although the scope of the constitutional right to counsel was established with the *Gideon* decision, the responsibility and the details of its implementation were left to the individual states.

In the early years following the decision, Wisconsin complied with the requirement through a county-by-county system.

This county-based approach changed in 1977 when

Wisconsin took the strategic step of adopting a statewide model of indigent defense, establishing the Office of the State Public Defender (SPD) as an

independent, executive-branch state agency. SPD trial offices started to open across the state, and the appellate representation, previously overseen by the Wisconsin Supreme Court, was transferred to the agency. The SPD ensures that our state meets the constitutional requirements set forth in *Gideon*.

Wisconsin's statewide approach offered through the SPD afforded consistency of operations, equal access to justice throughout the entire state, and economies of scale. Today, Wisconsin is one of about 20 states that rely on a statewide public defender system, with the remaining states largely relying on a county-by-county system.

The SPD's jurisdiction reaches all of Wisconsin's courtrooms. Staff are located in 35 trial offices located around the state, in two appellate offices located in Milwaukee and Madison, and in one central administration office in Madison. In fact, this very month we will honor the 35th anniversary of the opening of our first trial offices. In addition to SPD staff, over 1,000 private attorneys represent clients who meet the criteria for SPD services. These private attorneys are certified to accept public defender appointments in conflict-of-interest and overflow cases. Through the combined effort of our staff and our partners in the private bar, the SPD represented clients in almost 140,000 new cases in the last fiscal year.

The SPD is one component of a very strong criminal justice system that also includes judges, prosecutors, law enforcement, corrections officials, and court personnel. I am proud to say that Wisconsin has a long tradition of supporting all parts of this criminal justice system, in spite of fiscal challenges. In the area of providing effective defense services to those unable to hire an attorney, we recognize the decision in *Gideon v. Wainwright* as an important and historic part of this tradition. ▶▶

“Through the combined effort of our staff and our partners in the private bar, the SPD represented clients in almost 140,000 new cases in the last fiscal year.”

Kelli S. Thompson



July 11, 2013

Evidence-Based Decision Making: The Increasing Use of Research in Our Criminal Justice System

There is a growing trend in the criminal justice field to integrate evidence-based decision making, or EBDM, into local justice systems. At its simplest, EBDM can be described as the practice of using what has been proven to work. It places the primary reliance upon current and sound research, rather than upon anecdotal information, guesswork, or solely the experience of an individual. While the use of evidence-based decision making is relatively new to the field of criminal justice, the health care industry has embraced EBDM for some time.

The promise of evidence-based decision making is that it produces more consistent and better outcomes, as confirmed by the underlying research. In the criminal justice system, the benefits include the implementation of policies and practices that meet the goals of maximizing public safety, reducing the risk of reoffending, more appropriately allocating limited resources, and reducing costs.

Wisconsin is at the forefront of the trend toward the introduction of EBDM into its criminal justice systems. Substantial efforts are underway to integrate evidence-based decision making into our local criminal justice systems. Both Eau Claire County and Milwaukee County are currently researching and applying the methodologies and processes of EBDM into their respective criminal justice systems. The National Institute of Corrections (NIC) has provided great support in these efforts: NIC honored Eau Claire County and Milwaukee County as two of three jurisdictions among a nationwide pool of candidates to receive full technical assistance grants focusing on EBDM. As recipients of two of the three awards, both Eau Claire and Milwaukee are receiving the highest level of technical assistance offered by NIC.

Eau Claire and Milwaukee have already seen practical impacts from the adoption of risk-assessment screening after an individual is arrested but before his or her first court appearance. Assessment tools help guide the court's decision on issues such as bail amount and conditions. Use of this information appropriately places defendants on a track that maximizes the benefits previously listed.

The integration of evidence-based decision making into our criminal justice systems requires a substantial

level of expertise and coordination. Both of these elements are reflected in the partnerships NIC has formed in Eau Claire and Milwaukee, specifically with the respective county criminal justice coordinating councils. EBDM has also had an impact on state policy makers, as evidenced by increased resources for treatment, diversion, and drug courts in the most recent state budget as well as the formation of Wisconsin's first Statewide Criminal Justice Coordinating Council.

All that is learned through these partnerships will help serve as a model for other Wisconsin counties and for other jurisdictions across our country.

July 19, 2013

The Continued Expansion of Treatment Courts in Wisconsin

Wisconsin was an early adopter of problem-solving, or treatment, courts. Starting with Dane County's Drug Court Treatment Program in June 1996, Wisconsin is now home to 56 operating treatment courts according to the Wisconsin Court System website. In addition to treatment courts that address drug addiction, our state also has treatment courts that focus on alcohol, mental health, veterans, and tribal wellness. Some are hybrid (or co-occurring disorders) courts. While most courts are operated by one county for cases arising in that county, we are starting to see regional courts that address offenders from multiple counties.

Treatment courts, as the name suggests, treat or solve an issue while still holding the offender accountable for his or her criminal activities. Removing an offender's addiction, for instance, decreases the likelihood that the person will reoffend in order to "feed" his or her addiction. Successful treatment can lead to a reduction in crime and recidivism while restoring an individual to have a greater opportunity to be a valuable member of the community.

One of the drivers behind the proliferation of treatment courts is the proven outcomes they are able to produce. In fact, according to a UW Population Health Institute study of treatment alternatives and diversion programs, communities received a \$1.93 return on each \$1.00 invested in these programs.

The treatment court model relies on a team-based approach to oversee and assist the individual to treat his or her addictions. Judges, prosecutors, defense attorneys, probation agents, law enforcement, and treatment providers all come together in a nonadversarial model

“The time, energy, and resources necessary to plan and operate [treatment] courts properly are a smart investment with significant benefits for individual participants, for public safety, and for taxpayers.”

to promote problem-solving responses tailored to each offender. Nationally, research shows that specific aspects of treatment courts, such as this team approach and the direct interaction between the participants and the presiding judge, help the courts achieve the goal of reducing recidivism.

The Statewide Criminal Justice Coordinating Council and the Wisconsin Association of Treatment Court Professionals are working to create state standards for treatment courts to facilitate implementation in counties that may lack the resources to start a specialty court but that could sustain it once started.

The documented success of treatment courts makes it likely that Wisconsin will continue to see the development of new courts of this nature. The time, energy, and resources necessary to plan and operate these courts properly are a smart investment with significant benefits for individual participants, for public safety, and for taxpayers.

July 26, 2013

The Role of Specialized Practice Groups in a Public Law Firm

The Wisconsin State Public Defender (SPD) has dual responsibilities: we are a large law firm and a state agency. Although there is overlap, each function has its own set of expectations and stakeholders, and we strive to achieve harmony between both roles. In this blog post, I am going to discuss an area where we achieve congruence by developing specialty practice groups.

From the beginning of the SPD, we organized ourselves based on specializing in appellate and trial work. The agency continues to maintain both of these general areas of practice, and we have identified additional specific practice areas: juvenile, forensics, termination of parental rights, racial disparity, immigration, and sexually violent persons (Ch. 980).

The SPD benefits in several ways. From a state agency perspective, specialty practice groups allow us to share specialized knowledge and expertise efficiently,

lessening the need for staff and private attorneys to “reinvent the wheel” in these complex practice areas. From a law firm perspective, specialization allows us to enhance the quality of legal representation provided to our clients statewide.

Each practice group is led by a coordinator. That person stays abreast of the latest developments in the practice area and shares this expertise as an advisor, mentor, and educator to other SPD practitioners. Coordinators serve as a clearinghouse of sorts as they assist others in quickly changing areas of legal practice. Staff contact them as needed when they are preparing a client’s case or have a question in a new or undeveloped area of the law.

Each coordinator pulls together practice materials, including motions, briefs, transcripts, case outlines, and research/articles/studies to share with practitioners. Coordinators keep track of the legal nuances and mundane details in their practice areas and catalog them for easy dissemination to attorneys when requested. They assist with the agency’s training efforts, including presenting at the annual conference. Some coordinators conduct or assist with expert examinations at motion hearings and trials. The coordinators also assist private bar attorneys with their questions related to the respective practice areas.

Cases involving clients charged as sexually violent persons typically involve a number of very intricate and arcane actuarial statistics. A practitioner who only occasionally takes such cases would find it challenging to build the expertise needed to work with statistics. In this example, the Ch. 980 practice group assists the attorneys with training in these math and statistical elements. Similarly, the forensics coordinator helps others with the technical aspects of this practice area. In fact, as I write this post, the coordinator for our forensics practice group is assisting in a jury trial by focusing on the forensic elements of the case.

As the agency continues to utilize such specialties, we will, as necessary, change and adapt to the ever-evolving and changing field of criminal justice in Wisconsin. ■



Tracey Klein: Leading Through the Art of Governance

What do you get when you cross a lawyer whose specialties include corporate governance with an arts lover?

You get Tracey Klein, chair of the governance committee of Milwaukee's Skylight Music Theatre, chair of the governance committee of the Milwaukee Film Festival, and former board member for the Sharon Lynne Wilson Center for the Arts in Brookfield, Wis.

Add to that: cabinet member of United Way of Greater Milwaukee, former member of the board of the Elmbrook Swim Club, past president of TEMPO Milwaukee (a professional women's organization), former board member of the American Red Cross-Milwaukee Chapter, current member of the Wisconsin First Lady Advisory Council, American Lung Association of the Upper Midwest Volunteer of the Year for 2012 (along with her husband, Rick). The list goes on.

But stick to the arts for the moment: Klein says she loves musicals, she loves film—she loves being in touch with “the creative sides of the world.” You're not going to find her on stage, but she is committed to using her own talent and abilities to help arts organizations operate effectively.

It is a skill that comes from her day job. Corporate governance is one aspect of Klein's practice at the Milwaukee firm of Reinhart Boerner Van Deuren, where she is co-chair of the health care practice, chair of the hospital and health care systems group, and co-chair of the government relations group. In other words, she has developed a successful career specializing in clients in the health industry.

“It's been a tremendous specialty to be involved in,” Klein says. What's good about it? She gives two answers: Almost all of the clients are nonprofits, “mission-driven clients who are trying to do the right thing.” And she finds a lot of variety in the issues she works on—employee matters, transactions (including multimillion-dollar construction projects), contracts, and issues around patient treatment.

It's also the kind of specialty that has allowed her to live what she calls a balanced life—mother of two children (both in their 20s now), committed community volunteer, and someone with enthusiasm for many interests.

Klein's career and life could have taken a much different direction. She grew up in Delafield, Wis.,

and graduated from the University of Wisconsin-Madison with a degree in political science and a passion for politics. She worked as an aide to two Republican members of the Wisconsin Assembly and, for a year after college, as a staffer for the Wisconsin Republican Party. She wanted to pursue a career in politics and decided that a law degree would help.

That led Klein to Marquette Law School, where her involvements included an internship with the late Judge John Coffey of the U.S. Court of Appeals for the Seventh Circuit. Coffey advised her to be a lawyer first and a politician later. She graduated from the Law School in 1984 and took his advice. Klein is glad she did. She still has strong involvement as a political volunteer, but her legal career is bringing her satisfaction.

Klein says she is fortunate to have clients who want to hear not only advice on legal aspects of an issue, but counsel on what is the right thing to do. For example, she alludes to a situation at a hospital in another state where one doctor had a mixed track record in performing a particular procedure. She explains that she was able to help leaders of the hospital keep the interests of the patients at the top of their priorities in deciding how to deal with the situation.

“There are some moments when I think, ‘I’m going to make a difference here,’” Klein says. The evidence is considerable that that is an understatement. ■

1967

Wayne Brogelman has been elected to the board of directors of Historic Fraser, Inc., in Fraser, Colo., which hopes to acquire part of a ranch regularly visited by President Dwight D. Eisenhower and to open it as the Eisenhower Western White House and Heritage Center.

1970

Brian T. O’Connor received the Arbitrator of the Year Award from the Better Business Bureau serving Chicago and Northern Illinois at the group’s annual meeting. Since being certified in 2011 as a Better Business Bureau Auto Line Arbitrator, he has arbitrated more than a dozen Auto Line cases, in addition to other consumer matters.

1972



Terrence P. Cahill received the M Club Hy Popuch Memorial Service Award from the Marquette University Department of Intercollegiate Athletics in an April ceremony at the Al McGuire Center.

Michael F. Hupy recently celebrated more than 40 years of providing legal services when his firm, Hupy & Abraham, opened offices in Iowa (Des Moines, Cedar Rapids, and the Quad Cities). Hupy’s philanthropic interests include tuition support at St. Marcus School in Milwaukee.

1976

Mark S. Young has been appointed president of After Breast Cancer Diagnosis, a nonprofit organization providing free support to Milwaukee women affected by breast cancer and to their families. Young is a shareholder in the Milwaukee office of Habush Habush & Rottier, focusing on personal injury cases.

1981



Kay Nord Hunt was presented with the Distinguished Alumni Citation from Gustavus Adolphus College by Barry O’Neil, a fellow Adolphus alum and colleague at the Minneapolis law firm

Lommen Abdo. Hunt is only the 11th person in the area of law to receive the award in its 58-year history.

1983

Paul T. Dacier has been elected president of the Boston Bar Association for the year beginning in September.



Francis D. Schmitz has retired from the U.S. Department of Justice after 29 years. During most of that time, he served as an assistant U.S. Attorney in Milwaukee; he also served for five years in

the department’s National Security Division in Washington, D.C. He has entered the private practice of law in Waukesha, Wis.

1984



Philip R. O’Brien was recently appointed to the Professionals Committee of the International Foundation of Employee Benefit Plans (IFEBP). This

team of 16 professionals across the United States consists of accountants, actuaries, consultants, and attorneys representing the industries and crafts of the IFEBP’s professional members. O’Brien is a shareholder in the Milwaukee office of Reinhart Boerner Van Deuren and a member of the Taft-Hartley group in the firm’s employee benefits practice. ▶▶

1986

Kathryn A. Keppel was recently recognized for her "Outstanding Community Service" by Centro Legal, an organization that provides affordable legal services to low-income individuals in Milwaukee. She is a partner with Gimbel, Reilly, Guerin & Brown in Milwaukee.

1987



Captain Robert Blazewick, U.S. Navy, has been appointed as circuit trial judge for the Navy-Marine Corps Southern Circuit in Jacksonville, Fla. He graduated from the

56th Military Judges' Course on May 3 in Charlottesville, Va., and transferred to his new service from his position as a professor of international law at the George C. Marshall European Center for Security Studies in Garmisch, Germany.

Barb O'Brien is vice-president/president-elect of the Marquette Law Alumni Association Board for the 2013–2014 academic year.

1988

Timothy Reardon has been elected president of the Marquette Law Alumni Association Board for the 2013–2014 academic year.

Paul A. Milakovich has been elected chairman of the board of the Cream City Foundation in Milwaukee. He is associate vice president for University Advancement at Marquette University.

1990

Kelly Centofanti recently completed her term as president of the Marquette Law Alumni Association Board.

Jeffrey A. Pitman, Pitman, Kyle, Sicula & Dentice, has been admitted to the New Mexico Bar.

1991



Ruth A. Pivar has joined the Chicago office of Quarles & Brady. She is of counsel to the firm's trusts and estates practice group, where she advises clients in the areas of transfer tax, charitable

giving, dependent parent/child planning, insurance, and retirement planning.

1993

Kimberly Kolch and her husband, Juan José Cantarero, welcomed a son, Carlos David, on January 24.

1994

Christine E. Woleske, executive vice president of Bellin Health, was featured in "20 Women to Know," a story in the August edition of *You Magazine*, published by the *Green Bay Press-Gazette*. She has been with Bellin since 1998, first as a compliance officer and then as vice president and general counsel before her current role.

1995

Ivanyla (Vanny) Vargas has been appointed as the director of labor relations for Orange and Rockland Utilities, an affiliate of Con Edison, Inc., serving New York, New Jersey, and Pennsylvania.

1998

Stephen J. Beaver is the new senior vice president and general counsel of Aspect Software, Inc., in Phoenix, Ariz.

2001



Michael Maxwell was appointed by Governor Scott Walker and unanimously confirmed by the Wisconsin Senate to serve on the State Public Defender Board.

Robert R. Gagan, Calewatts, Duffy & Gagan, in Green Bay, is the new president-elect of the State Bar of Wisconsin.



SUGGESTIONS FOR CLASS NOTES may be emailed to christine.wv@marquette.edu. We are especially interested in accomplishments that do not recur annually. 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.

Dan Abelson: A Plot Line of Public Service



Tell a compelling story. Dan Abelson has always wanted to do that.

He thought his passion would lead him into filmmaking, and he enrolled in a college—Emerson College in Boston—that was famed for its arts programs. He worked on some films, but as a career, the film industry looked unattractive. He decided to channel the storytelling impulse in different directions.

The result: He's building chapters in a compelling story of public service in the Minneapolis-St. Paul area, where he grew up.

The plot turned first to computer programming. While at Emerson, Abelson learned some computer programming, and after graduating in 1997, got a full-time job in the Milwaukee area. "The work was boring as all get out," he recalls. Not such a compelling story. He could see that it was not a long-term job for him.

He considered getting a master's in business administration, but he regarded that as involving more math than he preferred. A law degree—that would be a better turn in the plot, he decided. "You can do a lot of things with a law degree," he says.

And a career in law could fit his core interest. "Whether you are making a film, writing a brief, or trying a case," he says, "you are telling a compelling story."

The plot took Abelson to Marquette Law School. It had him marrying his girlfriend, Alissa, in 2002. She has both undergraduate and master's degrees in psychology from Marquette. Dan graduated from the Law School in 2003 and accepted a clerkship with the Minnesota Supreme Court, which meant he could return to the Twin Cities. "This is where I really wanted to be," he says.

After clerking for two Supreme Court justices (including Alan Page, a member of the Pro Football

Hall of Fame), Abelson joined a midsized private firm, where the stories mostly involved construction matters. The next turn in the plot: Taking a position with the Minnesota attorney general's office for some five-plus years, working on civil cases, where (in an amusing twist) people thought he liked math and involved him in cases such as a large consumer protection suit over annuity products for senior citizens. Abelson also specialized in cases of accidents involving snowplows. "Let's just say that, in Minnesota, you won't win in the physical sense and you won't win in the legal sense, if you get in an accident with a snowplow," he says.

In 2011, the story took a turn he is finding rewarding: Abelson became associate general counsel at the Metropolitan Council, the regional government agency that operates the transit and wastewater systems in the Twin Cities and sets policy on matters including transportation, regional growth, affordable housing, and parks.

The compelling stories he tells now involve a range of issues, including environmental protection and transit, that Abelson sees as part of a tale of sound public policy.

Dan and Alissa have a son, Zach, 6, and a daughter, Georgia, 4. Zach in particular has brought out their storytelling passion. He was born a month and a half premature at Regions Hospital in St. Paul. Things turned out well, and the Abelsons have become supporters of the hospital and have told others of their experiences.

Does Abelson still do anything with movies? "Not much these days," he admits. "I rarely even watch movies because you don't have time with the kids. But I do enjoy photography." Which, of course, is one more way to tell compelling stories. ■

Carol I-Ping Tsao: Learning as Pleasure



If you want a good sense of the term “lifelong learner,” think of Carol I-Ping Tsao. You could have asked her at any stage of her life, including now, what she was learning, and she would have an ambitious answer.

Tsao has a bachelor’s degree from Northwestern University and a medical degree from the University of Illinois College of Medicine. She completed her internship in internal medicine at Loyola University in Chicago and came to Milwaukee to do a residency in psychiatry at the Medical College of Wisconsin. While building a successful career in psychiatry, she “decided it was time to learn something new.”

That something was the law. While still practicing full-time as a physician, she enrolled in the part-time program at Marquette Law School. “I loved being a student at Marquette Law School,” she says. After six years, she graduated in 2005.

A tenured full professor in the Department of Psychiatry and Behavioral Medicine at the Medical College of Wisconsin, Tsao has never practiced law in a conventional sense but says that the educational experience has been valuable to her.

Tsao has two major professional roles now. She is an attending psychiatrist at the Clement J. Zablocki Veterans Administration (VA) hospital in Milwaukee, a teaching hospital affiliated with Medical College of Wisconsin. And she directs the medical student psychiatric education program at the school.

At the VA hospital, Tsao supervises the care of hospitalized patients on the locked inpatient psychiatry unit, the unlocked inpatient psychiatry unit, and the consultation liaison service. She also performs electroconvulsive therapy, a procedure she says is useful in dealing with some who have major depression, bipolar disorder, and catatonic syndrome.

Where does her law degree fit into her medical work? Tsao notes that it has opened doors to certain opportunities that might not have otherwise presented themselves, including teaching bioethics, membership on the Medical College of Wisconsin’s institutional review board, and the occasion to assist attorneys representing the VA in tort claims involving psychiatrists. But mostly she values her legal education for broader reasons.

“My legal education helps me be a better physician,” Tsao says. It provides “a different lens” to help her solve problems. “One can borrow the best of one profession and import it for use in the other.” Compared to medical education, she observes, “legal education emphasizes verbal skills.” Learning to write briefs in law school improved her analytic and writing abilities. In addition, she says, legal education emphasizes how to distinguish and differentiate while medical education emphasizes how to bring disparate things together. Both are useful in solving problems.

So was law school worthwhile? “Absolutely,” she says. “I would do it again in a heartbeat.”

Though she maintains a close relationship with Marquette Law School, Tsao is involved in other community activities and learning experiences. She is an ordained deacon and elder in the Presbyterian Church and is currently serving on the governing board of Immanuel Presbyterian Church in downtown Milwaukee. She and her partner, a child psychiatrist and psychoanalyst, have an eight-year-old daughter. Together, the family studies tae kwon do at JK Lee Black Belt Academy, Fox Point, during the week and boats during weekends. Tsao and her daughter are both taking piano lessons at the Wisconsin Conservatory of Music. Of tae kwon do, boating, and piano, she says, “It’s for pure pleasure.” For that matter, she adds that “in many ways, so was law school”—the pleasure of learning and conquering new realms. ■

Mollie Newcomb has joined the legal department at Milwaukee Electric Tool Corporation in Brookfield, Wis.

2003

Kirk L. Deheck has been elected shareholder at Boyle Fredrickson in Milwaukee. He focuses his practice on the preparation and prosecution of patent and trademark applications.



Amalia L. Todryk, a partner in Quarles & Brady's Milwaukee office, has been designated chair of the estate & trust section of the Milwaukee Bar Association.

John Schulze has been appointed as chief legal counsel for the Wisconsin Department of Transportation.

2005

Anthony Cotton and his wife, Laurel, announced the birth of their first child, Dominic Anthony, on May 8.

Jessica Johnson and **Nathan Michalski** welcomed their son, Wesley William Michalski, on June 14.

2006

Anthony J. Anzelmo has joined Whyte Hirschboeck Dudek in Milwaukee as a member of the litigation practice group. His experience includes personal injury, product liability, construction defect, and professional liability defense.

Steven C. McGaver, of Gimbel, Reilly, Guerin & Brown, was elected secretary of the Milwaukee Young Lawyers Association.

Joseph LaDien has joined Davis & Kuelthau's Milwaukee office, focusing his practice on corporate and commercial real estate.

2007



Steven M. DeVougas, of Hinshaw & Culbertson, has been named to Lawyers of Color's inaugural "Hot List," which includes 100

early- to mid-career minority attorneys under 40 from the Midwest region.

2008

Thomas E. Howard has been appointed to the standing committee on mental health law of the Illinois State Bar Association during 2013–2014. He is in the Peoria, Ill., office of Howard & Howard, a full-service firm with a national and international practice providing legal services to businesses and business owners.

2010



Alyssa D. Dowse has joined the Milwaukee office of Quarles & Brady as an associate in the firm's labor and employment law practice group. She previously was with von Briesen & Roper.



Jennifer M. Jackson has joined Quarles & Brady's Milwaukee office as an associate in the corporate practice services group. Previously she practiced at

Wilson Elser Moskowitz Edelman & Dicker.

2011

Emily I. Lonergan, Milwaukee, was recognized by the State Bar of Wisconsin for her "Exemplary Performance as a Mock Trial Coach" with the Professional Learning Institute High School's mock trial team. She is an attorney at Gimbel, Reilly, Guerin & Brown, practicing in both civil and criminal litigation.



Amanda Pirt, of Hupy & Abraham, has been appointed vice-chair of the tort, trial and insurance practice committee of the American Bar Association's Young Lawyers Division.



Kristin M. Kaminski recently was admitted by bar examination to the practice of law in California. She joined the Nevada bar in 2011 and has since practiced

in trust and estate administration with Anderson, Dorn & Rader, in Reno, Nev.

2012

Eric V. C. Jansson has joined Jansson Munger McKinley & Shape in Racine, Wis., as an associate. Before law school, he was a journalist covering business and related political affairs in central and eastern Europe.



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THE SEVENTH CIRCUIT COMES TO MARQUETTE TO REMEMBER A COLLEAGUE

On April 17, 2013, nine judges of the U.S. Court of Appeals for the Seventh Circuit came to the Appellate Courtroom in Marquette Law School's Eckstein Hall, to hold a memorial ceremony for their late colleague, Judge John L. Coffey, L'48. Here, the judge's son, Peter Coffey, L'84, addresses the court and the audience of more than 200 individuals. After the ceremony, for another rare event, three of the judges—Chief Judge Frank H. Easterbrook, Judge Diane P. Wood, and Judge Diane S. Sykes, L'84—heard oral argument in three appeals from federal district courts in Wisconsin, with an overflowing crowd of law students, lawyers, and interested members of the community looking on.

