


MARQUETTE LAWYER

MARQUETTE UNIVERSITY LAW SCHOOL MAGAZINE SPRING 2015

A close-up portrait of Judge Paul J. Watford, a man with short dark hair, wearing a dark suit jacket, a light blue dress shirt, and a patterned tie. He is looking directly at the camera with a slight smile. The background is a blurred interior space with warm lighting and architectural details like columns and windows.

Judge Paul J. Watford on the Birth of Federal Civil Rights Enforcement

ALSO INSIDE:

Bob Scott Takes on Williston and Corbin—and
Macaulay, Whitford, and Triantis Engage with Scott

The Challenges Facing Catholic K–12 Education

Nine Marquette Professors on Hot Issues in Sports Law

How It Ought to Be, as I See It

The subtitle of our recent “Campaign Finance Regulation in Wisconsin” conference might have surprised some. That subtitle read “The Law as It Was, Is, Should Be, and Will Be,” and I refer to the “Should Be” component. Marquette University Law School is not in the habit of taking positions on contested public policy matters. Nor did we here, and in fact the subtitle is explained easily: Part of the conference involved two nationally prominent guests, Alan B. Morrison and Bradley A. Smith, engaging in a debate or exchange concerning what, in the different estimation of each, the law of campaign finance should be.



But a larger point—specifically, the Law School’s role in policy debates—merits some further observations. Let us begin by focusing on this *Marquette Lawyer* magazine. The cover story (pages 8–19) reflects Judge Paul J. Watford’s visit from southern California last academic year to deliver our annual E. Harold Hallows Lecture. This was not direct engagement with—indeed, it anteceded—the events

in Ferguson, Mo. Yet in considering the origins of involvement by the U.S. Department of Justice in enforcing civil rights, the article sheds light on some of the challenges that the law and society still face in this area. The accompanying comment (pages 20–21) by two Marquette University colleagues adds another dimension to the reflection.

The following article (pages 22–29) builds on a conference that the Law School convened this past fall: “The Future of Catholic K–12 Education: National and Milwaukee Perspectives.” Here, again, as with the campaign finance conference and the Hallows Lecture, we gathered subject-matter experts from both afar and nearby. These participants variously included a pair of Notre Dame law professors whose book had helped engender our idea for this conference, East Coast policy-shapers, and individuals deeply involved in Catholic K–12 education in Milwaukee on a daily basis. Marquette Law School also will make a unique contribution with a national survey later this year on

attitudes toward Catholic K–12 education, under the auspices of the Marquette Law School Poll (about which a brief article appears on page 4).

Robert E. Scott’s 2014 Robert F. Boden Lecture (pages 30–47) is another example of our approach. Professor Scott has worked out a theory of contract law. Marquette Law School does not proclaim him to be correct. In fact, we open these pages to brief suggestions that Scott does not get it all right; these partial dissenters include one of his coauthors, from Stanford Law School, and two renowned University of Wisconsin law professors emeriti. These latter colleagues in the Wisconsin bar and the academy had traveled to Milwaukee from Madison to attend the lecture itself.

And here it makes sense to move from this magazine, although it contains much else, to a larger point about Marquette Law School. When I stood on Tory Hill, now the site of Eckstein Hall, to help announce Joseph J. Zilber’s \$30 million gift to the Law School in 2007, I said that we wanted people to say of Marquette Law School, “That’s where you take the hard problems, the ones that affect us all.” Since then, we have done many creative things to help realize that bold aspiration. Some sense of our extraordinary progress came in fall 2010, when the *Milwaukee Journal Sentinel* referred to Eckstein Hall as “Milwaukee’s public square,” but we have done much even since—and have bigger expectations yet.

So you won’t find Marquette Law School itself declaring “the truth” about many public policy topics. Such is not our role. But whether it is in the *Marquette Lawyer* magazine, the pages of the *Milwaukee Journal Sentinel* in recent years (some of its reporters have served as Lubar Fellows for Public Policy Research at the Law School to explore in depth important public policy topics), our distinguished lectures, the “On the Issues with Mike Gousha” series, political debates, topical conferences, or articles by law faculty, one can find civil, intelligent, and (often) contrasting discussion of matters of law and public policy by students, faculty, lawyers, judges, academics from other institutions—indeed, as I said that day in 2007, “all engaged citizens, really.” And *that’s* how it should be.

Joseph D. Kearney
Dean and Professor of Law

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No Horse Race? No Problem, as Marquette Law School Poll Focuses in 2015 on Policy Issues

The Marquette Law School Poll has been hailed across the country for its extraordinary accuracy over multiple primaries and elections, as recently as the November 2014 election. But Charles Franklin welcomes an odd-numbered year such as 2015 less as a lull than as an opportunity to dig more deeply into issues.

“Absolutely! Life does go on between elections,” said Franklin, the school’s professor of law and public policy and director of the poll. “We have important policy issues, including the state budget, here in Wisconsin. And we are also pursuing some special projects.”

Although news media coverage of polling tends to focus mainly on the “horse race”—who is leading in high-profile elections—the Marquette Law School Poll has always been about more than that for Franklin and Mike Gousha, the Law School’s distinguished fellow in law and public policy.

“There’s a natural tendency to fixate on the horse race numbers,” Gousha said. “But every poll contains a lot of different subject matters, and we poll on many, many different questions in virtually every poll we do. So I think this does allow people to focus on things other than the horse race, and it allows people to get a sense of the questions we’re asking on a pretty regular basis.”

The Law School is pursuing two special projects in 2015: a poll on public attitudes toward regional economic cooperation across Milwaukee, Chicago, and northwest Indiana (the “Chicago Megacity,” as it is sometimes termed) and a national survey on perceptions of Catholic K–12 education. Both grow out of conferences that Gousha, together with Dean Joseph D. Kearney and with support



Charles Franklin and Mike Gousha

from the Law School’s Lubar Fund for Public Policy Research, convened at the Law School in recent years.

To be sure, even in 2015 the horse race is part of the poll. This includes keeping an eye on early developments in the race for president, especially with Wisconsin’s Gov. Scott Walker shaping up as a major Republican candidate.

“How the public comes to see the candidates, the potential presidential contenders, I think is right in the middle of the kinds of questions that we’re always interested in,” Franklin said. “If Governor Walker does get into the race, that will add another element of local interest to it, but we would explore it in any event.”

Gousha urged the creation of a poll shortly after coming to the Law School in 2007, but it was not until 2011 that the idea gained traction when he found the right partner. He acknowledges that the Marquette Law School Poll’s success and acclaim have exceeded anything that he anticipated. “I’m really grateful to Charles Franklin,” he said. “If he weren’t so good, I’d be in trouble with the dean.” ■

2014	Final MU Law Poll Margin	Result Margin	Difference
Wis. Governor	Scott Walker +7%	Walker +5.7%	1.3 points
Wis. Attorney General	Brad Schimel +4%	Schimel +6.2%	2.2 points
2012			
U.S. President	Barack Obama +8%	Obama +6.9%	1.1 points
U.S. Senate	Tammy Baldwin +4%	Baldwin +5.5%	1.5 points
2012			
Wis. Governor recall	Scott Walker +7%	Walker +6.8%	0.2 points

“Guiding Hands” Bolster Skills and Confidence of First-Year Students

It's not that hard to get into law school, Joe Poehlmann says. But once you're there—well, especially in the first semester, it can seem a challenge to get on a successful path. In particular, what's expected of a student is much different from undergraduate work. And who has more recent experience with the transition than upper-level students?

“It helps to have a guiding hand, even apart from the faculty,” Poehlmann says. He benefited from such help as a first-year student. And as a second-year student, he has provided it as one of the presenters in Marquette Law School's innovative Supplemental Success Program (SSP).

The program is part of the Law School's broader Academic Success Program (ASP), which offers students several voluntary ways to improve their opportunities to succeed in law school and the profession. A core part of ASP is a series of sessions outside of class time in which upper-level students, functioning in the nature of teaching assistants, help first-year students understand the content of their courses. It is similar to programs to boost academic success at many law schools. Individual tutoring in legal writing for some students and the opportunity for one-on-one academic counseling sessions are also part of ASP, as is true at a number of law schools.

The more distinctive Supplemental Success Program focuses not on the specific content of classes but on skills and coping mechanisms for students as they deal with the challenges of law school.

For example, Anne-Louise Mittal, an SSP presenter in the 2014–2015 year, says that many students don't know from their undergraduate years an effective way to take and maintain notes. In one of the SSP sessions, Mittal showed how she does that and offered advice.

Much of law school course work is bound up in final exams, says Ashley Sinclair, who also was an SSP presenter. How to deal with exams was one of her subjects. SSP “prepares you to know what to expect,” Sinclair says.

Rachel Mather, another SSP presenter, says, “It's nice to hear someone say, ‘This is how I do it.’ We're helpful in laying the groundwork.”

Matt Parlow, associate dean for academic affairs, and Amy Rogan-Mehta, director of student development and academic success, say that participation in both ASP and SSP is voluntary, but about 80 percent of first-year students take part.

At the opening session in August 2014, Parlow told students, “Without a doubt, going to ASP, you will learn more than if you don't go to ASP.” And the same is true, he said, for SSP.

The critical tools necessary for success as a lawyer involve not only the content taught in a course but also the ways to deal with the day-to-day demands of being a lawyer, Parlow said.

At that session, Rogan-Mehta said, “No matter what kind of attorney you become, you're going to need to be able to talk about the law. You're going to need to answer questions, and you're going to have to think on your feet.”

Those skills may not be in the title of any individual class. But learning them has become an important component of the development of lawyers at Marquette Law School even outside the formal course work. ■



Amy Rogan-Mehta (second from left) is joined by Supplemental Success Program leaders (from left) Ashley Sinclair, Joe Poehlmann, Anne-Louise Mittal, and Rachel Mather. Rogan-Mehta is the Law School's director of student development and academic success.

Hammons Named to Lead New Entrepreneurship Clinic

Entrepreneurs can face a wide variety of challenges, from the basics of forming a business entity to the details of obtaining licenses and permits. A new resource from Marquette Law School offers help.

The Law and Entrepreneurship Clinic is the first program in the Milwaukee area to offer free legal services to start-up businesses and entrepreneurs; its focus is on clients who cannot afford qualified legal counsel.

The clinic will be staffed by law students under the supervision of Nathan Hammons, a new clinical faculty member and director of the clinic. Hammons previously served as an adjunct professor while operating a private practice focused on tech start-ups.

“I’m honored to be a part of the Marquette community and excited to help launch the clinic,” Hammons said. “The clinic will help train students to become top-notch business attorneys, while giving them yet another outlet to answer the university’s call to serve others and enhance our community.”



Marquette University President Michael R. Lovell, left, and Professor Nathan Hammons

The clinic advances the vision of Marquette President Michael R. Lovell, who has called upon the campus community to embrace innovation and entrepreneurship.

“The Law School was quick to respond to that call,” Lovell said. “Entrepreneurs always need more time to spend on their ideas and innovations, which is exactly what the Law and Entrepreneurship Clinic will enable them to do. In return, our students will learn how to have a direct impact on the next wave of start-ups. Together, we’ll advance the region’s reputation as a place where great ideas become great realities.” ■

Greenberg Wins Sports Law “Master of the Game” Award

A few years after he helped found the Law School’s National Sports Law Institute (NSLI) in 1989, Martin J. Greenberg was searching for a way to honor a friend for his contributions to the sports industry. With brainstorming help from his wife, Greenberg eventually settled on the idea of creating the NSLI’s Master of the Game Award.

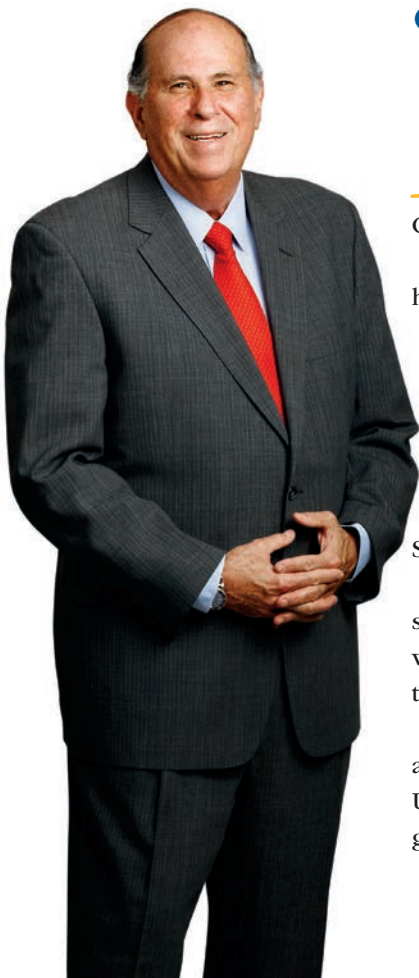
“The award is special because my wife and I created it,” Greenberg says. “And the first honoree was Al McGuire, who was a good friend of mine.”

The most recent honoree: Greenberg himself, who received the award as part of the NSLI’s 25th-anniversary celebration. Greenberg dedicated the honor to the students he has interacted with over the years, many of whom he introduced at the awards ceremony.

Greenberg no longer runs the National Sports Law Institute, as in its early days, but remains active in the Law School. He brings real expertise: his law office specializes in real estate and sports law—two subjects that he has taught as an adjunct professor at the Law School for some 40 years.

A quarter century ago, Greenberg encountered skepticism about sports law as a serious academic subject. Today, the public attention to legal aspects of the sports world—together with the job opportunities for attorneys in the industry—shows how times have changed.

“The program has grown tremendously, through the efforts of Professors Matt Mitten and Paul Anderson,” Greenberg says. “And it is the very best sports law program in the United States. To have been part of that at the beginning and throughout has been a great joy for me.” ■



Proud Albanian, Proud American, Law School Standout

Xheneta Ademi has two cultural identities.

“I’m Albanian,” she says—as Albanian as the language spoken in her home, as the traditions her family observes, and as the places she lived during the first 14 years of her life.

“I’m American,” she says—as American as her citizenship, as her diplomas from Manitowoc High School and the University of Wisconsin–Stevens Point, and as the hamburgers served in her family’s restaurant.

“I belong to both places, and I embrace both places,” says Ademi. That’s what her parents have urged her to do—respect and take part in both of the cultures that shape her life. She agrees with them.

More recently, there’s a third “culture” that has shaped Ademi’s life—Marquette Law School. As she heads toward graduation this spring, Ademi is completing a growth process that took her from being a struggling first-year law student to president of the Student Bar Association.

“I’m really glad I came here,” Ademi says. “It has helped shape me into the person I am today.”

But first Albania. Xheneta (pronounced *Je-ne-tab*) remembers her childhood as “a blast,” offering close-knit communities where everyone knew each other and there were lots of kids to play with. While parts of the Balkan region were



Xheneta Ademi

violent and unstable during Ademi’s 1990s childhood, she says that she was never exposed to that directly. In addition to Albania, her family lived in places including Turkey, Kosovo, and Serbia.

During those early years, her father lived in the United States, although he came back to the Balkans frequently. About 25 years ago, he and one of his brothers were living in Chicago, and they liked to go for long drives, Xheneta says. On one of those trips, they saw a restaurant for sale in Manitowoc, about 80 miles north of Milwaukee. They bought it. They continue to operate that family restaurant today.

When Xheneta was 14, the family joined her father in Manitowoc. Xheneta, then in eighth grade,

knew almost no English, and the culture was very different. But she adjusted quickly. “I was forced to speak English, and I think that really helped me,” she says. “It took a while for me to feel comfortable and make friends.”

She did well in college in Stevens Point, but she says that she didn’t need to study much. That didn’t work at Marquette Law School. She struggled in her first semester, but she remained determined: “I’m not the kind of person who’s going to give up.” She committed herself to succeeding—and she has.

“Law school built me into a fundamentally different person, for the better,” she says.

In her role as Student Bar Association president, Ademi has been active in helping launch a mentoring program that partners first-year students with upper-level students. Involvement in the bar association has helped her develop her own professional skills, she says.

Ademi has developed an interest in intellectual property law, and she hopes to focus on that in her career. She credits Professor Kali Murray as a mentor.

Now 25, Ademi says that her parents supported her in getting a good education. But their broader advice is a continuing gift: “Work hard every day, and you’ll be okay.” ■



SCREWS V. UNITED STATES AND THE BIRTH OF FEDERAL CIVIL RIGHTS ENFORCEMENT

HON. PAUL J. WATFORD

I. INTRODUCTION

The subject of this lecture is a remarkable but relatively obscure case called *Screws v. United States*, which was decided by the U.S. Supreme Court in 1945. It's a case involving police brutality in which the victim was killed. The federal government prosecuted the officers after the State of Georgia refused to do so.

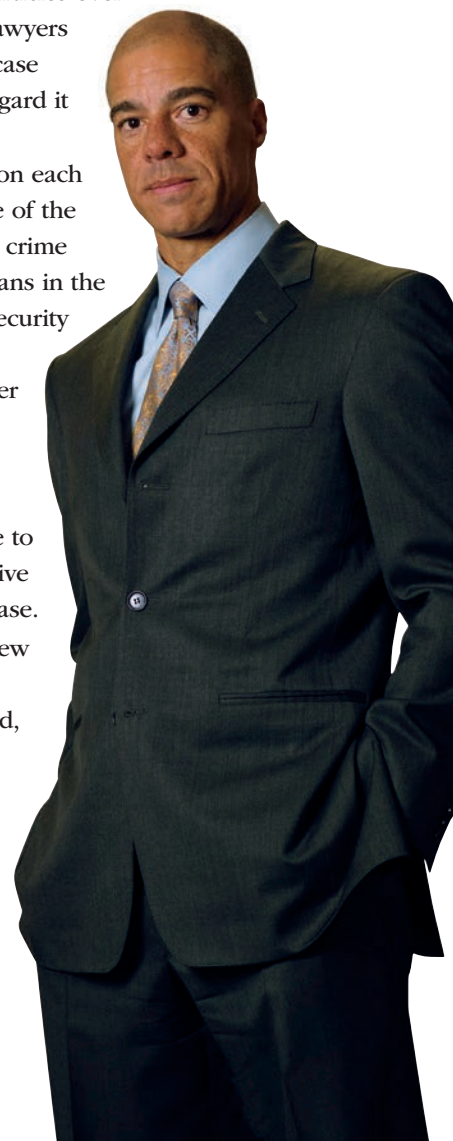
I say the case is relatively obscure because it hasn't been totally forgotten—it makes a brief appearance in federal courts casebooks, and it has received star billing in a smattering of law review articles over the years. Certainly, federal prosecutors who bring police brutality cases, and defense lawyers on the other side, are familiar with the decision. My goal in this lecture is to make the case that *Screws* deserves greater recognition and attention than it has thus far received. I regard it as one of the more significant civil rights decisions the Supreme Court has issued.

There are several things that make the *Screws* case a remarkable one, and I'll touch on each of them during this lecture. First, the case is remarkable because of the shocking nature of the crime involved. The almost nonchalant manner in which the defendants carried out the crime provides a window into what life was like on a day-in, day-out basis for African Americans in the South, particularly from the end of the Civil War until the 1960s. The lack of personal security from violence at the hands of white citizens, whether police officers as in *Screws* or private individuals, was an ever-present reality. The events in *Screws* are a stark reminder of that fact.

Second, the fact that the *Screws* case was prosecuted at all is remarkable. It took a unique confluence of factors to make that happen in 1943, and the history behind the events leading up to the *Screws* decision is fascinating in and of itself. I won't have time to do anything more than scratch the surface of that history in this lecture, but I'll try to give at least some flavor of the rich historical narrative that lurks in the background of the case.

And finally, the *Screws* case is remarkable for the legacy it has left, one that in my view is largely unappreciated. Had *Screws* come out the other way and been decided against the federal government, federal civil rights enforcement would have been stifled. Instead, it was given new life, and that helped change the course of history, particularly in ▶▶

Paul J. Watford is a judge of the U.S. Court of Appeals for the Ninth Circuit. Before taking the bench, he was a lawyer in private practice and in government service in Los Angeles and previously served as a law clerk for Justice Ruth Bader Ginsburg of the United States Supreme Court. This is a lightly edited version of Judge Watford's 2014 E. Harold Hallows Lecture at Marquette University Law School. A longer version, including notes, appears in the fall 2014 issue of the *Marquette Law Review*.



the South, in the second half of the twentieth century. I'll return to these points toward the end of the lecture.

II. THE FACTS OF SCREWS

Let me start by sketching out the basic facts of the *Screws* case. Who was Screws? Screws was M. Claude Screws, sheriff of Baker County, Georgia. Baker County is a small county in southwest Georgia, viewed by some at the time as one of the most backward counties in the state. All of the action in the case occurred in a small town called Newton, the county seat. Newton had a population at the time of maybe 300 people—definitely one of those small towns where everyone knows everyone else.

Sheriff Screws knew the victim in the case, a thirty-year-old African-American man named Robert Hall, quite well. In fact, he had known Hall all of Hall's life. Screws described Hall as a "biggety negro," someone to whom others within the local black community looked as a leader of sorts. At the time, in large areas of the South, that alone might have made Hall a target for violence, either by local law enforcement or groups such as the Ku Klux Klan intent on maintaining white

into the matter and later told Hall's father that Hall would need to get a court order authorizing return of the pistol. Undaunted, Hall appeared before the local grand jury and asked it to compel Screws to return the pistol. The grand jury lacked the power to do that, but it did call Screws to testify so that the sheriff could explain his actions. That would have been bad enough, but Hall then retained a local attorney to help him get his pistol back. The attorney sent Screws a letter addressing the apparently wrongful seizure of the gun.

The attorney's letter might have been the straw that broke the camel's back. Either the day Screws received the letter or the following day, Screws told several Newton residents he was going to "get" Robert Hall.

Screws began the evening of January 29, 1943, at a local bar. Around midnight, he sent two officers to Hall's house to arrest him on charges of stealing a tire. (All indications were that Screws had forged the arrest warrant, although that wasn't proved conclusively at trial.) According to Hall's wife, the officers handcuffed Hall before they placed him in the patrol car.

The officers then drove Hall to the town square, in front of the courthouse, where Screws was waiting. The

When the officers were finished, they had crushed the back of Hall's skull and left a pool of blood three feet by four feet in the middle of the town square.

supremacy. Targeting those who had the audacity to assert their rights, or even those who seemed to have become a little too prosperous financially, proved an effective tactic in reinforcing the proper "place" African Americans were supposed to occupy in society. Although it's used in a different sense, that old Japanese proverb comes to mind, "The nail that sticks up gets hammered down." That was certainly true then.

In any event, Hall didn't just attempt to assert his rights; he did so in a way that made things highly personal for Screws. It all started when, at Screws's direction, one of his deputies seized Hall's pearl-handled pistol. Screws had no apparent basis under Georgia law for his action, but he later stated his justification this way: "[I]f any of these damn negroes think they can carry pistols, I am going to take them."

Hall didn't take this apparent injustice lying down. He went to Screws's house and asked the sheriff to return his pistol. Screws said he would have to look

three men proceeded to beat Hall with their fists and a two-pound blackjack. They did so in plain sight (and hearing) of the many residents whose homes faced onto the town square. As residents watched from their windows and porches or listened from their bedrooms, Screws and the two other officers took turns beating Hall after he had fallen to the ground and lay motionless. One resident testified, "The licks sounded like car doors were slamming." The beating continued for roughly 30 minutes, during which Screws could be heard commanding the other officers, "Hit him again, hit him again."

When the officers were finished, they had crushed the back of Hall's skull and left a pool of blood three feet by four feet in the middle of the town square. Screws ordered the two officers to take Hall to the nearby jail. The officers dragged Hall by the legs up the sidewalk, into the courthouse, and around back to the jail, where they left him on the floor of a cell with other inmates.



Screws eventually summoned an ambulance, but Hall died shortly after arriving at the hospital, without regaining consciousness. In the morning, on their way to the market or the post office, the townsfolk of Newton all saw the pool of blood in the middle of the town square and the trail leading from that spot up to the courthouse and on to the jail.

After the State of Georgia failed to bring charges against Screws and the other officers despite repeated entreaties by the federal government, the Department of Justice indicted the three men for depriving Hall of his federal constitutional rights—namely, the right not to be deprived of his life without due process of law. The statute under which the officers were indicted makes it a federal crime to willfully deprive someone of “any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States,” while acting “under color of any law, statute, ordinance, regulation, or custom.” That statute had been on the books, with only minor changes, since right after the Civil War. It’s been codified in different places over the years, but it’s now found at 18 U.S.C. § 242, and for ease of reference I’ll refer to it throughout as Section 242.

A jury in Albany, Georgia, convicted all three defendants of violating Section 242, rejecting the officers’ claim that the beating had been justified in self-defense. The Fifth Circuit affirmed the convictions in a 2–1

decision. The Supreme Court granted the defendants’ petition for certiorari and set the case for argument in October 1944.

III. SCREWS IN HISTORICAL CONTEXT

Before explaining what the Supreme Court did when it decided the case in May 1945, I want to step back and provide a bit of historical context for the *Screws* prosecution. That’s necessary to appreciate the stakes involved when the Supreme Court took up the *Screws* case, and why the case wound up in the Supreme Court when it did.

The Supreme Court’s Dismantling of the Reconstruction-Era Civil Rights Statutes

As I mentioned, Section 242 traces its roots back to Reconstruction, right after the Civil War. At that time, the nation was in crisis. In the wake of the bloodiest war in American history, violence against African Americans in the South abounded as the Ku Klux Klan flourished. A deeply divided Congress battled over the best means of solving this problem and reconciling the South with the Union.

We’re all familiar with one of the products of this battle, the great Reconstruction-era constitutional amendments: the Thirteenth Amendment, abolishing slavery; the Fourteenth Amendment, prohibiting states from denying anyone, among other things, equal protection of the laws; and the Fifteenth Amendment, prohibiting denial of the right to vote on the basis of race, color, or previous condition of servitude. ▶▶

What's less well known is the comprehensive set of statutes that Congress enacted between 1866 and 1875 to enforce the rights conferred by these amendments. Had all of those statutory provisions remained in effect and been vigorously enforced, the stakes in the *Screws* case wouldn't have been nearly as high. So I'm going to take a minute here to sketch out where Section 242 fits within this larger project. And then I'll explain why, by 1945, the fate of Section 242 proved so pivotal.

Congress passed a series of statutes during Reconstruction designed, mainly, to protect the civil rights of the newly freed slaves. The first of these focused on securing equal citizenship status and the fundamental rights necessary to a free existence. The Civil Rights Act of 1866 declared that all persons born in the United States are citizens of the United States and, as such, are entitled to enjoy the same basic rights as white citizens. Those included the right to make and enforce contracts, the right to sue, the right to give evidence in court, and the right to purchase and hold property. Although much of this legislation was rendered superfluous two years later with the ratification of the Fourteenth Amendment, the Civil Rights Act of 1866 remains significant because it is where Section 242 originated.

Congress next turned to securing the right to vote, using its powers under the newly ratified Fifteenth Amendment. Congress passed statutes governing every aspect of the electoral franchise, from registration to voting qualifications to the counting of ballots. It also established an elaborate scheme of election observers to be administered by the federal circuit courts.

To combat the wave of racially motivated violence that swept through much of the South during Reconstruction, Congress also passed a complex set of criminal enforcement provisions. Those statutes went so far as to grant the president authority to suspend the writ of habeas corpus in lawless areas of the South where the Klan reigned with or without state complicity.

Finally, Congress sought to secure equal rights in everyday public life. It passed a sweeping civil rights bill that guaranteed full and equal enjoyment

of public accommodations—such as inns, theaters, and public transit—without regard to race or color.

Together, these acts represented the most significant effort on the part of the federal government to secure the civil rights of citizens at any point in the country's history before the 1960s. At first, with the support of President Ulysses S. Grant and the Republican Congress, the project achieved measurable success in promoting equality. But the program ultimately ended in failure, due in no small part to a series of decisions by the Supreme Court.

What accounts for that failure?

All of the acts I just mentioned were grounded on the notion that the Thirteenth, Fourteenth, and Fifteenth Amendments had greatly expanded the set of national citizenship rights—rights that all citizens enjoy by virtue of their status as citizens of the United States, and which are therefore beyond the power of any state to abridge. Congress viewed the three amendments as having granted the federal government vastly expanded power, at the states' expense, to enforce these new rights of national citizenship.

But the Supreme Court took a different view, as to both the scope of the rights conferred by the Reconstruction-era amendments and the extent of Congress's power to enforce those rights.

In the *Slaughter-House Cases* in 1873, and *United States v. Cruikshank* in 1876, the Court ruled that the rights of national citizenship protected against state infringement by the Fourteenth Amendment were extremely narrow. They consisted only of things such as the right to use the navigable waters of the United States, the right to free access to its seaports, and the right to demand the protection of the federal government while on the high seas. Most of the really fundamental rights, the Court held, were incidents of state citizenship, left solely to the domain of the states to protect.

In *Cruikshank* and *United States v. Harris*, decided in 1883, and several later decisions, the Court held that the Fourteenth and Fifteenth Amendments couldn't be used to reach the actions of private individuals but only those of state actors. That left Congress powerless to prevent ►►

At first, with the support of President Ulysses S. Grant and the Republican Congress, the project achieved measurable success in promoting equality.

But the program ultimately ended in failure, due in no small part to a series of decisions by the Supreme Court.

EQUAL JUSTICE UNDER LAW



private individuals from interfering with the rights conferred by those two amendments, even though much of the violence and intimidation designed to deter African Americans from exercising their rights was perpetrated by private, not state, actors. (The Court did hold elsewhere that Congress has the power to punish private individuals who interfere with the right to vote in *federal* elections, but that power is an implied one derived from Article I of the Constitution, not from the Fifteenth Amendment.)

In the *Civil Rights Cases* in 1883, the Court struck down the key public accommodations provisions of the Civil Rights Act of 1875. The Court held that those provisions couldn't be applied to private actors under Congress's Fourteenth Amendment powers because no state action was involved. And it held the provisions couldn't be sustained under Congress's Thirteenth Amendment powers either. That amendment authorizes Congress to regulate purely private conduct, but the Court read the extent of Congress's power narrowly, as

There was thus a long period of dormancy in federal civil rights enforcement, during which the threat of violence, at the hands of both the police and private individuals, became an entrenched part of daily life for African Americans in the South.

limited to prohibiting conduct that actually amounted to placing someone in slavery or involuntary servitude. Denying someone access to public accommodations on the basis of race, the Court ruled, didn't rise to that level. Justice Harlan's dissent in this case, which is on a par with his later dissent in *Plessy v. Ferguson*, argues persuasively that the Thirteenth Amendment did not just abolish slavery. It also authorized Congress, as he put it, "to protect the freedom established, and consequently, to secure the enjoyment of such civil rights as were fundamental in freedom."

After this series of decisions, and no doubt fueled as well by the contemporaneous withdrawal of federal troops from the South and the shift in public opinion against Reconstruction, as Professor Eric Foner has explained, the executive branch largely gave up on trying to enforce the civil rights statutes Congress had enacted. And in 1894, after the Democrats regained control of Congress and the White House, Congress repealed many of the provisions the Supreme Court had left standing. There was thus a long period of dormancy in federal civil rights enforcement, during

which the threat of violence, at the hands of both the police and private individuals, became an entrenched part of daily life for African Americans in the South.

Formation of the Civil Rights Section of the Department of Justice

That's where things stood until the late 1930s. But things began to change in 1939, when the newly appointed attorney general, Frank Murphy (later Associate Justice Murphy), created the Civil Rights Section within the Criminal Division of the Department of Justice. (In 1957, it was elevated to full Divisional status, and it remains the Civil Rights Division today.) Without that development, it's doubtful the *Screws* case would ever have been brought, much less have reached the Supreme Court. So I'm going to spend a couple of minutes discussing the Civil Rights Section's early years and how the *Screws* case fit into the section's broader litigation strategy.

Attorney General Murphy formed the Civil Rights Section for the express purpose of reinvigorating the federal government's role in civil rights enforcement. At the time, Americans were watching fascism's rise in Europe with alarm, which prompted some to focus more closely on respect for civil liberties here at home. Murphy said he created the section because he wanted to send a warning that the full might of the federal government would be brought to bear to protect the civil rights of oppressed minority groups in the United States.

One of the first tasks the new section confronted was to figure out which statutory tools remained at its disposal. So Murphy directed lawyers assigned to the section to undertake a comprehensive study of the existing statutes the federal government could use to prosecute civil rights violations. That study revealed that there were really just three statutes available, all of them remnants of Congress's grand Reconstruction-era civil rights project. One of them, the Anti-Peonage Act of 1867, is of relatively limited use, since it's confined to cases involving peonage, a form of involuntary servitude.

The other two statutes seemed more promising, although both had apparent limitations. The first is the statute now codified at 18 U.S.C. § 241, which began its life as Section 6 of the Enforcement Act of 1870. That statute (simplified somewhat) prohibits two or more persons from conspiring to prevent someone from exercising his or her federal constitutional rights. The good news was that the statute had been held to apply to private individuals and public officials alike. The bad news was that, because the statute applied to private individuals, it had been construed, beginning with the Supreme Court's decision in *Cruikshank*, as limited to interference with rights arising from the relationship between the victim and the federal government. It therefore did not cover any rights, such as those conferred by the Fourteenth and Fifteenth Amendments, that the Constitution protects only against interference by the states. As a result, the statute had been used most prominently to prosecute conspiracies aimed at interfering with the right to vote in federal elections.

The other statute, of course, was Section 242. Unlike Section 241, which had been subject to fairly extensive judicial interpretation since its enactment, there were almost no cases interpreting Section 242. It had been the subject of only two reported decisions, both at the trial court level, one involving the prosecution of a school official for excluding students on the basis of race and the other involving interference with voting rights.

The only thing that seemed clear about the statute's scope was that it was limited to prosecutions against public officials, by virtue of the statute's requirement that the defendant have acted "under color of" law. But in terms of the constitutional rights that the statute could be used to enforce, no one was quite sure what to think. The Civil Rights Section lawyers hoped that, because Section 242 was limited to public officials, it could be used to prosecute violations of a much broader set of rights than Section 241, including the full range of constitutional rights the Supreme Court had begun incorporating against the states via the Fourteenth Amendment's Due Process Clause.

Besides uncertainty over the scope of the rights protected, two additional issues of statutory interpretation remained unresolved with respect to Section 242. First, unlike Section 241, Section 242 required that the defendant have acted "willfully." That *mens rea* requirement had been added to the statute during a 1909 recodification, but without any legislative history to shed light on its meaning. And second, it wasn't



Judge Paul J. Watford at the Richard H. Chambers U.S. Court of Appeals Building in Pasadena, Calif.

entirely clear what the phrase "under color of law" meant. Some past decisions had suggested it might mean that the defendant merely had to be acting under the pretense of state or local law, even if the defendant acted in violation of that law. The Court appeared to have adopted that approach in 1941 in *United States v. Classic*, but that case involved a prosecution under both Sections 241 and 242, and most of the Court's analysis focused on Section 241.

Given all of the uncertainty surrounding the scope of Section 242, Civil Rights Section lawyers began looking for test cases they could take to the Supreme Court to obtain a definitive construction of the statute. The *Screws* case seemed an ideal one from the government's standpoint, and not just because the facts were compelling. The case would force the Supreme Court to decide whether Section 242 could be used in cases involving police brutality, which had been the subject of a large number of the complaints flooding the section since its establishment. And the Court for the first time would have to decide whether Section 242 could be used to prosecute violations of rights protected by the Fourteenth Amendment's Due Process Clause. (The prosecution's theory had been that the defendants deprived Hall of his right to receive a trial on the charge for which he had ostensibly been arrested.)

IV. THE OPINIONS IN *SCREWS*

That brings us to the decision in *Screws*. What did the Court hold when it finally got around to deciding the case nearly seven months after hearing argument? Well, the Court was badly splintered, and it barely produced an enforceable judgment. ▶▶

Given all of the uncertainty surrounding the scope of Section 242, Civil Rights Section lawyers began looking for test cases they could take to the Supreme Court to obtain a definitive construction of the statute.

Justice Douglas authored the lead opinion, but he spoke only for himself and three other Justices: Chief Justice Stone and Justices Black and Reed. Douglas's opinion tackled two main issues: the first was what amounted to a facial challenge to the statute's constitutionality on the ground that, when applied to rights protected by the Due Process Clause, the statute was too vague to be the basis for criminal liability; the second was what the statutory phrase "under color of law" meant.

Let's start with the "under color of law" issue. The defendants in *Screws* argued that they could not have been acting "under color of" Georgia law because, to convict, the jury had necessarily found that they deliberately killed Robert Hall without justification. That conduct—murder—plainly *violated* Georgia law. The defendants argued that Section 242 was intended to apply only when the defendant's actions were taken in *compliance* with state law, since only then could the defendant's acts truly be deemed those of the state.

Douglas definitively rejected that construction of the statute. He reasoned that "under color of law" could not mean simply "under law"; the phrase "color of" must have some meaning. It was enough, Douglas concluded, that the officers had acted under pretense of law—that they had acted in their official capacities as law enforcement officers when they arrested Hall pursuant to an arrest warrant, however dubious the validity of that warrant might have been. The fact that they had misused the authority granted to them by state law could not render them immune from punishment by the federal government. If it did, Douglas noted, states would have an easy way to avoid the commands of the federal Constitution.

Resolving the vagueness challenge proved more difficult. The argument, from the defendants' standpoint, wasn't a bad one. They argued, in effect, the following: "How can we be convicted for violating someone's 'due process' rights when Section 242 doesn't spell out what those rights are, and the standard the Court had articulated for defining rights protected by the Due Process Clause was something as vague as a 'principle of justice so rooted in the traditions and conscience of

our people as to be ranked as fundamental?'" Recall that the Supreme Court had just recently begun the process of incorporating various provisions of the Bill of Rights against the states by way of the Fourteenth Amendment's Due Process Clause (in effect slowly reversing its earlier, narrow construction of the rights inherent in national citizenship). Whether that process would extend to all provisions of the Bill of Rights, or just some, was very much in a state of flux. And how far that process would extend to other, unenumerated rights was also still very much in flux.

Even when specific rights have been held applicable against the states, the defendants argued, it was still impossible to know in advance what conduct would constitute a violation of those rights. The defendants pointed, for example, to the Court's own difficulty, often by closely divided votes, in deciding under what circumstances a state-court defendant's right to counsel is triggered. Imagine a state judge whose decision to deny counsel to an indigent defendant was later reversed by the Supreme Court. Could the judge face prosecution for having "willfully" deprived the defendant of his right to due process? Or what about police officers interrogating a suspect? How were they supposed to know whether their conduct would later be deemed to render the suspect's confession involuntary, when the Supreme Court's own standard for testing the voluntariness of confessions under the Due Process Clause kept evolving?

The concerns raised by the defendants in *Screws* were certainly legitimate, but they related to concepts of fair notice. They could have been addressed by requiring the due process right in question to have been established with sufficient clarity and specificity at the time the defendants acted. That's essentially what the Court ended up doing decades later to address fair-notice concerns in the civil context, by developing the doctrine of qualified immunity. And, ironically, it's the mode of analysis Justice Douglas used a few years later to uphold a conviction under Section 242 of a defendant who brutally beat confessions out of suspects.

But in *Screws*, Justice Douglas took a different tack in addressing the vagueness problem under Section 242. He latched onto the statute's requirement that the defendant have acted "willfully" in depriving the victim of her

constitutional rights. He concluded that the vagueness problem would be solved if the Court interpreted “willfully” to mean that the defendant had to act with the specific intent to deprive the victim of her constitutional rights. If the government proved that, Douglas reasoned, then the defendant must have had fair notice that his conduct violated the statute. After all, you can’t specifically intend to deprive someone of a constitutional right if you aren’t aware of the right’s existence.

After deciding that Section 242 required the government to prove specific intent, Justice Douglas concluded that the defendants’ convictions had to be vacated. The jury had not been instructed on that newly announced element of the offense, so the case had to be remanded for retrial.

Justices Rutledge and Murphy would have affirmed the convictions. They each wrote separate, quite powerful opinions explaining why they agreed with Justice Douglas on the “under color of law” issue, but vigorously disagreed that any vagueness issue was present in this case. Whatever concerns might be raised on that front in other cases, they argued, the defendants in this case could not complain that the due process right they were charged with violating was too vague. As Justice Murphy put it, “Knowledge of a comprehensive law library is unnecessary for officers of the law to know that the right to murder individuals in the course of their duties is unrecognized in this nation.”

Sticking to his convictions, Justice Murphy dissented. But Justice Rutledge agreed, reluctantly, to go along with the plurality’s disposition of the case—remanding for a new trial—to ensure that the Court could reach a judgment. (Some consider Justice Rutledge’s vote to be the origin of the practice, since followed by other Justices, of casting a vote contrary to belief in order to allow the Court to reach a disposition.)

The facts of the Screws case illustrate why preservation of a federal role for civil rights enforcement in this area was so important.

The three remaining Justices—Roberts, Frankfurter, and Jackson—dissented and would have reversed the convictions outright. They issued a joint dissent, although it’s widely believed that Justice Frankfurter was the lead author, as suggested by the late Professor Robert K. Carr.

The Frankfurter dissent took strong issue with both of the plurality’s holdings. Frankfurter mocked

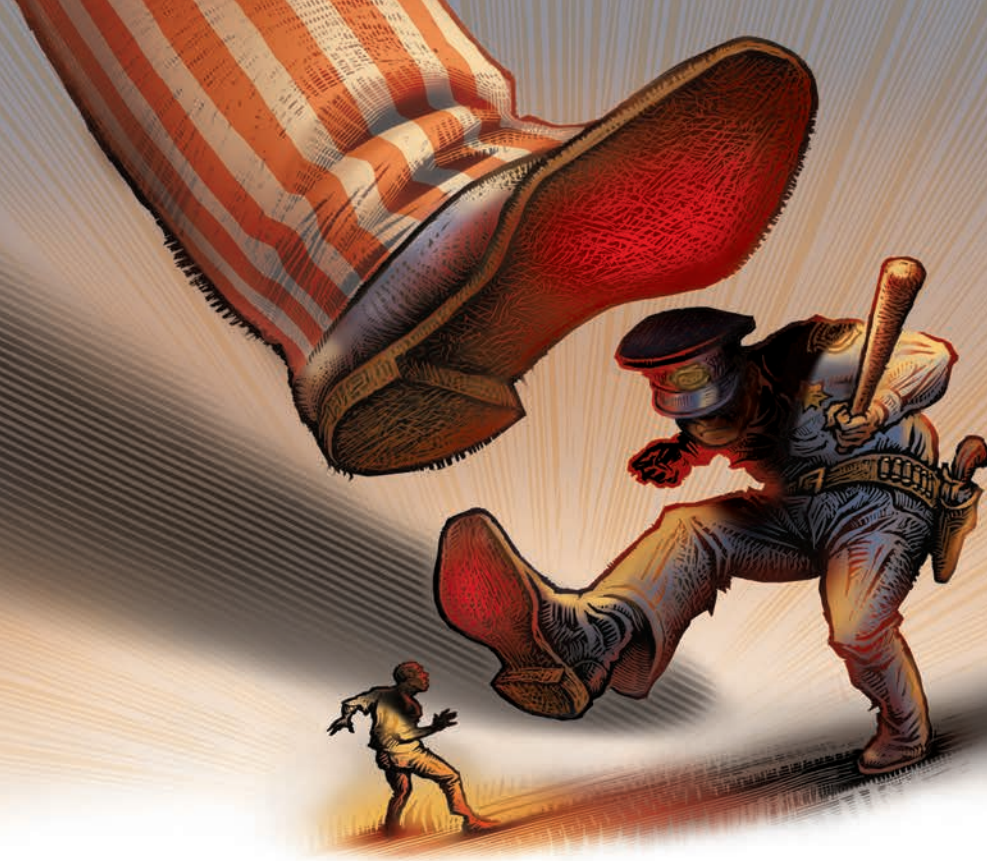
Justice Douglas’s solution to the vagueness problem, pointing out that the defect in the statute, at least as applied to due process rights, was that the specific rights Congress intended to be covered were not enumerated in the statute itself. The problem, therefore, was that no one could know beforehand whether his acts would or would not trigger the statute. Requiring a defendant to act “willfully” did not solve that problem.

But it was with the “under color of law” issue that Frankfurter took strongest issue. In his view, the Court’s construction of Section 242 had instituted a “revolutionary change” in the balance of power between the national government and the states. He argued that because the defendants violated Georgia law by committing murder, this was a purely local crime-enforcement matter that had always been left to the domain of the states. The federal government was now going to be allowed to make, as Frankfurter put it, “every lawless act of the policeman on the beat” a federal crime. To avoid that outcome, Frankfurter would have read Section 242 as applying only when the defendant’s actions were *authorized* by state law. Only then, Frankfurter contended, would the federal government have a legitimate interest in intervening.

V. THE LEGACY OF SCREWS

Having discussed some of the history leading up to the *Screws* case and what the Court actually did, let me finally turn to the legacy I think the case left us. The conventional thinking has been that the legacy of *Screws* is at best a mixed one, because the Court unnecessarily complicated the prosecution of civil rights violations under Section 242 by imposing that new specific intent requirement I discussed earlier. There’s certainly some validity to that view. The Court required proof that a defendant have acted with “a purpose to deprive a person of a specific constitutional right,” but then added that the defendant

need not be thinking in constitutional terms to be guilty. It’s never been entirely clear how the government is supposed to go about proving this element of the offense, and judges and lawyers in Section 242 cases have struggled to formulate comprehensible jury instructions explaining it. The one thing everyone agrees on, though, is that the specific intent requirement imposed by *Screws* has made ►►



it harder for the government to win convictions, even in cases where the defendants obviously acted in bad faith.

It's worth noting that on remand in the *Screws* case itself, a case that seems about as straightforward as they come in terms of proving bad faith on the part of the defendants, all three defendants were acquitted when retried. (In fact, *Screws* emerged from the case not only unharmed but also victorious: He was later elected to the Georgia State Senate.) We don't know whether the instruction the second jury received on specific intent made the difference. But one of the prosecutors who tried the case said afterward that the jury instruction the trial court gave on the specific intent element was very damaging for the government's case.

So there was perhaps some justification for those who, in the immediate wake of the decision, viewed *Screws* largely as a defeat for the cause of civil rights enforcement. But viewing the decision with the benefit of almost 70 years of hindsight, I think a different, and far more positive, picture emerges.

The most important legacy of *Screws* is that Section 242 survived. And that had importance in terms of both its direct impact on police brutality cases like *Screws* and its more indirect effect on the broader social changes that occurred in the decades that followed.

In terms of its most immediate effect, the survival of Section 242 meant that the federal government would have a role in combating the widespread problem of police brutality toward African Americans and other minorities, particularly in the South. Had

the statute instead been struck down, the power of the federal government to prosecute such abuses would have been drastically curtailed. No other statute remained that would have allowed the federal government to prosecute violations of the most basic rights under the Fourteenth Amendment.

The facts of the *Screws* case illustrate why preservation of a federal role for civil rights enforcement in this area was so important. What's most striking about the officers' actions in *Screws* is how little concern they had for ever being punished for what they did. They seized a man out of the comfort and supposed security of his home on fabricated charges of wrongdoing and then proceeded to beat him to death in plain view in the middle of the town square. They made no effort to hide their actions and apparently didn't care who saw or heard what they were doing. They did so because they had no fear that the state would ever prosecute them for killing an African American. And they were right: The State of Georgia refused to prosecute them. The only way that mindset changed was through intervention by the federal government. And if the Supreme Court had denied the federal government that power in *Screws*, the progress we've seen on this front would have been much slower in coming.

It's easy to discount the effect that federal prosecutions such as the one in *Screws* had on changing, however slowly, the mindset of police officers in the South. It's obviously not as though once the *Screws* decision came down, police brutality ceased to be a major problem. The federal government back then brought relatively few

Section 242 prosecutions, and that's still true today. And convictions in such cases were back then, and still are today, notoriously difficult to obtain. But in the aftermath of *Screws*, lawyers in the Civil Rights Section noted that even when Section 242 prosecutions in the South did not result in convictions, they still had a noticeable deterrent effect on the local police forces involved. That stands to reason, since officers who previously could have acted with all but certain impunity now had to factor in at least the possibility that they could wind up in federal prison.

The decision in *Screws* also helped breathe life into another, more useful tool that has been used to combat police brutality and other forms of police misconduct: civil suits under the statute that is now codified at 42 U.S.C. § 1983. That statute, too, traces its lineage back to the Reconstruction-era civil rights statutes Congress enacted. But it was sparingly used until the Supreme Court decided *Monroe v. Pape* in 1961. In that case, the Court was again confronted with the meaning of the phrase “under color of,” which is found in Section 1983 as well. Relying on its decision in *Screws*, the Court gave that phrase the same construction under Section 1983 that it had under Section 242. Justice Harlan, in concurring, laid off the hard work on the precedents: “Were this case here as one of first impression, I would find the ‘under color of any statute’ issue very close indeed. However, in *Classic* and *Screws*, this Court considered a substantially identical statutory phrase to have a meaning which, unless we now retreat from it, requires that issue to go for the petitioners here.” Justice Frankfurter again dissented, raising the same federalism objections he had voiced in *Screws*, but this time he was alone.

Section 242 has been used to prosecute police misconduct in many different settings over the years and not just in the South. Two high-profile cases immediately come to mind. The federal government used Section 242 to prosecute some of the men responsible for the 1964 murders of three young civil rights activists—James Chaney, Andrew Goodman, and Michael Schwerner—outside Philadelphia, Mississippi, in the case that later formed the basis for the movie *Mississippi Burning*. Federal prosecutors ultimately charged 18 defendants, and 7 of them were convicted. And the federal government relied on Section 242 to prosecute four of the officers involved in the Rodney King beating in 1991, after a state court jury acquitted them. Two of the officers were convicted in the federal trial.

Section 242 has also been used to prosecute a wide variety of civil rights violations outside the police

brutality context. The statute has been invoked against abusive prison guards, sexually harassing police officers, a state judge who sexually assaulted female litigants and court officers, and corrupt public officials. Without Section 242, the victims in cases like these might never see their constitutional rights vindicated.

Finally, to conclude, let me comment briefly on what I think are some of the broader, indirect effects the *Screws* case had on civil rights enforcement. *Screws* provided an emphatic rejection of the narrow view of federal authority to protect civil rights that had led the Supreme Court to strike down many of the other Reconstruction-era statutes. The result of the Supreme Court's approach during that period was a perpetuation of the status quo for African Americans in the South. Had Justice Frankfurter's conception of federal authority prevailed in *Screws*, the Supreme Court would have again validated the notion that the Fourteenth Amendment did not fundamentally alter the balance of power between the national government and the states.

Instead, the Court upheld the federal government's power to regulate in one of the most sensitive areas of a state's internal affairs: the conduct of its police. If there were any area where the Court could have been expected to say that Congress had gone too far in the name of protecting civil rights, it was this one. But the Court turned back the vigorous arguments advanced by Justice Frankfurter that Section 242 intruded too heavily on states' rights. And in the process, the Court made clear that the federal government could play a significant role in forcing Southern states to change practices that seriously disadvantaged minorities.

As we know, federal intervention on multiple fronts proved essential to ending the climate of pervasive fear and discrimination in which African Americans and other minorities in the South were forced to live until recently. The decision in *Screws* didn't spark those developments; broader political and social forces had to mobilize to make that happen. But I think it's fair to say that *Screws* removed one potential barrier to further federal intervention in the South. The case marks one instance, at least, in which the Court refused to leave the business of civil rights to the states alone, as Justice Frankfurter had urged. In that way, *Screws* may have created some momentum for the even more drastic federal interventions that were necessary to bring about fundamental social change in the 1950s and 1960s. And it is that legacy for which the case deserves our appreciation today. ■

THE STORY OF ROBERT HALL in Black and White

John J. Pauly and Janice S. Welburn

The details of the case still have the power to shock. A Georgia sheriff with a Dickensian name—Claude Screws—grows annoyed by Robert Hall’s efforts to recover a gun taken from him without cause, and orders two deputies to arrest that young black man and bring him to the courthouse. There the sheriff and deputies beat Hall with their fists and a two-pound blackjack for 15 to 30 minutes, and in full public view, crushing the back of his skull. They then drag him across the ground and up the courthouse steps to a jail cell. Such were the circumstances that led to a federal civil rights prosecution—the influential Supreme Court case that Judge Paul Watford thoughtfully dissects—and ultimately an acquittal.

Alongside those court proceedings, a parallel story about Robert Hall was taking shape in the nation’s press, both white and black. That is this essay’s focus. For what was said and left unsaid in that news coverage tells us much about America’s public imagination of race in 1943, and about the forms of coercion that white and black citizens had come to take for granted.

Perhaps the most surprising feature of that news coverage, in retrospect, was how calmly and matter-of-factly white newspapers described the crime, trial, and appeals—that is, when they chose to write about the case at all. Major papers such as the *New York Times*, *Chicago Tribune*, *Boston Globe*, and *Christian Science Monitor* did not print a single story on the crime (although the *Tribune* later editorialized on the Supreme Court decision). At least two dozen weeklies, mostly in the South and the West, ran one or more of the Associated Press dispatches: three stories on the trial and brief follow-up stories on the appeal and Supreme Court decision. Such stories almost never ran on page one and often were placed deep inside the paper or cut to two or three paragraphs and used as “filler.”

Journalism scholars have noted the importance of these “significant silences” in news coverage: moments when the profession seemingly suspends its normal routines and leaves stories uncovered or some of their important facts unstated. The story of Hall’s death case contained a number of such silences, most notably in the pattern of coverage. A major news story typically generates ongoing coverage and extensive collateral material—background pieces, personal profiles, interviews with witnesses, behind-the-scenes drama, and insider speculation—because the news organization assumes that readers will want to learn more about the event.

Virtually no such stories appeared in the white press in the wake of Hall’s beating. Editors likely considered its tale of racial violence so familiar that it did not warrant special treatment and assumed that their readers would have little interest in such details. Virtually alone among white newspapers, J. W. Gitt’s courageous York (Pa.) *Gazette and Daily* recognized the injustice, at least after the 1945 Supreme Court decision. In July 1946, when President Harry Truman called for a federal investigation into the recent lynching of four black men in Georgia, an accompanying story declared in its lead that “Governor-elect Eugene Talmadge of Georgia is an outright liar” for claiming that no lynchings had occurred during his three previous terms as governor. The story enumerated 12 cases during Talmadge’s tenure, and noted Hall’s lynching as occurring shortly after the governor left office.

The horrors of the case, and specifically Screws’s January 1943 beating of Hall for being a “biggety negro,” were all too familiar to blacks across the South. Dean Janice Welburn offers this account of her own experience: “As an African-American woman born in Georgia and raised in Birmingham, I was keenly aware that everyone was only a degree or two away from an act of anti-black violence. In the 1930s, Birmingham police beat my own grandfather for being in the wrong part of the city and tossed his body on the porch of his home. He suffered a stroke and died a year later.

Justice was never delivered in his case, and the embers continue to burn in our family's memory." Lynching by local townsfolk, beatings and pistol whippings at the hands of local police, and jailing on trumped-up charges—these were well-known acts of intimidation across the American South, intended to keep one in one's place, if one was black. The Civil Rights and Restorative Justice Project of Northeastern University School of Law has documented more than 350 such cases between 1930 and 1970, many of them involving police neglect and brutality.

The Associated Press dispatches described the Screws–Hall case in a concise, dispassionate, and balanced way, but without noting the deeper significance that the black press always found in such events. The mass black newspapers that emerged in the early twentieth century, such as the *Chicago Defender*, *Atlanta Daily World*, *Baltimore Afro-American*, and *Pittsburgh Courier*, used "race news" to express moral outrage and create national solidarity among African Americans. From the start, or at least upon the indictment of Screws in the spring of 1943, the black press bluntly declared Hall's death a lynching, printed the gruesome details that emerged in witnesses' testimony, and even recognized the larger legal implications of the case.

The black press coverage, in its own way, affirmed one of Judge Watford's key arguments: that the *Screws* case, for all its limitations and contradictions, created the hope of federal intervention. The *Chicago Defender's* Washington correspondent described the Supreme Court's decision as "one of the most important victories in the long fight for civil liberties for Negroes in the South." African Americans brutalized under the color of law would have recourse.

Recent events in St. Louis, New York City, Cleveland, Milwaukee, and Madison suggest that we continue to move among the shadows of this forlorn history. Allegations of racialized treatment of African Americans by police in highly segregated communities persist, and those communities continue to turn to federal authority in search of justice. The issue no longer seems merely regional either. In his lecture as Marquette University's 2014 Ralph H. Metcalfe Chair, historian Khalil Gibran Muhammad argued that Southern violence has had its Northern corollary in widespread beliefs about criminality in African-American communities. But, even if inclined, the press is no longer able to cloak such violence in silence. In the new digital environment, nothing remains invisible for very long. Robert Hall's fate would have passed largely unnoticed save for the persistence of the Justice Department, the advocacy of the NAACP, the courage of a local grand jury, and the news coverage of the black press. How we today might emerge from the shadows, or what forms of witness our own moment requires of us or of the press, is a question worth pondering.

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MUCH TO PRESERVE— AND MUCH TO CHANGE

What must Catholic K–12 schools in the United States do to reverse declining enrollment?

By Alan J. Borsuk

At 7:40 a.m. each school day, save only when the weather is extreme, the 200 students of St. Vincent Pallotti Catholic School on Milwaukee’s west side line up outside the school door, each grade on its assigned painted line. Principal Jeffrey Johnson calls out, “Our help is in the name of the Lord.” The students respond, “Who made Heaven and Earth.” Then they sing a hymn and say the Lord’s Prayer. There is an opportunity for individual prayers. And then everyone goes into the building.

There’s still a lot of life and tradition in the modest building that houses the kindergarten-through-eighth-grade school. But if the start of the day could be straight from a few decades ago, the realities in the school are very much from today. In particular: The families who belong to the church a few feet away have few children, so this is no longer really a parish school. A generation ago, all the students were Catholic and white. Now, about half the students are not Catholic. And the student body in recent years has been about a third white, a third African American, and a third Hispanic.

The academic focus of the school has changed as well. Less than a third of the St. Vincent Pallotti students were rated as proficient or advanced in reading or

math in Wisconsin’s standardized tests in the fall of 2013. That’s better than the average for Milwaukee schools, but it means there is an urgent need to do better, and the school staff is changing curriculum, approaches to teaching, and the degree to which students’ needs are dealt with in individualized ways.

The pursuit of building the students’ Catholic faith is more energetic and more traditional at this school than at many. But even that has changed, with the more diverse student population one of the factors. Johnson said that the culture of St. Vincent Pallotti puts great emphasis on “the inherent dignity” in each person, and the school mission statement says, “We embrace the visible acceptance of all and recognize a higher purpose to each life.” ▶▶

“Virtually 50 consecutive years of losing schools and losing enrollment. . . . If you don’t think something’s wrong with that, I think you have your head in the sand.”

Andy Smarick, a partner in a Washington-based nonprofit, Bellwether Education Partners, and senior policy fellow with the Thomas B. Fordham Institute

St. Vincent Pallotti is on the high end of urban Catholic schools in Milwaukee when it comes to academics, the teaching of Catholic values, and general vitality. And, thanks to Wisconsin’s publicly funded program of private school vouchers, Milwaukee is on the high end compared to the vitality of Catholic schools in many other urban areas.

But even on the high end, the forces changing Catholic schools are monumental. Responding to them is an increasingly urgent priority. Look at the overall scene, and you have to wonder where schools such

as St. Vincent Pallotti—and especially those that are weaker—are headed and what can be done to keep sufficient life in Catholic schools, a core part of the Catholic church in the United States for generations.

How monumental are the forces? The National Catholic Educational Association

reports that enrollment in Catholic elementary and secondary schools in 2013–2014 was 1,974,578 students. That is less than 40 percent of the 5.25 million in 1960. In fact, the number today is very close to the total in 1920. To underscore it differently: The association says that, since 2003, nearly a quarter of Catholic schools in the United States have closed.

Broad forces beyond the domain of schools are reshaping American Catholic institutions. They include changing demographics, the decline of white ethnic urban parishes, the growth of the Hispanic population (many of its members Catholic), changing American cultural standards and practices, and problems within the church itself. But forces within the domain of schools are also in need of attention, and there is a

growing effort to take steps to stop and even reverse the decline of Catholic schools.

Marquette Law School is making itself a convener and crossroads for discussion of the state of Catholic K–12 schools and what lies ahead. On November 19, 2014, the Law School, together with the Marquette College of Education, sponsored a conference, “The Future of Catholic K–12 Education: National and Milwaukee Perspectives,” at Eckstein Hall. It brought together national and local scholars and players, both at the podium and in the audience. A Marquette Law School Poll, focused on opinions about Catholic schools in several metropolitan areas, is in the works, with other events focusing on the future of Catholic schools also likely.

In provocative remarks at the Eckstein Hall conference, Andy Smarick, a partner in a Washington-based nonprofit, Bellwether Education Partners, and a senior policy fellow with the Thomas B. Fordham Institute, said that he was excited about some positive developments for Catholic schools. These included increasing options to support schools with public funding and philanthropic grants. “But let’s get honest about this,” Smarick said. “Virtually 50 consecutive years of losing schools and losing enrollment. . . . If you don’t think something’s wrong with that, I think you have your head in the sand.”

Patrick Lofton, executive vice president of the D.C.–based National Catholic Educational Association (NCEA), who attended the conference, agreed in an interview that “in some respects, Catholic schools are in a crisis right now.” He added, “If we’re going to have viable, sustainable Catholic schools, we have to rethink our model.”

As for Milwaukee itself, a report presented to the archdiocese in September 2013 by consultants from the University of Notre Dame’s Alliance for Catholic Education (ACE) said, “The leadership of the Archdiocese of Milwaukee



Archbishop Jerome Listecky gave opening remarks at the Catholic K–12 education conference.



Marquette Law School's Mike Gousha with Notre Dame Law School's Margaret F. Brinig and Nicole Stelle Garnett

now stands at a critical juncture” in responding to a list of concerns about Catholic schools. The consultants called for “rigorous self-reflection.”

Particularly in urban areas, more is at stake than simply whether a particular school or group of schools stays open, two scholars said at the Law School event. Margaret F. Brinig and Nicole Stelle Garnett, both Notre Dame Law School professors, described what they found in researching their 2014 book, *Lost Classroom, Lost Community: Catholic Schools' Importance in Urban America*. In a public conversation led by Mike Gousha, Marquette Law School's distinguished fellow in law and public policy, Brinig and Garnett said that the closing of Catholic schools in urban areas correlates with a decline in the “social capital” of the surrounding neighborhoods. The data they used, which focused largely on Chicago, controlled for a range of other aspects of neighborhoods and found a negative impact on neighborhoods that matched specifically with Catholic school closings.

In other words, the closing of a Catholic school harms the surrounding community in measurable ways. Similar results were found in Philadelphia, though not in Los Angeles, the two said, adding that Los Angeles has some of the lowest social capital on a neighborhood basis of any place in the country.

One aspect of what Brinig and Garnett found in studying school closings was that if a parish priest and others involved in a parish fought to keep a school open, they often succeeded. That led the authors to encourage

Catholic school communities to advocate strongly for their future.

But more needs to be done than simply keeping schools open. Several of the crucial challenges facing Catholic schools were spotlighted at the conference and in follow-up interviews and reporting. They deserve particular attention.

ACADEMIC QUALITY

One of the primary reasons historically for parents to choose Catholic schools was the quality of the education itself. That remains true at many schools, including many high schools that are academic powerhouses. But especially in urban centers, students in Catholic schools often do no better than public school students—and results are distressing for both sectors. The challenges connected to poverty and social change have had big impacts. But critics say that Catholic schools themselves have not responded with sufficient innovation and commitment to finding ways to succeed.

Kathleen Cepelka, superintendent of Catholic schools for the Archdiocese of Milwaukee, told the Marquette conference, “We are not satisfied.” A look at a few examples from public data about how students in Milwaukee's voucher program did on state tests in fall 2013 underscores why. Only 2 percent of students at St. Catherine's School on Milwaukee's west side were rated as proficient or better in reading or math. For Blessed Savior Catholic, a combined ▶▶



Marquette Law School's Alan J. Borsuk with Andy Smarick, a partner in a Washington-based education nonprofit and a senior policy fellow with the Thomas B. Fordham Institute, and Kathleen Porter-Magee, superintendent of the Partnership for Inner-City Education in New York

group of four former parish schools on the north side, the overall figure was 6 percent in reading and 5 percent in math. At St. Adalbert on the south side, it was 13 percent in reading and 21 percent in math.

What is being done elsewhere? One initiative is to bring some of the intense education strategies of high-performing charter schools to low-performing Catholic schools.

Kathleen Porter-Magee was recently named superintendent of the Partnership for Inner-City Education in New York, with the job of turning around six Catholic schools in Harlem and the Bronx. She described to the Eckstein Hall audience her efforts to build up the quality of teachers and teaching in the schools. Many of the teachers have been given little to no coaching, and education aims need to be much higher, with close monitoring of student success and effective response when a child isn't moving ahead adequately. She said she was aiming to establish, among

the adults involved in the schools, a clear, shared vision of "what excellence looks like." "Developing the talent we have," she added, "is the first thing to focus on."

Smarick, who was part of the conference panel with Porter-Magee and whose work often has focused on Catholic schools, said that some of the most talented and innovative Catholic educators were working in non-Catholic schools because their entrepreneurial and ambitious ideas for energizing schools were more welcomed elsewhere. Smarick said, though, that he was encouraged by what is unfolding in cities around the country where an "analog" to charter schools is arising for Catholic education. One of those initiatives, the Cristo Rey high school network, which emphasizes both high standards and giving students experience in workplaces, is opening a school in Milwaukee in fall 2015.

When he was later asked for his reaction to the statement that some enterprising educators preferred to work outside of Catholic schools, the

"I believe there is a culture that exists in some sectors of Catholic education that really does stifle creativity and stifle entrepreneurship."

Patrick Lofton, executive vice president of the D.C.-based National Catholic Educational Association

“I think the will is stronger because people are no longer in denial that Catholic schools are at risk.”

William Henk, dean of the Marquette University College of Education

national association’s Lofton said that he generally agreed. “I believe there is a culture that exists in some sectors of Catholic education that really does stifle creativity and stifle entrepreneurship,” he said. “That’s a challenge for us. I’m a big believer that we’ve got to think outside the box.”

SCHOOL LEADERSHIP

Lofton said, “One of the critical pieces that we’re seeing at the national level is that there is a crisis of leadership in Catholic schools.” For one thing, many current principals and superintendents are aging, “and we don’t have a pipeline of succession.” He added, “We know schools rise and fall on the quality of the leader.”

William Henk, dean of the Marquette College of Education, agreed. “The formula starts with leadership,” he said. And from that it expands to the people whom a good leader brings in as teachers and staff and how good a job that leader does in developing those people’s skills. “You’re only as good as your people,” Henk said.

Catholic school leaders, including Milwaukee Superintendent Cepelka, know this is a big need. Their mission includes finding ways to keep talented young educators in Catholic schools. Many now leave their jobs early in their careers.

GOVERNANCE

Cepelka told the conference at the Law School that changes were coming in the way Milwaukee’s Catholic schools are governed, especially the more than two dozen elementary schools in the City of Milwaukee. Governance is an issue nationwide, as well.

The ACE consultants were particularly concerned about inadequate oversight of schools. In one report, summarizing what they found at nine schools on the north side of Milwaukee, they concluded, “There is little evidence of a governance structure that is working effectively”

The Milwaukee archdiocese has created a task force on the future of schools. One of its biggest concerns will be to find ways to run schools more effectively

both as businesses and as education institutions. That may mean more-centralized operations when it comes to such things as purchasing and personnel management, as well as stronger academic leadership from the archdiocese office. Catholic schools now operate with a substantial degree of autonomy.

Nationwide, Lofton said, Catholic schools need to make big changes in how they are governed, including having boards with more expertise that take a stronger role in oversight. “I think that new governance models are much needed,” he said. Schools need to have boards that are focused on making sure a school stays financially healthy and has a long-term strategic vision.

CATHOLIC IDENTITY

Faith formation is a key issue, several speakers at the November 19 conference said. Laura Gutierrez, vice president of academic affairs for St. Anthony School on Milwaukee’s south side, said that the parents and students of the school, close to 100 percent of them Hispanic, are looking for faith formation and safety, as well as a good education. Even though the percentage of those who are Catholic is very high, their actual religious practice needs development, Gutierrez said. “We need to show that we’re valuing it as the adults leading this fight,” she said.

In a follow-up interview, Cepelka was asked whether faith formation in schools needs improvement. “Major,” she answered. “There are schools that need to teach religion more faithfully.” She pointed to St. Vincent Pallotti as a good example of how to do this well. The ACE consultants who studied Milwaukee schools said they found “a pervasive lack of Catholic identity” in some schools. ▶▶



Kathleen Cepelka, superintendent of Catholic schools for the Archdiocese of Milwaukee



Laura Gutierrez, vice president of academic affairs for St. Anthony School on Milwaukee's south side, and Father Tim Kitzke, a member of the pastoral team for several parishes in Milwaukee and a leader of Catholic East Elementary School

A major change from prior generations is that many Catholic schools in urban areas are now enrolling large numbers of non-Catholic children. Cepelka said at the conference that there are some schools on the north side of Milwaukee where more than 95 percent of students are not Catholic. But, she said, school leaders continue to take seriously the call to “teach as Jesus did.” She said that the parents who enrolled their children want the education and environment a Catholic school offers and that she could count on two hands the number of voucher students who have used their legal right to “opt-out” of religious events such as a Mass.

* * *

In many central cities, the closing of schools has been much more widespread than in Milwaukee, as Catholic families have moved to the suburbs and the cost of running schools has shot up in an era when there are almost no low-paid nuns teaching. In some cities, many Catholic schools have been

turned into non-religious charter schools—a step that, in Brinig and Garnett’s assessment of the evidence, has not brought “social capital” benefits, let alone those of having a Catholic school.

Marquette’s Henk at the November conference observed that, in the ten-county Milwaukee archdiocese, one school in five has closed since 1965, and that number would be much larger without vouchers. Milwaukee has the oldest and arguably the highest-impact urban voucher program in the country. It allows the education of about 27,000 private school students, thousands of them in Catholic schools, to be underwritten with public money, generally more than \$7,000 per student. Without the voucher program, in which Milwaukee Catholic schools have participated since 1998, Cepelka said, church schools in Milwaukee would be in “a very different place . . . a scary and probably purely survival mode.”

Enrollment overall has been close to stable in Milwaukee in recent years, while it has declined nationwide. But Milwaukee schools have varied

in their success in enrolling students. On the one hand, St. Anthony School on the south side has gone from being a fading parish school in the mid-1990s to now having almost 2,000 students, making it the largest Catholic K–12 school in the nation. On the other hand, some schools are “on life support,” Cepelka said, as they struggle with both educational success and low enrollment.

The ACE consultants said in 2013 that, nationwide, there were 400,000 “empty seats” in Catholic schools, “a remarkable 36 percent of which are in states that already have a choice program” making it financially more feasible for parents to enroll their children in Catholic schools. In other words, even when paying tuition isn’t the issue, the quality and attractiveness of a program can be—which leads back to the discussion at the November conference about how to increase the success and appeal of Catholic schools.

In the words of Father Tim Kitzke, a member of the pastoral team for several parishes in Milwaukee and a leader of Catholic East Elementary School, you need a good product. Fifteen years ago, Kitzke said, he would not have sent a hypothetical child of his own to Catholic East because the school was offering “a bad product.” But the school has made major improvements, and now he would enroll that child. He said that schools need to do more to change their culture to focus on children and their needs.

Thomas Kiely, director of the Institute for Catholic Leadership at Marquette University, said in an interview that Catholic schools need better academic and religious visions of what they are aiming to accomplish. The institute is working to help improve K–12 education, both in Milwaukee and beyond. Kiely said he sees in the schools “a lot of very dedicated people who are

under-resourced, and not just monetarily.” Overall, there is a lot of enthusiasm for the schools among parents, and parents are choosing Catholic schools intentionally.

Henk said in an interview that compared to five or ten years ago, things are better. “I think the will is stronger because people are no longer in denial that Catholic schools are at risk,” he said. And well-chosen innovations have been launched.

Smarick said that Catholic leaders have a choice: “Keep doing the things we’ve been doing that have led to [a] slow demise consistently for half a century. Or open your minds and do things differently. We’re starting to see on the horizon sunlight for the very first time.” He offered three areas that need to change:

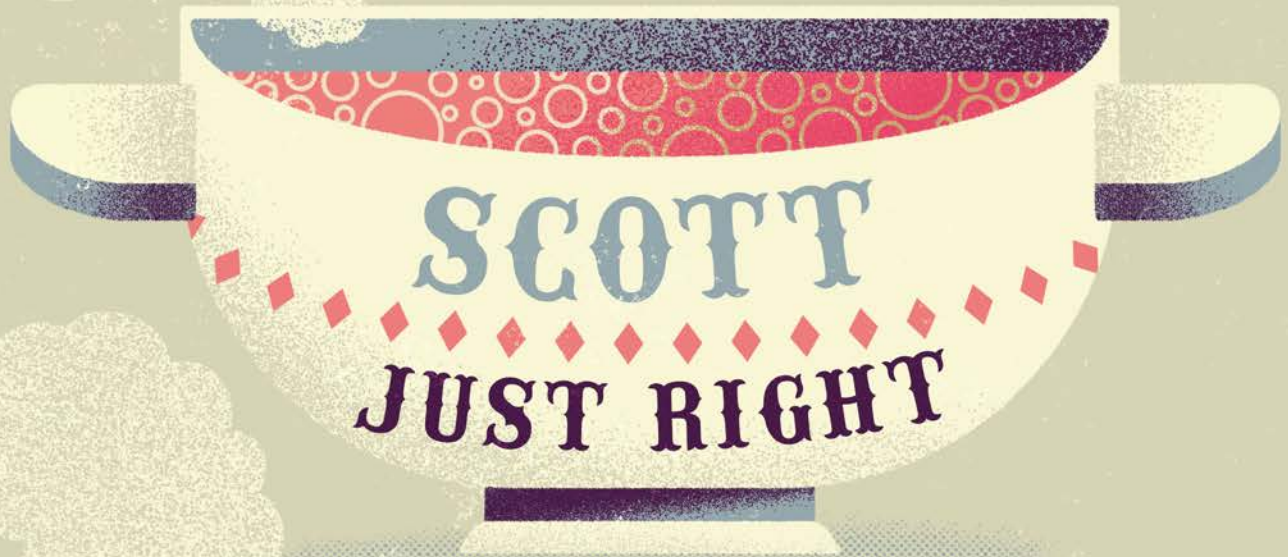
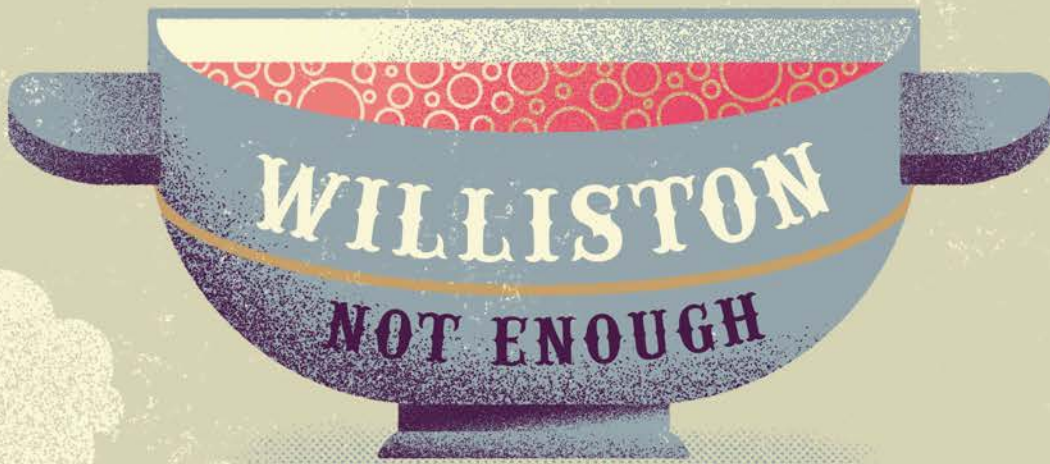
- “straight-up transparency and accountability” that make clear to parents and broader communities how well a school is doing;
- an understanding of the changing landscape of educational options for parents so that Catholic schools can position themselves as ones that more parents choose for their children; and
- the unleashing of more “entrepreneurialism” among those who want to lead Catholic schools.

“It was time for the milkman to go away,” Smarick said. “It was time for trains to get replaced by airplanes. Progress sometimes is progress. And that means breaking eggs sometimes to make omelets. So I’m bullish about the possibility of young entrepreneurs and related laity in these systems saying we have to try things differently, and that means replacing yesterday’s Catholic schools with a new breed of Catholic schools.”

On this view, the Catholic K–12 urban schools of the future would look even more different from the schools of a half-century ago than they do today—but they would again be thriving. ■

“So I’m bullish about the possibility of young entrepreneurs and related laity in these systems saying we have to try things differently, and that means replacing yesterday’s Catholic schools with a new breed of Catholic schools.”

Andy Smarick, a partner in a Washington-based nonprofit, Bellwether Education Partners, and senior policy fellow with the Thomas B. Fordham Institute



CONTRACT DESIGN AND THE GOLDILOCKS PROBLEM

By Robert E. Scott

I teach and write about contracts. I have done so for forty years. During that time, my approach has changed considerably. I used to teach contracts the traditional way: we would read cases of prior contract disputes and then, analyzing them from a litigator's perspective, help the students reconstruct the arguments. Ultimately, I would ask: What is the argument that would have given the plaintiff (or the defendant) the best chance of prevailing in court? This is a worthy exercise; it forces the students to learn the difference between good arguments and silly ones. And it is an essential skill of any good lawyer. Moreover, it is likely to be helpful to those who end up as commercial litigators. But there is one problem: data show that most practicing lawyers working in commercial and corporate law are transactional lawyers, not litigators. And so, over time, my perspective has shifted. I continue to have the students read cases, but now I spend much more of my time with the students asking a much different question: How could we have designed this contract to have prevented the dispute from arising in the first place? This is the perspective of the transactional lawyer looking at cases from the perspective of a pathologist: Why did the patient die? Sometimes, of course, the answer is that a contract dispute, like death, is inevitable. But much more often it turns out that a well-designed contract could have greatly minimized the risk of litigation. ▶▶

Robert E. Scott is the Alfred McCormack Professor and the director of the Center for Contract and Economic Organization at Columbia Law School. He served for ten years as dean of the University of Virginia School of Law and for more than two decades as the school's Lewis F. Powell, Jr. Professor. This is a lightly edited version of the annual Robert F. Boden Lecture, delivered by Professor Scott at Marquette Law School in October 2014. A longer version, including notes, appears in the spring issue of the *Marquette Law Review*.

A CHANGE
IN TEACHING
APPROACH
TO FOCUS ON
CONTRACT DESIGN

Nowhere is the issue of contract design more relevant today than in the current debate over contract interpretation. Contract interpretation remains the single most important source of commercial litigation and the least settled, most contentious area of contemporary contract doctrine and scholarship. Framed by the battle between the titans of contract, Samuel Williston and Arthur Corbin, and continuing to the present, two opposing positions have competed for dominance in contract interpretation. Many (indeed most) states, including Wisconsin, follow a traditional common law, “textualist” approach to interpretation. Here, when the writing is clear, courts cannot choose to consider the context surrounding the contract. In contrast, in states that follow California, and in all states where the subject matter involves the sale of goods under the Uniform Commercial Code, the courts are “contextualist.” Here, courts must consider the context regardless of the clarity of the written contract. Thus, the battle is joined: text versus context.

This battle over contract interpretation—which is better, text or context?—illustrates the deep chasm that separates scholarly debates over contract doctrine from the real world of contract design. The contract doctrine purports to address a single interpretive question, presenting itself in a variety of particular ways: What should courts do? Should a court adopt a hard or a soft parol evidence rule? Does the common law plain meaning rule still apply? Are merger clauses conclusive evidence that the writing is integrated? But the design choices lawyers make for their commercial clients are motivated by quite different considerations. Transactional lawyers who design contracts for sophisticated parties are much more concerned with managing the role of a court in resolving contract disputes than in debates over styles of interpretation. And designing a contract that successfully manages the court’s role is not an easy task.

The fundamental challenge lawyers face in designing a contract is that contractual obligations are agreed to *ex ante* (at the time the contract is formed) but are enforced *ex post* (after the transaction has broken down and parties are litigating). Because courts have the benefit of hindsight, the *ex post* world sometimes, though not always, resolves the uncertainties of *ex ante* contracting. In order to resolve those uncertainties, however, courts must be empowered to interpret contract terms. Now here is the rub: the invitation to interpret the agreement creates an opportunity for a mulligan, a “do-over,” where either party can behave strategically. The party who is disappointed by subsequent events may argue that the contract as written doesn’t fully reflect the parties’ true agreement, and, conversely, the party who was blessed by fate may argue that the contract as written is exactly what the parties intended even though it appears in hindsight to lead to unreasonable results. Anticipating this problem, the transactional lawyer faces the challenge of choosing between two very different options: either to expend costs in drafting and negotiating in order to devise innovative



Columbia’s Robert E. Scott delivers Marquette Law School’s Boden Lecture in the Eckstein Hall Appellate Courtroom.

contract terms that reduce the likelihood of future strategic behavior or to postpone those costs and delegate discretion to a later court to root out and deter this strategic behavior once litigation arises.

There are several reasons why contract doctrine does not provide any guidance on how best to respond to this challenge, but one in particular stands out. Contract law scholars have failed badly in understanding the causes and effects of contract breach. The difficulty starts with a misspecification of the problem. It is incorrect to think of contract breach as either action (or inaction) by a party who thereby fails to perform its contractual obligations satisfactorily. More properly, breach is a legal conclusion reached by a court charged with the duty of resolving these private disputes. So let's ask the question more precisely. Given the coercive power of the state to enforce contracts and award compensatory damages, why do parties ever breach?

There are three major explanations. First, many breaches are inadvertent: that is, parties breach because they are unable to provide a timely and conforming performance. For our purposes, it does not matter why—it could be failures in production or supply or any other of a host of external shocks that prevent full and complete performance. In any event, inadvertent breach does not implicate contract design (at least not directly).

What about advertent (or purposive) breaches? Here there are two candidates. One hypothesis can be traced rather directly to an article that Charles Goetz and I wrote more than 35 years ago. Developing an idea first suggested by Robert Birmingham in 1969, we coined the phrase “efficient breach.” Efficient breach theory was based on the premise that a contractual obligation is not necessarily an obligation to perform but rather an obligation to choose between performance and compensatory damages. Goetz and I explained the standard default rule of expectation damages by hypothesizing “that breach occurs where the breaching party anticipates that paying compensation and allocating his resources to alternative uses will make him better off than performing his obligation.” It was a nice try, but, in fact, it doesn't fit the data. There are very few examples of an efficient breach in which one party chooses between performance and the payment of expectation damages that are subsequently assessed by a court. In truth, efficient breach is both a null set and an oxymoron. So, while we meant well, Goetz and I are probably primarily responsible for leading a generation of scholars down the wrong garden path.

Does this mean that the data show there is no such thing as an advertent breach, in the sense of a conscious breaking of a promise to perform? Not at all. There are literally hundreds of cases where parties have been found by a court to have consciously breached their obligations under the contract. The interesting thing about these cases, however, is that “breach” is not the result of a rational choice between the alternatives of undertaking a performance that costs more than it is worth or paying equally costly compensatory damages. Rather, it is a conclusion reached by a court following a trial in which both parties insisted that their behavior was entirely proper under the contract. So what is going on here?

A possibility is that one of the parties—let's call him “the doofus”—is simply miscalculating what kind of performance the contract requires. If that is so, then the breach is merely inadvertent, the product of a mistaken judgment and thus no different from any other error that prevents a party from performing as promised. A second—much more likely—possibility is that one of the parties is welching on the deal. We might well be tempted to label this latter behavior as opportunism. Indeed, several scholars have recently argued that the risk of opportunistic breach is sufficiently acute that courts should zealously police against opportunism by deploying their traditional equity powers to punish an opportunistic party even in the face of a fully integrated and unambiguous written contract. They contend that this heightened risk of opportunism undermines any argument that sophisticated parties are better equipped to deal ▶▶

THE FAILURE OF CONTRACT SCHOLARS TRULY TO UNDERSTAND BREACH

AN APOLOGY FOR EFFICIENT-BREACH THEORY

with the risk of opportunism in advance through rational contract design. Contrary to the views of these scholars, I am going to defend the view that reliance on contract design is, in fact, the better approach. My claim is that what the proponents of a return to traditional equity believe can be done as a matter of theory, generalist courts, in fact, cannot do (at least not reliably).

Let's begin with the concept of opportunism. Oliver Williamson famously defined opportunism as “self-interest with guile.” But that characterization isn't quite right here: as it appears initially to the court, both of the contracting parties are guileless. Thus, we need to sort the behavior of the honest but mistaken breacher (who is not an opportunist to be sanctioned by a court using its equity powers) from behavior that is, in fact, self-interested but appears completely guileless. So let's call the latter behavior that I am describing “shading,” as in “shading the truth.” My hypothesis is that both the parties and the courts face a fundamental dilemma: First, shading behavior is ubiquitous, and, second, it is nearly impossible for a court to sort out who is the doofus and who is the shader. Let me take a moment to defend both of these propositions.

REACTION FROM **GEORGE TRIANTIS**

PRODUCT DESIGN IN CONTRACT DRAFTING

I am honored to be writing these comments on Bob Scott's essay. During the past four decades, contracts scholarship has evolved through several phases focusing on a distinct set of issues: in particular, remedies in the 1970s, default rules in the 1980s and early 1990s, the interplay between legal and nonlegal enforcement since the 1990s, and, currently, the challenge of contract design. Bob Scott is unique among contracts scholars in having been the leading voice through each of these phases; in so doing, he has inspired generations of legal scholars. I was particularly privileged to have had Bob as my teacher, colleague, and dean at the University of Virginia School of Law, my co-teacher in a contracts seminar we offered during several academic years, and a coauthor of several articles and a book. Much of what I know about the analysis of contracts, I learned at his elbow. Yet this would not be an interesting commentary if I did not discuss some respect, however slight, in which our viewpoints diverged. I shall try to be efficient enough, relying through the notes on some of my past work.

For the past 15 years or so,¹ I have been more sanguine than Bob about contextual interpretation in the resolution of contract disputes, whether by arbitration or court. In fact, commercial parties themselves invite reference to industry standards or course of dealings in the vague language they adopt in their agreements (such as “good faith,” “best efforts,” “commercial reasonableness”). A decade ago, Bob and I combined to publish “Anticipating Litigation in Contract Design,”² in which we presented a framework by which parties decide whether to describe their obligations in rule- or standard-like language. In doing so, the parties trade off the ex ante costs of contract design (involved in specifying rules) against the ex post costs of litigation (in applying standards to the particular circumstances). By evaluating this trade-off, the parties can choose, on a provision-by-provision basis, between a textual or contextual interpretation. Merger clauses can exclude precontractual communications and the like, but industry standards and courses of dealing are invoked by the use of standard-type language.

The parties have other tools at their disposal in the design process. As Bob and I noted in that article, they have significant discretion to opt out of the default procedural and evidentiary laws. In this way, the parties

¹ See George G. Triantis, “The Efficiency of Vague Contract Terms: A Response to the Schwartz-Scott Theory of U.C.C. Article 2,” 62 La. L. Rev. 1065 (2002).

² Robert E. Scott & George G. Triantis, “Anticipating Litigation in Contract Design,” 115 Yale L. J. 814 (2006).

To begin: Why is shading pervasive? There are several reasons, but most important is the fundamental fact that all contracts—even those carefully drafted in every detail—must be interpreted. Even if the interpretation is by a formalist court relying on the parol evidence rule to limit its inquiry to the text of the agreement and its plain language, the court is still required to harmonize and make coherent a contract with more than 100 individual provisions, each of which may be unambiguous when viewed in isolation but subject to interpretation when taken together. This means that all contracts depend on courts to implement correctly the ex ante instructions that the parties have embedded in their agreement. Those instructions can be framed either as “hard” terms (precise, bright-line rules) or as “soft” terms (broad standards) or, more often, as combinations of the two. But whether hard or soft, one party or the other will obtain a significant ex post advantage whenever there is a substantial exogenous shock between the time of contracting and the time of performance. Thus, if the contract terms are hard, the party with the apparent benefit of a bright-line rule can extort rents by refusing to adjust its behavior in ways that would reduce the ex post losses of the counterparty (let’s call this Type I shading). In light ▶▶

can tailor these provisions to the circumstances in which they expect their disputes to arise. By making the procedure more efficient, they increase the attractiveness of standards and contextual interpretation, and save on front-end transaction costs.

Even with imperfect and costly courts, parties might still opt for contextual interpretation of some provisions because it is superior to the alternative choice of textual interpretation of imperfect rules. Indeed, by manipulating the cost of litigation and the liquidated damages for breach to adjust for judicial error, the parties can design a contract under which a party would have the incentive to bring an action for breach only when the other party has in fact failed to meet its obligations.³ In his essay here, Bob refers to the moral hazard problem of a party’s exploiting the court’s error to reallocate the division of losses that had been agreed to in the contract. Yet consider whether such a plaintiff would incur the litigation cost of, say, \$40,000, for even a 30 percent chance of fooling the court into awarding liquidated damages of \$100,000. This illustrates a more general point about design: it is an opportunity to think of damages more creatively as serving a purpose beyond simple compensation. In fact, even casual observation will reveal that liquidated damages often deviate in practice from the purely compensatory level.

The notions that contracts are products and that products can benefit from design thinking are not new. How to encourage innovation and improve contract quality remains a challenge.⁴ At Stanford, our law students have the opportunity to learn from Stanford’s Institute of Design (the “d-school”) about techniques that can unleash their creativity to create more value through negotiation and contract design. This is an especially productive path in educating the next generation of transaction lawyers.

³ Albert Choi & George Triantis, “Completing Contracts in the Shadow of Costly Verification: The Case of Corporate Acquisitions,” 37 J. Legal Stud. 503 (2008); Albert Choi & George Triantis, “Strategic Vagueness in Contract Design,” 119 Yale L. J. 848 (2010).

⁴ George G. Triantis, “Improving Contract Quality,” 18 Stan. J. Law, Bus. & Fin. 177 (2013).



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SHADING—THE DIFFICULTY OF ITS DETECTION

of the problem that hard terms can work an injustice to the party who has been disadvantaged by fate, many scholars have argued that courts should imply broad standards of reasonableness or good-faith adjustment to moderate the effects of the bright-line obligation that subsequently proves so vexing. But this strategy merely shifts the advantage to the counterparty. Substituting a soft standard—such as good-faith adjustment—for the hard rule merely creates a moral hazard risk on the other side, inviting a losing party to exploit the court's discretion by persuading it to reallocate losses that were in fact allocated to the losing party by the contract (call this Type II shading).

Shading is not only pervasive but also difficult to detect. Often the shader is entirely sincere in her belief that she has complied with the contract and that it is the counterparty who is the breacher. There are two related but distinct phenomena here. The first is the “noisy prisoner's dilemma” problem: it is very difficult for parties engaged in iterative acts of performance to interpret correctly the behaviors of their counterparty. A cooperative action can often be misinterpreted as a defection and vice versa. This can lead to sincere but mistaken retaliation against a perceived breach of trust. Second, there is a phenomenon that every good commercial lawyer understands: the behavioral reality is that agreeing before the fact to bear a low-probability, long-tail risk is quite a different matter from being willing to absorb the entire cost once the risk materializes. The prospect of suffering large ex post losses can produce a form of cognitive amnesia in which both parties are convinced that their behavior is perfectly consistent with their contractual obligations. To be sure, a party's claim of compliance may be purely strategic, in which case the court will be confronted with a self-conscious opportunist in shader's clothing. But in any event, there is no “breach” in any meaningful sense of the word unless and until a court—acting as a referee—assesses the evidence and makes a call.

One might be tempted at this juncture to turn to relational contract theory and ask whether norms of trust, reciprocity, and the desire to preserve one's reputation will deter shading on the margin and avoid the problem altogether. But relationships built on trust alone are little help in this situation. Contract disputes of this sort present an end game—bet the ranch—situation in which the relationship will come to an end one way or the other, so the shader has little to lose. Moreover, even if contracting parties are willing to punish selfish or unfair actions by their counterparty, as the behavioral research suggests, this won't deter shading either. As I have suggested, both parties see themselves as behaving fairly under the circumstances and therefore feel that their actions are fully justified.

So what is a court supposed to do? As I mentioned earlier, several scholars have recently argued for a return to traditional equity—on this view, courts would make a Solomonic determination of who likely is the opportunistic party, and they would impose sanctions independently of what the contract appears to require. But before we endorse that approach, we must first answer a key empirical question: Can generalist courts find the shaders among the doofuses?

To begin to answer that question, I have assembled a data set of 75 randomly selected contract disputes presenting this issue to the court: who breached the contract? I tested two hypotheses. First, that disputes in which a party could plausibly be guilty of either Type I or Type II shading are common. Second, that courts in such cases would not (or could not) reliably identify behavior as opportunistic. The hypothesis that shading disputes are frequent is a function of the fact that disputes of this sort often require a third party to resolve. The second hypothesis rests on the claim that shading behavior requires a court to understand the underlying context of the transaction with sufficient depth to be able to identify subtle forms of aberrant behavior. Conceding that there is a considerable amount of judgment involved in my coding of the cases, I can report that the tentative findings are consistent with both hypotheses.

CAN A GENERALIST COURT FIND THE SHADERS?

Of the 75 selected cases, 46 involved claims where the counterparty's behavior could plausibly have constituted either Type I or Type II shading. In 19 of the 46 cases, at least one party alleged, in either pleadings or briefs, that its counterparty's claims were opportunistic. Yet, in none of the 19 cases alleging opportunism did the court either explicitly or by inference identify the behavior as opportunistic. To be sure, these results are only suggestive. These courts could be resolving the doofus/shader decision sub rosa but declining to identify it explicitly. But at best, the judicial silence gives us a very noisy signal.

There are other data that support the hypothesis that generalist courts are poor candidates for using their equity powers to reduce the incidence of opportunism. One line of analysis shows the difficulty of measuring allegedly opportunistic behavior against the norms and customs of the relevant trading community. Recent research on the medieval law merchant by Emily Kadens and on twentieth-century trade associations by Lisa Bernstein has shown that ongoing, "traditional" dealings never crystalize into well-defined, customary usages of trade at all. This evidence suggests that many courts, when asked to identify a trade usage, rely exclusively on interested-party testimony rather than on a careful evaluation of complex evidentiary submissions. Just to posit one example, the plaintiff's warehouse manager may testify that shipments usually arrive within three days. In short, there is virtually no evidence that courts undertake the empirical investigations needed to find a relevant custom and then use it to identify opportunistic behavior—and even less reason to imagine they could succeed if they did. Long-term, reciprocal relations always reflect the idiosyncrasies of the histories of each party with the others; and these idiosyncrasies prevent the community's practice from settling into a determinate custom or practice. Thus, even if generalist courts were better equipped for empirical investigation than they normally are, there will typically be no custom-based, context-embedded usage or practice for them to discover and use in evaluating a litigating party's actions.

Here then is the dilemma: Enforcing contracts requires interpretation, which means that courts are asked to police shading behavior, but doing so often leads to errors, because the courts are asked to do more than they are able to do. Let's call this "the Goldilocks problem." Left to their own devices, courts will intervene either too much or too little. ▶▶

THE GOLDILOCKS PROBLEM



CONTRACTS AND THE EXIGENCIES OF BUSINESS

Let me offer some observations, perhaps more on the general topic of Professor Robert E. Scott's Boden Lecture than on his specific thesis, but touching on both. My fundamental point is this: Whether and to what extent lawyers can effectively draft a contract for the express purpose of shaping the scope of a court's eventual interpretation of that contract seems to me to be primarily an economic question. It is really a matter of how much certainty my client wants to buy and how much "lawyering" my client will expect or at any rate tolerate. This is a function of circumstance.

In a lawyer's perfect world, we would always have the time and resources needed to craft a contract that consciously and deliberately takes into account all of the possibilities of a court's involvement in a dispute over that particular transaction. But this world would require two things we rarely have: the unlimited patience and the unlimited checkbook of a client.

In mergers and acquisitions, securities, commercial real estate, or other high-value work, where boilerplate has been tested, retested, and adjusted over time, this or something approximating it can happen. But what about closing an emerging technology license agreement that no one has ever quite done—before 10 p.m. on the last day of the quarter? The former can be readily and predictably drafted; the latter not so much.

It seems to me, then, that one of the primary drivers of contract-design innovation, with respect to managing a court's role in contract interpretation, is the reality of day-to-day commercial practice. There the luxury of theoretical reflection is usually trumped by necessity—necessity driven foremost by practical business considerations and limitations on time and money. These resource limitations save the lawyers involved from the indulgences of thinking "too much" and spending too much, increasing the efficiency of the result and perhaps even reducing the likelihood of a dispute: Practical contracts that work tend not to produce disputes that require a court's involvement to resolve.

Consider the situation in 1970, when the team of NASA engineers supporting the mission of Apollo 13 had to design a carbon scrubber for the crew in space, using only items on hand in the space module. They had some tubes, some duct tape, some cardboard, and other odds and ends. Under extreme time and resource pressure, this team of engineers came up with a solution that worked and saved the mission. How would that situation have turned out if that team of engineers had been hired on a consultant basis and told that it could take as much time as it needed, using any item from a vast catalogue of parts and supplies? To understate the answer: Not well for the astronauts.

To be sure, the observation is contextual—as I acknowledged at the beginning of this short essay. But I see the same dynamic every day as an in-house lawyer, where the contracting parties generally also have unique knowledge of the businesses and industries they serve and have no choice but to take more cooperative and relational postures in the contracting process. This makes the question of the ultimate scope of contract interpretation by a court less relevant from the outset.

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So what is the alternative? How do we get just the right amount of judicial policing of contracts? My argument is that sophisticated contracting parties and their lawyers can, in fact, design their contracts in ways that invite a court to perform this policing function but only when the court is likely to get the question right.

But before we look at the ways transactional lawyers can accomplish this task, we should remember that the problem was not always this severe. At early common law, the Goldilocks problem was contained by virtue of the historic division of roles between law and equity. Historically, the English common law applied two different sets of doctrines to interpret a disputed contract. The first consisted of rules—such as the parol evidence and plain meaning rules—that were cast in objective terms, minimizing the need for subjective judgment in their application. They were administered strictly, without exceptions for cases in which the application of a rule appeared to defeat its purpose. These doctrines originated in the first seven centuries of adjudication in King’s Bench and Common Pleas, the English courts that produced the corpus of the common law from the twelfth to the nineteenth century. The second set of doctrines consisted largely of equitable principles originating in the English Court of Chancery, which, by the end of the fourteenth century, began to exercise overlapping jurisdiction with the common law courts to hear cases that, in J. H. Baker’s characterization, “in the ordinary course of law failed to provide justice.” These doctrines were framed as broad principles administered loosely and were designed to provide exceptions to the common law interpretive rules. They were generally cast in subjective terms and therefore required judges to exercise judgment by evaluating the fairness or the “equities” of the particular transaction.

The Chancery’s willingness to provide an independent and alternative forum stemmed from the perception that the common law courts were incapable of policing opportunism because of the strict, rule-bound inclination of common law judges to apply the common law rigorously, without reference to the context of the case at hand. The Chancery’s sole focus, in contrast, was with the equities of the case at bar. Indeed, for many years the Chancery’s decrees had no formal precedential effect, which initially freed the Chancery from any concern that its context-specific rulings could undermine the consistency and predictability of contracting. And, important for our purposes, there was one key additional factor: in preindustrial England, the Chancery was more intimately familiar with the contextual environment of typical party disputes and could fairly sort relevant from irrelevant facts. Thus, even though the Chancery reversed or avoided outcomes dictated by the interpretive rules, these actions could be seen as necessary in order to vindicate, rather than undermine, the common law.

Fundamentally, however, the institutions of the common law and the Chancery were at cross-purposes. The result was two competing systems, often with incompatible procedural and substantive doctrines, yet overlapping in jurisdiction. The ultimate result of the merger of law and equity meant that the institutional framework of the state could no longer, by itself, solve the Goldilocks problem. In consequence, commercial parties today are likely to be poorly served if they choose to rely on subjective, equitable review by contemporary courts. Lacking the requisite specialization, courts today are relatively ineffective at uncovering the underlying context that is essential if they are to police opportunism effectively. In contrast to early courts of equity, when the courts were close to the actors in a largely homogenous economy, generalist courts today are removed from the enormously varied commercial-contracting context in modern economies and therefore are critically impaired in their ability to divine how and when parties might seek to exploit the uncertainties of ex post interpretation. ▶▶

A LOOK BACK AT THE COMMON LAW AND CHANCERY COURTS

THE ROLE OF CONTRACT DESIGN

So let's abandon the question the commercial litigator might ask: What contract doctrines best help courts determine when to intervene to deter opportunism? Rather, let's ask the question from the transactional perspective: How can we design a contract that appropriately limits the risk of opportunism and thus properly confines the court's role in supervising the contracting process?

We return (finally) to the question with which we began: How do skilled transactional lawyers—the contract designers of this world—address the Goldilocks problem? Is it possible to design a contract in which the court plays a superintending role that is sensitive to the context the parties have created? Unfortunately, we have only preliminary data to answer this question because contract design remains something of a mystery, largely neglected by both legal and economic scholars. Indeed, a large and growing literature demonstrates the resistance of contracts to change even in the face of a significant exogenous shock. We know that boilerplate terms in corporate indentures, sovereign bonds, and other standard-form contracts resist improvements that would appear to enhance contractual efficiency. Even when customized, bespoke contracting emerges from law-firm precedents that are tightly protected and resistant to amendment. Yet despite these impediments, contracts do change in many different ways, and the changes appear to be the product of intelligent design, perhaps aided by a quasi-Darwinian evolutionary process of trial and error. Studies of contemporary commercial practices that my colleagues, Ron Gilson and Chuck Sabel, and I have undertaken over the past four years show that sophisticated parties choose several different means of anticipating and deterring shading behavior in the design of their contractual regimes.

CUSTOMIZED CONTRACTS

To understand how contracts have evolved to address the Goldilocks problem (even as exogenous shocks alter the business environment in unpredictable ways), we should first begin by distinguishing two fundamental design categories. The first and most common is customization or “tailoring” of familiar contractual formulations. This involves changes in the terms within a particular instrument to better address particular uncertainties with future states. Thus, for example, in the past 50 years, parties have increasingly inserted vague terms such as “best efforts,” “reasonable best efforts,” or “commercially reasonable efforts” as modifiers that are combined with specific or precise performance obligations under the contract. Another example of customization occurs in thick contractual markets where trade associations or other collective bodies use an updating mechanism external to the parties to propose changes in particular terms that will ultimately be adopted by most if not all members of the collective body.

ENHANCED UNCERTAINTY AND THE INFORMATION REVOLUTION

A quite different category of contractual design has occurred, however, as a product of the enhanced uncertainty triggered by the “information revolution.” These design changes are innovative in a much more fundamental way: they involve mutations in the very form of a contractual agreement. In this latter category, we see radically incomplete contracts being used to manage, *inter alia*, supply chains, complex platform production relationships, and pharmaceutical alliances. Parties in this environment of enhanced uncertainty are doing something different—and, we might surmise, what they are doing is an effort to solve the Goldilocks problem in novel ways.

To understand what is going on, let us begin by focusing on two critical characteristics of the particular contracting environment. The first is the level of uncertainty—are commercial practices stable and predictable, or are they disrupted by unforeseeable changes in technical possibilities and market conditions? All else equal, the higher the level of uncertainty, the more difficult it is for parties to write, and courts to interpret, completely specified and fully integrated contracts. Rather, when the level of uncertainty is high, sophisticated parties develop agreements grounded

Goetz and I explained the standard default rule of expectation damages by hypothesizing “that breach occurs where the breaching party anticipates that paying compensation and allocating his resources to alternative uses will make him better off than performing his obligation.” It was a nice try, but, in fact, it doesn’t fit the data.

in the commitment to a regular exchange of private information but with no commitment as to the product that this agreement will produce. The second characteristic is the scope or thickness of the market—whether there are many traders or only a few engaged in a particular class of transaction that are using similar contracting strategies. All else equal, the greater the number of traders engaged in a transaction, the more likely that the contract terms and the rules for their interpretation—as well as a mechanism for adjusting terms as needs change—will be provided by a collective entity, such as a trade association, that can then provide a court the necessary context for interpretation. The interplay of these two forces—uncertainty and scale—points to the new forms of contracting among sophisticated parties and, at the same time, helps clarify the (often overwhelming) institutional demands that are placed on generalist courts.

Let me briefly illustrate the way that uncertainty and scale together determine whether and how the contract in question deals successfully with the Goldilocks problem. Begin with the case of thin markets, where the key variable is the level of uncertainty: For example, think about the battle for evolving technology in the market for electronics. Here the principal actors are few and scattered. Thus, unlike, say, the grain industry, these parties cannot rely on a trade association to institutionalize their design solutions because the market is too thin. In these circumstances, contract design occurs primarily in bilateral relationships, and here the level of uncertainty will determine how the parties respond to the problem of shading.

When uncertainty is low—say, for example, a one-year license of patented electronic software—sophisticated parties can turn to customized, completely specified contracting. By incorporating any context thought to be relevant as part of the “terms” of a complete, formal agreement, they can specify precisely the evidentiary base that will be made available to a court, while still preserving the court’s historic role in policing opportunism. For example, the contract can provide clear directions to a court of the context within which the specified uses of the licensed intellectual property are to be interpreted. This might include (a) a “whereas” or “purpose” clause that describes the parties’ business plans; (b) a series of definition clauses ascribing to words and terms particular meanings that may vary from their plain or ordinary meaning; and (c) appendices that provide illustrations or examples of the permissible uses of the licensed intellectual property as well as any memoranda the parties want an interpreting court to consider in interpreting the contract’s text. Alternatively, the parties can specify in the agreement that the meaning of terms should be interpreted according to the customs and norms of a particular industry or commercial community. ▶▶

UNCERTAINTY AND SCALE

LOW UNCERTAINTY

MODERATE UNCERTAINTY

The point here is simply that low uncertainty permits parties to design a contract that dramatically reduces (if not eliminates) the need for courts to inquire into any evidence extrinsic to the written agreement. By reducing the burden on a court to have to characterize ex post shading behavior accurately, this contract also reduces the likelihood of a court's making a mistake in interpreting the contract. Correspondingly, it reduces the incentive for the party disfavored by subsequent events (who, after all, is the likely shader) to engage in opportunistic litigation in the first place. With a completely specified contract in the low-uncertainty setting, therefore, courts are less mistake-prone, and parties less likely to encourage mistakes, resulting in less risk of judicial error.

Now suppose that the contracting parties confront moderate levels of uncertainty, in the sense that they can identify what should happen in some but not every future state of the world. One clear example is the decision to hire a sales representative to market the firm's electronic products following their manufacture. The parties can specify what they want the agent to accomplish as matters stand at the time of drafting the contract: they can identify the potential customer base, or geographic region, and they can specify sales goals. But they can't detail how the agent will try to market the products, how the agent will allocate her time across different products, or what adjustments the agent should make if market conditions change or competitors alter their strategies. Similarly, what if the product is a new drug, and the contract contemplates a license between the owner of the intellectual property and an agent who agrees to secure regulatory approval and commercialize the product? Contracts such as these will typically charge the agent/licensee with using "commercially reasonable" or "best" efforts to accomplish the specified tasks, reflecting the fact that the appropriate strategy is dependent on the outcome of uncertain events, such as the market demand and competitive conditions for the product in the first case and the results of clinical tests and the course of the regulatory process in the second example. The reason to use standards is clear: Courts assess performance with respect to standards only after the relevant future events have occurred. In this way, parties can obtain the advantage of hindsight: at the time for dispute resolution, the court has information that at the time of drafting the contract the parties lacked.

Both of these examples illustrate the design challenge of granting the agent some—but not too much—discretion in choosing the strategies that best meet the parties' ex ante expectations for performance. In this intermediate range of uncertainty, sophisticated parties use design strategies to constrain the discretion of a court later asked to assess the agent's behavior under the applicable standard. What we see is that parties (or more accurately their transactional lawyers) combine precise or specific obligations with the broad contractual standards. The specific obligations are directions about the context through which the standard should be applied. By combining specific terms with generalized obligations, the parties can add context evidence that is revealed over the course of contract performance to the original text of the agreement. The more effectively this context evidence can be harnessed so as to limit the court's discretion in applying the relevant standard, the more attractive is the use of standards that take advantage of the court's hindsight advantage. In this way, the parties design a contract to answer two key questions: when the court will look to context and who decides what context matters.

When and the extent to which parties design a regime deploying these broad standards thus depends on how effectively context can be specified in ways that reduce the risk a court can be persuaded by a shader to misunderstand or misapply the standard. To reduce this risk, parties can describe in the contract the context that will be relevant—what ▶▶

OPPORTUNISM AND THE TRANSACTIONAL LAWYER

In his essay, Professor Bob Scott notes that a transactional lawyer faces a choice in fashioning an agreement—either drafting to reduce the likelihood of opportunistic behavior by the counterparty or leaving it to a court to root out strategic behavior. Yet sometimes a transactional lawyer wants to preserve the potential for opportunism for his own client. To do this, the lawyer typically either omits any reference to the potential future opportunity in the contract or uses a vague or ambiguous standard with respect to the activity. That contractual silence or lack of specificity, in turn, enables the client to argue its interpretation in any subsequent litigation.

In this situation, the transactional lawyer, through planning, is enabling the client's opportunism. Often the counterparty is not even aware of this potential for opportunism, for it is not aware of the probable, or even possible, future opportunities that the client anticipates in its business. In this way, even the contractual counterparty (much as with a court) is ignorant as to the real purpose behind either a contract's silence or its vague or ambiguous standard on a particular topic.

Let us briefly consider the role of the transactional lawyer in this situation. Specifically, is it ethical for the transactional lawyer to draft a contract in a way that enables client opportunism?

On the one hand, it is arguably dishonest for a lawyer intentionally to draft contractual language in a way that allows the client to pursue future opportunities of which the counterparty is not aware. After all, it is misconduct for a lawyer knowingly to assist a client in misleading the counterparty as to the content of a writing that documents a contract, such as by failing to disclose a provision added to a contract where the counterparty would reasonably expect such disclosure—so teaches *Hennig v. Ahearn*, 601 N.W.2d 14 (Wis. Ct. App. 1999). It is only one step away from this type of drafting omission to fail to disclose information to the counterparty as to the client's opportunistic purpose for using a general contractual standard.

On the other hand, if, as Bob argues, courts cannot tell when a contractual party is pressing for an opportunistic interpretation of contractual language, then there is no way to determine where a transactional lawyer knowingly facilitated that opportunism. Thus, even if unethical, this type of conduct is impossible to police. Moreover, if a lawyer is supposed to diligently and competently represent her clients, then she must generally have the freedom to advance the clients' interests, especially when planning their business affairs in light of the uncertain future. The argument is therefore strong that the transactional lawyer is justified, if not required, to facilitate her clients' opportunism.

Yet it is not altogether clear. In these circumstances, most strikingly for me, the uncertainty of the propriety of the lawyer's conduct in this situation demonstrates the failure of current rules of professional conduct adequately to contemplate the role of the transactional lawyer. Without such guidance, transactional lawyers must often help their clients plan their business affairs in light of not only the uncertain future but also—for the lawyers—the uncertain present.

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THE GOLDILOCKS PROBLEM IN CONTEXTS WITH EVEN-GREATER UNCERTAINTY

industry, what kind of products, and, when possible, the evidence the court should use to measure performance under the standard. In this way, the contractually specified standard directs the court to make use of context in addition to text, but limits the court's inquiry to only that context evidence that is relevant to the particular obligation embedded in the standard. Thus, even where the level of uncertainty calls for the use of standards, it is the parties and not the courts choosing the balance between text and context that best suits the level and kind of uncertainty the transaction protects.

A central design question, however, is this: Can parties still solve the Goldilocks problem when even-greater uncertainties challenge the skills of contract designers? As the level of uncertainty rises even higher, commercial parties (and their lawyers) can no longer rely on the traditional forms of contracting. Over the past 15 years, the challenges of the information revolution have led to increasing levels of uncertainty and motivated parties in affected industries (and their lawyers) to innovate by designing entirely new and radical forms of contracting. Electronics is a good example of an affected industry. Electronics firms compete with each other to anticipate and design the next breakthrough in technology—for example, the smartphone platform displaces the PC, only to find itself displaced by whatever comes next. This high-uncertainty environment, where an entirely new technology can disrupt the status quo, has triggered a revolution in the basic form of the contract. As I suggested earlier, lawyers for these parties have innovated by designing novel collaborative agreements that only obligate the parties to explore possibilities together without committing them to execute any specific project. In other words, even though there is a formal and very detailed contract of many terms and pages, the contract regulates only the commitment to collaborate, and not the course or the outcome of the collaboration, which is left entirely unspecified. This means that any effort to enforce this agreement in court is limited to protecting each party's promised investment in the collaborative process rather than directing a division of any surplus that might result if the collaboration were to succeed.

This limited legal commitment means that there is a significant constraint on the potential role of a court charged with policing shading. Any resulting agreement to produce a specified product or to purchase a key input to production (the usual stuff of contracts) is not part of the formal contract at all. Rather, the substantive outputs of the collaboration develop only from the informal relationship of mutual trust that is the result of the collaboration process itself. It follows that a reviewing court's primary focus will be limited to questions of character rather than capability: Has one party cheated, say by using information gained during the collaboration for its own private purposes? Because any judicial sanction applies only to the commitment to collaborate, it is limited to the vulnerable party's verifiable reliance costs and does not extend to the award of profits that might have been earned had the project gone forward.

Let's turn now and see how scale—the thickness of the market—changes the landscape of contract design. Consider for example the market for key commodities—grain, cotton, and the like. Here we encounter a thick market where many parties engage in the same or similar forms of contracting. When markets are thick, the costs of design can be spread, in the sense that many actors face similar risks and stand to benefit from concerted responses to them. In this environment, the affected parties often institutionalize their contract design through the collective action of industry associations. Once again, the design challenge will vary according to the level of uncertainty faced by the actors, but scaling the contractual product permits novel solutions to the Goldilocks problem.

TURNING FROM UNCERTAINTY TO SCALE

Notice how scale changes the parties' design responses even in low-uncertainty settings. Let's assume that commercial practices in the particular industry are stable and well understood by a substantial community of traders. Nevertheless, a generalist judge can't be expected to have knowledge of such embedded trade practices or be able to conveniently obtain the information needed to make an accurate determination of which party is the shader. So the trade association has to cope with the adverse consequences of judicial ignorance while, at the same time, creating a framework to reduce the risk of shading. This challenge motivates the trade association to engage in innovative design. What is the result? These trade groups have chosen to rely on expert arbitrators to strictly enforce industry-approved, standardized contract terms. They regularly update the terms to keep them current with practice as it evolves. In this way, the trade group enlists a third party with a limited charge: just monitor the shading risk by holding parties to the strict terms of the contract. But what about context—the party-to-party adjustments that are always necessary as changed conditions affect performance? That is left entirely to relational norms of reciprocity (tit for tat) and the discipline of repeated dealings. As a consequence, the risk of a party's making strategic argument about the "true agreement" is eliminated. This is a solution that cabins the court's enforcement role much more successfully than in the parallel case of the bilateral standardized agreement—the paradigmatic exchange of purchase order and acknowledgment forms—that is governed by the context-friendly Uniform Commercial Code.

Finally, then, what happens in thick markets when uncertainty increases and, as in the case of bilateral contracting, the parties need to rely on standards in order to harness the hindsight advantage of a court? Under certain conditions parties use their scale to invest a particular court with expertise in discovering the relevant context. For example, intimate familiarity with evolving commercial practice permits an expert court, such as the Delaware Court of Chancery, to reliably recover the always-evolving contextual facts needed to resolve fiduciary-duty disputes between shareholders and corporate managers. Courts in these areas of geographic concentration of similar contracting parties can develop, over time, both judicial expertise in the subject matter and a body of precedents that can parallel the private interpretive regimes created by trade associations. In effect, in instances such as the Delaware Court of Chancery and perhaps the Santa Clara County Superior Court with respect to the Silicon Valley industrial district, we see a contracting regime that reflects both the constraints imposed by the problems of uncertainty and scale and the potential that generalist courts may become specialist courts through repeated exposure to the particular industry. Under these circumstances, a generalist court can serve a geographic concentration of similar contracting parties by engaging in contextualist interpretation in careful and skillful ways that police shading effectively and thus help parties in their quest to solve the Goldilocks problem. ▶▶

Here then is the dilemma: Enforcing contracts requires interpretation, which means that courts are asked to police shading behavior, but doing so often leads to errors, because the courts are asked to do more than they are able to do. Let's call this "the Goldilocks problem." Left to their own devices, courts will intervene either too much or too little.

The preceding examples are only illustrative of the many variations in contract design where transactional lawyers have relied on experience and intuition to innovate. Contract scholars can aid this process by undertaking further empirical investigations: the central idea is that the level of uncertainty and the thickness of the relevant market will determine the range of design strategies found in contemporary commercial transactions. In each of these cases, my analysis suggests that the key is to design a contract that meshes with the relational or informal enforcement provided by the context and that thereby serves to cabin the role of the decision maker tasked with policing difficult-to-verify shading behavior.

This context-specific relationship among uncertainty, scale, and the form of the contract illustrates vividly the problem confronting generalist courts in assessing how to cope with

REACTION FROM STEWART MACAULAY AND WILLIAM C. WHITFORD

DO COURTS USUALLY GET IT WRONG?

Professor Robert E. Scott—Bob, to us—has been an admired friend for a long time. His thinking, as presented in this essay version of his Boden Lecture, shows why. Bob draws on his own insights, a wide range of scholarship, and his original and excellent empirical research about practices in drafting complex contracts, to show us some cutting-edge drafting approaches and the reasons for them.

Bob focuses on how sophisticated transactional lawyers draft terms directed at possible litigation of disputes concerning complex business contracts. He argues that courts should later respect these drafting efforts. When contracts are written with great forethought between sophisticated parties who are paying attention to what they are doing, we agree.

Yet, as Bob discusses at much greater length elsewhere, many contracts between sophisticated parties are not carefully planned.¹ Professor Claire Hill has written a series of articles about the contract-drafting processes that are common in our largest law firms when they are preparing contracts between sophisticated parties.² Often partners expect associates to produce a written document quickly to keep down costs. Often associates copy terms from other contracts prepared for other clients. Sometimes the resulting document contains language that is inappropriate or inapplicable to the contract at hand, or even directly conflicting terms, none of which is discovered or appreciated at the time the contract is signed.

As Bob recognizes, these practices thrive because in almost all business transactions, what guarantees performance is trust, concern about reputation, and hope that a long-standing business relationship will continue. Litigation is rare. Even when trouble is encountered, lawyers are seldom brought in when businesspeople still have a valued ongoing relationship. A fortiori, businesspeople do not want to invest resources at the negotiation stage to provide clearly in the written document what the courts should do if certain contingencies arise—or, sometimes, even to memorialize understandings or assumptions shared when they formed the deal.

Bob expresses concern about a court's trying to resolve disputes by going beyond the words of a written contract and looking at the context of the parties' relationship. He recognizes that the written contract may not record what the parties were thinking when they negotiated and signed it, but Bob (and he is not

¹ Bob and his coauthor, Mitu Gulati, titled a book about such contracts: *The Three and a Half Minute Transaction—Boilerplate and the Limits of Contract Design* (2013).

² E.g., Claire A. Hill, "What Mistakes Do Lawyers Make in Complex Business Contracts, and What Can and Should be Done About Them? Some Preliminary Thoughts," in *Revisiting the Contracts Scholarship of Stewart Macaulay* (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

the risk of opportunistic behavior. The role of generalist courts will differ across the various dimensions I have outlined, but in all events it will be more restricted than the standard account under which the court is supposed to fit innovative forms of contracting into the traditional categories of common law contract. If a central goal of contract adjudication is to enforce the contract in the context that the parties have provided, then the courts need to defer to the context the parties have given them. To do that, both judges and contract theorists will have to attend to the unique characteristics of the novel contracts currently being designed by transactional lawyers. Thus, as I suggested earlier, in this environment, courts must practice the passive virtues. For it is the parties, not the courts, that drive the innovations in contract design. ■

alone) sees enforcing such accidental contracts as the price we must pay to avoid even-worse problems. He is convinced that judges usually get it wrong when they turn to context to seek what parties probably intended to happen in the unlikely event of litigation—or would have intended had they thought about it. Judges, after all, are rarely immersed in the practices and expectations in a particular business area. And inquiries into context can dramatically lengthen both discovery and trial.

Do courts often get it wrong when they go beyond a literal reading of the words of a contract document? This is an empirical question, albeit one that is very difficult to answer. We think that although written opinions often are easy to criticize, in many cases courts stumble but find a “rough justice”—that is, a result that is in the vicinity of what careful study would suggest to be appropriate. Space does not allow us to provide multiple examples,³ but we note that belief in “rough justice” has a long history. Karl Llewellyn, perhaps the greatest contracts scholar in the twentieth century, wrote frequently of his faith in judges’ “situation sense” when it came to resolving disputes brought to them. Even judges who did not reason well in an opinion often come to fair results.

Moreover, with respect to what lawyers expect judges to do, we should consider its likely impact on settlement of disputes, both before and during the course of litigation. Often if parties are pushed to find an acceptable if not ideal solution, they will do better than what is possible in the formal legal process. If there is a risk that judges will seek a fair result, in some situations at least, this may provoke more effort to find a solution that both sides can live with.

Contracts not drafted with mutual care are inevitable, but none of this detracts from the importance of studying how parties who want a carefully drafted contract can best insure that courts will respect their mutual understandings. This is Bob’s primary focus in this essay. We want to thank Marquette Law School for presenting Bob’s paper as its annual Robert F. Boden Lecture and for asking us to comment on it. His work is both excellent in quality and important.

³ Our study of the famous contracts case, *Hoffman v. Red Owl Stores, Inc.*, 13 N.W.2d 267 (Wis. 1965), is one example. See William C. Whitford & Stewart Macaulay, “Hoffman v. Red Owl Stores: The Rest of the Story,” 61 *Hastings L.J.* 801 (2010).



Stewart Macaulay and **William C. Whitford** are professors emeriti at the University of Wisconsin Law School.

FROM THE FACULTY

Joseph D. Kearney

Reflections on the Legal Aid Society of Milwaukee

Dean Joseph D. Kearney delivered keynote remarks at the 98th anniversary luncheon of the Legal Aid Society of Milwaukee in September 2014. The society's director is Kimberly Walker, L'98; its immediate past director is Thomas G. Cannon, a former Marquette Law School faculty member. The Legal Aid Society and Marquette University Law School have overlapping missions, as suggested in these remarks.

Let me begin with my thanks to Kimberly Walker for the generous introduction. It is a great privilege to speak at this annual Legal Aid Society luncheon. That would be the case in any year, but to be part of a program honoring John Ebbott, Bill Christofferson, and Lynn Sheets is, well, humbling. I also face a particular challenge. It's not that I am unaccustomed to public speaking. Nor is it that I have lost my nerve—although, in that regard, it *was* unnerving last week when my wife, Anne Berleman Kearney, argued a case before the Wisconsin Supreme Court. My role, as co-counsel, was merely to sit next to her silently, scratching out a few notes in order at least to look useful, but not being permitted to speak. She is an experienced appellate advocate, to be sure, but my point is about *me*. I flattered myself that at least, perhaps, it amused the seven justices to see me silent (or mostly so) for an entire hour.

No, the challenge comes today because, in speaking to a group such as the Legal Aid Society, I cannot pursue my usual technique. One of my good friends once told me, "You get it all in, every time you give a speech, even a short one." Now it is possible that this friend meant the comment rather wryly, more or less suggesting that I have a limited repertoire. That is, perhaps he meant that after the obligatory references to the south side of Chicago (and sometimes more specifically St. Ignatius high school and the Chicago White Sox), to the Interstate Commerce Act, to Eckstein Hall, and to Advanced Civil Procedure, there is little left that I could knowledgeably discuss. But I don't *think* that to have been his point. The problem

here, in any event, is that to touch substantially upon the Legal Aid Society of Milwaukee would defeat any effort to "get it all in" over the course of ten hours, let alone the ten or so minutes to which I have limited myself.

For the Legal Aid Society is not only so impressive but also so varied an organization, especially when considered over its run of 98 years (and counting) but also taken even just today. This is not conjecture on my part. I had occasion this summer to read Tom Cannon's history of the Legal Aid Society, published a few years ago by the Marquette University Press. It is extraordinary to get a glimpse into all the good that the Legal Aid Society has done, all the people who have been involved in it, all the forms that its programs have taken. One way of "getting it all in," I suppose, might be to go through the litany of various individuals who have been involved, listing them in a Billy Joel "We Didn't Start the Fire" sort of way—Victor Berger, Carl Zeidler, Tom Zander, etc.—but I cannot in good conscience sing to you. And Janine Geske, one of my longtime colleagues at Marquette, once remarked that, when she started at the Legal Aid Society of Milwaukee in 1975, straight out of Marquette Law School's graduating class, she had some 850 cases, and her predecessor didn't much believe in filing cabinets. So even to list the docket of a Legal Aid Society lawyer would require well more than ten minutes.

Yet it is another comment from Justice Geske that made the biggest impression on me concerning the Legal Aid Society: The strength of the organization has come from the remarkable *flexibility* that it has



Dean Joseph D. Kearney with Kimberly Walker and Thomas G. Cannon from the Legal Aid Society

demonstrated in pursuing its mission to “provide legal aid to the poor and do all things necessary for the prevention of injustice.” We can see this in Tom Cannon’s chronicle: divorce cases, once a staple, had to give way; the public defender work yielded to a state agency created for that purpose; even the impressive guardian ad litem work, so identified with the Legal Aid Society, cannot be presumed to go on forever.

The way in which the Legal Aid Society has interacted with Wisconsin’s law schools is an example of this flexibility. The interaction goes back to the beginning of the society, but the forms have varied. Just to take the last quarter-century, we at Marquette have had a vibrant program in which students can work as interns under the supervision of Legal Aid Society lawyers and receive the equivalent of credit for a course. We do this with other nonprofits (as well as some government agencies), but the Legal Aid

Society is our largest public interest partnership. We typically place six to seven students with the Legal Aid Society each semester, and we always have more applicants than positions available. My colleague, Professor Tom Hammer, who runs our clinical programs, and I—indeed, all of us at Marquette Law School—are immensely grateful for this collaboration.

Another form of interaction between Marquette Law School and the Legal Aid Society is more recent, though now well established: specifically, various of our Public Interest Law Society, or PILS, fellows receive funding through the Law School to work at Legal Aid each summer, either in the guardian ad litem division or the civil

division. For example, two fellows were there this past summer and two the year before.

The Legal Aid Society is also always at the table for the Coalition for Access to Legal Resources meetings where area legal services providers share updates about resources and projects. The coalition—or CALR—is a group that Marquette Law School helped form a few years ago in order to ensure better coordination as individual nonprofits variously pursue the cause of justice.

The Law School does much more of these sorts of things—both itself to serve individual clients in legal services work and to help coordinate efforts in this region—than was the case as recently as the 1990s. Without doubt, the Marquette Volunteer Legal Clinic (MVLIC), founded in 2002 through the leadership of Julie Darnieder and a number of other lawyers (and students), remains our flagship. We have expanded in the ensuing years to where we now have five ▶▶

It seems not too much to say that the Law School has emulated the flexibility of the Legal Aid Society in recent decades as we have gone about becoming one of the leading forces in this region driving pro bono work.

locations—the House of Peace at 17th and Walnut, the United Community Center on the south side, the Milwaukee Justice Center (in which, more generally, we are partners with Milwaukee County and the Milwaukee Bar Association), a clinic serving veterans (located on the west side), and, most recently (within the past year and again through the Milwaukee Justice Center), the Mobile Legal Clinic. These are accomplishments not just by Marquette Law School but by the legal community more generally: Many of you are volunteers at the MVLC sites (and if you are not, we can help you fix that), and you fulfill the double purpose of serving clients and helping educate and train the next generation of Marquette lawyers—that is, our scores of students who volunteer there.

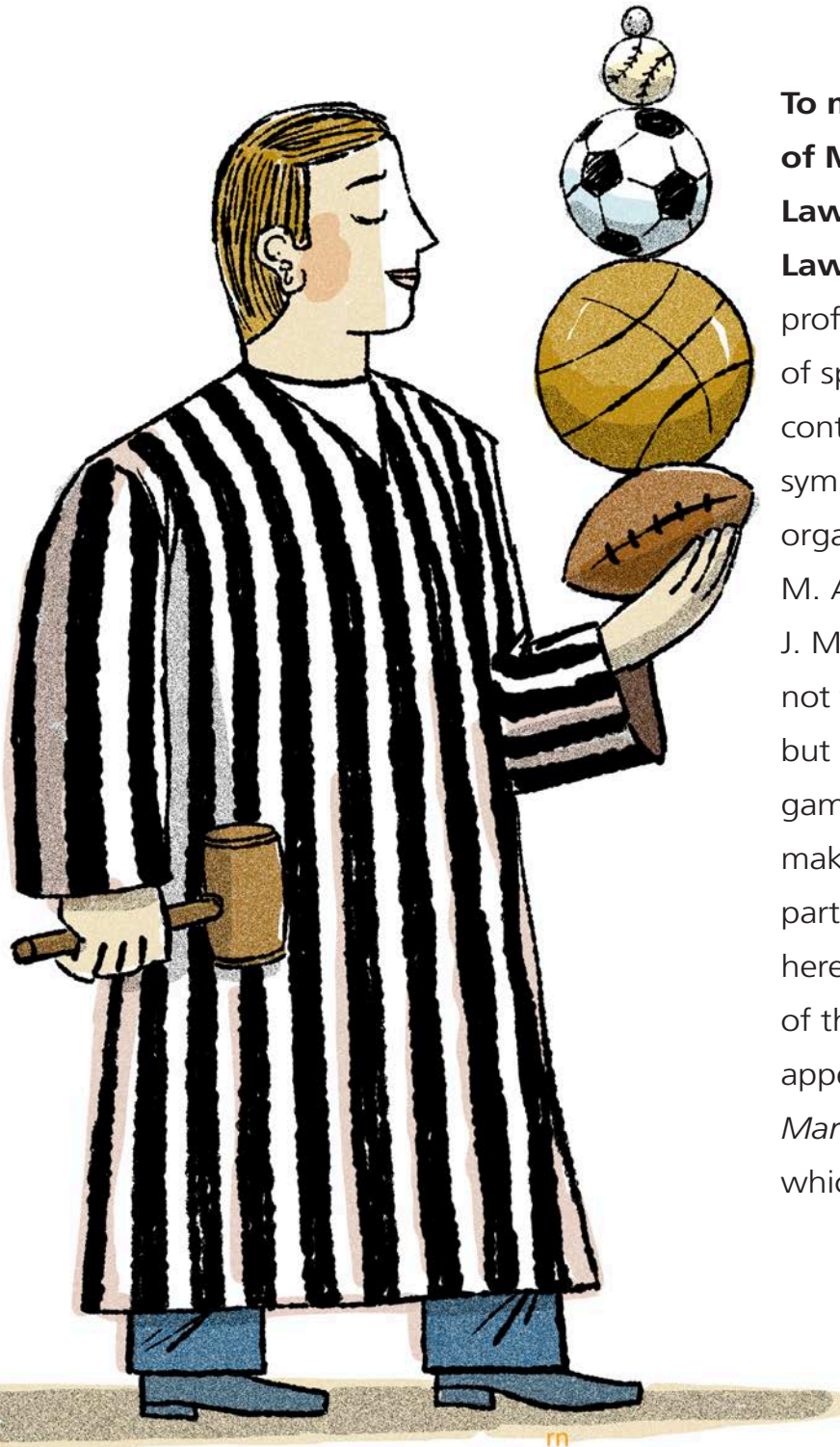
It seems not too much to say that the Law School has emulated the flexibility of the Legal Aid Society in recent decades as we have gone about becoming one of the leading forces in this region driving pro bono work. For a while, the effort seemed substantially to come from one person, the late Dean Howard Eisenberg, whose pro bono work was prodigious—perhaps too much so, ultimately. Then there was the entirely volunteer-led effort of the MVLC, which I have previously mentioned, begun during Howard's deanship. I was Howard's friend and protégé, of course, even if he was a Cubs fan and I a White Sox fan and even if my more important calling card in seeking the deanship was to have grown up in the same neighborhood on the south side of Chicago and to have attended the same high school, St. Ignatius, as Father Wild, then the president of Marquette. (The fact that Professor Dan Blinka, here today as a board member of the Legal Aid Society, was on the dean's search committee didn't hurt either.) In any event, after Howard's death, we as a law school became much more self-conscious about the matter, opening an Office of Public Service, led first by Dan Idzikowski, now the director of Disability Rights Wisconsin, and today by Angela Schultz. Across this time, we have been helped by a remarkable number of lawyers, many our alumni and many not.

We do all this to serve the community not only today but hereafter: the pro bono ethos among students at Marquette University Law School is one of the strongest of any law school in the country—the numbers alone help prove this—and we expect the returns on this investment to benefit Milwaukee and the nation for years to come. You may consider all this to be hyperbole, but, in fact, even when it comes to Eckstein Hall, the best law school building in the country (as my colleague Professor Mike McChrystal, also here today, has taught me to say), I am careful in my claims about the Law School. In all our pro bono work, the Legal Aid Society has been one of our sources of inspiration and deep partnership.

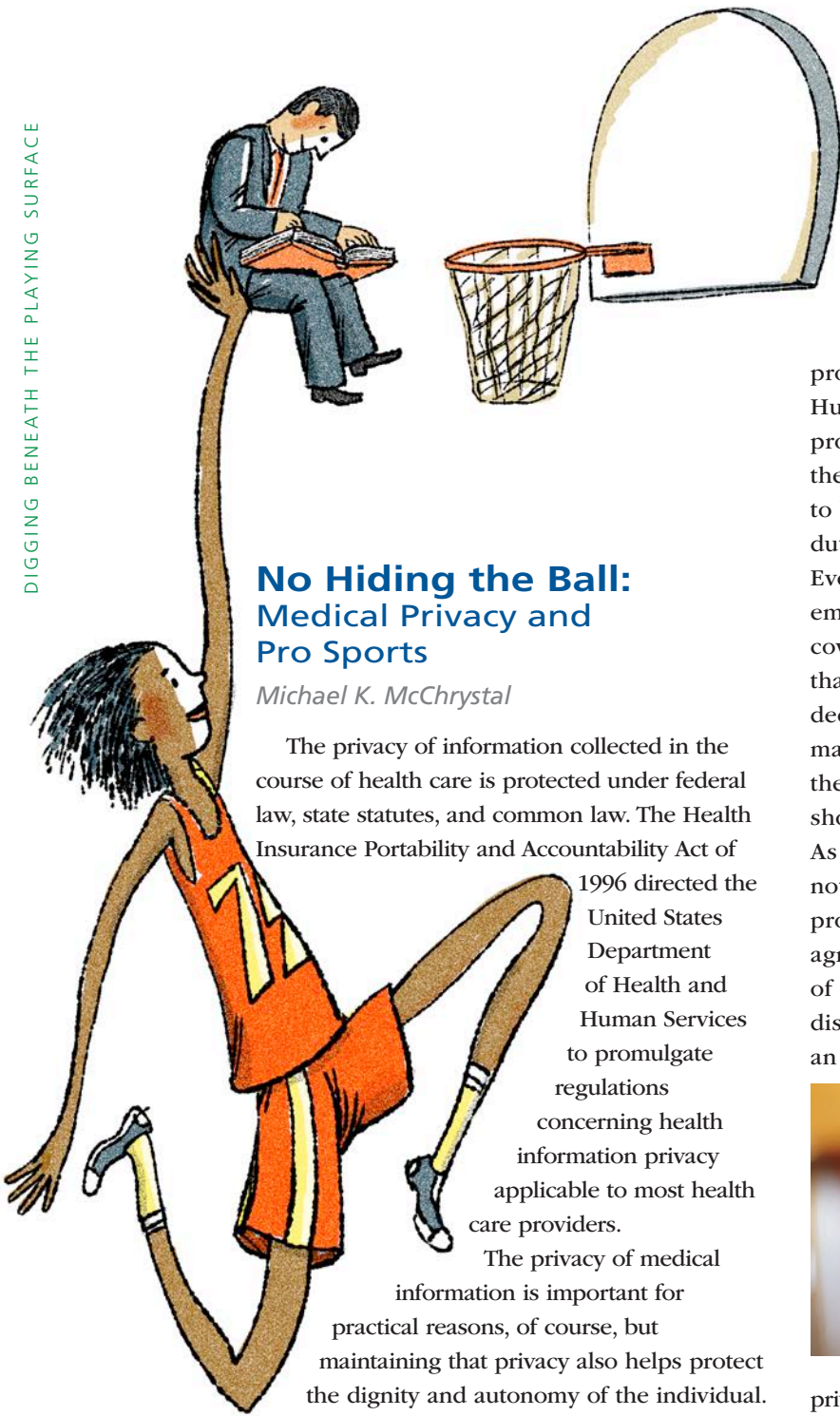
I would like to conclude. At the beginning of my remarks, I referred to a good friend of mine; this is Jim Speta, a law professor at Northwestern University. In a symposium that we published a few years ago on the occasion of the 125th anniversary of the Interstate Commerce Act, he began his essay with the observation of F. W. Maitland, early in the last century, "The forms of action we have buried, but they still rule us from their graves." This succinct statement, which perhaps you remember from your law school days (for a few of you maybe even from Tom Shriner's and my Advanced Civil Procedure class), referred of course to litigation procedure (forms of action), but it captures a larger truth about the law: The law—and we in it—can get so wrapped up in process as to lose sight of its substantive ends. This is one thing when we are talking of the law itself, where we need await the act of some sovereign authority for change. But it is another thing when it is our own private institutions whose superannuated structures we permit to hold us back. The Legal Aid Society seems immune to this phenomenon, and for this—as well as, more generally, for its substantive work—I admire all who have been involved in it over the past century.

So to all who are part of the Legal Aid Society today, I say, on behalf of Marquette University Law School, "You inspire us. Let us work further together in the cause of justice. Indeed, let us explore whether there are new forms by which we might do so." Thank you. ■

Digging Beneath the Playing Surface



To mark the 25th anniversary of Marquette University Law School's National Sports Law Institute, Marquette law professors with a wide range of specialties and interests contributed to a scholarly symposium on sports law, organized by Professors Paul M. Anderson and Matthew J. Mitten. The articles concern not what goes on during games but important aspects of the games and businesses that make sports such a high-profile part of our culture. We present here short excerpts from nine of the articles. The full articles appear in the current issue of the *Marquette Sports Law Review*, which is available online.



No Hiding the Ball: Medical Privacy and Pro Sports

Michael K. McChrystal

The privacy of information collected in the course of health care is protected under federal law, state statutes, and common law. The Health Insurance Portability and Accountability Act of

1996 directed the United States Department of Health and Human Services to promulgate regulations concerning health information privacy applicable to most health care providers.

The privacy of medical information is important for practical reasons, of course, but maintaining that privacy also helps protect the dignity and autonomy of the individual.

Among the most compelling practical reasons to guard privacy about health issues is the patient's pocketbook, particularly in cases where employment opportunities might be adversely affected by health concerns. This is certainly an issue of enormous importance to professional athletes.

Even beyond pocketbook concerns, health issues can strongly affect a person's self- and public image. Medical concerns are often associated with a physical deficiency, and professional athletes take particular pride in their physical accomplishments and the positive image they associate with those accomplishments.

So, on the one hand, medical privacy is taken seriously by many people and by the law. On the other hand, legal protection for medical privacy is generally subject to the significant limitation that privacy is lost when the patient consents to disclosure. With respect to the privacy interests of professional athletes, the Department of Health and Human Services, in responding to a comment on its proposed privacy rules—which are now final—said the following: “Professional sports teams are unlikely to be covered entities [i.e., entities that owe primary duties of confidentiality under the regulations]. Even if a sports team were to be a covered entity, employment records of a covered entity are not covered by this rule. If this comment is suggesting that the records of professional athletes should be deemed ‘employment records’ even when created or maintained by health care providers and health plans, the department disagrees. No class of individuals should be singled out for reduced privacy protections. As noted in the preamble to the December 2000 Rule, nothing in this Rule prevents an employer, such as a professional sports team, from making an employee’s agreement to disclose health records a condition of employment. A covered entity, therefore, could disclose this information to an employer pursuant to an authorization.”



The operating principle suggested by the department is that a player may be compelled to authorize the release of medical information to his team without violating federal health care

privacy regulations under HIPAA. Therefore, players can be compelled to consent to disclosure of information about their medical condition without violating privacy principles under federal law. The same is generally true under state law.

What Is the NBA?

Nadelle E. Grossman

While courts and commentators have given substantial treatment to the NBA's structure, those discussions have not focused on the NBA's structure for purposes of state organization law. As

I have argued, it is important to identify what organizational form applies to the NBA given the consequences that could flow from such structure. As I have also argued, the NBA may be a partnership, even though there is some basis to conclude it is a non-profit unincorporated association (NUA).

There are numerous consequences that would flow from the NBA's categorization as a partnership. Importantly, each member would owe a fiduciary duty to the other members. That means each member would have a duty to act with the requisite degree of care in making partnership decisions. Moreover, each



member would have a duty to act loyally, in the best interest of the NBA, and not in the member's own self-interest.

In the case of former Los Angeles

Clippers owner Donald Sterling, he would have breached his duty of care by carelessly making remarks that could injure the league's reputation and the NBA's collective brand. He would have also breached his duty of loyalty by uttering remarks opposed to the best interests of the NBA and its players, and their desire to maximize league revenues.

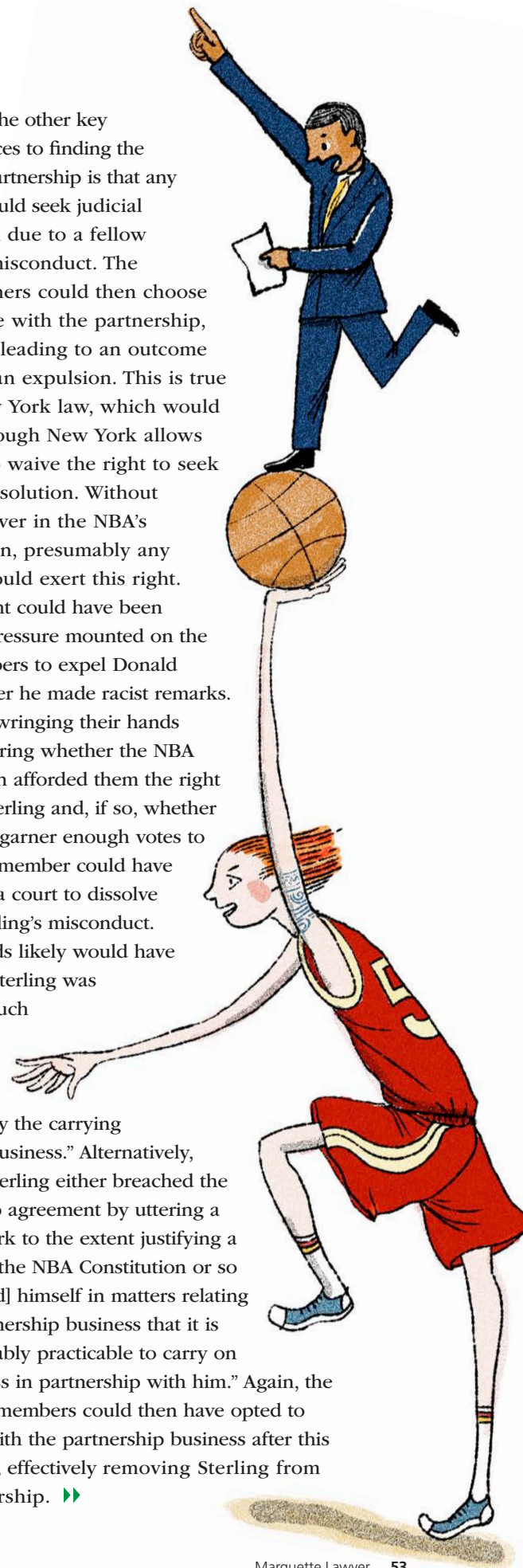
Here, the members have not eliminated these fiduciary duties in the NBA Constitution. While the NBA Constitution does address conflicts of interest, that provision does not state that it sets out the exclusive scope of fiduciary duties. Admittedly, the NBA Constitution does not contain such a provision because the NBA does not appear to view itself as a partnership. As such, no waiver is supposed to be necessary. However, as I argued elsewhere in this article, it is entirely plausible that the NBA is a partnership.

It is beyond the scope of this paper to analyze the intricacies of how these fiduciary duties would apply to the NBA's members. That analysis might be especially tricky given that the members also seek to maximize profits from their individually owned teams. On the other hand, courts in business organization law regularly resolve disputes among business owners who operate competing firms.

One of the other key consequences to finding the NBA is a partnership is that any member could seek judicial dissolution due to a fellow partner's misconduct. The other partners could then choose to continue with the partnership, effectively leading to an outcome similar to an expulsion. This is true under New York law, which would govern, though New York allows partners to waive the right to seek judicial dissolution. Without such a waiver in the NBA's Constitution, presumably any member could exert this right.

This right could have been useful as pressure mounted on the NBA members to expel Donald Sterling after he made racist remarks. Instead of wringing their hands and wondering whether the NBA Constitution afforded them the right to expel Sterling and, if so, whether they could garner enough votes to do so, any member could have petitioned a court to dissolve due to Sterling's misconduct. The grounds likely would have been that Sterling was "guilty of such

conduct as tends to affect prejudicially the carrying on of the business." Alternatively, arguably Sterling either breached the partnership agreement by uttering a racist remark to the extent justifying a fine under the NBA Constitution or so "conduct[ed] himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him." Again, the remaining members could then have opted to continue with the partnership business after this dissolution, effectively removing Sterling from the partnership. ▶▶



The Seventh Circuit and Wisconsin Sports Law

Matthew J. Mitten



The Seventh Circuit and Wisconsin courts have developed a significant body of high school sports law jurisprudence, most of which is consistent with other jurisdictions. There

are, however, some important, unresolved issues, as well as a few leading cases that, over time, may influence the development of the law governing high school athletics in states outside the Seventh Circuit.

To date, there has been no judicial determination whether the respective governing bodies for high school sports in Illinois, Indiana, or Wisconsin are a state actor, whose rules, decisions, and conduct are subject to the constraints of the U.S. Constitution pursuant to *Brentwood Academy v. Tennessee Secondary School Athletic Association* (2001). In *Brentwood Academy*, the U.S. Supreme Court held that the “nominally private character of the [Tennessee Secondary School Athletic Association (TSSAA)] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings.” The Court concluded the TSSAA is a state actor because the requisite entwinement with the State of Tennessee exists. Although the state did not create the TSSAA or fund its operations, public schools constituted 84 percent of its membership, state board of education members served ex officio on its board of control and legislative council, and its ministerial employees are eligible to participate in the state retirement system. The state board of education also permitted students to satisfy its physical education requirement by participating in athletics sponsored by the TSSAA.

Prior to the 2001 *Brentwood Academy* ruling, the Seventh Circuit held that the Illinois High School Association is a state actor because of the “overwhelming public character” of its member schools, 85 percent of which are public schools. In a case in which the panel majority did not address this issue, Judge Posner concluded that the Indiana High School Athletic Association, whose membership is “composed primarily of public schools,” is a state actor. A Wisconsin federal district court denied the motion of the Wisconsin Interscholastic

Athletic Association (WIAA) motion to dismiss a complaint alleging its violation of a student’s federal constitutional rights because the WIAA’s “direct influence upon the school’s athletic programs” makes it “clear that [WIAA is] functioning ‘under color of’ state law.”

After *Brentwood Academy*, in *Bukowski v. WIAA* (2006), the Wisconsin court of appeals ruled that the plaintiff did not prove the WIAA is a state actor because he offered no evidence of “extensive entwinement” between a state agency or public schools and WIAA. The court observed that the WIAA is not a state actor even if it received federal funds, that being insufficient alone to establish state action. However, this unpublished opinion has no precedential authority. Because virtually all Wisconsin public schools with interscholastic athletic programs are members of WIAA (and collectively constitute a majority of its members), and their principals and administrators probably are extensively involved in its rule-making and decision-making authority, WIAA is likely to be judicially found to be a state actor when record evidence of “extensive entwinement” with its member public schools is established.

Regulation of Sponsored Content in the New Sports Media Economy

Kali N. Murray

Sports advertising formats, like all other types of advertising strategy and campaigns, are becoming increasingly diverse. Sponsored content, in which advertising content is integrated specifically into editorial content, has become a new way to generate revenue in a media sport content economy. . . .

The regulation of sponsored content is bound by two key choices: what is the type of information that should



be regulated and who should regulate the relevant information. First, regulation of sponsored content falls within a broad category of regulated information that Michael Grynberg refers to as

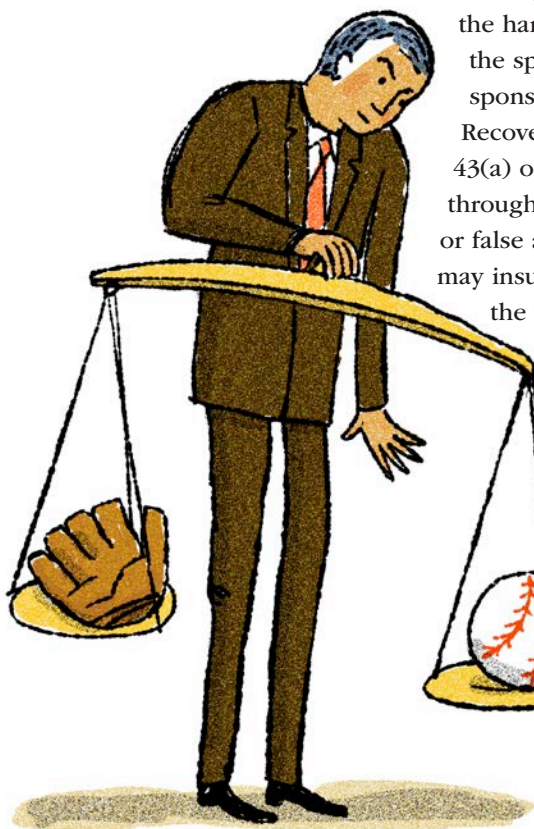
consumer information law, which regulates “the production and dissemination of information relevant to consumers in making purchasing decisions.” Categories of consumer information, according to Grynberg, can include trademark

law, false advertising law, state tort and contract law, and administrative regulation of unfair and deceptive advertising. Second, which entity should regulate sponsored content is an ongoing question. Consumer information regulation is a complex combination of public regulation, through entities such as the Federal Trade Commission or the state attorney general, and private regulation, through the intellectual property regulation of trademarks, false advertising, and false affiliation litigation within Section 43(a) of the Lanham Act. Thus, consumer information law is an area in which there is a “systematic deployment of private power in controlling what are regarded as public activities.”

To date, the primary deployment of regulation of sponsored content has been public. For instance, in December 2013, the Federal Trade Commission sponsored a workshop, “Blurred Lines: Advertising or Content? An FTC Workshop on Native Advertising,” to discuss the impact on consumers of false advertisement. The Federal Trade Commission identified that its preexisting regulatory structure would likely prove to be flexible in regulating sponsored content.

This article has contemplated what may be the best vehicle for private regulation of sports-related sponsored content by evaluating the ways in which harm could be experienced under the Lanham Act of 1946. My analysis concludes that private regulation within this arena might be insufficient, given the

difficulty of capturing the harms at risk within the spectrum of such sponsored content. Recovery under Section 43(a) of the Lanham Act through trademark law or false advertising law may insufficiently capture the ways in which the advertiser and the content generator may work together to create content. False advertising law may offer a way to regulate the content



of the ad itself but might be insufficient to capture the potentially complicated relationships that might need to be disclosed to consumers. The most potentially valid claim, false association, suffers from competing theories of recovery that are insufficiently theorized with each other, and thus may not be usable in everyday litigation. A serious question remains then: whether our regulatory model is sufficient for addressing the harms caused by sponsored content, an issue that is particularly compelling within the sports context.

Judges as Judges: Adjudication in Aesthetic Sports and Its Implications for Law

Chad M. Oldfather



Chief Justice Roberts was, of course, hardly the first to draw an analogy between umpire and judge, and he will certainly not be the last. The comparison is natural, for both roles require

their occupant to “make the call,” or, more formally, to serve as the presumptively final adjudicator of the rights of competing parties.

Yet while the judge as umpire seems to have naturally captured the imagination of judges, commentators, and laypersons alike, it has also come in for its share of critique, with critics pointing out the various ways in which the comparison is inapt. Perhaps the most frequently mentioned distinction is that umpires, unlike judges, play no role in creating or refining the rules they must apply. Thus, commentators have proposed substitute analogies, including the “justice as commissioner” and “justice as color commentator.” Along those lines, one of my goals in this essay is to suggest that there may be a better analogy—the somewhat less euphonious notion of the “judge as judge.” It may be, in other words, that the best sporting analogy to judges in law is not the umpire or referee but, rather, their namesakes in sport—the judges who provide the authoritative scoring in aesthetic sports, such as gymnastics and figure skating.

Judges in aesthetic sports, like their counterparts in law, derive a substantial portion of their authority and legitimacy from the expertise they bring to the position. ▶▶

Both, as we will see, play a significant role in shaping the content of the governing standards and draw, to a considerable degree, on their “tacit knowledge” in shaping and applying the rules. At the same time, however, their reliance on this sort of expertise—which necessarily entails the application of criteria unavailable or at least opaque to the lay observer or even the less-expert participant—creates an opening for skepticism. Observers will often be unable to determine for themselves whether the judges have accurately assessed the merits, and their efforts to do so will often lead them to assessments that differ from the judges’ assessments, likely because they have not accounted for all the factors that an expert judge considers. Because these observers cannot access all the factors driving the experts’ decisions and, thus, cannot fully understand them, they can easily conclude that the judges’ decisions are being driven by improper factors. Of course, judges in aesthetic sports have been accused, and occasionally found to be guilty, of corruption, as well as less pernicious forms of bias. The same is true of judges in law. Indeed, given the enormous cognitive demands associated with judging aesthetic sports, it is unsurprising that some extraneous factors influence officials’ determinations. That, too, can be said about judging in law.

Of course, metaphor and analogy have a tendency to obscure as well as to enlighten, so it is wise not to press the point too far. There are significant differences between the two contexts, as there will be for any sport-law comparison. Still, the comparison is worth developing, for the analogy goes deeper than the characteristics of the judicial role in the two contexts and includes features of the larger systems in which those two types of judges operate. Whatever the allure of analogizing judges to umpires and other officials in what philosophers of sport call *purposive* sports, the more realistic comparison may be to judges in *aesthetic* sports.

Addressing Abusive Conduct in Youth Sports

Judith G. McMullen

When we consider these goals of punishment of abusive conduct in the youth sport context in light of the research about causes and effects of abusive behavior by adolescents, some problems with the current approach become apparent. It is my contention that swift, automatic, and severe punishments are counterproductive to the preventive and educational goals of youth sports. In

particular, it is my contention that zero tolerance policies are harmful, and that referral of bullying and hazing incidents to outside law enforcement should be rare and not automatic. Since youth sports players are in a team environment—often one that is officially linked to a school—I believe that abusive behavior should be prevented through guidance and education where possible, and dealt with as a teachable moment where abuses occur. Although the desire to ban all behaviors remotely suggesting bullying or the desire to ban all perpetrators thereof from sports or school is understandable, automatic bans, either of specific behaviors or of particular people, are not a good solution to the underlying societal problems that lead to abusive behavior in sports.



Proponents of zero tolerance policies contend that harsh and certain punishment of specified offenses sends a clear message and will deter undesirable student or athlete behavior. However, when we consider

the zero tolerance approach in light of research about adolescent development discussed earlier in this article, it makes sense that the zero tolerance approach may fall short. As we have seen, adolescents tend to act impulsively and typically do not consider the repercussions of their behaviors prior to acting. Threats of Draconian punishment are unlikely to deter specific behaviors if the actors are acting on impulse or are motivated by adolescent concerns such as peer pressure, acceptance, or status.

A task force of the American Psychological Association (APA) recently examined research and data on zero tolerance and concluded that zero-tolerance policies have been problematic in school settings generally and may actually lead to worse behavioral outcomes for students. For one thing, suspension and expulsion, penalties associated with zero-tolerance policies, are associated with lots of negative outcomes, such as lower grades, lower standardized test scores, and higher dropout rates. The APA task force also found that schools with higher suspension and expulsion rates tend to have lower rates of school-wide academic achievement, even after controlling for lower socioeconomic status or other demographic factors. In the context of offenses such as bullying, the severity of the punishment may deter bystanders who observe the abusive behavior from reporting it. Moreover, as educators Christopher Boccanfuso and Megan Kuhfeld point out, since zero tolerance policies by their

nature do not consider context, “a student who is bullied may face the same suspension for retaliating in a physical altercation as the bully who initiated the confrontation.”

Just as exclusion from school can increase risks for the students left behind at school as well as for the students who are expelled or suspended, excluding players from their sports removes them from an important potential place to learn values, increase their physical fitness, and learn to be part of a team. This might accomplish a retribution objective, but it does not rehabilitate or educate players, and it does not reliably deter future abusive behavior since the original abusive conduct is most likely a product of immaturity, poor impulse control, and peer influences rather than a mature decision to engage in criminal behavior.

Crowdfunding and Sport: How Soon Until the Fans Own the Franchise?

Edward A. Fallone

Given the current legal environment for equity crowdfunding, is it realistic to expect the number of publicly owned professional sports teams to increase in the future? For teams in the four major leagues, the answer remains “No.” Valuations of major league football, basketball, hockey, and baseball teams run in the hundreds of millions and even in excess of \$1 billion. Crowdfunding has never been envisioned as a vehicle that could be used to raise sums at that level. At these stratospheric valuations, even conducting a stock sale intended to create a minority-owned block of shares becomes unlikely using small individual contribution limits. In addition, the private owners who have the resources to buy these teams

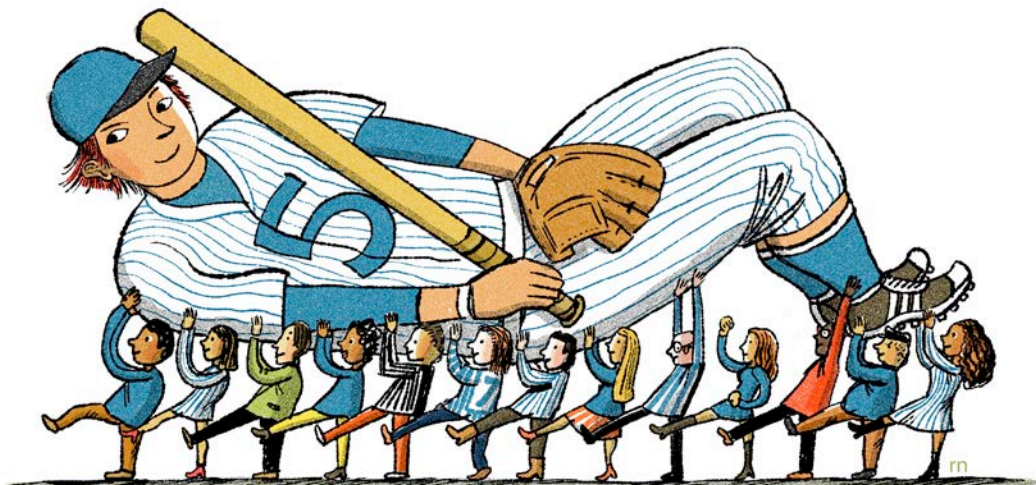
will be hesitant to share any future appreciation in the value of their investment with the public. The Green Bay Packers seem destined to remain the only publicly owned team in major league sports.



However, for minor league and expansion teams, the outlook is more promising. For example, valuations for minor league baseball teams range from the tens of millions of dollars for AAA teams

to less than \$10 million for a Class A team. In 2013, *Forbes Magazine* ranked the value of minor league AAA baseball teams from a high of \$38 million (the Sacramento River Cats) to a minimum of \$20 million. But valuations are even lower for Class A teams. Baseball legend Cal Ripken, Jr., owns the Class A Aberdeen Ironbirds minor league team, valued by *Forbes Magazine* at \$15 million. He also sold a Low A minor league franchise for \$7.5 million in December 2012. While the valuations for Class A teams have been on the rise in recent years, they are still at levels where crowdfunding might provide a means for a minority or even majority group of public shareholders to buy a share of the team.

The situation is even more promising for the minor leagues in sports other than baseball, and for expansion teams. For example, a new minor league hockey franchise in the Central Hockey League costs a minimum of \$500,000. This is well within the range of amounts successfully raised on crowdfunding portals. Valuations are especially affordable for less well-known professional sports leagues and for franchises in newly created leagues. The National Lacrosse League (NLL) is a professional ▶▶



indoor lacrosse league with nine teams, some of which draw in excess of 10,000 fans per game. The asking price for an expansion franchise in the NLL is \$3 million. And even though the A-11 Football League still exists only as a business plan and may never play a game, the promoters of the league are asking for a \$5 million franchise fee to buy a team in the fledgling professional football league.

At valuation levels below \$5 million, the strengths of crowdfunding as a means of raising capital seem particularly well-suited to professional sports teams. Sports teams are one of the primary beneficiaries of the way that the Internet increases interconnectivity between fans and content providers. More so than music fans or movie lovers, sports fans develop a passion for a team that is strong and often passed down through generations. If musicians and movie producers can successfully tap into fan loyalty via crowdfunding, sports teams can do so to an even greater extent.

After the Arbitration Award: Not Always Final and Binding

Jay E. Grenig

Although the Federal Arbitration Act provides that a court can vacate an award “[w]here there was evident partiality or corruption in the arbitrators,” it does not provide for pre-award removal of an arbitrator. A party may challenge any award ultimately rendered on the grounds of evident partiality. However, a party to arbitration who knows of an arbitrator’s alleged bias before rendition of the award and does not complain until after rendition of the award waives the impropriety.



In some circumstances, an award of damages may be so grossly excessive or inadequate as to indicate partiality. A court will not “set aside an award for mere inadequacy in [the]

amount [of damages], unless it is so great as to indicate corruption or partisan bias on the part of the arbitrators.”

In *National Football League Players Association v. National Football League*, a dispute over discipline imposed on players who tested positive for banned substances was heard by the NFL’s chief legal officer. The court rejected the Players Association’s contention that the decision—treated as an arbitration award—should be vacated because the “arbitrator” was partial.

The court pointed out that the Players Association had agreed with the NFL in the collective bargaining agreement that the commissioner or the commissioner’s designee could hear disciplinary appeals. The “arbitrator” in question was the NFL’s chief legal officer. Although the “arbitrator” had given the NFL legal advice regarding the matter that he heard, the court concluded that because the Players Association had not objected to the “arbitrator” before the award, it had waived any claim of bias.

Poston v. National Football League Players Association involved the Players Association and a licensed “contract advisor.” A licensed contract advisor “represent[ed] NFL players in various types of negotiations, including negotiations for employment contracts with particular teams and associated marketing opportunities.” Pursuant to their agreements with the Players Association, “the conduct of such advisors was governed by regulations established” by the Players Association. The Players Association, “through its Disciplinary Committee, ha[d] the power to discipline contract advisors for noncompliance with [these] regulations.”

One of the advisor’s employees improperly purchased airline tickets for four college players in order to attend a party at the advisor’s company. One player was suspended one game for impermissible benefits. The Players Association disciplined the contract advisor.

In accordance with established procedures, the Players Association Disciplinary Committee’s determination was appealed to arbitration. The Players Association selected an arbitrator to resolve the matter. The parties stipulated that the following two issues would be presented to the arbitrator: (1) whether the contract advisors engaged in or were engaging in prohibited conduct, as alleged; and (2) if so, whether the discipline imposed should be affirmed or modified. The arbitrator upheld the discipline.

The contract advisor filed a motion to vacate the arbitration award. The court rejected the advisor’s claim that the arbitrator was not impartial. The court noted that the contract advisor knew, or should have known, that the arbitrator used in the case was the one regularly used by the Players Association, and, therefore, should have raised any concerns regarding the arbitrator’s potential partiality before the arbitration proceeding. The court explained that “arbitration awards should not be vacated ‘where the arbitrator has disclosed any circumstance that would show bias,’ or ‘where an objecting party who is in fact aware of the relationship at the time of the arbitration remains silent.’”

Michael Sam and the NFL Locker Room: How Masculinities Theory Explains the Way We View Gay Athletes

By Lisa A. Mazzie



Sport has played a significant, if not leading, role in shaping masculinity; however, sport, too, is a social construct. Sports, as we now know them, emerged out of a

specific historical period, with the specific purpose of fostering masculinity in boys. By excluding women from organized sport—and by explaining this exclusion as due to the peculiarities of the female anatomy—men were able to build a solely male arena for the construction, performance, and reproduction of masculinity.

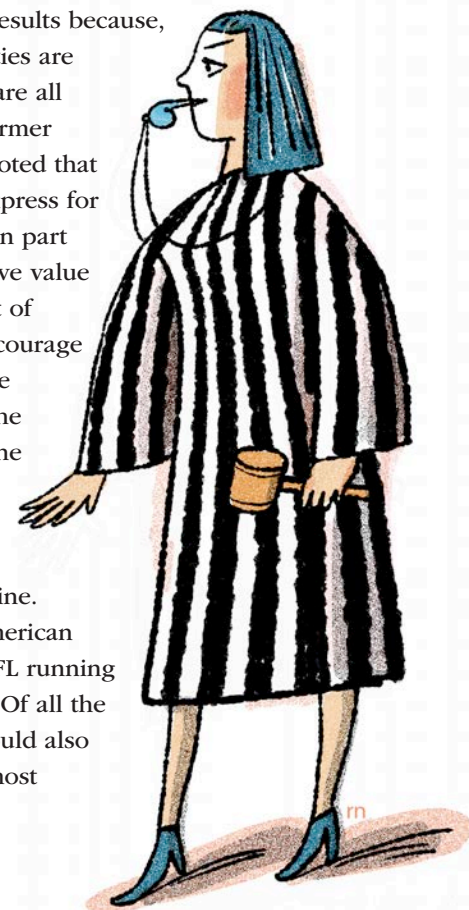
Present-day sport developed in the nineteenth century in Britain and the United States as a consequence of the Industrial Revolution. Prior to that point, most families had lived and worked together on family farms, where physical work was plentiful and fathers and sons were in close contact. With the Industrial Revolution, fathers headed out of the home to work often long hours, leaving their sons in the care of mothers and, increasingly, female teachers at school. The concern was that boys were becoming feminized by their lengthy contact with women.

Sports were consciously developed and introduced in public schools and in community organizations like the YMCA for boys to separate them from girls—making visible men’s purported physical superiority—and to allow them to learn “masculine” values, as Michael A. Messner has explained. Through sports, boys could use their bodies in socially acceptable, physical, sometimes violent, ways and learn traits such as competitiveness and dominance (emphasis on winning) that allowed them to distinguish themselves from girls and maintain hegemonic masculinity. Team sports, in particular, were valued, as they emphasized loyalty to the team (e.g., other males) and obedience to authority (e.g., a coach). Such lessons in physical and mental toughness, loyalty, and obedience were perceived to ready boys for military duty or leadership positions.

Modern sport, then, was constructed specifically as “a gendered institution,” constructed by men “largely as a response to a crisis of gender relations in the late nineteenth and early twentieth centuries. The dominant structures and values of sport came to reflect the fears and needs of a threatened masculinity.” As such, sport “has served as an important site in the construction of male solidarity.” Boys who participate in sports—and they learn early on that they “should”—are learning not just how that particular sport is played, but they are learning, often in all-male environments, the “culturally dominant conception of being a man.”

Learning to be a man in an all-male environment, though, can produce a “hypermasculine ethos,” a kind of masculinity that is “marked by misogyny, belief in male superiority, and homophobia,” in the characterization of Deborah L. Brake. Many elite sports teams tend to be all male; as such, traits that correspond to a hypermasculine ethos—traits such as physical strength, discipline, aggression, loyalty to other men, and heterosexuality—are particularly valued. Different sports emphasize such a hypermasculine ethos to differing degrees. The hypermasculinity a boy learns by participating in tennis or baseball is different from the hypermasculinity he learns by participating in football or ice hockey.

This differing ethos results because, just as not all masculinities are equally valued, neither are all sports. Academic and former Olympian Bruce Kidd noted that “[t]he preferences we express for different sports . . . are in part statements about what we value ‘in a man’ and what sort of relations we want to encourage between men.” The more aggressive and violent the sport, the more masculine it is considered to be; football is among the three most violent, thus among the most masculine. It is also a particular American institution. As former NFL running back Dave Kopay said, “Of all the team sports, football would also seem to be one of the most representative of the American character.” ■



CLASS | NOTES

The top five Wisconsin Legal Innovators of 2014, in the estimation of the State Bar of Wisconsin, met in Madison this past fall. From left: Anne Smith, **Michael J. Goring, L'82**, **Kelly A. Twigger, L'97**, Beth Ann Richlen, and **Karen E. Christenson, L'78**.

Karen E. Christenson spearheaded the planning for, and was the first presiding judge in, Milwaukee County's Family Drug Treatment Court. She led a team of professionals working with drug treatment counselors, service coordinators, and child welfare professionals to help return children to their parents, if possible.

Michael J. Goring, with funds donated to Marquette Law School by colleagues **Juliana Ebert, L'81**, and **Frank Daily, L'68**, to honor Goring's career-long leadership in pro bono service, prompted the Law School, in partnership with the Milwaukee Bar Association, to create a mobile legal clinic, housed in a specially outfitted bus. The clinic sets up shop in different places in Milwaukee County, reaching those who otherwise would not get legal help.



Photo: State Bar of Wisconsin/Andy Manis, photographer

Kelly A. Twigger and attorneys at the company she created, ESI Attorneys, developed an app for the iPad, *eDiscovery Assistant*, to assist clients in keeping up with the rapidly changing area of e-discovery. The app curates resources litigators need at their fingertips—rules, case digests, checklists, templates, and more.

More information about the awards is available at www.wisbar.org. ▶▶



Three Marquette lawyers have been named to the *Milwaukee Business Journal's* 2015 list of "40 Under 40," a roster of upcoming leaders in Milwaukee.



Danielle M. Bergner, L'05, a member of the Milwaukee City Attorney's Office.



Rebeca M. López, L'12, an attorney with the Milwaukee office of Godfrey & Kahn.



Rebecca Hopkins Mitich, L'09, of Whyte Hirschboeck Dudek, Milwaukee.

Jessica Poliner: On the Move, in More Ways Than One

“Five companies and a bunch of different countries.” That’s Jessica Poliner’s two-phrase summary of what she’s done since graduating from Marquette Law School in 2006.

She undersells the arc of her career. This is a woman on the move, and we mean that in three ways.

On the most literal level, she has lived and traveled professionally in a wide range of places—Florida, India, countries in South America, Panama (her current home), and, not to be left out, Milwaukee. “I’m globally mobile,” as she puts it.

On a second level, she has moved through a series of jobs. That includes a shift in her career, from traditional legal counsel to portfolio management of all industries in northern Latin America for a multinational equipment manufacturing business.

On a third level, each job has built on the prior one, putting Poliner in situations successively more responsible, more demanding, and more impressive. She has risen rapidly and now is Caterpillar’s country manager in Panama, overseeing more than 350 employees and a complex business environment. She also serves as district manager, responsible for distribution of Caterpillar products in Ecuador, Colombia, Venezuela, and Panama. “Two jobs for the price of one,” she says. The huge Caterpillar business has only 19 country managers, and Poliner was the first woman and youngest person to be named one of them.

“I’ve been very fortunate to be in the right place at the right time,” Poliner says. The path, in brief, began with work for a law firm in Milwaukee after she completed law school. That led to a position as a lawyer with Metavante, a Milwaukee-based financial services firm, which in turn led to a bigger position in Florida with Fidelity National Information Services (FIS), which bought Metavante.

Eventually Poliner returned to Milwaukee, where she had grown up, and joined a mining equipment manufacturing company, Bucyrus, as an attorney,



which led to her becoming part of Caterpillar after that organization bought Bucyrus. And Poliner has moved rapidly through what she calls three-and-a-half positions for Caterpillar, all involving business in Central and South America. (She speaks Spanish and Portuguese, by the way.)

Poliner has left her role as a lawyer behind and, whatever her future brings, she doesn’t expect to return to traditional legal work. But she has no regrets about going to law school. “I work a lot of hours, and I work hard, and I think a lot of that was fine-tuned in law school,” she says. “I think that my law degree has given me a lot of credibility in who I am and what I am.” It helped develop her work ethic and her sense of how to do a job well—or, as she puts it, “how you think, your attention to detail, how much you read, how much you can withstand.”

Poliner hopes to continue to build her career with Caterpillar and imagines that future positions will take her to other parts of the world. She says she has been “fortunate to work with incredible people” who have helped her develop her career to date. Summing up her path, Poliner says she has been “stretching myself in all sorts of different ways.” Given her success in less than a decade since graduating from Marquette Law School, that statement itself is no stretch. ■



A Trusted Advisor Willing to Get His Feet Dirty

enrolled in the Law School with the goal of building a career utilizing his business background. His family shares his inclination to business. His wife, Ann, also received a Marquette business degree and worked for a time as a commercial banker. Their two older children, Patrick and Megan, are Marquette business graduates who work in the financial sector, and the two younger ones, Michael and Kevin, are Marquette students majoring in business.

Over the years, Reardon's practice has developed so that about half of it is classic transactional work, including negotiating and documenting sales of businesses. The other half involves "day-to-day needs of middle market business," he said, including licensing, supply agreements, and ownership succession.

Reardon aims as a lawyer to be "someone who develops a deep relationship and understanding of clients' businesses, their strategies, their approach to the marketplace." When it comes to building a relationship with a client, "we like to go out and kick the tires, to get our feet dirty." Sometimes that can become literally true—Reardon's clients include companies in the waste business and in the sand and gravel (or aggregates) business. The boom in recent years in businesses dealing with fracking sand for petroleum extraction has shaped his work.

If you won't find Reardon in a courtroom, you also won't find him in the news. His representation is rarely high profile from a public-attention standpoint. His most memorable engagement, he says, involved a family who owned a lime business for six generations spanning 125 years. The business had 75 stockholders when they decided to sell, and Reardon became deeply involved in soliciting and considering multiple bids for the company, negotiating the terms, and eventually bringing the parties to unanimous agreement on those terms.

And that case that put him in a courtroom? It involved a dispute between a company that provided equipment and chemicals for doing dish washing at restaurants and franchise holders who carried out the service itself. In light of Reardon's affinity and skills, it is no surprise that the business dispute became a successful negotiation. ■

It was 2 a.m., and Tim Reardon was in a federal court in Minneapolis, where a judge had agreed to keep the court open so that a settlement could be approved as soon as agreement was reached.

So what was more unusual—the 2 a.m. court session a few years ago or finding Tim Reardon in court? While the former is obviously unconventional, there have been other 2 a.m. court sessions. But the latter is unique: "It's the only time I've ever been in court," Reardon says.

Reardon goes on to joke, "If I'm ever in court, I've done something wrong." And he has a strong reputation for not doing things wrong. In fact, the term "trusted advisor" would be a good way to describe his role for clients, primarily businesses and families owning businesses, not only in Wisconsin but across the United States and as far away as Hong Kong.

In one sense, Reardon hasn't gone far in life. He grew up in the Milwaukee suburb of Brookfield, and he lives there now. He joined the Milwaukee firm of Reinhart Boerner Van Deuren in 1988 when he completed Marquette Law School, and he has stayed there since. But when it comes to building a career in law, Reardon has traveled a path he describes as "a terrific ride." Challenging, rewarding, full of hard work—that's how he describes it.

Reardon got an undergraduate business degree at Marquette. "I really liked business," he says, and he

1979



William J. Katt, a partner in the Milwaukee and Chicago offices of the Wilson Elser law firm, has been named chair of the firm's national

aviation and aerospace practice. A Fellow in the American College of Trial Lawyers, he has focused on the aviation/transportation sector for much of his 35-year career.

1981

Mary Lee Ratzel has recently taken the position of general counsel—chief legal officer for ProHealth Care in Waukesha.

1985

Terese M. Halfmann has joined the Milwaukee office of Hupy & Abraham, where she will be expanding the firm's nursing home abuse practice area. Also a registered nurse, she was previously an associate at Pitman, Kalkhoff, Sicula & Dentice, representing victims of negligent nursing homes and assisted living facilities.

1986

Jo A. Swamp, of the Forest County Potawatomi Community, was honored by the *Milwaukee Business Journal* with an award in the category of Best Assistant General Counsel for 2014.

1987

Philip J. Miller has joined the trusts and estates team in the Milwaukee office of Whyte Hirschboeck Dudek.

1988



Timothy R. Brady has joined the university advancement team of Marquette University as director of regional development—

Chicago. He works out of the university's office in Chicago.

1989



Jack A. Enea, of Whyte Hirschboeck Dudek's Milwaukee office, has become co-leader of the firm's trusts and estates team. His practice focuses on

business and tax law, estate planning and administration, and real estate transactions and development.

1991

David L. Borowski was elected to the board of directors for the Wisconsin Trial Judges Association. He is serving in the civil division of the Milwaukee County Circuit Court, after a four-year rotation in the felony division.

1992

Timothy S. Jacobson, CEO of Visjonaer Consulting & Communications, Boscobel, Wis., has earned an Emmy Award for "Outstanding Achievement for Documentary Programs—Topical." He received the award, as executive producer of the film *Mysteries of the Driftless*, at the November awards ceremony of the Chicago/Midwest Chapter of the National Academy of Television Arts & Sciences. More information on the documentary can be found at www.untamedscience.com/mysteries-driftless-zone.

1995

Susan C. Minahan is now a member of the Milwaukee office of Whyte Hirschboeck Dudek, practicing in the corporate and finance practice group.

1996

Erika S. Baurecht has joined the Milwaukee office of Whyte Hirschboeck Dudek, working in the real estate practice group.

1997

Bradley C. Fulton has been named president and managing partner of DeWitt Ross & Stevens. He practices in the firm's office in Madison, Wis.

1998

David Rose is a partner at Wilson Elser in Hartford, Conn., where he led the formation of the firm's Connecticut government relations practice.

1999



Melissa Greipp, associate professor of legal writing at Marquette Law School, is one of the authors of the Legal Writing Institute's *The Moot Court Advisor's*

Handbook: A Guide for Law Students, Faculty, and Practitioners, recently published by Carolina Academic Press. The book is designed to be a resource of advice and best practices for running moot court and other legal skills competitions. ▶▶

2001

Deric P. DuQuaine, of Milk Source LLC, was honored with the award for Best Corporate Counsel—Private Company for 2014 by the *Milwaukee Business Journal*.

2002



Matthew R. McClean has been named chair of the Litigation Team at Davis & Kuelthau. He has been a member of the firm's Milwaukee office

since 2006. While his practice focuses in the area of construction litigation, McClean also represents clients in litigation over commercial contracts, real property claims, and intellectual property matters.

Patrick D. McNally and his wife, Sarah, welcomed their fifth child and third son, Miles Dennis David, born on July 9, 2014. McNally practices with Borgelt, Powell, Peterson & Frauen in Milwaukee.

John T. Reichert has joined the financial services law group of Godfrey & Kahn. He will split his time between the firm's Milwaukee and Waukesha offices.

2003

Kirk L. Deheck was recently elected to the board of directors at Boyle Fredrickson in Milwaukee. His practice focuses on the preparation and prosecution of patent and trademark applications, as well as intellectual property opinions and enforcement.

Kristin R. Muenzen received the John Marshall Award from the United States Department of Justice (DOJ) for her work in the litigation of *United States v. 275.81 Acres* in Somerset, Pa. This litigation arose from the government's acquiring the property where United Airlines Flight 93 crashed on September 11, 2001, in order that the National Park Service could construct and operate a national memorial. The sole issue at trial was the value of the property: Muenzen and her DOJ trial team successfully secured a verdict of \$1.5 million, significantly less than the landowner's claimed value of \$25 million.

Ryan E. Ruzziconi is general counsel of Flint, Michigan-based Diplomat Pharmacy, one of the nation's largest specialty pharmacies.

2006



Susan K. Allen Susan K. Allen has been promoted to partner at Stafford Rosenbaum. She practices in the firm's Milwaukee office, where her focus is

products liability defense, general commercial litigation, and vehicle warranty litigation.



Jill M. Carland was named senior counsel in the Phoenix law firm of Bowman & Brooke, where she defends several high-profile automotive manufacturers in product liability claims, including rollover/roof-crush and crashworthiness.

2007

Lee A. Greenwood has taken the position of legislative attorney with the Best Friends Animal Society, where he advocates on animal welfare issues throughout the country. Best Friends has helped pioneer the "no-kill" movement by implementing programs that encourage adoption and reduce the number of animals entering shelters.

Todd and Sara (Scoles) Krumholz welcomed Joseph (Joey) Brandon Krumholz to their family in Dallas on November 1.



Sarah A. Ponath has relocated her general practice law office from Brookfield to Butler, Wis. Her practice concentrates on small businesses, real

estate, estate planning, and traffic defense.

2008



Aaron J. Graf has joined the Milwaukee office of Mallery & Zimmerman as an associate practicing in the areas of commercial and employment litigation.



Ron Cadwalader has been named a partner at the law firm of Cassidy & Mueller in Peoria, Ill. Ron and his wife, Morgan, L'07, live with their two children in East Peoria, where Morgan is the city clerk. ▶▶

A Better Track: McNeely Turns Road to the Factory into a Ph.D. and Law Degree

"I thought I would work in the shop." That was R. L. McNeely's expectation when he was in high school. For a teen growing up in Flint, Mich., in the early 1960s, especially one who played defensive end on his high school football team, this was a common expectation: going to work in the area's car factories—"the shop."

That was only part of the reason for McNeely's expectation. Few of his high school's first-string African-American football players were receiving any interest from college recruiters. He was not among the few. McNeely says he wondered at the time why even second-string players who were white were being offered college scholarships. He later found out that the coach wasn't passing on most of the letters from colleges to black players.

Even that is only part of the reason. Black students, whatever their ability and potential, were offered effectively no counseling and no help aimed at getting them into college, McNeely says. That wasn't the path they were being put on. They were headed to the shop.

It was, in part, an accident, as McNeely puts it, that he went down a much different road. You had to be 18 to get an auto plant job, and McNeely was only 17 when he graduated from high school. So he decided to try college and got in to Eastern Michigan University.

He liked it and stuck with it. As he progressed, a friend told him what a master's degree was, and McNeely decided to get one—a master's in social work, focused on community organization, from the University of Michigan, to be specific. A professor there urged him to go further, and McNeely went on to get a Ph.D. from Brandeis University.

In 1975, he joined the University of Wisconsin–Milwaukee as a faculty member in social welfare. McNeely's research focused on job satisfaction in human services jobs and on work/family issues. As a professor, he testified before Congress. Additionally, a 90-minute NBC documentary was inspired by his research, and he appeared on the CBS national morning news. He also was involved in a wide range of Milwaukee community issues.

Around 1990, he decided that he didn't want to move into university administration but wanted to branch out. So McNeely enrolled at Marquette Law School, graduating in 1994. He developed a practice concentrating on guardian ad litem work, representing the interests of children involved in legal proceedings. "I used to see myself in a lot of those little kids I was representing," he says. He balanced his practice and continuing academic work for most of the next couple of decades. Now he is not-quite-entirely retired. As he puts it, "My focus now is on community service."

One of McNeely's long-term commitments to the community is in the form of an estate plan to endow a scholarship fund of \$500,000 at Marquette Law School. His purpose is straightforward and important: He wants to do what he can to ensure that the school is able to help African-American males develop themselves into Marquette lawyers.

McNeely says, "Institutional frameworks have combined to produce really adverse outcomes for many people of color," especially African-American males who have, in his term, "strong egos."

Yes, he says, there is better counseling for high school students now than in his day. Scholarship offers aren't being hidden from black athletes. But a lot more needs to be done to help students for whom many people still have the kind of low expectations that nearly limited McNeely a half century ago. McNeely beat those expectations, and he wants to make sure that, in times to come, others have the opportunity to do the same. ■



PROFILE: Daniel Chudnow, L'84



Chudnow Collections Bring “Yesteryear” Alive

Daniel Chudnow is the son of a man who loved collecting things. The result: One of Milwaukee’s undervalued and relatively unknown jewels, the Chudnow Museum of Yesteryear.

Daniel’s father, Avrum (Abe) Chudnow, L’37, was a successful lawyer and real estate developer. In 1966, he bought a building at 839 N. 11th Street, on the northern and eastern edges of the Marquette campus, to use as an office. Originally a single-family home built in 1869, the building had been the residence and clinic of a doctor for many years.

Abe Chudnow especially loved items from the era of his childhood. He began collecting them and kept them in the basement of his family’s north shore home until his wife had had enough. So he moved them to the 11th Street building and began shaping them into a private museum.

Daniel, L’84, worked with his father in business and law and shared the 11th Street building. Abe died in 2005, and several years later Daniel, along with his siblings, Lois Infeld, Robert Chudnow, and David Chudnow, decided to turn the building into a public

museum. Daniel, the only one of the siblings who lives in Milwaukee, is president of the board. “It was my father’s dream,” he says. “He wanted to share his collection with the public.” The museum opened in 2012.

It’s a remarkable place, the product of both personal passion and the expertise of museum professionals. Each room is a walk-in exhibit bringing to life a place people visited in the 1920s and ’30s—a grocery store, a pharmacy, a hardware store, a barber shop, even a speakeasy. All of the items are authentic; Daniel estimates that 90 percent of the exhibited pieces are from his father’s collection. A few are from Daniel’s own work of accumulating or supplementing; these include the easy chair that was once the personal favorite of legendary Wisconsin political figure Robert “Fighting Bob” La Follette.

Daniel’s own law and business office? He moved it to another historic building, just a few steps away.

The museum’s ice cream parlor carries the name “Wonderland Park.” That’s a name you could apply to the entire museum. For more information, visit www.chudnowmuseum.org. ■

2009

Kelley G. Shirk has joined the firm of Hall & Evans, Denver, Colo.



Peter M. Young has become a shareholder in Habush Habush & Rottier. He continues to practice in the firm's Wausau, Rhinelander, and Stevens Point offices.

2010

Kristin M. Kaminski has joined the Burton Law Firm, in Sacramento, Calif., as an associate in the firm's estate planning practice.



Renuka R. Vishnubhakta has joined Murrar Law Office in Milwaukee, a firm serving the immigration needs of individuals, families, and businesses.

2011



Kevin J. T. Terry has been appointed to the board of directors for the Wisconsin School Attorneys Association for a four-year term. He is an attorney with Ruder Ware in Wausau, Wis., focusing on labor and employment law, municipal law, and school law.

2012

Katharine M. Marlin has been named title operations counsel for Attorneys' Title Guaranty Fund in Waukesha, Wis.

Michael Van Someren has joined the Milwaukee office of Davis & Kuelthau as a member of the corporate and real estate practice.

2013

Ryan M. Spanheimer has taken a position at the firm of Fredrikson & Byron in Minneapolis.

Max T. Stephenson has joined Gimbel, Reilly, Guerin & Brown in Milwaukee.

2014

Bryant Park has joined Becker, Hickey & Poster, in Milwaukee. The firm's practice includes divorce and family matters, estate planning, probate, and guardianship.



Christopher K. Flowers (left) and **Charles (Andy) A. Gordon** are among the new associates in Godfrey & Kahn's litigation practice group in the Milwaukee office.



John T. (Jack) Murphy and **Katherine M. O'Malley** are new associates in the Milwaukee office of Reinhart Boerner Van Deuren.

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 at law.marquette.edu.



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(BLUE AND) GOLD STANDARD

Hailed by political reporters as the “gold standard” of public opinion polling in Wisconsin, the Marquette Law School Poll correctly forecast the outcome of the state’s races for governor and attorney general in 2014—extending the poll’s track record for accuracy since it was launched in 2012. Look for the poll to continue exploring significant public policy topics in 2015. See inside, p.4.

law.marquette.edu/poll



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