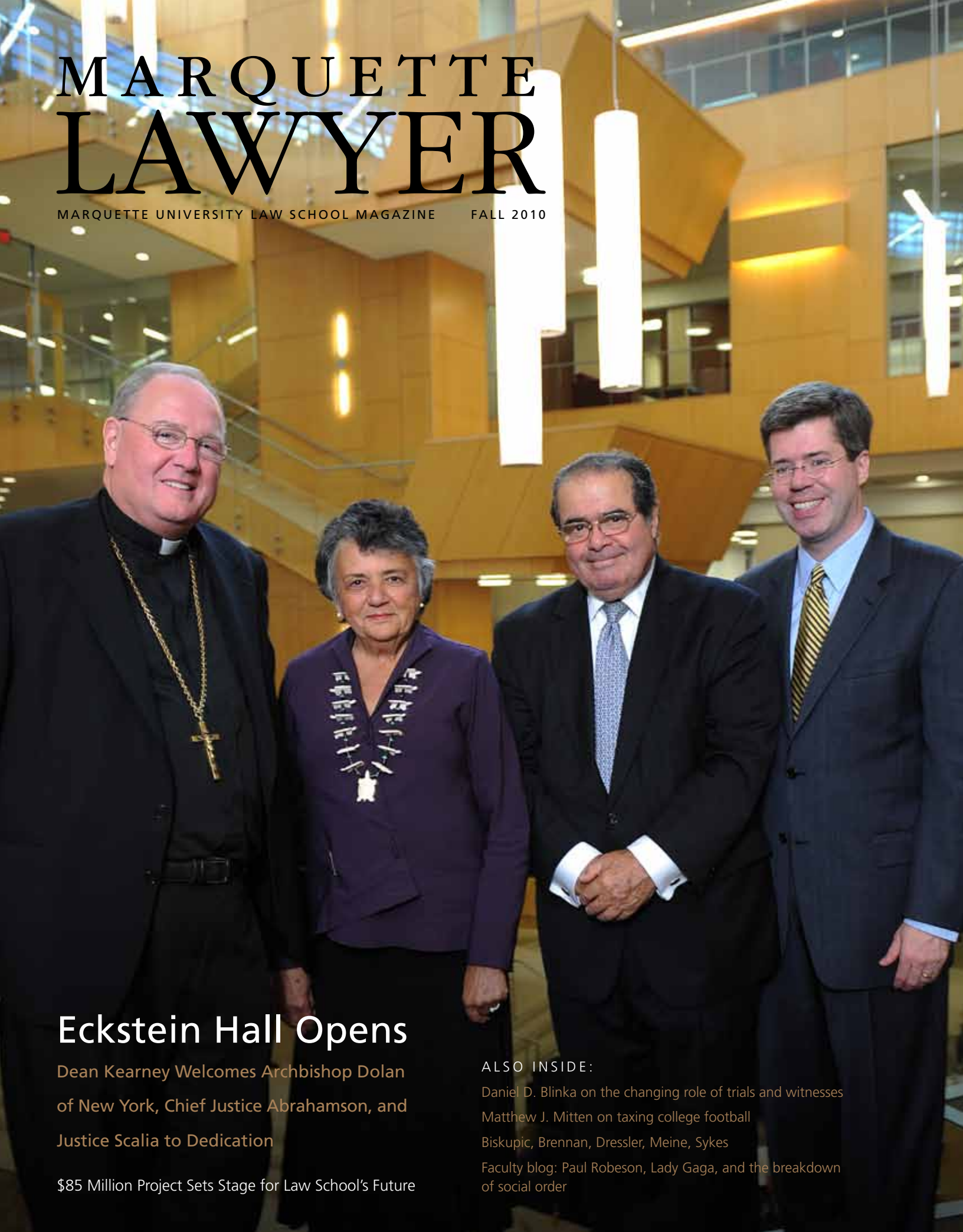
# MARQUETTE LAWYER

MARQUETTE UNIVERSITY LAW SCHOOL MAGAZINE FALL 2010



## Eckstein Hall Opens

Dean Kearney Welcomes Archbishop Dolan of New York, Chief Justice Abrahamson, and Justice Scalia to Dedication

$85 Million Project Sets Stage for Law School's Future

ALSO INSIDE:

Daniel D. Blinka on the changing role of trials and witnesses

Matthew J. Mitten on taxing college football

Biskupic, Brennan, Dressler, Meine, Sykes

Faculty blog: Paul Robeson, Lady Gaga, and the breakdown of social order

# Laying the Foundation

It is not unusual for me to invite you to read the latest issue of *Marquette Lawyer*. I am more self-conscious of it now because reading is much on my mind.

First, we have dedicated Ray and Kay Eckstein Hall—a building for whose exterior we set the goal of being noble, bold, harmonious, dramatic, confident, slightly willful, and, in a word, great; whose interior we wanted to be open to the community and conducive to a sense of community; and that we intended would be, in the aggregate, the best law school building in the country. One of the reasons that we succeeded in the last of these matters, no less than the first two, is the amount of reading among law students that the building will occasion. Whether it is the magnificent Aitken Reading Room, the comfortable Huiras Lounge, the sweeping Gallery overlooking the Marquette Interchange, or any number of other places, even this very social building will provide students places that attract them to sit and read the law.

Second, in the Aitken Reading Room, you will find Don Pollack's outstanding painting, commissioned for this building, *Laying the Foundation*. It draws on Abraham Lincoln's 1859 speech in Milwaukee, on the present-day Marquette University campus, where Lincoln stressed the importance of reading: *"A capacity, and taste, for reading, gives access to whatever has already been discovered by others. It is the key, or one of the keys, to the already solved problems. And not only so. It gives a relish, and facility, for successfully pursuing the yet unsolved ones."* This speech helped inspire our Legacies of Lincoln Conference, held last October to commemorate the sesquicentennial of Lincoln's Milwaukee speech and the bicentennial of his birth; papers from the conference, written by leading historians and lawyers, appear in the latest issue of the *Marquette Law Review*. You should read it (send me an e-mail, and I will send you a copy).

Finally, Marquette University enters the final year of the presidency of Rev. Robert A. Wild, S.J. Father Wild stands out among the 22 presidents of the University in terms of his commitment to the Law School. Eckstein Hall is only the most visible testimony. But I am reminded of Father Wild here because he is a great reader. I knew in 2005, in writing the memorandum "The Physical Future of the Law School," and a year later, in writing with Tom Ganey, the university architect, a critical memorandum concerning site selection for a possible new building (and associated parking), that Father Wild would read even reasonably lengthy memoranda that I might put before him. Such a willingness to read cannot be presumed in this modern world, which has more distractions even than when I entered the practice two decades ago. Our students would benefit from the example of Abraham Lincoln, Father Wild, and, as you even now demonstrate with this magazine, you.

Joseph D. Kearney
*Dean and Professor of Law*

MARQUETTE LAWYER FALL 2010

## FEATURE





## FACULTY INSIGHTS



## FROM THE PODIUM



Editor: Alan J. Borsuk

Production: Jane Eddy Casper, Christine Wilczynski-Vogel

Design: Douglas Frohmader, Andy Haas Schneider

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**Please send address changes to:**
Marquette University
Law School
Office of Alumni Relations
Eckstein Hall
P.O. Box 1881
Milwaukee, WI 53201-1881

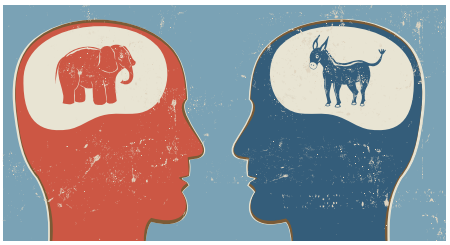
Phone: (414) 288-7090
Fax: (414) 288-6403
law.marquette.edu



On the cover:
Archbishop Timothy M. Dolan of New York, Wisconsin Supreme Court Chief Justice Shirley S. Abrahamson, United States Supreme Court Justice Antonin Scalia, and Marquette Law School Dean Joseph D. Kearney in the Zilber Forum of Eckstein Hall on September 8, 2010.



# Election trails to cross through Eckstein Hall for debates, forums



Autumn is often the hottest season of the year in Wisconsin—when it comes to politics. That is certainly the case this year, as strongly contested battles for governor, the U.S. Senate, and control of both houses of the legislature have put Wisconsin in a prominent position on the national political map.

Building on its commitment to be a place for serious discussion of major issues and taking advantage of the extraordinary facilities in the new Eckstein Hall, Marquette Law School will play a major role in the political events of the fall.

The Appellate Courtroom in the new building was the site in August of a one-hour "town hall challenge" between the two major Republican candidates for governor, Milwaukee County Executive Scott Walker and former Congressman Mark Neumann. The session was broadcast live on television and radio stations across the state as part of the "Up Front" program hosted by Mike Gousha, the Law School's distinguished fellow in law and public policy. The program originates from WISN-TV (Channel 12) in Milwaukee.

Again with Gousha moderating and the Appellate Courtroom as the venue, debates between the two major candidates for U.S. Senate and between the two major candidates for governor are expected to be held in October.

In addition, Gousha is scheduled to moderate a discussion about the role of money in elections and whether and how it should be regulated at 12:15 p.m. on October 5. Offering their decidedly different views will be Jay Heck, executive director of Common Cause Wisconsin, and Rick Esenberg of the law faculty.

And at 12:15 p.m. on October 26—just a week before the November 2 election—Gousha will host the state chairmen of the two major political parties, Republican Reince Priebus and Democrat Mike Tate.

Marquette leaders want people to regard Eckstein Hall as "the other Marquette interchange." Located adjacent to the heavily traveled freeway crossroads, the Law School aims to provide a heavily used setting for considering major issues facing Milwaukee and Wisconsin.

Joseph D. Kearney, dean of the Law School, said, "From the origins of designing this great building, we placed a premium on providing space and opportunity for public discussion of the events most important to our community."

National political experts have described Wisconsin as one of the places most worth watching as elections near. One of the best places for doing that watching will be Eckstein Hall.

# The Lawyer(s) of the Year

Maybe it would have been more accurate to call the Milwaukee Bar Association's award "the program of the year," but no one had trouble getting the message when the organization recognized the Milwaukee Foreclosure Mediation Program as "Lawyer of the Year."

The program was recognized for "activities and extraordinary accomplishments over the previous year [that] reflect well not only on the award winner but also on the profession in general."

The Law School's leadership of the program has been directed by Daniel Idzikowski, L'90, assistant dean for public service; Natalie Fleury, coordinator for dispute resolution programs; Debra Tuttle, L'87, chief mediator; and Amy Koltz, L'03, program coordinator.

With the involvement of Milwaukee Mayor Tom Barrett and Wisconsin Attorney General J. B. Van Hollen, state and city funds were made available for Marquette University Law School, the Legal Aid Society of Milwaukee, and other organizations, judges, and lawyers in private practice to launch the program.

The program offers mediation to lenders and homeowners who are involved in court proceedings related to foreclosure. It has enabled parties in dozens of cases to come to voluntary agreements allowing many people to remain in their homes.

# Law School programs aim to shed light on improving MPS

When Gregory Thornton was in the early stages of learning his new job—superintendent of Milwaukee Public Schools—one of his first public appearances was at a Marquette Law School forum in which four former superintendents of MPS talked about what they had learned from the job.

Like more than 150 other people, Thornton listened to the thoughtful yet passionate remarks of people who preceded him.

What he heard included calls to pursue reform of MPS more forcefully and calls to be cautious about taking things apart before you know what you're going to put together. He heard criticism of the amount of politics that surrounds education in Milwaukee, as well as a defense of what was done by some who were involved in those politics. And, in general, he heard the kind of provocative, serious discussion that the Law School is seeking to host as it develops its public policy programming, particularly in the area of education. The superintendents' forum was organized by Michael Spector, Boden Visiting Professor, who has focused on enhancing discussion about issues surrounding MPS.

"Although the Law School is a convener and a neutral rather than an advocate for any particular position or point of view, it believes that the more facts and ideas relevant to MPS decision-making that are made available to the community, the better will be those decisions and the better will be MPS educational outcomes," Spector said in his opening remarks at the session.

Spector and others are making plans for the new school year, including a half-day program on November 9 at Eckstein Hall that is expected to include two nationally prominent educators, Raj Vinnakota, co-founder and CEO of the SEED boarding school for high-needs students in Washington, D.C., and Rafe Esquith, a Los Angeles teacher who has authored three books and been recognized as national teacher of the year for his long record of success with fifth-graders from low-income homes. For more information, visit the Law School website at law.marquette.edu.

# Health, aging, and the Law School

How will the medical system be changed by the aging population? In a few years, will taking vitamin D be regarded as a fad or an established practice? What will really result from the new national health care law?

These may sound like issues for a medical conference. Actually, they were each discussed at Marquette Law School's annual *Elder's Advisor* conference several months ago. Titled "The Push to Institutionalize Prevention: We Win, We Lose," the conference drew about 100 people and featured presentations by experts from around the country.

Issues related to health and older people have been a major interest of the Law School since 1993. There are numerous courses taught each year focusing on those subjects, said Prof. Alison Barnes, who led the establishment of the *Marquette Elder's Advisor* law review. The courses are optional for second- and third-year students; interest has been steady and strong, Barnes said. Part-time and second-career students seem particularly interested, she noted.

The issues that the conference considered are fundamental to the well-being of people, Barnes said: "There are many legal aspects, including business, contracts, torts, and others that cut across a whole range of bioethics." There are even more criminal actions connected to health care than there used to be.

Plans are under way for the next *Elder's Advisor* conference to be held in spring 2011.

# Home. Anchor. Catalyst.
# ECKSTEIN HALL

Go past the first blush of excitement about moving Marquette University Law School into the spacious and dramatically beautiful Eckstein Hall. Ralph Jackson, what do you hope students will be saying about the building months or years from now?
"That it feels like home," Jackson said.

As the principal architect for the $85 million building, Jackson said that he and the many people involved in the project from Marquette agreed they wanted the building to send several important messages.

To the Milwaukee community as a whole, the message is one of connectedness. Every day, tens of thousands of people get a close-up view of the building, given its location adjacent to the Marquette Interchange, Wisconsin's most prominent traffic crossroads. The "narrative," as Jackson calls it, for them is that the building is a gateway to the campus, a gateway people are welcome to enter. The curving expanse of glass that makes the views so captivating—both looking into and out of the building—is intended to show how open the campus is to the city.

Facing toward the campus, the more traditional north and west sides of the building are intended to convey a message of respect for the legacy of Marquette and consistency with what Marquette stands for.

For the students, faculty, staff, and everyone else who use the building, the interior is intended to send a message that this is a first-rate place not only for classes but also for the total experience of a law school. This is a building where you could spend 15 hours a day and feel comfortable, with your needs addressed and the

setting conducive to both intellectual and social engagement.

"It's a student-centered building," said Jackson, of the Shepley Bulfinch architectural firm, based in Boston.

And the grandest elements of the building are designed to make that point. The Joseph and Vera Zilber Forum, the four-story atrium that is the central interior feature, creates not only a great openness but also a sense of warmth. The wide spaces on each floor provide room for studying and socializing that immediately became a hit with students when


LAWSCHOOL



classes began in August. The dramatic central staircase is designed to be a place where people will come upon others and stop to chat. People almost involuntarily fall silent when they walk into the cerebral and elegant atmosphere of the two-story Wylie and Bette Aitken Reading Room on the third floor, with two glass walls offering great views of downtown Milwaukee. And the ground floor of the Zilber Forum has already proved itself as a place for both specific events and for dozens of informal interactions every day. The building is simply a beautiful place to spend time.

But the mid-range and even seemingly minor elements of the building are also aimed at making it a special place. Consider the student lockers, for example. Input from students was one of the shaping factors in designing Eckstein Hall. "If we're going to spend so much time here, here's what we need," students said, according to Thomas Ganey, the university architect at Marquette. One of the pressing needs was personal storage space far better than the high-school-gym-like half-lockers they had in the basement of Sensenbrenner Hall, students said. So what did they get? Attractive lockers almost as large as closets, Ganey pointed out.

Or consider parking. If the building is to be a gateway to the community in particular terms, if it is to be welcoming to the public for use, it has to have good parking, the people shaping the building agreed. So there are 170 spaces on two levels below the main floor of the building. Many of them are reserved for guests.

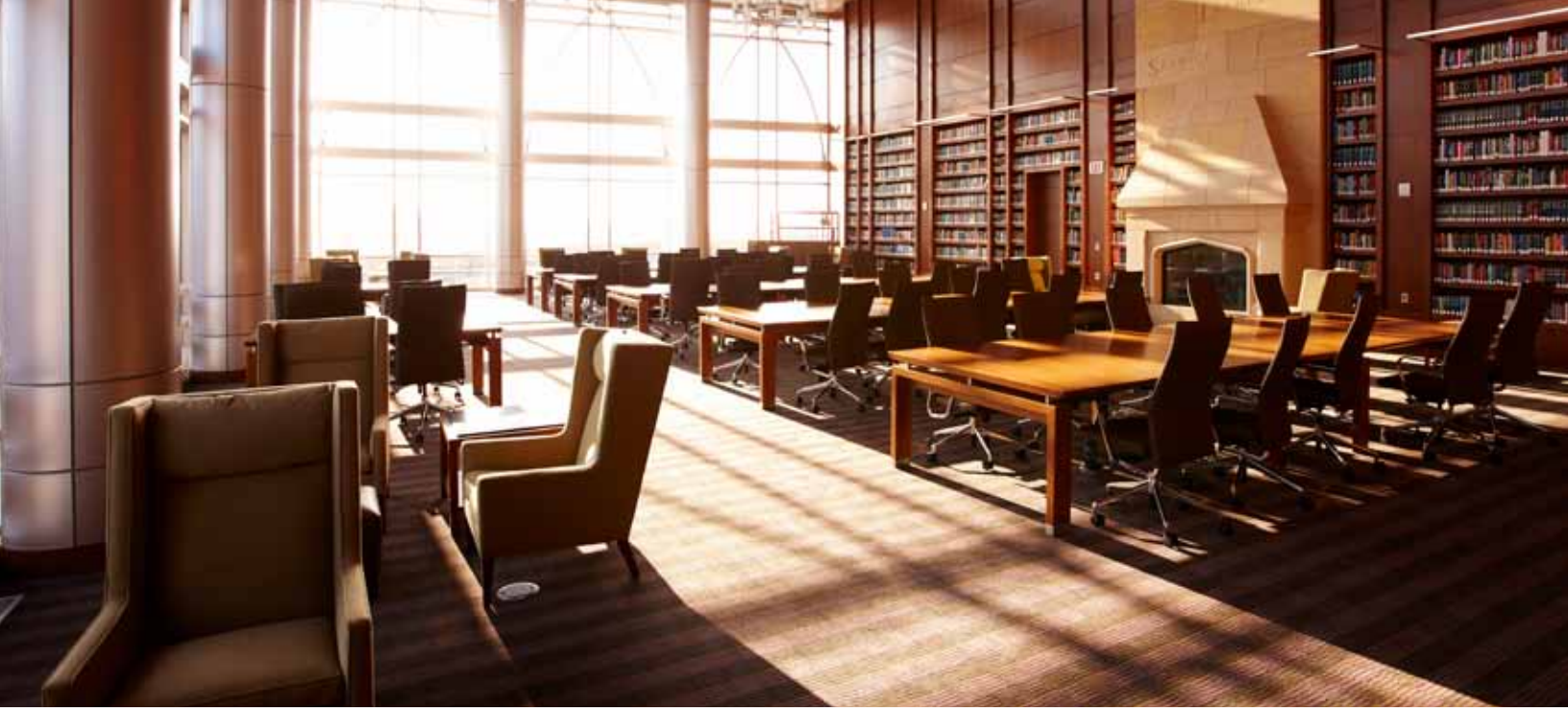
Of course, consider the library. The old library was awkward to use and cramped, and it offered poor situations for studying or working. "Sometimes you felt there wasn't room to think," said Professor Patricia Cervenka, director of the library. Using the new library is a vastly different experience. It is open to the rest of the building, with no walls separating it. Located in the northeast section of all four floors of the building, the library offers far better study and workspace while meeting the state-of-the-art goals for a law library in the Internet age.

Cervenka said that representatives of other law schools have already visited Eckstein Hall. "People have trouble keeping their mouths closed," she said. "It's a gorgeous place to walk in to."

And certainly consider the two courtrooms, the Appellate Courtroom on the first floor and the Trial Courtroom on the third floor. The Appellate Courtroom will also be the setting for a wide-ranging and active program of public policy sessions, with the capacity for live television and radio broadcasts.

The conference center on the fourth floor offers the same kind of high-tech amenities desired for presentations today, as well as excellent settings for dinners or receptions.

Technology installed throughout the building offers the things you would hope for in a school intent on using the tools of today to enhance education rooted in the richness of legal history. Ganey, the Marquette architect, said the designers of the building



> Overall, we've got a smash hit on our hands. This is Milwaukee's newest landmark, without a doubt.

wanted "great learning spaces that worked without technology—and worked even better with technology."

If a building is going to connect with the breadth of the lives of students, as well as faculty and staff, it needs to serve more than purely academic needs. Thus, there is the Tory Hill Café, just off the first floor of the Zilber Forum, with a menu including hot breakfasts and lunches and appealing (and generally rather health-conscious) snacks and drinks. Thus, the fitness center on the fourth floor, which will offer a wide range of classes as well as access to exercise equipment. Thus, the chapel on the fourth floor.

Discussions about doing something to improve the Law School's facilities began getting serious about six years ago. Ganey said that Law School Dean Joseph D. Kearney first asked him to examine what could be done to improve Sensenbrenner Hall, the school's home for decades. After an extensive program study of the situation, Ganey recalled, "We concluded that there was nothing to be done except build an entirely new facility."

Louis Andrew, L'66, of Fond du Lac, was on the planning committee and recalls a central concern: How could a new building be paid for? A $1 million gift from the Lynde and Harry Bradley Foundation in early 2007 got the ball rolling. But the turning point was a call from Ray Eckstein, L'49, of Cassville, Wisconsin, to Marquette's president, Rev. Robert A. Wild, S.J., in March 2007. Eckstein said that he and his wife, Kay, Sp'49, had decided to make a $51 million gift toward the new building. That was soon followed by a $30 million gift from Milwaukee real estate developer Joseph Zilber, L'41. Zilber designated $25 million of his gift for student scholarships.

Three-plus years later, more than $73 million has been raised toward paying for Eckstein Hall, with about $11.5 million to go.

And the building is a breathtaking reality. It is more than the Law School's great new home. It is a catalyst for rising excellence in every aspect of the Law School's life and an anchor for the future of the entire Marquette University campus.

"Overall, we've got a smash hit on our hands," Ganey said. "This is Milwaukee's newest landmark, without a doubt."

Dean Kearney pledged that the drive for a new facility would deliver to Milwaukee "nothing less than the finest law school building in the country."

The delivery has been made. The fruit of that is beginning to grow. ■

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# Eckstein Hall Dedication. September 8, 2010.

"Magnificent" was the word used by several of the speakers as they described Marquette University Law School's new home, Eckstein Hall, at dedication ceremonies held in a massive tent adjacent to the building on a day that was in many ways—even the weather—magnificent itself. U.S. Supreme Court Justice Antonin Scalia gave the keynote address, praising the building as he called for all those who use it to stay true to the core work of a law school. "I hope Marquette will always be a teaching law school," Justice Scalia said. The building is named for Ray and Kay Eckstein, whose $51 million gift led the fundraising campaign. The Ecksteins and many members of their family were present. Ray Eckstein's reaction when he first saw the building? "Wow," he said.


**1** U.S. Supreme Court Justice Antonin Scalia speaks to a crowd of about 1,600 in a huge tent adjacent to Eckstein Hall. **2** At a luncheon before the dedication, Dean Joseph D. Kearney, Ray and Kay Eckstein, and Rev. Robert A. Wild, S.J., president of Marquette University, make a toast to Eckstein Hall. **3** Wisconsin Supreme Court Chief Justice Shirley S. Abrahamson speaks at the ceremony. **4** Justice Scalia calls on students, faculty, and supporters of the Law School to keep education in the basics of the law as their most important goal. **5** Archbishop Timothy M. Dolan of New York is joined by Archbishop Jerome E. Listecki of Milwaukee in blessing Eckstein Hall.

# BLOGGING THE LAW,

The faculty blog on the Law School's website (law.marquette.edu/facultyblog) has become a lively forum for discussion of legal issues—and more. History, culture, sports, politics, and contemporary trends of many kinds have been addressed on the blog in thoughtful and readable ways. You think Lady Gaga doesn't belong on a Law School blog? Surprise. Here she is, together with an excerpted selection of other interesting recent posts. We hope that you will keep up with the blog and join in with your own comments.

## *Law & Order* and the Rise of the Pop Cultural Prosecutor

May 25, 2010 | Posted by: David R. Papke

Years before *Law & Order* ended its incredible twenty-year run on May 24, 2010, the series had staked its claim to being the longest-running prime-time series featuring lawyer characters. In addition, the series included an important change in how the heroic pop cultural lawyer is represented. In earlier lawyer shows with especially lengthy runs, such as *Perry Mason* in the 1950s and '60s and *Matlock* in the 1980s and '90s, the lawyer hero was customarily a criminal defense lawyer. Even the fictional firm of McKenzie, Brackman, Cheney & Kuzak in *L.A. Law* had a department devoted to criminal defense work. In *Law & Order*, by contrast, the heroic lawyers are always prosecutors.

What explains this very popular shift in imagery? Part of the reason is the general sense that crime has run amuck. Starting in the 1980s, a commitment to crime control replaced the drive for racial and economic justice as the preeminent domestic policy. Any politician on the local, state, or national level who seems "soft on crime" is doomed at the polls. More generally, the Reagan presidency marked a national turn to the right, and in subsequent decades, even the Democrats who have occupied the White House have been moderates. The heroic pop cultural prosecutor is well suited to crack down on crime and to embody conservative values.

Over the years, *Law & Order* became a genuine cultural phenomenon. The series' popularity led to spin-offs and to countless reruns of both the original episodes and the spin-offs. In the end, *Law & Order* in all its forms not only reflected a public sentiment and emergent politics but also powerfully reinforced that sentiment and politics.

## Paul Robeson and Marquette Law School

June 4, 2010 | Posted by: J. Gordon Hylton

Barry Brecheisen/WireImage/Getty Images

Most people remember Paul Robeson as a star of stage and screen and as a controversial African-American civil rights leader of the early and mid-twentieth century. His performances in *Othello*, *The Emperor Jones*, and *Show Boat* are legendary, as are his renditions of "Old Man River." His support of radical politics and his enthusiasm for the Soviet Union made him a highly controversial figure during the Cold War.

However, before he became famous as an actor and an activist, Robeson was a law student and a professional football player, a combination that brought him to the Marquette College of Law in the fall of 1922.

Here is the story.

Robeson was born in 1898 in Princeton, New Jersey, and came of age at the height of the Jim Crow era in the United States. He was a superb student in the public

# BLOGGING THE CULTURE

schools of Somerville, New Jersey, and he was offered a full academic scholarship by Rutgers University, at which he enrolled in 1915. At the time of his enrollment, he was only the third African-American to have attended Rutgers, and he was the only black student at the school during the four years in which he was enrolled.

Few college students have ever excelled at the level at which Robeson performed at Rutgers. He graduated first in his class; was elected Phi Beta Kappa as a junior; and won the college's oratory contest each year that he was enrolled. He also won twelve varsity letters in football, basketball, baseball, and track.

After graduating from Rutgers in 1919, he moved to New York, where he enrolled at the New York University Law School. After a semester at NYU, he transferred to Columbia.

To support himself while in law school, Robeson played for two seasons in the National Football League (or the American Professional Football Association, as it was initially known). In 1921, he played for the Akron Indians, which were led by player-coach Fritz Pollard, the great running back and the first African-American to coach a predominantly white professional team.

In 1922, Pollard jumped to the Milwaukee Badgers and apparently convinced Robeson to join him. Robeson apparently decided that a weekly commute to Milwaukee would be too difficult, so he took a leave of absence from Columbia Law School that fall.

The 1922 Milwaukee Badgers began their season on October 1. On October 17, the *Milwaukee Journal* ran a story under the heading "Robeson, Giant Pro End, in M.U. Law Dept." (Robeson was 6'3" tall and weighed approximately 220 lbs. at that point in his life, which apparently qualified as "giant-size" under the standards of 1922.) The brief story went on to report that Robeson "has taken up a course of review and research work in Marquette [University's] school of law, preparatory to taking the New York state bar examinations late this year." Counting his semester at New York University, Robeson had already attended law school for three years, so he was already eligible to take the New York bar examination. In 1922, most states required applicants for admission to the bar to have only a specific number of years of legal education rather than a law degree.

While the *Journal* story seems to suggest that Robeson may have enrolled at the law school, the law school bulletins for 1922 and 1923 do not list Robeson as a student in the fall of 1922, and he is similarly absent from the records of the university registrar.

Robeson's affiliation with the law school was likely somewhat informal. In the 1920s, several law professors at Marquette offered "bar prep" courses for students who were preparing to take the Wisconsin bar exam. Normally these classes were held after the end of the academic year and just before the summer bar examination.

After the season, Robeson returned to New York and re-enrolled at Columbia. He graduated from law school in the spring of 1923 as a member of a class that also included future U.S. Supreme Court Justice William O. Douglas. Already immersed in his theatrical career, Robeson apparently never got around to taking the New York bar examination, and he never again played in the National Football League.

Can we say that Robeson attended Marquette Law School? Probably not, but he was one of many fascinating individuals whose lives have intersected with our institution.

## "Greta Garbo and Monroe, Dietrich and DiMaggio": Persona, Authenticity, and the Right of Publicity Then

June 15, 2010 | Posted by: Kali N. Murray


Summer is here and, much to my joy, videos are back! The confluence of Lady Gaga, Glee, OK GO, and YouTube has reminded us of the great art form of the 1980s, the video, a four- to five-minute presentation of a lip-synched musical song in which dance choreography was more often than not a crucial element. The video had elements of a copyrighted work (under Section 102 of the Copyright Act, it can comfortably be classified as audiovisual work), but more importantly than that, the video served as an extended commercial to prompt the viewer to go out and purchase the artist's work.

The video, though, at its greatest heights, was used by its more skilled practitioners to build and shape the

individual artist's persona beyond the popularity of any particular song. This often had the effect of strengthening the long-term commercial value of an artist's work. Madonna used the video art form to its maximum extent, making relevant her persona for over 25 years (yes, people, 25 years).

Thus, the video also invokes a more neglected sister of copyright, the right of publicity, which broadly protects the commercial value of a person's identity.

A typical right of publicity statute, the Illinois Right of Publicity Act, grants the "right to control and to choose whether and how to use an individual's identity for commercial purposes" (765 Ill. Comp. Stat. 1075/10). While the right of publicity began as a narrow right to protect one's name and likeness, it has often been interpreted by courts to protect other indicia of identity (most famously in *Vanna White v. Samsung Electronics*). Although the existence of the right of publicity often prompts questions about why we want to protect a person's commercial identity (Paris Hilton, shudder), the video also prompts the question of exactly what identity does the right of publicity seek to protect?

The video era featured two great female video stars, Madonna and Janet Jackson, both of whom used the art form of the video to construct identity in different ways. Janet Jackson used the video to construct an "authentic" person in that she referenced a persona that did not shift from video to video (for example, go to YouTube, take a look at her "crowd" videos, "When I Think of You," "Alright," "Escapade," and "That's The Way Love Goes"). In each, Janet's persona is much the same. She is an approachable individual, seeking love and enjoying friendship, amidst a series of different dancers.

Madonna, by contrast, famously changed her persona often. Unlike Janet, she took another name, Madonna, rather than be Madonna Louise Veronica Ciccone from Michigan. Madonna then changed personas so frequently that any Madonna fan has a favorite Madonna persona (my favorites are Boho New York Early Eighties Borderline Madonna and Ray of Light Madonna). In a way, Madonna changed so much that we knew she had become constant in, at least, the ability to change.

So, as these videos demonstrate, when we talk about identity as to the right of publicity, there is an open question. What is identity? As we define the right, should we protect only a person's authentic identity (name, likeness, voice, etc.), or do we protect that constructed identity? Are Madonna's many personas as valid as Janet's one?

## "Rah-Rah-Ah-Ah-Ah, Roma-Roma-Ma-Ma, Gaga, Ooh-La-La": Persona, Authenticity, and the Right of Publicity Now

June 16, 2010 | Posted by: Kali N. Murray

These questions of authentic and constructed personas are still very much an issue in today's video culture. Our current great video stars, Lady Gaga and Beyoncé, have often played with this question of authenticity versus construction.

In fact, I would argue that Beyoncé and Gaga can be seen as "baroque" versions of the authentic Janet and the constructed Madonna. Beyoncé heightens the authentic tradition in her videos. For example, in the video "Crazy in Love," she sings, standing next to the man who would become her husband, Jay-Z, about how much she loves him. Like Janet, Beyoncé uses her given name. Lady Gaga, very obviously, extends the constructed tradition. In the video for "Bad Romance," Lady Gaga changes personas 14 times in one video. Lady Gaga makes us call her Lady Gaga.

Lately, however, Beyoncé and Lady Gaga themselves have sought to confuse these boundaries, between the authentic and constructed, through their two videos "Videophone" and "Telephone."

"Videophone" is very much within the tradition of the "authentic" video persona (the video is shot in black and white, Lady Gaga is in white the entire time, and even the choreography revisits previous Beyoncé videos). By contrast, "Telephone" (which clocks in at 9:30 minutes) is an extended play on constructed personas where both Lady Gaga and Beyoncé play with any number of personas, and indeed in the penultimate scene, use the trope of a traditional authentic video (lunch with boyfriend in a diner) to poison all of the participants.

Thus, these videos attempt to bridge the authentic and constructed identity, and then question it even more by asking, is there a difference? Are our authentic selves "constructed"? Are our "constructed selves" authentic?

All of this is interesting to me because it raises the

question of whether we should be protecting this right of publicity in the first place. What are the markers of identity? How can we judge what is the best protection for identity if we cannot decide what it is that constitutes those "indicia" of identity?

And I have not begun to delve into Minor Threat, OK GO, Nirvana, Sleator-Kinney, and the authentic DIY Alternative Music Video!

## Can Google-TV Help Liberate Cable-TV?

May 24, 2010 | Posted by: Erik Ugland, Marquette University Diederich College of Communication

Tech nerds and media junkies have been buzzing lately about Google's announcement that it will soon rollout Google-TV—a new device/platform that will turn people's televisions into portals for online video and other web content.

There is no denying Google's determination to expand its dominion over the communications universe, nor the inevitability of the web's eventual absorption of traditional television.

These two things terrify broadcast and cable executives. But the advent of web television might benefit traditional TV businesses—particularly cable companies—in one important category: First Amendment protection.

Even though the courts have long acknowledged that cable television is a First Amendment-protected medium, they have assigned it a kind of second-class constitutional status, based on the premise that cable markets are not sufficiently competitive.

In 1994, the U.S. Supreme Court held in *Turner Broadcasting v. FCC* that cable companies operate as effective monopolies, creating bottlenecks for the dissemination of video content in the communities where they operate. In *Turner*, the Court upheld the constitutionality of the must-carry rules, which require cable operators like Time Warner and Comcast to add the signals of local broadcast stations to their channel lineups. In addition, cable operators must set aside channels for leased-access by third parties, and they can be compelled to subsidize and disseminate public, educational, and governmental (PEG) programming, among other things.

These regulations are constitutional only because of the lack of competition that existed when the laws were adopted in the early 1990s. But a lot has changed since then.

Phone companies, such as AT&T and Verizon, now offer cable service (which they were not allowed to do until 1996), DirecTV and Dish Network offer DBS service to nearly every home in the country, and video content is now ubiquitous on the web, even without the seamless packaging of Google-TV. The bottleneck, in short, has broken.

The disconnect between these policies and their underlying premises is not merely a public policy problem; it is a constitutional problem. All of these regulations interfere with the expressive autonomy of cable operators and put special burdens on them that are not imposed on newspapers, magazines, or web communicators.

Cable networks must limit the amount of advertising time during children's programs. They must provide equal opportunities to political candidates whose opponents appear on those networks in nonexempt programming. And they must abide by the payola rules, which prohibit nondisclosed payments made by third parties in exchange for airtime.

It is probably hard for most people to get exercised about the rights of giant cable companies, with their ever-expanding rates and outsourced customer service. But they are constitutionally protected speakers, and the claim that they are differently situated from their competitors using other media just isn't credible anymore.

It is time for Congress and the FCC to scrap the current regulatory scheme and for the courts to reconsider cable's constitutional status in light of the new technological and market realities.

Maybe Google-TV will provide the impetus for the end of cable regulation as we know it.

## Violence and Social Order

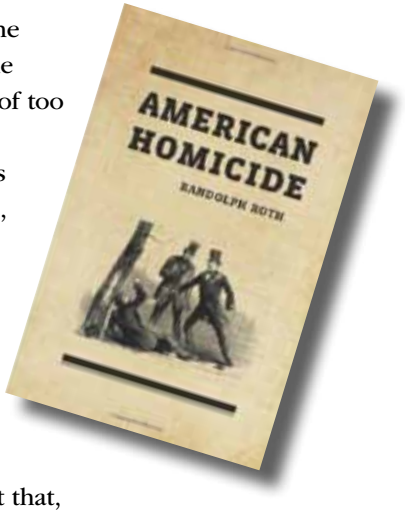
April 14, 2010 | Posted by: Bruce E. Boyden

The *L.A. Times* published an op-ed in April touting Randolph Roth's recent book, *American Homicide*. Roth is an historian at Ohio State University who studies violence and social change, a subject I am intensely interested in as well. In *American Homicide*, Roth argues that the homicide rate in the United States tends to spike not as a result of gun ownership or poverty, but when people lose faith in their government. He claims that the first such notable rise in violence occurred in the aftermath of the Civil War, "a catastrophic failure in nation-building," when a significant proportion of the population became extremely suspicious of their fellow Americans.

If true, that thesis bodes ill for our current situation, in which oddly apocalyptic rhetoric over ostensibly ordinary government actions seems to be on the rise. Loss of a debate now seems to no longer be an invitation to try harder next year, but rather conclusive evidence that the entire system is corrupt. While some have expressed the fear that such rhetoric will lead to large outbursts of explicitly antigovernment violence, such as that planned by the militia members recently arrested in Michigan, the connection between overwrought rhetoric and such extremists seems tenuous at best. What seems more likely is that heated rhetoric augurs simply more violence, not violence directed at a particular target.

But predicting the future is treacherous business; it is far safer to try to explain the past. And Roth's thesis, as I understand it (I haven't read the book), helps explain some aspects of a phenomenon I've been interested in for a while now—the outbreak of violence in Tombstone, Arizona, in 1881 and 1882, usually referred to as "the Gunfight at the O.K. Corral."

The "Gunfight at the O.K. Corral" is usually conceived of as a single and semi-mythic instance of Western heroism, in which officers of the law faced down ruthless criminals and brought them to justice. That's certainly the way Wyatt Earp spun the tale almost 50 years later. But what captured my interest in the subject in college, after having written a high-school book report debunking the standard story told in such films as *The Gunfight at the O.K. Corral* and *My Darling Clementine*, was that the famous gunfight turned out to be simply one episode in a general storm of lawlessness that spiralled out of control in southeastern Arizona. "Lawlessness" is actually the wrong term, since it implies the absence of law. What happened in Tombstone was a struggle for control of the social order of a boomtown. Each side of the conflict had some claim to be associated with the formal structures of government—the Earps were associated with the city police force, appointed by the Republican mayor (and editor of the Republican *Tombstone Epitaph*); the Clantons, their opponents, were ranchers associated with the Democratic county sheriff, and supported by the Democratic *Tombstone Nugget*.




The irony of Tombstone was that the violence there was not the result of the absence of social order but the result of too many social orders.

Among the things that struck me as I researched the society of Tombstone, and this ties back to Roth, was the incredible antipathy left over from the Civil War. George Parsons, a Republican entrepreneur who had migrated to Tombstone early on to seek his fortune, described Democrats repeatedly as "traitors" in his diary and expressed amazement that, essentially, all Southerners had not been rounded up and tried for treason—15 years after the end of the Civil War, a war that ended when Parsons himself was only 14. The deep distrust between Republicans and Democrats in Tombstone had some of its origins in their different norms and social practices, certainly, but Roth's thesis suggests that the two groups may have already been predisposed to define the other as a group that put no reasonable limits on what it was willing to do. And if one's opponents are without limit, then it does not make sense to limit one's own behavior, as George Smiley recognized.

That's the danger then in coming to see a system of government as not simply wrong, but deeply corrupt.

# Why Modern Evidence Law Lacks Credibility

This essay by Professor Daniel D. Blinka is based on an article of the same name that appears at 58 *Buffalo Law Review* 357 (2010). Blinka has been a faculty member of Marquette University Law School for 25 years, before which he was a trial lawyer in the Milwaukee County District Attorney's office. Blinka has a Ph. D. in American history. He writes and teaches in the fields of evidence, trial advocacy, criminal law and procedure, legal history, and ethics.

The modern adversarial trial is at a crossroads. Curiously, it seems that trials, long a mainstay of popular culture, are better thought of by the general public than they are among legal professionals. The public embraces trials both real and fictional. Novels, television shows, and movies capitalize on the trial's inherent drama while celebrating its pursuit of the unvarnished truth. Strangely, the legal profession is less sanguine. "Alternative" dispute resolution is ever so fashionable, and the "vanishing trial" is bid good riddance as unreliable, if not capricious.

One's confidence in trials largely turns on how well they are believed to reveal the historical truth of "what happened." Trials are hailed as "crucibles of truth." And this is largely a function of witness credibility: Whom do we believe and why? Unsettling to some while a comfort to others, credibility is deliberately relegated to the amorphous realm of lay common sense and life experience. Put differently, the average person is deemed as skilled as any lawyer or judge in distinguishing accurate from inaccurate testimony. Evidence law itself provides no independent, meaningful standard of determining credibility.

Why does the law so sanguinely entrust the common person and her common sense with this difficult yet critical task? The answer is in part historical, but mostly it is the product of unacceptable alternatives. Religion plays virtually no role in trials, other than the largely ceremonial witness oath. Modern evidence rules explicitly hold that witnesses' religious beliefs do not affect their credibility. Yet with enlightened equanimity, those same rules also slam the door on science. Polygraphs, voice stress analyzers, and the like are routinely excluded from the courtroom, as are psychologists and psychiatrists who deign to offer their insights about whom a jury should believe and why. Harboring equally little faith in religion and science, the law is content with the jury's life experience and "common sense" as both sufficient and necessary. Common sense is sufficient because we reasonably rely upon it in our daily lives in judging the accuracy of what others tell us. And it is deemed necessary to the legitimacy (popular faith) of our judicial system.

I have long been intrigued by the central, yet largely unexplored, role played by popular thought and culture in both the doctrine governing impeaching witnesses generally and the determination of witness credibility in trials. Lurking in the background is the ever-present tension among legal rules and policy, the insights of modern psychology, and the community's common sense. The title of this essay, and a longer article on which it is based, is not intended to denigrate evidence law as such but merely to underscore its heavy debt to popular thinking and to better appreciate the complications this engenders.

Doubtless, popular assumptions about witness credibility strike many critics as naïve and perhaps invalid, yet these very assumptions form the core of the law of evidence and support the trial's legitimacy. More precisely, evidence law invokes four "testimonial assumptions" whenever a witness's testimony is believed accurate, and thus not a mistake or a lie: (1) the witness accurately perceived the event through her five senses; (2) she now accurately recalls those perceptions when testifying; (3) her words (testimony) accurately describe her



Orson Welles plays lawyer Jonathan Wilk in the 1959 courtroom drama *Compulsion*, a movie based on the Leopold and Loeb trial.

memories; and (4) she is sincerely recounting those memories (and not lying). While the general public finds these assumptions familiar and reliable, the very essence of "common sense," critics are understandably skeptical in light of evidence law's wholesale abdication of credibility to popular thought. Impeachment law regulates various techniques for probing credibility at trial, yet provides no measure apart from popular beliefs. Although the eminent evidence scholar Mason Ladd once called credibility the "lawyer's problem," it is nonetheless a problem that a lay jury is ultimately expected to solve, drawing from its own experiences, insights, and beliefs.

Several critical themes emerge from the confluence of common sense and witness credibility. Most basic, the testimonial assumptions recognized by evidence law are products of mainstream thought and culture, not some refined philosophy of truth determination or a branch of modern psychology, at least not one recognizable as such today. It is somewhat ironic, then, that when modern evidence law was in its infancy in the early 19th century, it was heavily influenced by the Scottish school of common-sense philosophy, which dominated what we'd now call the psychological thinking of the time. The Scottish school firmly rejected other subjectivist theories, which questioned whether one could be certain about anything in the world; rather, the Scots extolled the reliability of human perceptions, memory, and communication. Simon Greenleaf, a devout evangelical Christian, Harvard law professor, and progenitor of modern evidence law, used the common-sense philosophy as the theoretical scaffolding for his landmark evidence treatise in the 1840s. So convinced was Greenleaf in the power of his methodology that he followed it with an influential 1847 essay that proved the truth of the New Testament by applying the law of evidence in a way that demonstrated the credibility of the gospel writers, Mathew, Mark, Luke, and John!

What gave common-sense thinking its power was that it resonated in 19th-century popular thinking as well as the professions and the sciences of the time. And while modern science found it wanting by the late 1800s, common sense's essence remained current in popular thinking about how people perceive, remember, and describe events, as well as their sincerity. The assumptions of evidence law merit brief consideration.

All testimony is either correct or incorrect. An incorrect answer means that the witness is lying or honestly mistaken—in his perception, memories, or narrative (description). A correct answer assumes that the witness accurately perceived an event and is now sincerely and accurately recalling and describing it. Thus, perception, memory, narrative accuracy, and sincerity are the keys to credibility.

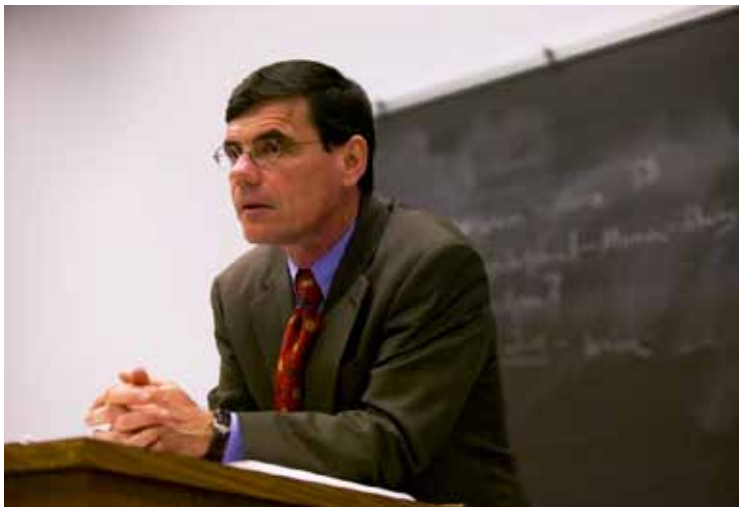
Evidence law equates "sensory perception with knowledge," in the words of one commentator. More precisely, it assumes that people acquire information through their five senses: sight, hearing, touch, taste, and smell. Eyesight is especially prized, with hearing a close second, albeit heavily hedged by the hearsay rule. No witness, lay or expert, is allowed to testify about another person's state of mind because no such "sixth sense" is recognized.

Those same perceptions are "recorded" in one's memory. The dominant analogy today is the video camera, yet it should be remembered that common-sense thinking originated long before photography itself: the eye captures images which are stored in the brain. The key here is the law's assumption of stable, retrievable memories. The problem with analogizing memory to a video camera or, for that matter, a computer's hard drive is that such technology, when working properly, preserves all detail. The human memory does not.

Testimony is delivered orally before the jury—a live performance. Testimony is, or should be, largely extemporaneous responses to questions posed by the lawyers. The question for the trier of fact is how closely

> "Trial judges should play a more active role in the proof process, particularly to assure that juries are provided with information critical to assessing the accuracy of lay testimony."

the witness's narrative (testimony) matches the recorded memories, and in turn how accurately those memories reflect what the witness saw in the first place. Leading questions are generally barred on direct examination so that the jury may hear the witness's own words; conversely, leading questions on cross-examination serve to test the witness's resolve to describe things one way and not another. Plainly, some people are just better at this than others. The witness's word choice and delivery are often determinative of how much weight a jury will give to his testimony. Seasoned trial lawyers understand that over-preparation of witnesses yields only stale, scripted testimony. Spontaneity of sorts is expected. Moreover, the witness's demeanor is often as critical as his word choice; how he testifies is as significant as what he says.



Professor Daniel D. Blinka

The final concern is sincerity. Is the witness lying about what he knows? Perhaps because the darker side of the human condition is that all people lie at least some of the time, this unspoken sordid commonality equips us all with the ability to ferret it out.

These assumptions are embedded in various evidence rules that resonate in everyday life. Several examples will suffice. "Bias" is heavily favored by evidence law. Lawyers may cross-examine any witness about a potential interest or bias arising from any source—emotions, social relationships, or financial interest. Other witnesses may be called to prove the bias if needed. Not only is bias impeachment readily understood by all people from an early age (think of the "teacher's pet" in grade school), it potentially resonates in all four testimonial assumptions. It colors one's perceptions, memories, and word choices and may induce one to lie. It operates at the conscious and unconscious level. So too, a "defect" in a witness's capacity to perceive, remember, or narrate is deemed a noncollateral issue, as is bias. Poor eyesight, bad hearing, failing memory, or inarticulateness is fair game. A witness's capacity for sincerity, however, is measured by his character for truthfulness. The rules permit cross-examination about prior acts of deceit and falsehood. Prior criminal convictions are also admissible on the theory that convicted criminals are less enamored with telling the truth than noncriminals. In our daily lives, we are just as wary of nearsighted eyewitnesses as we are of entrusting secrets or valuables with disreputable persons.

Despite a plethora of esoteric rules, evidence law is strikingly bereft of any systematic approach to determining credibility. No master rule commands lawyers to explore a witness's potential bias, defective memory, etc. Rather, the law assumes that lawyers intuitively know to do this. Impeachment rules originated as ad hoc limitations on excessive cross-examination tactics that seemed unfair or overly demeaning, a provenance that explains their lack of coherence and rigor. Lawyers selected these very tactics based on their affinity with how ordinary people (the jury) thought about facts. Moreover, trial lawyers were then, and still are, far more concerned with blasting their opponent's evidence than pursuing the "truth" that the modern trial purports to be looking for. In sum, even today the rules exist more as tools to be used at the lawyer's discretion, the assumption being that lawyers are sufficiently adroit, knowledgeable, and experienced to draw out the strengths and weaknesses related to credibility. The techniques are also inordinately weighted toward exposing the willful liar (the perjurer) than they are navigating the far greater problem of the honestly mistaken witness, a regrettable artifact of history.

Evidence law's laissez-faire reliance on popular thinking poses some special problems for the modern trial. First, proof that contradicts the common-law testimonial assumptions, particularly social scientific or psychological evidence directed at popular "misconceptions," effectively diminishes the jury's role in fact finding and threatens the trial's legitimacy. Modern insights about the frailties of eyewitness identification or the phenomena of false confessions are usually excluded on grounds

that the jury (somehow) intuitively grasps such things or that the lawyers can expose the weaknesses without expert witnesses. Polygraphs are generally excluded, but what about newer neuro-imaging technology that purportedly measures truthfulness? While the topic is complex, for present purposes we should take note that often the real problem with such "insights" is that they conflict with popular thinking and would reduce juries to spectators if not render them altogether useless. One prominent psychologist, critical of "repressed" memory cases, has declared that there is "no reliable way to listen to a memory report and judge whether it is true or false." Proclamations like this threaten the taproot of the trial, not to mention history itself. The risk here is that trial law will become colonized by experts who will tell juries which witnesses to believe and why, thereby undermining the jury's autonomy to determine credibility and the legitimacy of trials themselves. Ironically, the jury is reduced to deciding only among the credibility experts themselves.

Second, evidence law assumes that its testimonial assumptions, as well as the rules governing credibility, remain consonant with current popular thought despite their nineteenth-century origins. The public's faith in the five senses and stable memories seems safe enough at present, but what about quaintly Victorian notions about one's "character trait for truthfulness"? Evidence that any human being has lied on a prior occasion (at least!) seems weirdly obvious and not the least helpful in determining her credibility today, so why permit it?

Third, the "vanishing trial" risks relegating the trial jury to history's museum of curiosities while breeding a generation of lawyers lacking fundamental trial skills and adept only at settlement. How does a fledgling trial lawyer learn how to distinguish among strong and weak cases without trying some herself? How else does a lawyer develop the skills needed to support or attack a witness's credibility? And will public confidence erode if our justice system, civil and criminal, lives only by the "deal"? The problem is particularly acute in the criminal justice system. For example, a prosecutor lacking trial skills may eschew charges in a circumstantial case or where witness testimony conflicts simply because he has no idea whether it is provable in the first place. At the other extreme, a prosecutor may overcharge a case to leverage a guilty plea by a defendant understandably reluctant to risk all at trial. Unseasoned criminal defense counsel are unlikely to recommend that a client take a marginal case to trial. Similar issues arise in the civil justice system, where lawyers' enchantment with expensive discovery and motion practice may mask a reluctance, or even an inability, to try cases in the first place.

Raising issues is easy; finding answers is hard. Evidence law is understandably reluctant to substitute its common-sense underpinnings for the infirmities of modern psychology. Nonetheless, it should strive to better understand its roots in mainstream thought and popular culture if only to better appreciate where and how cultural changes, and psychology's insights, might assist credibility determinations without undermining the trial's legitimacy. The trial itself must change, however, at least incrementally. Trial judges should play a more active role in the proof process, particularly to assure that juries are provided with information critical to assessing the accuracy of lay testimony.

Both perjury and mistaken testimony are "wrong" and distort fact finding, yet present rules and procedures are more oriented toward exposing the liar than the innocently mistaken witness. If lawyers lack the necessary seasoning to operate under the current laissez-faire system, evidence law should mandate (not permit) inquiry into a witness's potential biases or any defects in testimonial capacities. Other rules need to be rethought. If there is no popular consensus about what constitutes a "truthful character," it is difficult to justify the plethora of rules that permit and regulate evidence about such a dubious concept in the first place. The human propensity to lie is simply, and regrettably, not in need of evidence. As for prior criminal convictions, the judge might handle this by simply telling the jury not to speculate about this subject because the law will permit no such evidence, whether positive or negative, at least as relates to credibility. The key, then, is to assure that the trial's conception of credibility remains in tune with popular assumptions. And where popular thinking itself may be uninformed or naïve (e.g., the false-confession phenomena), then experts should educate the jury. We must assure that the jury receives the information it requires in determining credibility in a manner that does not undermine the legitimacy of the trial itself or the reliability of its outcomes.

Tom Hauck/Getty Images Sport/Getty Images

## Seeking Better Field Position

# Targeted Reform of Commercialized Intercollegiate Athletics

This is an excerpted version of an article in the *San Diego Law Review* written by Matthew J. Mitten, Professor of Law and Director, National Sports Law Institute, Marquette University Law School; James L. Musselman, Professor of Law, South Texas College of Law, Houston, Texas; and Bruce W. Burton, retired Professor of Law, South Texas College of Law. Reprinted with permission of the copyright holder, *San Diego Law Review*.

The United States marketplace responds to cultural forces and strong public demand for popular products; the commercialization of college sports directly reflects the marketplace realities of our society. For example, in response to substantial public interest in intercollegiate sports, particularly Division 1 Football Bowl Subdivision (FBS) football and men's basketball, colleges and universities rationally invest substantial resources in their athletic departments. Leaders of these institutions see the athletic program as a means to achieve a wide range of legitimate objectives that further their missions: providing a lens through which the nature, scope, and quality of their higher educational services are discovered by the public; attracting faculty,

students, and student-athletes; diversifying their student body; forging a continuing bond with alumni, the local community, and other constituents that provides both tangible and intangible benefits; and enhancing their institutional reputations. In an extremely competitive higher education market, academic leaders increasingly use intercollegiate sports as a catalyst and means to achieve these legitimate ends. This rational conduct on the part of university presidents and governing boards is merely a facet of competition in a well-functioning democratic society, which is embedded in human nature and modern culture and embodied by the centuries' old American enterprising spirit of doing what is necessary to compete successfully.

Some commentators have taken the position that the increasing commercialization of college and university athletic programs requires that federal tax laws pertaining to those programs be reexamined and ultimately modified by Congress. Specifically, the argument is that many intercollegiate athletic programs, particularly those with FBS football and men's basketball teams, have become large and profitable businesses insufficiently related to education; as a result, Congress should reexamine whether college and university athletic programs, as well as the NCAA, should be entitled to exemption from federal taxation and/or from the federal unrelated business income tax ("UBIT").

These recent appeals to Congress to subject college and university athletic programs to the UBIT appear in reality to be at best a cry for increased and more effective regulation of such programs by the NCAA, and at worst a red herring aimed at gaining leverage in a quest to diminish the ever-widening influence of intercollegiate athletics in the world of higher education.

There is probably universal agreement that college and university athletic programs are in need of reform, and most would probably agree that the most competitive and profitable programs are in need of more effective regulation than they currently receive. But that falls far short of concluding that any programs currently in existence are not substantially related to the college or university's educational purpose. It would be difficult to envision an athletic program that would be so devoid of educational value that it would not contribute importantly to the educational purpose of a college or university; for that to be the case, the athletic program would have to be conducted similarly to a professional sports franchise, with virtually no regard given to education of its student-athletes. No athletic program would be allowed to go that far if appropriate and effective regulation were administered by the NCAA.

It would be a mistake to further burden and complicate federal tax laws with new requirements to be met by the NCAA and its member educational institutions, along with creating the potentially significant costs of federal agency enforcement, when targeted reform can more effectively achieve some of these objectives and others in an alternate manner.

The commercialization of intercollegiate athletics in response to culturally driven market forces is a largely irreversible trend, which is not necessarily socially undesirable because it can be used to further broaden university academic objectives. Some reform, however, is needed to ensure that intercollegiate athletics are student-athlete centered and actually further the purpose of higher education, rather than functioning as a tail that wags the university dog or an anchor that inhibits fulfillment of its academic mission. We propose offering the carrot of federal antitrust law immunity (rather than swinging the stick of threatened federal taxation of athletic department revenues) to implement targeted reforms to correct the most significant problems caused by the commercialization of intercollegiate athletics.

Because of antitrust liability concerns, the NCAA has been reluctant to enact cost control legislation and currently is simply encouraging each of its member institutions to individually make financially responsible decisions regarding the resources allocated to its intercollegiate athletics program and its athletics department's expenditures. Effective NCAA internal governance of commercialized intercollegiate athletics requires uniform rules and enforcement, which are necessarily the product of agreements and collective decision-making among NCAA member institutions, thereby inviting antitrust challenges under § 1 of the Sherman Act.

We propose that Congress provide the NCAA and its member institutions with broad or limited immunity from antitrust liability under § 1 of the Sherman Act, expressly conditioned upon the adoption and implementation of several targeted external reforms to ensure that 21st-century intercollegiate athletics further legitimate higher education objectives, provide student-athletes with the full benefits of their bargain, and enhance the likelihood they will obtain a college education that maximizes their future career opportunities other than playing professional sports.



> Because intercollegiate athletics are an integral part of institutions of higher education, the revenues generated by university athletic departments should continue to be exempt from federal taxation.

The step we propose would keep collegiate athletics from crossing the line between a primarily educational endeavor and a commercial enterprise; enhance the academic integrity of intercollegiate athletics; promote more competitive balance in intercollegiate sports competition; require university athletic departments to operate with fiscal responsibility; and limit unbridled market competition for inputs necessary to produce intercollegiate athletics such as coaches.

Our proposed antitrust immunity would be conditioned upon certain requirements that the NCAA and/or its member institutions must satisfy. The following are some possible requirements:

- At least a four-year athletic scholarship that covers the full annual cost of college attendance (which may be taken away only for failing to meet minimum academic requirements, engaging in misconduct, or voluntarily choosing not to continue playing a sport) and tuition funding for a fifth or sixth year of college education if necessary to complete a bachelor's degree if the student-athlete is in good academic standing when his or her intercollegiate athletics ability is exhausted. Providing these additional benefits likely would increase the college graduation rates of Division I FBS football and men's basketball student-athletes, whose efforts generate most intercollegiate athletics revenues.
- Free medical care or health insurance for all sports-related injuries, plus extension of the injured student-athlete's scholarship for a period of time equal to the time he is medically unable to attend class due to injury. This is an important benefit because the NCAA currently permits, but does not require, its member institutions to provide medical care or health insurance for sports-related injuries.
- Mandatory remedial assistance and tutoring for entering student-athletes whose indexed academic credentials are below a certain percentile (e.g., 25th) for their university's freshman class.
- The creation of a post-graduate scholarship program administered by the NCAA and funded by a designated percentage of the total net revenues generated by intercollegiate football and men's basketball (and perhaps other sports), including the sales of merchandise incorporating aspects of student-athletes' persona (e.g., team jerseys with numbers identifying individual players).

Antitrust immunity could also be conditioned upon requiring that a certain percentage of the net revenues from sports such as football and basketball be used to fund and expand participation opportunities for student-athletes in sports that do not generate net revenues, or requiring the NCAA and its member universities to provide detailed information concerning their athletic department finances using standardized accounting methods.

Given the shield of antitrust immunity, the NCAA could adopt legislation to curb the existing athletics' arms race by imposing annual or multiyear per sport aggregate spending caps or limits on certain expenditures (e.g., coaches' salaries) for the different levels of intercollegiate athletics competition. In turn, these cost savings could be used to maintain or increase intercollegiate athletics participation opportunities in women's sports and men's nonrevenue sports.

Legend has it that King Canute I was the ancient monarch who stood on the ocean shore and commanded the tide not to come in—not surprisingly, his effort failed. Similarly, the commercialization of intercollegiate athletics is an inevitable market response to our nation's strong cultural passion for sports competition. It is equally inevitable that college and university leaders would seek to use intercollegiate athletics as a means of achieving other legitimate institutional objectives. Because intercollegiate athletics are an integral part of institutions of higher education, the revenues generated by university athletic departments should continue to be exempt from federal taxation. It is, however, necessary to ensure that the increasing commercialization of intercollegiate athletics does not conflict with the academic missions of universities or interfere with student-athletes' educational opportunities. Our proposed solution is that Congress should provide the NCAA and its member universities with a limited exemption from the federal antitrust laws as a means of implementing targeted reforms to ensure that intercollegiate athletics are primarily an educational endeavor rather than commercialized quasi-professional sports.

Public Service Conference

# Aldo Leopold and the Ripples of a Water Ethic in Wisconsin

This is an edited excerpt from an address by Curt Meine at Marquette University Law School's Public Service Conference, "Water and People," held February 26, 2010. Meine is director of Conservation Biology and History, Center for Humans and Nature, and a senior fellow of both the International Crane Foundation and the Aldo Leopold Foundation. He is author of *Aldo Leopold: His Life and Work*, published in 1988 by the University of Wisconsin Press.

Ripples on the water. It is a fitting image with which to consider the origins and expansion of a water ethic in Wisconsin, and around the world. And Marquette University is a fitting place. Père Marquette points the way for us, perhaps, from the university's official seal. We see him exploring Wisconsin's waters with his Native American guides, gesturing toward a far horizon that we might well imagine to be an ever-unfolding future. All of our forbears—native and missionary, explorer and immigrant—would carry their canoes over literal and figurative portages, making ripples in the ethical landscape of Wisconsin. All would, according to varied traditions, define the value of our inviting waters.

As we are meeting at a law school, it seems appropriate to read the concluding sentence of an obscure article on lakes and terrestrial ecosystems that Aldo Leopold wrote in 1941. Commenting on our penchant for modifying aquatic ecosystems, Leopold wrote: "Thus men too wise to tolerate hasty tinkering with our political constitution accept without a qualm the most radical amendments in our biotic constitution." It was, as Leopold noted in so many of his writings, so much easier to change the land (and its waters) than to change ourselves and our ethical norms.

Aldo Leopold's sense of an ethical regard for water began long before, during his boyhood along the Mississippi River in Iowa. It progressed through pioneering work in the vulnerable watersheds of the semi-arid American Southwest. It came together in Wisconsin in a quiet place called Coon Valley in the early 1930s. This badly eroded valley in western Wisconsin, typical of so many others in the region, became the site of the nation's first watershed conservation demonstration project. Hundreds of farmers within the watershed committed themselves to stemming the degradation that their own forbears had brought on in the decades following European settlement. The result was a revolution in soil and water conservation. It would affect not only the Wisconsin landscape, but landscapes across the region, the nation, and the world. . . .

Leopold's ethical insights drew upon his decades of field experience, his appreciation of emerging scientific concepts, and his frustration with short-sighted economic and resource management policies. He finally summarized his concerns in "The Land Ethic," the capstone essay in his classic book, *A Sand County Almanac*. In it he expressed the fundamental lesson that he had learned through his career: that to address effectively our conservation needs, to realize the full range of cultural benefits from the land, to sustain our economy and communities, and to demonstrate respect for our fellow creatures, we as individuals and communities must assume responsibility for the health of the land as a whole.

It is useful to break down that summary and make a few points that connect Leopold's idea to our discussion here of water and ethics.

First: Leopold's definition of land was broad and inclusive, and water was an essential component of it. In his words, "The land ethic simply enlarges the boundaries of the community to include soil, waters, plants and animals, or collectively, the land."

Second: Leopold saw the sphere of our ethical consideration expanding throughout history (however fitfully) and held that it must expand in the future to include the land. "The extension of ethics to the land," he wrote, "if I

Photo courtesy of the Aldo Leopold Foundation (www.aldoleopold.org).

Living on, learning from, and writing about the land and water, particularly in central Wisconsin, led Aldo Leopold (above and below) to become a central figure in building environmental consciousness.

read the evidence correctly, is an evolutionary possibility and an ecological necessity."

Third: Such an ethic entails responsibility for the healthy functioning of the entire biotic community. In one of his most elegant statements of the theme, he wrote: "Conservation is a state of health in the land. The land consists of soil, water, plants, and animals, but health is more than a sufficiency of these components. It is a state of vigorous self-renewal in each of them and in all collectively." We might say it differently today. We would refer to the resilience of aquatic ecosystems. We can talk with much greater scientific precision about point-source pollution, polluted run-off, soil erosion, and sedimentation rates; species diversity, invasive species, and trophic cascades; altered hydrological regimes, excessive groundwater withdrawal, extreme rainfall events, and climate change. But in the end, it is still all about the health of the land as a whole, and water as a fine indicator of that health.

Finally: We live in a society that regards land first and foremost not as a community, as Leopold implored, but as a commodity. He wrote in the foreword to *A Sand County Almanac:* "We abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect." Shall we treat water as a mere commodity, or shall we treat it as the essential ingredient that supports and determines the quality of life—of *all* life—in the larger community to which we belong? Science informs our consideration of that question. But it cannot answer it. For that, we must turn to our ethical sources and traditions.

We are all part of a necessary, ongoing conversation about the physical, ecological, economic, cultural, and spiritual value of water, and what we as individuals and as a community ought to do with respect to that value. In living up to that obligation, we may take some encouragement from Leopold and what I have taken to calling the most important sentence that he ever wrote: "I have purposely presented the land ethic as a product of social evolution because nothing so important as ethics is ever written. . . . It evolves in the minds of the thinking community." It is a remarkable thing when one ponders it: in an essay entitled "The Land Ethic," Leopold notes that no one can in fact write an ethic. With that sentence, Leopold wisely liberated his own idea and invited everyone to participate in its further development. It is in fact a call to responsibility, a directive to all of us to bring to this vital work our own experience, background, insight, and knowledge. Aldo Leopold did not write the land ethic. You and I *are* the thinking and caring community. You and I "write" the land ethic by entering the conversation. It evolves through our commitment. And if we believe that water must be given greater respect and attention in that process of ethical development, then let us not wait. Let us go to the water's edge and get about the task. ■

Photo courtesy of the Aldo Leopold Foundation (www.aldoleopold.org).

Barrock Lecture

# Make My Day: "Feminism" and the Changing Law of Self-Defense

This is an excerpt from a *Marquette Law Review* essay by Joshua Dressler, Frank R. Strong Chair in Law, The Ohio State University, Michael E. Moritz College of Law, based on the George and Margaret Barrock Lecture on Criminal Law, which he delivered at Marquette University Law School on April 8, 2010. The lecture was titled, "Feminist (or 'Feminist') Reform of Self-Defense Law: Some Critical Reflections."

The retreat doctrine, specifically the requirement that a person retreat if she can do so at no reasonable risk to herself rather than stand her ground, is eroding at a particularly fast pace. The change may be, in part, a function of the violent nature of modern American life, but it is more likely the result of the ability of groups like the National Rifle Association to play on our fears of violence. But it is also the result of feminist "empowerment" efforts or, at a minimum, the astute (one might even call wily) efforts of conservative law-and-order advocates to use feminist arguments in support of their self-defense reform proposals, and thus co-opt some feminists.

The erosion of the retreat requirement, in part by invoking feminist rhetoric, is ironic. As I noted earlier, the retreat rule is perhaps the least "male" self-defense doctrine. Consider how Harvard Professor Joseph Beale explained the doctrine more than a century ago:

> A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of retreat, but he would regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow-being on his hands. It is undoubtedly distasteful to retreat; but it is ten times more distasteful to kill.

Since 2005, however, this seemingly pro-cowardice, anti-macho, doctrine of self-defense law has been successfully attacked. With the passage of Florida's "Make My Day" law, 26 other states have significantly expanded the scope of their self-defense rules.

Florida's law, a model for the other states, provides a person with the statutory right to stand one's ground and use deadly force outside the home—that is, to meet force with force—in any public place where the person has a right to be (as well as in one's automobile), as long as the individual "reasonably believes [deadly force] is necessary . . . to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony." As well, the new law provides the self-defender immunity from criminal and civil actions that arise out of use of deadly force in the preceding circumstances.

Thus, the castle doctrine has come to the public streets, bars, and other public areas. And the leading proponent of this change in Florida (and, indirectly, in the many states that have followed the Florida model) was Marion Hammer. Who is Hammer? She described herself in 2006 as a 4'11" 67-year-old woman who "wouldn't hesitate to shoot you" if she felt her life were in danger or she feared injury. Perhaps more pertinently, however, she is a past president of the National Rifle Association—the law was an NRA measure. One should not lose sight of the fact, however, that her rhetoric in support of greater use of deadly force in self-defense usually centered on the need to empower women—that is, her strategy was "to feminize the NRA's message through the linking of gun ownership with protection [of women] against male violence." She defended the Florida law this way:

> A woman is walking down the street and is attacked by a rapist who tries to drag her into an alley. Under prior Florida law, the woman had a legal "duty to retreat." The victim of the attack was required to run away. Not anymore. Today, that woman has no obligation to retreat. If she chooses, she may stand her ground and fight.

Now, of course, the previous law did not require the woman in her scenario to run away if doing so would have jeopardized her safety. But the message is clearly one of empowerment of women.

On closer analysis, the feminist argument here is not as feminist as it first appears. Basically, Hammer's message is that women in modern times are vulnerable outside the home—outside, that is, the protection their husbands are expected to provide them in the castle—and, therefore, women need to be armed. But once we arm these vulnerable women, we are essentially being told that women should not have to retreat because they can be as a macho as men and stand their ground. Thus, the NRA project simultaneously "embraces feminine"—we are the weaker sex and need a gun as an equalizer—"and feminist rhetoric."

These new no-retreat laws have effected changes inside the home as well. When a person uses defensive force against someone unlawfully and forcibly attempting to enter a dwelling (or occupied vehicle) or against one who has already entered the residence, the new law creates a presumption that the defender "held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another." Although this is a rebuttable presumption, prosecutors have typically treated the presumption as virtually conclusive. One can shoot the intruder almost at will.

The latter in-home rule is not particularly feminist or even pseudo-feminist in character. However, Florida law (followed by some other states) *does* provide explicit benefits to domestic violence victims, presumably usually women, in the home. Under the new law, if a victim of domestic violence receives a protective order against another person—including a spouse or live-in partner—and if that person seeks to enter her *or their* home in violation of the protective order—even if he is entering, for example, to pick up his belongings—the legal presumption I just described applies to the woman living there. If she kills in these circumstances, the legal presumption is that she killed lawfully. . . .

So we learn that some feminists are Real Women, just like their Real Men comrades-in-arms. Still, I am gratified that, as other feminists demonstrate, one can surely be a feminist and not believe that arming women with concealed weapons, inviting them to kill their abusers in the home, and abandoning the retreat rules outside the home are signs of cultural progress. Indeed, I would rather consider the abandonment of the retreat rule as, primarily, an NRA victory, perhaps disguised in feminist rhetoric, and not one truly supported by most feminists. ■

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Annual Women Judges Night

# When Judicial Gender Divisions Really Aren't

In a speech to the 30th annual Women Judges Night in Milwaukee in April, the Hon. Diane S. Sykes, L'84, of the U.S. Court of Appeals for the Seventh Circuit, discussed her views on why the gender of judges is generally not relevant to analyzing their work. In this excerpt, she recounted cases that occurred during her time on the Wisconsin Supreme Court from 1999 to 2004 when the court split along gender lines in reaching decisions. Chief Justice Abrahamson and Justice Ann Walsh Bradley (as well as a newer member of the Court, Justice Annette Kingsland Ziegler, L'89) were in attendance.

During my tenure at the state Supreme Court, there were only three cases that divided the court along gender lines. The first two were *State v. Huebner* and *State v. Franklin*, which raised related issues regarding the use of a six-person jury in misdemeanor cases. The court had recently held that the statute authorizing a jury of six in misdemeanor cases was unconstitutional; the issue in *Huebner* was whether a defendant who had not objected to the six-person jury at trial could obtain relief on appeal, and *Franklin* raised the

issue of whether counsel's failure to object was ineffective assistance of counsel. The court held in *Huebner* that the failure to object was a forfeiture that the court would not remedy. In *Franklin* the court held that counsel's failure to object was not ineffective assistance of counsel. I joined Chief Justice Shirley Abrahamson's dissent in both cases, as did Justice Ann Walsh Bradley. The gender split among the justices went unnoticed.

The same cannot be said of the third case. *State v. Oakley* was a case about a deadbeat dad who was hopelessly and criminally in arrears on his child support. David Oakley had fathered nine children by four women and owed more than $25,000 in back child support. He was charged with nine counts of felony intentional nonsupport and pleaded guilty to three of them, facing a possible 15 years in prison. The circuit-court judge imposed a short prison term followed by lengthy probation, and, as a condition of probation, barred Oakley from having any more children unless he could demonstrate to the court that he was supporting those he already had and had the financial ability to support another. The judge imposed and stayed a sentence of eight years, so a violation of the no-procreation condition would mean eight years in prison. As will be obvious by now, Oakley challenged the constitutionality of the ban on procreation, and his case deeply divided our court.

In a majority opinion by Justice Jon Wilcox, the court concluded that the no-procreation probation condition was constitutional. Justice Bradley and I separately dissented, and Chief Justice Abrahamson joined us. Justices William Bablitch and Patrick Crooks each wrote concurrences responding to different points in the dissents. The issue was novel, so we were in uncharted legal territory, and the case was difficult for the court. It was agreed that the no-procreation condition implicated a fundamental right; we also agreed on the severity of the crime and the strength of the state's interest in protecting women and children from the harsh consequences of chronic deadbeat dads like David Oakley. We disagreed over whether the no-more-children condition was an overbroad encumbrance on the procreation right in light of the conditional nature of the defendant's liberty interest. There was a lot of back-and-forth in the opinions about how to characterize the no-procreation condition and how the constitutional inquiry should be framed. For the all-male majority, it was the defendant's intentional and ongoing disregard of the rights of his children and their mothers that mattered most. For the all-female minority, banning the birth of a child was a constitutionally overbroad response to the problem.

Now, as you might imagine, the court's decision in *State v. Oakley* made some news—in the conventional media and beyond. The case was tailor-made for talk radio and television and was picked up by local and national talk shows. This is where the court's gender split was noticed. A few days after the court's decision in *Oakley* was released, I was at home in the evening folding laundry in my kitchen. The television was on in the background, tuned to the Fox News Channel. (Surprise! You were expecting maybe MSNBC?) I was only half paying attention, but I heard Bill O'Reilly's voice saying: "Coming up on *The Factor*, the case of a Wisconsin deadbeat dad with nine kids ordered not to have any more children!" So I started to pay attention, and after the commercial break, Bill O'Reilly came back on and introduced the story this way: He put photos of the three dissenting justices up on the screen—the Chief, Justice Bradley, and me—and alongside our photos was David Oakley's mug shot. Now, David Oakley was kind of a creepy-looking guy, so I could sense where this was going. With these photos on the screen, Bill O'Reilly said: "Why do *these* women want *this* man to have more children?"

Well, of course that's *not* what we had said, but there it was, on national television, on a show watched by millions of people. This was not going to be a problem for Shirley and Ann, of course, because they don't know anybody who watches the Fox News Channel. But I know a lot of people who watch the Fox News Channel, and as Bill O'Reilly continued to discuss the David Oakley case, my phone started ringing, and I spent the rest of the evening explaining to family members what the case was really about.

Our court returned to the *Oakley* case in a different forum a couple of years later. As many of you know,

every year the state supreme court goes on the road and hears a day or two of oral arguments in one of Wisconsin's 72 counties. The court's traveling sessions are always accompanied by a visit with the local bar association and area civic and school groups. A year or two after the *Oakley* case was decided we heard arguments in Portage County and during a break went to visit with the students at the Stevens Point Area Senior High School.

We were all seated at a long table on the stage in the high school auditorium, and there were thousands of students present—Stevens Point is the largest high school in the state—and after an introduction and initial presentation about the court by the Chief, we took turns answering questions from the students. When it was my turn, a student asked what was the most interesting case the court had recently decided. I explained that many—though not all—of our cases were interesting because we only accepted cases that had statewide importance, but that even so, most of the time our decisions did not get a lot of attention outside the legal profession. I was buying a little time trying to think of a case that would be sufficiently interesting and explainable to the students. I decided to go with the *Oakley* case.

I gave a brief description of the facts and the issue in *Oakley* and then explained our split decision. I told the students that the case was novel and difficult and had attracted quite a bit of attention—including commentary on the fact that the court had divided along gender lines, with the male justices in the majority and the female justices in the minority. But, I hastened to add, the issue in the case really had *nothing* to do with gender—at which point the Chief leaned into her microphone and said: "But it had everything to do with *sex!"* This had the effect you might expect on the assembled students and ended my serious discussion of the court's interesting caseload.

Now, *Huebner* and *Franklin*—the six-person jury cases—obviously had no gender-salient issues (assuming there is such a thing), and in truth *Oakley* didn't either. I suppose you could view the *Oakley* case as a clash between the interests of single mothers and their children and the rights of support-delinquent fathers, and in that sense our dissenting votes were counter-gender intuitive. But the case was really about the limits of state power, which is a legal question; and I think the way that judges approach legal issues cannot be gender-stereotyped. ■

## Hooding Ceremony Address

# Doing the Right Thing When the Crunch Comes

This is an excerpt from the address given at the Law School's Hooding Ceremony this past spring by Joan Biskupic, Supreme Court reporter for *USA Today* and author of *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice* and *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia*. Biskupic has a bachelor's degree from Marquette University and a law degree from Georgetown University.

I want to relate something Chief Justice William Rehnquist told me in one of our regular lunches. As most of you know, the late Chief Justice grew up in nearby Shorewood. I very much played my Wisconsin card with him and took him regularly to lunch. Sometimes we would go out to a restaurant on Capitol Hill, which put us in a special room where he could smoke his Merit Lite cigarettes. Sometimes we would eat in his chambers. Chief Justice Rehnquist was aware that my grandfather, who came to America from a village in Croatia, had settled in Sheboygan before moving down to Chicago, where he raised his children and where we, his grandchildren, were born.

At one of our lunches, the chief and I talked about the Watergate era and the scandal that he narrowly missed. The break-in at the Democratic headquarters that

led to the cover-up and fall of President Richard Nixon in 1974 occurred in June of 1972. Only five months before that precipitous incident in the summer of 1972, Rehnquist had left the Justice Department of Attorney General John Mitchell and taken his seat on the Supreme Court.

Several of Rehnquist's former colleagues ended up embroiled in Watergate, indicted, and convicted. In fact, when the Watergate tapes case came to the Supreme Court in 1974, Rehnquist recused himself because his old colleagues were involved.

Rehnquist told me he was relieved to have been gone from the Justice Department when the Watergate cover-up occurred. Yet, he also said something interesting to me about the temptations he might have faced if he had remained behind. "You presume you will do the right thing," he told me, "but you never know how you might handle the pressure at the time." Rehnquist spoke of potential pressure from his bosses and of simply being caught up in a bad situation while thinking you are doing good. It occurred to me then, and many times since then, what a wise thought this was. None of us can presume we are immune from the pressures of politics or money or all the other enticements that come to people in power, but especially come to lawyers.

Rehnquist was 47 years old when President Nixon appointed him to the Supreme Court. He had been around long enough to have seen plenty of colleagues and even some friends get into trouble, either in Washington or in Phoenix, where he started his legal career.

Rehnquist came to Washington in 1969 just as Abe Fortas was caught in a financial scandal and about to become the first—and still only—Supreme Court justice forced from the bench amid controversy. We remember Fortas for this dubious distinction. But recall that Fortas had been a highly respected corporate lawyer and civil-rights advocate earlier in his legal career. In fact, Fortas had represented Clarence Gideon, the indigent Florida prisoner whose 1963 landmark case established the right of a criminal defendant to be represented by a lawyer, even if it has to be at public expense.

President Johnson made Fortas an associate justice in 1965. The trouble started when Johnson tried to quickly elevate him to chief justice in the election year of 1968. Because of Fortas's close relationship with Johnson, critics accused the president of cronyism. But Fortas' real difficulties were traced to some of his financial dealings, including that he had received a $20,000 retainer from indicted stock manipulator Louis Wolfson. With his bid for chief justice filibustered in the Senate and mounting questions about his financial dealings, Fortas resigned from the Court in May 1969.

For him, money was the lure. But there are all sorts of ways to be tested. Maybe it will simply be not putting in the work necessary to represent a client. Maybe it will be following the lead of a boss who is trouble. Maybe you will be simply drunk on the power of your position. Maybe you will get inside-information from the company and make that stock trade. These things may never happen to you, but I think it helps to be vigilant and not presume you are above it all.

Justice Antonin Scalia, my most recent book subject, is fond of saying the rule of law is the law of rules. But that's only part of the equation. Lawyers cannot go only by the letter of the law. They have to embrace the spirit of the law and bring their wisdom and good judgment to it.

So, how to do the right thing? The best advice I have is to get good advice. I do not think you can presume that every partner in the firm, every boss in a government office, every director of an agency will share your interests. It helps to choose your role models carefully. Look for older people who have been around, who themselves have been tested. Seek out people who are excellent at their work and who have integrity. Watch them for their smarts and savvy to be the best lawyer possible, but also watch them to be ethical and judicious.

I can immediately point you to one group of people who can be helpful: professors here at Marquette. They have already invested in you. Stay in touch with those who you believe can offer guidance as you move along in your legal career. They know that being a lawyer is a privilege and a challenge. ■

Milwaukee Bar

# Remembering, and Learning from, the Best of the Legal Profession

This is an excerpted version of the Memorial Address given by Michael B. Brennan, of Gass Weber Mullins, LLC, at the Milwaukee Bar Association's annual Memorial Service on April 30, 2010. Brennan recalled his father, James P. Brennan, L'60, and other lawyers who had died the preceding year.

Certain members of a profession best represent the various qualities of the legal profession. They have a high level of knowledge and superior competence. They contribute to professional bodies, and they have respect for that profession's rituals. They embody a profession.

I am sure that that is how many of us here today feel about the loved ones, friends, and colleagues whom we gather to remember.

The legal profession itself has a noble past. The practice of law has been seen as a secular calling with its own end: the attainment of a wisdom that lies beyond technique. I like to say that practicing law is "more than just playing legal chess." It has been called "a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess." This practical wisdom, or prudence, is the exercise of good judgment, particularly about the goals or ends of proposed actions, whether for the client, or for citizens in general. Joined with this practical wisdom is public-spiritedness, a devotion to the public good reflected in an active involvement in public affairs.

Recognition of the legal profession's noble past is found in the writings of the historian and political thinker Alexis de Tocqueville. Tocqueville advanced an exalted view of the American lawyer. For Tocqueville, attorneys brought stability to a turbulent society. Lawyers mediated between the government and the people. They assumed a responsibility for the common good through public life, for which they were particularly suited by training and cast of mind.

Tocqueville wrote: "In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society. . . . If I were asked where I place the American aristocracy, I should reply without hesitation that . . . it occupies the judicial bench and the bar."

I would submit it is these attributes of a lawyer—practical wisdom, public-spiritedness, a mediator between the public and the government—that we should remember in the careers of the loved ones, friends, and colleagues who bring us together today.

. . . .What is it about this profession that helped define these attorneys whom we remember today, and which defines, at least in part, some of us? I would submit to you, it is more than education, or knowledge, or even professional expertise. It is the contributions they made. It is the vital nature of their work.

> "... it is these attributes of a lawyer—practical wisdom, public-spiritedness, a mediator between the public and the government—that we should remember ..."

To list a person's accomplishments does not always give insight into character. But how a person spends his or her time on this Earth, and the results of these efforts, sometimes does.

The individuals whom we remember today joined a profession. They tried to live by the ideals of that profession. And we, and thousands of others, are better off because of that. And for the same reasons the profession helped define them, it should help define us, to go forward and practice today and in the future those civic virtues we saw, and we see, in them. ■

PROFILE: Patricia McGowan

# Prosecutor by training, protector at heart


**Marquette law degree:** 1989
**Employment:** Assistant District Attorney, Milwaukee County
**When time allows:** Reading, bowling, playing Scrabble, traveling with family and friends
**Family:** Single, one adult son

Pat McGowan had to grow up faster than planned. The life lessons that came along with becoming a parent at 15 contributed to the tenacity she showed pursuing an education and becoming an Assistant District Attorney, and the compassion she shows now clearly arises from her experiences.

Born and raised in Milwaukee, McGowan attended Rufus King High School for the College Bound. She relied on family and friends to babysit her young son (now an adult with a family of his own) while she attended school. Two special people had a significant influence on her life and career.

"Mrs. Lois Williams, our family's landlord who happened to be a teacher at a local high school, was my encouragement for going on to college. She would come over to pick up the rent check and talk to me about what I could do with my life," said McGowan. "Even after I became pregnant at a young age, she continued to push and encourage me to do well in school and go on to college. Then, as a freshman in college, I met an attorney, Lindsey Draper, L'75, who was the first black attorney I had met. He became my inspiration for wanting to help others in the legal system." She attributes the willpower to overcome obstacles to the grace and mercy of God. "He put wonderful people like Mrs. Williams and Lindsey Draper in my life to let me know that I could do anything I set out to do," McGowan said.

About being a Marquette student, McGowan recalls, "Initially, I started out studying computational mathematics but early on switched to law enforcement for some very personal reasons. I really wanted to help people." She explained, "I had some extended family who had issues with law enforcement, who instead of taking responsibility for their bad choices blamed their situations on 'the system.' I wanted to see for myself what this 'system' was all about."

Seeing for herself turned into making a lifetime commitment—a commitment to be a protector, as well as a prosecutor.

After earning her bachelor's degree in 1984, McGowan went to work for the Marquette Public Safety Department and soon decided that she wanted to pursue a law degree.

McGowan started her career at the Milwaukee DA's office while a law student at Marquette. She worked as an intern in the family division and in the area known as children in need of protection or services (CHIPS). She also spent one semester dealing with felony cases and another with misdemeanor cases. When she graduated in 1989, she wasted no time getting to work. She went to commencement on Sunday, was sworn in on Monday and Tuesday, and started at the DA's office on Wednesday. "I've been here ever since!" she said.

McGowan has worked in many of the divisions of the DA's office. Since May, McGowan is back working in children's court at the Vel Phillips Juvenile Justice Center handling CHIPS cases. "I like doing this," she said. "It really is my first love." Although cases involving children are heartbreaking and often involve overwhelming tragedy, she feels gratified when she can do something for the most innocent. "I feel like I'm helping when I get children placed in homes or with services that are safe and healing for them, and when I help parents find services they need so they can better care for their children," she said.

"Being an Assistant District Attorney carries with it a lot of discretionary decision-making but also a lot of responsibility," McGowan explained. "I learned early on that it is imperative to be fair and firm in dispensing justice and doing what is right." She has dedicated her entire career to this. "Someone has to be sure that justice happens for both sides." It is vital, McGowan said, to treat everyone with respect and dignity, whether it is a homeless person who just got robbed, a drug addict who committed a crime in order to get a fix, or the professional person sitting on a jury.

She genuinely cares about the people she comes in contact with throughout her days and regularly prays for the families she serves. She is very involved in community organizations, several relating to her heritage and her faith. McGowan is a mentor both formally and informally and has been slowly but surely working toward a master of arts degree in Christian Studies through Trinity Evangelical Divinity School. When she retires from her legal career, she hopes to use that degree to become more involved in ministry with her congregation, Christ the King Baptist Church, perhaps trading in speaking in a courtroom for full-time ministry. ■

PROFILE: Jerome Janzer

# Diligence and respect key to success

Ever since grade school, Jerry Janzer wanted to be a lawyer. "I liked the idea of helping people solve their problems and felt very comfortable in an advocacy role," he said. And ever since he can remember, he had great role models to help him achieve his dream: his parents, Ron and Laurie Janzer.

Janzer learned a lot from his dad (who passed away four years ago) and his mom—lessons that have guided him throughout his career. "I developed a strong work ethic at a very young age," explained Janzer. Throughout high school, college, and even law school, he worked 25 or more hours a week at his parents' business, Janzer Religious Articles. "My parents not only told me but showed me how to treat everyone with respect, that everyone matters," Janzer said. That philosophy continues to be a guiding principle for him.

Janzer's discipline for hard work continued through law school. While in law school, Janzer worked as a law clerk at Defense Research Institute, a position he was selected for by Professor John J. Kircher. His work at Defense Research Institute yielded him a full scholarship for his third year of study at the Law School. Janzer was particularly influenced by Professor Kircher, "You had to be prepared in Jack's class; he was demanding but fair," Janzer explained.

Janzer joined Reinhart Boerner Van Deuren s.c. immediately after graduating from law school and has been at the firm since. His practice focuses primarily on real estate development and financing, corporate finance, mergers and acquisitions, corporate governance, and succession planning.

In 2006, he was named CEO of Reinhart, overseeing the firm of

**Marquette law degree:** 1982
**Employment:** Chairman, president, and chief executive officer of Reinhart Boerner Van Deuren s.c. He is also co-chair of the firm's real estate practice and a member of the business law practice.
**Family:** He and his wife, Joanne, have three children ages 14, 13, and 10.

approximately 205 lawyers and 400 employees, with four offices in Wisconsin and Illinois.

Janzer is also very involved in the Law School, serving on the advisory board and formerly on the alumni board. Grateful for his education and the scholarships he received while a student, he funds an academic scholarship for students and also contributed generously to the Eckstein Hall building fund. He continues to be committed to the Law School and its mission.

"I've seen an incredible transformation in the Law School that started with the late Dean Howard Eisenberg's outreach to alumni and has continued and grown under Dean Joseph Kearney's leadership," Janzer said.

Janzer serves a variety of community organizations, including the Board of the Marcus Center for the Performing Arts and the Greater Milwaukee Committee. Particularly close to his heart are his work as Chair of the Milwaukee Chapter of CEOs Against Cancer, and his work with the American Lung Association, Children's Hospital, and other organizations that are instrumental in the fight against cancer. Cancer is a cause that has special meaning to Janzer, whose son, Jarrett, now 13, is a bilateral lung cancer survivor.

"I have learned that if I work hard and I am the best I can be in everything I undertake, the rest will take care of itself," he said. A demanding premise, but one Janzer obviously lives by, whether it is for his work, his family, or his community.

PROFILE: Christine Woleske

# An indirect path to a direct goal

Not many people apply to law school with a goal to work in a hospital. Chris Woleske did. Armed with a Marquette Law School degree, determination, and talent, she has arrived at her desired destination, but by a route other than initially planned.

Woleske earned a bachelor's degree in health care administration in 1986, with a specific intent to work in hospital administration. She planned to eventually study for her master's but took some time after getting her undergraduate degree to help her husband with a business he had recently established in Marinette, Wisconsin. "After four years of working with him, and also having a son, we agreed it was time for me to pursue my education and career," she said. "My husband encouraged me to consider law school instead of a master's in business administration or public health. We knew it wasn't the most direct route to health care administration, but a law degree would provide me with options in the event that plan changed."

So the Woleskes made it happen. They rented an apartment in Milwaukee, where Chris and their nearly four-year-old-son lived during the week, returning to Marinette most weekends. After her second year of law school, Woleske began clerking at a firm in Green Bay. She joined the firm—Liebmann, Conway, Olejniczak & Jerry (LCOJ)—upon graduation, practicing general business law and health law for four years.

In 1998, she joined her current employer, Bellin Health. "While working at LCOJ, Bellin Health had been a client, so when it needed someone to start its compliance program, this presented a great opportunity for me to do what I had always wanted to do," she said. She joined Bellin as a compliance officer and general counsel.

**Marquette law degree:** 1994
**Employment:** Executive vice president and general counsel, Bellin Health
**Family:** She and her husband, Joe, have two children, Matt (23), and Elle (14). They have been married for 25 years.

"Bellin Health has provided me with a great opportunity to take on additional responsibilities and learn about health care operations," Woleske said. Five year ago, she took on the challenge of leading the project to build and open a critical access hospital in Oconto, providing advice and participating in putting the plan into action.

So what is a lawyer doing in a top-level position in a health care facility? "Having a law degree provides a base level of credibility," she said. "I deal with issues that vary from drafting employment contracts to advising the organization on the interpretation of a regulation or accreditation standard, to developing a plan for an acquisition." Additionally, as executive vice president, she is involved with strategic planning, human resource management, leadership development, and financial management. "Having an attorney on a leadership team enhances the diversity of thought processes on the team," she said.

Woleske stays connected with the Law School in several ways. She has served on committees for and attended most of her class reunion events and has helped host Green Bay-area Marquette Law School get-togethers. She is also committed to serving several community organizations in the Green Bay area.

She is grateful for her law school education and how it helped her to realize her goal. She said, "The investment we made in my law school education was one of the best we ever made. If I had a chance to do it all over again, I wouldn't change a thing!"



# The right place at the right time

**Marquette law degree:** 1983
**Employment:** Co-manager of Milwaukee office of Habush Habush & Rottier, S.C., manager of its Sheboygan office, and member of the firm's executive committee.
**Family:** He and his wife, Liz, have been married for 29 years and have four children ages 20 to 27.

The view from Larry Fehring's 23rd-floor corner office at Habush Habush & Rottier in Milwaukee's US Bank building is reflective of his life. He is at the top of the world—he excels at his job, is blessed with a healthy family, and has a sense of gratitude that keeps him positive and focused.

The son of a brewery worker and a homemaker who highly valued education, Fehring attended St. Lawrence Seminary High School in Mt. Calvary, Wis., and initially considered joining the Capuchin-Franciscan order. "I had signed up to go to Nicaragua the summer after high school and then realized that lifestyle was not for me," he said. "I cancelled those plans and enrolled at Marquette as an undergraduate." He majored in economics, political science, and English, and also studied abroad for a year in Ireland. He always kept in the back of his mind the option of going to law school.

When the time for that came, Fehring was about to commit to moving to Chicago when he was notified of his acceptance to Marquette Law School. "I've been grateful ever since," he said.

During law school, Fehring clerked at what is now known as Kasdorf, Lewis & Swietlik, and upon graduation, he accepted a position in the firm's insurance defense litigation area. One of his cases involved defending a case being handled by a lawyer at the Habush firm during the summer of 1985. Later that year, the Habush firm was looking to grow. "An attorney I was working with at Habush thought enough of my lawyer skills to ask me to join the firm as a personal injury attorney for the plaintiff. It was a golden opportunity," said Fehring. "I am so very pleased I am here, in great part because of how Bob Habush runs this firm. He has been a wonderful mentor and is a generous man."

Fehring's job representing injured parties is challenging but rewarding. The most important thing he has learned during his professional life is "to be honest . . . in all things." That principle applies to his personal life, as well—a life that includes volunteering with the St. Benedict the Moor food program in downtown Milwaukee, serving as a trustee of his parish, and, when time allows, running and kayaking.

In recent years, Fehring said, Marquette Law School has reached out to alumni of his generation. He has responded—so much so that he is now president of the Law School Alumni Association. "I appreciate the sense of community that is fostered and the respect toward the alumni," Fehring said.

# Going to bat behind the scenes


Photo courtesy of Atlanta Braves/Pouya Dia

**Marquette law degree:** 1996
**Employment:** Senior vice president and general counsel for the Atlanta Braves
**Family:** He and his wife, Krista, have four children, Maddie (12), Charlie (10), John (7), and Elizabeth (5).

It sounds like every young boy's dream: going to the ballpark nearly every day of the week. For Greg Heller, it's not just a dream . . . it's a dream job. "I get to have my life's work be something I absolutely love doing—meld my love of the game with my training as a sports lawyer," he said.

Heller's office, just down the hall from baseball great Hank Aaron's, overlooks left center field at Turner Field baseball stadium, built for the 1996 Olympics in Atlanta and named after then-owner Ted Turner. "I get to work and watch baseball at the same time," he quipped. Most often, there's quite a bit more of the former than the latter.

Heller has been focused on the business end of sports throughout his career, having earned a sports marketing degree from Indiana University. He also served an internship with the Peoria Chiefs, a minor-league affiliate of the Chicago Cubs.

Growing up in Peoria, Ill., Heller was an athlete as well as an avid sports fan. As a young man, he had a job with the Chiefs, pulling the tarp on and off the field and selling tickets. "I love the game, and everything to do with it, but decided I wanted to continue on in the business end of sports at a more advanced level, so I decided to go to law school," he said. He applied to several law schools and ultimately chose Marquette because of its sports law program. While a student, he had many opportunities to immerse himself in the field. "I worked as a research assistant in the Sports Law Institute, had an internship with the Milwaukee Brewers, wrote for the *Sports Law Journal,* and authored a law review article on the NCAA enforcement process," he said. During his final year of law school, he sent out more than 300 inquiry letters trying to find a job in sports law. "I landed a job as an associate attorney with a firm in Atlanta that concentrated mainly on corporate mergers and acquisitions and a little bit of sports law," Heller recounted. Still in search of the dream job, he then moved to a smaller firm back in Chicago, where he concentrated on sports and entertainment law matters for several years. "Then, in 2000, I got an email from Paul Anderson [associate director of the National Sports Law Institute and adjunct professor of law at Marquette Law School] that Turner Broadcasting was seeking counsel."

Experience, connections, and desire came together to allow Heller's dream to come true. He was hired in a dual role, as team counsel and senior counsel for Turner Sports and Turner Broadcasting System, Inc. In 2007, when the Braves were sold by Turner, he came to the Braves full time as general counsel and senior vice president. "There are only 30 jobs like this in the country," he said, "and I am humbled and truly blessed to hold one of them."

Heller's responsibilities are wide and varied, including stadium and business operations, and sales and marketing matters.

His job means he attends a good portion of the Braves' 81 home games, quite often with his family. But he still makes time to stay true to the Jesuit mission of service to his community by coaching youth basketball at his children's school. With gratitude, he regularly participates in National Sports Law Institute events at Marquette and serves on the Sports Law alumni board. He is a true team player. ■

PROFILE: Robin Rosche

# Life in the fast lane

Robin Rosche's journey to her position as assistant chief counsel with Department of Homeland Security in Chicago has been fascinating and more than a bit circuitous.

After graduating early from high school in Milwaukee, Rosche joined the Air Force security police and spent four years in Germany. While in the service, she worked on obtaining her associate degree in police science and then joined the City of Milwaukee Police Department, where she spent 10 years, the first three doing undercover on the vice squad and working 12 to 16 hours a day. It was during that time that she learned to identify priorities and manage them. "Peoples' lives were at stake, so I had to be prepared at all times," she said.

While an officer, Rosche decided to finish her bachelor's degree and took classes at UW-Milwaukee. Over the next decade, she chipped away part time at a degree. As she was finishing up her undergraduate degree, she started studying for her LSAT. "I am very committed to Milwaukee, own a home here, and have a lot of good contacts in the law enforcement field because of my time as a police officer," she explained. She decided to stay in town and attend Marquette Law School through the part-time program, while also working as a detective. "Marquette has an extraordinary program," Rosche said. "The part-time program was training in and of itself. I learned how to juggle priorities and be flexible. I took classes that really shaped my career and motivated me to keep learning."

She left the police department for a job as a paralegal in the Milwaukee District Attorney's office, continuing to go to law school part time. Through creative scheduling, a vigorous plan, summer school, and a lot of long days, Rosche graduated from law school in 2000 and was hired as a prosecutor in the Milwaukee DA's office.

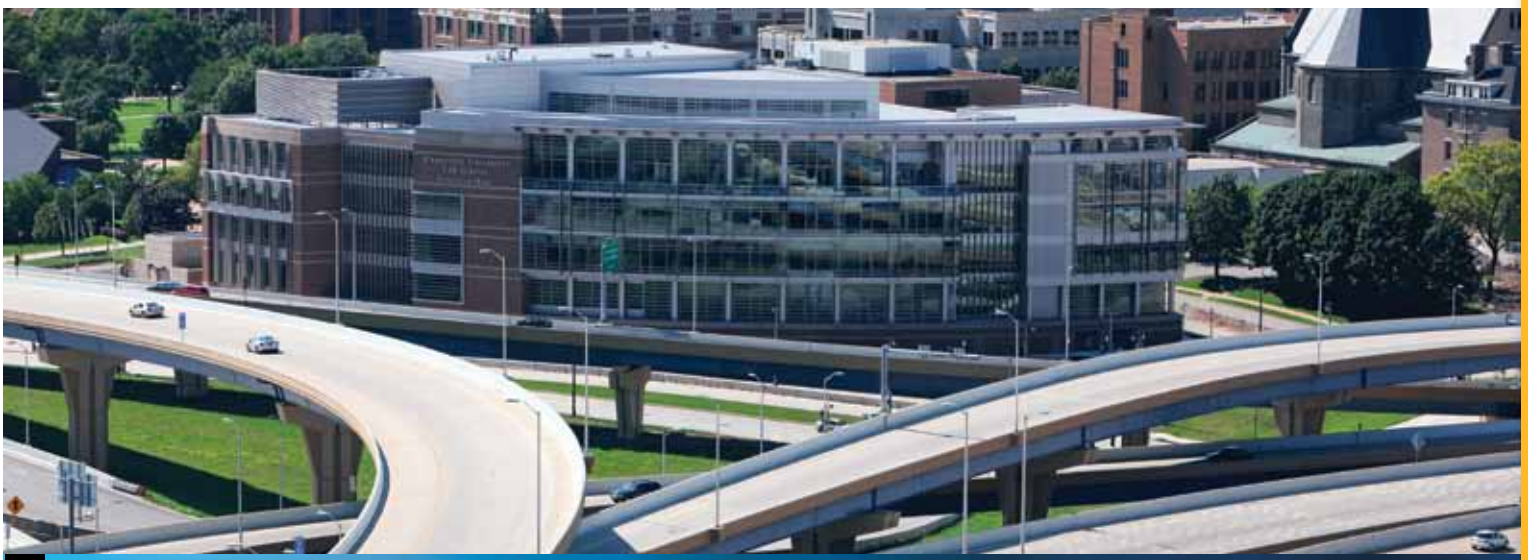
Over the next few years, she became fascinated with global environment issues and international law. In 2004, she took a leave from the DA's office to earn a master's degree in international law from the University of London in England. "I turned 40 that year and figured it was now or never," she said.

With an impressive resume of education and experience, Rosche was offered her current position with the Department of Homeland Security, working in immigration and customs enforcement. "I represent the federal government in immigration proceedings with people who are involved in removal proceedings. It is a very complex area of law," she said. "We are dealing with people's lives, so it is imperative that the right decisions are being made and that the law, which is constantly changing, is understood and interpreted correctly."

She lives in Milwaukee, but her office is in Chicago, which for some would prove to be a logistical nightmare. Rosche, however, makes it work by commuting on the train or staying over in Chicago a few times during the week.

She works hard and plays hard. Rosche competes (and has placed) at a national level as a bodybuilder and fitness competitor, training every day that she is able. And just when you think her life is as remarkable and exciting as it can get . . . ask her about her Harley. ■

**Marquette law degree:** 2000
**Employment:** Assistant Chief Counsel, Department of Homeland Security
**Family:** She and her husband, Donald Doro, have been married for 10 years.



# THE OTHER MARQUETTE INTERCHANGE

The Marquette University Law School community invites lawyers, judges, policymakers—indeed, all engaged citizens—to discussions and events at the Law School this fall semester.

### FRIDAY, OCTOBER 1

**Marquette Law Review Symposium: Promoting Employee Voice in the New American Economy**

Featuring Kenneth G. Dau-Schmidt, Willard and Margaret Carl Professor of Labor and Employment Law, Indiana University–Bloomington, Maurer School of Law, 8:00 a.m. to 4:30 p.m.

### TUESDAY, OCTOBER 5

**On the Issues with Mike Gousha**

Jay Heck, Executive Director of Common Cause Wisconsin, and Richard M. Esenberg, Marquette Law School, 12:15 p.m.

### TUESDAY, OCTOBER 12

**On the Issues with Mike Gousha**

Milwaukee Public Schools Superintendent Gregory Thornton, Noon.

### FRIDAY, OCTOBER 22

**National Sports Law Institute Conference: The Increasing Regulation of Sports in a Declining Economy**

8 a.m. to 5:30 p.m., Alumni Memorial Union

Registration information is available at law.marquette.edu/jw/2010conference

### TUESDAY, OCTOBER 26

**On the Issues with Mike Gousha**

Wisconsin Democratic Party Chairman Mike Tate and Wisconsin Republican Party Chairman Reince Priebus, 12:15 p.m.

### MONDAY, NOVEMBER 1

**Hallows Lecture: Society, Law, and Judging**

Aharon Barak, Former President of the Supreme Court of Israel, Visiting Professor of Law and Oscar M. Ruebhausen Distinguished Senior Fellow, Yale Law School, 4:30 p.m.

### SATURDAY, NOVEMBER 6

**On the Issues with Mike Gousha**

Ray Suarez, Senior Correspondent, *PBS NewsHour*, 2 p.m.

### TUESDAY, NOVEMBER 9

**Social Innovation and Social Entrepreneurship Initiative: Paths to High Success for High-Need Students**

8:20 a.m. to 1:30 p.m.

### THURSDAY, NOVEMBER 11

**On the Issues with Mike Gousha**

Susan Lloyd, Executive Director of the Zilber Family Foundation, 12:15 p.m.

### FRIDAY, NOVEMBER 12

**Annual Civil Litigation Conference: Modern Technology in the Courtroom**

9 a.m. to 3 p.m., 5 CLE.

### TUESDAY, NOVEMBER 16

**On the Issues with Mike Gousha**

Wisconsin Governor Jim Doyle, 12:15 p.m.

### FRIDAY, DECEMBER 3

**Annual Wisconsin Supreme Court Conference: Review and Preview**

A discussion among prominent attorneys and academics of the Court's immediate past and current terms, 9 a.m. to 3 p.m., 5 CLE.

For complete details about these and other events or to register, please visit law.marquette.edu or call Christine Wilczynski-Vogel, Associate Dean for External Relations, at 414.288.3167, or email christine.wv@marquette.edu.

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