

# MARQUETTE LAWYER

MARQUETTE UNIVERSITY LAW SCHOOL MAGAZINE SUMMER 2012

## ALSO INSIDE:

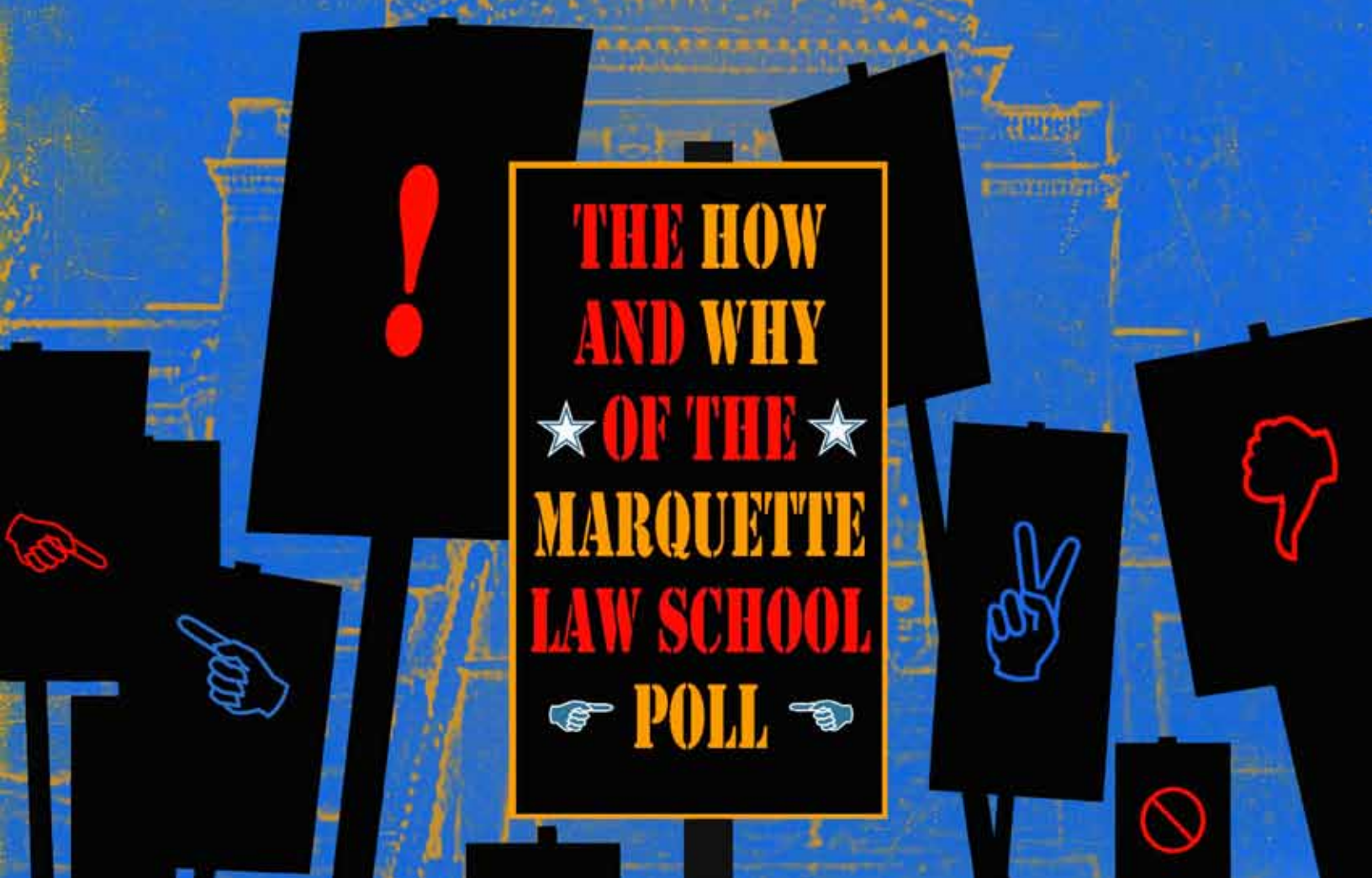
When Sports and the Law Meet:  
A Faculty Roundtable

Justice Elena Kagan at Eckstein Hall

The Life and Art of Marion K. Coffey

From the Podium:

Dean Margaret Raymond,  
Professor Robert Weisberg



**THE HOW  
AND WHY  
★ OF THE ★  
MARQUETTE  
LAW SCHOOL  
POLL**

## Another form of work with students

I recently had occasion to publish an article in the *Northwestern University Law Review*, together with a longtime co-author. In the article, we thanked some 17 current or (predominantly) former students for their help as research assistants. This number was a bit unusual, as the article had been a few years in the making. In fact, it had taken parts of seven years, even as my co-author published numerous other things during that time, and I, too, engaged in some other projects, including not least Eckstein Hall.

But the point on which I want to focus is the contributions of these research assistants—or, more boldly, the contribution of the article (or their work on it) to their education. The sort of factual research required for the Northwestern article was

not so different from what a lawyer might do in certain instances, in the sense of requiring the uncovering and marshaling of information found in documents, books, and archives.

The legal research was similarly analogous to the sorts of inquiry that one writing a brief might undertake, according to the particular circumstances presented.

The students' work lays the foundation in other senses as well. I inform all of my research assistants up front that, whatever the particulars of their work for me, it will be tedious and inglorious. I suggest that, in that regard, it will be good preparation for much of the practice of law, and I mean that as a denigration of neither the practice nor their work (most of *most* work is tedious and inglorious).

But it is, more than anything, the opportunity for a faculty member to work with the students as colleagues, frequently one-on-one, and incidentally but necessarily to impress upon them one's professional habits, that warrants the assertion that the research can be an important part of their education. I believe that learning legal doctrine is by far the most important thing that a law student does, but developing familiarity with the legal culture and facility with legal discourse is important also. Work as a research assistant contributes to each of these aspects of formal legal education.

All of this is on my mind for two reasons. One is that recent commentary has called into question the societal value of law review articles. I am not engaging generally on that matter (my view is too nuanced for useful exposition here). Yet, to me, it is clearly a mistake to portray the work of a student writing or editing or helping research an article as necessarily (or even likely) being without direct benefit to his or her legal education.

The other is that, even more recently than the Northwestern piece, I have found myself required (required by myself, admittedly) to write and collect some essays by a few leading academics to mark the 125th anniversary of the Interstate Commerce Act. They will appear in the *Marquette Law Review* (and we will reserve space in the next *Marquette Lawyer* for a few excerpts), and the law review's outgoing editor-in-chief has dispatched the incoming editor-in-chief and managing editor to help me in the editing of the essays. Having worked with me on some of the painstaking finishing processes of the Northwestern article, he told the newcomers that it will be good for them to have a similar experience with me, as they develop their own habits. I have even persuaded myself that no part of his motivation in effecting this handoff was a desire to ensure that he did not have one last go-round with me.

Joseph D. Kearney  
Dean and Professor of Law



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## Letissa Reid: Building relationships—and careers

Career Planning Center welcomes assistant director



Connecting with people is both a personal trait and a professional asset for Letissa Carver Reid. “I seem to be good at talking to people,” she says. “I know the gas station attendant very well.”

Her strength in networking has helped her throughout her career as a lawyer. And it is a core part of her new role as assistant director for career planning at Marquette University Law School. Reid joined the Law School November 1. Her position was added to the Career Planning Center better to support students and alumni. She joined Paul D. Katzman, assistant dean for career planning, and Erin M. Binns, director of career planning.

In the challenging job climate that law school graduates face nationwide, Reid’s talent for making connections is helping boost Marquette lawyers as they launch their careers. “I have a really positive story for students,” Reid says. There are several parts to that story.

One part is the importance of networking and relationships. Reid’s own story is a case study. She says she has benefited greatly from mentors and colleagues wherever she has gone. Reid grew up in Milwaukee and graduated from Divine Savior Holy Angels High School. She received a bachelor’s degree from the University of Michigan and a law degree from Indiana

University School of Law. She became a clerk to an appellate judge in Chicago, which led to a position with a large law firm there. Reid had no prior interest in environmental law, but a mentor encouraged her to focus on the area, which she did. She continued that interest after she joined the Chicago office of a Milwaukee-based law firm, Gonzalez Saggio & Harlan. She took a career break after she and her husband, Michael, had a son.

Ironically, the only career step she took that didn’t benefit from prior relationships was her application for her current position. But Reid says she is finding that her ability to build and maintain relationships is helping open doors for Law School graduates. She says that she gets a warm reception wherever she goes. “The alumni are really, really receptive to me,” she says. “They understand that the climate is tough, and they want to help students with mentoring and networking.”

A second positive part of what Reid tells students is that there are opportunities and much room for success in today’s challenging job market, but it takes longer to find positions than it did a few years ago, and people may not get their first choice. Patience and persistence are virtues.

And a third part consists simply of trying to convince sometimes-stressed students of a simple message: “It’s going to be OK.” Walk by Reid’s office or spot her elsewhere in Eckstein Hall, and chances are good you will find her talking with students, helping them navigate a path ahead, and assuring them things will work out.

An African-American woman lawyer would have faced big hurdles a generation ago, and challenges remain. But Reid says she has had good opportunities. “I am proud of who I am,” she says, and she treats her identity as “a badge of honor.”

As for her new job, “I’m absolutely having a very good time here.” And she is eager to focus that positive energy on helping students and graduates find good professional situations of their own. ■

## Justice Kagan gives students perspective on the Supreme Court— and on Eckstein Hall

In news stories and in the general public image, taking a case to the United States Supreme Court primarily means standing in front of the nine justices to present an oral argument.

Count that for about five percent of what goes into presenting a case, Justice Elena Kagan told the more than 200 Marquette Law School students packed into Eckstein Hall's Appellate Courtroom on April 3. The other 95 percent is in the briefs submitted to the justices. Kagan said that she would urge anyone preparing a case for the Court to concentrate on those written arguments.

Kagan visited the Law School to help judge the annual Jenkins Honors Moot Court Competition. In addition, she took part in a special one-hour "On the Issues" session with Mike Gousha, distinguished fellow in law and public policy, intended especially for law students.

Asked about the importance of oral arguments, Kagan said that she often wondered about this when she was solicitor general, the position she held before joining the Court in 2010. Having now seen things from both sides, she said oral arguments matter the most in lower-profile cases where there are no "priors," or previous similar cases.

Kagan added that the arguments can matter sometimes: "I can definitely think of cases where I went in [to oral arguments] thinking one thing and came out thinking another," as well as times when she went in undecided and came out supporting one side.

She also said that oral arguments can serve as a valuable time for justices to make points with each other, "and that is especially true if you have a little bit of an unusual take on a case." She said, "Oral argument is a great time to plant a seed." That is particularly relevant for her, as the junior member of the Court. For when it comes to discussing how to decide a case in the justices-only conferences, usually held a few days after arguments, every other justice gives a view before she gets her chance. The oral argument session can be a way for

her to get her views heard before the conference meets, Kagan said.

Responding to a student who asked why people should have faith in the Court, Kagan said that sometimes there are predictable 5-to-4 votes. "That's just the nature of things," she said. But she added, "There are a world of cases that people don't as often take note of, and some quite important, where there aren't these predictable divides." Those often are the cases that show the strengths of the deliberative processes the Court uses.

She called the Court "an inspiring institution." From the inside, she said, "what you're most impressed with is just how prepared the justices are." Despite strong differences expressed in some opinions, personal relations among justices are warm. "Everybody is struggling to get the answers right," she said.

Kagan clearly looked at her visit partly through the eyes of a former dean of Harvard Law School. "This is quite the building," she said of Eckstein Hall as she started the session with students. She said that she had built a building when she was dean but suggested that Eckstein Hall may be better (Gousha graciously did not press her on the point). Later in the session, she said being a law school dean was the hardest job she has had, adding that it made her use "every muscle I have." ■



## Alumni honored for achievements



Natalie Black



Adrian Schoone



Stefanie Ebbens Kingsley



Ante Udovicic

Four Marquette lawyers were recognized at the National Awards Reception in Eckstein Hall in late April for their accomplishments. The four were:

### Alumna of the Year

**Natalie A. Black, L'78.** Black is senior vice president and chief legal counsel for Kohler Co. and president of the Kohler Foundation. She is involved in a wide range of pursuits, from international business deals to advocating for effective programs to teach children to read. She is increasingly involved in philanthropic work and in efforts such as teaching her grandchildren the responsibilities of charitable giving. Black is a trustee of Marquette University. She and her husband live in Sheboygan County.

### Lifetime Achievement Award

**Adrian P. Schoone, L'59.** Schoone has practiced in Racine County and headed his own law firm for more than half a century. He is a past president of the State Bar of Wisconsin and has served the profession in many other roles. He said he gets his strongest sense of accomplishment from “vindicating rights or enforcing obligations for clients in need of that.” He said he intends to continue practicing law “as long

as it is enjoyable and rewarding,” adding, “By that standard, I’ll be doing it indefinitely.”

### Howard B. Eisenberg Service Award

**Stefanie Ebbens Kingsley, L'05.** A Cedarburg, Wis., native, Kingsley is now directing attorney for the Columbia, Kentucky, office of the Appalachian Research and Defense Fund. In addition to working with low-income clients and a wide range of legal needs, she is involved in advocacy on issues such as regulating payday loans. “I can’t imagine doing anything else,” she said. “It’s my mission that if better is possible, good is not enough.”

### Charles W. Mentkowski Sports Law Alumnus of the Year

**Ante Z. Udovicic, L'98.** Udovicic is athletics and activities director of South Milwaukee High School. “It is very rewarding to be able to help students as they move through school and toward college or life after high school,” he said. “People used to ask me all the time if law school was a waste of time since I am not practicing law, and I always tell them absolutely not. Hardly a day goes by where my legal training at Marquette hasn’t helped in some way.” ■

## IP Colloquium brings legal scholars to Eckstein Hall

Intellectual property law often focuses on restrictions on the use of others’ creative thinking and results, but a special program in the 2011-12 academic year allowed Marquette Law School students to benefit from share-the-intellectual-wealth offerings from a dozen experts in the field.

The Intellectual Property Colloquium Series, organized by Professor Irene Calboli, faculty director of the Intellectual Property & Technology Program, brought 11 professors from other law schools to Eckstein Hall for a half dozen lunch-time presentations in each of the two semesters. The sessions were open to the public as well as students.

The wide-ranging series addressed issues involving medicine, science, freedom of expression, sports, corporate identity, and other areas where intellectual property law plays a central role. From “Contraband: Art, Advertising & Property in the Age of Corporate Identity,” with Sonia Katyal of Fordham University School of Law, to “Jewish Process Thought and Copyright Policy,” with Professor Roberta Rosenthal Kwall of the DePaul University College of Law, the subjects were provocative and diverse.

“The goal of the series was to expose students to current hot issues in IP by bringing in academic leaders in the field and fostering academic debate,” Calboli said. ■

**Y**outh Law Day brought about 150 students from a half dozen high schools in Milwaukee to Eckstein Hall on March 15 to get a look at how the legal system works and some of the things that are involved in becoming and succeeding as a lawyer. The program included a mock trial, presided over by Milwaukee County Circuit Judge Marshall Murray, and encouragement for students to pursue legal careers. Speakers included Dean Joseph D. Kearney, Milwaukee County District Attorney John Chisholm, and several judges and attorneys. “Don’t let anybody else tell you you can’t be successful,” Judge Carl Ashley, L’83, told the students. ■



## Certificates added in litigation and alternative dispute resolution

**N**ewly graduated Marquette lawyers this May include the first students to receive certificates in two particular specialties in which they have received in-depth training. The new certificate programs are in litigation and alternative dispute resolution.

Matt Parlow, associate dean for academic affairs, said that faculty members worked to identify appropriate areas for certificates and develop rigorous requirements for students before adding the two certificates to the popular sports law certificate that more than 20 students earn each year.

“Marquette Law School has always been known for training practice-ready lawyers,” Parlow said of the litigation certificate. And in recent years, he noted, the Law School’s alternative dispute resolution training has achieved national acclaim.

To qualify for the certificates, students are required not only to take a substantial amount of classroom work related to those areas but to engage in significant co-curricular activities, such as internships, clinical opportunities, and participation in student competitions.

The litigation certificate program is headed by Professor Daniel D. Blinka. The alternative dispute resolution program is led by Professor Andrea K. Schneider.

Parlow said that certificate programs allow students to organize their academic work around particular interests, send signals to potential employers of a student’s commitment and beginning proficiency in an area, and signal in general the Law School’s strengths.

“Litigation and alternative dispute resolution are two strongholds for us, and we are eager to build on them,” Parlow said. ■

“Marquette Law School has always been known for training practice-ready lawyers,” Parlow said of the litigation certificate.

# RELIABLE POLLING

*Amid Stormy Politics*





Throughout an historic election year for Wisconsin, an extraordinary new project, the Marquette Law School Poll, is providing an even-handed, in-depth look at what the public as a whole is thinking.

The headline across the top of the front page of the *Milwaukee Journal Sentinel* on March 28 read, “Recall race still tight, poll finds.” The secondary headline was, “Walker leads both Barrett and Falk, but just by a little, in Marquette Law School survey.” The second-most prominent story on the front page reported that Mitt Romney had taken a lead over Rick Santorum among people intending to vote in the Wisconsin Republican presidential primary, “according to a new Marquette Law School poll.”

Sure, the pair of stories is an example of how the Law School is getting a lot of attention for the polling project it is conducting throughout 2012. But that front page demonstrated more than that. Along with a large and growing list of reports in local, state, and national media, it showed that, because of the Marquette Law School project, everyone is getting heard as Wisconsin proceeds through a year of historic and tumultuous political events. If polling provides the voice of the total population, the Marquette Law School Poll is the leading vehicle for that voice to get heard this year, amid all the partisan rhetoric and advertising sweeping across the state.

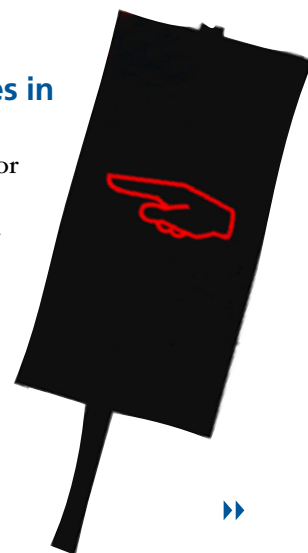
So what is this project? It is nothing less than the most thorough and extensive study of public opinion in Wisconsin history. And partway through this momentous year, the Marquette Law School Poll is achieving its central goals. The results of the monthly rounds of polling have been clear, enlightening, and focused on what is shaping Wisconsin politics. The poll is being conducted to high professional standards and in nonpartisan ways, under the umbrella of a highly regarded academic institution. Results of the poll have been reported by just about every news organization in

Wisconsin and by many major news outlets nationally, including the *Washington Post*, *Chicago Tribune*, *Los Angeles Times*, politico.com, and NPR. And the trove of results being built with each month’s outcomes is—and will be hereafter—a valuable resource for researchers, reporters, and the general public to understand in depth what was motivating voters in Wisconsin during this extraordinary time.

John Pauly, provost of Marquette University, said, “I am proud of the way our Law School Poll has created a nonpartisan space for analysis and discussion during a remarkably contentious and divisive moment in the state’s history. For me, that is exactly the sort of work a great university should undertake on behalf of civic life. We want to bring our energy and expertise and intelligence to bear on public discourse. The Marquette Law School Poll has helped us imagine a deeper role that Marquette University could play in the political life of our city and region.”

### Amid polarization, complexities in overall opinion

Professor Charles H. Franklin, director of the poll and a visiting professor of law and public policy at Marquette Law School, said that the early rounds of polling show that, while the state is sharply and nearly evenly split on questions such as who should win the recall election for governor, the picture is more complex when it comes to specific issues. In some cases, such as the question whether public





Charles Franklin, visiting professor of law and public policy

employees should pay bigger shares of the cost of benefits than they formerly paid, sentiment backs the position of Republicans. But on issues such as reductions in education funding, Democratic positions are more popular.

The poll reveals “a state of multiple opinions rather than a single partisan divide,” Franklin said. Questions about the economy and jobs, he said, show “a mixture of views far more heterogeneous than either of the two political parties would like to see or say, let alone emphasize.”

He said, “We asked, ‘Do you agree or disagree? The middle class in the state won’t catch a break unless we ask the rich to pay their fair share.’ In response, 66 percent agreed, while 31 percent disagreed. But we also asked (with the same lead-in): ‘The middle class in the state won’t catch a break unless we get state spending under control.’ There, 73 percent agreed, while 22 percent disagreed. If voters aligned all their opinions strictly along partisan and ideological lines, we would not see this pattern. Voters often have a surprising mix of opinions.”

Franklin said that economic optimism rose through the first quarter of 2012. In January, 36 percent thought the economy would get better over the next year. In February, this rose to 46 percent, and in March to 50 percent. While more than half of respondents said the recession had a major effect on their personal finances, by March 67 percent said they were no longer suffering from the effects of the recession.

“In the Republican presidential primary, we captured the surge toward Rick Santorum in February, following his victories in Minnesota, Missouri, and Colorado, which took him to a double-digit lead over Mitt Romney,” Franklin said. “By March, however, eight days before the primary, we found that Romney had rebounded to an 8-percentage-point lead. Romney ultimately won by 7.2 percentage points. Our data show that this was due much more to Romney’s surging between February and March. Santorum’s support actually changed very little over that month, while Romney more than doubled his support.”

Another example of poll results: “As gas prices rose sharply, voters were ambivalent about how much any president can do about prices,” Franklin said. “Forty-six percent said a president could do a lot about gas prices, but an identical 46 percent said gas prices were beyond any president’s control. But when we looked at answers by partisanship, we found a sharp divide: 64 percent of Republicans said a president can do a lot about gas prices, while 62 percent of Democrats said gas prices are beyond a president’s control. In May 2006, when gas prices rose during the Bush presidency, those views were reversed in a national poll: 55 percent of Republicans said a president can’t control gas prices, while 75 percent of Democrats said presidents could do a lot. Partisanship is a powerful filter for how we interpret responsibility for economic conditions.”

### The Law School’s public policy initiative

But no doubt many people remain curious what a law school is doing sponsoring a polling project. Let’s shed some light on what lies behind the project when it comes to both why the Law School undertook this and how the project is being conducted.

Public opinion polling goes back to the 1930s. But it has become increasingly sophisticated and influential in the political world in recent years. The truth is that major campaigns conduct large amounts of polling, sometimes almost daily, to track how a candidate is doing and to shape what a candidate says and does. Those results

Kearney's goal in the public policy initiative was to make the Law School a crossroads or home for substantive discussion of public policy issues facing the region, state, and nation. The key was Mike Gousha.



Mike Gousha

are usually kept private, or, in some instances, selected results are made public, usually in ways aimed at promoting a candidate. Further, there are polling firms that are known as having underlying partisan affiliations, often working under contract with campaigns. Much of their polling may be sound, but the partisan affiliations of the firms are inescapable when one weighs the results their polls get.

As far as nonpartisan polling goes, news media organizations and some colleges and universities have conducted political polling for years, but economic factors have reduced the scope and frequency of such work, particularly in a place such as Wisconsin.

Heading into 2012, although Wisconsin was almost certain to be a battleground state in the presidential race and an election was set for an open seat in the United States Senate, prospects were not good for frequent, high-quality, nonpartisan polling to be available in Wisconsin across the year. The advent of a history-making recall campaign against Governor Scott Walker made the case for a high-quality polling project all the more compelling.

In 2010, Mike Gousha, distinguished fellow in law and public policy at the Law School, became involved in conversations with people involved in polling and public policy work in which the idea of the Law School's hosting such a project was raised. That led to conversations with Dean Joseph D. Kearney and a number of faculty and, ultimately, to the decision that the Law School should undertake such an effort, with Franklin as the director. "Polling was a direction that I had hoped for some time we would go," Gousha said.

Franklin, a political scientist on leave from the University of Wisconsin–Madison's College of Letters and Science, is a nationally known expert on public opinion and polling. He co-founded Pollster.com, which won national awards in 2008 and 2009, and founded pollsandvotes.com. He was co-director of the Big Ten Poll in 2008 and has served as a member of the ABC News election night analysis team. He is a visiting professor

of law and public policy at Marquette Law School during 2012. In addition to directing the poll, Franklin is teaching a statistics class for law students and a multidisciplinary seminar on polling and campaigns with law, business, communications, and political science grad students.

The context of the Marquette Law School Poll is the public policy initiative begun by Dean Kearney several years ago. Kearney's goal was to make the Law School a crossroads or home for substantive discussion of public policy issues facing Milwaukee and Wisconsin. He wanted the Law School to increase public awareness of major policy matters and become a neutral convener for people willing to work together to move issues forward—or at least to discuss them in a civil and intelligent way.

The key was Mike Gousha. In 2007, Gousha joined the Law School following a career at Milwaukee's Channel 4 (WTMJ-TV), where he had come to be regarded, in the *Milwaukee Journal Sentinel's* characterization, as the best television news journalist in Milwaukee history. At the Law School, Gousha has hosted, moderated, and facilitated a long list of events, including debates among candidates for governor and the U.S. Senate and frequent sessions of the "On the Issues with Mike Gousha" series, bringing newsmakers and other significant figures to Eckstein Hall for one-hour conversations open to the public. Gousha also hosts a half-hour Sunday television program on state politics, "UpFront with Mike Gousha," shown on Channel 12 (WISN-TV) in Milwaukee and on stations throughout Wisconsin.

In 2009, Alan J. Borsuk, joined the public policy initiative; Borsuk was a reporter and editor at the *Milwaukee Journal* and *Milwaukee Journal Sentinel* for 37 years (Kearney says wryly that he does not lightly term Borsuk the "dean of Milwaukee's print journalists"). Borsuk works on Law School publications and the website, helps arrange policy events, and maintains his specialty as a reporter and commentator on



education through a Sunday column he writes for the *Journal Sentinel* and through talks and other appearances he makes around Milwaukee.

In short, Marquette Law School has sought to establish itself “as the place to which those in the region come to discuss the hard civic problems, the ones that affect us all,” Kearney said in announcing the Marquette Law School Poll last fall.

In launching the poll, Kearney said, “To know the winners, we need only wait for the votes to be counted. But to understand why voters chose as they did and what hopes and fears motivated their choices requires us to conduct scientifically sound polls.”

Kearney said then that with the leadership of Franklin and the engagement of Law School professors, including Mike McChrystal and Phoebe Williams, as well as the involvement of Gousha and Borsuk, “This will be an academic enterprise that establishes the Law School as a serious player in campaign analysis.”

Franklin says he was attracted to Marquette by the Law School’s commitment to stimulating public policy awareness. He says that, as he looked to the prospects for polling in Wisconsin in 2012, he felt, “Why shouldn’t Marquette Law School step into that relative vacuum?”

“The way to give the public at large a voice in the conversation is through polling,” Franklin says. “Political parties, candidates, and interest groups are constantly doing polling in the state, which means they know what attitudes are. . . . So the only people who don’t know are the citizens themselves.” As he put it, “One goal of our polling is balancing the scales.”

## The design and structure of the polling project

It was agreed by all involved in the effort that the polling project would involve numerous rounds of polling, approximately monthly, through 2012, with adequate resources to allow not only questioning on “horse race” matters of which candidates people prefer, but also issue-oriented questions that shed light on why they feel the way they do. The combination of frequency and depth of the surveys makes it the most in-depth polling effort in Wisconsin history. “It’s by far the most extensive polling of the state ever,” Franklin said. Other organizations have done good polls, he said, but there has been nothing on the scale of the Law School’s effort.

Another key element of the polling project is that every result is being posted on a website, [law.marquette.edu/poll](http://law.marquette.edu/poll). That includes every question

and the responses that it got, as well as “crosstab” breakdowns giving results in extensive detail. Some polls, especially those from partisan sources, release data only on certain questions or do not release crosstabs. Such detailed information can be used, for example, in shaping a candidate’s positions or campaign strategy and, therefore, campaign leaders would not themselves disclose it.

In the Marquette Law School Poll, the goal is maximum transparency in what the poll finds and full access to the data for anyone, from curious citizens to academic researchers, so that the project can be a resource. “This is intended to be an academic enterprise and to create a public good,” Kearney said.

The polling project is supported from existing annual-fund dollars; that is, it is based on the accumulation of many small donations to the dean’s discretionary fund. Student tuition is not used to support the project.

Professor Williams said, “I expect that each report about the polling results will help frame the issues that surround the very important political contests taking place during 2012. We all benefit from an intelligent informed electorate. In my view, the Marquette Law School Poll helps us to achieve this goal.”

Michael O’Hear, associate dean for research, has also been involved in the initiative. “Although the horse race numbers have been getting the headlines,” he said, “what I find so exciting about the polling project is what it is uncovering about the underlying values and perceptions of Wisconsin voters. This will help researchers, both academic and other, to better understand the meaning of the electoral results in this nationally significant swing state. Additionally, I hope that the poll results will help policy makers in Wisconsin as they develop their post-election agendas.”

Amber Wichowsky, an assistant professor of political science at Marquette, said she uses public opinion information frequently in her research, but she often faces limitations. “Most surveys provide just a snapshot of public opinion at any particular moment in time,” Wichowsky said. “Others that track voters over an extended period tend to focus on surface-level questions. Virtually all surveys have sample sizes that are too small to consider how individuals are influenced by their local environments.

“The Law School’s poll nicely addresses each of these limitations. Yes, Wisconsin will be at the heart of American politics in 2012. And for that reason alone, the poll is an exciting project. But the poll will also go

below the surface to look at how Wisconsinites think about particular issues such as education, health, and tax policies. It will provide a dynamic look at the electorate that will allow us to consider trends in public opinion over the course of several campaigns, from the recall election in June to the general elections in November. And by surveying roughly 700 registered voters each month, we will be able to look at how political attitudes and behaviors are shaped by social, political, and economic contexts.”

### How you can draw conclusions from 700 people

So how is the poll being carried out? How is it that you can interview 700 people from around the state—the approximate sample size for each poll—and say you have a handle on what five million-plus Wisconsinites are thinking?

Franklin says that polling is a combination of science and art. The more scientific part is how a few hundred people can be a valid sample of a few million people. Franklin begins describing how that is so by asking: When you go to the doctor, how big a sample of blood does he need to take to figure out what’s going on in your body? The doctor doesn’t need to drain all your blood, of course; so, too, does a pollster not need to interview every person to get a good handle on sentiment. Statistical theory provides a rigorous proof of the validity of sampling as a means of estimating characteristics in a much larger population.

The key to a reliable poll, Franklin says, is a valid random sample. In the case of the Marquette Law School Poll, that means contracting with one of several firms nationwide that can combine every Wisconsin area code and residential telephone exchange (the first three digits of the seven-digit number) with randomly generated numbers, which are used for the last four digits, and then can provide people to do the calling and questioning. In the Marquette Law School Poll, people are called over a four-day period, and, although many won’t take part or can’t be reached, the combination of persistence and randomness yields a good sample.

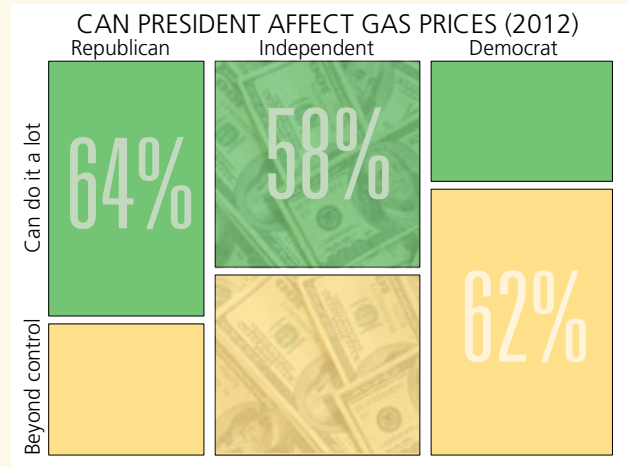
“By picking numbers at random, we are giving every number in the state an equal chance of being in the sample,” Franklin says. “That’s the magic. That’s what makes 700 people representative of five million. We do not pick and choose whom we dial based on any characteristic other than a random phone number.”

One important element of the Marquette Law School Poll is the inclusion of cell phone numbers. More than a quarter of all adults now use cell phones as their only or primary telephone. The cell users are disproportionately young and lower income, Franklin says. Yet they are left out of many

## Can the president affect gas prices?

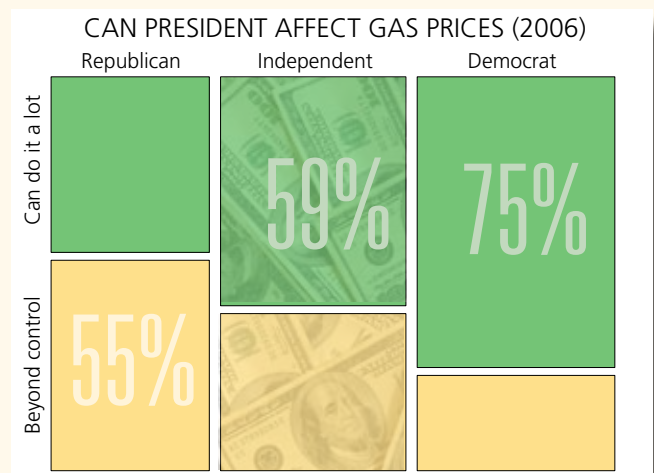


MARQUETTE LAW SCHOOL POLL



As gas prices recently rose sharply, voters seemed ambivalent about how much any president can do about prices. Forty-six percent said a president could do a lot about gas prices, but an identical 46 percent said gas prices were beyond any president’s control. Yet when we look at answers by partisanship, we find a sharp divide: 64 percent of Republicans said a president can do a lot about gas prices, while 62 percent of Democrats said gas prices are beyond a president’s control.

Below: In May 2006, when gas prices rose during the Bush presidency, a national poll by CBS News and the *New York Times* showed those views were reversed: 55 percent of Republicans said a president can’t control gas prices, while 75 percent of Democrats said a president could do a lot.



Follow the Marquette Law School Poll throughout 2012 at [law.marquette.edu/poll](http://law.marquette.edu/poll).



polls. Why? A key reason is that many polling companies now are using automated questioning techniques (so called “robo-calls”). The technique is controversial—are results as reliable when people are dealing with a machine?—but, more importantly, federal regulation bans robo-calls to cell phones. That knocks cell phone users out of automated polling projects. The Marquette Law School Poll calls are all made by “live interviewers,” which allows the inclusion of cell phones. Franklin says that polling firms also are exempt from no-call rules so they can call anyone. (However, more-responsible firms will strike your number from their database if you tell them you don’t want to get further calls, he says.)

With a sample of 700, the margin of error is 3.7 percentage points—again, something calculated by a formula, Franklin says. Interestingly, that margin of error remains about the same no matter how large the total population is, once you get above a certain level. So whether you were polling concerning the City of Milwaukee, the state, or the nation as a whole, 700 or so would yield the same degree of reliability.

Does the margin of error go down if the sample increases? Yes, Franklin says, but the decline is relatively slight. If you increase the sample to 1,000, the margin goes down to 3.1 percentage points. Further increases yield diminishing differences, so it is rare to see a poll

that involves many more than 1,000 to 1,500 respondents.

The “art” side of polling focuses on what to ask and how to ask it. While there has been a great deal of academic research on how to phrase questions and how people react to different types of questions, writing questions is still a matter of judgment, Franklin says.

In the case of the Marquette Law School Poll, that means that each month’s survey is preceded by extensive work by Franklin and others on developing a draft of a questionnaire, followed by circulating it to a group of people within the Law School, including Gousha, McChrystal, and Borsuk, for feedback. Most months, the cycle includes a lengthy face-to-face session to settle specifics.

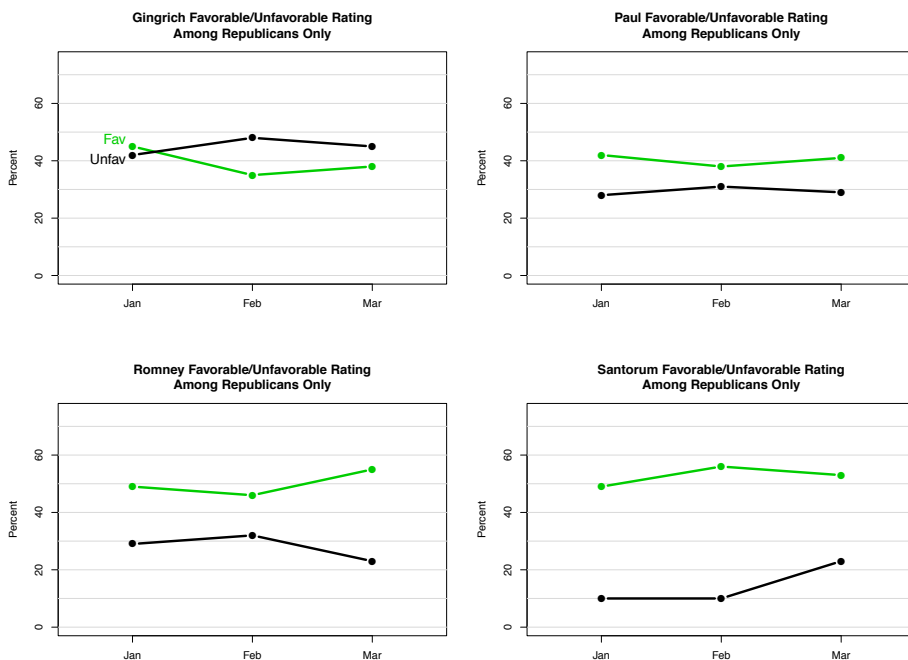
### The art of structuring questions

How to phrase a question about candidates for an office—if the election were today, would you vote for A or B?—is fairly simple (although even in that case, the people asking the questions are required to rotate the possibilities, so that half the time “B” precedes “A,” to avoid biasing the results by the order of names).

But phrasing issue-oriented questions—for example, how are you being affected by economic trends?—is a more complex matter and can lead to extensive discussion.

The key, Franklin says, is, “How do you phrase a question so that it is clear to the large majority of people?” The answer includes using common, non-technical terms, and asking direct questions without unnecessary words. Franklin says this “generally leads to rather bland-sounding questionnaires,” especially when the goal is to be as nonpartisan as possible. But, he says, bland questions are better than provoking strong reactions on account of the language used in a question.

What makes a poll partisan or biased? Franklin says the answer is rarely in the sampling techniques. The process of random selection is widely accepted and used by even most overtly partisan polling efforts. “It is far more likely that bias comes in the question wording or the selection of which issues to ask about,” Franklin says. A Democratic-leaning firm might pick different issues from a Republican-



The Marquette Law School Poll succeeded in capturing the ups and downs of the Republican presidential primary campaigns in Wisconsin between the start of the year and the April 3 election, as seen in part in these charts.

“Politics is never short of spin, and our goal is to produce information about what citizens think about politics and public policy in Wisconsin without spin.”

—Charles Franklin, visiting professor of law and public policy

leaning firm or word things differently. Even the order of questions can bring different responses—what Franklin says is called “priming” responses.

In the case of the Marquette Law School Poll, careful work goes into keeping things as nonpartisan as possible. But even so, realization can be complicated. Consider two examples:

In February, voters were asked whether they approved or disapproved of the job performances of President Barack Obama and Governor Walker. They were also asked how they thought the economy was doing. As an experiment to test the impact of the economy on people’s thinking, Franklin directed that half be asked the Walker and Obama questions first and half be asked the economy questions first. As described in a story in the *Los Angeles Times*, the results showed that those who were first asked about the economy gave Obama significantly lower job-approval totals than those who were asked the approval question before the economy was brought up. Walker had somewhat better job approval ratings among those who were asked about the economy first.

Also in February, the poll asked about opinions on whether a proposed iron-ore mine should be developed. The question that emerged from deliberations was this: “There is a proposal to develop an iron-ore mine in northwestern Wisconsin. Supporters argue that the mine will create 700 jobs and long-term economic benefits. Opponents argue that not enough environmental protections are in place to preserve water and air quality. Do you support or oppose developing the mine?”

At almost the same time, a well-known polling firm, Public Policy Polling (PPP), was hired by the Wisconsin League of Conservation Voters to ask this question: “As you may know, the Wisconsin State Senate is considering an open-pit mining bill. Supporters of the bill say that Wisconsin should streamline its environmental regulations in order to create more open-pit mining jobs in northern Wisconsin. Opponents say that the existing water protections should not be weakened to allow out-of-state mining companies to expose Wisconsin families to chemicals such as mercury, lead, and arsenic. Which

comes closer to your point of view? Environmental regulations should be streamlined or environmental regulations should not be weakened.”

The Law School Poll found sentiment favoring developing the mine, 52 percent to 33 percent. By contrast, the PPP poll found 34 percent in favor and 49 percent opposed to the mine. In the light of the different outcomes, some commentators argued that the Law School question was too general and that mentioning “700 jobs” helped incline people to saying they were in favor. Others argued that the PPP question, by mentioning the chemicals and using the term “out-of-state,” was inclining people against the mine.

Those involved in the Marquette Law School Poll knew going into the effort that there would be claims that the polling was biased. Those on the lower end of results often claim that the results aren’t accurate or that a poll was biased against them. Indeed, when the first poll results came out in January and had Governor Walker slightly ahead of possible Democratic opponents in the recall, there were claims by some bloggers and Democratic leaders that the poll was biased against Democrats. Subsequently, polling by others found very similar results, and the claims faded away.

Some questions are being asked each month in the poll; others will be asked from time to time. Either way, across the full year, trends in how people are perceiving things will be seen, and a richness to the picture of Wisconsin public opinion will emerge.

Kearney, Gousha, Franklin, McChrystal, and others involved in the poll are confident in the value of providing unbiased polling results, especially in a volatile political year like 2012 in Wisconsin.

“Politics is never short of spin, and our goal is to produce information about what citizens think about politics and public policy in Wisconsin without spin,” Franklin says. “Skeptics on all sides will always find that polling doesn’t represent the world as they see it. But by covering a wide range of subjects from several points of view and showing exactly what we asked and exactly what people told us, without our interpretation, we at least let people draw their own conclusions.” ■

# Penalties and Procedures

Increasingly complex off-the-field rules and processes for athletes mean more interaction between the worlds of sports and law





Marquette Law School's sports law program and its National Sports Law Institute were featured in the Fall 2011 issue of this magazine. Following up on that article and on the almost-daily headlines about problems with athletes' conduct, we asked five Marquette professors involved in sports law about their perspectives on trends in enforcement of rules, especially for off-the-field conduct. The five are Matthew Parlow, associate dean for academic affairs and associate professor of law; Matthew Mitten, professor of law and director of the National Sports Law Institute; Paul Anderson, adjunct professor of law and associate director of the National Sports Law Institute; Janine Kim, associate professor of law; and Martin Greenberg, adjunct professor of law and one of the leaders in the Law School's establishment of the National Sports Law Institute.

**As with politicians and entertainers, athletes are sometimes being sanctioned today for things that were brushed under the rug or glossed over in earlier times. In what ways have lines been redrawn when it comes to conduct bringing some form of punishment?**

**PARLOW:** I think athletes have always misbehaved off the court or field, but it is only in recent times—say, the last 15 years—where leagues have started to take a keener interest in punishing for behavior that, while unrelated to the athlete's performance for his team or during a game, is nevertheless problematic for the league. This newly focused attention is due, in part, to the incredible rise in advertising, sponsorship, and television and radio revenue for leagues and their teams. Fans love competitive sports, but fan support is also dependent on a league's image. The athletes that help compose the league—and their behavior both on and off the court or field—are critical for maintaining fan loyalty. Leagues have a vested financial interest to ensure that their players—while not necessarily looking like choirboys—are also not devaluing the league brand through inappropriate behavior outside of the game.

But a league's attention to athlete misbehavior off the court or field—and its

attendant punishment for it—are also due to the fact that not only has the press grown fond of reporting such transgressions, but there are also iReporters who need only pull out their cell phone and film (and upload onto YouTube) or Twitpic the image; the incident can go viral almost immediately.

**KIM:** I think there are at least two significant forces at work here. The first is one that was just mentioned: publicity. Athletes are celebrities, and their activities are much more exposed to public scrutiny and judgment. That makes it very hard for leagues and others simply to ignore misbehavior. The second is the phenomenon of evolving societal norms. Behavior that used to be considered acceptable or typical may no longer be considered that way. In the criminal law, for example, there have been major changes in the way we think about rape and domestic violence; we take these offenses a lot more seriously than we used to. It seems to me that private institutions, when establishing and enforcing codes of conduct, are not immune to this process of evolution. >>



Janine Kim

### In what ways have the systems for determining those punishments changed?

**PARLOW:** With recreational and performance-enhancing drugs, leagues have obviously adopted stricter policies and protocols that impose harsher penalties for positive drug tests. This evolution has been occurring for decades, but especially in the last decade. In terms of punishing for misbehavior off the field or court, most league commissioners have invoked their “best interests” powers, whereby the commissioner may act in the best interests of the league, even if there are not prescribed protocols for such circumstances. This power can be limited by clauses or provisions in the league constitution, the collective bargaining agreement, or other league-governing documents. But since most leagues do not expressly curtail this power in the area of punishment for off-court/field misbehavior, league commissioners may invoke this authority when imposing such punishment. The NFL has adopted a personal conduct policy that more clearly lays out the expectations of all league personnel—including players—and details how they will be punished for transgressions that hurt the perception of the league.

**GREENBERG:** Focusing on colleges and on coaches, I have a lot of questions about what I see as a potentially bankrupted system, in a sense. Is the need to win so great

or the need to generate revenue so important that all ideals of amateurism and ethics are put aside? College athletics are big business. Coaches lead multimillion-dollar enterprises. Television and cable contracts, merchandising, naming rights, enhanced seating, and championship bowl games are as important in the college game as they are to its pro brethren. Sports-generated revenue has become even more important as a result of state budget cuts to higher education. Are university presidents giving ground to athletic directors and college coaches? Who actually is running the university today? Is the sports money machine actually winning out? Has big-time sports become an unchecked fiefdom where there is almost no end

to what will be undertaken to protect the brand, the image, the name, the heroes, the dollars, or anything that might interfere with the scoreboard? We probably need to take a better look at the amateur enterprise where transparency, oversight, academic priority, and public accountability need to be the bottom-line goals.

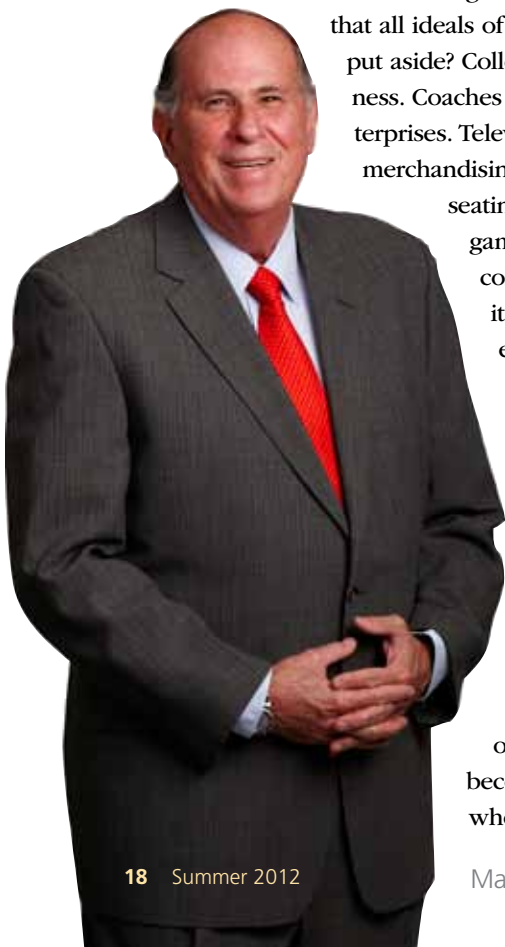
### How much do the systems of sanctioning players, teams, or college programs resemble the kind of procedures you would find in a civil or criminal court case? Can you point to some of the similarities or differences between the theories for punishment that underlie our criminal justice system and those for sports leagues?

**KIM:** I’m not sure that there *is* a theory behind punishment by sports leagues. Philosophers and jurists have long struggled with theories of criminal punishment, asking questions about why and how much the state should punish individuals. Many people are familiar—even if only on an intuitive level—with notions of retribution, deterrence, and rehabilitation. The issue is by no means resolved, but it’s fair to say that the criminal justice system approaches it very self-consciously. But when it comes to private entities, like sports leagues, it’s hard to glean any particular theory behind their disciplinary actions, especially when they are authorized by a notion as undefined and unlimited as “best interests” of the game. That said, I don’t think it would be far-fetched to say that sports leagues are probably interested in achieving retribution, deterrence, and rehabilitation, even if they aren’t willing or able to pursue these purposes in a consistent and rigorous fashion.

**PARLOW:** Commissioners, in many instances, sit as judge, jury, and appellate court on their own decisions related to punishment meted out to wayward athletes. In this regard, a league commissioner has more power, authority, and control than any one actor would in a criminal or civil justice system.

### What seem to be the most successful tools for keeping athletes in line? Fines? Suspensions? Escalating sanctions? Bad publicity?

**ANDERSON:** It depends on the level of athlete. High school athletes who break school, school district, or association rules are typically suspended or ruled ineligible, and this can work well. At the college level, violations can really affect a university (in that it may have to do such things as returning tournament revenues) more



Martin Greenberg

than the student-athletes themselves. Often, since the athletes who violate the rules are those who assume that they will be going pro in their sport, they could not care less about any penalties and are merely using college as a stepping stone to the professional ranks (even though their specific chances of professional success are so small). At the professional level, the main things that seem to dissuade players are fines coupled with suspensions. For players making millions of dollars, actually missing games can take a large chunk out of their paycheck—potentially several hundred thousands of dollars. The other side of this is that many players make so much money that this sort of punishment has no impact on them financially or otherwise.

**PARLOW:** I would say all of the above, save perhaps the bad publicity. Players hate losing money through fines (and suspensions, as they are unpaid suspensions almost all of the time), particularly because many of them have shorter careers and they need the money from their playing days to help sustain them later in life. Escalating sanctions have also seemed to work for some (Mark Cuban as owner of the Dallas Mavericks eventually got sick of paying six-figure fines, despite being a billionaire, and Adam “Pacman” Jones finally ran himself out of the National Football League because of escalating sanctions for a number of off-the-field transgressions). Bad publicity, on the other hand, is a mixed bag. Here’s why: Sometimes having a bad-boy image can be to the advantage of certain athletes, despite the league’s disliking it. It helps them sell jerseys; it gives them street-cred with kids who follow the sport. Allen Iverson comes to mind here.

**The decision in Ryan Braun’s performance-enhancing-drugs case turned on a chain-of-custody issue involving the urine sample. That’s something you normally associate with courtrooms and not playing fields. As a lawyer, what do you think can be learned from how that case turned out? Did Braun get off on a “technicality,” as some say?**

**PARLOW:** I think that the case is a good reminder to lawyers that procedure can be as important as the merits of your case.

**ANDERSON:** Chain of custody in a drug-testing appeal is not merely a technical rule; it is one of the most fundamental and basic parts of the policy itself. Especially in a situation where the system assumes the player’s guilt by imposing a strict-liability standard for what is in his body, virtually the only way to argue that a result should be set aside is to show that there was a problem with chain of custody. This is something done at all levels of drug testing. Other cases on the international sports level have made clear that in a system where an athlete is strictly liable for what is in his body, those implementing a drug-testing scheme should also be strictly liable, as it were, for making sure that the system is followed exactly.

**Braun’s case received enormous attention. How do the procedures for cases involving banned substances allegedly used by a major league baseball player differ from such cases in other sports? In general, how effective are sports regulatory bodies in banning performance-enhancing drugs?**

**ANDERSON:** Currently, Major League Baseball’s drug-testing program seems to be the most extensive system in professional team sports in the United States, in terms of both what it tests for and the seriousness of the penalties that can be imposed. Of course, baseball also has historically received the most criticism, and so this enhanced system seems to be a direct reaction to that.

If leagues truly have buy-in from the players to work together to create a strict liability system in regard to particular banned substances, the program can be very effective. There are several potential problems, though. First, the science of creating banned substances and methods continues to outpace the ability of regulators to create a comprehensive list of all the ways that a policy can be violated. Once a policy says that “these” are the methods a player cannot use or the substances a player cannot take, it runs the risk of someone’s developing an unforeseen method or substance that would not be covered but could also be just as performance-enhancing. Second, as the Braun situation illustrates, players need to



“Because the nature or scope of discipline imposed on professional athletes affects their working conditions, it is a mandatory subject of collective bargaining that must be agreed to by the players’ union in each league.”

— Matthew Mitten

expect confidentiality from the system, and so far, at least in baseball, this has not always occurred.

And, finally, the policies set up a system of responsibility for what one has in his or her body. They do not really test use or possession. Instead, the mere presence of a substance in one’s body is enough for him or her to be subject to liability. This mirrors the international system under the World Anti-Doping Agency (WADA) code. But it also adds to the perception of immediate guilt with virtually no way to show any valid reason why something appears or why a test result may be mistaken.

**MITTEN:** In contrast to Olympic, college, and high school drug-testing programs (which are unilaterally imposed by sports-governing bodies and educational institutions), major league professional sports’ drug-testing programs are a mandatory subject of collective bargaining, which generally requires the consent of the players’ union to be adopted. Similarly to those of the WADA code (which governs Olympic competition) and the NCAA’s approach, professional sports leagues’ drug-testing policies impose strict liability and establish sanctions (in particular, competition bans for a specified time) for violations.

But there are some key differences. The prescribed sanction for a first doping offense (e.g., use of anabolic steroids) is much shorter for NFL (4 games) and MLB players (50 games) than NCAA (one year) and Olympic athletes (two years). Although the length of the suspension of Olympic and NCAA athletes may be reduced based on one’s degree of fault for a doping offense, professional athletes generally are subject to a fixed suspension regardless of their

individual level of fault. In other words, both intentional and unintentional (or inadvertent) violations are punished the same.

To provide an effective deterrent, drug testing of athletes must be unannounced and occur out-of-competition as well as during competition, which is an important feature of Olympic, NCAA (except for Division III), and professional sports drug-testing programs. It is likely that more frequent and widespread drug testing (including the collection and analysis of blood as well as urine) combined with the use of non-analytical positive evidence (e.g., athlete admissions), which has been implemented for Olympic and some professional sports, has reduced the overall usage of banned performance-enhancing substances by athletes. But doping certainly has not been eradicated from sports at any level of competition.

**The NCAA has an elaborate set of rules for athletic programs and athletes, yet it seems that instances of rule violations are increasingly common and increasingly serious. Is the system working? Any nutshell thoughts on what would make it more effective?**

**ANDERSON:** The perception that rules violations by NCAA schools are becoming more common and serious is misleading. These problems have been happening for over 100 years. In fact, reform of college athletics to deal with perceived violations of the rules goes back perhaps to 1855, when Harvard agreed not to use graduates in athletic contests at the collegiate level. The difference now is the explosion of sports media, which brings any issue to the forefront, online or on television, immediately. The public is also very willing to throw out any notions of innocent-until-proven-guilty and assume



Paul Anderson

that any report of a violation of abuse in college athletics is true, before any real investigation occurs.

Although I am not convinced that the system needs a huge overhaul, the main problem is that the NCAA and athletic departments do not have the resources to be police forces. Their enforcement will be reactive and not preventative. And with the money coming to many (especially coaches at the highest levels), administrators will often sweep problems under the rug because they are willing to sacrifice the integrity of a program, and perhaps a university, hoping that that problems will go away or not be noticed. Until university presidents work consistently with other university leaders and athletic departments to treat athletics similarly to all other units in a university, reports of abuses will continue, no matter what rules are written.

**MITTEN:** The root of the problem is that the NCAA has a very detailed matrix of rules seeking to preserve the “amateur” nature of intercollegiate athletics in an increasingly commercialized environment, the latter being driven primarily by the American public’s passion for college football and men’s basketball. Although the NCAA and its member universities collectively generate billions of dollars and many coaches receive multimillion dollar contracts, the economic benefits that a student-athlete is permitted to receive are strictly limited to the value of an athletics scholarship, which does not equal the full cost of university attendance. If a student-athlete receives any “extra benefits” from institutional sources or representatives or preferential treatment from third parties (e.g., discounted tattoos), he or she violates the NCAA’s amateurism rules, which adversely affects the person’s intercollegiate athletics eligibility.

There is a strong, inherent incentive to violate the NCAA’s amateurism rules, with the attendant need (or so it may seem) to cover up any violations, because of the

substantial tangible and intangible rewards of fielding winning intercollegiate teams, as well as student-athletes’ economic needs and desires to receive a share of the revenues that their talents generate. Permitting universities to pay student-athletes a cash stipend to narrow the deficit between the value of an athletic scholarship and the full cost of attendance (which has been proposed and is currently being evaluated by the NCAA’s membership) should reduce amateurism-rules violations, but won’t completely eliminate them. Perhaps the most effective deterrent would be federal or state laws criminalizing the provision of economic benefits to student-athletes that causes the loss of their eligibility to participate in NCAA athletics, although this is not a measure that I advocate, for a variety of reasons.

### What legal limits are there on the latitude sports teams, leagues, or regulators have to sanction athletes for things they do off the field and in their private lives?

**MITTEN:** Because the nature or scope of discipline imposed on professional athletes affects their working conditions, it is a mandatory subject of collective bargaining that must be agreed to by the players’ union in each league. As a *general* rule, team- or league-imposed discipline on professional athletes for off-field conduct is subject to review by an independent arbitrator based on a “just cause” standard of review. The arbitrator usually has authority to reduce the punishment if it is found to be unauthorized or disproportionate to the offense.

By contrast, Olympic, college, and high school sports-governing bodies, as well as educational institutions themselves, generally have the unilateral authority to establish reasonable codes of conduct regulating athletes’ off-field conduct (the opportunity to participate in athletics being typically viewed as a conditional privilege rather than a right). Public educational institutions—because they are “state actors” subject to the constraints of the federal constitution—must respect student-athletes’ federal constitutional rights by not prohibiting or disciplining protected private conduct (e.g., consensual sex among adults) and by providing due process before disciplining for off-field misconduct. Discipline imposed on Olympic sport athletes generally is subject to de novo review by an independent arbitrator; by contrast, discipline imposed on college or high school athletes is subject to very deferential, rational-basis review by a court (absent alleged violation of a constitutional right subject to heightened judicial scrutiny). ■



Matthew Mitten



## Homily at the Funeral Mass of Marion K. Coffey

### Gregory O'Meara, S.J.

This past winter, Marion K. Coffey passed away at the age of 87. Coffey was the wife of the Hon. John L. Coffey, L'48, of the U.S. Court of Appeals for the Seventh Circuit, and had numerous other connections with Marquette University Law School. She was as well a noted painter; in the words of Mike Johnson, author of her obituary in the *Milwaukee Journal Sentinel*, "[t]here was something about art that touched Marion Coffey's soul, and she used her talents and good nature to brighten the lives of those she encountered, from people she met on Milwaukee street corners while painting to those who purchased her creations." Her nephew, Rev. Gregory J. O'Meara, S.J., associate professor of law at Marquette University, delivered the homily at her funeral Mass in St. Monica Catholic Church in Whitefish Bay, Wis. With his permission, and that of Mrs. Coffey's children, Peter L. Coffey, L'84, and Lisa C. Robbins, we share it here—together with some of her artwork.

**F**rom the book of Jeremiah, in today's reading: "Go down to the house of the potter, and there I will impart my words to you."

Note: God does not speak to the prophet, or to us, in the places we expect. There is no Garden of Eden here, no burning bush; God does not reveal his law on the mountain; nor does he make his will known in the Temple, or cry out in the wilderness.

Rather he instructs Jeremiah to go down to the lower part of Jerusalem—near the well of Siloam, where potters and other craftsmen had easy access to water to ply their trade. There, on the threshold of the artist's studio, God draws Jeremiah's attention to the potter at the wheel, who keeps working on the same vessel, re-fashioning it if it is spoiled. In the eyes of the artist, this lump of clay is filled with possibilities.

And only after Jeremiah's observations does God speak: "Just like clay in the hands of a potter are you in the hands of God. . . ."

In this conscious echo of the creation story in which God fashions human beings from the clay of the earth, Jeremiah identifies the labor of the artist as holy—as revealing how God works in our lives. . . .

Hold that thought—as we make an intuitive leap.

A proverb teaches that "eyes are the windows of the soul." Ordinarily, the aphorism suggests that, by looking within the eyes of others, we can see who or what they are. In Marion's case, we met her soul not only by gazing in her eyes; but also, through her painting, she gave us the breadth of vision, the crystalline purity, of how she saw the world.

And so, what lessons might we gain by standing on the threshold of her studio, in her daughter's home, where she was surrounded by family and friends, whom she needed every bit as much as potters in Jeremiah's time needed water? In the midst of apparent chaos, with steel drums playing in the background, and canvases upon canvases heaped, Marion would remind us with each brush stroke how wonderful life can be.

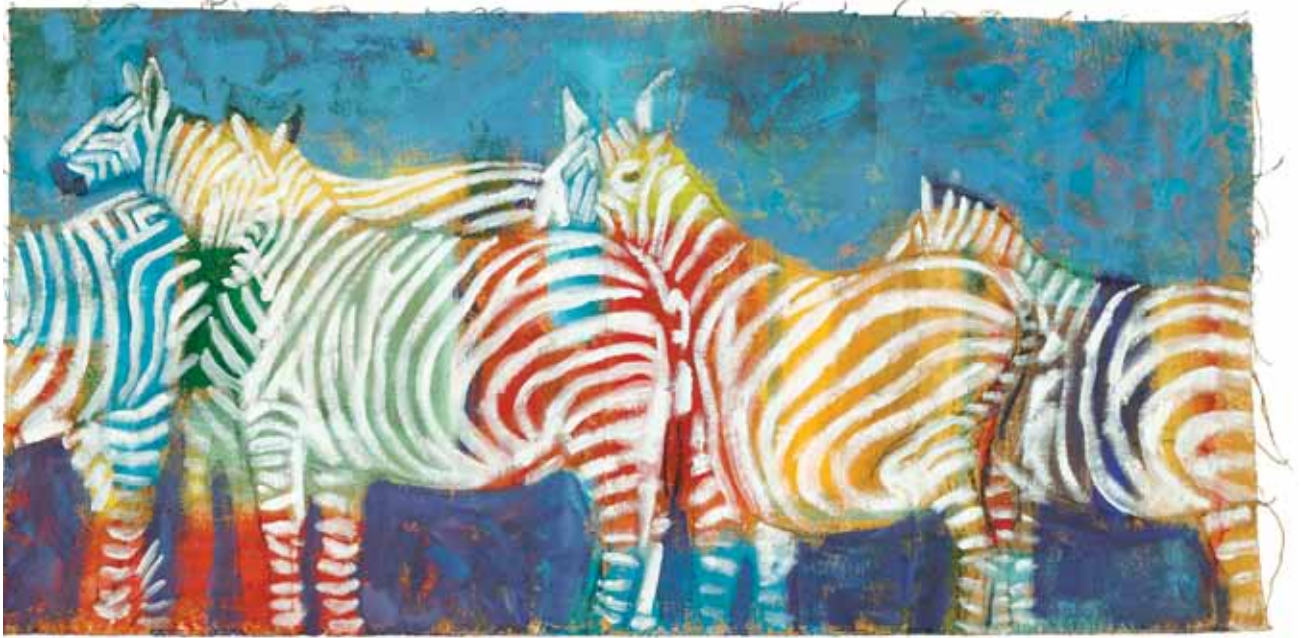
By means of her disciplined eye; her delicacy in distinguishing hue, color saturation, and grayscale; her sometimes whimsical sense of form, line, and perspective; and her unerring ability to focus on the spiritual center of what she perceived, Marion invited us to see what we so often miss to our detriment.

Through Marion's vision of the world, we were given the privilege of seeing our lives laden with the profound beauty of everything: from rocks, leaves, and flowers to old laundromats and Masai tribesmen, from octagonal barns and vases tumbling forth daisies to cows and castles far more colorful than those portrayed in mere photographs. >>



Photo: Troy Freund

Marion Coffey



Three of Marion Coffey's paintings: Above, *Kenya Zebras*; near right, *Abbey de Senanque*; far right, *America 2001*.



For Marion, ours is a world made manifest both in quiet tranquility and brassily shouting forth, a riot of color and joy!

Though she may not have put it this way, by looking through Marion's eyes, we can begin to understand that God continues to take delight in creation, to look at this world and see it as very good.

*"Blessed are the clean of Heart, for they shall see God."*

But the lessons Marion taught us were not just those inscribed in pigment and composed on raw linen. By the very integrity of her life, she gave flesh to these ideals set forth in First Corinthians 13. In her slightly quirky but strong hand, we have the card she copied out for her grandchildren. And, as might be expected of an accomplished painter, the words are in a real way superfluous, for one need only look at the canvas of her life to see what St. Paul was talking about.

She really *was* patient, kind, never boastful or conceited. She didn't put on airs.

In Marion, we knew someone who kept no score of wrongs and was always ready to make allowances to

trust, to hope, and to endure whatever comes. The chapter from which this passage is taken concludes, "There are three things that last—Faith, Hope, and Love, and the greatest of these is Love."

Perhaps because I share the cussedness of most law professors, I want to draw your attention not to the worthy virtues of love or faith; rather, I would like to consider the oft-neglected virtue of hope. Recall our friend Jeremiah; the prophet observes that God sees himself as akin to the artist who keeps kneading the clay until the vessel comes out right.

This should give us hope. For if, like Jeremiah, we stand on the threshold of Marion's studio and see how she sees the world, we could do worse than understand God as someone who saw the world as charged with the unfailing beauty that inhabits Marion's painting, that defined and shaped her life on earth. Perhaps our prayer really must be that God look at us, and the sometimes shapeless lumps of clay we can be, and see us through Marion's eyes, knowing us to be just as beautiful and as loveable as she did.

If we can rightfully grasp that hope, then we too can rejoice and be glad, for, when God shares Marion's vision, our reward, like hers, will indeed be great in heaven. ■



Barrock Lecture | Robert Weisberg

## Reality-Challenged Philosophies of Punishment

This past fall, Robert Weisberg, the Edwin E. Huddleson, Jr. Professor of Law at Stanford University and Director of the Stanford Criminal Justice Center, delivered Marquette University Law School's annual Barrock Lecture on Criminal Law. Weisberg's article based on the Barrock Lecture will be published in the summer issue of the *Marquette Law Review*; this is an abridged version of that article.

America's current criminal justice system is arguably the most punitive in our own history, as well as the most punitive among all the world's developed countries. The American ratio of incarcerated people to total population is about seven times as high as those of other industrialized democracies, and about five times higher than the historical average for the half-century ending in 1980. Our imprisonment rate has acquired a dramatic name—"mass incarceration," a term used by critics to provoke anxiety and shame about an ostensible paradox: the wealthiest and most powerful free-market democracy imprisons an anomalously high percentage of its population even at a time when crime itself is not one of the country's pressing social problems.

A related paradox has arisen within academic scholarship itself. On the one hand, a great deal of recent scholarship has directly confronted mass incarceration, with perspectives ranging from econometric causal analysis to political cultural critique. Among the notable new books are Todd R. Clear's *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse*, Anthony C. Thompson's *Releasing Prisoners, Redeeming Communities: Reentry, Race, and Politics*, Marie Gottschalk's *The Prison and the Gallows: The Politics of Mass Incarceration in America*, and Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. These and other new books are a great resource for both the academic and the general reader, but I will deploy one in particular, *Punishment and Inequality in America*, by sociologist Bruce Western, because it is perhaps the most eclectic and comprehensive of the new offerings.

On the other hand: Academics in a parallel universe have been continuing longstanding jurisprudential debates about the purposes of punishment (retribution, general and specific deterrence, incapacitation, and rehabilitation), debates that barely acknowledge the issue of mass incarceration. Indeed, most prominent in these ab-

stract debates has been a robust revival of retributivism, the rationale for punishment most associated with—or blamed for—the enormous increase in incarceration in recent decades. The old and new writing in this category is obviously vast, but conveniently we have a new collection of both classics in the field and illustrative new contributions: *Why Punish? How Much?*, edited by Michael Tonry. Read together, the Western book and Tonry collection might provoke a national embarrassment that our supposedly deepest body of thought about punishment seems so disconnected from the world of punishment that we have created and may indeed have been a reckless enabler of that world.

**Facts of American Incarceration**

Almost 1 percent of the population of the United States is currently behind bars. Another 2 percent of Americans are on parole or probation, and hence at risk of incarceration (or reincarceration) at any time. These absolute numbers have increased over 400 percent in the last 30 years, during which the American population grew about 30 percent. To be sure, the ratio of prisoners to population is too crude a measure to allow meaningful comparisons among nations, given differences in quality of statistics, crime definitions, and administrative schemes. Nevertheless, the United States is clearly an outlier not just among developed democracies (our ratio of roughly 700/100,000 is about six times higher than the average for European Union nations) but among all nations (Russia and South Africa trail slightly with about 600 and 400 per 100,000, respectively).

The composition of the U.S. prison population will surprise no one. About 33 percent of prisoners are white, less than half the proportion in the general



Robert Weisberg



population. About 21 percent of the prison population is denominated Hispanic, compared to 15 percent of the general population. About 40 percent of the prison population is African-American, more than three times the 12 percent share of the general population. From another angle, Western notes that, in



2000, 2.1 percent of all men aged 18 to 65 were incarcerated, but this imprisoned population represented 1.0 percent of white men, 3.3 percent of Hispanic men, and 7.9 percent of African-American men. The racial disparity in incarceration greatly exceeds that for unemployment, nonmarital child bearing, and infant mortality.

A plausible first intuition is that our incarceration rate is mostly a function of our crime rate. Western illustrates both the temptations and flaws of this approach. In the early 1970s, the national rate for serious and violent crimes had been about 450 per 100,000 individuals, rising by 1990 to more than 700, and for those years, the incarceration rate closely tracked the increase in crime. But since 1990, the crime rate has dropped remarkably, to about the level of the early 1970s, while the incarceration rate continued to grow along the same steep curve (although it has leveled off just in the last two years).

Now here we have the quandary of the half-full/half-empty bucket. One possible conclusion is that the continued increase in imprisonment explains the crime-rate drop. The other is that once crime started dropping, all the continued increase in imprisonment was gratuitous. Statisticians address this quandary through the usual regression techniques, comparing correlations between the two rates across time and jurisdictions to identify the key variables. Presumably, at some point more incarceration should reduce crime through deterrence or incapacitation; however, as Western shows, the research consensus is that only about one-fifth of the reduction in crime between 1993 and 2001 comes from the increase in incarceration. Indeed, new evidence shows that the most dramatically continuing crime drop among American cities after 2001 is in New York City, while the New York state prison population has actually shown a nationally anomalous *decrease* over the last 20 years.

Western's own research refines this consensus with a creative focus on juveniles. From 1980 to 2000, while adult incarceration jumped 430 percent, juvenile incarceration jumped only about 50 percent, despite a drop in juvenile crime parallel to that for adults. Western observes that juvenile crime and adult crime usually move together,

and almost all adult criminals have been juvenile offenders. So if the consistent upward trend in adult incarceration after 1980 was the result of more crime, then we should have seen a consistent rise in juvenile crime. Yet data from 1980 to 2000 show instead a drop in almost all categories of youth crime. Western infers that, absent formal changes in legal rules that would restrict juvenile prosecutions, we should have seen a rise of juveniles in incarceration. So perhaps the continuing incarceration boom has to be traced to such deliberate policies or new practices as a dramatic shift toward incarceration rather than probation sentences for certain crimes or an increase in the length of prison sentences. Western says that lawmakers did not premeditate the increase in incarceration; rather, the changes were rooted in a variety of functional and expressive motivations that ultimately reelect politicians with toleration of or indifference to an increase in the prison populations.

The standard political causal story combines white populist backlash to the civil-rights movement, capture of the white South by Republicans, Nixon's translation of working-class resentment into law-and-order propaganda, and general disenchantment with the Roosevelt-Kennedy-L.B.J. welfare state. Western affirms that the incarceration boom began in punitive legislation caused by conservative backlash against civil rights. And he goes beyond the stock-story orthodoxy to test correlations of penal policy with such ground-level factors as controlling political parties, urbanization, quantity of police officers, and budgetary investment in law enforcement. In all these regards, he finds that spikes in imprisonment are tied to political choices and administrative policies that often are neither responses to crime increases nor instruments of crime decreases.

But Western's special contribution concerns the relationship between incarceration rates and the lower-level labor market for minorities. I stress the evasive term "relation-

ship,” for here Western is very careful to acknowledge that our understanding of correlations outpaces our ability to determine causes. His goal is to alarm us about striking associations between incarceration and economic inequality, in a context in which the associations take many complex forms: we imprison the poor and the uneducated at rates that are distressing enough even without regard to race but are horrifying once race is identified; those imprisoned then suffer detriments from incarceration way beyond any officially legislated criminal penalty; and then these detriments doom great numbers of offenders to reincarceration in a continuing cycle.

Controlling for certain state-level fixed effects, Western finds that for the years 1980–2000, every increase of one-tenth of one percent in a state’s unemployed males under age 45 who have completed high school but not college is associated with a 2.4 percent increase in the incarceration rate. Looking to income, Western finds that for all black and white males, a \$100 increase in weekly pay—roughly the marginal value of a high school diploma—is associated with a 32 percent decline in incarceration. Most starkly, in 2000, regardless of race, people without high school degrees were five times as likely to be in prison as were those with high school degrees; and black men born in the 1960s who did not complete school had as much chance of being incarcerated as being employed. By age 35, for blacks without a high school degree, prison is a common denominator that exceeds the rate of union membership, high school graduation, or even marriage. As we move down the educational ladder, and with a strong racial disproportion, prison becomes a “modal life event,” a tediously predictable part of the condition of being an African-American man in the United States.

Western tempers his findings with the observation that the conventional measure of the unemployment rate fluctuates too much with macroeconomic conditions to yield any clear correlations with incarceration. But he adds the nice twist that official unemployment statistics are a poor measure of joblessness because they exclude from the denominator people who are unemployed because they are incarcerated. Western seems to want us to feel embarrassment at the economic context and consequences of the incarceration rate, for he says that the hidden masses of prison inmates “occupy a shadowy status that affects a variety of social statistics that record the economic well-being of the population,” and that the prison boom “makes a new contribution to the invisibility of the poor.”

Much of the commentary on mass incarceration alludes to the costs associated with harm to families and neighborhoods, costs that, though real, are difficult to measure. Western aims at a more measurable harm: the direct effect of incarceration on prisoners’ future employment and income. Controlling for prior personal factors that might reduce economic prospects, Western isolates the “Aggregate Earnings Penalty” (AEP), the decrease in future earnings attributable solely to past incarceration; he infers that a post-prison offender will suffer a 30–40 percent loss of income.

Western finds moreover that AEP correlates with other adverse social outcomes: increased domestic violence, increased rupture of existing domestic partnerships (partly because of increased domestic violence), and, possibly, reduced future marriageability. The disconnected, erratic personal lives of ex-prisoners makes them much more likely to fall into recidivism and to reenter prison. In short, mass incarceration produces a new and massive underclass, disproportionately made up of racial minorities.

Targeting in particular the misleading common narrative of the 1990s, Western wants to fight the naïve or disingenuous puzzlement that some have expressed about how incarceration could rise in such a time of prosperity. The imagery of widespread economic success leads Americans either to ignore the prison boom altogether or to shrug at it as beyond explanation. Western wants to challenge any national self-congratulation about the civil-rights movement, in that invisible mass incarceration is a form of residential segregation: by virtue of incarceration, “the invisibility of today’s poor remains rooted in the physical and social distance between whites and blacks.”

### The Universe of Punishment Theories

Michael Tonry’s collection on punishment theory includes not only classic texts from Bentham, Kant, and Hegel but also modern contributions from retributivists Andrew Von Hirsch and Norval Morris, theories of Foucault with roots in Marxism, and defenses of restorative and therapeutic justice. To Tonry, the American criminal justice system is a mid- to late-19th-century creation built on premises unabashedly utilitarian. Late-Victorian utilitarianism remained dominant well into the 20th century, under the rubrics of rehabilitation, deterrence, and incapacitation. But the 1960s saw a huge new revival of interest in retributivism.

Let me summarize the state of the art on modern punishment theory and put it into interaction with



Western's picture of modern incarceration. I put most of my emphasis on retributivism, precisely because of its especially salient role in providing intellectual cover for the state of American criminal justice.

**Retributivism.** The great transition to a newly robust retributivism occurred about half a century ago, and one reason for its robustness lay in its nonpartisan or bipartisan motivations. American sentencing policy had become highly discretionary, with penal codes granting vast powers to judges at initial sentencing and later to parole officers, on the theory that efficacious punishment had to be individually tailored to curb criminal tendencies.

The result pleased no one. Liberals thought incapacitative or rehabilitation-based sentences were far too long and too much in the hands of judges unbound by clear legislative rules. Conservatives, seeing the same picture, thought that sentences had become much too lenient. Perhaps by accident the two sides agreed that clear, predetermined, and uniformly applicable sentences based on the nature of the crime were the answer.

Ever since then, from various perspectives, jurists have been promoting retributivism. Law-and-order conservatives have stressed that evil deeds merit long sentences, regardless of social efficacy, although they also argue that utilitarian projects of criminal justice have proved feckless. Liberals, led by the great scholar Norval Morris, have argued that a certain form of retributivism, which they call "limiting retributivism," can put a cap on sentences to ensure that they do not become excessively long for harsh utilitarian purposes, while also arguing that harm or culpability-based rules avoid capricious and racist disparities in outcomes. Some retributivists are tough-sounding deontologists about moral desert; others argue from the liberal side

that notions of moral desert can promote compassion and communal empathy, as reflected in various versions of the restorative justice movement.

But of course at the heart of all these forms of retributivism is some notion of a crime deserving a discernible sanction. And, overall, retributivism was the philosophical engine powering the rigidly determinate and often very harsh sentencing policies that, as Western shows, helped produce mass incarceration.

The reversal from early- and mid-20th-century utilitarianism to a new retributivism was sharp and dramatic. But Tonry cautions that fashions change and that even cycles of change are often equivocal. The real story of modern jurisprudence of punishment seems to be not the rise of any one school but a certain insularity within these schools, and here retributivism is the best example. While the social scientists and social critics lament the ills of America's vast prison complex, retributivism theorists worry mostly about their own internal coherence or their conceptual differentiation from others' theories.

Western's book calls to mind the chastening admonition to retributivism issued some years ago by the philosopher Jeffrie Murphy. Murphy focused on the strand of retributivist thought known as social contractarianism, by which retribution rests on the premise of a community of shared values and rules that benefit all concerned and thus create a debt of obedience, for which punishment is the payment for violation. Murphy lamented that if a society is riven by extreme economic inequality, to expect that this principle applies to people on the lowest rung "is to live in a world of social and political fantasy," because the retributivist "would be hard-pressed to name the benefits for which they are supposed to owe obedience."

As Western depicts mass incarceration, social inequality and economic inequality are not just the background facts of punishment—they are also salient as cause and effect. But through the lens of Western's research, retributivist theory proves irrelevant or orthogonal to the key social, political, and economic questions of mass incarceration in another way as well. One sees some retributivist scholars gesturing in the direction of concern about the costs and benefits of a retributivism-based system and the challenge to retributivism of scarce public resources. This work mostly involves borrowing abstract microeconomic models from utilitarian theories. It then operates on the assumption that the only serious empirical challenge to retributivism is the scarcity of prosecutorial and correctional resources, and in turn it conceives of a kind of commodity of punishment that must then be distributed



“[O]ur supposedly deepest body of thought about punishment seems so disconnected from the world of punishment that we have created and may indeed have been a reckless enabler of that world.”

among “deserving” offenders, with the goal of optimizing the overall retributive effect of the law.

But still, overall, Western’s work implicitly challenges retributivist jurisprudence for its indifference to or disrespect for social fact, because even the supposed acknowledgment of social fact in terms of scare government resources seems otherworldly. Of course, the state never has the resources to punish all offenders, so it must make choices in light of the scarcity of the tools of punishment. But the real thrust of Western’s book is that the punishment we administer is so vastly disproportionate to any possible gain from inflicting it, and huge portions of society are so helplessly vulnerable to state power, that the notion of scarcity seems more a rhetorical trope than a social fact. Put another way, even if criminal legislation could somehow be doled out in carefully measured doses to reflect a true scale of desert and culpability, we have no such system in the United States. Once we account for the true detriments imposed by incarceration, especially as depicted by Western’s account of the Aggregate Earnings Penalty and associated collateral effects, punishment seems so incommensurate with guilt and desert “earned” by offenders as to belie the jurisprudence of retributivism.

If these consequences of incarceration are so profoundly metastatic, then perhaps the matching of punishment to crime has become a hopeless exercise, and the traditional critique that retribution must account for the fallibility of the institutions of justice misses the point. In this light, the United States seems to have lost both the moral authority to impose retributive punishment and the intellectual and political authority to claim cost-benefit justification for incarceration. At the very least, Western’s argument suggests that punishment theorists have a moral obligation to reconsider theoretical commitments given these social realities.

**Incapacitation.** Here we have what should be the least problematic rationale for punishment, both theoretically and empirically. If we have decent information about the criminal proclivities of an offender, then we should reasonably be able to estimate the number of crimes prevented for a particular period of his life. At the same time, among utilitarian rationales, incapacitation seems especially harmonious with retributivism, given its partial alignment with what the offender has done and is likely to do.

The incapacitation justification briefly was publicly ascendant in the crime-high 1970s, championed by the late neoconservative, James Q. Wilson, under the name of “selective incapacitation.” Wilson argued that some humans’ irreducible proclivity to commit crimes was immune to efforts to ameliorate the underlying social “causes” of crime. Social science could identify the likeliest recidivists, so that isolation could be keenly parsimonious. But critics complained that reliance on conventional criteria of personality and past conduct is too unsystematic and error-prone, and not self-correcting. Others argued that the key variable affecting the number of crimes is not the number of criminally inclined people on the streets but the number of criminal opportunities (the so-called “replacement effect”).

As Franklin E. Zimring and Gordon Hawkins elaborated in their book, *Incapacitation: Penal Confinement and the Restraint of Crime*, selective incapacitation rose to prominence not because it had much intellectual or empirical foundation, but because, along with deterrence, it served a default function: For utilitarians, it was the best rationale available to fill the breach when rehabilitation faltered—indeed, its superficially intuitive logic, so consistent with the “public safety” rhetoric of politicians, enabled it to fill that role better than deterrence. More broadly, incapacitation proponents ignore the social contingencies that affect speculations about crimes prevented, paying far too little attention to modern theories of crime causation and motivation.

In that regard, the most obvious challenge that mass incarceration poses to incapacitation is, as noted earlier, that the continuing post-1990 spike in incarceration seems to have accounted for only a small fraction of the reduction in crime. And regardless of the causal link between conscious incapacitation goals and our incarceration boom, mass incarceration moots any claims of accurate predictions of recidivism, creating social conditions that put all inmates at high risk of an endless cycle of recidivism. Indeed, Western’s and others’ depiction of the inefficacy of our increased imprisonment rate in preventing crime underscores another important critique of selective incapacitation. Under any modern regime, given the uncontroversial necessity of imprisoning the most egregious criminals and the non-incarceration of the least dangerous offenders, changes in incapacitation policy work only at the margin of middle-level offenders, >>

such that the changes are unlikely significantly to affect the cost-benefit rationality of imprisonment. If this notion of diminishing marginal benefits of incapacitation is generally true, then it is egregiously true when our prison rate expands so drastically as it has in recent decades. Further, offending rates of low-level offenders who get shorter sentences under selectivity may increase because of decreased deterrence.

Moreover, regardless of the causal link between conscious incapacitation goals and our imprisonment boom, mass incarceration has mooted any claims of accurate predictions of recidivism by creating social conditions that put all inmates at very high risk of an endless return cycle, whatever individual propensity to recidivism they might have shown in a different social context.

Finally, the social reality of prisoner-on-prisoner crime raises doubt whether anyone could truly believe that incapacitation is the goal of incarceration. As Guyora Binder has argued, the promoters of selective incapacitation must assume either that crime does not occur in prison, or that prison crime simply does not count. The former assumption has never been true, and in an era of overcrowding wrought by the spike in imprisonment, the frequency of criminal-on-criminal assaults is extremely high. The prevalence of prison violence raises the question whether incapacitation theory is truly concerned with reducing the risk of violent crime, or merely *redistributing* its risk from innocents to past offenders. The position that only non-offenders deserve protection from violence would seem to be a principle of retributive desert rather than utility. Such segregation of offenders not only sets them apart from “society” physically; it also sets them apart from “society” symbolically, by implying that their welfare does not count in toting up the welfare gains and losses from incarceration.

**Deterrence.** Perhaps because it seems so intuitively plausible, general deterrence has received little theoretical or normative discussion. The commentary has been almost all about refinements in the technology needed to assess the deterrent effect. Law-and-economics figures such as Steven Shavell, Louis Kaplow, and A. Mitchell Polinsky have made a massive intellectual investment in modeling the marginal deterrent capacities of various



types of sanctions. But that effort faces daunting challenges in understanding human psychology.

One generally accepted empirical finding is that certainty of punishment appears to deter more than severity, presumably because it is more salient for people with higher discount rates. But efforts to come up with other robust empirical findings have failed. Many of these efforts have focused on the deterrent effect of the death penalty; limitations in the data have probably rendered unanswerable the question whether it has any deterrent effect at all. Sometimes

other natural experiments arise, as where a law changes the age for adult liability, and some have isolated the perception—from the fact—of possible punishment as a threat by comparing survey-perception data to actual punishment rules, but these produced little clear evidence of marginal effect.

If punishment had a significant marginal deterrent effect, the high visibility of harsh punishment in the form of mass incarceration should itself have been a powerful force in reducing crime. But, again, the empirical research summarized and augmented by Western—demonstrating that the post-1990 spike in incarceration can explain at most a small fraction of the simultaneous drop in the crime rate—suggests otherwise. Most likely, we have reached the point at which the baseline punishment in society (including both incarceration itself and the follow-on costs of incarceration to released prisoners) is so high that potential criminals are psychologically inured to additional deterrence.

**Rehabilitation.** The foregoing discussion leaves us with only the last of traditional theories of punishment: rehabilitation. This late in the day, we cannot seriously revive rehabilitation as the justification for the system we have cobbled together. Prisons often successfully incapacitate (if we ignore prisoner-on-prisoner crime), but no one still argues that these facilities offer inmates the realistic promise of rehabilitation. If some inmate is less prone to crime after his release from prison than he was before entering it, the likeliest reason is that he was incapacitated far enough into life that he has aged out of his earlier proclivity.

We can procure modest rehabilitation through diversion of funds to drug detoxification and educational and vocational counseling. But these programs serve largely to mitigate the simultaneous effects of the penalties. Indeed, as Western notes, in the age of mass incarceration, “rehabilitation” has taken on a new meaning: we no longer even pretend that prison itself rehabilitates, instead recognizing that, to be reintegrated into society, prisoners require rehabilitation from the effects of prison itself.

### Conclusion

To capture the difficulty of reconciling a theory of punishment with the practice of punishment, Tonry reminds us of Hegel’s cautious, flexible view of retribution as a justification for punishment: “[E]quality remains the basic measure of the criminal’s essential desert, but not of the specific external shape which the retribution should take.” Tonry’s elegant essay ends, at the same time, with an acerbic look at theory itself: fashionable philosophers of punishment “provide coherent, articulable bases for assessing whether particular punishment policies, practices or decisions are just,” even while we suffer from a deficit of moral clarity because “[p]olicies have been adopted, and people punished under them, that cannot be justified

under any of the normative frameworks developed in the past two centuries.”

On these questions, the democratic process has somehow passed by academic thinkers, in that the last few years have seen political movement toward putting brakes on mass incarceration. Budget problems have constrained a few legislatures to arrange quiet truces on the political demagoguery of crime, lower rates of crime have pushed law-and-order politics off the national election agenda, and some states have even reached toward reducing the infamous 1970s-era mandatory minimums on drug sentences. But these moves toward sanity are modest and fragile.

As Western shows, the United States has proved capable of reducing its incarceration rate. But the conventional view is that mass incarceration is here to stay: once incarceration reaches a critical mass, it is self-reinforcing by virtue of the criminogenic nature of the prison experience and the resilience of American criminal justice institutions in reabsorbing and recycling recidivists, and the absolute number of individuals in prison is so large that a compensatory decrease has become politically infeasible. The jurisprudes of punishment from the parallel universe will never enter majorly into real-world penal policy, but they can surely do better by making theory face reality. ■

## Boden Lecture | Margaret Raymond

### “The Report of My Death Was an Exaggeration”— Delaying the Postmortem on American Law Practice

Dean Joseph D. Kearney, on behalf of Marquette Law School, invited Margaret Raymond, the new Fred W. & Vi Miller Dean and Professor of Law at the University of Wisconsin, to deliver Marquette’s annual Robert F. Boden Lecture this past fall. Dean Raymond’s lecture focused on the future of American law practice. The following is an excerpt.



Margaret Raymond

**A**nother phenomenon that Richard Susskind, in *The End of Lawyers*, and others believe will contribute to the end of lawyers is the prospect of alternative dispute resolution mechanisms that do not

require lawyers at all. A recent news article discussed General Electric’s insistence that its suppliers submit to having their simple disputes with the company resolved using an online settlement process called Cybersettle. The mechanism, a set of blind bidding opportunities that attempt to align the offers each party will make, is, of course, not free; the company providing the platform charges for its services. But the company argues that the cost and efficiency of the Cybersettle process



make it preferable to traditional litigation or alternative dispute resolution.

This is a fascinating development. It's not, however, unanimously viewed as an improvement. New York City used it for several years to settle small personal-injury and property-damage claims and recently returned to using in-house staff to manage its settlement processes. Still, a process such as Cybersettle does away with the need for a lawyer entirely for the parties using it, and may, in fact, reduce those situations in which individuals consult lawyers.

It's not, however, going to end litigation. Susskind seems to believe that individual access to legal information will lead to a significant reduction in legal disagreements; "as citizens," he writes, "we should be able to find out easily and quickly what our legal entitlements are, and in so doing, we should be able to avoid legal disputes."

I don't agree, however, that legal disputes arise primarily because individuals have a mistaken notion of their legal rights or obligations. In most circumstances, disputes arise because people disagree about facts, not about law. And if their disagreement is about the law, it may be because they don't like the answer the law provides. In any event, I am skeptical that a combination of better legal information and online dispute resolution mechanisms will obviate the need for litigation.

Nor will it mean that we need not be concerned about client protection. Many authors suggest that online ranking and ratings systems will effectively guide clients to quality legal counsel. Susskind, in particular, is rapturous about the possibilities for client satisfaction; given price competition and online rankings, he argues, "client detriment . . . [will be] a phenomenon of the past."

I am particularly skeptical of the notion that online reviewing of lawyers will lead to good information about quality practitioners. The thing that makes me skeptical is Yelp. For those of you who are not users of online tools to choose restaurants, I highly recommend Yelp, whose reviewers are extraordinarily cranky and seem to have a lot of spare time. How sad I was to learn recently that many of those reviews are invented, posted either by friends of the proprietor (to falsely generate positive "buzz" about the business) or by competitors who offer false negative information.

In a recent study, a team of researchers at Cornell devised a software product that effectively identifies fake reviews. Given the temptation to shill even where the transactions at issue are small, I would hesitate to conclude that online reviewing systems are likely to be a highly reliable source of quality information about lawyer performance.

Notwithstanding my disagreements with some of these messages about the future of the practice, there is no question that these writers are telling us something important: that change is coming. This is not entirely a bad thing.

First, the changes that these writers describe have the potential to benefit the justice system. If, in fact, we can make the delivery of legal services less expensive through the use of online tools, appropriately supervised nonlawyer assistants, and information resources, that should be very good news for previously





“Lawyers struggle constantly to stay relevant in a changing world.”

underserved client populations. I am always resistant to statements that we have “too many lawyers” because I am painfully aware of the broad range of legal needs of low- and middle-income individuals in this country that go unmet. If the tools and changes that these authors identify really do make legal assistance more accessible and affordable to those prospective clients, that presents an exciting opportunity for us as lawyers to think about how to use those techniques to improve access to justice.

But there is no question that lawyers need to be responsive to change. Professor Thomas Morgan, in *The Vanishing American Lawyer*, quotes former Army Chief of Staff Eric Shinseki as saying, “If you don’t like change, you’re going to like irrelevance even less.” To stay relevant, we must take account of change.

To some of you, this responsiveness to change may seem like business as usual. If what we are hearing is that lawyers, to keep their clients’ business, will need to be intently focused on client needs, conscious of clients’ desire to cut costs, prepared to direct clients to nonlawyer services that will meet their requirements, responsive to client needs on a 24/7 basis, and attentive to the need not simply to provide legal services to clients but to add value, my guess is that many of you in the practice are already single-mindedly focused on doing this. If what the authors mean is not that this is the end of law practice, but that it is the end of some wasteful, privileged, lawyer-centered practices in which some lawyers have apparently been engaged, then that’s okay with me.

There’s lots of advice for lawyers out there about how to respond to the difficulties of the current environment. My favorite was the recent recommendation that to make yourself attractive to clients, you need to be “beer-worthy”—a person with whom your client would like to have a drink.

But it is worth remembering that this is not the first time in history that lawyers have worried about being unequipped to deal with economic difficulty and quick and irrevocable social change. Professor Deborah Rhode once said that “[l]awyers belong to a profession

permanently in decline.” If we look back in time, we can find ample predictions of the end of law practice. So when Professor Morgan argues that “the concept of a lawyer we have known will become a part of history, along with the knights and mercenaries who were hired to fight the battles of others in earlier times,” we should remember some history—examples I took from Professor Morgan’s own book:

“There never has been a worse time within my experience for a young man to undertake to make a beginning as a lawyer in New York. The community has been feeling poorer and poorer for a number of years. The law business and the proceeds of law business have been contracting steadily and the contraction has forced out of practice and into clerkships a great many lawyers of experience and ability, and has at the same time forced all lawyers in practice to greater economy.” This was Elihu Root, talking about the state of the profession in 1878.

“The large number of students in the law schools presents a difficult problem of placing the young law graduates after they are admitted to practice and is symptomatic of the possible serious overcrowding of the bar in the future.” This was Homer Crotty, writing about the state of the profession in 1951.

And at other times, lawyers have been utterly unprepared for the practice that a changing world required. As one commentator wrote of the law school class of 1900, its members were subsequently confronted with—and unready for—the development of workers’ compensation, the income tax, labor relations, and the growth of administrative agencies.

My point is not to trivialize the concerns raised by these authors, but to recognize them as universal. Lawyers struggle constantly to stay relevant in a changing world.

In the end, clients will continue to have legal needs. The question is how lawyers can creatively and effectively meet the needs of those clients in a manner and at a cost that the clients and the system can afford. ■

# Once the Land and More on American Law

The Marquette Law School Faculty Blog, on the school's website, is a wide-ranging forum. Consider this selection of recent postings from four professors, addressing passions past (the Milwaukee Braves) and present (Tim Tebow) and shedding light on matters as diverse as trends in copyright law and the constitutionality of anti-Sharia laws. Serious-minded and open-minded, the Faculty Blog offers lots more of this, in addition to reporting on what is going on at the Law School. Follow it at [law.marquette.edu/facultyblog](http://law.marquette.edu/facultyblog).

## Why Milwaukee Lost the Braves

By J. Gordon Hylton, Professor of Law

Forty-six years ago, the baseball world trained its attention on the Wisconsin Supreme Court and its impending decision in the case of *Wisconsin v. Milwaukee Braves, Inc.*, soon to be reported at 31 Wis. 2d 699, 144 N.W.2d 1 (1966). At issue was whether a Milwaukee trial judge, acting on behalf of the State of Wisconsin, could prevent the Milwaukee Braves Major League Baseball team from relocating to Atlanta, Georgia.

After the team's Chicago-based owners had announced their plans to move to Atlanta for the 1966 season, a criminal action was filed in Milwaukee County Circuit Court. It alleged that the Braves and the other nine teams in the National League had conspired to deprive the City of Milwaukee of Major League Baseball and, moreover, had agreed that no replacement team would be permitted for the city. Thus, the complaint alleged, the defendants were in violation of the Wisconsin antitrust law.

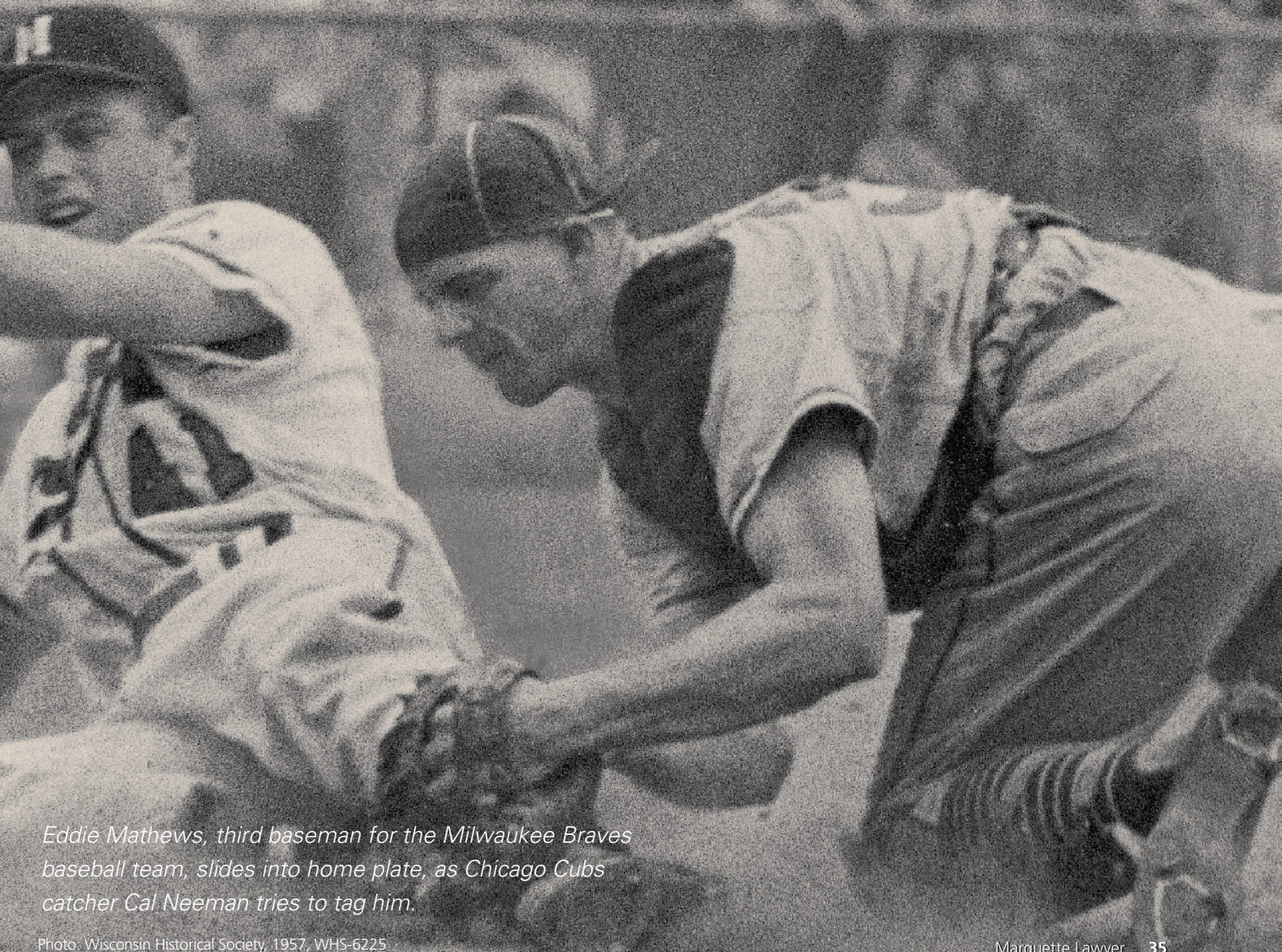
The defendants initially removed the lawsuit to the United States District Court for the Eastern District of Wisconsin, but on December 9, 1965, District Judge Robert Tehan, L'29, remanded the case to the state court. There trial was conducted before Judge (and former Marquette Law School Professor) Elmer W. Roller, L'22.

On April 14, 1966, only hours before the Braves were to open the season with a game against the Pittsburgh Pirates in Atlanta, Judge Roller ruled that the owners of the Braves and the other National League teams had acted in "restraint of trade" and thus were in violation of the Wisconsin antitrust law.

Roller fined the defendants \$55,000, plus costs, and enjoined the Braves from playing their 1966 home games anywhere other than Milwaukee, >>



# of the Braves— and Legal Culture



*Eddie Mathews, third baseman for the Milwaukee Braves baseball team, slides into home plate, as Chicago Cubs catcher Cal Neeman tries to tag him.*

unless the National League agreed to place a new team in Milwaukee in 1967. To give the National League time to make arrangements for an expansion team for 1967, Roller stayed his judgment until mid-June, an act that allowed the Braves to continue playing in Atlanta.

The Braves' owners immediately appealed Roller's decision to the Wisconsin Supreme Court, which agreed to hear the case on an expedited basis. On June 9, 1966, the appeal was argued—a day on which the Braves, who never had a losing season while in Milwaukee, sat in sixth place in the National League with a record of 25-30.

With the stay extended, the Braves continued to play in Atlanta, and six weeks later, on July 27, a day that

would see the Braves slumping all the way down to eighth place, the Wisconsin Supreme Court overturned Roller's

lower court ruling by a narrow vote of 4-3. (Justice E. Harold Hallows, also formerly a law professor at Marquette, was one of the three dissenters, who would have sustained Roller's injunction against the move to Atlanta.)

The Court's majority opinion was based on two different rationales, and the Court explained that one was embraced by two justices and the second by two

others. The first rationale was that organized baseball's exemption from the federal antitrust laws, most recently upheld by the U.S. Supreme Court in *Toolson v. New York Yankees* (1953), extended to state antitrust rules as well. The alternative theory concluded that even if organized baseball was not exempt from state antitrust regulation generally, the portion of the remedy imposed by Judge Roller that ordered the National League either to return the Braves to Milwaukee or else to give the city a new team ran afoul of the United States Constitution's Commerce Clause and constituted an unenforceable interference with interstate commerce. The majority did not dispute Roller's findings of fact concerning the monopolization of baseball in Milwaukee.

The three dissenters disagreed with both of the theories in the majority opinion and concluded instead that Congress should be presumed to have left the regulation of baseball to the states until it explicitly exercised its own regulatory authority. They also maintained that the legitimate interests of the State of Wisconsin in this case took priority over the "restrictive effect on interstate

commerce that might result from the enforcement of Wisconsin's laws."

Not willing to concede defeat after such a narrow loss, the State of Wisconsin sought review in the United States Supreme Court. However, while the state's petition for a writ of certiorari was pending, Judge Roller's lower court order was dissolved, and the Braves were free to play out the season in their new southern home.

Although the Braves lost again on July 28, to fall into ninth place, 14½ games behind the first-place Pittsburgh Pirates, the Wisconsin Supreme Court decision seemed to clear away the cloud of bad play that had hung over the team all season. The Braves played inspired baseball the rest of the season, and ended up with a record of 85-77, good for fifth place in the 10-team league and within 10 games of the pennant-winning Los Angeles Dodgers, who had overtaken the Pirates.

Milwaukeeans had to wait until December 12 to learn that the United States Supreme Court had denied the state's petition for certiorari. However, in an uncharacteristic move, the Court revealed that it was badly divided on whether to hear the case. Justices William O. Douglas, Hugo Black, and William J. Brennan, Jr., were in favor of hearing the case, but certiorari was opposed by Chief Justice Earl Warren and Justices Tom C. Clark, John Marshall Harlan II, Potter Stewart, and Byron White.

Although he had taken the oath of office as a Supreme Court justice on October 4, Justice Abe Fortas, according to the Court's announcement, "took no part in the consideration or decision of this petition." In any event, the attempt to involve the nation's highest court died as a result of the failure of a fourth justice to support the petition.

In another unusual development, Wisconsin filed a petition requesting that the Court rehear the petition for certiorari, perhaps in hopes that Fortas might be now willing to support the petition, but rehearing also was denied. On January 23, 1967, the litigation over the Braves' departure finally came to an end when the Court simply announced that the rehearing petition had been denied and that Justice Fortas had not participated in the review.

Thus, by late January, it was clear that the city of Milwaukee would be without major league baseball for 1967. When the National League announced in November 1967 that it would be adding two additional teams for the 1969 season, Milwaukee applied for one of the franchises, as did groups from Dallas-Ft. Worth, Denver, Buffalo, San Diego, Toronto, and Montreal.



However, when the two new franchises were awarded in May 1968, the National League ignored Milwaukee and awarded teams to San Diego and Montreal. As a result, except for a total of 20 Chicago White Sox games played in County Stadium in 1968–1969, Milwaukee remained without Major League Baseball until 1970. That, of course, is when Bud Selig and his associates bought the bankrupt Seattle Pilots shortly before Opening Day and moved the one-year-old American League team to Milwaukee, where they were renamed the Brewers.

The most interesting question arising out of the Milwaukee Braves litigation is why the Braves were so anxious to leave Milwaukee in the mid-1960s. After relocating to Milwaukee in 1953 (from Boston, where the team had played since 1871), the Braves were for the rest of the decade one of the showpiece franchises in all baseball. In a decade in which attendance at major league baseball games steadily eroded, the Braves set one National League attendance record after another.

Part of the answer to the question lies in the fact that, in the mid-1960s, Atlanta simply held much greater potential than Milwaukee as a source of revenue for a Major League baseball team. Not only was it based in a larger and still rapidly growing metropolitan area, but it was also located in an area (the Southeast) without Major League Baseball. In contrast, Milwaukee was bounded by the Chicago Cubs and White Sox to the south, the Minnesota Twins to the west, Lake Michigan to the east, and the underpopulated areas to the north.

In other words, Atlanta's superior location provided greater opportunities both for live attendance and for the sale of increasingly important broadcasting rights.

However, after the wave of team relocations between 1953 and 1961, Major League owners had become clearly reluctant to permit additional teams to change cities in search of greater revenues, particularly if it would leave the vacated city without a team. The proposals of Kansas City Athletics owner Charlie Finley to move his struggling team to various cities, includ-



An aerial view of Milwaukee County Stadium during a game in the Braves' heyday. Photo: Wisconsin Historical Society, WHS-54732

ing Dallas–Ft. Worth, Atlanta, Louisville, and Oakland, had been regularly rebuffed in the years between 1962 and 1966. It was highly unlikely that the other owners would have approved the Braves' relocation to Atlanta in 1966, had the only reason to move been a desire to make greater profits.

The sad reality was that between the mid-1950s and the mid-1960s, Milwaukee appeared to have gone from being a hotbed of baseball attendance to a city in which the citizenry seemed no longer willing to go to the ballpark to support the home team, even if the team was still a pennant contender. Although this was something of a misperception, it is easy to understand why many observers in the 1960s adopted that view. [The post on the faculty blog sets forth and analyzes the attendance numbers, which are among the things omitted here. – *ed.*]

The reasons for the falloff in attendance are complicated, especially given the fact that the team had a winning record during each of the 13 seasons that it played in Milwaukee. Fan exhaustion may have been a factor. This was certainly a much mentioned explanation in the press in the early 1960s. The Braves were located in one of the smallest markets in major league baseball, and Milwaukee's attendance totals represented a much higher percentage of the metropolitan population than those for any other major league team in the 1950s.

However, the drop in attendance was also related to the team's perceived declining performance beginning in 1960. By one measure, the Milwaukee Braves were

“The most interesting question arising out of the Milwaukee Braves litigation is why the Braves were so anxious to leave Milwaukee in the mid-1960s.”



the most consistently successful team in Major League Baseball history. On the other hand, the Braves were significantly more successful relatively to their competition in their first eight seasons in Milwaukee than in their last five.

After finishing second in the National League in 1953 and third in 1954, the Braves went on a remarkable run. In 1955 and 1956, they finished second behind the Brooklyn Dodgers, and by only one game in the latter year. They then won National League championships in 1957 and 1958 (and the World Series in 1957), and they finished in a tie for first place in 1959 with the Los Angeles Dodgers. (Unfortunately, they lost the 1959 playoff series, and thus missed a third straight World Series.)

Although the Milwaukee Braves' 1961 season was hardly a failure in terms of either on-field performance or attendance, it was the first year since arriving from Boston that the team failed to turn a profit. The team's attendance dropped by almost 400,000 fans, and the decline in attendance revenue, combined with the fact that the Braves probably had the highest payroll in the Major Leagues, converted a \$500,000 profit in 1960 into an \$80,000 loss in 1961.

Throughout 1963 and 1964, rumors were rampant that the new owners planned to move the team to Atlanta. Even with increased attendance and more games on television, the team incurred further losses in 1964, totaling a reported \$500,000. In light of continued losses, the decision was finally made to relocate the team to Atlanta in time for the 1965 season, and initially the other National League teams supported the move.

However, the Milwaukee County Board threatened to sue to enjoin the relocation of the team unless it complied with the terms of its lease, which ran through the 1965 season. A team offer to buy out the lease was rejected by the board, and, in the face of a potential lawsuit, the other National League owners refused to approve the 1965 relocation plan after all. However, they did declare that it was in the best interests of the National League to permit the Braves to move to Atlanta in 1966, essentially confirming the lame duck status of the Milwaukee Braves of 1965.

Fan reaction to this resolution was one of unrepressed anger. Although the Braves were in first place for most of the 1965 season, after opening day, the 1965 season was played under a fan boycott, and barely a half million people showed up for the Braves home games that year.

Was there anything that could have been done to prevent the situation that resulted in the Braves' departure? The real aberration in Milwaukee baseball history was the attendance figures of 1953–1959, not those for 1960–1965. Given its population, Major League Baseball attendance in Milwaukee in the early 1960s, at least through 1964, was actually pretty good. Selling the team to owners with no commitment to Milwaukee in 1962 probably made it inevitable that the team would soon be relocated to a larger, more lucrative market.



## A Second Look at the Sharia Law Amendment

By Ryan M. Scoville, Assistant Professor of Law

In January, the U.S. Court of Appeals for the Tenth Circuit issued a decision on Oklahoma's "Sharia Law Amendment." A quick summary: In 2010, Oklahoma voters approved a ballot initiative that amended their state's constitution to prohibit Oklahoma courts from "considering or using" either "international law" or "Sharia Law" in making judicial decisions. A district court issued a preliminary injunction that at least temporarily prohibited the Oklahoma law from taking effect on the ground that its language regarding Sharia

Law violates the Establishment Clause. The Tenth Circuit decision held that the district court did not abuse its discretion in issuing the injunction.

Although not yet addressed by the courts, I think it's worth noting that the Amendment's language on international law also may be unconstitutional. The reason is the Supremacy Clause. First, note that the Amendment explicitly prohibits Oklahoma courts from "considering or using" international law in the form of both treaties and custom. This prohibition is unqualified, and thus at least facially encompasses treaties and custom of all kinds.

Now consider the text of the Supremacy Clause. Article VI, Section 2 of the U.S. Constitution establishes that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." By referring to treaties that are "made, or which shall be made, under the Authority of the United States," the Clause establishes supreme status for treaties to which the United States is a party.

The argument for the Sharia Law Amendment's unconstitutionality is pretty straightforward. Insofar as it refers to treaties without qualification and thus includes those to which the United States is a party, the Amendment bars Oklahoma courts from considering or using treaties that have the status of supreme federal law. To prohibit a ratified treaty's consideration or use is to deny its legal relevance, in effect even its existence, regardless of how significantly the treaty might otherwise affect the outcome of a case. Even litigation outcomes directly at odds with those dictated by U.S. treaties would seemingly be permissible in Oklahoma.

There's also a Supremacy Clause argument concerning the Amendment's language on customary law. International custom binds all states that have not timely objected to its development, and thus, as a formal matter, generally binds the United States. Though recently a subject of pretty heated debate, the traditional view is that such custom is a form of federal common law and thus backed by the Supremacy Clause. If one accepts that view, then it would be unconstitutional for the Sharia Amendment to bar Oklahoma courts from considering or using custom in much the same way that it would be unconstitutional to bar their consideration or use of U.S. treaties.

A court might attempt to avoid these problems in a couple of ways. The first would be to construe the Amendment narrowly. There is a fair argument that the text pertains only to treaties to which the United States

is not a party, and to custom not applicable to the United States. Certain language, for example, suggests a general intent to adhere to federal law—a body that obviously includes U.S. treaties and at least arguably includes customary norms. Other language states an opposition only to the application of the "legal precepts of other nations or cultures." The latter does not implicate ratified treaties or binding custom, which are the law of this country. The narrow interpretation would alleviate the Supremacy Clause problem by ensuring that the Amendment's prohibition applies only to treaties and custom that are not federal law.

Another potential way to save the Amendment from unconstitutionality would be to conclude that custom is simply not a form of federal common law. This position would be contrary to the traditional view, but it has gained at least some support since Professors Curtis Bradley and Jack Goldsmith first articulated it in the late 1990s. If customary law is not federal common law, then the Supremacy Clause does not encompass it, and Oklahoma courts would not be obliged to consider or use it in their decisions.

Both of these efforts to save the Amendment would encounter difficulties, however. First, the narrow interpretation would render the Amendment's text on international law essentially irrelevant in practice. I doubt that Oklahoma courts encounter many cases requiring them to resolve disputes concerning U.S. treaties, much less treaties to which the United States is not even a party. I also doubt that they encounter many opportunities to resolve disputes over obscure principles of international custom that do not bind the United States. And so long as that is true, the narrow interpretation would essentially tell the courts not to do something that they don't do anyway.

Second, concluding that international custom lacks the status of federal common law would require a departure from the traditional doctrine on that issue. There are, frankly, pretty intriguing arguments on both sides of the debate that the Bradley–Goldsmith argument has generated, but the U.S. Supreme Court has never squarely held that international custom lacks the status of federal common law.

In short, the constitutionality of the Sharia Law Amendment's language on international law is, at best, uncertain. Its treatment of treaties is either unconstitutional or essentially irrelevant. And its treatment of custom may require courts to resolve a longstanding debate about custom's domestic status.



Getty Images Sport



## Tebowing and the Constitution

By Scott C. Idleman, Professor of Law

**M**uch has been made of Denver Broncos (now New York Jets) quarterback Tim Tebow's outward expressions of his Christian faith, especially his practice of kneeling in moments of prayer—"Tebowing" as it is now called—after touchdowns, some of them admittedly a bit miraculous.

A recent issue of *Time* magazine, for example, included an article on Mr. Tebow, his faith, and the Tebowing phenomenon, with pictures of people in different locations "Tebowing Round the World." Fox Sports' website similarly offers a gallery of athletes and celebrities Tebowing in various settings.

So, what is the possible relationship between Tebow-like conduct and the Constitution? As long as the faith expressions of Tim Tebow and his imitators don't implicate the government, then the Constitution, which generally concerns only the government's actions, is not triggered. Whether non-governmental entities such as the NFL or the Broncos may place limits on Tebowing—e.g., as "excessive celebration" prohibited by NFL Rule 12, § 3, art. 1(d)—is a matter that could potentially infringe players' rights under federal or state civil rights statutes. But neither the First Amendment's ban on religious establishments nor its guarantee of religious free exercise would come into play.

The matter, alas, has not been confined either to Tim Tebow or to non-governmental settings. At least two public school students in New York, for instance, were suspended, allegedly for causing an obstruction,

after Tebowing in a school hallway. Whether their First Amendment speech and religion rights were violated is unknown—have all hallway obstructions led to such punishments?—but there can be no doubt that the Constitution applies to the school's actions.

Nor has Tebow-related conduct been confined to students. In Columbia, South Carolina, a high school coach seemingly encourages his athletes to be religious in the manner of Tim Tebow. That is entirely fine as a sentiment, but if it translates to pre- or post-game prayers led or promoted by the coach, then the Establishment Clause would almost certainly make such conduct unconstitutional. The same might even be true of Tebow-like touchdown prayers by players, if encouraged, let alone directed, by the coaching staff.

To be sure, it was in the context of a public high school's football game that even student-initiated and student-led prayer, when using the school's public address system on school property and under school faculty supervision, was held by the U.S. Supreme Court (in 2000) to be unconstitutional under the Establishment Clause. Although the Court noted that "nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the school day," it further remarked that "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."

In summary, Tebowing or other Tebow-like conduct may in some instances be protected by the Constitution's First Amendment, while in others it may be circumscribed if not absolutely prohibited. Such calls, of course, will ultimately be made not by zebra-striped referees on the field of play but by black-robed judges in a court of law, with no set limit on either the number of challenges or the use of instant-replay footage.

## The Conservative Turn in Copyright Politics

By Bruce E. Boyden, Assistant Professor of Law

**D**avid Brooks had an interesting column in the *New York Times* in which he asked, "Why aren't there more liberals in America?" According to Gallup Poll numbers, about 41 percent of Americans self-identify as conservative, versus 36 percent as



moderate and 21 percent as liberal. This strikes Brooks as a bit of a puzzle, since the financial crisis and the economic downturn would seem to support liberal beliefs in some ways. Brooks's answer: "Americans may agree with liberal diagnoses, but they don't trust the instrument the Democrats use to solve problems. They don't trust the federal government. A few decades ago they did, but now they don't. Roughly 10 percent of Americans trust government to do the right thing most of the time, according to an October *New York Times*, CBS News poll."

Brooks goes on to speculate about the basis for that distrust: "Why don't Americans trust their government? It's not because they dislike individual programs like Medicare. It's more likely because they think the whole system is rigged. Or to put it in the economists' language, they believe the government has been captured by rent-seekers."

This all sounds very familiar. It's essentially the basis of the current critique of copyright law: that Congress has become beholden to a few stakeholders, and, as a result, modern copyright law has become unmoored from any legitimate purpose and now simply apports rents to favored dinosaur industries.

But even that description of the situation is not dark enough. The pessimism, in copyright as well as politics generally, extends to the judicial branch as well. The Supreme Court, along with conservatives, has essentially given up on the courts and lawsuits as an instrument for civil justice. I think this is what explains the sharp turn in recent years away from discovery as the fire in which the truth proves its mettle, away from class actions, toward summary judgment, away from jury control over punitive damages, away from lawsuits generally and toward arbitration at every opportunity. Think of the rhetoric in favor of "tort reform"—limiting tort lawsuits and especially placing damage caps on actions, for example, for grievous injuries caused by negligence. The very idea of letting negligence determinations go to the jury—once a core function of juries—strikes many as intolerable. Tort lawsuits are said to be out of control, with liability highly unpredictable, and unreasonable, eye-popping damage awards that create a chilling effect that acts as a drag on innovation, supported only by a highly influential lobby that controls the relevant legislatures. Only the lawyers win. There's considerable skepticism in the tort reform rhetoric about the plaintiffs, too—who are these complainers? Why can't they just suck up the trivial misfortunes that come their way?

Concerns about copyright lawsuits are similar, which is a bit surprising, since most copyright critics are probably politically liberal. The law is said to be hopelessly nebulous, plaintiffs are out of control, the potential damages are huge, and even the faintest threat of a suit chills innovation and drags down individuals and businesses. There is no longer faith that judges and juries will sort the good cases from the bad at a reasonable price. And even if they could, the plaintiffs are looked at askance, as not really suffering an injury worth remedying at any non-trivial investment of time and resources.

Part of the common theme here is, I think, part of the long-term trend away from the common law in American jurisprudence. Once, a hundred years ago, nearly all of the law in its everyday application was non-statutory—entirely accreted from judicial opinions over the centuries, without any basis in statutes. Even where there were statutes, judges felt free to add to them with doctrines of their own making—fair use and secondary liability in copyright law are well-known examples. Indeed, much of the doctrine we have in copyright law was built during this era—substantial similarity, the idea/expression distinction, merger and *scènes à faire*—which explains copyright's different feel from patent law, which was statutorily codified in 1952 in a way that did not simply preserve the judicially developed doctrines that came before.

Copyright, like tort, is to a large extent a common law subject, and the zeitgeist is moving steadily away from courts as the locus of law's development—or, really, of any legitimate decision-making control over the law at all, beyond mere application. This trend is exemplified by the Supreme Court confirmation hearings in which nominees from both parties describe the enterprise of judging as more or less a routine application of existing law to facts. For whatever reason, nebulosity and uncertainty—in tort law, in litigation costs, in copyright—are becoming less tolerable, and the practice of legislatures of kicking key legal determinations to judges or juries is getting viewed with more and more suspicion and anger. I think that's a long-term problem, however, as the idea of being able to regulate conduct through the operation of some sort of fully specified, easy-to-apply set of rules identified in advance is just as unachievable now as it was when H.L.A. Hart made fun of it in *The Concept of Law* in 1961. ■



## An extrovert and change agent

"I was given the gift of gab," Franklyn Gimbel says. Indeed. Prominent lawyer, civic leader, confidant of major politicians and judges, storyteller, schmoozer, all-around extrovert—someone, by his own description, born with a gene for wanting to get up in front of crowds and lead. Someone who says that when it comes to practicing law, he agrees with the adage that it's not only what you know but "who you know."

It sometimes seems like everyone knows Gimbel, L'60, a Milwaukee native who has practiced in his hometown for more than half a century. Has there been anyone who, at least on a personal level, doesn't like him?

Well, yes. For one: Harold Breier, the tough, legendary chief of Milwaukee police from 1964 to 1984. "Breier and I fought for five years," Gimbel says, referring to his term on the city's Fire and Police Commission from 1977 to 1982. Gimbel was appointed by another legend, Henry Maier, Milwaukee's mayor from 1960 to 1988. Gimbel was a close informal advisor to Maier on political matters.

Breier ran the police department in an old-fashioned, authoritarian manner. He adamantly resisted pressure to change his ways, especially when it came to policies regarding a range of race-related issues, such as the small number of minority police officers at that time and the refusal to assign any of them to the then-all-white south side. Gimbel



was one of the main people working to apply that pressure. The outcome was a federal court consent decree in the early 1980s under which the police department created two hiring lists, one for white candidates and one for minority candidates. For several years, the department had to hire two minority applicants for each white hired, with the goal of redressing past practices. The Milwaukee Fire Department was required to follow similar practices.

The result was what Gimbel calls "a major revolution" in the racial makeup of Milwaukee's police and fire departments. He said he would put that at the top of his list of "events or structures that will live on after me."

Also high on the list: His appointment in 1994 by then-Gov. Tommy Thompson to the Wisconsin Center District board of directors, which oversees Milwaukee's convention center. Gimbel soon became—and remains—chair of the board. The Frontier Airlines Center was built during that period, and the old Milwaukee Auditorium was transformed into the Milwaukee Theatre. "I have

Marquette law degree: 1960

Practice: Gimbel, Reilly,  
Guerin & Brown

a huge sense of pride about the opportunity to oversee construction of the convention center,” Gimbel says.

The list of other civic and volunteer involvements is long—past president of the State Bar of Wisconsin and of the Milwaukee Bar Association and member of the board of the Greater Milwaukee Foundation since 2000, to give a few examples.

Gimbel recently turned 76. He continues practicing at the firm he founded in 1968, after serving as an assistant United States attorney from 1963 to 1968. Gimbel, Reilly, Guerin & Brown now has 13 lawyers. Gimbel himself continues to take high-profile cases—he is representing one of the defendants in a case arising from the “John Doe” investigation involving several aides and associates of Gov. Scott Walker when Walker was Milwaukee County executive. His workdays aren’t as long as they used to be, and he involves other lawyers in all of his cases, he allows.

But retire? “I’m still working because there’s nothing I’d rather do,” Gimbel says. ■

## 1956

**Claude Kordus** acted as the content editor and a contributor for the text, *Trustees Handbook*, a publication of the International Foundation of Employee Benefit Plans, a Milwaukee-based organization. The book provides legal, actuarial, accounting, investment, administration, and communication insights for the trustees of multi-employer blue-collar benefits plan.

## 1967



**Michael J. Zimmer** was awarded the Paul Steven Miller Memorial Award for Scholarly Contributions to the Field of Labor and Employment Law. The presentation was at

the Sixth Annual Labor and Employment Law Colloquium, held at Loyola and Southwestern law schools in Los Angeles. Zimmer is a professor of law at Loyola University Chicago.

## 1968

**William A. Jennaro** has become of counsel to the firm Gimbel, Reilly, Guerin & Brown in Milwaukee.

## 1976



**John T. Bannen** has received a master of arts in foreign language and literature degree, in Spanish, from the University of Wisconsin—Milwaukee. He is with

the Milwaukee office of Quarles & Brady.

## 1977

**John S. Shiely** has been elected to the Oshkosh Corporation Board of Directors. He is currently chairman emeritus of Briggs & Stratton Corp. in Wauwatosa, Wis.

## 1981

**Ronald R. Hofer** has received the 2011 V. Robert Payant Award for Teaching Excellence from the National Judicial College in Reno, Nev. (the award is named after Judge Payant, L’56). Hofer has been teaching at the college for the past 18 years and is the former chair of the college’s faculty council.



**Julianna Ebert** received the Frederick O. Kiel Distinguished Service Award from the National Association of Bond Lawyers Board of Directors. She is a partner in the Milwaukee office of Quarles & Brady.

**Kay N. Hunt** has been named Minneapolis Best Lawyers Appellate Practice Lawyer of the Year for 2012. She is chair of appellate practice for Lommen, Abdo, Cole, King & Stageberg.

## 1982

**Michael S. Ariens** recently published *Law School: Getting In, Getting Out, Getting On* (Carolina Academic Press 2010) and *Lone Star Law: A Legal History of Texas* (Texas Tech University Press 2011). He is a professor of law at St. Mary’s University School of Law in San Antonio, Texas.



**Donald W. Layden, Jr.** has joined Baird Venture Partners as an operating partner. He will focus on evaluating and overseeing investment opportunities in the

business services sector. Layden is also with the Milwaukee office of Quarles & Brady.

## 1983

**William A. Kissinger** has joined Kahler Slater, a Milwaukee-based architecture and experience design firm, as director of business development. He will focus on Kahler Slater’s health care and academic health sciences teams. ▶▶

SUGGESTIONS FOR CLASS NOTES may be emailed to [jonathan.leininger@marquette.edu](mailto:jonathan.leininger@marquette.edu) or [christine.wv@marquette.edu](mailto:christine.wv@marquette.edu). We are especially interested in accomplishments that do not recur annually. Personal matters such as wedding and birth or adoption announcements are welcome. We update postings of class notes weekly on the Law School's website, [law.marquette.edu](http://law.marquette.edu).

## 1984



**Linda S. Maris**, Brookfield, Wis., has been named the first president of the National Christian Foundation Wisconsin, a ministry that supports individuals with their charitable planning. The

organization is affiliated with the National Christian Foundation in Atlanta, which is the nation's largest provider of donor-advised funds for Christians.

## 1988

**Navroz J. Daroga** has joined the TriComply compliance team. TriComply is a division of TriNovus, which is based in Birmingham, Ala.

**Peter M. Garson**, Madison, has joined DeWitt Ross & Stevens as part of the firm's business and trusts and estates groups.

## 1992

**Timothy S. Jacobson**, La Crosse, Wis., recently published his first novel, *The Kurchatov Penetration*, with Visjonær Press. Jacobson, executive director of Mississippi Valley Conservancy, a land trust, also is serving as executive producer of a documentary film of science exploration, *Mysteries of the Driftless*, expected to be released in 2012.

## 1993

**Lisa C. Paul**, Milwaukee, has been named one of the most inspiring people of 2011 by the *Catholic Herald* in Milwaukee. Her memoir, *Swimming in the Daylight*, was featured at the Association of Marquette University Women Spring Book Club.

## 1997

**John Paul Fernandes** has been named director and CEO of Eurotex Finanz Inc., a private investment company located in the British Virgin Islands.

## 1999



**Michael T. Flynn** has been appointed director of litigation at Joy Global, Inc., a Milwaukee-based original-equipment manufacturer and aftermarket parts and services provider for both

the underground and aboveground mining industries.

**Roberta A. Heckes** received the 2011 John Lederer Service Award from the State Bar of Wisconsin's Solo, Small Firm, and General Practice section.



**Mary T. Wagner's** *Fabulous in Flats* was recently named 2011's "Book of the Year" by the Florida Writers Association. The award was presented during the annual Royal Palm Literary Awards contest.

## 2001

**Chad J. Wiener**, Milwaukee, has been elected partner at Quarles & Brady. He is a member of the firm's corporate services group.

**Jennifer Peterson Wolff** has been elected a shareholder at Godfrey & Kahn. She is a member of the corporate practice group in the firm's Milwaukee office.

## 2002

**Semhar Araia**, Minneapolis, Minn., was recently honored by the White House as part of the Champions of Change series. She and 13 others were recognized for their leadership in America's diaspora communities. Araia is the founder and executive director of Diaspora African Women's Network.

**Patrick D. McNally**, a shareholder in the Milwaukee office of Borgelt, Powell, Peterson & Frauen, has been named the 2011–2012 Lead State Chair in Wisconsin for the Council on Litigation Management, a nonpartisan alliance of thousands of insurance companies, corporations, general counsel, risk managers, claims adjusters, and attorneys.



**Joseph W. Voiland**, Milwaukee, has been named a shareholder at Reinhart Boerner Van Deuren. He is a member of the firm's litigation, employee benefits, and government relations practice groups.

## 2003

**Christopher M. Cahlamer** has been elected a shareholder at Godfrey & Kahn. He is a member of the securities practice group in the firm's Milwaukee office.



**Tara R. Devine** was promoted to partner at the Illinois firm, Salvi, Schostok & Pritchard. She concentrates her practice in the areas of personal injury, wrongful death, and medical malpractice cases.

**Lisa Nester Kass**, Milwaukee, has been named a shareholder at Reinhart Boerner Van Deuren. She is a member of the firm's litigation and intellectual property practices.

**Natalie R. Remington** is fulfilling a one-year elected term as president of the Association for Women Lawyers, a statewide organization based in Milwaukee. Remington is with the Milwaukee office of Quarles & Brady, focusing her practice on trade secrets litigation, breach of contract claims, and lender-liability matters.



## A goalie on the move



When Annie Owens returned to Kentucky this spring for her wedding, she had come a long way since graduating from high school there in 1998 and heading to Brown University in Rhode Island. Still on the rise, she is now an appellate lawyer who appears before and submits briefs to federal courts throughout the country.

At Brown, Owens played Division I field hockey; she was a four-year letter winner and starting goalie on the 1999 Ivy League championship team. She studied political science and American history. After graduating in 2002, she headed to Marquette Law School. While in law school, she was a research assistant for Dean Joseph D. Kearney and, during the summers, worked in Washington, D.C. She became enamored with constitutional law.

The summer after her first year of law school, she served a fellowship with Senator Herb Kohl on the United States Senate Committee on the Judiciary. During her second summer, Owens accepted a position with the law firm then known as Wilmer Cutler & Pickering, also in D.C. That settled for her a key goal: She wanted a career in the nation's capital.

After she graduated first in her Law School class in 2005, Owens clerked at the U.S. Court of Appeals for the Fifth Circuit for a year. "I interviewed with Chief Judge Carolyn Dineen King, who had grown up in Milwaukee. She was thrilled to have an applicant from Marquette Law School and hired me the same day." At

**Marquette law degree:** 2005

**Practice:** Wilmer Cutler Pickering Hale and Dorr, Washington, D.C.

the end of the clerkship in Houston, Owens applied for a Bristow Fellowship with the Office of the Solicitor General in the United States Department of Justice in Washington, D.C. "I honestly did not expect to receive it," she explains.

Owens had accepted a position in Washington at a firm that practiced telecommunications regulation and appellate litigation. Then she got the call: "I was offered the position as Bristow Fellow. The Solicitor General's Office picks four people a year nationwide," she explains. She accepted the year-long position in 2007. "It was a fascinating year. I drafted briefs in opposition to certiorari, wrote appeal-recommendation memoranda, and assisted in drafting of merits briefs and preparation of oral arguments before the United States Supreme Court. I also briefed and argued a Vienna Convention case before the United States Court of Appeals for the Seventh Circuit."

Owens was recently named counsel at Wilmer Cutler Pickering Hale and Dorr, a large private practice firm with offices worldwide, where she began as an associate in 2008. "I have an argument before the United States Court of Appeals for the Sixth Circuit coming up this summer," she says. "So I'm having fun and doing interesting work."

Owens has an active pro bono practice. "Our firm is very committed to pro bono work," she says, "and it is a very rewarding aspect of my career. I get to help people who might not have had the best representation in the past and who have a real need for someone to represent them in court."

Owens's husband is also a lawyer in Washington, D.C. "It's great to be married to someone with whom I can discuss the law and who understands my professional obligations," Owens notes.

First-rate research skills, an affinity for litigation, and a spirit of service: It's a formula for growing success for Owens. ■

## Finding perspective in the mountains—and in her practice

For Julie O'Halloran, L'89, being a lawyer is not so much about moving mountains as it is about how mountains have moved her.

She and her husband, Hugh O'Halloran, L'89 (a law school classmate and now partner at Foley & Lardner), spend as much time as they can in mountain areas all over the world, most often in Jackson Hole, Wyoming.

Many years ago, they decided that instead of griping about the winter, they would embrace it. They bought skis and boots and headed to Colorado.

And then the mountains transformed them—especially Julie O'Halloran's practice, albeit indirectly. "My time in the mountains quite literally gives me a healthier perspective in all aspects of my practice. It brings to the forefront how necessary it is to remain humble, respectful, and authentic—which, if one is honest, are tasks that are challenged in a law practice on a regular basis," she explains. After years in her family-law practice, she was seeking ways to merge her passion for finding unique and peaceful resolutions to problems with conflicts that are inherent in her line of work. The "mountain perspective," as O'Halloran calls it, gives her that ability to step back and recognize how to approach problems in a healthier way.

"I find that our time in the mountains is profound



and important in a way that is difficult to articulate. The practice of law can be tough, and the ability to spend quality time in a place that is larger and grander than all of us put together is simply awe-inspiring." These experiences launched her into personalizing her practice to be true to herself.

During her two-plus decades in practice—first at Margolis & Cassidy, Milwaukee, for 12 years and then, since 2001, as a partner in her own firm, Gagne & O'Halloran, focusing on family law—O'Halloran has stayed committed to bringing quality and meaning to her practice. "My efforts to personalize my practice led me to pursue additional education and training

**Brian P. Thill**, Madison, has been elected a shareholder at Murphy Desmond. He focuses on creditors' rights, bankruptcy, title insurance, litigation, business, and real estate. Brian and his wife, Jodie, welcomed a daughter, Betsy, born on October 18, 2011.

**Amalia L. Todryk**, Milwaukee, has been elected partner at Quarles & Brady. She is a member of the firm's trusts and estates group.

### 2004

**Walter N. Neta**, Green Bay, has been promoted to shareholder at Olson, Kulkoski, Galloway & Vesely. He focuses on worker's compensation, Social Security disability, and long-term-disability litigation.

### 2005

**Joseph A. Abruzzo** has been elected shareholder at Lichtsinn & Haensel, Milwaukee. He focuses on civil litigation and general corporate law.



**Danielle Bergner** has joined the Milwaukee office of Michael Best & Friedrich. She is with the firm's transactional practice group and will focus on real estate, municipal law, and finance.

**James R. Johnson**, Washington, D.C., has joined Hogan Lovells as a member of the firm's FDA practice group. Johnson began his career in the FDA's Office of the Chief Counsel, where he most recently served as Associate Chief Counsel.

**Reggie L. Wegner** has been elected shareholder at Lichtsinn & Haensel, Milwaukee. Wegner focuses on tax and general corporate law.

**Marquette law degree:** 1989

**Practice:** Gagne & O'Halloran, Milwaukee

**Family:** Married to Hugh J. O'Halloran, L'89

in mediation. Disputes exist in everyone's life, and this experience gave me a different perspective on how to creatively resolve matters." She is on track to earn a master's degree in dispute resolution from Marquette University's College of Professional Studies in December.

O'Halloran is dedicated to developing skills for working through conflict and problems in respectful, constructive, and dignified manners. Her practice includes collaborative family law, an approach developed in recent decades to try to minimize strife and contested litigation in the divorce process.

She says that parties are relying more and more on mediators and arbitrators rather than going to court. "Mediation is efficient, more cost-effective, and often provides a creative resolution. As architects of their own deal, people are more likely to abide by the solution," she explains.

Another gift from the mountains is their reminder to O'Halloran about her place in this world. "We tend to think we are important as lawyers," she says. "The mountains and their majesty, the wildlife, and the breathtaking beauty of nature prove to be constant reminders of how relatively unimportant we are as individuals, and that we need to find ways to effectively coexist." Her philosophy was partly developed, O'Halloran says, looking back, by her education at Marquette. "I am proud to be a Marquette lawyer, with all that it means. Marquette Law School really focuses on law as a profession, and I do everything I can to be true to the profession and my colleagues and treat everyone with respect." ■

## 2006

**Lisa A. Baiocchi** has joined the Milwaukee office of Arnstein & Lehr. She concentrates on labor and employment litigation.

**Michael A. McCanse** has joined the Phoenix, Ariz., office of Quarles & Brady as an associate with the firm's commercial litigation group.

## 2007

**Adam S. Bazelon**, Milwaukee, has joined the Law Firm of Jonathan B. Levine. He focuses on condominium law and real estate litigation.



**Kristin A. Occhetti** has been appointed to the trust committee of Life Navigators (formerly ARC of Greater Milwaukee). She is with the Milwaukee office of Quarles & Brady and

focuses her practice on estate planning and wealth preservation strategies for individuals, small business owners, and professionals.

## 2010

**Jesse R. Dill** has joined the Milwaukee office of Arnstein & Lehr. He represents

management in a variety of labor and employment law matters before state and federal courts.

**Drew S. Jelinski**, Milwaukee, has joined Halloin & Murdock as an associate. He focuses on construction, real estate, and insurance coverage litigation.



**Larry Lueck** has been named associate counsel for Nsight, a company he has been with for 19 years. He was also elected to the Common Council for the City of De Pere, Wis., in 2011.

## 2011

**Thomas J. Burmeister** has joined the Milwaukee office of von Briesen & Roper. He is a member of the firm's banking, bankruptcy, business restructuring, and real estate practice groups.



**James M. Burrows**, Milwaukee, has joined Reinhart Boerner Van Deuren as an associate. He is with the firm's litigation practice.

**Lora L. Chupita**, Milwaukee, has joined Rose & deJong as an associate. She focuses on commercial and civil litigation.

**Ryan D. Gehrke** has joined the Milwaukee office of von Briesen & Roper. He is a member of the firm's litigation and risk management practice group.

**Emily I. Lonergan**, Milwaukee, has joined Gimbel, Reilly, Guerin & Brown as an associate. She focuses on civil litigation, personal injury, and criminal defense matters.

**Samantha Prah** has joined the Sheboygan County District Attorney's Office as an assistant district attorney.

**James D. Rael**, Sheboygan, married in July 2011. He is with the Wisconsin State Public Defender's Office.

**Rose Simon**, Menasha, has joined Petit & Dommershausen as an associate. She focuses on criminal defense, juvenile law, and family law. ■

## Law School Celebrates Annual Jenkins Finals



Justice Elena Kagan, U.S. Supreme Court (*center*), was joined by Judge Diane S. Sykes, L'84, U.S. Court of Appeals for the Seventh Circuit, and Judge William C. Griesbach, L'79, U.S. District Court for the Eastern District of Wisconsin, in judging Marquette's Jenkins Honors Moot Court Finals on April 3. Presenting oral arguments in Eckstein Hall's Appellate Courtroom were (*left to right*) second-year students Sarah McNutt, Kristina Gordon, Ariane Strombom, and Megan Zabkowicz. For more on Justice Kagan's visit to Eckstein Hall, see inside, p. 5.