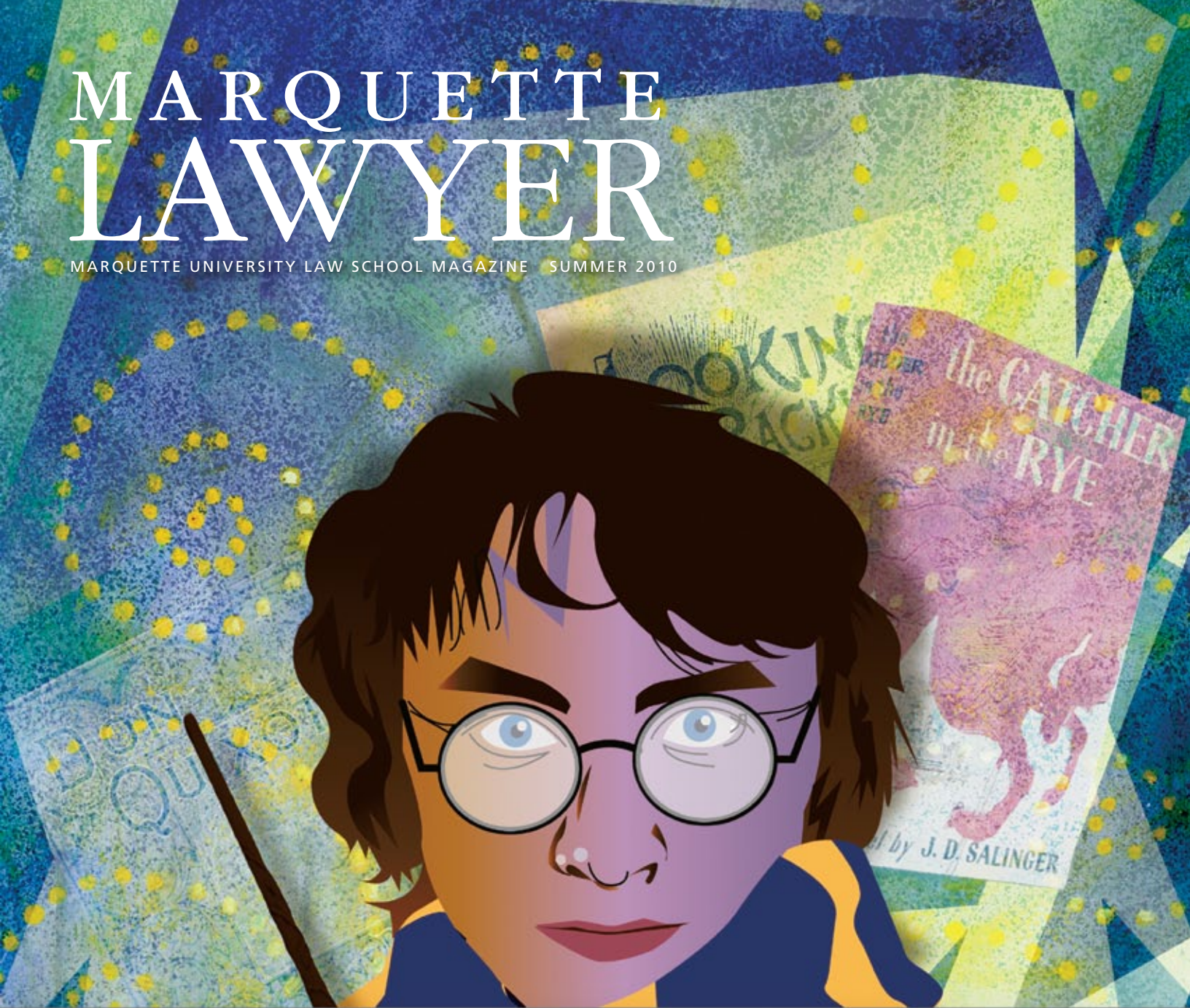


# MARQUETTE LAWYER

MARQUETTE UNIVERSITY LAW SCHOOL MAGAZINE SUMMER 2010



## Who owns the lives of fictional characters?

A Marquette law faculty blog debate

### ALSO INSIDE:

Mark E. Steiner on Lincoln and his books

Michael J. Klarman on the story of  
*Brown v. Board of Education*

Barker, Litman, Meares, Selig, Travis, Wild, Wiseman





## The New Marquette Law School: More than Bricks and Mortar

On the afternoon of September 8, 2010, Marquette University Law School will dedicate what we believe to be the best law school building in the country. The belief is a considered one. Ray and Kay Eckstein Hall, which now graces the most prominent intersection in the State of Wisconsin, the Marquette interchange at the heart of Milwaukee, is as brilliant in its interior as in its exterior façade. From *A* to *Z*—from the Aitken Reading Room to the Zilber Forum—Eckstein Hall delivers all that is required for a great law school, at a level of excellence. This includes a path-breaking library without borders, state-of-the-art classrooms, a café, a fitness center, and even an underground parking facility.



Yet in important respects, all of this is just a detail. The substantive work of Marquette Law School has continued throughout the planning and construction over the past several years. One can get a sense of this,

even from afar, by visiting our highly successful faculty blog, <http://law.marquette.edu/facultyblog>. Its various entries catalogue, on a daily basis, faculty research, our students' remarkable pro bono efforts, the Law School's public-service outreach, and our curriculum, among other things, and incidentally reflect the important strides that the Law School has made in recent years in all of these spheres. I encourage you to read it regularly.

This *Marquette Lawyer* magazine is another window into the Law School. It reflects the work of both our faculty (as in the cover story, which draws on the faculty blog) and visitors to the Law School for conferences and symposia. These include Harvard Law

Professor Michael J. Klarman (who delivered our most recent Boden Lecture); Yale Law Professor Tracey S. Meares (our inaugural Barrock Lecture on criminal law); Michigan Law Professor Jessica Litman (our Nies Lecture on intellectual property law); United States District Judge Sarah Evans Barker (our Hallows Judicial Lecture); South Texas College of Law's Mark E. Steiner, a Lincoln expert who was one of the prominent academics at our Legacies of Lincoln Conference; and, from much closer to home (indeed, just a mile or so down Wisconsin Avenue), Major League Baseball Commissioner Bud Selig, a frequent speaker at the Law School. These visitors enrich not only the Marquette Law School community but the broader region as well, as the Law School expands its cultural role.

This issue of *Marquette Lawyer* is the first edited by Alan J. Borsuk, our senior fellow in law and public policy, who joined us this past fall after 37 years as a reporter and editor at the *Milwaukee Journal* and *Milwaukee Journal Sentinel*. Alan joins Mike Gousha, the distinguished broadcast journalist who came to us three and a half years ago. Both Mike and Alan maintain independent portfolios as journalists—indeed, the one through his Sunday television show and the other through his Sunday newspaper column—and are in the nature of faculty in terms of their discretion and autonomy to pursue the truth in spheres that especially interest them.

Even as we have expanded the faculty during my seven years as dean, we are fortunate to have been able to secure funds, outside our students' tuition, thus to broaden our outreach. Our most pressing effort in this regard is to complete the fundraising for Eckstein Hall. We have been the beneficiaries of gifts exceeding \$72 million (toward our \$85 million goal), and we have received an additional \$25 million for student scholarships. Truly Marquette Law School is on the move—and not just physically.

Joseph D. Kearney  
*Dean and Professor of Law*

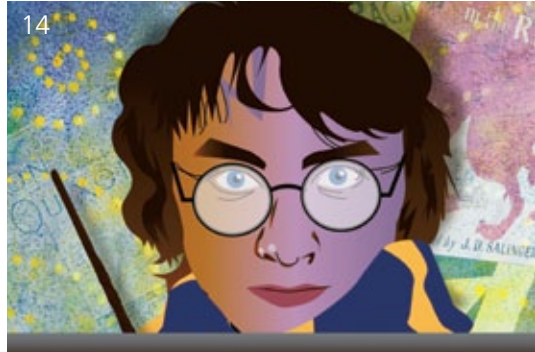
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South Texas College of Law



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# COUNTDOWN: ECKSTEIN HALL NEARS

**It was a need.**

**It became an idea.**

**Then a plan.**

**And then a construction site.**

**Soon it will be the home of  
Marquette Law School.**

**Ray and Kay Eckstein Hall is nearly complete.**

Construction is on schedule for the Law School to move into its new home during the summer and for classes and other activities to begin with the start of the school year.

The campaign to finance the new building also continues to make progress.

Rev. Robert A. Wild, S.J., president of Marquette University, announced recently that the two-story reading room that will be one of the central features of the building will be named in honor of Wylie and Bette Aitken, who are donating \$2 million. A 1965 graduate of the Law School, Wylie Aitken is a founding partner of the Aitken\*Aitken\*Cohn law firm in Orange County, California, and a nationally renowned trial lawyer.

"I can't forget my roots," Wylie Aitken said. "Bette and I are



# COMPLETION



proud to help make Eckstein Hall a first-class facility.”

Dean Joseph D. Kearney said, “The generosity of the Aitkens reflects their belief that a Marquette legal education can be transformational.”

Eckstein Hall, located at the most prominent intersection in Wisconsin, the Marquette interchange, where the highways from Chicago, Madison, and the North converge near Milwaukee’s city center, has already raised the profile of the Law School. It will more than

double the space of the Law School and help it serve as a forum for discussions of law and public policy.

Leaders of the campaign pledged to create the best law school building in the country.

They are about to deliver. ■

**\$13 million**  
*still needed*

.....  
**\$85 million**  
*goal*

.....  
**\$72 million**  
*raised to date*

**Be a leader.  
Push us to  
the top.**

A crossroads for discussion of public policy—this is an important emerging initiative of Marquette University Law School. The Law School aims to provide the settings and resources for serious and careful but provocative examinations of major issues that face Milwaukee, the State of Wisconsin, and the nation. In recent months, the school has frequently succeeded in doing that, including major conferences on the future of water as an economic asset for the Milwaukee region and on countering bullying in schools by use of restorative justice practices. Here is a look at a few of the school's efforts.

## Mediating a Mountain of Mortgage Problems



Maybe it is the pink cover sheet. Or maybe it is just the need for help. When the Milwaukee Foreclosure Mediation Program got underway in July 2009, program personnel decided to use a brightly colored top sheet for the packet of mediation information that would be given to anyone named in foreclosure proceedings. The thinking was that, with the bright color, the material

was more likely to be noticed by recipients, said the Law School's Debra Tuttle, L'87, chief mediator for the program.

But with the foreclosure problem as intense as it has been in Milwaukee, the step may not have been needed.

"Our caseload has been double what we anticipated," Tuttle said.

The program's success can be measured not only by the number of people seeking and receiving help, but also by the respect the mediation program has gained. Lawyers and financial institution representatives who have worked with the mediators have expressed appreciation for the high quality of their work, and counties throughout Wisconsin are turning to the Marquette team for help in launching mediation efforts of their

own, said Natalie Fleury, the Law School's coordinator for dispute resolution programs. Fleury explained that "help" ranges from simply providing the documents and procedural instructions used in Milwaukee to consulting in support of other counties' operations and training their mediators, such as through the work of Professor Andrea Schneider, who leads the Law School's nationally acclaimed dispute resolution program.

The program emerged from work by representatives of several governmental and nonprofit organizations trying to find effective ways to address escalating credit and mortgage problems. Daniel Idzikowski, L'90, the Law School's assistant dean for public service, played a central role in convening and coordinating those efforts. Thanks to the involvement of Milwaukee Mayor Tom Barrett and Wisconsin Attorney General J. B. Van Hollen, state and city funds were provided for Marquette University Law School to launch the program, with other organizations playing important roles. The work with the Milwaukee County Circuit Court has been facilitated by the strong support of Chief Judge Jeffrey A. Kremers, Clerk of Court John W. Barrett, and Chief Deputy Clerk James J. Smith, together with the assistance of numerous lawyers, including a substantial team from Foley & Lardner.

The goal is simply to help both the people who live in a home and

the lender who holds a defaulted mortgage on that home to work out an agreement that is in the best interests of both sides and that avoids a full court proceeding. Most of the time, mediation leads to people's keeping their home under new financial terms, although it sometimes means finding "a graceful exit" for the homeowner, Fleury said.

Tuttle said that in mediation, "there are no good guys; there are no bad guys; there are only problems to be solved."

Tuttle related that before the program was launched, it was expected that about 10 percent of foreclosure cases in Milwaukee County courts would lead to requests for mediation. In fact, the rate has been closer to 20 percent, which translates to about one hundred requests a month.

The process is voluntary, and mediators have no direct power, explained Tuttle and Amy Koltz, L'03, the program coordinator.

Most of the cases are resolved before going to formal mediation. Tuttle said that more than forty cases had gone through mediation, and the pace of mediation sessions was running about seven a week.

"I don't think any one of us was actually prepared for what it turned out to be, in terms of the volume," Koltz said. But, she added, "to be a resource that actually does make a difference for people is very heartwarming." ■



From left, Debra Tuttle, Natalie Fleury, and Amy Koltz.



## The Path Away from School Bullying

**I**t was a shocking case that made national news in March: Nine teenagers at South Hadley High School near Boston were charged with harassing a 15-year-old girl for months until she hanged herself.

Bullying doesn't often make headlines like that. But ask leaders of any school—city, suburban, rural, public, private—and they will tell you that the way some kids treat others is just plain mean, or worse. The consequences can be severe, as the South Hadley case showed. And even milder bullying creates an unhealthy atmosphere for everyone in a school.

### But something can be done about it.

That is a key underlying principle of the Restorative Justice Initiative of Marquette University Law School, and it was the theme of the Sixth Annual Restorative Justice Conference, sponsored by the Law School on November 10, 2009. Held at the Alumni Memorial Union, the conference reached a capacity audience of 350, including school officials, teachers, and students from throughout the Milwaukee area.

"We have to be willing to get involved in each other's lives and stand up against behavior such as bullying," said Dr. Brenda Morrison, codirector of the Centre for Restorative Justice at Simon Fraser University in British Columbia and the conference keynote speaker.

Morrison outlined ways to approach different aspects of bullying, or what she called "bad apples," "bad barrels," and "bad barrel makers." She said that by addressing core issues in children's lives and by adopting constructive approaches to discipline problems between students, more positive environments

can be created in schools and issues can be resolved in much more healthful fashions than through traditional discipline measures.

She praised the Law School's Restorative Justice Initiative, headed by Professor Janine Geske, L'75, a former Wisconsin Supreme Court justice, and the restorative justice efforts under way in some local schools and adult settings in Milwaukee. The initiative's approach to addressing bullying differs from that of traditional practices that



A capacity audience of 350, including school officials, teachers, and students from throughout the Milwaukee area, took part in the Sixth Annual Restorative Justice Conference, sponsored by the Law School on November 10, 2009.

emphasize punishing offenders. Instead, the Restorative Justice Initiative brings together all the parties involved in a problem, and the group works in a structured way to change behavior for the better.

"Milwaukee, you have a lot to be proud of," Morrison said.

Speaking more broadly, she said that while there are lawyers who have worked hard on such efforts, the legal system should do much more to build the potential of restorative justice practices.

"There are lots of really good

lawyers doing amazing work within a system that needs to move to the next level of justice," Morrison said.

One of the highlights of the conference was a panel discussion with three students from Milwaukee's Custer High School; all three of the students were perpetrators of bullying practices in the past. "I'm a dominating bully," one said in introducing herself.

All three students said that the school's Violence Free Zone program, run by a local organization,

the Running Rebels Community Organization, had helped them learn to deal with issues in their life in better ways than bullying.

"I learned to talk out my problems without violence," one student explained.

The conference offered workshops led by school and law enforcement leaders such as Milwaukee County District Attorney John Chisholm, Assistant District Attorney David Lerman, who is restorative practices coordinator with Milwaukee Public Schools, and Kristi Y. Cole, director of the Safe Schools/Healthy Students program for Milwaukee Public Schools.

It also included presentation of "Starfish Awards" to eight people with distinguished records in helping Milwaukee-area young people. ■



issues. Companies could be offered free or reduced-price water as an incentive to locate, or relocate, in the Milwaukee area, suggested Meeusen. The idea led to a story on the front page of the next day's *Milwaukee Journal Sentinel*.

In a speech at the conference, Governor Doyle touted both the potential of water as an economic engine and Wisconsin's merits in pursuing that goal.



## Irrigating the Growth of Thinking About Water

What would it take to turn Milwaukee into a world-class center for freshwater business?

**T**he urgent need for jobs in the Milwaukee area and the enormous demand for fresh water in many parts of the world—is there a way to address both at the same time by making water-related businesses a bigger vehicle for economic strength in southeastern Wisconsin? Or, to put it bluntly, what would it take to turn Milwaukee into a world-class center for the freshwater business?

About 300 business, political, and academic leaders gathered to talk about that at the Alumni Memorial Union on November 2, 2009, at a conference, “Milwaukee 2015: Water, Jobs, and the Way Forward,” organized by the Law School’s Mike Gousha, Distinguished Fellow in Law and Public Policy. Among the participants: Wisconsin Governor Jim Doyle, Milwaukee Mayor Tom Barrett, and key academic and business leaders.

“We have no doubt that Marquette University Law School can help the region reach its water goals,” Dean Joseph D. Kearney said in welcoming participants to the November conference. “We take our role as conveners seriously.”

At the conference, there was a strong mix of visionary idealism and warnings about practical needs when it comes to pursuing the potential to make Milwaukee a capital of water-related industry.

“My dream is that, by 2015, when people think water, they think Milwaukee,” said Richard A. Meeusen, president and CEO of Badger Meter and a member of a panel discussion at the conference.

One major policy idea was floated at the conference: using Milwaukee’s abundant supply of water as an incentive to attract industries from places, such as Atlanta, that are struggling with water-supply

### More water discussions at Marquette Law School

“Milwaukee 2015” was the largest, but definitely not the only, foray the Law School is taking in furthering policy discussions around water.

**December 8, 2009** Robert Glennon, author of *Unquenchable: America’s Water Crisis and What to Do About It*, spoke at a luncheon, hosted by the Law School and moderated by Mike Gousha, on the need for major changes in public policy and attitudes toward water as shortages get worse in many parts of the country.

**February 26, 2010** The Law School’s annual daylong Public Service Conference focused this year on “Water and People,” with discussion across a range of major water-use issues, particularly in regard to Wisconsin and the Great Lakes region.

For details, visit [law.marquette.edu/water](http://law.marquette.edu/water).

“It doesn’t get much better than that, building an industry around making the world a better place, and that’s what we can do around water.” Doyle said, “We need to have a topflight water research center,” and offered praise for efforts to build up the existing center at the University of Wisconsin-Milwaukee.



But University of Wisconsin-Milwaukee Chancellor Carlos Santiago, whom the Law School included in the conference, said that Milwaukee does not have a lot of time in launching major steps to pursue the water development vision and needs to become a more attractive place for the most talented researchers and innovators related to water.

“We truly have a great opportunity in our hands,” said Anselmo Teixeira, senior vice president of Siemens Water Technologies. “There is no established water technology hub in the United States.” Teixeira described what was being done in Israel and Singapore to build water-related industries there, and those efforts go far beyond what is happening in Wisconsin now.

Barry L. Grossman, an attorney with Foley & Lardner and a member of the board of directors of the M-7 Water Council, an organization of public and private leaders throughout the seven-county metropolitan area, said Milwaukee efforts will have to have more innovation, more investment, and more infrastructure if the potential of water to help economic development is to be realized.

Kim Marotta, vice president for corporate social responsibility at MillerCoors, said one thing that is needed is the positive attitude by all involved that Milwaukee can succeed at this and do better than other places that want to develop as hubs for water development. She warned against “the mentality that we just can’t do it . . . . That’s just not how you move ahead.”

Meeusen called for more leadership by major political figures and said government support would be critical to succeeding in branding Milwaukee as a water hub. ■

## The Law School’s Award-Winning Mitzvahs

It’s not often that leaders of a Jesuit institution get credit for doing mitzvahs. But that was the case when Jewish Family Services Milwaukee honored Marquette University Law School with its first-ever Chair’s Community Caring Award.

The award recognized a list of Law School programs that serve the needs of low-income people, students in public schools, people on military duty, leaders of nonprofit organizations, and people in danger of losing their homes to foreclosure.

Jewish Family Services (JFS) officials said the Law School had embraced JFS’s core value “to care for those among us in need, not as a burden but as mitzvah.” The Jewish term *mitzvah* can be translated to mean “the work that is done in observation of an obligation to do good or in pursuit of doing good for others.”

JFS took note of Law School programs including the “M-LINC” program which provides assistance to nonprofit organizations; the “Dispute Resolution College for Kids” underway in a set of public schools in Milwaukee; the Milwaukee Foreclosure Mediation Program; the Marquette Volunteer Legal Clinic to help needy community members; and Service Members and Veterans Legal Assistance of Wisconsin, a program led by the Law School and aimed at helping those in the military service with civilian legal matters.

The award was presented by JFS Board Chair Nathan Fishbach and Milwaukee County Circuit Judge Rebecca Dallet to Dean Joseph D. Kearney (all pictured below) at a meeting in September 2009.

“Marquette Law School serves as a role model to future leaders by teaching and practicing the value and obligation to perform community service.”

JEWISH FAMILY SERVICES MILWAUKEE





### In Depth:

## Looking at the Work of the Wisconsin Supreme Court

What's a more appropriate subject for a public policy discussion at a law school in Wisconsin than the track record and future of the state's Supreme Court?

**A**nd what's a better way to address that subject than to get people who have a wide range of views and who work in an array of different roles in the legal system to come together for a day of serious discussion?

In other words, Marquette Law School's October 30, 2009, conference, "Wisconsin Supreme Court: Review and Preview," was a prime example of the role the school can play in furthering understanding of aspects of law and public policy.

In remarks opening the conference, Law School Dean Joseph D. Kearney called the conference "Something Important," including the capital letters.

"We are gathering, in one room, intelligent academics and lawyers, and we are having a thoughtful and—I am

Marquette Law School's conference "Wisconsin Supreme Court: Review and Preview" was a prime example of the role the school can play in furthering understanding of aspects of law and public policy.

sure—civil conversation about the Wisconsin Supreme Court in a number of different respects," Kearney said. "[I]f such a conversation among a broad-based group does not strike you as 'Something Important,' then I suggest, respectfully, that you are mistaken. For there has not been much of this conversation for more than a decade. This is not because thoughtful or important things have not been said or written about the Wisconsin Supreme Court. . . . But the lecture or law review article or even blog post does not inevitably lead to a *conversation*, and so I am especially pleased that we could put together this conference."

Sessions of the conference reviewed the court's 2008–2009 term in a variety of substantive areas, and offered previews of some of the more interesting cases on the 2009–2010 docket. There were sessions on the court's recent decisions involving business law, criminal law, and civil rights and liberties as well as discussion of some of the philosophical rifts within the court that have become so public.

The conference also included sessions discussing the issue of judicial recusal after the U.S. Supreme Court's 2009 decision in *Caperton v. A.T. Massey Coal Co.* and a consideration of recent criticisms of the Court as "activist" in light of the changes in its composition following the 2007 and 2008 elections.

The conference was proposed and organized by the Law School's Richard Esenberg and cosponsored by the Appellate Practice Section of the State Bar of Wisconsin. It included presentations by full-time faculty members Chad Oldfather, Ed Fallon, Michael O'Hear, and Jack Kircher, L'63. Adjunct faculty who participated in the event were Anne Berleman Kearney, Thomas L. Shriner, Jr., Dean Strang, Tim Trecek, L'93, and Ralph Weber. The Hon. Diane Sykes, L'84, of the United States Court of Appeals for the Seventh Circuit, and the Hon. Lynn Adelman of the United States District Court for the Eastern District of Wisconsin also appeared on panels.

Planning is under way for a similar conference this fall in the new Eckstein Hall. ■





## Two Decades of Growing Success: The National Sports Law Institute

When the National Sports Law Institute (NSLI) was created two decades ago, it was housed in offices on N. 17th Street, six blocks from the Law School's Sensenbrenner Hall. But in recent years, the NSLI's offices have been one of the things that a visitor encounters upon entering the Wisconsin Avenue doors of the Law School.

Both locations were selected in large part as matters of practical circumstance. Yet there is a symbolism in the two: When the institute was founded in 1989, sports law was not widely recognized as a field of legal study. Academically speaking, it was a pursuit on the periphery of what law schools did.

Now, legal issues are clearly at the heart of much of what happens in American sports, and the validity of sports law as a field and as an academic pursuit is widely recognized.

Furthermore, the sports law program at Marquette Law School has gained national acclaim. Students from across the nation have come to Milwaukee solely because of the program. It now holds an important

spot on the roster of specialties offered by the Law School.

As the National Sports Law Institute celebrated its twentieth anniversary in 2009, those involved from the start were able to take pride in what had been accomplished and look with some humor on the early days when they had to struggle to get respect for their choice of legal specialties.

Almost every day now, the news carries a clear underlying message that sports is a huge business—and that huge legal issues, ranging from athletes' contracts to antitrust disputes, are at the core of that business. In fact, in its current term, the U.S. Supreme Court is considering an important antitrust case on whether the National Football League is a single entity or a collection of legal entities, namely, the teams. At stake is control of the lucrative business of team logo paraphernalia, with implications for other business sectors.

The NSLI at Marquette offers a rich set of courses and seminars for students, as well as for practicing lawyers. Over the years, the institute has been host to important sessions

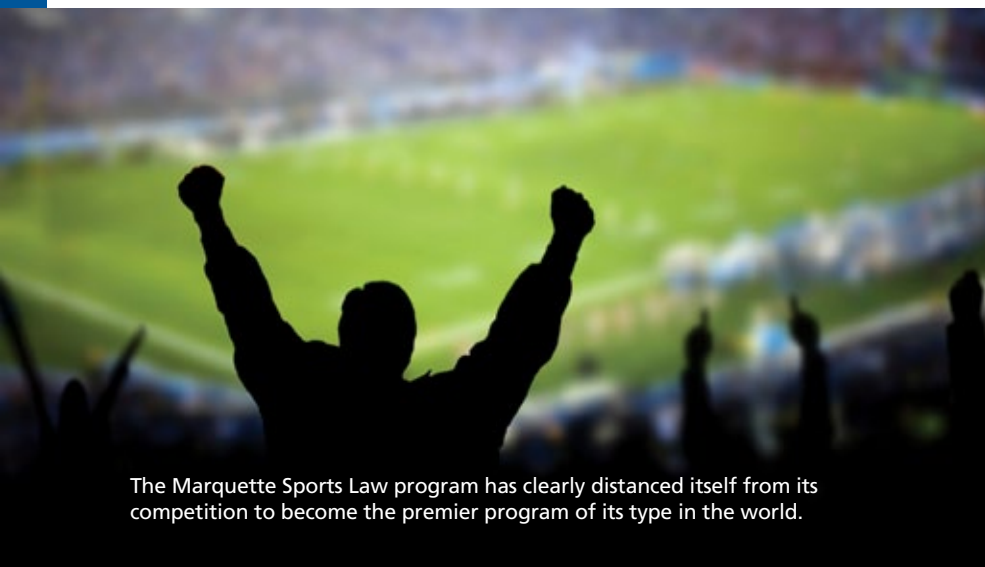
with many of the key figures shaping the American sports scene. Some experts are close at hand: Major League Baseball Commissioner Bud Selig frequently speaks to classes. Others have come from far away to take part in programs.

"The National Sports Law Institute has grown tremendously over the years with its move to the main Law School, its annual conference and journal, and its reputation across the country," Greg Heller, L'96, senior vice president and general counsel of the Atlanta Braves, wrote in a recent newsletter published by the institute.

Clark Griffith, commissioner of the Northern League of Professional Baseball, wrote, "Sports law is the most exciting area of the law for students and practitioners, and the NSLI is the leading institution in furthering the study and practice of sports law."

William Miller, L'96, a faculty member in sports and fitness at the University of Wisconsin-Parkside, concluded, "Thanks to the ongoing leadership of Matt Mitten and the ongoing dedication, skill, and passion of Paul Anderson, the Marquette Sports Law program has clearly distanced itself from its competition to become the premier program of its type in the world."

James Ghiardi, L'42, professor emeritus, recalled the roles of people such as Professor Martin Greenberg, L'70, and Dean Frank DeGuire, L'60, and the late Associate Dean Charles Mentkowski, L'48, in launching the institute. "It can be stated with certainty that the NSLI has filled an important need in legal education," Ghiardi wrote. "Nationally and internationally, it has added prestige and recognition to the school." ■



The Marquette Sports Law program has clearly distanced itself from its competition to become the premier program of its type in the world.

## Crossroads for Public Discussion



Mike Gousha hosts Senator Russ Feingold, Judy Woodruff, and Milwaukee Archbishop Jerome Listecki at various “On the Issues” events held at the Law School this past year.

On this, Senator Russ Feingold and Congressman Paul Ryan agree. On this, the major candidates for governor of Wisconsin, Tom Barrett, Mark Neumann, and Scott Walker, have no debate. On this, community leaders, authors, judges, and major media figures find common ground. “This” is the “On the Issues with Mike Gousha” series at Marquette University Law School.

### Reason after reason to come to Marquette University Law School



Gousha and Mayor Tom Barrett



Gousha and Cong. Mark Neumann



Gousha and County Executive Scott Walker

Now in its fourth year, the series has brought all of those mentioned here and many others to the Law School for an hour of serious questioning and conversation with Gousha, the widely known broadcast journalist who is the Law School’s distinguished fellow in law and public policy. The sessions are open to the public, and audio recordings are posted on the Law School’s website.

But that is hardly the only way the Law School is making itself a forum for publicly examining the interesting and serious issues shaping life in Milwaukee, Wisconsin, and the nation. Major annual lectures with prominent legal scholars, such as the Boden Lecture and the Barrock Lecture, have brought a series of prominent jurists and legal scholars to the Law School. And major conferences,

open to the public, on issues such as the environment, health care, and restorative justice are key parts of the Law School’s public service. All together, they provide reason after reason for people—whether law students, members of the Marquette University community, or people from the general public with no campus ties—to make the Law School a destination.

That will be even more the case in Eckstein Hall, the new law school home, which will open this summer. The building is designed to be a high-quality setting for events that will focus on policy and issues important to the region and beyond. Eckstein Hall—Marquette Law School—will be a place for addressing serious issues seriously.

For information on upcoming events, follow the Law School’s website at [law.marquette.edu](http://law.marquette.edu). ■



# Joseph J. Zilber: Building a Better Milwaukee

Joseph J. Zilber was a builder. He was hugely successful as a builder of homes in Milwaukee, especially in the years after World War II. Later, he built major real estate projects across the United States. But in the end, his biggest accomplishment may well have been as a builder of a better future for Milwaukee and a builder of paths for people to lead better lives.

With his death at 92 on March 19, 2010, Milwaukee and Marquette University lost a special friend and ally who spent his last years vigorously trying to push good causes forward. The impressive atrium that will be the heart of the interior of Eckstein Hall, the Law School's new home, will be called the Zilber Forum. There are at least four reasons why it is appropriate to pay tribute to Zilber in this way:

- **The name was generated by an act of generosity.** Zilber's generosity certainly benefited the Law School and Marquette as a whole, but it extended across the city. He launched an initiative in 2007 to reinvigorate neighborhoods that have been struggling, including the near north side community where he was born. He set aside a large fund to help launch a school of public health at the University of Wisconsin-Milwaukee. He contributed generously to numerous other causes to meet the needs of Milwaukee—including the funds to build the hospice where he died.
- **The name speaks to Zilber's eagerness to help people.** Zilber donated \$30 million to the Law School capital campaign announced in 2007. But \$25 million of that gift funds scholarships for students, five times the amount that went toward construction of Eckstein Hall. People came first for Zilber. That was true in his business, where he was regarded as a caring and warm boss who generated great loyalty among employees. That was true when it came to people with needs, such as students facing the high cost of a legal education.
- **The Zilber Forum will be a place to address problems.** It will be more than an atrium and crossroads for people using Eckstein Hall. It will be the setting for a wide range of presentations, panel discussions, and—as the name says—forums on issues important to not only the legal community but Milwaukee as a whole. Zilber loved Milwaukee to his core. He believed that Milwaukee was on the road to improving after a period of tough times. And he wanted

Milwaukee's needs to be addressed. The Zilber Forum will help do that.

- **The name is a sign of the love Zilber and his late wife, Vera, had for Marquette.** Both of them attended the University, and they met here. As for the law degree he received in 1941, Zilber often joked that he never lost a case—because he never took one. He worked all of his life in real estate. But he spoke warmly about how much he gained by getting the law degree and how much Marquette University meant to him.

Joseph Zilber made a difference on many fronts. His legacy only will grow if people take his message to heart and use the opportunities that will be offered in places such as the Zilber Forum to make Milwaukee better. Marquette University Law School expresses its condolences to the Zilber family as the school commits itself to building his legacy. ■



# THE BLOG DEBATE: CHARACTER CONTROL

Since its launch in September 2008, the Marquette Law School Faculty Blog has published about 1,000 posts and 1,500 comments on a wide variety of law-related topics. Posts often generate lively, provocative exchanges. Reprinted below is just such a thread from late last year: a series of posts by Professors Edward Fallon, Bruce Boyden, Gordon Hylton, David Papke, and Richard Esenberg. They are wrestling here with the question whether literary characters deserve copyright protection, but the question takes them into a wide-ranging discussion of cultural history, literature, authorship, and the nature of the creative process.





There is much to learn from the thread, and much on which to reflect. One of the insights that emerges is that literature has always been a public conversation of sorts—albeit not always a very civil one—and every book may be thought of as a sort of sequel to earlier works, drawing on and responding to established genre conventions, character types, plot devices, and so forth. Of course, back in the time of *Don Quixote*, the subject of the first post, the conversation might be very slow to develop. Today, the Internet has dramatically accelerated and opened up the conversation. This has perhaps not been an unqualified advance. As authors strive to be heard above the Internet’s cacophony, it sometimes seems that the inflammatory tone of Cervantes’s attack on Avellaneda (see the first post below) has become more the rule than the exception.

When we launched our Faculty Blog ([law.marquette.edu/facultyblog](http://law.marquette.edu/facultyblog)), we hoped that it would be a place for a different sort of public conversation—not only engaging and provocative but also thoughtful, well-informed, and civil. The posts, excerpted below, exemplify precisely this sort of exchange.

—Michael M. O’Hear, Associate Dean for Research

## CAULFIELD MEETS QUIXOTE

By Edward A. Fallone

*Salinger v. Colting*, a lawsuit alleging breach of copyright, has received a great deal of attention because the plaintiff was the reclusive author J. D. Salinger. He sued Swedish author Fredrik Colting in New York over the latter’s book, *60 Years Later: Coming Through the Rye*, a novel in which one character is a 76-year-old Holden Caulfield. United States District Judge Deborah Batts rejected Colting’s argument that his use of the Holden Caulfield character constituted a critical commentary on the Salinger novel, *The Catcher in the Rye*, and therefore fell within the “fair use” exception to copyright infringement. She granted Salinger’s request for a preliminary injunction preventing the publication of the work in the United States. [Salinger died January 27, 2010. — ed.]

Some observers of the case have focused on its unusual grant of the plaintiff’s request for an injunction—this is a rare instance of U.S. law’s allowing a prior restraint on publication. Other observers have debated the intersection of First Amendment rights and copyright protections implicated by the lawsuit. In contrast, when I heard about the case, my thoughts turned to *Don Quixote*.

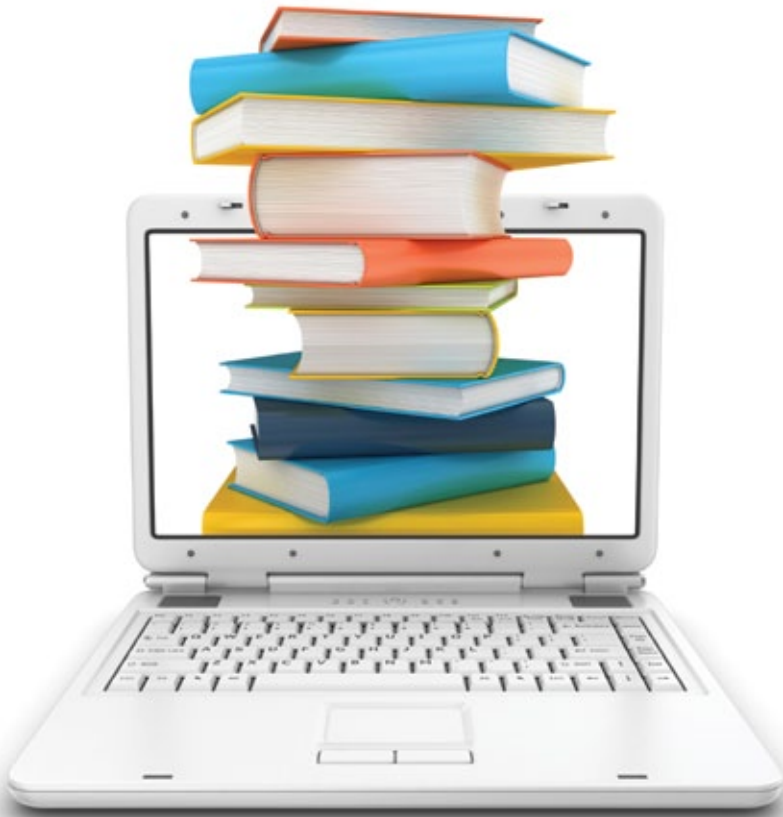


Through the end of the 16th century and into the beginning of the 17th century, the appropriation of characters and plots from earlier authors was a common literary practice. In England, Shakespeare wrote plays that retold stories that had been told by other playwrights, and other authors in turn recycled Shakespeare’s plots. Several different versions of *Hamlet* entertained Elizabethan audiences.

The first copyright laws date only to 1518, and they took the form of a monopoly that granted exclusive rights to a printer to publish a particular text. It appears that copyright law was invented as a way of protecting the nascent printing industry. It originally provided no legal protection to authors at all. However, that would soon change.

The novel *Don Quixote* was published in 1605 by Miguel de Cervantes. It introduced two iconic characters: a comical old man who thinks himself a chivalrous knight errant and his humble sidekick, Sancho Panza. It also slyly critiqued a social order in Spain that was dominated by both unproductive nobles and a repressive Catholic clergy. The book was a huge success, and 10 years later, in 1615, Cervantes published *Don Quixote Part Two* (thus proving that Hollywood did not invent the sequel).

One of the most famous parts of *Don Quixote Part Two* is its prologue, written in Cervantes’s own voice, which contains a vicious attack on a certain Alonso Fernández de Avellaneda. It seems that



in the ten-year interval between the publication of parts one and two, Avellaneda had published his own continuation of the adventures of Don Quixote and Sancho Panza. In his prologue to part two, Cervantes insults Avellaneda without mercy.

The brutality of Cervantes's verbal attack, and its literary quality, transformed Avellaneda's own version of *Don Quixote* into an obscure historical footnote, forgotten by all but the most determined students of Spanish literature. Ironically, a close reading of Avellaneda's much-ridiculed work demonstrates that it has real literary merit in its own right. In particular, Avellaneda's version patronizes the character of Don Quixote and treats him as clearly insane, thus impliedly rehabilitating the portrayal of the existing social order in the first book and defending it from a damaging critic.

Miguel de Cervantes's written attack on Avellaneda's use of his characters was unprecedented because it portrayed the derivative work as an intentional injury to the original author. Moreover, the severity of Cervantes's indignation suggested to the reading public that the harm Cervantes had suffered was very real. People began to think about the rights of authors to control the use of their characters in a different way. In 1709, the Statute of (Queen) Anne for the first time gave authors a legal monopoly on the reproduction of their work for a set period of years. Thus was born modern copyright law.

So what is wrong with giving authors the right to control the use of their characters? Copyright law is intended to provide an economic reward to the original creator, by granting him the legal right to prevent the use of his characters in ways that might diminish their value. However, copyright law comes with an associated cost. The fact that Fredrik Colting's novel may never be published in the United States illustrates that cost. All of us bear the opportunity cost of all the derivative acts of creation that will never take place as a result of granting copyright protection to the original author.

It is true that some derivative uses of someone else's characters are allowed, notwithstanding copyright protection. Parodies and critical commentaries using established characters are permitted under the First Amendment. However, this seems like an almost arbitrary exception to the original creator's exclusive right to control his characters. Other derivative uses of an established character can enrich our common culture as much as a parody or a critical analysis.

Why allow someone else to write a parody of *The Catcher in the Rye* but prohibit a Holden Caulfield sequel? The sequel might be puerile trash, but it just might be a masterpiece in its own right. Why not allow a third author to write a Holden Caulfield opera? Or a ballet? I doubt that people would stop reading *The Catcher in the Rye*. In fact, the sales of Salinger's novel might increase.

“Every act of creation should be viewed as a gift from one person to all people. . . . It is only if we view the act of creation as a ‘sale’ from the author to the rest of us that it makes sense to allow the author to place conditions on the use of his creation. This is the crux of the problem.”



One answer is that it is unfair for others to use Salinger's character in order to make a profit for themselves. But existing law allows some exceptions for parodies and critical commentaries that can earn a profit for their authors. In addition, the law now extends the life of copyright protection beyond the life of the creator. In light of this fact, it is difficult to argue that the protection of the creator's exclusive ability to enjoy the monetary benefits flowing from his creation is the primary concern of the law.

Every act of creation should be viewed as a gift from one person to all people. Should J. D. Salinger have the right to gift our culture with an iconic character and, at the same time, claim the ability to dictate how this gift can be used? Even if his gift is misused or abused by others, Salinger has no moral basis to complain.

It is only if we view the act of creation as a "sale" from the author to the rest of us that it makes sense to allow the author to place conditions on the use of his creation. This is the crux of the problem. Over time, the existence of copyright law has commodified the act of creation. It is no coincidence that this process began in 1518 with the technological innovation of the printing press. The commodification process accelerates with each new technological advance.

In our digital age, every consumer can purchase and enjoy a vast universe of cultural artifacts at the press of a button. However, rarely do we spend any of our time engaged in the act of creation itself. Most of us spend little or no time each day playing music, telling stories, or painting pictures. Why should we bother, when it is far more convenient to purchase the creations of others? The irony is that we are increasingly surrounded by our culture, but at the same time we are increasingly alienated from it. By treating the creative act as a commodity, copyright law has facilitated this trend.

The key to profit in a service economy is to convince the public to pay for something that they used to expect to get for free. We didn't always pay such a high price for our culture. The "fair use doctrine" once permitted a broad use of another author's creations so long as no monetary benefit was received. The initial success of Salinger's lawsuit demonstrates how narrow the fair use doctrine has become. Like the western prairie before it, the "public domain" is slowly being fenced in and parceled out to the highest bidder.

It doesn't have to be this way. We should eliminate copyright protection for literary characters. If J. D. Salinger feels that his beloved character has been ill treated by others, then he can always respond in the same way as Miguel de Cervantes did: he can publish his own sequel. Like Cervantes, Salinger can even include a vituperative attack on the upstart artist who has offended his creation.

If the public sees no merit in Colting's creation, then Colting's book will soon be forgotten. However, let the rest of us decide for ourselves whether there is real merit in Colting's creation. Copyright law, as it is now structured, allows one artist to deny each and every one of us the possibility of other worthy works of art.

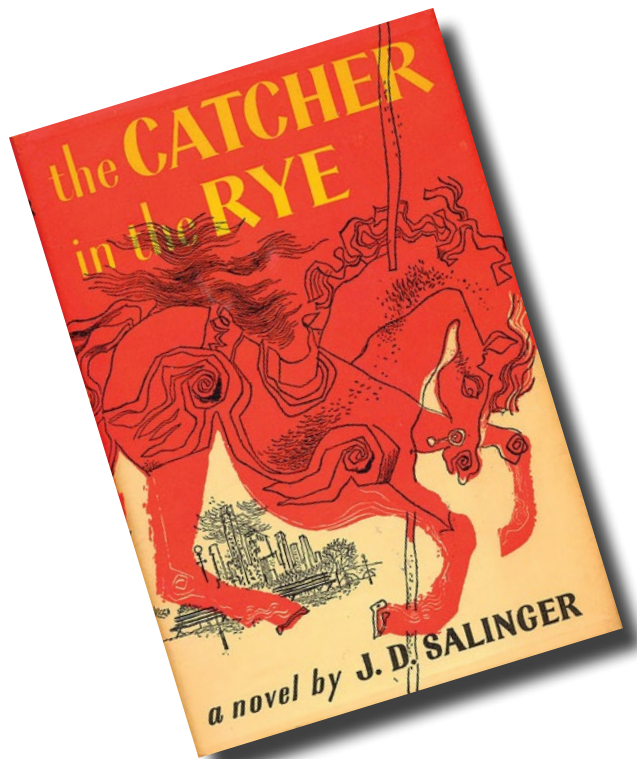
## THE WINDMILL'S REPLY

By Bruce E. Boyden

Cervantes's reaction to the implicitly critical sequel does seem like an important moment in the development of the idea of the fictional author as master of his or her creation. However, I also want to offer a contrary view on a couple of points that Ed raises. To begin, Ed concludes that copyright's commercialization of creative works is a problem. One solution, Ed proposes, is to eliminate copyright protection for literary characters. I disagree with both sides of this equation. There's an emerging problem with copyright law, but it's not commercialization of creativity. Commercialization of creativity is the entire reason copyright law exists. And eliminating copyright protection for sequels across the board would create far more problems than it would solve.

First, the nature of the problem. As Ed explains, there's a tradeoff involved in the copyright system. One of the purposes of copyright (some would say the only purpose) is to incentivize the creation of new works. ▶▶





Copyright does this by creating a property right in the works that result. There are some costs, however. One cost is that there will be some works that would have been created and distributed without any copyright protection at all, and yet public access to those works may be restricted. And for those works that would not have been created or distributed but for copyright or some other means of public support, there's an offset against the benefit—namely, that not all uses of the work will be possible for the duration of the copyright (which is now extremely long).

Ed writes, “It is only if we view the act of creation as a ‘sale’ from the author to the rest of us that it makes sense to allow the author to place conditions on the use of his creation.” That’s true. It’s also the entire point of having copyright in the first place. The copyright system rejects the notion that every act of creation is a gift. It creates a market for acts of creation in order to allow large numbers of small benefactors to pay for works *ex post* as opposed to *ex ante*. This system might seem onerous now, but it’s worth comparing it to the system it replaced: support for artists from wealthy patrons. A legal system that gives the option of support from a broader array of people allows a greater number and diversity of expensive works to be created.

Of course, this doesn’t tell us where to draw the line between acts that infringe on the owner’s

copyright and acts that don’t, and Ed is not alone in proposing that the line should be drawn particularly close to verbatim copying. But I do not think Ed’s proposed solution is workable. Character copyright is an incredibly vexing issue.

Copyright is supposed to vest in works, and characters are not works; they are pieces of works—sometimes pieces of several works in which the character has subtly evolved from one work to the next. When confronted by one of these multiwork characters, it’s difficult to say what exactly is being protected, which has perhaps led courts to essentially throw up their hands when considering such questions. It has also, I think, led Congress to shy away from allowing the first versions of any modern cultural icons from entering the public domain. No one knows what would happen. But the Salinger case is not just about the use of a single character in a new work; it’s about a sequel—a classic example of a derivative work. The question here is whether there should be any exclusive right to prepare derivative works at all.

It’s pretty clear that the ability to control sequels and adaptations is part of the incentive package for modern creators of works. Hollywood studios somewhat notoriously look for, at least in certain genres, scripts that will generate a whole series of films rather than just one. Many authors intend to write an entire series of books, or sell the film or television rights, or both. J. K. Rowling was in part spurred on to complete the first *Harry Potter* because she knew she had six more behind it if it did well. Songwriters expect revenues from anyone who records their song, not just the first person.

It’s worth noting that patents have a different system: a patent owner does not own all follow-on inventions. Copyright’s different take on follow-on works, I think, reflects a recognition that the authors of fictional works create not simply single works but entire universes. Works without their own universes, such as music, databases, or histories, enjoy much less expansive derivative works rights. Your history of the First Battle of Bull Run gives you no rights to a history of the Second Battle of Bull Run.

This policy of awarding exclusive rights in follow-on works to authors actually works to the advantage of smaller authors and distributors. Without it, larger players could simply wait to see what books or movies seemed to do well in small markets, then flood



much larger markets with sequels and adaptations. Indeed, they would have an incentive to do that.

The Salinger case is an odd one for defending the derivative-works right, because Salinger is hardly a typical author. Salinger seems to be fighting not to preserve his ability to write a sequel, but to preserve the option of having no sequel at all. But the justification for derivative-works rights is that most authors are not going to be like Salinger. Most are going to write sequels, or at the very least authorize others to write sequels, when their universes catch on. Sure, there's a risk of curmudgeons like Salinger, but it's a low risk, one worth bearing in order to keep the rule (exclusive rights in derivative works) relatively simple.

## LOOKING BACKWARD AND THE FALLONE-BOYDEN DEBATE

By J. Gordon Hylton

The post-publication history of Edward Bellamy's 1888 utopian novel, *Looking Backward, 2000–1887*, speaks to the issue at the core of the Fallone-Boyden debate. My two colleagues disagree over the desirability of copyright protection for literary characters and the proper resolution of the recent legal action filed by J. D. Salinger against the Swedish author of a sequel to his novel, *The Catcher in the Rye*. Ed Fallone opposes protection, and Bruce Boyden supports it. On this issue, I'm with Ed.

*Looking Backward* is the story of Julian West, a man who falls asleep in 1887 at a time of great industrial strife and wakes up in the year 2000, when the problems of industrialism have been solved by a collectivist government that manages all industrial production for the benefit of society as a whole. At the time of the book's publication, Bellamy was a 38-year-old writer and one-time lawyer from western Massachusetts. *Looking Backward* quickly turned out to be one of the best-selling books written in the United States in the 19th century, selling several hundred thousand copies in

the years immediately following its publication. It was translated into dozens of different languages and was also a publishing sensation in Europe.

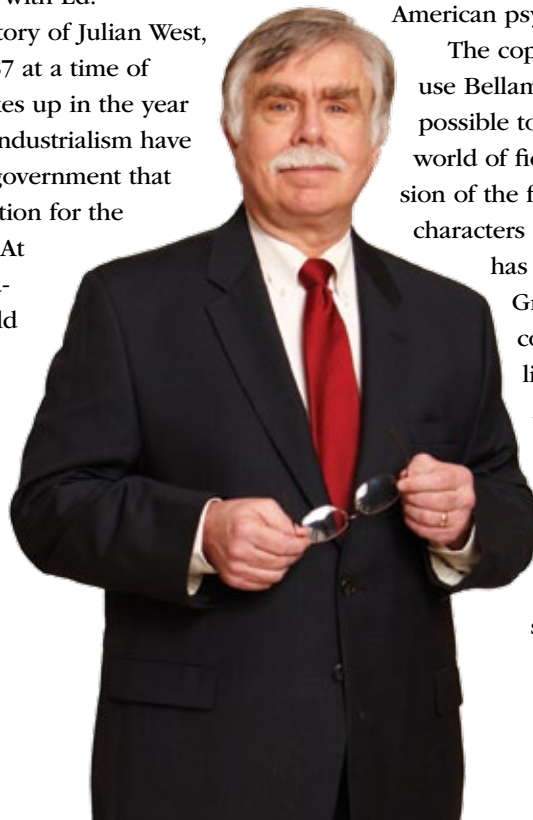
Novels by other writers continuing the story of Julian West in the 21st century began to appear almost immediately. Some of these sequels embraced Bellamy's vision of the future, while others sought to paint Bellamy's future as a dystopian nightmare. According to literary historian Krisham Kuman, at least 62 novels based on *Looking Backward* were published in the United States between 1888 and 1900. All of the sequel writers made use of *Looking Backward's* story line, and most employed Bellamy's main characters. As far as I can determine, none secured a license to do so from Bellamy.

Bellamy himself reentered the fray in 1897 with his own sequel to *Looking Backward*, entitled *Equality*, in which he addressed many of the issues raised by the authors of the less-than-sympathetic sequels, including the future of education and women's rights. Unfortunately, Bellamy's own sequel was not nearly as successful as the previous volume, and he died of tuberculosis the next year at the age of 48.

Although the pace slowed in the 20th century, there were almost one hundred *Looking Backward* sequels, prequels, and reimaginings published after 1900, apparently culminating in the off-beat *Edward Bellamy Writes Again*, a 1997 novel by New Age Christian writer Joseph R. Myers, who sought to combine the insights of Bellamy with those of the American psychic Edgar Casey.

The copyright point here is that the ability to use Bellamy's story line and characters made it possible to have a rich, ongoing debate in the world of fiction over the merits of Bellamy's vision of the future. Had Bellamy tried to control his characters in the same manner that J. K. Rowling has controlled Harry Potter and Hermione Granger, or J. D. Salinger wishes to control Holden Caulfield, the intellectual life of late 19th- and early-20th-century America would have been much less rich.

As someone more interested in a better world than his own financial enrichment, Bellamy was no doubt delighted that his novel had inspired so many of his supporters and his





critics to continue his story. Legal protection against verbatim copying of the text was enough for Edward Bellamy; I don't see why it shouldn't be enough for Miguel de Cervantes and J. D. Salinger as well.

## *HARRY POTTER AND THE UNAUTHORIZED SEQUEL*

By Bruce E. Boyden

Gordon's contribution to the debate Ed and I were having on derivative works is fantastic. I'm familiar with *Looking Backward*, having read it in grad school, but I was not familiar with all of the spin-off literature that resulted. Certainly it seems like the debate among rival sequel authors was a good thing that probably decreased Bellamy's incentives or ability to profit from his work not at all.

But Bellamy's case is also an atypical case. The actual fiction in *Looking Backward* seems almost beside the point; even more than most science fiction, it's really a political tract in novel's clothing. That makes it more prone to criticism and commentary in the form

of follow-on works than most other novels would be. In other words, I think cases like *Looking Backward* should be handled by an exception to the general rule against unauthorized sequels (fair use), not by abolishing the general rule altogether.

Once you move away from clear cases like *Looking Backward*, the line between sequels that primarily comment and sequels that primarily exploit becomes really hard to draw. And courts have tried to cram commentary cases into the "parody" category for reasons that escape me. That means that fair use, which is often not easy to predict, may be particularly unclear for this class of cases. Salinger might be a case that's close to the line. But I can imagine much easier cases that argue in favor of the general rule.

Suppose there is no copyright protection against anything except verbatim (or near-verbatim) copies. It's 1995, and J. K. Rowling is shopping around her manuscript for *Harry Potter and the Philosopher's Stone*,\* saying she envisions a series of seven books if the publisher is interested. She sends the manuscript to Bloomsbury Publishing; but they say they are not interested. However, that's not quite true. They are very interested in publishing the Harry Potter series; they are convinced it will sell well. They just don't want Rowling to be the author. So they call in one of their favorite children's authors, hand him the manuscript, and say, "Write seven of these, one for each year of Harry Potter's experiences at Hogwarts, using the same characters and locations; just don't use any of the events depicted in the manuscript." And he does, and it sells like gangbusters, and is made into multimillion-dollar movies. Rowling never gets a penny.

Shouldn't Rowling have a legal right to stop this?

In addition, if all that matters is literal copying, it's not clear what becomes of movie rights and other adaptations of works, which are often far from literal depictions.

Encouraging artists to continue exploring the universes they created is the right policy.

\*Subsequently published as *Harry Potter and the Sorcerer's Stone*.



“The notion of an ‘author’ in modern western culture is a weighty one, carrying with it some sense of origination. It connotes more than ‘writer,’ which is a less prestigious characterization that goes primarily to a particular activity.”

## WHAT IS AN AUTHOR?

By David R. Papke

This blog exchange rekindled for me the intellectual question of how to best understand what an “author” is. The notion of an “author” in modern western culture is a weighty one, carrying with it some sense of origination. It connotes more than “writer,” which is a less prestigious characterization that goes primarily to a particular activity. We customarily assume “authors” are intense and even tortured souls heroically working alone. We also sometimes assume that their chief incentive must and should be monetary enrichment. These assumptions grow out of dominant ideological prescriptions related to, respectively, autonomous individualism and the bourgeois market economy.

I think it is better to conceive of an “author” as socially constituted. This is obviously the case when two or more people write a work together or when manuscript reviewers, editors, or critics play major roles in the composition of a work. In addition, according to cultural studies commentator Lucien Goldmann, we should recognize the

manner in which a purported “author” belongs to a “collective subject.” The “author” in this conceptualization not only consciously collaborates but also functions in a fundamentally trans-individual way. He or she works in a set of social relations and draws on established forms, reigning sentiments, and anticipated responses.

If we appreciate the way an “author” is socially constituted, we might actually enrich the experience of authorship. As Ed Fallone reminded us, the rampant commodification of our era often has the effect of alienating a person from the fruits of his or her labor. This is as true for a person who writes a novel (or a sequel . . .) as it is for some-

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body building a birdcage. Indeed, many “authors” eventually become so alienated that they disavow their works or even urge the destruction of their unpublished manuscripts. Recognizing the truly social in individual authorship can help protect the beauty, integrity, and empowerment of creative labor.

## I AM THE AUTHOR

By Richard M. Esenberg

**A**s a member of your faithful blog committee, I once inadvertently published posts by Professors Melissa Greipp and David Papke under my own name. The mistake was fixed in the morning.

But I found the latter error intriguing. Here I was, ostensibly the “author” of a post regretting “dominant ideological prescriptions related to, respectively, autonomous individualism and the bourgeois market economy.” It was as if someone had replaced my bedside Edmund Burke with Jean-Paul Sartre.

But here’s the thing. I do agree—in a sense—with David’s point.

If, in the terms David invokes, the author is part of a “collective subject” whose work is “trans-individual” in that it is permeated by others in its creation, then it seems equally probable that it is permeable in the ways in which it will be understood. This should be so quite apart from whether someone else appropriates parts of the work and turns it to a different purpose. (I once heard the band Rage Against the Machine used as part of a presentation at a corporate board meeting.) The “established forms” and “reigning sentiments” that the author invokes may, even



because of the creativity with which he invokes them, provoke responses other than those he anticipated.

An author—or, for that matter, a musical or visual artist—loses control of the meaning of her published work. Others may understand it or use it in ways that she never intended: e.g., Ronald Reagan’s use of Bruce Springsteen’s “Born in the U.S.A.” as a patriotic anthem rather than an expression of irony and anger.

I don’t pretend to know what intellectual property law says about this. One can’t have a property interest in how someone perceives a work, although one can, I suppose, have a property interest in controlling its use and can exercise that interest in a way that hampers the manner in which the work itself can be used to further this unintended and undesired understanding.

But, as a matter of interpretation, I don’t think that there is anything wrong with reading a work or hearing a song in a way that its creator did not intend and, in fact, may categorically reject. My mother was a painter who always told me that a work of art (including hers) was not limited to an artist’s intent or interpretation.

On my personal blog, I occasionally post Sunday music videos (generally live performances) often around a theme and sometimes in support of some political or—more often—philosophical observation. Once in a while, a commenter, in high dudgeon, will say that Thom Yorke never meant that or Dylan repudiated his Christianity. I don’t care. They can point brilliantly to things in the world. But I get to say what it means to me.

Mom would be proud.

## MORE ON LITERARY CHARACTERS AND COPYRIGHT LAW

By Edward A. Fallone

**M**y brother, Jim Fallone, has over 20 years of experience as an executive in the publishing industry, currently with Andrews McMeel Publishing in Kansas City, and is a published illustrator. While this experience makes him dependent upon copyright law for his meal ticket, it also gives him some valuable insights into the creation and marketing of literary characters.

Here are the comments of Jim Fallone:



Ed, to begin with, you are fundamentally wrong (as is Professor Hylton).

It is true that *The Catcher in the Rye* can be viewed as art and as such can be viewed as a gift in the Lewis Hyde tradition. However, there are moral and cultural value rules that separate a gift from usury, and that line of separation is not clearly defined and may vary from culture to culture. These rules are directly related to the broader context that exists within the society at the time.

When Cervantes wrote *Don Quixote*, authors of fictions and stories rarely got paid. It was the printer who tended to make the money, both by pirating printings of the original work and by commissioning and even writing many of the sequels to *Quixote*. You can argue that economically Cervantes was much like today's blogger or fan fiction writer. But this is not the same context in which we view *The Catcher in the Rye*. This latter book is a successful and viable commercial revenue generator. It is a business, and the livelihood of the author is directly dependent on the book's own reputation as literature—as well as the mystery surrounding the author and his purposely limited output.

Cervantes we see today as an artist who created something new and who never received much money or benefit from it. However, at the time of his book's creation that is what he desperately sought. Because there were no laws to protect Cervantes, everyone but the author cashed in.

Professor Hylton chose Edward Bellamy's 1888 Utopian novel, *Looking Backward, 2000–1887*, for comparison. Bellamy's book was a parable for a political and philosophical movement. Each sequel was addressing the socialist model, which was the protagonist. The characters and back story of the book were less than secondary and little more than clip art on a PowerPoint presentation. The very nature of the book was to prompt philosophical discourse on the author's political views.

*Looking Backward* was successful. It made the author wealthy and had a measurable value as a commodity, but much of the author's revenue actually came from the lecture circuit. The failure here is that there was no real intellectual property of value. The main character of the book—Julian West—held no exploitable value, and the only character of any value was Bellamy's socialist model.

In the case of Salinger—again looking beyond the words on the page—a significant reason for the work's



reputation and value as art is precisely the unusual absence of further exploration and exploitation. The value of the novel's theme of a boy's alienation and angst about the future are all the more poignant and urgent precisely because we don't know what becomes of him. This allows us all to identify with Holden and use him as a prism for our own awkward adolescence.

Permitting works by any other author who created an unauthorized canon to the world that Salinger created in *The Catcher in the Rye* would be the equivalent of writing a sequel to *Star Wars* in which Luke has a previously unknown bastard child with Leia, who subsequently becomes a fat alcoholic fascist ruler of the Empire and dooms the rebels to continued mediocrity for generations. There is no way that Lucasfilm would allow its carefully created and detailed universe to be devalued, thereby jeopardizing the reputation of its brand.

This value goes beyond the movies to the action figures and lunch boxes. Both the massive world of *Star Wars* and the tight and reclusive world of *The Catcher in the Rye* rely upon the integrity of their vision and on the property's reputation and myth for a major portion of their value. It's not just telling a new story about Luke that is at issue; it is the creation of new characters and their designation as *Star Wars* characters. In the current context of publishing and retailing, it damages *The Catcher in the Rye's* potential place in school-adoption programs across the country if we permit others to add to the canon or to create confusion as to what should be in the canon.

The current system of publishing allows the good to rise and to be licensed and exploited to its fullest. The bad will go out of print, where the rights will revert and eventually become public domain. ■

On October 1 and 2, 2009, the Law School, together with the Marquette University Department of History, sponsored a conference entitled “Legacies of Lincoln.” The conference marked both the bicentennial of Lincoln’s birth and the sesquicentennial of his visit to Milwaukee to speak at the Wisconsin state fair. The following is an abridged version of a paper prepared for that conference by Mark E. Steiner, professor of law at South Texas College of Law, and drawing on Steiner’s well-received book, *An Honest Calling: The Law Practice of Abraham Lincoln*, published in 2006. Professor Steiner relates that “while the good parts of this article are entirely new, other portions appeared in one form or another in my book and are reprinted by permission of Northern Illinois University Press, which also wanted me to mention that the book is now available in paperback.” The unabridged article, including footnotes and together with other conference proceedings, will appear in the summer 2010 issue of the *Marquette Law Review*.

# LINCOLN’S LAW BOOKS

by Mark E. Steiner

## LINCOLN IN MEMORY

We associate Abraham Lincoln with books more than any other president except, perhaps, Thomas Jefferson. But Jefferson’s association with books creates more distance, while Lincoln’s draws us closer. Lincoln’s reading is linked to self-betterment and personal growth. Lincoln is also seen as a reader as a boy and a young man, not as an adult.

The most popular cultural images of Lincoln as reader are his reading as a boy in Indiana and as a young man in New Salem, Ill. The image of Lincoln reading by fireside was popularized by Eastman Johnson’s 1868 painting, *Boyhood of Lincoln*.

Art historian Patricia Hills has noted that Johnson depicted Lincoln “acting out the moral drilled into every schoolboy, that in America hard work and perseverance” guarantee success. This image still pervades contemporary children’s biographies whose covers are adorned with young Lincoln reading. The message intended by these book covers is clear: if you read books, you can become president, or, perhaps more subtly, reading is transformative.

Behind the legend of Lincoln and books lay a substantial basis of neighbors’ and relatives’ reminiscences portraying Lincoln as a voracious reader. As historian Merrill D. Peterson has noted, “[Lincoln] never became a learned man, but of his eagerness for books and learn-

ing there could be no doubt.” Lincoln’s cousin, Dennis Hanks, remembered how “Abe was getting hungry for book[s], reading Evry thing he could lay his hands on.” His stepsister, Matilda Johnston Moore, recalled that Lincoln “was active & persistant in learning—read Every-thing he could.”

While Lincoln read everything he could get his hands on, he could only get his hands on relatively few books. Borrowing books from neighbors, he read *Aesop’s Fables*, *Pilgrim’s Progress*, *Robinson Crusoe*, William Grimshaw’s *History of the United States*, and Mason Weems’s *Life of George Washington*. John L. Scripps, author of an 1860 campaign biography, wrote Lincoln: “In speaking of the books you read in early life, I took the liberty of adding Plutarch’s *Lives*. I take it for granted that you had read that book. If you have not, then you must read it at once to make my statement good.”

*Boyhood of Lincoln* (1868), Eastman Johnson. ▶  
Bequest of Henry C. Lewis 1895.90, University of Michigan Museum of Art







America's collective memory of Lincoln also commemorates his reading habits as a young man in New Salem. Lincoln moved to New Salem when he was 22 and left when he was 28. New Salem is where Lincoln decided to become a lawyer and then "read for the law." Lincoln's self-education in New Salem figured prominently in campaign biographies. David Gilmour Blythe's 1860 painting, *Abraham Lincoln, Rail Splitter*, shows Lincoln splitting rails with an open book in the foreground. In subsequent artistic depictions of Lincoln in New Salem, he picks up the book. At New Salem, Avard Fairbanks's 1954 statue, *The Resolute Lincoln*, shows Lincoln striding forward with a law book grasped in his right arm while he drags an axe in his left hand. The book points to his future vocation and the axe to the life he would leave behind. The most famous is Norman Rockwell's *Lincoln the Railsplitter* (1965), which shows Lincoln walking while reading a book held in one hand and an axe in the other. In these images, Lincoln is reading thick books, obviously intended to represent law books.

Again the Lincoln of history is worthy of the legend, as Lincoln scholar Douglas L. Wilson has noted. Wilson notes that the New Salem years "were a time of intensive reading and study for Lincoln." Interviews of New Salem residents attest to Lincoln's devotion to reading while living in New Salem. Robert B. Rutledge recalled seeing Lincoln thus:

reading, walking the streets, occasionally become absorbed with his book, would stop & stand for a few moments, then walk on, or pass from one house in the town to an other, or from one crowd or squad of men to an other, apparently seeking amusement with his book under his arm, when the company or amusement became dry or irksome, he would open his book & commune with it for a time, then return it to its usual resting place, and entertain his audience.

While in New Salem, Lincoln studied grammar and surveying, and "*Devoured* all the Law Books he could get hold of." Russell Godbey memorably described the first time he saw Lincoln reading a law book: "The first time I Ever Saw him with a law book in his hands he was Sitting astraddle of Jake Bails wood pile in New Salem—Said to him—'Abe—what are you Studying?' 'Studying law'—replied Abe. 'Great God Almighty—' Said Godbey."

But this association in American memory between Lincoln and law books curiously ends when he actually



*Lincoln the Railsplitter* (1965), Norman Rockwell.  
Collection of The Butler Institute of American Art, Youngstown, Ohio

enters the legal profession. In popular culture, movies and children's books about Lincoln focus on him as a trial lawyer, not as a "book lawyer." Lincoln scholars also tend to overlook this aspect of Lincoln's practice. One recent study noted how "[c]ircuit lawyers lived on their wits, without the safety net of precedents and case law to back them in their reasoning." Other students of Lincoln's practice have overstated the scarcity of law books in frontier Illinois. John J. Duff, for example, wrote that "Lincoln had no encyclopaedias of law, no digests to go by—only the maxims of the English common law as set forth in *Blackstone* and applied by a few adjudications in the older sister states."



This neglect of lawyer Lincoln as a reader of law books is strange for several reasons. First, Lincoln's dependence on law books in his practice is easily demonstrated, even on the circuit. Ward Hill Lamon, who practiced law with Lincoln on the circuit, noted that Lincoln "reasoned almost entirely to the court and jury from analogous causes previously decided and reported in the books, and not from the elementary principles of the law, or the great underlying reasons for its existence." In his use of law books, Lincoln was a typical antebellum lawyer. Second, antebellum lawyers were a bookish sort, which was acknowledged in the portraits and photographs of lawyers of the era. In the earliest known image of Lincoln, a daguerreotype taken in 1848, his left hand is touching a book on a table. In the famous photograph taken by Matthew Brady in 1860, Lincoln is standing, with his left hand resting on a short stack of books.

### LINCOLN READS FOR THE LAW

New Salem residents remembered Lincoln reading law books in 1831 or 1832; however, Lincoln wrote that he only began studying law "in . . . earnest" after the election of 1834. Lincoln biographer Douglas L. Wilson considers the earlier reading "exploratory," as Lincoln "had been entertaining the hope of becoming a lawyer for some time, perhaps for several years, before finally committing himself to the effort." In Indiana, Lincoln had attended trials and read the Revised Statutes of Indiana, according to his cousin, Dennis Hanks. Lincoln had been unwilling to commit to the study of law until "a private conversation" during the 1834 canvass with his fellow Whig legislator, John T. Stuart, who encouraged Lincoln to study law.

When Lincoln once served as a bar examiner, the candidate later recalled that Lincoln's first question was, "What books have you read?" Lincoln asked the question because antebellum lawyers read for the law. But most aspiring lawyers read in lawyers' offices as apprentices. When Lincoln "borrowed books" and "studied with nobody," he took a different path.

The dominant form of antebellum legal education was law-office study. Most lawyers came to the bar through apprenticeships. Lincoln didn't miss much by not serving a formal apprenticeship. Josiah Quincy in 1832 summarized law-office study as "[r]egular instruction there was none; examination as to progress in acquaintance with the law,—none; occasional lectures,—none; oversight as to

general attention and conduct,—none."

Lincoln gained all the advantages of apprenticeships while missing the disadvantages. Stuart and his partner, Henry Dummer, provided access to law books. Dummer later recalled that "Lincoln used to come to our office in Spfgd and borrow books." According to Dummer, Lincoln "did not say much—what he did say he said it strongly—Sharply." When Lincoln claimed he "studied with nobody," he may have overstated things. Stuart probably served as Lincoln's "combination teacher/mentor/supervisor." Stuart and Dummer may have done more than direct Lincoln's reading. William Greene, a New Salem resident, believed that Stuart provided Lincoln "many explanations & elucidations" of law. Lincoln missed little by not copying documents in Stuart's office. His association with Stuart, however, gave him a sponsor, a mentor, and access to law books.

Lincoln, like other antebellum lawyers, was able to read for the law because of the revolution in law books in the early nineteenth century. Legal historian Willard Hurst noted that "the appearance of influential treatises gave great impetus to apprenticeship and self-imposed reading, at the expense of any expansion of training in formal law schools."

We have a pretty good idea of some of the law books that Lincoln read in New Salem. Lincoln undoubtedly read William Blackstone's *Commentaries on English Law*, and he probably also read Joseph Story's *Equity Jurisprudence*, Chitty's *Pleadings*, and Joseph Kent's *Commentaries on American Law*. Lincoln later recommended five different legal treatises to law students in the 1850s.

Lincoln may well have read Kent's *Commentaries on American Law* while in New Salem. A New Salem resident also recalled Lincoln's reading Kent, and a law clerk remembered Lincoln's referring to his "studies of Blackstone and Kent." Kent attempted to Americanize the common law in his *Commentaries*, and they soon became a standard reference work for American lawyers.

If Lincoln limited his reading to Blackstone, Story, Chitty, and Kent, then his legal studies were relatively superficial when compared with formal legal education. Lincoln recognized this. After turning down Isham Reavis's request to study law with him, Lincoln suggested that Reavis contact Henry Dummer (who was a graduate of Bowdoin and Harvard Law School), "a very clever man and an excellent lawyer (much better than I, in law-learning)."

In letters written in the 1850s, Lincoln advised prospec-



tive lawyers to prepare for the bar as Lincoln himself did twenty years before. The advice was pretty much the same: “get books, sit down anywhere, and go to reading for yourself.” Lincoln never suggested attending law school, although law schools were located nearby in Cincinnati and Lexington. Lincoln never suggested first receiving some college education. Lincoln, in fact, never suggested that the would-be lawyer apprentice or study in a lawyer’s office.

Lincoln was clear that he was advising the young man to do exactly what he himself had done in New Salem. To Isham Reavis, he said that “it is but a small matter whether you read *with* any body or not. I did not read with any one. . . . It is of no consequence to be in a large town while you are reading. I read at New-Salem, which never had three hundred people living in it.”

Lincoln emphasized commitment and hard work: “Work, work, work is the main thing,” he advised Isham Reavis. “If you are resolutely determined to make a lawyer of yourself, the thing is more than half done already.”

## LINCOLN AND BLACKSTONE

Lincoln’s having begun his law studies by reading Blackstone’s *Commentaries*—the typical starting point for would-be lawyers in antebellum America—is a matter of particular interest. As Ann Fidler has noted, “Blackstone was the urtext of antebellum law students, and the reading of the *Commentaries* was the centerpiece of the system of private rituals practiced by them.”



The Present Law Office of Abraham Lincoln, the President Elect, on Fifth Street, West Side of the Public Square, Springfield, Illinois. Frank Leslie’s Illustrated Newspaper (December 22, 1860)

Blackstone’s *Commentaries* were the first books purchased by Lincoln. William Dean Howells in his 1860 campaign biography described the “peculiar manner” in which Lincoln “pursued his law studies”:

He bought an old copy of Blackstone, one day, at auction, in Springfield, and on his return to New Salem, attacked the work with characteristic energy.

His favorite place of study was a wooded knoll near New Salem, where he threw himself under a wide-spreading oak, and expansively made a reading desk of the hillside. Here he would pore over Blackstone day after day shifting his position as the sun rose and sank, so as to keep in the shade, and utterly unconscious of everything but the principles of common law.

Lincoln did not change this account in his corrected copy. New Salem resident Henry McHenry had told campaign biographer James Quay Howard in 1860 that Lincoln had been so absorbed in Blackstone that “people said he was crazy.”

Lincoln, as Robert A. Ferguson notes, was our “last Blackstone lawyer to lead the nation.” Blackstone’s *Commentaries* had a profound impact on Lincoln. Lincoln has been quoted as saying that he “never read anything which so profoundly interested and thrilled me” and “never in my whole life was my mind so thoroughly absorbed.” Blackstone was the only work that he recommended that he did not regularly cite in his law practice, although Henry C. Whitney recalls Lincoln’s riding the circuit with Blackstone’s *Commentaries* in his saddlebags along with volumes of Illinois statutes and session laws. While Lincoln’s heavy intellectual debt to Blackstone was typical of antebellum lawyers, he apparently did not

share the concerns of those lawyers sensitive to the differences between American and British principles of governance.

The *Commentaries* had one quality with particular significance for Lincoln: Blackstone presented an orderly system in a comprehensible manner. This quality stemmed from Blackstone’s intended audience. Blackstone’s *Commentaries*, as Frederick Ritso pointed out in 1815, “were not designed for students at law, but for students at the University; they were not addressed to professional but to unprofessional readers.”

Josiah Quincy, in an address at Harvard in 1832, declared that Blackstone represented the “first successful attempt to reduce the English law into an orderly system.” After Blackstone, “the law assumed the aspect of a well-defined science, which had its limits, its proportions, its divisions, its principles, its





Abraham Lincoln (1848)

objects, all arranged in an orderly method.”

Lincoln had decided against studying law in 1832 because he believed “he could not succeed at that without a better education.” Lincoln believed that his education was “defective.” Reading the *Commentaries* helped assure Lincoln that, despite his earlier insecurity about his inferior education, he could succeed as a lawyer. Moreover, Lincoln, whose “search for order was the defining characteristic of his adult life,” would have deeply appreciated Blackstone’s orderly system. Lincoln would still need Stuart’s encouragement before he could finally commit to the study of law.

### LINCOLN’S LAW LIBRARY

Lincoln, like most antebellum lawyers, came to the bar with minimal preparation. His early legal training and the rapid changes in antebellum law ensured that his legal education continued throughout his law career. Lincoln was called a “case lawyer” by lawyers who practiced alongside him. They seem to have intended a negative connotation. Lincoln, according to Herndon, “was in every respect a case lawyer, never cramming himself on any question till he had a case in which the question was involved.” Lincoln “never studied law books unless a case was on hand for consideration.” Although Lincoln advised would-be

lawyers to “still keep reading” after becoming licensed, Lincoln’s reading instead was directed toward the case before him. Ward Hill Lamon said Lincoln was a “case lawyer” because he based his arguments on analogous cases instead of grand legal principles. In the late nineteenth and early twentieth century, the term “case lawyer” became a criticism associated with the still controversial case method.

Lincoln’s approach to reading law books was typical for a lawyer. Herndon noted that “Lincoln never read much law, and never did I see him read a law book through,” completing the sentence by noting “and no one else ever did.” Lincoln’s approach can be seen in his actions that he took after he received New York bookseller John Livingston’s catalogue of law books. Lincoln kept the catalogue, which listed over 1,100 English and American treatises by subject, but he also wrote “[t]oo deep for me” on the outside of the envelope.

In any event, Lincoln needed to find legal authority. For some authority, he did not venture far or deep. John H. Littlefield, who studied in Lincoln’s law office in 1858, later recalled that the office contained about “200 volumes of law as well as miscellaneous books.” A drawing of Lincoln’s law office that appeared in 1860 shows several bookcases and books stacked on top of a small cabinet. Lincoln owned case reporters from Illinois and English courts, treatises, federal and state statute and session laws, digests, and formbooks. Lincoln also used books from the Illinois Supreme Court library.

When looking for case law, Lincoln was not confined to Illinois authority. While decisions from other jurisdictions were not technically binding, they could not be ignored. In one trial brief in a will contest, Lincoln cited twenty cases from eleven jurisdictions. In the *Illinois Central Railroad v. McLean County* appeal, Lincoln cited three Illinois cases, 16 decisions from 13 other state courts, and one United States Supreme Court opinion.

Lincoln also cited English case law. In 1847, J. G. Marvin noted that “[t]he absolute necessity to the American lawyer, of keeping up an acquaintance with the English decisions, is well understood.” Lincoln had some English reports in his office and had easy access to others.

Lincoln relied heavily on legal treatises in his law practice. Lincoln’s appellate cases attest to his frequent use of treatises. Lincoln cited 34 treatises in 39 trial and appellate cases. Twenty-eight authors were represented. Lincoln also owned treatises that do not show up in citations in his

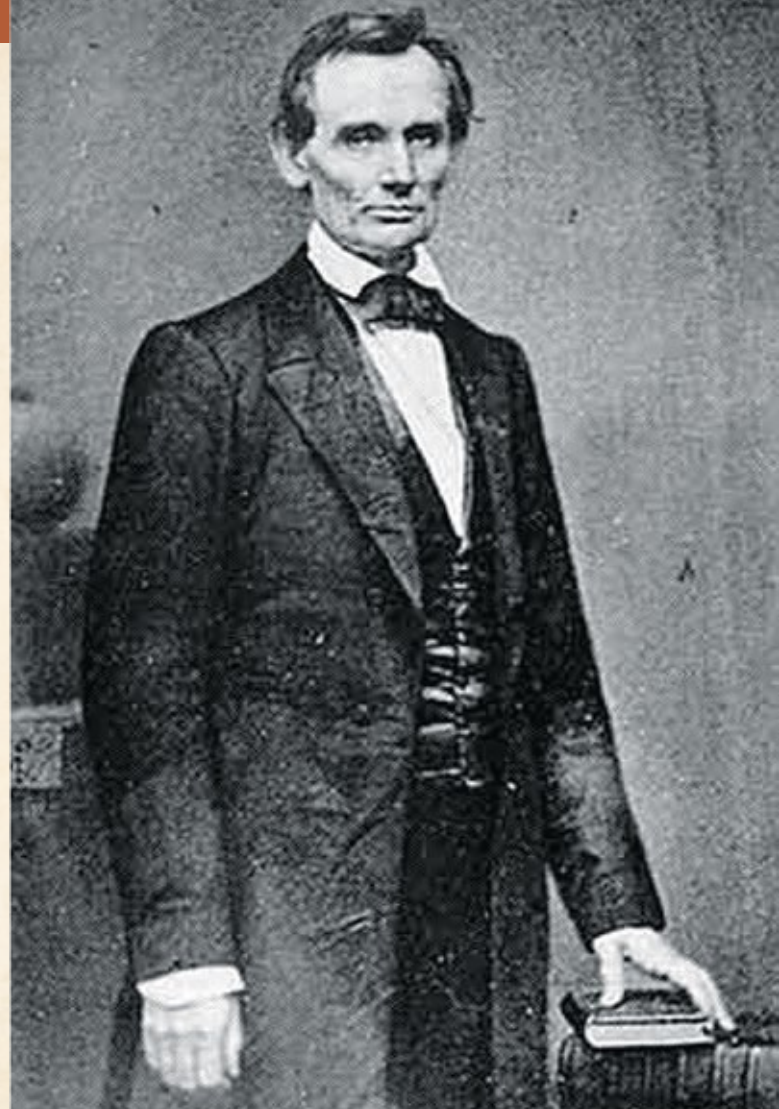


written pleadings or briefs or recorded in appellate decisions. Lincoln owned treatises on such substantive areas as criminal law, railroad law, landlord and tenant law, and common carriers.

Lincoln, like other antebellum lawyers, also relied on published digests of reported decisions. Digests provided concise summaries of the various points of law found in reported decisions. The summaries would be arranged under a system of classified headings. Norman L. Freeman, the author of the 1856 Illinois Digest, said that “[d]igests have become almost a necessary evil in the practising lawyer’s library.”

Lincoln often used and cited digests in appellate cases. His favorite was the United States Digest, which was the “first comprehensive American digest, covering both law and equity and both state and federal courts.” Lincoln used the United States Digest as both a case-finding tool and as a substitute for the reported cases. An 1851 letter shows how Lincoln relied on the digest. Lincoln in this letter discussed “the competency of a Stockholder to testify” in a stock subscription case. He cited two cases. He first gave his client a citation to a Pennsylvania case but admitted “this book is not here & I find a reference to it in the Suplt. U. S. Dig: Vol. 2 page 976. Sec. 405.” Lincoln was referring to the 1847 Supplement to the United States Digest. Lincoln next cited a Kentucky case, “7 Dana 99.” Lincoln also had found this case using the 1847 supplement. It was listed on the same page as the other case. Lincoln, however, had read this case; he reported that “[t]his case is full and plump; and is, perhaps, the only reported case, exactly in point.” Digests, like treatises, allowed a lawyer like Lincoln to wait “till he had a case in which the question was involved” to study the law.

Lincoln also relied upon formbooks, a practice he had begun before he became a lawyer. New Salem resident Abner Y. Ellis remembered that, before he became a lawyer, Lincoln “had an old form Book from which he used in writing Deeds, Wills & Letters when desired to do so by his friends and neighbours.” Among those early legal documents that Lincoln wrote for his neighbors are an 1832 bill of sale for the “right and title” to the New Salem ferry, an 1833 summons for a suit on a \$21.57 note, and three deeds written in 1833 or 1834. Formbooks such as Charles Gilman’s *Illinois Conveyancer* (1846) supplied labor-saving templates for simple transactions such as deeds.



Abraham Lincoln (1860). Matthew Brady

### “BUT HE WOULD STUDY OUT HIS CASE”

Lincoln learned to keenly analyze legal issues and then research those issues to find applicable precedents. He developed those skills during his partnership with Stephen T. Logan. Logan later recalled that “Lincoln’s knowledge of law was very small when I took him in.” Logan explained that:

I don’t think he studied very much. I think he learned his law more in the study of cases. He would work hard and learn all there was in a case he had in hand. He got to be a pretty good lawyer though his general knowledge of law was never very formidable. But he would study out his case and make about as much of it as anybody.

John H. Littlefield, who studied law in Lincoln & Herndon’s office, later described Lincoln studying out his cases: “Lincoln’s favorite position when unraveling some knotty law point was to stretch both of his legs at full length upon a chair in front of him. In this position, with books on the table near by and in his lap, he worked up his case.” Judge David Davis remembered how Lincoln



“was Slow to form his Opinions—he was deliberate.”

Lincoln was an excellent appellate lawyer, arguing hundreds of cases to the Illinois Supreme Court, where he developed sophisticated (and technical) legal arguments. He or his partners handled several thousand cases during his nearly 25-year career—and over 400 of those were appeals to the Illinois Supreme Court (in more than 160 of these Lincoln had been hired for the appeal). Before he was president, Lincoln was, at any rate, precedential. For example, in different cases, Lincoln argued both sides of an evidentiary matter: whether the relative wealth of the plaintiff and the defendant could be considered by the jury when it assessed compensatory and punitive damages.

Herndon thought Lincoln was a better appellate lawyer than trial lawyer: “He was greatest in my opinion as a lawyer in the Supreme Court of Illinois. There the cases were never hurried. The attorneys generally prepared their cases in the form of briefs, and the movements of the court and counsel were so slow that no one need be caught by surprise.” He took advantage of legal technicalities when he could, arguing that appellants had failed to follow the formal requirements of pleadings and appeal bonds in order to obtain dismissals.

## LINCOLN AS POLITICIAN AND PRESIDENT

Lincoln as a politician in Illinois in the 1850s reflected the research and analytical skills he had honed as a lawyer. Lincoln was incensed when the Kansas-Nebraska Act was passed by Congress in May 1854. But he did not say anything publicly until he had “studied out his case.” He spent “months of solitary reading and preparation” before he began giving speeches about the act. His criticism of the act was based upon history and precedent. When Lincoln directly responded to one of Douglas’s speeches, he used old speeches by Douglas to good effect, noting how Douglas had praised the Missouri Compromise as “a sacred thing, which no ruthless hand should attempt to disturb.” Similarly, Lincoln studied the Dred Scott opinion for two weeks in the Illinois Supreme Court library before giving his first public pronouncement about the decision. On the evening of the speech, he walked into the statehouse with “law books under his arm.” The research showed: Lincoln attacked the “assumed historical facts which are not really true” in the court’s opinion.

Lincoln took the same approach when he prepared

to give a major speech at Cooper Union in New York. Lincoln decided to give a talk about slavery, “citing the lessons and precedents of the American past.” Herndon noted that Lincoln “searched through the dusty volumes of congressional proceedings in the State library, and dug deeply into political history. He was painstaking and thorough in the study of his subject.” From his own library, Lincoln consulted Elliott’s *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Sanderson’s *Biography of the Signers to the Declaration of Independence*, and Story’s *Commentaries on the Constitution*. At the supreme court library, Lincoln studied *The Papers of James Madison*, *Debates in the Federal Convention of 1787*, the *Letters of George Washington*, the *Congressional Globe*, and the *Annals of Congress*. The finished product was a “combination of legal brief and history lesson.”

During the “secession winter” of 1860, journalist Henry Villard observed that Lincoln was “indefatigable in his efforts to arrive at the fullest comprehension of the present situation of public affairs and the most proper conclusions as to its probable consequences.” Lincoln’s “faithful researches” for precedents and authorities reflected his training as a lawyer and the results of his continuing legal education.

As president, Lincoln was suddenly required to understand a subject upon which he previously had given little thought: military strategy. Lincoln is widely perceived as an outstanding war president. Civil War historian T. Harry Williams, author of *Lincoln and His Generals*, called Lincoln “a great war president, probably the greatest in our history, and a great natural strategist.” But, as historian James M. McPherson has recently argued, Lincoln was not a natural strategist. Once again, Lincoln had mastered a subject through deep study. Lincoln’s private secretaries, John G. Nicolay and John Hay, recalled how Lincoln “gave himself, night and day, to the study of the military situation. He read a large number of strategical works. He pored over the reports from the various departments and districts of the field of war.” McPherson fittingly concludes that Lincoln “worked hard to master this subject, just as he had done to become a lawyer.” William Lee Miller in his recent study of President Lincoln concluded that Lincoln was not “intimidated by the arcana or mystique of military strategy. He did what he had done on other subjects all his life: he obtained the books and taught himself.” ■





Boden Lecture

# Brown v. Board of Education

Why was it a hard case and how did the decision matter?

Michael J. Klarman is the Kirkland & Ellis Professor at Harvard Law School. In September 2009, he delivered Marquette Law School’s annual Robert F. Boden Lecture. In this essay, prepared in conjunction with his visit to Marquette, Professor Klarman explores the topic of his Boden Lecture: some of the context, and aftermath, of *Brown v. Board of Education*.

## I. Why was *Brown* a hard case?

Most people today would be surprised to learn that *Brown v. Board of Education*, probably the most famous decision in the history of the U.S. Supreme Court, was a hard case for the justices. If state-mandated segregation of public schools is not unconstitutional, what is? The fact that the ruling in *Brown* was unanimous, moreover, suggests that the case was an easy one. Yet appearances can be deceptive. In fact, the justices were at first deeply divided over how to resolve *Brown*. Indeed, several of them were never fully convinced that they had found a sound legal basis for declaring segregation unconstitutional.

In a memorandum to the files that he dictated the day *Brown* was decided, Justice William O. Douglas observed,

In the original conference [in December 1952], there were only four who voted that segregation in the public schools was unconstitutional. Those four were Black, Burton, Minton, and myself. Vinson was of the opinion that the Plessy case was right and that segregation was constitutional. Reed followed the view of Vinson, and Clark was inclined that way.

Justices Frankfurter and Jackson, according to Douglas, “viewed the problem with great alarm

and thought that the Court should not decide the question if it was possible to avoid it.” Ultimately, however, both believed that “segregation in the public schools was probably constitutional.”

In Douglas’s estimation, in 1952 “the vote would [have been] five to four in favor of the constitutionality of segregation in the public schools.” Other justices who were counting heads reached roughly similar conclusions. In a letter written to Justice Stanley Reed just days after *Brown* was decided, Felix Frankfurter noted that he had “no doubt” that a vote taken in December 1952 would have invalidated segregation by five to four. The dissenters would have been Vinson, Reed, Jackson, and Clark, and the majority would have written “several opinions.”

*Brown* was hard for many of the justices because it posed a conflict between their legal views and their personal values. The sources of constitutional interpretation to which they ordinarily looked for guidance—text, original understanding, precedent, and custom—indicated that school segregation was permissible. By contrast, most of the justices privately condemned segregation, which Justice Hugo Black called “Hitler’s creed.” Their quandary was how to reconcile their legal and moral views.

Frankfurter’s preferred approach to adjudication required that he separate his personal views from the law. He preached that judges must decide cases based



upon “the compulsions of governing legal principles,” not “the idiosyncrasies of a merely personal judgment.” In a memorandum he wrote in 1940, Frankfurter noted that “[n]o duty of judges is more important nor more difficult to discharge than that of guarding against reading their personal and debatable opinions into the case.” Yet Frankfurter abhorred racial segregation, and his personal



School integration at Barnard School, Washington, D.C. Library of Congress Prints and Photographs Division, 1955.

behavior clearly demonstrated his egalitarian commitments. In the 1930s he had served on the National Legal Committee of the National Association for the Advancement of Colored People (NAACP), and in 1948

he had hired the Court’s first black law clerk, William Coleman. Nonetheless, he insisted that his personal views were of limited relevance to the legal question of whether segregation was constitutional. The Court could invalidate the practice, Frankfurter believed, only if it was legally as well as morally objectionable.

Yet Frankfurter had difficulty finding a compelling legal argument for striking down segregation. His law clerk, Alexander Bickel, spent a summer reading the legislative history of the Fourteenth Amendment, and he reported to Frankfurter that “it is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting.” Frankfurter was no doctrinaire originalist; he believed that the meaning of constitutional concepts can change over time. But this did not mean that judges were free to write their own moral views into the Constitution. Nor could Frankfurter maintain that evolving social standards, quite apart from the convictions of the justices, condemned segregation; in the early 1950s, 21 states and the District of Columbia still had mandatory or optional school segregation. Precedent also strongly supported the practice. Of 44 challenges to school segregation adjudicated by state appellate and lower federal courts between 1865 and 1935, not one had succeeded. Indeed, on the basis of legislative history and pre-

cedent, Frankfurter had to concede that “Plessy is right.”

*Brown* presented a similar dilemma for Robert H. Jackson, who also found segregation anathema. In a 1950 letter, Jackson, who had left the Court during the 1945–1946 term to prosecute Nazis at Nuremberg, wrote to a friend: “You and I have seen the terrible consequences of racial hatred in Germany. We can have no sympathy with racial conceits which underlie segregation policies.” Yet, like Frankfurter, Jackson thought that judges were obliged to separate their personal views from the law, and he was loathe to overrule precedent.

Jackson revealed his internal struggles in a draft concurring opinion that began: “Decision of these cases would be simple if our personal opinion that school segregation is morally, economically or politically indefensible made it legally so.” But because Jackson believed that judges must subordinate their personal preferences to the law, this consideration was irrelevant. When he turned to the question of whether “existing law condemn[s] segregation,” he had difficulty answering in the affirmative:

Layman as well as lawyer must query how it is that the Constitution this morning forbids what for three-quarters of a century it has tolerated or approved. He must further speculate as to how [we can justify] this reversal of its meaning by the branch of the Government supposed not to make new law but only to declare existing law and which has exactly the same constitutional materials that, so far as the states are concerned, have existed since 1868 and in the case of the District of Columbia since 1791. . . . Convenient as it would be to reach an opposite conclusion, I simply cannot find in the conventional material of constitutional interpretation any justification for saying that, in maintaining segregated schools, any state or the District of Columbia can be judicially decreed, up to the date of this decision, to have violated the Fourteenth Amendment.

Jackson hesitated to invalidate segregation for another reason as well. He had become skeptical of judicial supremacy, not only because he thought it was inconsistent with democracy, but also because he feared that it was a practical impossibility. Jackson worried that unenforceable judicial decrees bred public cynicism about courts. In a posthumously published book, he wrote: “When the Court has gone too far, it has provoked reactions which have set back the cause it was designed to

advance, and has sometimes called down upon itself severe rebuke.” As the justices deliberated in *Brown*, Jackson wondered if the Court was up to the task of transforming southern race relations. Litigants would quickly discover “that devices of delay are numerous and often successful.” Enforcement would require coercing “not merely individuals but the public itself.” Because a ruling against one school district would not bind any other, every instance of recalcitrance would necessitate separate litigation. Individual blacks would bear this burden; the Justice Department was unlikely to sue, and even if it wished to, Congress probably would not appropriate the necessary funds.

That the nine justices who initially considered *Brown* would be uneasy about invalidating segregation is unsurprising. All of them had been appointed by President Franklin D. Roosevelt or President Harry S. Truman on the assumption that they supported, as Jackson put it, “the doctrine on which the Roosevelt fight against the old court was based—in part, that it had expanded the Fourteenth Amendment to take an unjustified judicial control over social and economic affairs.” For most of their professional lives, these men had criticized untethered judicial activism as undemocratic—the invalidation of the popular will by unelected officeholders who were inscribing their social and economic biases onto the Constitution. This is how all nine of them understood the *Lochner* era, the period between 1905 and 1937, when the Court had invalidated minimum-wage, maximum-hour, and protective labor legislation on a thin constitutional basis. The question in *Brown*, as Jackson’s law clerk William H. Rehnquist noted, was whether invalidating school segregation would eliminate any distinction between this Court and its predecessor, except for “the kinds of litigants it favors and the kinds of special claims it protects.”

Thus, several justices wondered whether the Court was the right institution to forbid segregation. Several expressed views similar to Vinson’s: If segregation was to be condemned, “it would be better if [Congress] would act.” Justice Jackson lamented, “[I]f we have to decide the question, then representative government has failed.”

In the end, even the most conflicted justices voted to invalidate segregation. How were they able to overcome their ambivalence? All judicial decision-making involves extralegal or “political” considerations, such as the judges’ personal values, social mores, and external political pressure. But when the law—as reflected in text, original understanding, precedent, and custom—

is clear, judges will generally follow it. And in 1954 the law—as understood by most of the justices—was reasonably clear: Segregation was constitutional. For the justices to reject a result so clearly indicated by the conventional legal sources suggests that they had very strong personal preferences to the contrary.

And so they did. Although the Court had unanimously and casually endorsed public school segregation as recently as 1927, by the early 1950s the views of most of the justices reflected the dramatic popular changes in racial attitudes and practices that had resulted from World War II. The ideology of the war was antifascist and prodemocratic, and the contribution of African-American soldiers was undeniable. Upon their return to the South, thousands of black veterans tried to vote, many expressing the view of one such veteran that “after having been overseas fighting for democracy, I thought that when we got back here we should enjoy a little of it.” Thousands more joined the NAACP, and many became civil rights litigants.

Two other developments in the 1940s also fueled African-American progress. Over the course of the decade, more than one and a half million southern blacks, pushed by changes in southern agriculture and pulled by wartime industrial demand, migrated to northern cities. This mass relocation—from a region in which blacks were nearly universally disenfranchised to one in which they could vote nearly without restriction—greatly enhanced their political power; indeed, they became a key swing constituency in the North. Other blacks migrated from farms to cities within the South, facilitating the creation of a black middle class that had the inclination, capacity, and opportunity to engage in coordinated social protest.

The onset of the Cold War in the late 1940s created another impetus for racial reform. In the ideological contest with communism, American democracy was on trial, and southern white supremacy was its greatest vulnerability. As the Justice Department’s brief in *Brown* argued, “Racial discrimination furnishes grist for the Communist propaganda mills.” After *Brown*, supporters of the decision boasted that America’s leadership of the free world “now rests on a firmer basis” and that American democracy had been “vindicated . . . in the eyes of the world.”

By the early 1950s, such forces had produced concrete racial reforms. In 1947, Jackie Robinson desegregated major league baseball. In 1948, President Truman issued executive orders desegregating the federal military and civil service. In 1950, Ralph Bunche became



the first black man to win a Nobel Peace Prize. Dramatic changes in racial practices were occurring even in the South. Black voter registration there increased from 3 percent in 1940 to 20 percent in 1950. Dozens of urban police forces in the South hired their first black officers, and blacks began serving again on southern juries, often for the first time since Reconstruction. Minor-league baseball teams, even in such places as Montgomery and Birmingham, Alabama, signed their first black players. Most southern states peacefully desegregated their graduate and professional schools under court order.

As they deliberated over *Brown*, the justices expressed astonishment at the extent of the recent changes. Frankfurter noted “the great changes in the relations between white and colored people since the first World War” and remarked that “the pace of progress has sur-

prised even those most eager in its promotion.” Jackson may have gone farthest, citing black advancement as a constitutional justification for eliminating segregation. In his draft opinion he wrote that segregation “has outlived whatever justification it may have had . . . Negro progress under segregation has been spectacular and, tested by the pace of history, his rise is one of the swiftest and most dramatic advances in the annals of man.”

It was these sorts of changes that made *Brown* possible. Frankfurter later conceded that he would have voted to uphold public school segregation in the 1940s because “public opinion had not then crystallized against it.” The justices in *Brown* did not think that they were creating a movement for racial reform; they understood that they were working with, not against, historical forces.

## II. How did *Brown* matter?

If *Brown* did not create the civil rights movement that swept the nation in the 1950s and 1960s, what were its contributions to that movement? There were several. *Brown* dramatically increased the salience of the segregation issue, forcing many people to take a position for the first time. The decision was also hugely symbolic to African Americans, many of whom regarded it as the greatest victory for their race since the Emancipation Proclamation. One black leader called *Brown* “a majestic break in the dark clouds,” and another later recalled that blacks “literally got out and danced in the streets.” *Brown* also inspired southern blacks to file petitions and lawsuits challenging school segregation, even in areas of the Deep South where such bold tactics would otherwise have been inconceivable.

But *Brown* may have mattered most in a way that has not been sufficiently appreciated. By the early 1960s, a powerful direct-action protest movement—sit-ins, freedom rides, and street demonstrations—had exploded in the South. While *Brown*’s role in sparking such activity has been much debated, several things are clear. When law enforcement officers responded to these demonstrations with restraint, media attention quickly waned, and the protests failed to achieve their objectives. That is how Sheriff Laurie Pritchett minimized the effect of mass demonstrations in Albany, Georgia, in 1961–1962; Mississippi officials defused the Freedom Rides in a similar manner in the summer of 1961. However, when southern sheriffs used beatings, police dogs, and fire hoses to suppress protestors, media attention escalated, and northerners reacted with horror and outrage. Brutal assaults on peaceful demonstrators by southern law enforcement officers transformed northern opinion and enabled the passage of landmark civil rights legislation.

*Brown* contributed to this violence by ensuring that when direct-action protests came to the South, politicians such as Bull Connor and George Wallace were

there to meet them. It did so by inflaming racial tensions and reversing what had been steady black progress in the region. With the threat of school desegregation lurking in the background, whites in the Deep South suddenly found black voting intolerable, and dramatic postwar expansions of black suffrage in Mississippi, Alabama, and Louisiana were halted and then reversed. *Brown* likewise retarded university desegregation, which had been proceeding fairly smoothly after *Sweatt v. Painter* in 1950, and the nascent integration of minor league baseball and college athletics.

In the wake of *Brown*, white southerners made clear—in both word and deed—that they were willing to go to violent lengths to maintain white supremacy and resist desegregation. After years of quiescence, the Ku Klux Klan (KKK) reappeared in such states as South Carolina, Florida, and Alabama; a Klan leader reported that *Brown* created “a situation loaded with dynamite” and “really gave us a push.” Now that the justices had “abolished the Mason-Dixon line,” Klansmen vowed “to establish the Smith and Wesson line.” Even citizens’ councils, organizations committed to preserving segrega-



The court that decided *Brown*. Front row, left to right: Felix Frankfurter (1939–1962), Hugo Black (1937–1971), Chief Justice Earl Warren (1953–1969), Stanley F. Reed (1938–1957), William O. Douglas (1939–1975). Back row, left to right: Tom C. Clark (1949–1967), Robert H. Jackson (1941–1954), Harold H. Burton (1945–1958), Sherman Minton (1949–1956).

attend Ole Miss, attributed the assassination of the NAACP's Mississippi field secretary, Medgar Evers, to "governors of the Southern states and their defiant and provocative actions." One Tennessee lawyer blamed violence related to school desegregation on congressmen who had signed the Southern

Manifesto, which assailed *Brown* as a "clear abuse of judicial power" and pledged all "lawful means" of resistance: "What the hell do you expect these people to do when they have 90 some odd congressmen from the South signing a piece of paper that says you're a southern hero if you defy the Supreme Court?"

tion while ostensibly eschewing the violent tactics of the Klan, took a militant stance. A Dallas minister told a large citizens' council rally that if public officials would not block integration, plenty of people were prepared "to shed blood if necessary to stop this work of Satan." A handbill circulated at a similar rally in Montgomery declared that, "[w]hen in the course of human events it becomes necessary to abolish the Negro race, proper methods should be used," including guns and knives.

The link between extremist politicians and violence is certainly plausible, but the causal connection between particular public officials and the brutality that inspired civil rights legislation is downright compelling. Two of the most prominent examples are T. Eugene ("Bull") Connor, the police commissioner of Birmingham, and George Wallace, the governor of Alabama. The violence that they at best condoned and at worst actively fomented proved critical to transforming national opinion on race and the segregation issue.

In the mid-1950s, political contests in southern states assumed a common pattern: Candidates sought to show that they were the most "blatantly and uncompromisingly prepared to cling to segregation at all costs." As "moderation" became a term of derision, the political center collapsed, and moderate critics of massive resistance were labeled "double crossers," "sugar-coated integrationists," "cowards," and "traitors." Previously moderate lawmakers either joined the segregationist bandwagon or were unceremoniously retired from service.

Connor had first been elected to the Birmingham City Commission in 1937, when he pledged to crush the communist/integrationist threat posed by the unionization efforts of the Congress of Industrial Organizations. By 1950, however, civic leaders had come to regard Connor as a liability because of his extremism and frequently brutal treatment of blacks, and they orchestrated his public humiliation through an illicit sexual encounter. Connor retired from politics in 1953, and signs of a racial detente in Birmingham—including the establishment of the first hospital for blacks, the desegregation of elevators in downtown office buildings, and serious efforts to integrate the police force—quickly followed.

Most southern politicians prudently avoided explicit exhortations to violence, and many affirmatively discouraged it. Still, their extremist rhetoric sounded very like a call to arms and probably encouraged the use of force. Governor Marvin Griffin of Georgia condemned violence but insisted that "no true Southerner feels morally obliged to recognize the legality" of *Brown*, which he called an "act of tyranny." Congressman James Davis of Georgia insisted that "[t]here is no place for violence or lawless acts"—but only after calling *Brown* "a monumental fraud which is shocking, outrageous, and reprehensible" and denying any obligation "to bow the neck to this new form of tyranny."

In the end, whether such political demagoguery actually produced violence mattered less than the carefully cultivated perception that it did so. African-American leaders and the NAACP constantly asserted such a linkage. James Meredith, the first black man to

tion in 1961, Connor offered the KKK fifteen minutes of “open season” on the Freedom Riders, as they rolled into town. After horrific beatings had been administered to media representatives as well as demonstrators, the *Birmingham News* wondered, “Where were the police?” City voters, who had handed Connor a landslide victory just two weeks earlier, were probably less curious.

In 1963, the Southern Christian Leadership Conference (SCLC), after the failed demonstrations in Albany, Georgia, sought a city with a police chief unlikely to duplicate Laurie Pritchett’s restraint. They selected Birmingham, in part because of Connor’s treatment of the Freedom Riders two years earlier. Martin Luther King, Jr.’s lieutenant, Wyatt Walker, later explained: “We knew that when we came to Birmingham that if Bull Connor was still in control, he would do something to benefit our movement.”

The strategy worked brilliantly. Connor eventually unleashed police dogs and fire hoses on the unresisting demonstrators, many of whom were children. Television and newspapers featured images of breathtaking savagery, including one that President John F. Kennedy reported made him “sick.” Editorials condemned the violence as “a national disgrace.” Citizens voiced their “sense of unutterable outrage and shame” and demanded that politicians take “action to immediately put to an end the barbarism and savagery in Birmingham.” Within 10 weeks, spinoff demonstrations had spread to more than one hundred cities.

Televised brutality against peaceful civil rights demonstrators in Birmingham dramatically altered northern opinion on race, and it led directly to the passage of the 1964 Civil Rights Act. Opinion polls revealed that the percentage of Americans who deemed civil rights the nation’s most urgent issue rose from 4 percent before Birmingham to 52 percent after. Members of Congress denounced the Birmingham violence and, in the same breath, introduced measures to end federal aid to segregated schools. Only after the police dogs and fire hoses of Birmingham did President Kennedy announce on national television that civil rights was a “moral issue as old as the scriptures and as clear as the American Constitution.”

Like Bull Connor, Alabama’s governor, George Wallace, was also an unwitting agent of racial progress. Perhaps more than any other individual, Wallace personified the effect of *Brown* on southern politics. Early in his postwar political career, Wallace had been criticized as being “soft” on segregation. In the mid-1950s,

however, sensing the changing political winds, he broke with the racially moderate governor, James Folsom, and cultivated conflict with federal authorities over racial issues in his position as Barbour County circuit judge.

But he had not gone far enough. In 1958, Wallace’s principal opponent in the Alabama governor’s race was Attorney General John Patterson, who bragged of shutting down NAACP operations in the state—and who received the Klan’s endorsement. Wallace became the candidate of moderation in comparison, and Patterson won easily, leaving Wallace to ruminate that “they out-niggered me that time, but they will never do it again.” He made good on that vow in 1962, winning on a campaign promise of defying federal integration orders. In his inaugural address, he declared, “In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny and I say segregation now, segregation tomorrow, segregation forever.”

Like most southern politicians, Wallace publicly condemned violence. Yet his actions encouraged the brutality that helped transform national opinion on race. In the summer of 1963, Wallace fulfilled his campaign pledge by temporarily blocking the entrance to the University of Alabama to prevent the matriculation of two black students. That September, Wallace used state troops to block the court-ordered desegregation of public schools in Birmingham, Mobile, and Tuskegee. He also encouraged extremist groups to wage “a boisterous campaign” against desegregation, and he defended rioters, who he insisted were “not thugs—they are good working people who get mad when they see something like this happen.”

Threatened with contempt citations by all five Alabama federal district judges, Wallace eventually relented. The schools desegregated, but within a week



Civil Rights March on Washington. U.S. National Archives, 1963.



tragedy had struck. Birmingham Klansmen, possibly inspired by such gubernatorial proclamations as “I can’t fight federal bayonets with my bare hands,” dynamited the Sixteenth Street Baptist Church, killing four black schoolgirls. Within hours of the bombing on September 15, 1963, two other black teenagers had been killed, one by white hoodlums and the other by police. It was the largest death toll of the civil rights era, and Wallace’s role did not go unnoticed. Martin Luther King, Jr., publicly blamed the Alabama governor for “creat[ing] the climate that made it possible for someone to plant that bomb.” President Kennedy, noting “a deep sense of outrage and grief,” thought it “regrettable that public disparagement of law and order has encouraged violence which has fallen on the innocent.” Wallace may not have sought the violence, but his provocative rhetoric probably contributed to it, and he certainly took no measures to prevent it.

Most of the nation was appalled by the murder of innocent schoolchildren. One week after the bombing, tens of thousands of Americans participated in memorial services and marches. Northern whites wrote to the NAACP to join, to condemn, and to apologize. A white lawyer from Los Angeles wrote that “[t]oday I am joining the NAACP, partly, I think, as a kind of apology for being Caucasian.” Another northerner condemned whites who were complicit in the bombing as “the worst barbarians” and she was “ashamed to think that I bear their color skin.” A white youngster from New Rochelle, New York wrote: “How shall I start? Perhaps to say that I am white, sorry, ashamed, and guilty. . . . Those who have said that all whites who, through hatred, intolerance, or just inaction are guilty are right.” The NAACP urged its members to “flood Congress with letters in support of necessary civil rights legislation to curb such outrages,” and many of them did.

Despite such growing outrage, Wallace remained enormously popular with his constituents, and he continued to rail against the “shocking” pronouncements of federal “judicial tyrant[s]” and to urge local authorities to resist desegregation. His persistence helped ensure that Alabama would once again provide the setting for events that would shock moderate Americans into action. Early in 1965, the SCLC brought its voter registration campaign to Selma, Alabama, in search of another Birmingham-style victory. King and his colleagues were drawn to the site partly by a law enforcement officer of Bull Connor-like proclivities—Dallas County Sheriff Jim Clark.

Clark played his role to perfection, and the result was another resounding success for the civil rights

movement. The violence culminated in Bloody Sunday, March 7, 1965, when county and state law enforcement officers viciously assaulted marchers as they crossed the Edmund Pettus Bridge on their way to Montgomery. Governor Wallace had promised that the march would be broken up by “whatever measures are necessary,” and Colonel Al Lingo, Wallace’s chief law enforcement lieutenant, insisted that the governor himself had given the order to attack. That evening, ABC television interrupted its broadcast of *Judgment at Nuremberg* for a lengthy and vivid report of peaceful demonstrators being assailed by stampeding horses, flailing clubs, and tear gas. Two white volunteers from the North were among those killed in the events surrounding Selma.

The nation was repulsed by the ghastly televised scenes. *Time* reported that “[r]arely in history has public opinion reacted so spontaneously and with such fury.” President Lyndon Baines Johnson “deplored the brutality.” Huge sympathy demonstrations took place across the country. Americans demanded remedial action from their congressmen, scores of whom condemned the “deplorable” violence and the “shameful display” in Selma and now endorsed voting rights legislation. On March 15, 1965, President Johnson proposed such legislation in a televised speech before a joint session of Congress. Seventy million Americans watched as the president beseeched them to “overcome this crippling legacy of bigotry and injustice” and declared his faith that “we shall overcome.”

Before the violent outbreaks of the 1960s, most white northerners had agreed with *Brown* in the abstract, but they were disinclined to push for its enforcement. Indeed, many agreed with President Dwight D. Eisenhower that the NAACP should rein in its demands for immediate desegregation. But televised scenes of officially sanctioned brutality against peaceful black demonstrators by white law enforcement officers in the South horrified the vast majority of Americans; it brought an end to the apathy and led directly to the passage of landmark civil rights legislation. *Brown* was less directly responsible than is commonly supposed for putting those demonstrators on the street, but it was more directly responsible for their violent reception. *Brown* fanned the flames of southern fanaticism and propelled extremist, vitriolic politicians into positions of power. Those politicians in turn ensured a situation ripe for the violence that northerners found unconscionable. By helping lay bare the violence at the core of white supremacy, *Brown* accelerated its demise. ■

## Hallows Lecture

# The Role of Imaginative Justice

The Hon. Sarah Evans Barker, United States District Judge for the Southern District of Indiana and one of the nation's most highly regarded federal district judges, gave the 2009 Hallows Lecture at Marquette University Law School. In the lecture, "Beyond Decisional Templates: The Role of Imaginative Justice in the Trial Court," she presented her thoughts on a 2008 book, *How Judges Think*, by the Hon. Richard Posner of the United States Court of Appeals for the Seventh Circuit. In the book, Posner suggests that there are instances when deciding a case in the best manner requires a judge to do "something more" than what is conventional. Judge Posner refers to those cases as falling in "open spaces" in the law. The full text of Judge Barker's lecture can be found at 92 Marq. L. Rev. 667. This is an excerpt.

So this is what I would like to help you see more clearly: the amount of strategic discretion vested in trial judges, which translates into opportunities for them to use their judicial imaginations, is very extensive. In fact, in exercising—perhaps I should say, in enacting—that imagination, what trial court judges are able to do vastly exceeds the creative opportunities available to appellate judges. The flexibility allowed appellate judges is primarily in the form of decisional discretion, by which appellate judges are able to give broad play to their intellectual and analytical capacities. Appellate activism typically receives much closer scrutiny and generates more disapproval by the public and the media as well as the legal academy than does the less visible, strategic discretion entrusted to trial judges. But in truth, discretion and power are hardly less significant or influential or creative when applied by "the lower courts." In fact, it might be said that it is in these "lower courts" that the most interesting and most creative, indeed, the most imaginative activity actually occurs.

I should emphasize this: for judges, operating within this decisional space is absolutely, clearly, the exception and not the rule. Most cases filed in the trial courts, as well as the appellate courts, are routine squabbles for which the routine analytical and decisional approaches work just fine. The facts underlying each dispute are developed and stabilized, the appropriate procedural steps are followed, the controlling precedents are articulated and applied, and decisions are rendered. This tried-and-true approach is appropriately applied in most cases and most situations confronting the trial court judge, and, frankly, there are simply too many cases on our respective dockets to give anything other

than routine attention to most of them.

So where and how does the need for this "something more" present itself? Judges are called upon to use their imaginations primarily in the nonroutine situations where there is a strong need to devise solutions that more



closely respond, first, to the real nature of the problems the parties have placed before them and, second, to the real goals that brought the parties to court. These are typically cases in which the law is either too limited in its reach or doesn't match the need for a solution. And the underlying catch-22, of course, lies in the nature of courts as opposed to the nature of legislative bodies. The legislature can refuse to act: it's too hard and too complicated, they can say; when they don't have the votes, they can say, "Come back again in ten years, if you're still alive." But the courts can't take a pass: if a judge refuses to resolve a case, no matter the incomplete state of the applicable law, it's time for disciplinary action against the judge. . . .

[T]here is a vast array of circumstances in which trial judges must problem solve where the only resources they have to draw upon are their own sense of judicial discretion and their own judicial creativity. The usual guides—statutes, precedents, regulations, the Constitution, even well-established common-law principles—are missing in action. The judge appears



to be standing out there on some hill all alone, surrounded by the fog and din of battle, doing the best he or she can under the circumstances.

But here is the point I want to make: standing alone does not mean standing alone and free. Even when the trial judge acts in the “open area,” there are true constraints on her decisional powers. When the usual or traditional guy wires disappear from the process, that does not mean that the judge floats off into outer space. Like astronauts performing their space walks far beyond earth’s gravitational pull, judges, too, remain tethered to the mother ship if they hope to survive the experience. The notion that there is some area of complete decisional freedom where judges are permitted to act out their libertine subjective preferences is a silly and uninformed illusion.

So what are the constraints on trial judges when they exercise these discretionary powers? Certainly, the most important one is the rule of law, which provides the fundamental backdrop. This is, after all, a legal process, not political science or sociology or even

economics (I say with particular deference to Judge Posner). The trial judge’s actions have to conform to the rule of law but also have to pass muster with the parties and the public and the appellate panels. I would put these latter requirements loosely in a category called “cultural restraints.”

Besides cultural restraints, there are also important practical parameters: the actions taken by a judge have to be enforceable—they have to work, to be realistic and within the reach of the court’s actual powers. The people on the receiving end of the court’s orders have to know precisely what they are being required to do, and if they don’t do it voluntarily, the trial judge has to be able to make them do it, often with the help of the United States Marshal. Finally, not only do the exercises of discretion and imagination in the trial court have to be legal, practical, and within cultural norms, they have to stay within the four corners of the case before the court—they have to be about the particular problems the court is being asked to solve. . . . ■

## Nies Lecture

# The Copyright Act of 2026

The annual Helen Wilson Nies Lecture on intellectual property law was recently delivered by Jessica Litman, the John F. Nickoll Professor of Law and Professor of Information at the University of Michigan. Professor Litman’s Nies Lecture was entitled “The Copyright Act of 2026.” The full text, including footnotes, appears at 13 Marq. Intell. Prop. L. Rev. 249. This excerpt begins after Professor Litman has posited that the goals of copyright should be to nurture the creation, dissemination, and enjoyment of works of authorship.

Those are general goals that should shape the way that copyright law rewards creativity and investment in creative endeavors. I find it easy to imagine a variety of different new copyright laws that would meet those goals. Every few years, I ask all my copyright students to try to write one, and they’ve come up with very useful and very different ways of doing it.

When copyright lawyers and copyright scholars sit down at real tables in real conference rooms and try to talk about reforming the copyright law, though, everything is much more difficult. Copyright scholars have, by and large, no constituency and no political

clout, so folks are going to listen to us only if they feel we have something worthwhile to say. Recently, as I’ve said, the view of much of the copyright bar is that we don’t. Indeed, I’ll go further, and say that at least some highly respected copyright lawyers have



suggested that copyright scholars advance dangerous and misleading views of the law that, if taken seriously, could undermine the integrity of the entire copyright system. The copyright lawyers I've been talking with represent clients, some of whom do have some political clout. Because they have clients, of course, they've got good reasons to try to retain any advantages they believe they get from the law on the books while getting rid of the disadvantages. For some of them, the prospect of copyright reform is a way to both cement their most heroic (by which I mean least plausible) victories and reverse their unanticipated defeats. Since we have lawyers on both sides of those cases, we can throw the idea of a short law right out the window. The history of past revision efforts is a protracted negotiation in which everyone ultimately agrees to ratify the general concept of their historic victories while negating their application to the specific facts that generated the lawsuits. Doing that for lots of controversial cases can generate a very long, complicated law that doesn't seem to make a lot of policy sense.

That's why I'm not optimistic. The trouble with the laws that come out of a process like that is that, in the long run, they aren't good for anyone. They undermine the public's sense that copyright law is legitimate and worth upholding.

So, I'd like to challenge you to a thought experiment. I assume that my assertion about the purpose of copyright is uncontroversial. I'll repeat it: We want the copyright system to nurture the creation, dissemination, and enjoyment of works of authorship. When it works well, it should encourage creators to make new works; assist distributors in disseminating them widely; and support readers, listeners, and viewers in enjoying them. We may individually disagree on which of the three interests should prevail in the event of a conflict. We may have different ideas about how one gets there from

here. We may differ about, if there are extra statutory goodies to spread around, which interest has the strongest entitlement to be given them. We would all agree, though, that the current law leaves some things to be desired in how it accomplishes these three goals.

Rather than looking at copyright reform as an avenue to nail some things down and pry other things up, I suggest looking at it as an opportunity to rethink the subject entirely. If this statutory revision is like the last

couple, it will consume a bunch of years. That's going to be a substantial chunk of your professional lives. Instead of nibbling around the edges, let's imagine that everything is up for grabs. It won't be, but thinking about it as if it is will help each of us figure out what is important to rethink and what we can get away with merely remodeling.

If we were writing on a blank slate, how could we craft a law that would meet those goals? Forget, for the moment, everything you know about copyright law. Forget the six exclusive rights, the exclusions and

exemptions, the compulsory licenses, and the four fair use factors. Could you write a statute that is better for authors, distributors, readers, listeners, and viewers than the one we have now? Of course you could. What would it look like?

The first objection I expect to hear to this thought experiment is that we have treaty obligations that constrain us when we think about redesigning the copyright law. They constrain us less, though, if we don't assume that the current barnacle-encrusted design of the law is a given: It is okay under both the Berne Convention and TRIPS, for example, for us to redesign the law so that we move power and control away from distributors and toward authors. Imagine, for example, a real termination right that allowed authors to terminate any transfer at any time after 10 years had elapsed from the date of the grant. People might raise all sorts of objections to that proposal on a lot of policy grounds,





but it would go a part of the way toward shifting the copyright balance from distributors to creators, and it would be fine under Berne and TRIPS. Indeed, we can go much farther than that: We could offer authors meaningful attribution and integrity rights. That's not only fine under Berne and TRIPS, Berne requires it. We're in breach of our treaty obligations because we promised we would do that and failed to follow up. Similarly, a host of private copying exclusions appear to be Berne—and TRIPS—compliant. A variety of different reformulations of the exclusive rights would pass muster under Berne and TRIPS.

This is to say that our treaty obligations leave us a fair amount of room. More importantly, though, the kinds of incentives that made sense in the 19th or even the 20th

century may not make sense in the 21st. If we figure out something that would work better than the current model of copyright law, and we figure out why, then from there we can try to sort out whether we can fit it within our treaty obligations or whether it's worthwhile to seek to vary the terms of the relevant treaties.

Besides, it's just a thought experiment. If everyone in the room went home and wrote down a draft statute, none of those bills would end up being enacted as The Copyright Revision Act of 2026. It seems entirely possible, though, that if we all indulge in this thought experiment or ones like it, the conversations we are doomed to have about copyright reform over the next eighteen or so years will be more civil, more interesting, and more useful. ■

## Intellectual Property Law Review

### A Lesson from Swamp Rock

Mary Jane Saunders, general counsel to the Subway Franchisee Advertising Fund Trust Ltd., spoke to the *Marquette Intellectual Property Law Review* banquet last year. Her speech recounted three Supreme Court decisions involving intellectual-property law and can be found in full at 13 Marq. Intell. Prop. L. Rev. 451. This is an excerpt from her remarks.

**F**ogerty *v. Fantasy, Inc.* is a case that I have used to great advantage. John Fogerty was the lead guitarist and chief lyricist for Creedence Clearwater Revival, the group that brought you many timeless rock-and-roll classics, including *Proud Mary*, *Born on the Bayou*, *Have You Ever Seen the Rain?*, and *Bad Moon Rising*.

The Fogerty case is about my all-time favorite Creedence song—a little swamp rock ditty called *Run Through the Jungle*, which Fogerty wrote in 1970. Many people think that this song is about the Vietnam War and the extreme emotion nine years of the United States' active combat brought to this country, but Fogerty has said that the song is actually about gun control. He thought that Americans were simply too gun-happy.

I would describe *Run Through the Jungle* as a litigation-happy song. Creedence Clearwater Revival broke up in 1972 because the other members did not think Fogerty was giving them enough voice as artists and was cutting them out of financial decisions. He was apparently a bit of a control freak. After the band broke up, Fogerty got into a bunch of contract disputes with Fantasy, the band's record label. To settle the disputes and get out from under his contract obligations, Fogerty assigned his publishing and distribution rights to Fantasy. ▶▶



Then in 1984, 14 years after he wrote *Run Through the Jungle*, Fogerty wrote a new song called *The Old Man Down the Road*. Fantasy Records thought that the song sounded too much like *Run Through the Jungle* because it was a swamp rock song, so it sued Fogerty for copyright infringement.

Fogerty won the copyright case. The trial judge found that an artist simply could not plagiarize himself. You would think that would end things, but here is where the case got really interesting. After winning, Fogerty tried to get his attorney fees and costs. At that time, prevailing plaintiffs tended to get their fees awarded as a matter of course, but with Fogerty, the trial court and then the Ninth Circuit said that prevailing defendants could not get their fees unless they showed that the original claim was frivolous or made in bad faith.

Fogerty ultimately appealed the case to the Supreme Court, obviously not on the copying issue, but rather on the question of his demand for an award of attorney's fees. The Supreme Court agreed with Fogerty that there should not be a dual standard for prevailing plaintiffs and prevailing defendants. After all, the Copyright Act says that a court "may . . . award a reasonable attorney's fee to the prevailing party as part of the costs."

Of course, the Copyright Act says that a court "may" award attorney's fees. There is no automatic award when you prevail. How does a court decide? The Supreme Court said that courts are supposed to exercise "equitable discretion."

Now, what happened with Fogerty? On remand, the district court gave him an award of \$1.3 million in fees. The court based its award on several factors. First, Fogerty prevailed with respect to his copyright in *The Old Man Down the Road*, which the Court said secured the public's access to an original work of authorship and paved the way for future original compositions—by Fogerty and others—in the same distinctive swamp rock style and genre. The district court also reasoned that while Fantasy litigated in good faith, Fogerty's defense was the type of defense that furthers the purposes underlying the Copyright Act and therefore should be encouraged through a fee award.



Further, the district court found that a fee award was appropriate to help restore to Fogerty some of the lost value of *The Old Man Down the Road* copyright that he was forced to defend.

Did Fantasy Records just pay up? No. It appealed. Fantasy argued that the district court abused its discretion in awarding fees to Fogerty because Fantasy was "blameless" in pursuing a "good faith" and "faultless" lawsuit.

Luckily, the Ninth Circuit agreed with Fogerty this time around. The court found that the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement. It affirmed the award of fees and went one step further by remanding the case back to the district court so that the district court could give Fogerty another fee award—his fees for defending Fantasy's appeal.

During the course of my career, I have represented copyright owners who have had their rights cruelly and unfairly stolen by unscrupulous copyists and infringers. I have also represented honest, hard-working business people who have been maliciously and unfairly accused of stealing someone else's intellectual property simply because they put out a competitive product.

What the plaintiffs and the defendants have in common is that they all need lawyers and all lawyers cost money. Just citing the *Fogerty* decision can sometimes keep your clients out of court. It may inspire a defendant to settle or it may dissuade a plaintiff from bringing a questionable case. All plaintiffs mention attorney's fees in their cease-and-desist letters, but few of them remember that they might end up paying the defendant's fees if they lose. ■



## Commencement Speech

# Using Your Law School Education

Allan (Bud) Selig, commissioner of Major League Baseball, spoke at the Law School's 2009 commencement ceremony. This is an excerpt from his remarks.

I am a native of Milwaukee, and I am very familiar with this wonderful university and the outstanding reputation of Marquette University Law School. I have also had the opportunity to teach here this past semester, which I enjoyed immensely. Although I never attended law school, my friends will tell you that I have practiced law without a license for more than 40 years. I also have one very important and personal connection with Marquette Law School. My daughter, Wendy, is a graduate, and it has served her very well throughout her career, both in and out of baseball.

The importance of an education was impressed upon me at an early age. My mother, Marie, was a teacher, and she believed that a good and proper education was essential to a successful life. That has never been truer than it is today.

Your education and your years here at the Marquette University Law School have prepared you with the knowledge, skills, character, and strength to confront the future with hope and faith. Your legal education will open many doors and provide opportunities far beyond the traditional practice of law. The role of the law and lawyers in professional sports provides an excellent example of these opportunities.



Virtually every aspect of professional sports involves the law or legal issues. Antitrust laws are applied to franchise relocations and other internal governance matters; intellectual property laws are crucial to our business pursuits; and labor laws regulate the relationship between management and players on a daily basis and imbue every aspect of being a commissioner. My frustration at being unable unilaterally to impose rules on myriad subjects—whether the amateur draft, salary restraints, or performance-enhancing substances—because of the need to negotiate changes under the collective bargaining agreement between us and the union has been well documented. Whether the labor laws were designed to protect multimillion-dollar athletes is a subject well worth discussion, but the fact remains that the labor laws of our country have a profound impact on our sport, and every professional sport.

A legal education also helps develop important skills that can create career opportunities. Your professors at Marquette have taught you to write clearly, speak persuasively, and negotiate skillfully. Skills like these have helped me address a unique dynamic in professional sports. Teams must be bitter competitors on the field of play—after all, what we sell is the integrity of our competition—but they must be partners off the field, or the sport cannot be operated, let alone thrive. When teams put their own interests above the collective good, the league as a whole suffers. That is where we found ourselves when I became commissioner, and it took a decade to get the clubs to recognize that as the entire sport grew, so would individual franchises. We have come through a time of extraordinary growth and competitive balance, with eight different teams winning the last nine World Series, and more than half of the teams in the game making the playoffs over the past two years. That took years of negotiating, cajoling, compromising, and incorporating these positive changes into our governing documents. Young lawyers like you are uniquely positioned to develop the kinds of skills that can help create this type of change. ■

## Public Service Conference

# Community Justice

Jeremy Travis, president of John Jay College of Criminal Justice of the City University of New York, spoke last year at the Law School's annual Public Service Conference, which addressed "The Future of Community Justice in Wisconsin." Travis's address was entitled "Building Communities with Justice: Overcoming the Tyranny of the Funnel." This is an excerpt from his remarks.

Our topic today is community justice. We should pause for a moment to reflect on these two words, *community* and *justice*. Years ago, I spoke with Ronnie Earle, the progressive district attorney in Austin, Texas, who campaigned on a platform of "community justice" and was regularly reelected by considerable margins. I asked him what those words meant. With a twinkle in his eye, he said that the beauty of the phrase was that nobody could define either *community* or *justice*—both concepts are elastic and complex—but everyone had good associations with both words. By committing his office to the concept of "community justice," he conveyed a break with the past, and a more positive vision of the future. And he got reelected several times.

When we use the phrase "community justice," we are often distinguishing it from our concept of "criminal justice." We are trying to imagine a world in which matters of justice are treated differently. And, with the insertion of the word *community*, we are imagining a role for communities in the pursuit of justice that, arguably, is new and different.

I would challenge us to ask these two questions: First, when we imagine "community justice," how is that different from "criminal justice"? Second, what is the role for communities in this vision?

Forty-two years ago, the President's Crime Commission, established by President Lyndon Johnson following the urban race riots of the mid-1960s, issued a landmark report entitled "The Challenge of Crime in a Free Society." The commission made a number of important recommendations, including the creation of



a national capacity to collect data on criminal victimization and to conduct research on crime and justice issues. But perhaps its most important contribution was to argue that the agencies of justice—the police, prosecutors and defenders, the courts, probation and corrections—working together, constitute a criminal justice "system." The commission actually prepared a graphic depiction of this

"system"—a funnel-shaped chart that begins on the left with the number of crimes committed, then depicts those reported to the police (about half), then those resulting in an arrest (about 20 percent), then those moving to prosecution and conviction (about half), and finally those very few cases, compared to all crimes, resulting in sentences of imprisonment.

This image of the criminal justice "funnel" has dominated our thinking about issues of crime and justice for the past generation. We think of crimes as inputs on an assembly line, moving inexorably from the in-basket of one agency to that agency's out-basket and then on to the in-basket of the next. This mechanical depiction of the criminal justice system has led us to view justice as an engineer would view a complicated public water system. We become fascinated with ways to improve the hydraulics of the system. Can we improve crime reporting? Can we improve the likelihood of an arrest? Can we improve the rate of successful prosecutions? Can we send more people to prison? Can we send them to prison for longer terms?

In my view, our thinking about justice has been warped by the influence of the 1967 President's Crime Commission picture of justice. I call this phenomenon the



“tyranny of the funnel.”

My hope for the “community justice” movement—and for this conference—is that we can develop a new view of justice that will free us from the “tyranny of the funnel,” that we will be able to reconceptualize our response to crime and our pursuit of justice.

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One of the challenges that we must face head-on is harnessing the moral authority, not just the legal power, of the agencies of justice. In our understanding of the assembly line of justice, the role of the workers on the assembly line—the police, lawyers, judges, and corrections officials—is to move cases along efficiently, keeping a professional and objective distance from the cases and the litigants, and dispensing justice impartially. In my opinion, by embracing this view of the dispassionate justice professional, we run the risk of losing something very important, namely the moral authority inherent in the roles of these public officials.

Fortunately, we are now witnessing, in a number of unrelated pockets of innovation, the emergence of a moral voice for justice that I find very exciting. One of the most powerful reform movements in our field these days is the problem-solving court movement, which began 20 years ago with the first drug court in Miami, Florida. Today we have a wide variety of problem-solving courts—mental health courts, domestic violence courts,

community courts, gun courts, youth courts, and reentry courts. These courts have captured the imagination of both public and professional alike and are the leading edge of a very important idea, redefining the role of the courts in our response to crime.

These courts have many important attributes—they try to address underlying problems, not just adjudicate the legal issues in the case; they bring together a variety of services to assist offenders; they recognize the reality of relapse. But one of the most important dimensions of these courts is that they allow judges—and sometimes other professionals—to speak in a moral voice, without all the restraints of the assembly line. Judges speak to defendants as people; they speak openly to family members about the ways they can support the success of their loved ones; they recognize human weaknesses; they acknowledge the difficulty of the struggle with addiction; they applaud success and sanction failure; they talk about the importance of an individual defendant’s success to the well-being of the larger community.

The judges, prosecutors, and other officials who are leading these important innovations have been freed from the tyranny of the funnel. Their programs are far removed from the cogs on the assembly line; they are anything but efficient; but I would argue that by speaking in this moral voice, these government officials are advancing the cause of justice in very powerful ways. ■

## Barrock Lecture

# A Path to Better Communities

Tracey S. Meares, Walton Hale Hamilton Professor at Yale Law School, delivered the 2009 Barrock Lecture on Criminal Law at Marquette University Law School. The text of the full lecture, “The Legitimacy of Police Among Young African-American Men,” can be found at 92 Marq. L. Rev. 651. This is an excerpt from the lecture.



I would like to point to a strategy that features what I have called moral engagement as opposed to notions of criminal deterrence.

Chicago has recently experienced a steep drop in homicide and other violent crime. Indeed, if one examines

the highest crime communities on the city’s high-poverty west side, one would observe a 37 percent drop in the quarterly homicide rate between 1999 and 2006. While researchers are beginning to examine several competing and complementary factors responsible for the drop in Chicago’s murder rate, one influential program, Project Safe Neighborhoods (PSN), may be a major contributing factor.

PSN is a billion-dollar federal program designed to promote innovative gun-crime reduction strategies throughout

the nation. In Chicago, PSN has meant the formation of a multiagency task force that includes members from law enforcement and local community agencies. PSN Chicago utilizes several coordinated strategies that rely on traditional law enforcement as well as recent developments in the realms of restorative and procedural justice.

The PSN team also believed, consistent with theories of legitimacy detailed above, that the key to changing patterns of gun crime lies in altering the normative beliefs of gun users themselves. Keeping these principles in mind and considering other successful programs implemented in Boston, the PSN team crafted its most innovative strategy, Open Offender Forums. Offenders in the target neighborhood with a history of gun violence and gang participation who were recently assigned to parole or probation are requested to attend a forum hosted by the PSN team.

The forums are hour-long, round-table style meetings in which approximately 20 offenders sit around a table with representatives from state and local law enforcement, community representatives, and various service providers. Informal conversations with attendees after the conclusion of meetings often last an additional hour and lead to more intimate follow-up and service provision. The meetings take place in a location of civic importance (such as a local park, library, or school) and are designed to be egalitarian in nature, meaning that offenders sit at the same table as all other forum participants, rather than as passive audience members. The content of the meeting is designed to stress to offenders the consequences, should they choose to pick up a gun, as well as the choices they have to make to ensure that they do not reoffend.

PSN appears to have been remarkably effective in reducing neighborhood crime rates. There were dramatic reductions in homicide in the PSN districts as compared to control areas and the city as a whole. More specifically, there was an approximately 37 percent decrease in the monthly homicide rate after the start of the program as compared to the preceding three years.

The PSN program with the greatest effect on declining neighborhood level homicide was the Offender Notification Forums. In short, the greater the proportion of offenders who attend the forums, the greater the decline in neighborhood levels of homicide.

Analyses of recidivism rates give further support of the efficacy of the PSN Forums. To summarize, individuals who attended a PSN forum were almost 30 percent less likely to return to prison as compared to similar individuals in the same neighborhood who did not attend a forum.

Those who lead this new wave of law enforcement and community safety projects take them seriously. They understand that attempting to sustain neighborhood safety through a continuing commitment to carpet-bombing and locking up the next generation of young African-American men is doomed to failure. They understand that, despite an often crippling alienation between law enforcement and communities, police, community members, and offenders alike want the streets to be safe, residents to succeed, and for jail and prison to be a rare last resort. They are discovering—in practice, not just in theory—that a normative commitment to compliance is a sustainable and realistic approach to bringing crime down. When it does not work, law enforcement is still there, but it is used far less often and is seen as legitimate by the affected community.

It is this last point that makes me hopeful about the potential for young African-American men, many of whom are involved in the criminal justice system, to accept the new path of policing. I do not want to be Pollyannaish about this issue. The challenges are severe, and the stakes are high. What we can see is that policing agencies are changing practices and methods that reflect the theories I have discussed here. Indeed, Milwaukee's Chief Ed Flynn is a leading member of this new vanguard. The other thing we can see is that these new strategies are leading to lower crime rates, just as the theory would suggest. My own research demonstrates that offenders are just as likely as nonoffenders to believe in the legitimacy of law—a finding that might surprise some. However, those same offenders still remain deeply skeptical of police.

I suspect it is a matter of time. The reality may be that we shall never convince those who offend to fully trust the police, but we will be much better off in a world in which the demographic group that is the most likely to be entangled in the system does not automatically presume that the police behave antagonistically toward them. And, moreover, the existence of social networks among groups means that African-Americans as a group also will be better off. This is so because crime is likely to be lower in communities that are committed to this approach, but also because crime reduction is not the only goal of these new approaches. Helping communities help themselves get things done for the long term is a critical larger objective. Legitimacy in law enforcement is not just a nascent strategy. It is a movement. It is movement with the potential to transform the way this nation does law enforcement, achieves community safety, and heals longstanding rifts between police and minority communities. It is, in short, about nothing less than ensuring domestic tranquility. ■



## St. Thomas More Society

# Some Reflections on the Law School

Rev. Robert A. Wild, S.J., President of Marquette University, spoke at the dinner following the 51st Annual Red Mass of the St. Thomas More Society of Wisconsin on October 15, 2009. This is an excerpt from his remarks.

When I came to Marquette in 1996 as president, the Law School was a proud entity but also aloof, present but somehow separate from the rest of campus. It wasn't flashy, but the facilities and its faculty did provide its students with a solid legal education. For nearly a century, the school had turned out lawyers who were welcomed into positions at law firms or in public service or, as is the case with many of you, who chose to hang shingles of their own in private practice. Such at least was my impression of the school when I first began as president.

Yet it didn't take me long after arriving at Marquette to recognize that the Law School was actually connected in a very profound way to our Jesuit mission. And the person who helped me see this was Howard Eisenberg, then starting his second year as dean. Unknowingly, Howard began building the case for the Law School by ghostwriting for me an articulation of the school's Jesuit mission that I found so powerful, so well done, that I called Howard and asked him if he had written it himself. Very forcefully he assured me that he most certainly had! It was Howard who convinced me of the Law School's potential as a national model for excellence in legal education and its powerful connection to the University's Catholic, Jesuit identity. He also opened my eyes to the fact that this academic unit had been made to shuffle along in a state of benign neglect, with the University making little investment in its future over the years. I decided then that this is not the way to run the railroad, and I made a commitment to support the Law School's development in every possible way—a decision I've never regretted.

When Howard died in 2002, Interim Dean Janine Geske stepped into the office and generously helped us carry forward. And then Dean Kearney, with great commitment and skill, took up the mantle of leadership and continues the work with alumni, faculty, and colleagues in legal circles to discover new ways to make Marquette Law School an unrivaled legal asset and resource for the community and the state. Through symposia, conferences, speakers, an expanded curriculum, and more, Marquette Law School is successfully chiseling a substantial profile as a regional resource for both members of the bar and citizens of this area to participate

in thought-provoking discussions of even the most complex of legal and public policy issues.

This commitment does not come without enormous investment. Eckstein Hall, the Law School's new home as of next fall, is only the most visible evidence of the University's invigorated financial commitment to the Law School, a commitment

that has allowed the school to hire and retain truly top-flight faculty members and to provide much better scholarship support to its students.

True, there are some who question the "fit" of a law school at a Catholic, Jesuit university. In my mind, there could not be a better or more logical partnership.

Throughout much of the 1980s, an international group of Jesuits and laypeople gathered to discuss the evolution of Jesuit education since Ignatius Loyola first set forth the Ratio Studiorum, the foundational educational philosophy that would guide all Jesuit schools. But of course as the centuries passed, the needs of our students and the constitutive elements of an excellent education gradually changed as well. The document this international group produced, "The Characteristics of Jesuit Education," reaffirmed the most fundamental aspects of a Jesuit education in language appropriate to our present age. I think that much of that document would resonate positively with you, especially today when you are reigniting your own connection to the Holy Spirit in your work. I'll mention just two statements affirmed in this document for having stood the test of time. One is this: "The mission of the Society of Jesus is the service of faith, of which the



promotion of justice is an absolute requirement. . . .” And the second: “Jesuit education encourages the building of solidarity with others that transcends race, culture, and religion since every program can be a means to discover God, to worship God present and at work in creation.”

Our first-year law classes comprise students from 90 different schools, each of them choosing to come to Marquette for what he or she expects of an excellent legal education. Some arrive not fully aware of how our Catholic, Jesuit tradition will be reflected. When they leave us three years later, they have learned first and foremost how to be excellent practitioners of the law (for the constant search for excellence which is at the core of Jesuit education has been inculcated), but also to be able and committed in the search for justice and to ask the deeper questions that best lead to that goal; to model a certain reflectiveness in the practice of the law, mindful that every interaction with a

client or a colleague has an impact on other individuals; and to pay special attention to the poor and the marginalized in order that their needs, too, be dealt with justly and equitably. To be sure, some go well beyond this in terms of beginning to integrate their faith—in many instances, their Catholic faith—into their professional lives.

Perhaps our most important contribution in this regard is to provide models for these students. And we do, not only in the form of particular faculty but also in the alumni and other lawyers who come through our building and interact with our students. We are doing more than educating lawyers at Marquette, and we are even doing more than building, in Eckstein Hall, the finest law school building in the nation. In the end, we are attending to the call of God, who invites servants into his vineyard—servants whose rigorously honed legal skills will be expended and poured out on behalf of others. ■

## Heartland Delta Gathering

### Jesuit Educational Values

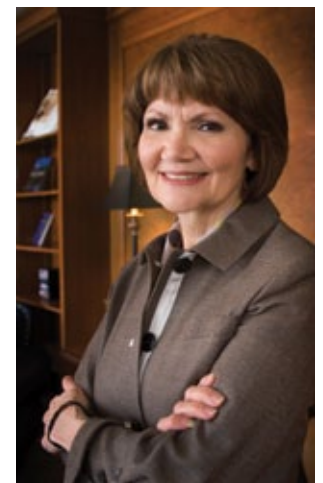
Christine Wiseman, L’73—formerly professor of law at Marquette and vice president for academic affairs at Creighton University, most recently provost of Loyola University Chicago, and, now, president at Saint Xavier University in Chicago—spoke at the 2009 Heartland Delta gathering at Marquette University of individuals from Jesuit colleges and universities. This is an excerpt from her remarks.

Jesuit education has been both a personal and professional journey that has occupied most of my life. I stand before you a woman educator and administrator in the Jesuit system for over 30 years—and a mother who has sent three children to be educated at three different Jesuit institutions. I tell people that I am the woman the Jesuits educated me to be.

So what is it that distinguishes our learning as “Jesuit Catholic”—and why is the integration of “faith” and “justice” so distinctive in this intellectual paradigm by which we define Jesuit education? Perhaps a bit of historical context is in order.

The Jesuits are, of course, members of a religious order of the Roman Catholic Church. The order was founded in 1540 by St. Ignatius of Loyola, who termed it *Companã de Jess*

(the “Company of Jesus”) in Spanish and *Societas Jesu* (the “Society of Jesus”) in Latin. In his article on the Jesuits and their impact in Europe from 1450 to 1789, author Michael W. Maher recounts that the Jesuits moved into education because Ignatius realized the educational mission as an opportunity “to aid our fellowmen to the knowledge and love of God and to the





salvation of their souls.” But as he organized the first schools, Ignatius relied upon the organizational principles reflected in the “method of Paris” which had framed much of his own education. Those organizational principles in turn became reflected in the *Ratio Studiorum*—a Jesuit course of studies. This method of studies served as a template for Jesuit schools throughout the world.

Maher also recounts that the *Ratio Studiorum* was first definitively recognized and published in 1599 under Claudio Aquaviva, who was then superior general of the Society of Jesus. By 1773, the Jesuits “employed this course of studies throughout their 669 colleges, 179 seminaries, and 61 houses of study.”

The *Ratio Studiorum* placed great emphasis upon the classical disciplines—disciplines such as theology, philosophy, ancient history, literature, Greek, Latin, and mathematics. In fact, in some of the early Jesuit institutions, students were not identified as seniors, juniors, sophomores, and freshmen, but as students of philosophy, rhetoric, poetry, or the humanities.

But it wasn’t simply what was taught that marked the Jesuit intellectual tradition. It was and is how students are taught—a pedagogy designed to foster close interaction between students, and a faculty who seek to mentor their education, not just to transmit knowledge.

In all this, there is also a certain practicality to Jesuit higher education. Fr. Peter-Hans Kolvenbach, immediate past superior general of the Society, said so himself in his May 2001 address in Rome to the International Meeting of Jesuit Higher Education. After all, according to *Heroic Leadership* author Chris Lowney, “The Jesuits embraced the world and immersed themselves in its everyday life, living in its cities and cultural centers and traveling and working with its people”—and learning in the process that the lilies of the valley may grow without labor or toil, but we human beings do not.

But beyond all this—the humanism and the practicality—Fr. Kolvenbach recounted that Jesuit education “concerns itself . . . with questions of values, with educating men and women to be good citizens and good leaders, concerned with the common good, and able to use their education for the service of faith and promotion of justice.” Women and men, for and with others.

Back in 1998, the Marquette University Board of Trustees complained to its academic administration that we could not identify for ourselves or our students the uniqueness of a Jesuit education. In short, we had lost our ability to articulate the value of that intellectual paradigm. The board’s complaint launched a review of the undergraduate core curriculum across seven undergraduate units, including Arts and Sciences, Business, Engineering, Journalism, Health Sciences, Nursing, and Professional Studies.



When I became associate vice president for academic affairs at Marquette in 1998, I joined an initial steering committee, chaired by Dr. John Pustejovsky, to lead that effort until I left Marquette for Creighton University in 2002.

Reports were written in 2000 by a Core Curriculum Steering Committee and in 2002 by a Core Curriculum Review Committee. And what we concluded is this: Jesuit education, even as it has evolved, continues to be founded on knowledge of the humanities (literature, rhetoric, poetry, history, and classical languages), but it is founded as well on the natural sciences, the social sciences, and philosophy. Equally important, it is an ordered study.

The courses that students are required to take challenge them to move beyond descriptive knowledge to normative and spiritual reflection, asking themselves the same question captured by Fr. Peter-Hans Kolvenbach and repeated by others: “How does one act humanely in the world as it exists today?”

And so, the rationale for today’s Jesuit education remains constant in its simplicity: students are empowered first to examine the world, then to engage the world, and—finally—to evaluate and change the world.

And how do we do at fulfilling these collective expectations derived from our Jesuit traditions? Some data are right here—in the latest National Survey of Student Engagement. Of our seniors who responded “quite a bit” or “very much,” 72 percent tell us that at our institutions they have devoted efforts to helping others in need; 64 percent tell us that they have actively worked to further social justice; 75 percent tell us they have defined their own values and beliefs; 77 percent tell us that they demonstrate a respect for others’ differences; 66 percent tell us they have actively worked toward a more inclusive community; and 66 percent tell us that they understand the Jesuit principle of “men and women for and with

others.” We’re not perfect, but we know what we’re doing and why we are doing it. And so, President Obama, when you ask for the service and active citizenship of our youth, you need look no further than the students we graduate from these—our 28 Jesuit colleges and universities.

And when you hear the term, *Jesuitical*, my friends, think not about the debate between Hillary Clinton and Tim Russert on whether or not her vote on the Iraq war was really just a vote to put inspectors back in Iraq, or whether she was accusing Tim Russert of employing casuistry to make a morally specious argument. Think instead about the words of my friend and colleague, Dr. Heidi Malm, professor of philosophy at Loyola, who heard that I was delivering

remarks on the topic of learning, justice, and faith in Jesuit higher education and wrote:

I found myself talking about that topic in my Honors College course on moral responsibility today, explaining why I so enjoy teaching (especially value/moral issues) at a Jesuit university even though I’m not Catholic. The focus . . . on clear, careful, intellectually critical reasoning on important moral issues and their underlying values, as well as on one’s position (duties and rights) within a society, is wonderful. . . . After all, how could a college-age person not be interested in such things? ■

## Civil Trial Counsel of Wisconsin

# Law Schools as Common Ground for Discussion

Marquette University Law School Dean Joseph D. Kearney addressed the annual meeting of the Civil Trial Counsel of Wisconsin in December 2009. This is an excerpt from his remarks.

I regard the Law School as a common ground where folks ought to be able to come together—not because they agree but precisely because they do not.

More than ever, we need such common ground in the legal profession. It scarcely exists these days, it seems to me. This is no indictment, or even criticism, of groups such as this one or its counterpart on the plaintiffs’ side, the Wisconsin Association for Justice. Such groups provide a valuable forum for the pursuit of common interests, though not as much so for debate, in my experience. By contrast, this may be a something of a criticism of the State Bar of Wisconsin. I am not one of the dis-integrators and, in fact, see the State Bar as, in important respects, playing a positive role, especially among some of the lawyers perhaps most at risk of losing an adequate connection to the larger profession.

At the same time, it is difficult for me to see the State Bar (that’s a capital “S” and a capital “B”) as providing a robust intellectual commons where folks from the profession can

come together to discuss and debate large ideas in the administration of justice. To some extent, my difficulty in seeing this derives from some of the pursuits over the past decade or two, in which, for example, the State Bar of Wisconsin has decided that it is among its

interests to lobby the legislature of the State of Wisconsin as to proper content of the substantive law of torts (and, more





specifically, whether the Third Restatement of Torts should be adopted for products liability). Purporting to speak for an integrated bar on practice and procedure is one thing, it seems to me; doing so on substantive law matters is quite another. But the difficulty of successful leadership in certain matters may also inhere in the nature of bar associations: their primary calling card, I think, historically has been their success as trade groups.

The profession therefore needs common ground to discuss, across the lines of practice areas—across the plaintiff’s and defense bar bar, if you will—important matters affecting the profession. There are certainly matters requiring attention.

One of my own strong views has to do with what a colleague and I have come to term the “culture of default” in Wisconsin courts.

As a general matter, we have a legal system that prides itself on ensuring that, wherever possible, adjudication is determined on the merits and not technicalities.

Indeed, the Wisconsin Supreme Court has told us, repeatedly, that this is “the entire tenor of modern law.” There is much truth in this. We see it, perhaps most notably, in the legal system’s great focus on the truth, as made accessible, we hope, through not only the traditional adversarial process (which undoubtedly at some level is required by the Due Process Clause) but also the much more modern device of discovery, with its extraordinarily intrusive devices. But we see it as well in the prevailing practices of excusing non-compliance with rules in order to avoid adjudication on the basis of technicalities and small slipups. For example, defects in summonses and complaints, if technical and nonprejudicial, are excused; so, too, we see in the case law, are various failures to comply with statutory timing requirements for mediation in malpractice cases.

The *rule* is similar with respect to default judgments—a trial court has authority, “upon such terms as are just,” to vacate a judgment where there has been, for example, “mistake, inadvertence, surprise, or excusable neglect”—but the *practice* is rather different. Indeed, it is clear to me that the prevailing culture in the trial courts in this state increasingly favors the entry of default judgments and the subsequent refusal to vacate them. Two of my colleagues on the adjunct faculty and I have been sufficiently troubled by what we have seen that two years ago we were moved to file our own amicus curiae brief in the Wisconsin Supreme

Court, laying out our thoughts on the matter and asking the Court to issue an opinion recalling for the bench and bar “that the law’s preference for disposition on the merits extends to nonprejudicial and nonjurisdictional mistakes made by either side” in litigation—to defendants and default judgments no less than to plaintiffs and dismissals for defective summonses. We did this, not as Marquette University faculty nor even for our law firms, but in our capacity simply as members of the bar with an interest in a principled, well-functioning, and even-handed judicial system. The court essentially declined the invitation, although it at least did not favor the particular default judgment at issue in the case in which we filed our amicus brief.

“One of my own strong views has to do with what a colleague and I have come to term the ‘culture of default’ in Wisconsin courts.”

I wish not to get bogged down in my default-judgment point—obviously I feel strongly enough about it that, on my own time and dime and behalf, I filed an amicus curiae brief. Rather, I use it as an example of my point that there are matters that the legal profession needs to discuss in common. Where will this happen? This group is not sufficient, for example: the proportion of people in this room who will agree with me concerning the culture of default in the Wisconsin courts is higher than it would be in the larger profession. You are, after all, a defense association.

And a good perspective on the matter would include not only the plaintiff’s bar—even if we might confidently predict many of its members’ basic views—but also the trial judges. My own sense is that the culture of default owes much in its origins to the evolving view that judges have of themselves—over, say, the past thirty years—as case managers. A case with a default judgment is a case managed, a case processed, a case closed. It goes on the “resolved” side of the judge’s periodic report.

So if trade groups and bar associations cannot be adequate fora to discuss many important issues in law and public policy, where can the profession go? Back to school, is my short answer—to law schools, that is, which in many respects are well positioned to convene intelligent discussion and debate among groups and individuals with opposing views. Or at least this is our hope for Marquette . . . ■

PROFILE: Kristine Cleary

## The skills and determination to climb

**D** Perseverance, dedication, and the ability to adapt to unexpected situations—Kristine Cleary, L'83, called on those qualities to climb the Grand Teton mountain in Wyoming several years ago. And she has called on those same qualities often in a career as a business owner, lawyer, community volunteer, and parent of three (with her husband Peter L. Coffey, L'84).

Cleary graduated from Luther College in Decorah, Iowa, with a double major in environmental biology and political science. “I decided to go to Marquette Law School after talking with a number of women who had gone to various law schools,” she said. “One of the women was from my hometown of La Crosse, Wisconsin, and expressed that she felt embraced at Marquette Law School and that the student/teacher ratio was excellent.”

While a law student, Cleary had an opportunity to clerk with Wisconsin Supreme Court Justice Donald W. Steinmetz. The experience left her with a lasting lesson: “I felt very intimidated meeting him for the first time,” she recalled. “I remember sitting across from him in his chambers and noticing he was wearing what looked like a Mickey Mouse watch, complete with moving arms! I had to ask him about it, and he said that it kept him from taking himself too seriously.”

After graduating from the Law School in 1983, Cleary worked for the Natural Resources Defense Council in New York for a year. She then moved back to the Midwest and worked as a law clerk for Judge Russell Eisenberg, a federal bankruptcy judge in Milwaukee.



In 1987, she was recruited by Michael Best & Friedrich, where she was a partner in the practice area of bankruptcy, creditors' rights, and lending financial institutions. “I assumed I would be at Michael Best & Friedrich the rest of my career,” she said.

But in 1997, a turn of events occurred for which no amount of training could prepare her. “My father died unexpectedly, and I took a leave of absence from the law firm to attend to our family business in La Crosse. I then determined that my time and energy would be best spent in working for our family business, Cleary Management, a property management corporation.” Although the business office is located in La Crosse, Cleary usually works out of her home office in the Milwaukee area.

Cleary appreciates being a self-employed business owner and is gratified to be working with the business that her father (who was also a lawyer) started. “As an owner of a business, I deal with responsibilities that range widely from reviewing surveys, drafting and renegotiating leases, finalizing business transactions, overseeing administrative matters and investments, to even [doing] some janitorial work,” she said. She appreciates the diversity of the job as well as the flexibility, especially with regard to raising a family.



Cleary's Marquette law degree has been vital in her success. "Understanding the law behind real estate purchase and development is vastly beneficial. It is essential for any business person to understand the law and its ramifications," she said. She agrees with what her father once said: "A legal education opens doors for you that other educational backgrounds do not."

In her gratitude, she is also very generous. In addition to giving of her time by serving on the Law School Advisory Board, Cleary and a friend who is a partner at Michael Best & Friedrich have a specific avenue for financial support. "We started a scholarship at Marquette Law School for nontraditional women who return to law school. We are always pleasantly surprised when our scholarship report arrives and we see that others have given gifts to the Law School Scholarship for Women Fund," she related. Additionally, she gives of her talent to numerous community, legal, and performing arts boards, and is now serving as the elected chairman of the board for State Bank Financial in La Crosse.

Cleary looks forward to continuing her work with the family business. She knows that, much like her mountain trek, it can be a difficult climb, but it's one worth the effort.

## 1960

**William J. Mulligan**, of Davis & Kuelthau, Milwaukee office, has been named in the 2010 edition of *Best Lawyers*. He practices in commercial litigation and environmental law.

## 1961

**Rosemary R. Elbert** received the Lifetime Achievement Award as an honoree for Women in the Law, sponsored by the *Wisconsin Law Journal*. She was the first woman lawyer in the Milwaukee County Corporation Counsel's office and in 2004 became the first permanent executive director of Wisconsin Judicare, Inc., in Wausau, Wis. Her career has spanned private practice, government work, and now work for indigent clients, where she concentrates in domestic violence cases.

## 1966

**William R. Drew** was recently presented with the Les Aspin Center for Government Founders Award. He has been a member of the Les Aspin Center Board of Visitors since it was founded in 1995.

## 1968

**William A. Jennaro** of Cook & Franke of Milwaukee, has been named "Best Mediator" in the *Wisconsin Law Journal's* "Best of" poll. Award recipients were chosen by voting among lawyers and judges from around the state.

## 1971

**Mary L. Staudenmaier**, chairman of the board of the Stephenson National Bank & Trust in Marinette, Wis., has been named to a three-year term on the board of trustees of Mount Mary College. She is a 1960 alumna of Mount Mary and was previously honored by the College's Alumnae Association with the Madonna Medal for Professional Excellence, the highest award bestowed by the association. She is also a current member of the Law School Advisory Board.



## 1974

**Mark F. Vetter** has been named in the 2010 edition of *Best Lawyers*. He practices labor and employment law at the Waukesha, Wis., firm of Buelow Vetter Buikema Olsen & Vliet.

**James A. Wilke**, a shareholder in intellectual property practice at Reinhart Boerner Van Deuren, Milwaukee, has been elected to the Engineers and Scientists of Milwaukee Board of Directors. He is the first patent attorney to serve on the board. Wilke is teaching a course, "Intellectual Property for Engineers," at Marquette University College of Engineering.

## 1976

**Thomas L. Frenn**, shareholder with Petrie & Stocking in Milwaukee, was named a "Leader in the Law" by the *Wisconsin Law Journal*. Frenn is a past chair and longtime member of the State Bar of Wisconsin's Business Law Section and served as the inaugural chair of its Nonprofit Organizations Committee.

## 1977

**Michael P. Sand** has retired after a 31-year career in law. He is now pursuing his favorite avocation, real estate, as a buyer broker with Sotheby's International Realty in Bozeman, Mont. Sand is a past president of the Montana Trial Lawyers Association and is on the staff at Gerry Spence's Trial Lawyers College.

## 1978

**Roy E. Wagner**, shareholder at von Briesen & Roper, was reelected to serve his second term as the chairperson of the Construction and Public Contract Law Section of the State Bar of Wisconsin. He previously received the 2008 Charles Dunn Author Award during the Annual State Bar Convention, presented by Chief Justice Shirley Abrahamson. Wagner and coauthor Terry Peppard were selected to receive the award by the State Bar Communications Committee for their article, "Mediating Complex Construction Claims."

## 1980

**John P. Macy** received a 2009 "Leader in the Law" award from the *Wisconsin Law Journal*. He is a shareholder in the firm of Arenz, Molter, Macy & Riffle, Waukesha, Wis. Macy represents scores of cities, villages, towns, and districts throughout southeastern Wisconsin. He is a frequent instructor for municipal law seminars sponsored by the League of



## SAVE THE DATE

Ray and Kay Eckstein Hall, the Law School's new home, will be dedicated on Wednesday, September 8, 2010.

Wisconsin Municipalities, Wisconsin Towns Association, Wisconsin Municipal Clerks Association, and the Wisconsin Association of Assessing Officers.

**Daniel G. Vliet** has been named to the 2010 edition of *Best Lawyers*. He practices labor and employment law at the Waukesha, Wis., firm of Buelow Vetter Buikema Olsen & Vliet. The American Bar Association has appointed him as the Membership Development Committee Employer Co-Chair of the Labor and Employment Law Section.

### 1981

**Barbara J. Janaszek** was recently named a "Super Lawyer" by *Wisconsin Super Lawyers* magazine. She is with the Milwaukee office of Whyte Hirschboeck Dudek and focuses her practice on business litigation.

**José A. Olivieri** received the Fran Swigart Board Leadership Award from the Volunteer Center of Milwaukee. He is only the second recipient of this award named in honor of one of Milwaukee's most respected volunteer leaders. Olivieri's current and past board service has benefited the United Community Center, Lutheran Social Services, Greater Milwaukee Foundation, Milwaukee Community Service Corp., and the University of Wisconsin Board of Regents, among others. He has also served on various community-based commissions and councils. In his law practice at Michael Best & Friedrich, he counsels management in labor and employment law matters.

**John O. (Jack) Skagerberg** has joined the national accounting and financial services firm of Thompson, Cobb, Bazilio & Associates (TCBA), Washington, D.C., as a senior executive. TCBA is one of only eight firms approved nationwide as a Federal Deposit Insurance Corporation (FDIC) Resolution Asset Contractor. TCBA assists the FDIC with bank liquidation services. At TCBA, Skagerberg leads bank takeovers and liquidations, working alongside the FDIC and other TCBA professionals.

### 1982

**Robert H. Buikema** has been named in the 2010 edition of *Best Lawyers*. He practices labor and employment law at the Waukesha, Wis., firm of Buelow Vetter Buikema Olsen & Vliet.

**Donald W. Layden, Jr.**, has joined the Milwaukee office of Quarles & Brady LLP as a partner with the Corporate Services Group. He will focus his practice on corporate law, with an emphasis on clients in the technology and business services areas. He serves as chair of the Law School Advisory Board.

**Ulice Payne, Jr.**, former president of the Milwaukee Brewers, was unanimously elected to serve a two-year term as board chairman of the YMCA of the USA, beginning in February 2010. Payne joined the board in 2005. The board establishes policy and strategic direction for the YMCA of the USA, which is the national resource office for the nation's 2,686 YMCAs. Payne heads daily operations for the consulting firm, Addison-Clifton, LLC, an advisor on global trade compliance. An active community and

business leader, he also serves on the board of trustees for Marquette University.

### 1984

**Brian G. Carroll** is a new shareholder at Reinhart Boerner Van Deuren. His areas of practice are in business law and health care.



He has served as general corporate counsel to several corporations and health care organizations. He practiced for more than 25 years in Waukesha County. Carroll is a past

president of the Waukesha County Bar Association and currently serves on the board of directors of ISB Community Bank, the Waukesha County Action Network, the Waukesha County Community Foundation, and the Waukesha Memorial Hospital Foundation.

**Jean W. DiMotto**, Milwaukee County Circuit Judge, was honored with the Excellence in Volunteering Award from Nia Imani Family, Inc., a residential agency helping single mothers with addictions to learn healthy living, parenting, and job skills.

**Stephanie S. Rothstein** was appointed by Governor Jim Doyle as judge for the Milwaukee County Circuit Court. She began serving in March 2009 and has been subsequently elected to a six-year term. She served for 25 years in the Milwaukee County District Attorney's office. She and husband, **Gregory**, L'84, live in Whitefish Bay, Wis. with their children, Jacqueline, Grace, and Leah.

### 1987

**Brian R. Smigelski** has become a partner at DeWitt Ross & Stevens in Brookfield,



Wis. He has joined the Litigation, Construction, and Labor and Employment Relations Groups. His practice is focused on the area of commercial litigation in state and federal

trial and appellate courts, as well as in arbitration proceedings. He has served as both the Litigation Section chairperson and as a committee chairperson for the Milwaukee Bar Association, as well as chairperson of the



State Bar's Lawyer Referral and Information Services Committee.

## 1988

**Jerome G. Grzeca**, founding and managing partner at Grzeca Law Group, an immigration law firm, was recently selected as a recipient of the American Immigration Lawyers Association (AILA) President's Commendation for Outstanding Leadership.

**Ann M. Rieger**, the first female president of Davis & Kuelthau, was recently named as a Women in the Law honoree by the *Wisconsin Law Journal*. She and her husband, Tom, have three daughters and live in Brookfield, Wis.

## 1991

**Shawn M. Govern** has joined DeWitt Ross & Stevens as a partner in the Brookfield office, with the Litigation, Business, and Real Estate Groups. He focuses his practice primarily on representing businesses (family-owned, as well as large companies), banks, real estate developers, franchisees, and corporate clients.

## 1993



**Steven R. Glaser** has joined The Schroeder Group of Waukesha as a shareholder. He has over 15 years of experience in assisting businesses to solve their legal problems and

providing practical and efficient business solutions.

**Leah J. Poulos Mueller** was inducted into the Chicagoland Sports Hall of Fame on September 24, 2009. She garnered more than 65 Olympic, world, and international speedskating medals and titles during an illustrious career that spanned 12 competitive years and three Olympic teams. During her international career, she not only broke world records on the ice but also helped establish programs that benefit United States Olympic athletes today. She is currently a practicing attorney in Waukesha, Wis.

## 1994

**Michael H. Doyle**, a certified financial planner, has been promoted to director of development at Loras College in Dubuque, Iowa. Before joining Loras in 2007 as senior development officer, he worked in financial planning with careers at Northwestern Mutual Life Insurance Company, Ernst & Young, and Richardson Financial Group.

**Kimberly K. Stoll** was elected a corporate officer, vice president of marketing, by Badger Meter, Inc., Milwaukee, through its board of directors. She most recently served as director of utility marketing at Badger Meter.

## 1995

**Scott B. Franklin** and wife, Amber, are the proud parents of twin girls, Melanie Jordan and Laci Jillian, born December 12, 2008. The family makes its home in Mequon, Wis. He is a third-generation certified public accountant and a second-generation attorney. He is with Kohler and Franklin, CPA, Milwaukee.

## 1997

**Chad W. Kopljen** has been awarded a direct commission in the Wisconsin Army National Guard as a judge advocate general corps officer. He is serving as an assistant staff judge advocate in the 64th Troop Command.

## 1998

**Daniel J. Finerty** has joined the Labor and Employment Practice Group in the Milwaukee office of Godfrey & Kahn. He will continue to practice labor and employment law with a focus on employment litigation and restrictive covenant litigation. In addition, he regularly advises clients on how labor and employment-related legislative developments may affect their business.

**Willem J. Noorlander** has been named shareholder in the litigation department of Reinhart Boerner Van Deuren, Milwaukee.

## 1999

**Michael D. Cicchini** coauthored a book, *But They Didn't Read Me My Rights!: Myths, Oddities, and Lies About Our Legal System*, which is being published by Prometheus Books. Cicchini wrote the book with Amy B. Kusher, lecturer in English at the University of Wisconsin-Parkside. Cicchini's practice, based in Kenosha, focuses on criminal law.

**James P. Denis III** has been named shareholder in the Litigation Department of Reinhart Boerner Van Deuren, Milwaukee.

**Gregory E. Erchull** has joined Chernov, Stern & Krings, Milwaukee, as a shareholder. He focuses his practice on commercial and residential real estate transactions, including lease issues and zoning concerns.

**Daniel S. Galligan** of Whyte Hirschboeck Dudek, Milwaukee, was recently named one of Wisconsin's Rising Stars by *Wisconsin Super Lawyers* magazine. His area of practice is business/corporate law.

**Jeffrey P. Greipp** has been appointed as chief legal counsel for the recently established National Prosecutors' Resource Center in Washington, D.C., where he provides training and technical assistance to prosecutors throughout the country and serves as a liaison to Congress and state legislatures.

**Brent D. Nistler** recently opened a second office in Brookfield, Wis. Before founding Nistler Law Office, he served as a Milwaukee County assistant district attorney and was also employed as a litigator at Reinhart Boerner Van Deuren. Nistler has been named a Rising Star by *Law and Politics* magazine.

**Mary T. Wagner**, a criminal prosecutor, in Sheboygan County, Wis., has written and received a number of awards for *Running with Stiletos: Living a Balanced Life in Dangerous Shoes*, a collection of essays on making life meaningful. A second book, *Heck on Heels: Still Balancing on Shoes, Love, and Chocolate!* was published in November 2009.



**Jascha Beck Walter** became a partner in the Brookfield office of DeWitt Ross & Stevens. He practices in the areas of business, information technology, and intellectual property. The national

publication *Law & Politics* has recognized him as a Rising Star.

## Sailing an impressive course

Frank L. Steeves admits that he applied to law school so he could put off the time when he had to get a real job. Maybe he's making up for lost time with his real job now—senior vice president, secretary, and chief legal officer of Emerson, a St. Louis-based Fortune 100 company employing 140,000 people and operating in 150 countries.

Obviously, Steeves found more in law school than a place to avoid reality. For one thing, he found a way to have a significant impact, first in Milwaukee for many years and now on a global stage.

Steeves's family moved to Milwaukee from Vermont when Frank was in high school and his father was named dean of the School of Education at Marquette University. It was a given, then, that the younger Steeves would attend Marquette for his undergraduate studies. He graduated with a degree in political science in 1976 and applied to law school.

"I figured that going to law school would give me a three-year reprieve," he quipped. "I had no knowledge of the legal profession whatsoever. My family had never dealt with lawyers, and no one in my family had been a lawyer. We had never even known a lawyer!"

Steeves was particularly influenced by two professors—Jack Kircher and the late Charles W. Mentkowski—but for very different reasons.

"To survive in Jack's course, I had to know the material. To know the material, I had to understand contracts and statutes. That took time," Steeves explained. "Jack was careful and organized in his teaching methods. This taught me that the most complex of areas can be learned if approached logically. It also opened up the insurance law world to me, which I found I liked quite a bit."

As for Mentkowski, Steeves said, "While I respected Chuck Mentkowski when I was a student, I loved him

in the years after I graduated. As with Jack Kircher, he was a great teacher, but he also had a rarely understood but always-present support for his students, unmatched by anyone I have met since. He was patient with me, always looked for opportunities for me, and, most important, always believed in me. Nothing is a better motivator than having someone whom you respect believe in your abilities."

Steeves graduated from Marquette Law School in 1979. He began his legal career as a staff attorney in the juvenile division of the State Public Defender's Office in Milwaukee. "I met with families, worked with wonderfully dedicated lawyers, saw countless instances of unsolvable tragedy, and, hope that, on occasion, I have made a difference in a young person's life," he said. "I am not sure which job, the one I have now or the one I had then, was or is more satisfying. I view both as equally important and with much to offer."

He subsequently became an insurance lawyer. In 21 years at the firm that became Crivello, Carlson, Mentkowski & Steeves, he became one of Milwaukee's highest-profile risk-management and insurance-defense lawyers. Steeves resigned from the firm in 2001 to join von Briesen & Roper, and became vice chairman of that firm in 2004. During his years at von Briesen & Roper, he developed a strong client base of insurance companies and manufacturers.

Emerson had been a client early in his career, and his role with the international company gradually expanded from handling Wisconsin cases to one with responsibilities across more than 1,200 locations where Emerson has operations. "This gave me exposure to Emerson's board, and I became friends with some of its members, including its then-chairman, Chuck Knight, the chairman of its audit committee, August A. Busch III, and Randall

“Practicing law can be the best job in the world. It allows you to use your intellect to make a direct impact on clients and the community.”



Stephenson, chairman of AT&T,” Steeves said. “When my predecessor retired, I was asked if I was interested in applying. At first, I said ‘no’; a year later I said ‘yes.’”

Steeves accepted his current position in March 2007. He now deals with the Securities and Exchange Commission, the New York Stock Exchange, trade regulators, intellectual property experts, U.S. and foreign government cabinet-level ministers, and members of the foreign judiciary—particularly in Russia (Emerson has 30 sites in Russia) and in China (Emerson has more than 40,000 employees in China). Emerson is a global leader in bringing technology and engineering together to serve customers through its network power, process management, industrial automation, climate technologies, and appliance and tools businesses.

“Every single day I use all the tools I learned in my almost 30 years of practice in Milwaukee,” Steeves said. “Among these are to fight a rush to judgment; the importance of separating fact from guesswork; the recognition of talent in students, young lawyers, support staff, investigators, and engineers; and, most important, to respect all others no matter their background, position, history, and no matter what opinions others may have shared.”

Steeves has two adult children and lives in St. Louis. When he lived in Milwaukee, his hobbies were reading, carpentry, and boating. “In St. Louis,” he said, “we have books and wood, but not water in the same way, so I



Steeves is pictured during construction of the *SV Denis Sullivan*, the schooner whose home is at Discovery World at Pier Wisconsin in Milwaukee, a project that he was instrumental in establishing.

replaced the boat with an aircraft, and I now fly myself back to Wisconsin when possible.” He also makes time to continue his work with the Discovery World Museum on Milwaukee’s lakefront (an initiative he helped establish, initially as the Lake Schooner project). In St. Louis, he was appointed to serve on the executive committee of the Missouri Historical Museum and was appointed by the Missouri governor to represent Missouri in the Chicago-St. Louis high-speed rail initiative.

“Practicing law can be the best job in the world,” he said. “It allows you to use your intellect to make a direct impact on clients and the community.” Obviously, Steeves’s personal philosophy includes taking his work seriously. But it goes well beyond that. He said, “Also have as much fun as possible in everything you do, and never, ever, allow yourself to be reduced to the role of cynic—life is way too short to be wasted in that way.”

## 2000

**Amy M. Ciepluch** has made partner in the Milwaukee office of Quarles & Brady. Her practice concentrates in the areas of employee benefits and executive compensation, where she provides ongoing counseling on all benefit plan types, both for profit and not-for-profit entities.

**Sara Dastgheib-Vinarov** is a partner in the Chicago office of Quarles & Brady. She focuses her practice on intellectual property. She works with clients to procure and manage worldwide patent portfolios in a variety of life science areas.

**BrookEllen Teuber**, prosecutor at the Jefferson County District Attorney's office, was named an honoree for Women in the Law by the *Wisconsin Law Journal*. For the past decade, she has tried domestic violence, rape, and murder cases.

## 2001

**Nicole S. Elver** has joined the Louisville, Ky., law firm of Middleton Reutlinger. She practices in the firm's litigation section,



concentrating in the areas of commercial litigation and insurance defense litigation. She was an attorney in the Division of Enforcement of the Securities and Exchange

Commission in Washington, D.C., for more than seven years.

**Jim Sullivan**, who represents Wisconsin's 5th District in the State Senate, has been reappointed to a second term as a commissioner of the Midwestern Higher



Education Compact. His term will run to 2011. The Midwestern Higher Education Compact (MHEC) is one of four statutory compacts created for the purpose of advancing higher

education through cooperation and resource sharing across 12 states.

## 2002

**Grant T. Huebner**, Milwaukee County District Attorney's office, has been named one of the *Wisconsin Law Journal's* "Up and Coming Lawyers."

## 2010 Alumni Awards winners honored



With several hundred family members and friends looking on, four distinguished alumni of Marquette University Law School received recognition for their accomplishments April 22 at the Marquette Alumni Memorial Union. Pictured left to right: Ulice Payne Jr., L'82, who received the Alumnus of the Year Award; Catherine A. Ritterbusch, L'00, who received the Howard B. Eisenberg Service Award; Michael T. Sneathern, L'02, who received the Charles W. Mentkowski Sports Law Alumnus of the Year Award; Donald A. Levy, L'60, who received the Lifetime Achievement Award; Rev. Robert A. Wild, S.J., president of Marquette; and Richard M. McDermott, L'94, president of the Law School Alumni Association.

**Paula Davis-Laack** has launched a new company focused on helping lawyers and professionals live full-time lives. The business is called The Marie Elizabeth Company and has a website: marieelizabethcompany.com.

**Geoffrey A. Lacy** has been named to the 2010 edition of *Best Lawyers*. He practices immigration law and labor and employment law in the Green Bay office of Davis & Kuelthau.

## 2003

**William E. Fischer**, with Kohner, Mann & Kailas, Milwaukee, has been named by the *Wisconsin Law Journal* as an "Up and Coming Lawyer."

**Ryan E. Ruzziconi** of Swartz Creek, Mich., has been appointed general counsel of Diplomat Specialty Pharmacy.

**Jessica M. Zeratsky** is a member of the Banking, Bankruptcy, Business Restructuring and Real Estate Practice Group at von Briesen & Roper in Milwaukee. She focuses her practice on commercial and bankruptcy litigation, business restructuring, loan documentation, workouts, and general debtor and creditor law. Zeratsky and her husband, **Matthew Zeratsky**, L'06, reside in Menomonee Falls, Wis.

**Cindy L. Fryda (Zubrod)** has been recognized as a Rising Star in *Wisconsin Super Lawyers*. She also participated in and graduated from Leadership Waukesha, a nine-month program sponsored by the Waukesha County Chamber of Commerce. She is with The Schroeder Group of Waukesha, Wis.

## 2004

**Jane E. Appleby** has been elected for a three-year term to the Milwaukee Bar Association's Judicial Committee, which evaluates candidates for judicial appointments. Her



practice at Quarles & Brady in Milwaukee focuses on general civil and commercial litigation. She has experience in legal ethics and disability benefits and is an appointed member of the State Bar of

Wisconsin's Standing Ethics Committee.

**Thomas J. Krumenacher**, patent attorney with the Milwaukee office of Quarles & Brady, has been named chairman of the Greater Brookfield Chamber of Commerce



Board of Directors. He also chairs the board's executive committee. Krumenacher is also a board member of the Milwaukee School of Engineering Alumni Association Board of

Directors and chairman of the City of Pewaukee Board of Review.

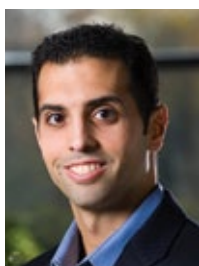
**Daphne C. Roy**, Milwaukee, has joined U.S. Bancorp Fund Services as a 1940 Act attorney.

**John J. Schulze, Jr.**, served on the steering committee for the 2009 Wisconsin Entrepreneurs' Conference in Milwaukee. The conference, in its seventh year, brought together over 400 Wisconsin entrepreneurs, business leaders, and investors to network and participate in events.

**Deborah G. Spanic**, Johnson Controls, Milwaukee, was named a Rising Star by *Wisconsin Super Lawyers* magazine. She focuses her practice on information technology/outsourcing.

## 2005

**Dino Antonopoulos** has joined The Schroeder Group, of Waukesha, Wis. He



brings experience in the areas of commercial and civil litigation, corporate and business law, and employment and real estate matters.

Antonopoulos is on the board of

directors for the Brookfield Convention & Visitors Bureau, Brookfield, Wis.

**Elizabeth A. Conradson Cleary**, Milwaukee City Attorney's Office, has been named an "Up and Coming Lawyer" by the *Wisconsin Law Journal*.

**Lindsey R. King** has been elected to the board of the Young Lawyers Division of the State Bar of Wisconsin. She is an associate in the Milwaukee firm of Petrie & Stocking,

where she practices primarily in litigation with a focus on labor and employment law.

**Rudolph J. Kuss**, Law Offices of Daniel W. Stevens, Milwaukee, has been named an "Up and Coming Lawyer" by the *Wisconsin Law Journal*.

**Katherine M. Longley** has been named an "Up and Coming Lawyer" by the *Wisconsin Law Journal*. She is with the Milwaukee office of Foley & Lardner.

**Jeremy R. McKenzie**, Davis & Kuelthau, Milwaukee, has been named an "Up and Coming Lawyer" by the *Wisconsin Law Journal*.

**Theodore J. Perlick-Molinari** has been named an "Up and Coming Lawyer" by the *Wisconsin Law Journal*. He is with Birdsall Law Offices in Milwaukee.

## 2006

**Steven C. McGaver** has been elected to the board of the Young Lawyers Division of the State Bar of Wisconsin. He is an associate with the Milwaukee law firm of Gimbel, Reilly, Guerin & Brown, where he focuses his litigation-oriented practice on criminal, civil, municipal, and licensing matters.

**Chad E. Novak** is with Old Republic National Title Insurance Company in Minneapolis, Minn. He and **Sarah Fassbender**, also class of 2006, were married in St. Paul, Minn., on October 3, 2009.

**Mathew D. Pauley** is living in Chicago, Ill., where he has a post-doctoral fellowship in the Medical Humanities and Bioethics Program at Northwestern Feinberg School of Medicine.

**Jaime L. Sitton** has joined the St. Louis, Mo., firm of Sandberg Phoenix & von



Gontard as an associate. She concentrates her practice in the area of health law—medical malpractice. She is licensed to practice in Missouri, Illinois, and Wisconsin.



## PROFILE: Terry Fox

## Gaining from family roots and

## 2007

**Mark S. Kapocius** has been named director of Human Resources and Special Services for the School District of Whitefish Bay. He makes his home in Greendale, Wis., where he was elected municipal judge in 2008.

## 2008

**Nathan G. Erickson** has joined von Briesen & Roper as a member of the Business Practice Group, where he focuses on general corporate law, securities, and the purchase, sale, and leasing of commercial real estate. He resides in Glendale with his wife, **Stephanie Erickson**, L'05.

**Sally A. Ihlenfeld** is a member of the Health Care Practice Group at von Briesen & Roper in Milwaukee. She focuses her practice on general health law, including medical staff, risk management, and patient care matters. She resides in St. Francis, Wis.

**Jeffrey A. Morris** is an associate in the Environmental and Real Estate Practice in the Waukesha, Wis., office of Reinhart Boerner Van Deuren. Previously, he served Reinhart as a consultant. He is also a licensed professional engineer.

**Michael F. Tuchalski** has joined Nistler Law Office, in Milwaukee and Brookfield, Wis., as an associate.

## 2009

**Patrick J. Bodden** has joined the firm of Ruder Ware in Wausau, Wis., where he will advise business owners and individuals in all aspects of business and personal planning.

**Jay S. Einerson** has joined Michael Best & Friedrich in Milwaukee as an associate with the Intellectual Property Practice Group. Before joining the firm, Einerson was an electronics and software engineer and an engineering manager for Fortune 100 companies, small technology companies, and start-ups.

Terry Fox, L'84, is a third-generation lawyer. His father and his grandfather are both attorneys, but that's not all. Terry is the youngest of seven children, and five of them are lawyers (his sister Rosemary is a 1980 grad of Marquette Law School), as are many cousins and other relatives. It was not, however, a given that he would follow in their footsteps.

Originally from Chilton, Wisconsin, Fox attended UW-Milwaukee, where he earned degrees in history and political science. After graduating in 1977, he returned to his hometown to serve two two-year elected terms as the Register of Deeds, while considering whether to follow the family tradition of a legal career.

When he decided the answer was “yes,” he was off to Marquette Law School. There, Fox enjoyed the academic rigor and the camaraderie of law school. After graduating, Fox joined a small firm in his hometown, where he practiced for three years. “It was an established firm in the community where my father and grandfather practiced, so it was an easy transition and a comfortable place to be,” he explained.

After considering a move to Dallas, Fox decided in 1987 to join the firm of Dewane, Dewane & Kummer in Manitowoc. Then in 2000, after 13 years of practicing together and enjoying tremendous growth, a few of the partners separated and formed Kummer, Lambert & Fox, the firm he is with today. “We are a general-practice firm. I do primarily business transactional law, succession, and estate planning,” Fox said. “The ability to truly help someone solve a problem, especially in a small town where I know and respect the people we serve, is very gratifying.” The flip side of that is when he has to tell people things they don't want to hear. “It's tough sometimes and frustrating when we are limited by what we can do to help people out of their difficult legal situations,” he said. As difficult as it is sometimes, Fox related, the most important principle by which he lives is to speak the truth. “You have to live by what you say,” he said. “In our profession, it is sometimes challenging, but essential.”

At a point in his career when many people start to think of retirement, something wonderfully unexpected happened for Fox. In a convergence of talent, foresight, and friendship, he and three friends from Manitowoc recognized the nation's challenge with developing a renewable energy source and saw an opportunity. The answer was blowing in the wind.

In 2003, Tower Tech Systems, Inc., was formed. “We started to manufacture support structures for wind turbines. Through

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## blowing winds



Terry Fox is pictured with portions of the wind turbine towers that are manufactured in Manitowoc.

a serendipitous combination of work and luck, we attracted an investor; acquired a gear manufacturing business in Cicero, Illinois, and Pittsburgh, and a fabrication business in Manitowoc; and added a maintenance division located in South Dakota and later a transportation division in Clintonville, Wisconsin, to actually transport the wind towers,” explained Fox. Three years later, their company went public, it is now traded on NASDAQ as Broadwind Energy, Inc. (BWEN).

“We divided up the legal, real estate, accounting, engineering, and administrative responsibilities based on what we were all best at,” explained Fox. “I never thought anything like this would have been probable or possible.” He is no longer an officer in the company but does sit on its board.

Fox and his wife, Paula Engler, have two young sons ages 12 and 10 who keep them busy. Their free time is spent watching the boys play baseball four nights

a week in the summer, golfing with them, traveling, and hunting. “I don’t ever anticipate a sedentary life,” said Fox.

As he contemplates winding down his legal practice, Fox looks forward to spending more time on charitable endeavors in his community. He is involved with the Green Bay Diocese and is on the board of the endowment trust for a sheltered workshop that employs developmentally disabled adults who provide contract work for manufacturers.

He also plans on getting more involved with activities at the Law School, whose transformation he

admires. “The new programs that are being offered are fascinating, especially the program being developed in water law. Marquette will be one of the few schools in the country that has the staff and the ability to foster that specialty. What a credit to the Law School and something to be very proud of,” Fox said.

He is equally impressed with the emerging new facility. “Eckstein Hall is going to be a model for other schools across the country,” he said. “Dean Kearney’s vision, which has been driving this effort, is reflected not only in the physical aspects of the building but also in the dedication to the quality of the education provided to the students, programs for the entire community, including continuing legal education for attorneys and other professionals.”

A visionary in his own right, Terry Fox knows a good thing when he sees it.

**Jessica A. Franklin** has joined the Godfrey & Kahn Milwaukee office as an associate in the environmental practice group.

**Jonathan W. Fritz** has joined the Labor and Employment Practice of Reinhart Boerner Van Deuren, Milwaukee.



**Olivia M. Kelley** has joined DeWitt Ross & Stevens as an associate in its Litigation, Business, and Tax Groups in the Brookfield, Wis., office.

**Christopher M. King** is an associate at Michael Best & Friedrich in Milwaukee with the Intellectual Property Practice Group.

**Kevin P. Rizzuto** has joined the Intellectual Property Practice Group of Michael Best & Friedrich, Milwaukee, as an associate. Before joining the firm, Kevin worked as a patent examiner for the United States Patent and Trademark Office.

**Christopher G. Smessaert** is an associate in the litigation group of Godfrey & Kahn in Appleton.

**Joshuah R. Torres** has joined Godfrey & Kahn in Milwaukee, as an associate with the Financial Institutions Group.

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## PROFILE: Ann M. Rieger

# Second-generation success

It's a pattern that has run through generations of immigrants of many different ethnicities: For the newcomers, hard, physical work was the way to get established in America. But for their children, education was the way to make it. The path for Ann M. (Roccapalumba) Rieger, L'88, follows that course. But there was a sad twist to Rieger's story that could have knocked her off the road to success.

Rieger was born in Milwaukee to Italian immigrants who came from Porticello, a small fishing village in Sicily. "My father was a house painter, a grocer, jukebox repair man, and probably a lot more that I don't even know about," Rieger recalled. "In short, whatever it took to make a living."

But her father died when she was two years old. While some would say that she then was raised by a single mother, Rieger said that was not really the case. "I was raised in a typical Italian household on the east side of Milwaukee, which meant a very large extended family," she said. She lived with her mother and grandparents in the lower unit of a duplex, and her aunt, uncle, and





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## story based on hard work and strong values

cousins lived in the upper unit. When the upstairs relatives moved out, her mother's cousins, who also had immigrated, moved in. She likens her childhood to the movie *My Big Fat Greek Wedding*, "but without the lamb on a spit in the front yard."

Rieger's mother, who never remarried, had to support herself and her daughter. "My mother worked in factories, first as a seamstress and then in basic production work," Rieger said. Neither of her parents had the opportunity to go to college, but it was a dream they had for their daughter. The value of an education was stressed to her—education was something that could never be taken away.

The family moved to Brookfield for her high school years, and she took the first step toward fulfilling her parents' dream by enrolling in Marquette University. She earned a bachelor's degree in accounting in 1985. She said she enjoyed her undergraduate experience so much that she did not think about enrolling anywhere else when she decided to go to law school.

Her law school years had significant and lasting impact. "The core values that were instilled in me at Marquette—doing my best and always doing what is right—follow me silently wherever I go," Rieger said. "While every institution of higher learning teaches any number of technical skills, Marquette provided an ethical education that permeates everything I do. I did not fully appreciate that until I had been working in the real world for a number of years."

Rieger also has lighthearted memories of law school such as this one: "My maiden name is Roccapalumba. While it is pronounced quite phonetically, it is intimidating by its length. During my first semester in law school, it often appeared that some of my law school professors would look at the name and proceed to call the name of the classmate to my left or right, but not me, when asking a question of the class. Ultimately, I waited three months to have a law school professor even attempt to state my last name—Roccapalumba. I do recall that Professor Blinka pronounced it perfectly!"

Upon earning her law degree in 1988, she began her career at Cook & Franke and became a shareholder in 1996. She moved her practice to Davis & Kuelthau in 2000. "Since the very beginning of my move to Davis & Kuelthau, I became involved in the backroom functions of running a law firm. This included service on a number of the firm's committees, including recruiting and finance," she said.

For many years, Rieger recruited law students from Marquette for participation in summer clerkship programs. "I was always fascinated to hear the stories about what changed and what remained the same in the many years since I graduated from law school. We have had many Marquette students clerk with Davis & Kuelthau who have gone on to become practicing attorneys with the firm."

Rieger became the head of the corporate team in 2006, a member of the firm's board of directors in 2007, and president of the firm in 2008. While firm administration is a significant part of her position, she continues to work directly with clients on a regular basis. Her practice is focused on corporate law, nonprofit law, estate planning, and succession planning for closely held business owners.

She and her husband, Thomas A. Rieger, Arts '85, have been married for more than 21 years and have three daughters. They share a passion for Marquette basketball and, in their leisure time, also follow a number of professional Wisconsin sport teams, as well their daughters' school teams.

She recently served on the planning committee for her law school class reunion. She is also involved in community and parish activities. However, much of Rieger's community service is dedicated to educational efforts such as Economics Wisconsin (which teaches economics in classrooms) and the Youth Leadership Academy, a charter school located within the North Side branch of the YMCA of Metropolitan Milwaukee. After all, she is grateful for how her own family instilled in her the value of education. Now she aims to pass on the message.

## Serving Wisconsin from the bench

“Who would have predicted that a girl who grew up sweeping floors in her parents’ hardware store would become a Supreme Court justice?” That is how Justice Annette Kingsland Ziegler, L’89, summarizes the path of her life. In 2007, she became the 80th justice (and the sixth female) elected to the Wisconsin Supreme Court.

Ziegler grew up just outside of Grand Rapids, Michigan, and was raised, along with three siblings, by hard-working parents. According to Thomas Edison, “Opportunity is missed by most people because it is dressed in overalls and looks like work,” but Ziegler’s parents were not “most people.” She learned the value of hard work by their example. She earned business administration and psychology degrees from Hope College in Holland, Michigan. Upon the advice of a college guidance counselor, she reconsidered her plan to earn an MBA and decided to seek a law degree instead.

She had never been to Milwaukee but took quickly to Marquette Law School and the city when she visited. “I felt an immediate connection when I first came to Marquette,” she said. “Not only did I believe that I would obtain a solid legal education, but I was excited to be part of the Milwaukee community. It turned out to be a perfect fit, for which I am eternally grateful.”

Ziegler initially intended to use her law degree in a business setting. That changed between her first and second year of law school when she worked as a clerk for personal injury attorneys at Samster, Aiken & Mawicke. “The manner in which those

attorneys used their legal talents to help people truly inspired me to practice law,” she said. Still, she wanted to be involved in the business aspect of the law because of her background with her family business and her business degree.

At the beginning of her second year of law school, she began clerking with O’Neil, Cannon & Hollman, where she gained valuable experience in business law. She was offered an associate position with the firm and, upon graduation, practiced in the area of corporate and business litigation, as well as the areas of real estate transactions, tax, personal injury, product liability, and family law. In 1992, she became a special prosecutor with the Milwaukee County District Attorney’s office, handling thousands of criminal matters. Several years later, she was hired as an assistant United States Attorney for the Eastern District of Wisconsin, followed by another term of service with the Milwaukee District Attorney’s office on a joint federal-state project.

Ziegler was appointed by then-Governor Tommy G. Thompson to the Washington County Circuit Court in 1997 and became the first female judge in that county. She was elected in 1998 and reelected in 2004. “I loved sitting on the circuit court bench. It allowed me to help people through very difficult situations. Most people who come to court are very intimidated by the experience and at a difficult point in their lives. As a judge, I could really help them move forward. I have always strived to treat all people with dignity and respect and ensure that they receive equal treatment and justice under the law.”

“[O]ne can be humane and still serve as a zealous advocate or a good judge. I believe that it is critically important to be a decent human being and engage in random acts of kindness.”



In the decade she was on the circuit court bench, Ziegler was assigned more than 32,000 cases of all kinds—civil, criminal, family, juvenile, probate, and more. “That provided a solid base of knowledge in virtually every area of the law and, combined with my other judicial activities, was helpful to me when I decided to run for the Supreme Court,” she said.

A Supreme Court seat opened when Justice Jon Wilcox announced he would retire at the end of his term in 2007. “At that point, I had been on the bench for 10 years and thought that, as a justice, I could make a valuable contribution to the court and the citizens of this state,” Ziegler said. “I could impart the perspective of a trial court judge. I thought I’d let the voters decide.”

And they did. She received 58.6 percent of the vote over Madison attorney Linda Clifford in the contentious general election.

“I’ve been working hard ever since to make the people of the whole state proud that they elected me,” Ziegler said.

Ziegler said she enjoys her work a great deal and is very aware that the work of the court affects the people of this state in a fundamental and personal way. “I care very much about the future of our state, what it will be like for my children, other people’s children, and the people who live here,” she said. “I am doing my very best to get it right.”

Ziegler believes that her experience as a trial court judge, coupled with her Marquette Law School education, prepared her well for the high court. “I would recommend pursuing a Marquette University law degree to anyone who is interested in a legal education,” she said.

She is married to J. J. Ziegler, and they and their three children live in West Bend, Wisconsin. Ziegler and her family enjoy outdoor family activities and are dedicated to conservation. She and her husband are supportive of numerous charitable organizations in the community and their parish. She also serves on the

Marquette University Law School Advisory Board and the Marquette University Centennial Celebration of Women Honorary Committee. She is a fellow of the American Bar Association and a member of the American Law Institute. She has hired three law clerks from Marquette and has had several Marquette interns since she became a justice.

Ziegler said, “The single most important thing I have learned is that one can be humane and still serve as a zealous advocate or a good judge. I believe that it is critically important to be a decent human being and engage in random acts of kindness. It is contagious. . . . Lawyers have the unique opportunity to make the world a better place. We need to take that responsibility very seriously.”



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