

MARQUETTE LAWYER

MARQUETTE UNIVERSITY LAW SCHOOL MAGAZINE SUMMER 2014

Heather Gerken

THE REAL PROBLEM WITH *CITIZENS UNITED*:

Campaign Finance, Dark Money,
and Shadow Parties

Reactions from Feingold,
Esenberg, and Abrahamson

ALSO INSIDE:

Nancy King on Using Priors in Sentencing

Marquette Law School Poll on
Wisconsin's Truth in Sentencing

Kearney on Legal Education's Future

Reforming the Wisconsin Supreme Court?



Lectures and Magazines—and Communities

Distinguished lectures that feature renowned visiting scholars are a mainstay of university life. Such lectures teach, inspire, and sometimes provoke. They also have an exquisite potential to strengthen communities. And so, for example, when we invited Professor Thomas W. Merrill of Columbia Law School to deliver the Boden Lecture in 2010, we were keenly aware that his discussion of *Melms v. Pabst Brewing Co.*, an 1899 decision of the Wisconsin Supreme Court, could attract the interest of local history buffs, American history scholars, real estate lawyers, and economists, as well as the Law School community. (We did not predict that it would prompt an essay in response from Judge Richard A. Posner.) As our inaugural distinguished lecture in

Eckstein Hall, it was also a nice detail that the property at issue in *Melms* sits only a few blocks away from the Law School's new home.

Similarly, when Professor Arti K. Rai of Duke Law School delivered the Nies Lecture in Intellectual Property in 2013, her topic was “Patents, Markets, and Medicine in a

Just Society,” which we knew would attract lawyers and other professionals in Milwaukee’s vibrant health care and inventor communities. Thus, the 200 members of the audience included not just students, faculty, and lawyers but also numerous researchers and other individuals drawn away from their work at GE Medical Corp., the Medical College of Wisconsin, and the University of Wisconsin–Milwaukee.

This engagement with the broader community through our distinguished lectures is not just an Eckstein Hall phenomenon. For example, when criminal law scholar Dan M. Kahan of Yale Law School was the Boden Lecturer in 2008, his visit with us included an “On the Issues with Mike Gousha” session where he was joined by Milwaukee County District Attorney John T. Chisholm. It also involved a smaller, more informal conversation with various law faculty and corrections officials.

Our purposes in the *Marquette Lawyer* magazine include building on our distinguished lectures, in order further to teach, inspire, and provoke—and further to strengthen communities. In this issue, the cover story (pp. 10-25) is Yale Law School Professor Heather K. Gerken’s essay based on her Boden Lecture a few months ago. It sets forth her criticism—differing from that of most commentators—of the U.S. Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*. Our presentation contains brief reactions from three prominent members of the Marquette Law School community who know a thing or two about campaign finance: former adjunct professor Shirley S. Abrahamson and former visiting professors Richard M. Esenberg and Russell D. Feingold. This illustrates yet again our persistent and aggressive commitment to be an important convener of conversation concerning politics and elections in Wisconsin and beyond. The article elsewhere in this issue (pp. 40-43) concerning the proposal emerging from the State Bar of Wisconsin fundamentally to revise elections and eligibility to the Wisconsin Supreme Court is another example.

Vanderbilt Law School Professor Nancy J. King’s article on the use of prior convictions in sentencing (pp. 26-35) also exemplifies our use of distinguished lectures. The audience at Professor King’s Barrock Lecture on Criminal Law this past fall included the chief judges of the state and federal trial courts in Milwaukee, the top federal and state prosecutors in the region, and the state public defender of Wisconsin, among others. More generally, a substantial debate is developing in Wisconsin about criminal law sentencing and policy, and Marquette Law School is helping drive that debate even apart from its distinguished lectures. The article in this *Marquette Lawyer* (pp. 36-39) reflecting Professor Michael M. O’Hear’s use of Marquette Law School Poll results to elucidate Wisconsinites’ nuanced attitudes toward the state’s truth-in-sentencing law is part of that effort. The Law School itself has no policy agenda concerning these various controversies, but our communities are surely richer for the individual opinions that we present and especially for the facts, intelligence, and wisdom that our lecturers contribute.

We invite you to be part of our community by reading this magazine.

Joseph D. Kearney
Dean and Professor of Law



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Race, Poverty, and Other Urban Realities

Gaps Along Race and Income Lines Are Focus of Law School Programs

Marquette Law School did not set out to hold a symposium on issues related to race and poverty during the 2013–2014 school year. But with problems associated with those realities facing the Milwaukee region and the United States as a whole, public events in Eckstein Hall across the school year often focused on these subjects. The conversations were polite but direct. At one session, attorney William Lynch, a longtime advocate for desegregation programs in public schools, said, “When was the last time you heard in polite conversation the term *integration* except to read the materials about coming to this conference?” In short, the programs did not shy away from crucial and sensitive subjects. Here are some samples from across the year.

ON THE ISSUES WITH MIKE GOUSHA, FEBRUARY 18, 2014

Milwaukee Police Chief Ed Flynn

If there's something strange in your neighborhood, who ya gonna call? Those were the opening lines of the theme song to the movie *Ghostbusters* in 1984. And it was, in large part, the key question Milwaukee Police Chief Ed Flynn asked recently in Eckstein Hall. His answer, of course, was, “The police.” But that that is *the* answer carries serious consequences for efforts to make Milwaukee a safe place with vibrant neighborhoods.

Over the last 25 years, Flynn said, “we have seen a consistent and unrelenting disinvestment in the social network.” He gave mental health as an example: “Right now, the response of our society to issues of mental health is the criminal justice system. I’ve seen this for years, and it’s becoming more so. . . . If you have a mental health problem, we can guarantee you a jail cell.” He said substance abuse is another example.

“What is our social network [for] dealing with substance abuse? Jail.”

Flynn, in his sixth year as Milwaukee’s chief, said, “I’ve got 1,800 men and women out there who are being asked to deal with virtually every single social problem that presents as an inconvenience, discomfort, or issue. . . . It is this one group that right now has the weight of every single social problem on it. And maybe we should start asking ourselves, do we need to double back and see what else we’re doing?”

“The problems of intergenerational, endemic, hardcore poverty are pernicious and affect everything,” Flynn said. “Crime is probably 20 percent of the police department’s work. My average copper is out there spending 80 to 85 percent of his or her day dealing with social problems presenting themselves as things nobody can do anything about except call the cops.” ■



ON THE ISSUES WITH MIKE GOUSHA
OCTOBER 3, 2013

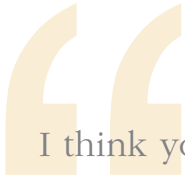
The Three Co-chairs of the Milwaukee Succeeds Initiative

Milwaukee Succeeds, the broad-based effort of civic leaders to improve the educational outcomes of Milwaukee children, is a low-profile but ambitious effort. After two years, the work of several committees focused on a range of major issues has produced little for public view. But three civic leaders who spearhead the effort said at an Eckstein Hall event that they expect that to change soon.

“I think we’re going to see success much sooner than we thought because we’re going to start to implement things,” said Jacqueline Herd-Barber, a retired engineer who is involved in a wide array of civic efforts.

Mike Lovell, chancellor of the University of Wisconsin–Milwaukee





I think you're going to start seeing some meaningful outcomes, that we're going to start implementing things that will start moving the needle."

John Schlifske, CEO of Northwestern Mutual

(and now president-elect of Marquette University), said that Milwaukee Succeeds has brought together large numbers of people from many of the important sectors and organizations in the area and that they have been preparing fresh efforts around important goals. "A year from now, when we measure, the needle is going to be moved just because there are so many people involved," Lovell said.

And John Schlifske, CEO of Northwestern Mutual, said, "I think you're going to start seeing some meaningful outcomes, that we're going to start implementing things that will start moving the needle."

Creation of the effort was spurred by leaders of the Greater Milwaukee Foundation. Improving outcomes from "cradle to career" is the goal, and task forces have been addressing such issues as early-childhood health and community youth programs.

In answering a question from Mike Gousha, the Law School's distinguished fellow in law and public policy, about when results would be visible, Schlifske said, "The three of us are all action-oriented people. . . . I'm getting impatient, to be honest with you." He said he was not impatient with the work being done because it is so complex, but with the need to do something to improve educational results as a whole in Milwaukee. "Every school year that goes by is a lost opportunity," he said. ■



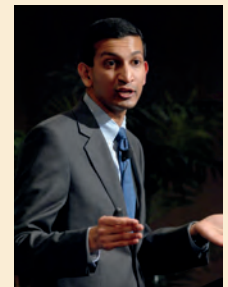
Professor Raj Chetty, Harvard University Economist

NOVEMBER 5, 2013

Crunching data involving 40 million people in every part of the United States, Professor Raj Chetty and colleagues have created a provocative and important index of how much opportunity there is for children growing up on the lowest 20 percent of the economic ladder to make it to higher rungs as adults. The answers vary widely across the country, and Milwaukee is one of the places where the answers are not very encouraging.

Chetty spoke at a session that combined the Marquette University Economics Department's Marburg Lecture with Marquette Law School's "On the Issues with Mike Gousha." Chetty has won numerous awards, including a MacArthur Foundation Fellowship and the John Bates Clark medal, given by the American Economic Association to the American economist under the age of 40 who is adjudged to have made a significant contribution to economic thought and knowledge.

Among the 50 most populous areas in Chetty's analysis, the Milwaukee area ranked 41st in opportunity to move up in life. The opportunity picture in most of the rest of Wisconsin was decidedly better. The differences, Chetty said, translate into saying that a child from a low-income household in Green Bay will make, on average, thousands of dollars more a year as an adult than a child from such a home in Milwaukee.



Raj Chetty

Chetty emphasized education in discussing what Milwaukee might do to improve its rating on the opportunity index. He said the metro area as a whole is on a par with the nation when it comes to success in school. But the difference in success between the city and the suburbs is much higher than in comparable metropolitan areas. The disparity in education may be related to the high degree of racial and economic segregation in Milwaukee, he suggested.

He said that other research he has worked on supports making improvement of the quality of teaching a priority. ■



Crossing the Line:

Lessons Learned from City-Suburban Education Programs

It has been almost 40 years since Wisconsin created the voluntary city-suburban school integration program that is known as Chapter 220. By the early 1990s, more than 6,000 students were involved annually, with minority students who lived in Milwaukee enrolling in suburban schools while white students who lived in the suburbs enrolled in Milwaukee Public Schools. That number has fallen to less than half of that today, as city-suburban transfers using the state's open enrollment law (which has no racial-integration purpose or provision) have risen.

What has been learned from Chapter 220 and related efforts? That was the focus of a fall gathering, which included several key figures involved in the history of the program, primarily organized by Alan J. Borsuk, senior fellow in law and public policy at the Law School.

Kara Finnigan, a researcher who has studied similar efforts nationwide, keynoted the session with a summary of what has been done in other metropolitan areas, including city-suburban school consolidations,

annexation, and other efforts to bridge school-district boundaries on a voluntary basis. "All of these strategies have been limited, at best, in terms of their impact," said Finnigan, associate professor at the Warner School of Education at the University of Rochester. Programs such as Chapter 220 have been one of the few routes that have succeeded in getting large numbers of children to cross school-district lines. Finnigan said that "[t]here is some evidence of higher achievement" among those who have taken part, but research has been limited.

Demond Means, superintendent of the Mequon-Thiensville School District, is a major proponent of Chapter 220—and was a participant as a child. He called the program "transformational," and said reinvigorating it is important. He noted that enrollment has fallen not because of lack of demand from parents, but because school districts have instead moved on to the open-enrollment program, which benefits them more from a financial standpoint. "There is a level of urgency that has just gone away," Means said. "Social justice is not an issue that people are willing to stand up in the arena and advocate for any more."

Professor Robert Lowe of the Marquette University College of Education, which together with the Law School convened the gathering, outlined the rise and fall of support for racial integration of schools nationwide. Among African Americans, he said, there was nearly universal support for school desegregation in the 1950s and 1960s, and, for a period, court decisions were strongly supportive. But the downsides of desegregation fell largely on African Americans, Lowe said, and the tide of court decisions turned against the efforts in the mid-1970s. Now, Lowe said, the legal picture is unfavorable to meaningful desegregation programs, many cities are almost impossible to integrate demographically, and the demand for integration has diminished.

Dennis Conta, who as a legislative leader in the 1970s played a crucial role in creating Chapter 220, called for creating "a new Chapter 220" that would be focused on children growing up amid intense poverty and would offer schools funding that would encourage their participation.

Michael Spector, now retired from Quarles & Brady, was involved in shaping Chapter 220. He expressed regret that so much racial separation still exists. Spector said he asked a granddaughter attending a public school in a predominantly white suburb why Chapter 220 should continue. "Because it's the only way I'm going to get to know kids who are African American," she answered. ■

ON THE ISSUES WITH MIKE GOUSHA, FEBRUARY 5, 2014

Former Milwaukee Mayor John Norquist

Congestion in an urban area is “a little like cholesterol,” said John Norquist, mayor of Milwaukee from 1988 through 2003. There is good cholesterol and bad cholesterol. “If you don’t have any cholesterol, you’re dead,” Norquist said.

Norquist is a strong partisan of neighborhoods with a mix of stores, businesses, and residences, with active pedestrian life, and with streets where drivers don’t just zip past. Think of the Third Ward in Milwaukee, an area whose revitalization was spurred by Norquist’s policies. And definitely think of freeways—but not favorably. If anything, Norquist said, Milwaukee hasn’t torn down enough freeways in recent years.

Norquist is retiring this summer after a decade as president and CEO of a Chicago-based nonprofit organization, the Congress for the New Urbanism. He said the trend nationwide toward revitalization of urban neighborhoods is “more of a return to the norm” of American living. It was government policies in the post-World War II era that led to a decline in urban life by promoting freeways, automobiles, and federally subsidized mortgages for homes in suburban areas. His view is that young people more recently have discovered that “they really like urban living.”

Norquist was never afraid to speak his mind, and that was certainly true during his Eckstein Hall visit. He threw barbs especially at the Southeastern Wisconsin Regional Planning Commission, which he said fosters urban sprawl, and at some suburban Republican legislators, who he said have “this sort of racially tinged, anti-Milwaukee attitude, which is relieved temporarily when they show up at a school-choice press conference.” Norquist generally spoke positively about developments in Milwaukee under his successor, Mayor Tom Barrett. ■



John Norquist

ON THE ISSUES WITH MIKE GOUSHA, DECEMBER 4, 2013

Professor Craig Steven Wilder

Head of the history faculty at Massachusetts Institute of Technology

People most likely think of prestigious Ivy League universities as bastions of high-minded thought and pursuit. But their histories are also tied strongly to the slave trade in America and the racism that was so pervasive both before and after the American Civil War. That is the central theme of *Ebony and Ivy: Race, Slavery, and the Troubled History of America’s Universities*, a 2013 book by MIT’s Professor Craig Steven Wilder.



Craig Steven Wilder

“The task of the historian is to tell difficult truths as honestly as we can and to help the reader understand both the complexities and the disturbing realities of the past,” Wilder said.

Wilder described how major institutions such as Harvard and Yale had long and close relationships with the slave business. That included recruiting the sons of slave traders and plantation owners as students, benefiting from large donations from very wealthy businessmen who were involved in slavery, and promoting the belief that black people and American Indians were inferior and should be suppressed.

The academy did not stand apart from slavery, in Wilder’s characterization. While in some university and college quarters the movement to abolish slavery received important support, in other quarters some of the worst excesses of racism were supported and practiced. The phenomenon was Northern as well as Southern.

“We can’t escape that past, we can’t run away from it, so we might as well turn and confront it as honestly as we can,” Wilder said in Eckstein Hall’s Appellate Courtroom.

“Colleges and universities are capable of extraordinary good, but we have to put them to that task,” Wilder said, noting that institutions do what people direct them to do. ■



Marquette Law School's team of Hans Lodge, Robert Steele, and Brendon Reyes (left to right) made it to the finals of the National Moot Court Competition, in New York City, in February after winning in regional competition. Professor Melissa Greipp, who oversaw the team's work, praised the three students and their coaches, attorneys Emily Lonergan and Jason Luczak.



Professor Mitten and the race to make decisions in Sochi

As one of nine international arbitrators serving on the Court of Arbitration for Sport's ad hoc division, Marquette Law Professor Matt Mitten had to be available in Sochi on short notice to resolve disputes that came up during the recent Olympic Games. Mitten served on two of the arbitration panels convened during the Olympics. Decisions had to be issued especially promptly to prevent a disruption of scheduled events. So that meant working through the night without breaks.

"Both of the ones I did, we worked around the clock," said Mitten, the director of Marquette's National Sports Law Institute.

In Sochi, Mitten was part of an arbitration panel that heard a protest from a half-pipe freestyle skier, Daniela Bauer, who was not selected for the Austrian team but felt she should have been.

Mitten said the panel ruled against Bauer "somewhat

reluctantly" because there were no published qualifications for the Austrian ski team, giving the Austrian federation the right to make a subjective judgment about whom to send.

The second case Mitten heard involved a protest from the Canadian and Slovenian ski cross teams, complaining that the French team had violated a rule that prohibited shaping pants legs in ways that gave competitors an aerodynamic advantage. The Canadians and Slovenians alleged that the French had team personnel cuff athletes' pants into a finlike shape just before the event started.

A protest of this kind needed to be made within 15 minutes of the event's finish; this protest was not filed until six hours later. The panel therefore ruled against the complainants, even though their complaint might have had some justification.



Matthew J. Mitten

"You've got to have your ducks in a row and know what the rules are," Mitten said.

Mitten has been a member of the Court of Arbitration for Sport's pool of approximately 300 arbitrators for more than a decade, but this was his first time working at the Olympics.

"It was a once-in-a-lifetime experience," he said. ■

Marquette Law School Alumni Awards

HELPING OTHERS: That's a common denominator among the four Marquette lawyers selected by the Law Alumni Association Board to receive awards this spring. Each has earned a reputation for success in legal or corporate settings, and each has a record of service to others.



ALUMNUS OF THE YEAR

Patrick O. Dunphy, L'76

Inspired by his father, Patrick Dunphy cofounded Cannon & Dunphy nearly 30 years ago. Dunphy's father, Ward, was also a Marquette lawyer, and he spent several years of his career as a member of the Law School faculty.

Patrick Dunphy says that his father "instilled a sense of responsibility, reliability, and ethical conduct in me."

The Cannon & Dunphy firm opened in 1985. While the success of plaintiffs' attorneys often is measured by the size of awards—and the firm has won three of the largest in state history—Dunphy also takes pride in cases that have changed a law or procedure to protect others in society.

Dunphy has remained involved in Marquette Law School throughout his career. In recent years, he has organized (together with Professor Daniel D. Blinka) the Law School's annual civil litigation continuing legal education program, always featuring Marquette trial lawyers.



LIFETIME ACHIEVEMENT AWARD

William J. Mulligan, L'60

One of the most important lessons Bill Mulligan took away from his days as a Marquette law student was that preparation is a one-word formula for success.

Mulligan approaches each case as another chance to learn—the more complex, the better, it seems, from the nuances of how the paper manufacturing process affects the environment to a labyrinth of pharmaceutical and health care issues.

"For me, this legal work combines helping clients and doing good with personal enjoyment," Mulligan says.

Mulligan is a shareholder of Davis & Kuelthau, where he represents individuals, businesses, and local government entities in litigation matters.

In the 1970s, he served as the U.S. Attorney in Milwaukee and as a member of the Marquette law faculty. He also has served as president of the Law Alumni Association Board.



HOWARD B. EISENBERG SERVICE AWARD

Dawn R. Caldart, L'01

As the executive director of the Milwaukee Justice Center (MJC), Dawn Caldart oversees efforts to provide free legal services to members of the community who are unable to afford an attorney. Her dedication to the work is clear to all who deal with her.

"I had the privilege of having Dean Howard Eisenberg as a professor," Caldart says. "For me, he was the model of what a lawyer should be, and he inspired me to 'do well and do good.'"

The MJC is a collaborative project among the Milwaukee Bar Association, Milwaukee County, and Marquette Law School. Caldart oversees all administrative functions of the justice center.

Caldart's service does not stop with the legal profession. She recently led the formation of a Milwaukee chapter of Hope by Twelve, an international organization promoting educational opportunities for girls in Ethiopia.



CHARLES W. MENTKOWSKI SPORTS LAW ALUMNUS OF THE YEAR

Matthew J. Banker, L'01

Right after graduating from the Law School, Matthew Banker went to work for the National Collegiate Athletic Association. Now, his expertise in the nuances of college sports' regulations makes him a key asset to the

University of Louisville athletics department.

"Each day is unique," Banker says. "Being part of the process that involves both educating students and supporting their teams' competitive ambitions is rewarding."

Banker became Louisville's associate athletic director for compliance in October 2013. He previously was the assistant commissioner for institutional services for the Ohio Valley Conference and assistant dean for student affairs at the Indiana University School of Law in Indianapolis.

THIS NOTE IS LEGAL TENDER
FOR ALL DEBTS, PUBLIC AND PRIVATE

The Real Problem with *Citizens United*:

CAMPAIGN FINANCE, DARK Money, and Shadow Parties

By Heather K. Gerken



Introduction

I want to begin by thanking Marquette University Law School and the organizers of the Boden Lecture for inviting me here today. It's an honor to be invited to deliver a lecture named after such an illustrious dean. And it's an honor to be invited by Dean Joseph Kearney, who is not just a distinguished dean in his own right but someone known in the legal world for his integrity and decency. Even back in the days when we clerked together, he held the respect of every clerk at the Supreme Court. It has been especially lovely to watch him during the last 24 hours. There's an old saw in election circles that one campaigns in poetry and governs in prose, and it's been a delight to watch Dean Kearney move seamlessly from one to the other. When he speaks about the students, the faculty, or the mission of Marquette Law School, it's all poetry. And yet he is also the person who instructed me that this talk should be 43 minutes long.

Today I will use my 43 minutes to offer food for thought. Not a fully worked out theory, not a firm claim, but a series of observations about the current state of campaign-finance law and its long-term effects on American politics.

Here's what I'm *not* going to say: I'm not going to tell you the near-ubiquitous tale that reformers, reporters, and even a fair number of academics tell about the current state of campaign finance. That story is that the Supreme Court's decision in *Citizens United v. Federal Election Commission* (2010) treated corporations as if they were individuals for the first time. It thereby ushered in a new era of corporate spending, with wealthy corporations spending wildly, saturating the airwaves, and taking over American politics. The story is that *Citizens United* has caused a sea change in American politics, and the Court's overturning of *Austin v. Michigan Chamber of Commerce* (1990)—the much-revered case in which the Court upheld campaign-finance regulations in order to promote equality—was the modern-day equivalent of *Plessy v. Ferguson*.

Even to set aside the overwrought reference to *Plessy*, almost all of that story is wrong, and some of it is utter nonsense. And I say this not as someone who is against campaign-finance regulation, but as someone who believes in it. I say this as someone who believes that there *is* a bigger story about the relationship between *Citizens United* and American politics; it's just not the story the media and reformers are telling.

Here I will argue that the so-called dark-money trend may be a symptom of a deeper shift taking place in our political process. And it is one that *Citizens United* has helped bring about. *Citizens United* mattered, but not for the reasons that most people seem to think. Here, in short, I hope to tell you the *real* problem with *Citizens United*.

Part I offers a brief history of campaign-finance reform and debunks the conventional wisdom about the case. It ends by suggesting that *Citizens United* mattered for reasons that have little to do with corporations or equality. Instead, the most important part of the opinion concerned the relationship between independent spending and corruption.

Part II shows how the Court's corruption ruling has changed the political landscape. We all know that there is more "dark money" in the system—money spent by sources that are virtually untraceable—and we all know how troubling it is to have large amounts of dark money flowing through the election system. But the conventional wisdom may be missing something more fundamental about the effects of *Citizens United*: The decision may ultimately push our current party system toward one that is dominated by powerful groups acting outside the formal party structure. The worry, then, isn't about dark money so much as "shadow parties"—organizations outside of the party that house the party elites.

Part III explains why the emergence of shadow parties could further weaken our already-flagging political system. It suggests that shadow parties risk undermining the influence of the saving grace of politics: the "party faithful," who play a crucial role in connecting everyday citizens to party elites. ▶▶

» Heather K. Gerken delivered Marquette University Law School's annual Boden Lecture this past academic year. The lecture remembers the late Robert F. Boden, L'52, who served as dean of the Law School from 1965 to 1984. Gerken is the J. Skelly Wright Professor at Yale Law School, having previously clerked for Justice David H. Souter at the United States Supreme Court, been a professor at Harvard Law School, and practiced law in Washington, D.C. This is a lightly edited version of Professor Gerken's lecture. A version with footnotes will appear in the summer issue of the *Marquette Law Review*.

I. The REAL PROBLEM with *Citizens United*

To understand why *Citizens United* really matters, you have to know some history. I suggested some of this background shortly after the *Citizens United* decision, in conference remarks printed in the *Georgia State Law Review*, but let me elaborate here as we begin.

The tale we tell in the academy is that in the beginning (or the early 1970s at any rate) Congress created the Federal Election Campaign Act, and we saw that it was good. The snake in this garden of campaign-finance Eden was the Supreme Court's 1976 decision in *Buckley v. Valeo*. There, the Supreme Court famously drew a distinction for First Amendment purposes between contributions (the money given to a campaign) and expenditures (the money spent on a campaign). In the Court's view, expenditures were closely tied to cherished First Amendment activities and thus hard to regulate, let alone cap. Contributions, on the other hand, raised weaker First Amendment concerns and thus could be subject to more regulation, including caps.

You can see the problem. Congress intended to regulate both sides of the money/politics equation—the money donated and the money spent. By lifting the cap on expenditures while leaving in place the cap on contributions, the Supreme Court created a world in which politicians' appetite for money would be limitless but their ability to get it would not. Two of my academic colleagues (Samuel Issacharoff and Pamela Karlan) analogized it to giving money-starved politicians access to an all-you-can-eat financial buffet but insisting they can only serve themselves with a teaspoon.

We all know what happened: just what you would expect to happen. Political interests inevitably

looked for loopholes, they inevitably found loopholes, and they inevitably drove big trucks of money through those loopholes. There was the soft-money loophole. When that got closed, people started to use issue ads to bypass the existing rules. Then came 527s and “swift boating.” The 527s have been displaced by SuperPACs and 501(c)(4)s and (c)(6)s. As a result, the entire reform game has been focused on closing those loopholes, engaging in the regulatory equivalent of whack-a-mole.

Why the Court's rulings on corporations and *Austin* were doctrinal sideshows

This brings me to the first mistake in the tale we tell about *Citizens United*, and it will be a familiar point to anyone who has been involved in this game of regulatory whack-a-mole. As suggested early on by Nathaniel Persily, the floodgates of corporate spending were open well before *Citizens United*. On account of an earlier Supreme Court decision that originated from Marquette's home state of Wisconsin (*FEC v. Wisconsin Right to Life* in 2007), certain kinds of corporate and union ads were constitutionally protected so long as they were phrased carefully. Provided that those ads didn't explicitly encourage people to vote for or against a candidate, they were protected. *Citizens United* simply eliminated the need to be careful about phrasing the ad copy. To offer a crude example, before *Citizens United*, a corporation could run an ad saying, “Senator X kicks puppies—Call Senator X and tell him to stop kicking puppies.” After *Citizens United*, a corporation could run an ad saying, “Senator X kicks puppies—Don't vote for the puppy-kicking Senator X.” If there was a time to amend the Constitution to prohibit corporate speech, it was well before *Citizens United*, which means it was well before anyone thought that there was a problem.

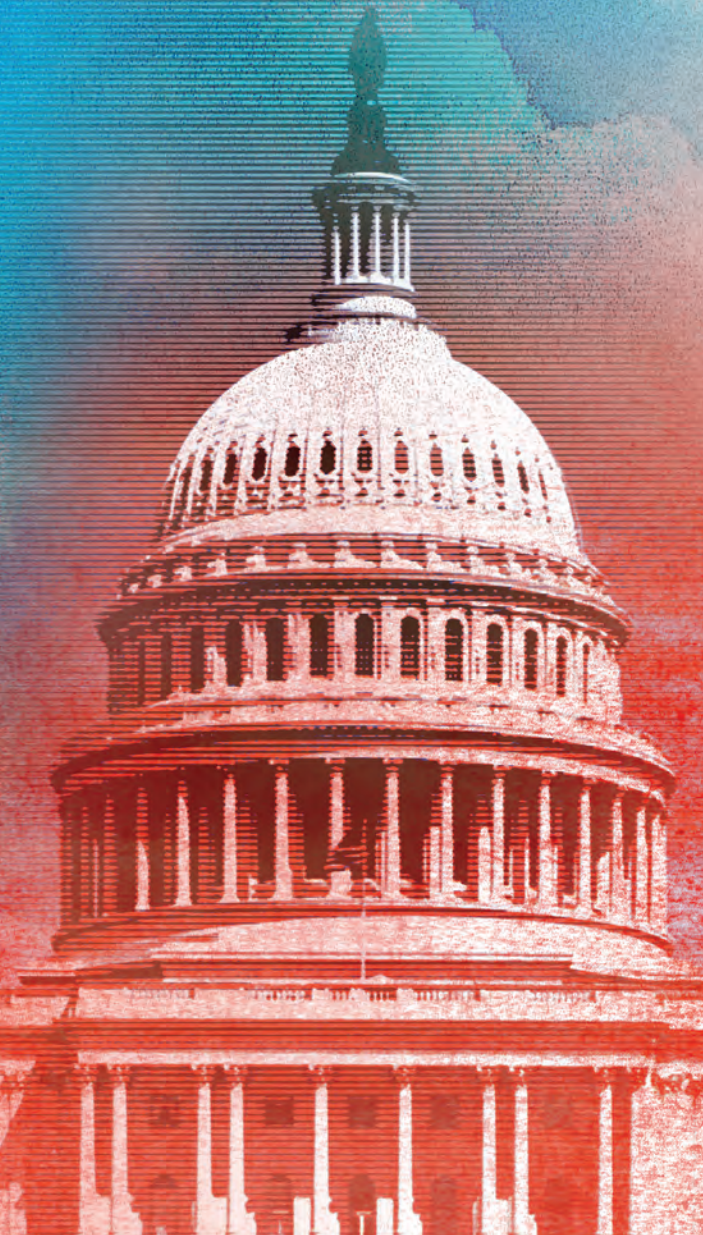
Nor can we blame *Citizens United* for the fact that independent spending—corporate or other—is hard to trace. *Citizens United* ruled eight to one in favor of the constitutionality of transparency measures, upholding a variety of disclosure and disclaimer rules. The fact that so much independent election spending is “dark money” must be laid at the feet of Congress and the Federal Election Commission (FEC), which have failed to enact adequate disclosure regulations. ▶▶



Heather K. Gerken

We the People

...in order to form a more perfect Union, establish Justice, insure domestic Tranquility, promote the common Defence, and secure the Blessings of Liberty to ourselves and our Posterity, do hereby constitute this Constitution...



The final mistake in the reformers' tale of woe is the suggestion that it was a disaster when *Citizens United* overruled *Austin*, the solitary Supreme Court case, from 1990, that relied on the equality rationale to uphold a campaign-finance regulation. You can imagine why reformers were so attached to *Austin*. Equality is a deeply intuitive justification for campaign-finance regulation. But the overruling of *Austin* was even less significant than what the Court said about corporate speech. *Austin* was a symbol, to be sure. In terms of the doctrine, however, the case was a sport. *Austin* would have been an important case if it had ever been followed. But it hadn't. By overruling *Austin*, all the Court did was formally confirm the case's irrelevance to current doctrine.

Why the Court's ruling on corruption mattered

Citizens United was important, however. It was important for reasons that reformers, in particular, don't want to talk about. That's because *Citizens United* substantially cut back on the power that Congress has to regulate in this area. It is *that* part of the ruling—not the part about corporations, not the part about equality—that is reshaping the campaign-finance landscape.

As any first-year law student can tell you, when Congress regulates in this area, it must have a good reason to do so. And *Citizens United* seems to have dramatically cut back on the reasons Congress can regulate. That's because it substantially narrowed the definition of corruption, which is regularly invoked whenever Congress wants to pass reform. Indeed, while reformers have mourned the Court's rejection of the equality rationale, the most important line in *Citizens United* was not the one overruling *Austin*. It was this one: "Ingratiation and access . . . are not corruption."

For many years before *Citizens United*, the Court had gradually expanded the corruption rationale to extend beyond "quid pro quo corruption" (I give you money, you give me votes). The Court had licensed Congress to regulate even when the threat was simply that large

donors had better access to politicians or that politicians had become "too compliant with the[ir] wishes" (in the words of a 2000 case). Indeed, at times the Court went so far as to say that even the mere *appearance* of "undue influence" or the public's "cynical assumption that large donors call the tune" was enough to justify regulation.

Before *Citizens United*, in other words, "ingratiation and access" *were* corruption. This loose definition of corruption was easy to satisfy and easy to invoke when regulating campaign finance. After all, if Congress can

regulate whenever the American people think the fix is in, it can regulate at any time. What this meant in practice is that reformers could get almost everything they would have gotten from *Austin* without ever having to say the word *equality*.

But Justice Anthony Kennedy isn't a fool. He was well aware of what his more-liberal colleagues had been doing with the corruption rationale, and he did everything he could in *Citizens United* to put a stop to it. Kennedy didn't say that the Court was overruling these cases. But that's just what it was doing.

Citizens United thus shifted the regulatory terrain surrounding independent spending—the spending that is not done in conjunction with the party or the candidate. That's the money spent by SuperPACs. That's the money spent by Karl Rove's Crossroads GPS. That's the money that Justice Kennedy told us

does not corrupt, which means that's the money that neither Congress nor the FEC can regulate heavily going forward. *Citizens United*, in sum, didn't matter because of what it said about corporations. It mattered because of what it said about corruption. If you are going to amend the Constitution, focus on the corruption ruling, not on whether, to quote Mitt Romney, "corporations are people," too.

The evidence that the corruption rationale is the one that matters is clear. Lower court decision after lower court decision has struck down regulations on independent spending. That's why we have SuperPACs. That's why the 501(c)(4)s and (c)(6)s are hard to regulate.

...Citizens United substantially cut back on the power that Congress has to regulate in this area. It is that part of the ruling—not the part about corporations, not the part about equality—that is reshaping the campaign-finance landscape."

The numbers tell the same story. There was a lot more money swishing around in 2012 than in prior years. And much of that money involved independent expenditures, often untraceable ones. But that money—as best we can tell—hasn't signaled a giant uptick in *corporate* spending. The share of corporate spending looks roughly the same. And it's not hard to guess why. Most corporations would rather stay out of the game. It's dangerous, for one thing, as Target learned when it was subjected to a boycott for supporting a conservative gubernatorial candidate who opposed same-sex marriage. Companies also worry about getting shaken down by politicians on both sides of the aisle. As a general matter, corporations do much better

by investing their resources in lobbying, where their influence is both outsized and hidden from view. That's where the smart corporate money goes.

To conclude the point: *Citizens United* mattered. But it mattered for reasons that people have largely ignored. It didn't unleash the corporate floodgates. It didn't fundamentally shift the doctrine when it overruled *Austin*. It didn't even prevent Congress or the FEC from shedding light on the sources of "dark money." What *Citizens United* did do is substantially limit the extent to which Congress or the states can limit independent expenditures. That mattered for 2012. And it may matter even more, going forward, for the reasons I am about to suggest. ▶▶

REACTION FROM RUSS FEINGOLD

Reactions

The question facing reformers isn't whether power will attempt to corrupt our government—there is overwhelming evidence that it does. Instead, the crucial question is how we prevent that power from corrupting.

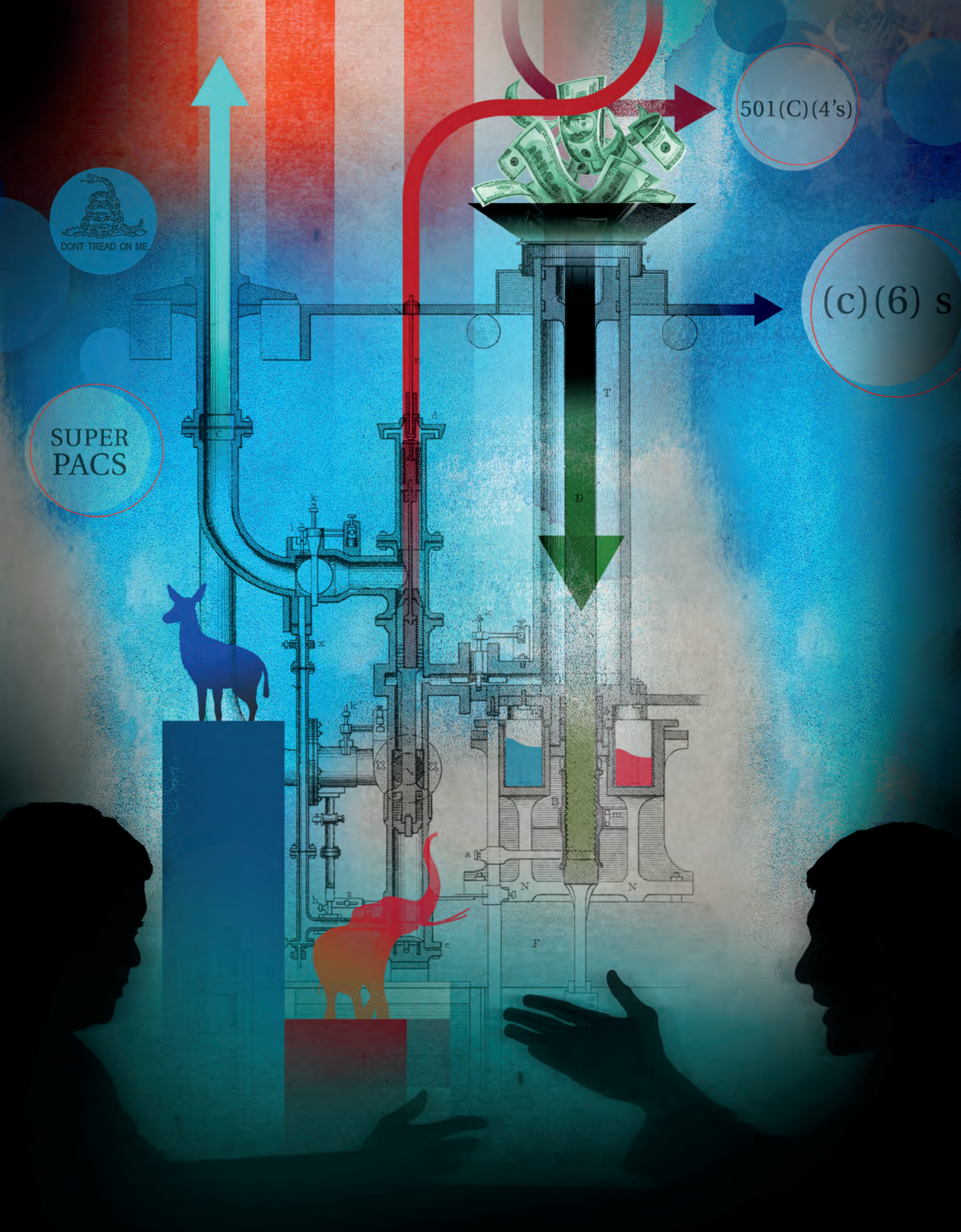
In the age of Internet activism, political parties no longer serve as the exclusive home base for rank-and-file voters. Today, people come to the political process through issue-specific organizations, campaigns, and, sadly, top-down corporate-funded groups like those that spawned the Tea Party. Many if not most of these entities conduct their own get-out-the-vote effort. And while political parties certainly serve an important function, the soft-money era of the 1990s proved that parties are certainly not immune from corruption when we allow huge corporate contributions to fund them.

Power amassed by corporate spending is corrupting regardless of whether it resides in or out of a political party. So while I share Professor Gerken's concern that big-money influence is amassing outside the party system, I believe the only conclusion is to regulate groups outside the party in a way that assures that their amassed power does not corrupt, just as John McCain and I did by banning soft money within the party.

The preservation of our system of elections must be a continual, sometimes ungratifying process as technologies and legal entities continuously evolve. But an argument that corporate money's influence can never be bridled is simply an invitation for corruption itself.

The Hon. Russ Feingold served as a U.S. Senator from Wisconsin from 1993 to 2011. He currently serves as the secretary of state's special envoy to the Great Lakes region of Africa, including Rwanda and the eastern reaches of the Democratic Republic of Congo.



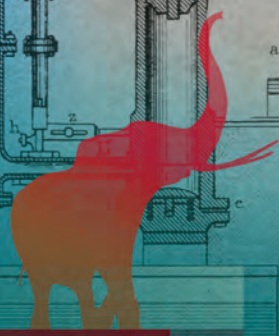


501(C)(4's)

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SUPER PACS

DONT TREAD ON ME



II. DARK Money and Shadow Parties

The corruption ruling leads me to what I believe to be the real problem with *Citizens United*. Or, more accurately, it leads me to the two real problems with *Citizens United*. The first is dark money, and the second is shadow parties.

Dark money is the problem that you know. Thanks in part to the Court's corruption ruling, there was a lot of dark money in 2012. In 2008 the Obama campaign had a record \$800 million. One political scientist told me at the time that Obama had more money than God, although I'm not sure how we'd verify that. But the independent groups that were spending in 2012 had a great deal more money than that. Estimates consistently put that number well over a billion dollars. That's *billion* with a "b." And much of that was dark money that cannot be traced to its origins.

As I noted above, we can't really lay the blame for dark money at the Court's feet. The push toward independent spending was already happening in large part because of the failure of Congress and the FEC to keep up with the game of regulatory whack-a-mole. Even before *Citizens United*, 501(c) organizations such as

the Chamber of Commerce and Crossroads GPS—the independent organizations that absolutely dominated the 2012 elections—fell outside current regulations. Nor has Congress or the FEC done what is needed to trace where the independent money is flowing. *Citizens United* didn't cause that problem. But by deregulating independent spending in a world without adequate disclosure measures, it exacerbated the situation and prevented Congress and the FEC from adopting sensible fixes going forward. Needless to say, dark money is a problem. We worry when billionaires can secretly spend gigantic amounts of cash to support candidates.

I won't rehash those worries here. I'll just say that as much as I worry about dark money, I worry more

that dark money is just a symptom of a deeper trend in campaign finance. My worry is less about money and politics and more about *power* and politics. My worry isn't about dark money. It's about shadow parties. My worry is that the SuperPACs and 501(c) organizations might someday become shadow parties, as political elites adapt to the new regulatory environment ushered in by *Citizens United*.

The challenge of party regulation: political elites as shape-shifters

So what *is* the relationship between money and power in this cycle? It's a perfect example of what Sam Issacharoff and Pam Karlan call the "hydraulics" of campaign finance. Campaign-finance regulations do not reduce money's influence; they simply force it into different outlets. Party donors whose contributions were limited turned to soft money. When the soft-money loophole was closed, the money went into 527s. Then 527s morphed into SuperPACs, and thereupon 501(c)(4)s and (c)(6)s. The money is still in the system; it's just traveling down different channels. Hence the depressing lesson about the hydraulics of campaign-finance reform: Regulation doesn't necessarily reduce the amount of money in the system. It may just shift money into different channels.

That is what many people in my field predicted would be happening in 2012. But they missed a crucial feature about 2012 spending. They assumed that money in 2012 would move away from the parties into other structures and that the parties would therefore lose control of it. Some even thought this would give incumbent politicians an incentive to regulate independent spending. Incumbents, after all, naturally worry about independent organizations stepping on a campaign's message, sending the wrong signal, and depriving candidates and parties of the control they prefer to exercise over spending. Indeed, the one point of agreement between incumbents on both sides of the aisles is that they'd prefer to keep the money in *their* hands. ▶▶

It turns out, however, that parties still exercise a great deal of control over independent spending. What do I mean by that? If the money is being spent by outside groups, how can “the parties” control it? To understand how the parties can still control independent spending—to understand why *Citizens United* might shift the terrain of politics—you have to understand not the hydraulics of campaign finance, but the hydraulics of party power. You have to understand that parties are not stable legal entities but shape-shifters. Once you understand how party elites can retain control over “independent”

organizations, you might start to worry that *Citizens United* matters for quite different reasons from what we’ve suspected.

Parties as shape-shifters

Here I draw heavily on an article by Michael Kang, although it was written almost a decade ago and devoted to different questions. Kang argued that Issacharoff and Karlan had it wrong when they talked about the hydraulics of campaign finance. He claimed that they mistook what is really a symptom of the hydraulics of

REACTION FROM RICHARD M. ESENBERG

I agree with Professor Gerken that the conventional story about *Citizens United* is not only overwrought but wrong. The spigot for independent spenders—Professor Gerken’s “shadow parties”—was already wide open. *Citizen United*’s principal innovation was to free that spending from the easily manipulated distinction between “express” and “issue” advocacy. This was an important development but not a revolution.

Whatever its provenance, how does this independent spending matter? Any answer must be tentative. American politics is a bit like the weather in Wisconsin. If you don’t like what’s happening today, just wait until tomorrow.

Still I wonder whether Professor Gerken has it precisely wrong.

The rise of her shadow parties may not marginalize the party faithful at all. Indeed, the rise of independent spenders may enhance political competition and empower candidates more responsive to the parties’ ideological bases.

I doubt that the party faithful “reside in the formal party.” Grassroots activists—Professor Gerken’s “glorious creatures”—are far more likely to call themselves “progressives” or “conservatives” than “Democrats” or “Republicans.” Thus, each party’s base tends to enforce ideological discipline.

Professor Gerken’s assumption is that the shadow parties are synonymous with the party elites. I’m not as sure. What if independent spending is also ideologically motivated and can operate as a vehicle by which insurgent candidates can become relevant? George McGovern’s 1972 candidacy was a grassroots uprising. It was also bankrolled by Stewart Mott—an early and portside version of Charles Koch.

Of course, this may not be optimal. If our current campaign-finance regime leads to the rise of shadow parties, it will be, in part, because it helped to destroy the old ones. If the messages of independent spenders eclipse those of the candidates, it is because we chose to silence the latter while the Constitution prevented us from muzzling the former.

My own response to our inability to manage money in politics might be to call the whole thing off. But that’s a topic for another day.

Richard M. Esenberg is the founder and president of the Wisconsin Institute for Law & Liberty, a nonprofit and nonpartisan organization whose activities include litigation in the areas of property rights, economic freedom, voting rights, regulation, taxation, school choice, and religious freedom. He is a longtime member of the Marquette University Law School faculty, currently serving as adjunct professor of law, with courses including Election Law.



party power for an independent phenomenon. It's not money that has a hydraulic force, Kang tells us. It's power. Political energy. Campaign-finance regulation is but the most visible example of the ways in which legal regulation can redirect, but not eliminate, political energies.

To understand the argument, it's useful to start with the basic point. To paraphrase Dan Lowenstein, political parties are not a thing, like a table or a chair. They aren't stable legal entities. They are a loose collection of interests, gathered together to compete with other interests to put policies into place. They can thus take different forms as circumstances dictate.

This means that political parties are very hard to regulate. They are *shape-shifters*. Each time we try to regulate a particular type of political institution, political entrepreneurs find new outlets to channel their energies, new institutions to occupy, new means of exercising power.

The presidential nomination process

The best known example in political science is the McGovern-Fraser reforms, and here I should apologize to my political science readers for retelling what has become a bedtime story for their graduate students. In the wake of the 1968 nominating convention, the Democratic Party substantially reformed the nominating process. We now think of conventions as something akin to a coronation—a chance to sell a candidate to the public, not a moment when decisions get made. But for those too young to remember, conventions used to be the moment when the standard-bearer was chosen. There really were smoke-filled rooms, and the nominating process was almost entirely in control of party bosses.

The reforms had one major purpose: to take power away from the party bosses and give it to the party membership. It was the party elites vs. the party faithful, the party leadership vs. its ground troops, the people who controlled the money vs. the people who cast the ballots. Thus was born the nominating process we know today, one relying on primaries and caucuses and involving broad participation by party members.

For a long time, political scientists thought that McGovern-Fraser meant the end of party elites. But it

turns out that the Empire always strikes back. Party elites have still managed to exercise a substantial amount of control over the nominating process despite the absolutely fundamental structural changes that McGovern-Fraser introduced. In fact, over the last decades, almost every single presidential candidate nominated by either party has been the candidate favored by the political elites. The Democrats are more fractious, admittedly, but the Republicans have been virtually in lockstep with their party leaders. The year 2008 was an outlier in this respect. It was the only recent election where both candidates were not the candidates chosen by the elite. John McCain looked like a traditional GOP candidate, but he was loathed by party insiders because he was perceived as disloyal. And Hillary Clinton was the choice of party elites, at least at the beginning of the process.

How is it that political elites no longer have the formal power to choose, and yet they still choose? How do they manage it? Elites exercise influence through what political scientists call the “invisible primary.” If you watch a presidential race closely, you'll notice that before a single vote is cast, there is a seemingly endless array of endorsements (the infamous superdelegate controversy of 2008 just scratches the surface). What elites do, in essence, is signal to each other which candidate they prefer. Money, support, and boots on the ground come with those endorsements. And with money, support, and boots on the ground come votes. Hence the rather astonishing success of party elites. It's not a foolproof system, but it has a far better record of success than most things in politics. ▶▶



“Each time we try to regulate a particular type of political institution, political entrepreneurs find new outlets to channel their energies, new institutions to occupy, new means of exercising power.”


Shape-shifting and party regulation in Wisconsin

The invisible primary is just one example of the hydraulics of party power—the way that shutting down one outlet for political power leads others to be forced open. Marquette is an especially great place to talk about this trend because one of the most vivid examples of the hydraulics of party power comes from Wisconsin’s own history. It’s an excellent illustration of how party elites shape-shift in response to regulation.

During the first half of the 20th century, Wisconsin imposed substantial regulations on political parties, limiting their ability to electioneer, make endorsements, raise money, etc. Formal political parties couldn’t do much save run the nomination process.

How did party elites respond to Wisconsin’s regulation? They shape-shifted. They looked to “statewide voluntary committees,” which interestingly enough had been created mostly by dissidents within the party. Those nonparty organizations proved to be incredibly enticing to the party organization. Party elites abandoned the official party structure for the private statewide voluntary committees that supported the party. Party elites did all the electioneering and fund-raising they needed to do through private associations. And just as the Supreme Court in *Citizens United* blessed independent spending as “independent” from parties and candidates and thus protected by the First Amendment, the Wisconsin Supreme Court blessed voluntary committees as “independent” from the formal parties’ candidates and thus protected by the First Amendment.

The hydraulics of political power, in short, worked just as you’d expect. When one outlet for power (the formal party) was closed, power found another outlet (a shadow party). As the power of the voluntary committees grew, they became the de facto parties in Wisconsin politics. The shadow parties, in short, became more important than the parties themselves.



“I’m worried about whether the Jim Messinas of the world will be working inside the formal party structure or outside of it, inside the Democratic and Republican parties or inside the shadow parties.”

Independent spending in 2012 and beyond: the rise of shadow parties?

The Wisconsin example strikes me as quite salient today. Once you understand the hydraulics of party power, once you recognize that party elites will shape-shift in response to changes in the regulatory environment, you can see that it’s quite easy to imagine the rise of shadow parties in the wake of *Citizens United*. In fact, we *already* see party elites exercising a great deal of control over independent-spending organizations. Despite the formal prohibitions on coordination, the

independent SuperPACs and 501(c)(4)s are intimately interconnected with the real parties. These organizations have started to look like shadow parties—they are outside of the formal structure, but they have begun to house the party leadership.

SuperPACs and nonprofits: the new home for party elites?

To get a sense of which institutions party elites occupy nowadays, take a look at a great paper coauthored by one of my favorite political scientists, Seth Masket. It graphs the connections among the people who run 527s and party elites. The connections are so deep and so pervasive that the diagram looks like a rat’s nest.

The same deep connections run between the SuperPACs and the candidates they support. Most of the SuperPACs are run by the people who used to run the candidate’s campaign. And it’s not just staff members that tie the SuperPACs to their candidates and party. It’s the candidates themselves, as has been brilliantly shown by Stephen Colbert, who has singlehandedly done more for campaign-finance reform than anyone in the last hundred years save Richard Nixon. Colbert did a great skit with his fellow comedian, Jon Stewart, and his lawyer, Trevor Potter, in which Potter represented both Colbert and Colbert’s SuperPAC at the same time. Colbert even put the leaders of both the campaign and the SuperPAC on the same conference call to talk strategy.

The only problem with Colbert's running joke is that it's too accurate to be funny. Colbert is playing it straight. The reality *is* the farce; the comedy is the tragedy. While there is no commonsense definition of *coordination* that would allow what we see today, the legal definition of coordination allows a great deal of, well, coordination.

SuperPACs have used the same footage in advertisements as the campaigns they are supporting. SuperPACs and campaigns have even run what are basically the same ads. Sometimes they even share the same office. For instance, companies working for both the Mitt Romney SuperPAC and his campaign were in exactly the same suites in Alexandria, Virginia.

Better yet, the founder of one of the companies was married to a deputy campaign manager for the Romney campaign. She, conveniently enough, also ran a consulting firm housed—you guessed it—in the same suite. The husband, temporarily cursed with self-awareness, did at least admit that the arrangement looked “ridiculous.” But, returning to Ferdinand the Bull mode, he also insisted that he and his wife never talked about the campaign. He also told us not to worry about coordination with the *third* company in the suite—one also working for Romney's SuperPAC as well as Karl Rove's Crossroads GPS. Why? Because it was separated from the other companies by . . . a conference room. ▶▶

REACTION FROM SHIRLEY S. ABRAHAMSON

Wisconsin conducts nonpartisan judicial elections in which independent groups (some identified with political parties) have begun to expend substantial sums of money. These sums invariably raise issues of the appearance of partiality and recusal standards for judges. The public is concerned. Recent poll results show that more than 80 percent of respondents believe that campaign financing influences court decisions.

I have frequently said that the public's trust and confidence in the judiciary depend on the public's trust and confidence in a neutral, impartial, fair, and nonpartisan judiciary. No decision a judge makes is more important than the decision about whether to sit on the case. I have called upon our Office of Judicial Education, the two law schools—the University of Wisconsin and Marquette University—and the State Bar to develop education programs for the public, bar, and judges related to recusal.

Marquette University Law School took an important step in inviting Yale Law Professor Heather Gerken, an election law expert, to deliver the Boden Lecture on money and politics. I asked Professor Gerken about the effect of campaign contributions and expenditures on judicial campaigns. Her reply, as follows, should be made part of the public record:

Judicial elections are one of the places where money is likely to have the most corrosive effect. The obvious reason, of course, is that we have a different sense of the position (hence all the objections about judicial elections generally). But I have an additional worry that stems from my experience in election law. In most instances, big money funds races between the two major parties. There, at least, voters have some background sense of the politics of the candidates, which means that money may have less of an effect. In judicial elections, however, the money may matter more because we lack a “shorthand” (such as an identification with a political party) to guide our votes.

The Hon. Shirley S. Abrahamson is chief justice of the Wisconsin Supreme Court. She was appointed to the court in 1976 and won elections in 1979, 1989, 1999, and 2009. She is the longest-serving justice in the history of the court and has served as chief justice since 1996.



Even the top-tier leadership is connected. Campaign heads—even some candidates themselves—have begun to attend SuperPAC fund-raisers, while donors and operators of the SuperPACs regularly consult with party officials. My favorite example of “noncoordination” is when Newt Gingrich told *his own* SuperPAC to stop running certain advertisements.

Where will Jim Messina work in 2020?

This brings me to what *I* think is the real problem with *Citizens United*. What does the emergence of these independent organizations mean for the structure of American politics? What keeps me up at night is a simple question: Where is Jim Messina—Obama’s mad-genius of a campaign manager—going to work in 2016 or 2020? I’m worried about whether the Jim Messinas of the world will be working inside the formal party structure or outside of it, inside the Democratic and Republican parties or inside the shadow parties.

The SuperPACs and the nonprofits, after all, have started to function like shadow parties. They raise money, they push candidates and issues, and their leadership is often the mirror image of the leadership of the parties themselves. But these organizations have important advantages over the formal parties. They can raise unlimited sums of money, often with minimal disclosure. Election lawyers spend endless amounts of time dealing with the hassles associated with the formal parties’ raising money. If you are a lawyer for one of the shadow parties, your biggest worry is that Congress or the FEC might actually start doing its job and pass regulations. In this day and age, that’s not much of a worry.

Given all the advantages that the shadow parties have over the formal parties, money will continue to flow toward them. More importantly, power will continue to flow toward them. The worry, then, is that in the ongoing and ever-present battle between the party elite and the party faithful, the leadership and the membership, the independent groups may shift the balance of power between the two.

Before I talk about this possibility, I should offer a caveat. It may be that the emergence of these independent organizations will mean nothing in the long term. It’s important for academics to acknowledge that we don’t always know what’s going to happen next.

It wasn’t that long ago when academics were wringing their hands over the weakness of the parties, their lack

of unity, and their lack of a distinctive brand. Now it’s just the opposite, with almost every academic joining the hue and cry over powerful, united parties with deeply polarized identities. American politics churns at a marked pace. Any academic who tells you that she is sure what’s going to happen in the wild and woolly world of politics isn’t an academic worth her salt. Moreover, we are dealing with shape-shifters here. Change is necessarily part of the equation.

More concretely, it may not matter if the newly emerging shadow parties operate alongside the formal parties. The parties have often split their functions. They have, for example, sometimes contracted out their registration or get-out-the-vote work to independent organizations. It’s possible that the independent spending organizations will just be appendages—fund-raising machines that allow the major parties vastly to exceed the limits we’ve imposed on them.

Moreover, no matter how powerful they become, these independent organizations cannot displace the parties or their membership entirely. The party label is like a Good Housekeeping Seal of Approval. It’s a shorthand for voters, one whose importance shouldn’t be underestimated. Being the standard-bearer of a major political party matters. For all its money and power, Crossroads GPS is a political brand unknown to most Americans. It isn’t going to be running a presidential candidate anytime soon.

But the role of the party in American politics goes far deeper than merely serving as a political heuristic, and here’s where we might think harder about the emerging structure of American politics if the shadow parties emerge as a powerful force. Political parties don’t just matter because they provide a useful shorthand for voters. Parties are also the fora in which interest groups coalesce, battle, and reach deals that allow for governance when the time comes. Parties are where a great deal of democratic compromise takes place; each major party offers a package of policy-making compromises that Americans, often reluctantly, choose between. We sometimes think that politics and parties are a problem and governance is what matters. But politics and parties are what make governance possible.

Parties also provide the energy that fuels our democracy—they are the source of much of its creativity and generativity. Party elites serve as “conversational entrepreneurs” in American politics,



in Robert W. Bennett's term. The battles between the parties, the battles within the parties, the wars among political elites and factions and interest groups all help set the policy-making agenda, tee up questions for voters, frame issues, fracture existing coalitions, and generate new ones, as variously demonstrated in the legal literature by Michael Kang and by social scientists building on the late Erving Goffman's work.

Given the role that the parties play in American politics, should we worry about the development of shadow parties? The nonprofits and SuperPACs do a lot of the things the major parties do. They are institutions where elites can bargain, strike compromises, drive debates, frame issues, and sell candidates. If these groups mostly existed separate and apart from the candidates, we might not worry, because the one thing a party requires is a candidate. That is, as I noted above, why many thought that incumbents might put a stop to independent spending at some point: they wouldn't like political power to exist outside the parties. But now incumbents can have their cake and eat it, too. These shadow parties are so tied to the candidates and the parties that politicians can take advantage of everything the formal party structure has to offer while being backed by a powerful independent fund-raising machine. For this reason, one can imagine these shadow parties developing into institutions with strong ties to a candidate, to his donor base, to all of the elite decision makers and interest groups that matter for a campaign.

The one group that these independent organizations will never house, however, is the party faithful. The party faithful are the people who knock on doors, make calls, show up at rallies, and spend countless hours

“These shadow parties are so tied to the candidates and the parties that politicians can take advantage of everything the formal party structure has to offer while being backed by a powerful independent fund-raising machine.”

working for campaigns. Everyday people who are passionate about politics, the party faithful do most of the ground work for the campaigns. Call them politics' foot soldiers, call them partisan hacks, call them crazy. I call them the most glorious creatures in American politics. And even as the shadow parties' influence grows, the party faithful still reside in the formal party.

What happens if the center of gravity shifts? What happens if the elites run the shadow parties and the party faithful are left by themselves in the shell of the formal party structure? What happens if what really matters in politics happens in the shadow party, not the formal party?

Let me give a crude example. The *Christian Science Monitor* ran a rather extraordinary story in the fall of 2012, when Romney was behind in the polls.

The story suggested that the Romney campaign didn't have enough money to take it through November. It was depending on outside spending, particularly Karl Rove's massive war chest. The reporter asked a simple question: What happens if Rove decides to cut Romney off?

Now imagine you want to be a player in GOP politics. Where do you want to work? Do you want to work for Romney's campaign? Or Rove's? Romney's formal party? Or Rove's shadow party?

As I said before, it's possible it won't matter. It's possible that these shadow parties will simply remain convenient means for evading campaign-finance rules. But it's also possible that the center of gravity will shift. We'll see a bipartite world, with elites and big donors occupying one institution—wielding enormous power by virtue of their money—and the party faithful occupying the other. ▶▶



Quis custodiet ipsos custodes?

III. Why we should PLACE OUR FAITH *in the PARTY FAITHFUL*

I worry about a world dominated by shadow parties because I have a slightly romanticized view of the party faithful. I think of them as one of the few groups capable of keeping the parties honest.

There's long been a conundrum in politics. Given that no voter can monitor every vote of every representative, how does the principal control the agent? How do the people control their representatives?

For a long time, one answer to that question has been the political parties. They enforce party discipline, punish defectors, reward loyalists, and keep the brand

distinctive. But then, of course, one wonders *quis custodiet ipsos custodes?*

"I have faith in the party faithful and hope very much that they will continue to wield the power they do."

Who will guard the guardians themselves? Who will ensure that the parties do right by the voters?

The party faithful is a possible answer. They serve as a bridge between the elites and

the voter, between the party and the people. They provide an institutional check on the bargains that elites can strike, some brake on how many principles will get compromised along the way. Party faithful are often political realists. They understand that compromise needs to be made. But they also believe in something—that's why they are the party faithful.

The party faithful's influence comes through informal mechanisms. The influence that comes from being part of the same organization, being under one roof, interacting regularly with the campaign leadership. We are social animals. Our views are shaped by those around us whether we are aware of it or not.

If you have faith in the party faithful, you might worry about shadow parties because they hive off the party elite from the party faithful, reducing the day-to-day interaction that has long connected the two groups.

If you have faith in the party faithful, you might worry that the emergence of a dual system—a party and a shadow party—will reduce the party faithful's most important form of influence, the influence that they exercise by virtue of being part of the same organization. Big donors and big interests have always played an outsized role in politics. Until now, though, one important access point for the everyday concerns of everyday people has been the everyday people who work for campaigns. What happens when even that access point is eliminated?

If you have faith in the party faithful, the emergence of shadow parties might worry you for reasons that have nothing to do with the conventional wisdom about big donors and dark money.

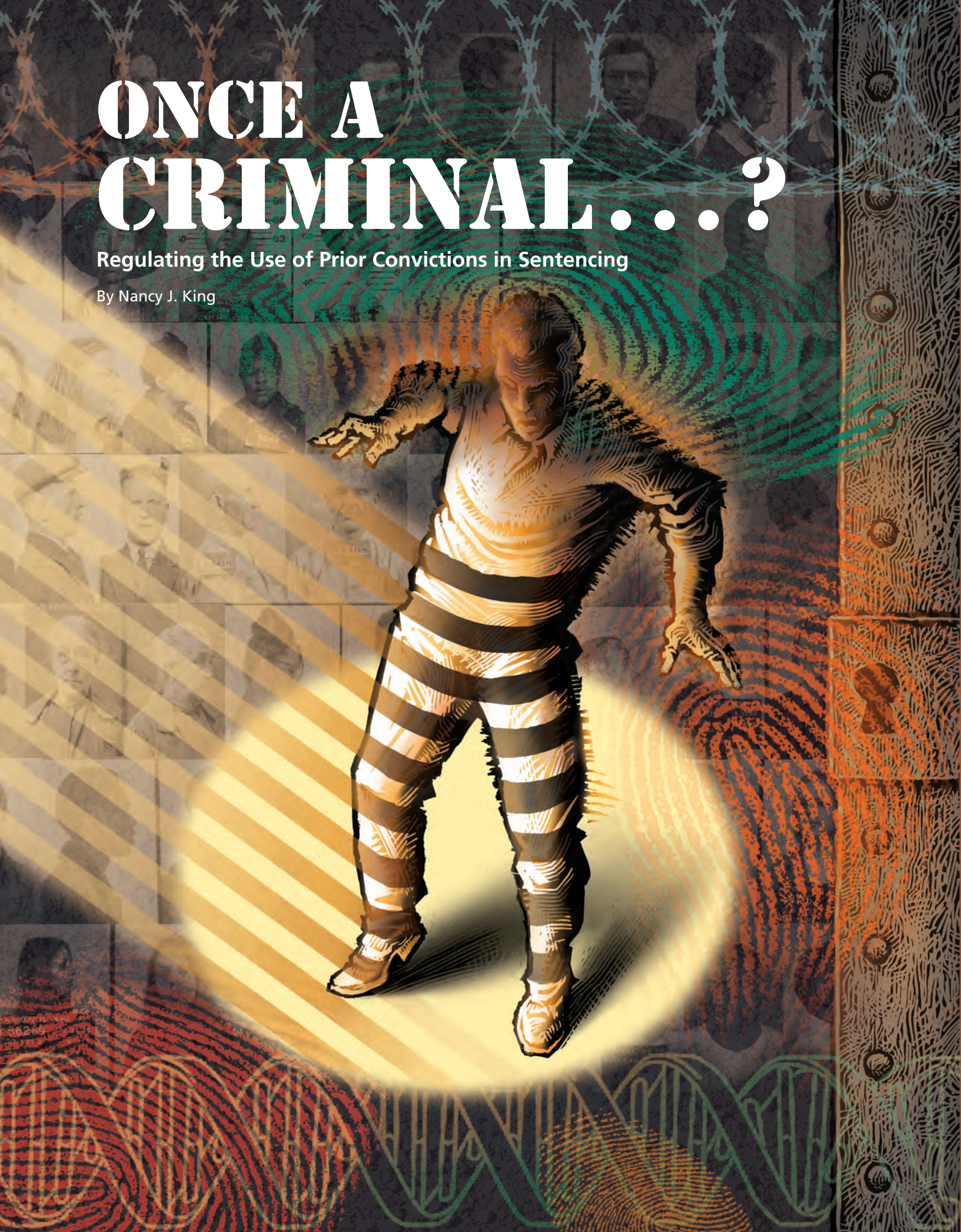
Conclusion

I'll end with a more modest, perhaps even a more optimistic claim. Politics is an ever-changing, dynamic force, and few things stay stable for long. But I'll stick with my romantic point as well. As the campaign-finance landscape evolves in response to *Citizens United's* deregulation of independent spending, we shouldn't lose track of the partisan hacks, the foot soldiers of politics, the worthiest and most honorable participants in the party structure: the party faithful. While I've been among those who worry about driving money outside the parties, my bigger worry has become that we're driving *power* outside the parties, turning them into shell organizations whose utility to candidates is little more than the heuristic. We're separating the party elites from the party faithful. We're ensuring that the party elites talk to the moneyed interests, and the party faithful talk to the rest of us. The informal social network that once provided a bridge between those two worlds is slowly being dismantled. I have faith in the party faithful and hope very much that they will continue to wield the power they do. And it's hard to see how that will be true if the power of the shadow parties exceeds that of the real ones. ■

ONCE A CRIMINAL...?

Regulating the Use of Prior Convictions in Sentencing

By Nancy J. King



On November 18, 2013, **Nancy J. King**, the Lee S. and Charles A. Speir Professor at Vanderbilt Law School, delivered Marquette Law School's annual George and Margaret Barrock Lecture in Criminal Law. This is an abridgment of that lecture. A longer, essay version appears in the spring 2014 issue of the *Marquette Law Review*.



There is perhaps no principle in sentencing more familiar than boosting punishment for defendants who have been convicted before. But as widespread as this practice is, it has recently become quite controversial. In my remarks, I'll highlight two concerns: first, that repeat-offender penalties are not well designed to accomplish their intended goals, and second, that the procedures for imposing some of these sentences are unconstitutional. Let us start with the history of efforts to identify prior offenders—a history relevant to each of these two issues.

I. Repeat-Offender Punishment: A Look Backward

Punishing the Marked Offender—Colonial Times Through 1830

Statutes mandating stiffer sentences for repeat offenders have been with us since before the nation was formed. But in early America, courts had no photographs, fingerprints, or DNA to determine if a person who *claimed* to be a first offender was lying. So they used the same cheap identification method used in Europe for centuries—marking or branding the body of the person convicted.

Felonies during this period were generally punishable by death, but even until the late 1820s and early 1830s, a defendant convicted for the first time could seek from the judge “benefit of clergy,” essentially a reprieve from execution, and be branded on the palm or cheek instead. For example, in 1801, future president Andrew Jackson, sitting as a judge in Tennessee, granted benefit of clergy to a fellow convicted of delivering a “mortal bruise” to a man’s head with an oak plank. According to the court records, the defendant was immediately “burned in the left hand with the letter M,” marking him as ineligible for this leniency again. Marking bodies was also common for non-capital crimes. For example, first offenders convicted of some crimes lost one ear; second offenders lost the other. Punishments such as these were replaced by terms of incarceration only gradually, between the late 1790s and the 1830s, as each state built its very first prison. ▶▶



Discovering the Recidivist—Penitentiaries and the Deviant Type—1820–1880

These new penitentiaries ushered in a new punishment: lengthy terms of incarceration. For repeat offenders, these terms could increase with each additional lesson unheeded. When its prison was built in 1817, Massachusetts, for example, imposed an extra seven years on every second offender, and life in prison for every third offender.

The building of each state's penitentiary also offered new hope for identifying prior offenders. Prison records noted marks, scars, and tattoos, along with names. And there was—for the first time—just one set of records for all convicts in the state. But the records being organized by name, it was impossible to search by scar or missing digit. As de Tocqueville explained after visiting American prisons: “[T]he courts condemn, almost always, without knowing the true name of the criminal, and still less his previous life.”

Legislatures recognized this too, and a few changed their laws to address it. The established common law rule followed in every state at the end of the 18th century required that whenever a statute specified a more severe sentence for a repeat offender, the prior conviction had to be alleged in the indictment and proven to a jury beyond a reasonable doubt. After several years' experience with its new penitentiary, Massachusetts passed a new statute that required the warden to notify the state's attorney when he recognized a prior offender, and the state's attorney to charge the prisoner as a repeat offender in a supplemental charging document called an information. The prisoner would then be brought from prison back to court, where, if his past conviction was proven to a new jury or admitted, he would be sentenced to the longer term. But this innovation was not followed in most states.

Even as our Civil War ended, courts still had no practical, reliable way to identify a person as one who before conviction had been convicted previously. By 1930, everything had changed.

Technology to the Rescue—Photos, Bertillonage, and Fingerprints—1880–1930

Photography was first. The first “rogues’ gallery” was displayed at the New York Police Department in 1858, and by the 1880s police departments all over the world had mug-shot collections. But there was no efficient way to search hundreds of photographs. This problem was solved by a revolutionary identification system using an index of eleven bodily measurements. Indexing by measurement, not by name, the Bertillon system identified a prisoner in minutes. It won over the wardens in New York and Illinois, who mandated measurements for all inmates by the 1890s. Prisons and police departments in other states followed suit. Fingerprinting was not far behind. It was first used in criminal cases for *women*, as Bertillon operators found it awkward to measure the body parts of prostitutes. By 1920 it had been extended to men, and the NYPD’s fingerprint index had grown to 400,000 sets of prints.

Trusting Science—Parole for Some, Incapacitation for the Dangerous—1930–1970

These new, reliable means of identifying past offenders reinforced the belief that crime was committed by a small group of physically inferior deviants born with moral deficiencies. “Instinctive criminals,” argued one expert, could be identified by their “ill-shaped heads”; “asymmetrical faces”; “deformed, . . . ill-developed bodies”; “abnormal conditions of the genital organs”; “large, heavy jaws”; “outstanding ears”; and “a restless, animal-like, or brutal expression.” Many thought repeat offenders should be segregated from society, like the insane. Six states authorized involuntary sterilization of habitual criminals, a practice that the Supreme Court did not stop until 1942. Confident that judges now could reliably

sort less-dangerous first offenders from more-dangerous hardened criminals, legislatures in the 1920s and 1930s adopted both more-severe recidivist penalties and more-lenient probation and parole. By 1949, 43 of the 48 states had habitual felony offender statutes; more than half permitted or mandated life in prison for third or fourth offenders.

Punitive Turn—Three Strikes and Other Mandatory Sentencing Laws—1970 On

Two decades later, when legislators decided to rein in the discretion of judges and parole authorities, new sentencing guidelines keyed sentences to criminal history and quantified its effect on punishment. In states that retained discretionary parole release, parole eligibility was denied or delayed for repeat offenders. And by 1996, 24 states and the federal government had passed even tougher “two-,” “three-,” and “four-strikes and you’re out” laws, some requiring life without parole.

The effects of these repeat-offender premiums have varied by state. In Washington State as of last year, nearly 70 percent of the 637 prisoners serving life-without-parole sentences were sentenced under the state’s three-strikes laws. In California, where a second strike carries a doubled sentence and the third strike carries 25 to life, the effect was huge: maximum sentences statewide grew 6 percent longer, and the odds of a prison sentence rose nearly 23 percent. As of 2009, one of every four California prisoners was serving a second- or third-strike sentence, and, of these, most—55 percent—were convicted of a nonviolent offense.

With this background, let’s turn to two of the challenges that repeat-offender penalties pose for courts and legislatures. ▶▶

“These new, reliable means of identifying past offenders reinforced the belief that crime was committed by a small group of physically inferior deviants born with moral deficiencies.”

II. Justifying Repeat-Offender Penalties: A Mismatch Between Theory and Practice

First, stiffer penalties for prior offenders—as applied—too often fail to advance the reasons that they were adopted. Let’s consider the reasons and the reality.

Deterrence—Weak Effects

Recent research has found that increased sentences for repeat offenders do not appear to be very effective *deterrents* to future crime. Here’s the nutshell version of what you can find in the sources in the literature: Three-strike statutes have had little detectable impact on crime in some states, such as California, and in others they are linked to only a small decrease in robbery and property offenses. As for deterring the sentenced offender himself from future crime, recent research suggests that the longer periods of incarceration appear to have “either no effect or undesirable effects” on rates of offending after release.

Incapacitating the Dangerous— Predicting Risk from Criminal History

A second, more commonly voiced rationale for recidivist penalties is the *incapacitation* of those most likely to commit future crime. The newest trend in sentencing is to use risk assessment and “evidence-based” predictions of reoffending to determine what sentence to impose. Lawmakers hope that risk assessment will help them trim prison populations while still getting the most bang for their criminal justice buck; judges like it because it makes sentencing seem more objective. In Virginia, risk scores determine who is eligible for alternative punishment. Missouri judges rely on an automated recommendation reporting the offender’s risk score and predicted recidivism after two years for other offenders in his specific risk category. Here in Wisconsin, a number of counties have been using risk measures for several years, as part of the AIM (Assess, Inform, and Measure) Pilot Project.

The explosion of research and commentary affords an indication of how controversial this is. The *Federal Sentencing Reporter*, edited by Marquette’s own Professor Michael O’Hear, recently devoted an entire issue to it. Risk also triggered a major debate in the American Law Institute, ending in a provision of the new Model Penal Code—Sentencing, endorsing its limited use.

Many understandably object to the use of risk prediction in sentencing as unfair: it punishes a defendant just because he has the same characteristics as other people who were reincarcerated after release, and it deprives him of liberty for what he might do rather than what he actually did. Others are concerned that reliance upon factors *other* than prior criminal history, such as gender or age, violates the Equal Protection Clause. But a growing chorus is warning that even the use of criminal history to predict recidivism risk is unjustified and unwise. I’ll summarize some of these criticisms briefly.

1. *Risk prediction as applied at sentencing—questionable reliability.* First, even though the best risk-prediction instruments (an instrument here means essentially a questionnaire or list of weighted factors) can correctly predict the risk class of an offender as often as 7 out of 10

times, sentencing based on criminal history as practiced is not risk assessment at its *best*. Here are just a few of the problems:

Much of the research supporting reliability of risk assessment has tested instruments used to predict recidivism by parolees. These instruments include “dynamic” factors that change after sentencing, as well as variables such as age, companions, marital status, gender, social achievement, or psychological health. When risk is predicted based on prior criminal history alone, all of these factors are ignored, increasing the number of cases in which the prediction is wrong.

Also, although research confirms that recidivism rates do increase as the number of prior convictions increases beyond three or four, the relationship between a single prior conviction and future crime is tenuous at best. For example, two years after release from their first conviction, offenders over age 41 are no more likely



Nancy J. King

to commit a crime than people with clean records; for those between 37 and 41, the rates converge after five years. So maybe the old adage referred to in the title of this talk might make sense if it were “*Four times a criminal recently, probably a criminal later,*” but to assume that a single criminal conviction dooms a person to a life of crime may be no more accurate than century-old predictions of future violence based on jaw size.

Finally, repeat-offender laws and criminal history scores usually don’t track the measures of past offending that research links to recidivism. Juvenile history is often included, despite research showing most people desist from crime after late adolescence. The recency of a prior conviction dramatically affects its predictive capacity, depending upon the age of an offender, but most criminal history provisions do not vary with the age of the defendant, and many impose no limit on the age of prior convictions. The *type* of prior crime also matters—property offenses, for example, are much more likely to be repeated than other offenses. But sentencing laws and guidelines often do not distinguish between crime types.

2. Costs of increasing sentences based on predictions from criminal history—exacerbating racial bias.

A second problem with basing the need for incapacitation on prior record is that even if it does improve predictions somewhat, any resulting marginal, and possibly temporary, reduction in crime might not be worth its costs. Reliance on criminal history exacerbates past racial bias in investigation, arrest, charging, bargaining, and sentencing. Bernard E. Harcourt in his book, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*, calls this the “ratchet effect,” and condemns risk prediction at all phases of the criminal justice process for this reason. Today, nearly one in three adults in this country has a criminal history record, and as of 2007, the percentage of blacks under correctional control was more than four times that of whites. Since California adopted its three-strikes law, black defendants have received significantly

longer prison sentences than whites and Latinos. A recent study found that two-thirds of racial differences in imprisonment rates in Minnesota resulted from the weighting of criminal history factors in sentencing. Just a few months ago, U.S. Attorney General Eric Holder ordered federal prosecutors to consider ignoring recidivism provisions, stating, “In some cases . . . recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution.” This problem is so pronounced that the Equal Employment Opportunity Commission recently warned employers that using criminal history data in hiring decisions could expose them to disparate impact lawsuits.

Just Deserts in Proportion to Blame— A Mismatch with Repeat-Offender Penalties

For these reasons and many more, some retributivists are calling for a ban on the consideration of criminal history in setting sentences. Others committed to “just deserts” sentencing philosophy have argued that repeat offenders are actually more blameworthy than first offenders, because they are more defiant, or because they had already learned that their behavior was wrong. The problem is, current laws don’t advance either theory. Repeat-offender premiums are imposed on negligent, impulsive, and reckless action as well as knowing behavior, and they often punish defendants who have “prior” convictions not because their latest criminal acts were committed after a previous sentence, but only because prosecutors decided to prosecute multiple counts arising out of the same criminal episode sequentially. And in most jurisdictions, most defendants eligible for recidivist premiums end up bargaining for something less.

In sum, legislatures, sentencing commissions, and courts are not doing a very good job of aligning punishments for repeat offenders with either theory or research. ▶▶

“Recent research has found that increased sentences for repeat offenders do not appear to be very effective *deterrents* to future crime.”

III. The Process:

A Changing Constitutional Landscape

A separate concern is that the process for imposing these penalties may violate the Constitution. This controversy started just over 13 years ago but has heated up in the past few months.

Apprendi, *Alleyne*, and the Exception for Prior Convictions

In the summer of 2000, the Supreme Court in *Apprendi v. New Jersey* held that a fact that increases the maximum penalty a defendant faces is an element of a crime, and a defendant has a right to have a jury find that fact beyond a reasonable doubt. Allowing a judge to determine merely that such a fact is probably true violates the Sixth Amendment right to a jury finding of every element, said the Court. This past summer, in *Alleyne v. United States*, the Court explained that this rule applies to facts that increase the minimum sentence range as well, and overruled a 2002 decision in which it had said otherwise. This element status brings with it at least three rights: the right to jury determination, by proof beyond a reasonable doubt, and, at least in the federal courts, inclusion in the indictment.

But in every one of its many decisions applying *Apprendi*, the Court has carefully stepped around statutes that raise punishment ranges for prior offenders. It has done this by consistently including in each declaration of the *Apprendi* rule an exemption for the particular fact of prior conviction. Not one of these cases has actually involved a recidivist penalty, so the announced exception remains dicta. Most recently, the *Alleyne* decision included a footnote explaining that the Court declined to revisit the exception because the parties had not contested it. But plenty of other defendants are contesting it, and a majority of justices may be ready to scrap it. Here's why they should.

No Clear Historical Basis for Exception

First, the historical record, so crucial to the Court in all of its *Apprendi* cases, does not support exempting prior convictions from the *Apprendi* rule.

Let's start with charging practice. Throughout the 19th century, courts followed the common law rule requiring the initial charge to allege any prior offense that increased punishment. Only a handful of states, such as Massachusetts, Virginia, and West Virginia, opted to permit the prosecution to allege the defendant's repeat offender status *after conviction*, if a defendant's alias was debunked upon arrival at prison. Eventually, in 1912 in *Graham v. West Virginia*, the Supreme Court concluded that this omission of the prior offense allegation from the initial indictment was not a *federal* constitutional problem, reiterating the rule (true still today) that states need not use indictments at all. After *Graham*, more states followed Massachusetts. But this limited development—affecting no more than a handful of states until 1912, and not followed in the federal courts until after World War II—is nothing like the established historical practices that have influenced the Court in prior cases.

As for the right to have a jury decide prior-offense status when that would raise the maximum sentence, this was the law in virtually every jurisdiction from the Revolutionary War past World War II. As late as 1946, only Alabama and Kansas allowed a judge to make this determination instead of a jury. Observers in other jurisdictions reported more than one case in which the jury, despite fingerprints and other “unmistakable evidence” that a defendant was indeed a multiple offender, “decided upon its oath that the prisoner was a first offender,” choosing to nullify the habitual offender law rather than apply it. ▶▶

“Criminal history, if it will justify a longer prison sentence, deserves the same pre-charge investigation as other facts that may aggravate a crime.”



“The Court was wrong to carve out this prior-conviction exception in *Apprendi*, and it was wrong in *Almendarez-Torres*.”

Precedent—Why *Almendarez-Torres* and Other Cases Do Not Support the Exception

Precedent shouldn't prop up this exception either. The case of *Almendarez-Torres v. United States* (1998) is considered the chief authority for the prior-conviction exception, but any basis it once had is no longer viable. The defendant in that case turned up in a Texas jail, after he'd been deported following a burglary conviction, and was charged with reentering the United States illegally. His indictment did not say whether he was being charged under subsection (a) of the relevant statute—which stated that the maximum sentence was two years—or subsection (b), which provided for up to 20 years if reentry occurred after a conviction for an aggravated felony. The defendant pleaded guilty and admitted his prior burglary conviction, but then argued at sentencing that because his indictment had not alleged his prior conviction, a fact that he argued was an element of the greater offense defined in subsection (b), he faced at most two years. The Supreme Court disagreed, and in a five-to-four decision, it upheld his seven-year sentence. Congress intended that the prior conviction triggering the 18-year increase would be a sentencing factor that the judge could find after conviction, the Court reasoned, not an element of a greater, aggravated version of the reentry offense. Two years later, when the Court announced in *Apprendi* that legislatures cannot bypass the right to jury trial by designating a fact that raises the maximum sentence as a “sentencing factor” instead of an element, it exempted the fact of prior conviction, citing its decision in *Almendarez-Torres*, and the “prior-conviction exception” to the Sixth Amendment rule in *Apprendi* was born.

The Court was wrong to carve out this prior-conviction exception in *Apprendi*, and it was wrong in *Almendarez-Torres*. Justice Stephen Breyer's opinion for the Court in *Almendarez-Torres* rested on *Graham*, from 1912, and *Oyler v. Boles* (1962), which also rejected claims that omitting a sentence-raising prior conviction from the initial indictment violated due process. But both of those cases construed the Constitution's limitations on *states*, not the scope of the indictment clause in the

Fifth Amendment, at stake in *Almendarez-Torres*, which doesn't even *apply* to state defendants. Moreover, both cases were decided before the Court declared that state defendants had a constitutional right to reasonable notice of the charge and the right to a jury trial.

The other cases relied on by the Court in *Almendarez-Torres* either have been overruled since *Apprendi* (in *Ring v. Arizona* in 2002 and *Alleyne*) or have nothing to do with charging and proof requirements for prior convictions. Several cases stated that a prior conviction that increases a sentence is not an element, but those cases involved claims that increasing a sentence because of a prior conviction was unconstitutional because it was improper punishment for the *prior* offense. In each, the Court explained that the heightened punishment was not punishment for the prior conviction but, instead, “a stiffened penalty for the latest crime.” None of those cases would be affected by abandoning the exception.

Policy—Managing Jury Prejudice

Nor should policy arguments keep the exception alive. The justices have worried that if prior convictions were to be presented to juries, defendants would suffer. But prior convictions are already elements of other crimes, such as felony firearm offenses. And courts have managed any prejudice just fine by using stipulations to limit what the jury hears about the prior conviction, by bifurcating trials and adjudicating the prior-conviction question only after the jury determines guilt on the other elements, by allowing the defendant to waive the jury for the prior-conviction element alone, or by allowing the defendant to admit that particular element, something like a partial plea of guilty. And they've been doing this for nearly 200 years, ever since Connecticut first chose to adopt bifurcated findings in its habitual-offender cases in the early 1800s.

As for the policy reason that initially led to the alternative charging practice from which the exception grew, that reason has vanished. Identification occurs in plenty of time to include in the initial charging instrument those prior convictions that actually raise the sentence range. State and local law enforcement has

been submitting and retrieving fingerprints electronically from the FBI for about 15 years. The largest biometric database in the world, the FBI's Integrated Automated Fingerprint Identification System (IAFIS), contains fingerprints and criminal histories for more than 70 million people and reportedly matches fingerprints in an average of 30 minutes. Criminal history, if it will justify a longer prison sentence, deserves the same pre-charge investigation as other facts that may aggravate a crime.

Stare Decisis: Eroded Doctrine, Shifting Votes

If all of the possible justifications for the prior-conviction exception to the *Apprendi* rule are as weak as I suggest, the Court is unlikely to decide that stare decisis warrants keeping it on life support. Justices Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg have already made their opposition to the exception clear, so its demise would require only two more votes, from Justices Stephen Breyer, Sonia Sotomayor, or Elena Kagan. In *Allelyne*, Justice Breyer agreed to overrule as “anomalous” the Court’s decision (a decision where he had written in support) exempting from the *Apprendi* rule facts that raise the minimum sentence. The exception for prior convictions is equally, if not more, anomalous, and Justice Breyer may very well be ready to overrule his prior opinion for the Court in *Almendarez-Torres*, too. And the justification that Justices Sotomayor and Kagan provided in *Allelyne* is equally applicable here: When prosecutors are perfectly able to charge and prove these matters to a jury, Justice Sotomayor wrote for herself (and Justices Kagan and Ginsburg), “stare decisis does not compel adherence to a decision whose ‘underpinnings’ have been ‘eroded’ by subsequent developments of constitutional law.”

If the Court discards the exception, it will finally end cases like David Appleby’s. Appleby was charged with third-offense DUI and third-offense driving on a revoked license. At his plea proceeding, he was informed that his maximum sentence on each charge was three years, for six years total. He was not warned that his plea would actually expose him to *life* in prison if the prosecutor decided to file a “recidivist information.” So he pleaded guilty, and before sentencing, the prosecutor did file a recidivist information, alleging that Appleby had been previously convicted of other felonies (namely, one assault, several felony versions of DUI, and driving on a

revoked license). A jury found Appleby to be the same person who had been convicted before, and the judge sentenced him to life in prison. In 2010, a divided panel of the Fourth Circuit, relying on *Almendarez-Torres*, rejected Appleby’s constitutional challenge. But in dissent, Judge William B. Traxler cut to the heart of the problem: “Appleby was sentenced to *life* on the charges to which he pleaded guilty after being told that he could be sentenced to no more than *six years*” (my modified emphasis). It is time for the Court to require prosecutors in West Virginia to do what prosecutors elsewhere seem to have no trouble doing: determine whether the defendant is eligible for recidivist punishment, decide whether to pursue that punishment, and give formal notice of this to the defendant—*before* conviction.

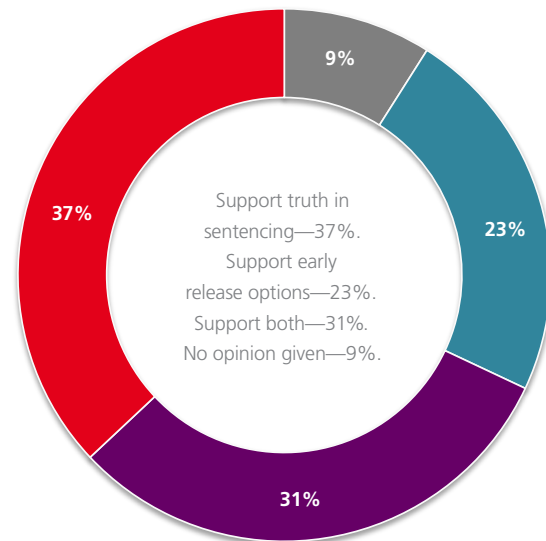
Prosecutors, courts, and legislatures can’t have it both ways: If a recidivist premium is indeed punishment for the crime a defendant admits at his guilty plea and not additional punishment for the prior convictions that boost his sentence, then the Constitution requires that he be informed of the actual sentence range that he faces if convicted, before he decides whether to admit or contest the charge.

I do not advocate abandoning using criminal history in sentencing. But as courts, legislatures, and commissions revisit how criminal history affects punishment, I hope that they take the opportunity not only to bring these rules into compliance with the Constitution but also to consider whether they make sense given what we have learned about their effects. For example, if a criminal history aggravator is supposed to isolate the most violent offenders for incapacitation, then the prior convictions that trigger a lengthier sentence should be narrowed to those that predict violent behavior, and back-end release provisions should be made available for those who by anyone’s measure do not pose that risk, such as the elderly and the very ill. Changes such as these, bringing sentencing practice into line with theory and research, may seem incremental, but the potential impact is significant, not only for those branded as convicted criminals—figuratively not literally nowadays—but also for everyone who bears the costs of using incarceration to control crime. ■

Yes, No, and It Depends

Flexible Middle Ground on Inflexible Sentences Could Indicate Paths for New Policies

By Alan J. Borsuk



Yes or no—are you in favor of Wisconsin’s truth in sentencing? Or is there an important answer that lies somewhere in between?

“Tough on crime” politics often makes issues such as fixed sentences and early release of convicts from prison seem like they come with clear-cut dividing lines, with the preponderance of public opinion favoring the harder line.

But a groundbreaking examination of public opinion in Wisconsin, using results from the Marquette Law School Poll, finds that *three* substantial camps exist

when it comes to questions such as whether there should be ways to release people from prison before they have served their full terms: Yes, no, and it depends on some specific factors.

That third group’s views are shaped in important ways by moral perspectives on what is the right thing to do, as much as or more than they are by factors such as saving money through reducing the prison population, said Michael O’Hear, Marquette Law School professor of law and associate dean for research.

O’Hear and Darren Wheelock, an associate professor in Marquette’s Department of Social and Cultural Sciences, analyzed responses to questions related to “truth in sentencing” that were asked during the Marquette Law School Poll conducted in July 2012 and July 2013. The poll results showed

strong support for the truth-in-sentencing law: for example, 66 percent of those in the July 2013 sample agreed that “truth in sentencing should continue to be the law in Wisconsin,” while 27 percent disagreed.

But O’Hear and Wheelock also found more than 50 percent of those polled in support of policies that, in practice, would allow some inmates to be released before serving their full sentences—contrary to the core notion of truth in sentencing.

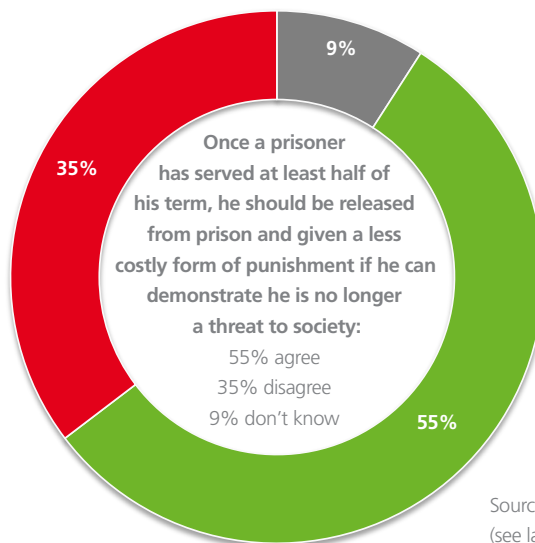
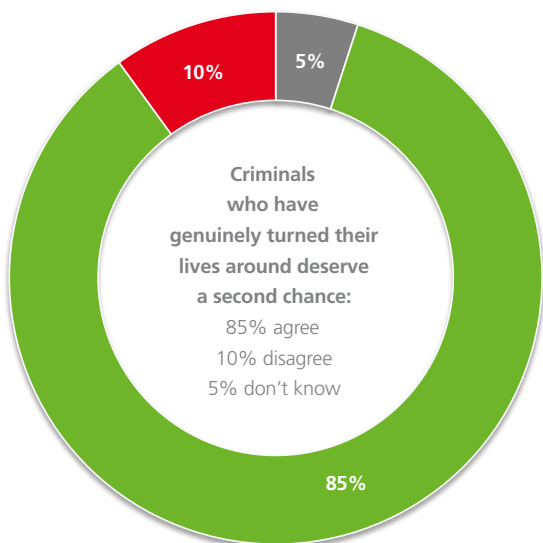
How to explain this? Detailed analysis of the responses led O’Hear and Wheelock to identify three groupings of opinions, not just the two (“Yes” or “No”) groups that might be expected. Overall, 37 percent of people supported truth in sentencing and opposed early-release programs. Another 23 percent opposed truth in sentencing and supported early-release programs. That left what O’Hear and Wheelock called “the swing vote”—the 31 percent of those polled who said that they supported both truth in sentencing and at least some ways to provide early release. (The remainder consisted of people who did not have or did not give an opinion.)

Describing the swing group, the two researchers have written, in a paper scheduled for publication in the *Brigham Young University Law Review*, “This group of respondents is the most intriguing in that they seemingly hold two competing notions of sentencing and criminal punishment”:

“In our view, this group of respondents actually represents the duality of public attitudes toward criminal punishment more generally. In the abstract, TIS [truth in sentencing] laws



Michael M. O’Hear



Source: Marquette Law School Poll (see law.marquette.edu/poll)

capture sentiments of certainty, equity, and fairness that most individuals support. Assuming sentences are fair and reasonable, then a sensible criminal-justice system should hold offenders to serve their full prison terms for everyone’s benefit, including the offenders themselves, who will have the benefit of knowing exactly how much time they must serve. On the other hand, however, notions of second chances and rehabilitation still underlie common understandings of what a responsive criminal justice system should be able to accomplish in practice.”

In an “On the Issues with Mike Gousha” program in Eckstein Hall in November, O’Hear outlined the incarceration trends in Wisconsin and nationwide since the early 1970s, along with the rise of opposition to parole and early release.

In Wisconsin the prison population was about 2,000 in 1973, but, beginning in 1974, “we have three decades of literally unbroken increases in the size of our state’s prison population,” O’Hear said. The count reached a peak of almost 23,000 in 2004, the end of that period. Since then, the number has generally stayed around that level or dropped a bit. As of the end of March 2014, the state Department of Corrections reported that the inmate count was 21,799. Over the same period, the state corrections budget rose from tens of millions of dollars a year in the 1970s to more than \$1 billion a year now.

Between 1970 and 2000, O’Hear said, 15 states abolished parole and 20 more restricted it, reducing or eliminating the opportunity for those serving time to be released before serving their full sentences—and in

many cases, including in Wisconsin, before serving even half of their sentences. But, with prison populations and budgets rising, 36 states reestablished or expanded early-release options from 2000 to 2010, O’Hear said.

Wisconsin took part in both trends. It adopted a truth-in-sentencing law that abolished parole for those convicted of crimes occurring on or after December 31, 1999. (One of the primary advocates for the law was then-State Rep. Scott Walker.) In 2002, the legislature modified the law so that prisoners could apply to the sentencing judge for release after serving either 75 or 85 percent of their sentences, depending on the severity of their offenses. In 2009, the law was amended again, this time to create an Earned Release Review Commission, which had the power to allow some convicts out of prison early. The justification for that change largely relied on a goal of holding down spending on the corrections system, O’Hear said. A relatively small number of prisoners were actually released by the commission. But in 2011, with Scott Walker newly sworn-in as governor, the 2009 changes were overturned by the legislature.

O’Hear suggested that it may have been the wrong strategy for advocates of the 2009 changes to defend them as a fiscally wise step. The recent Marquette Law School Poll results, he said, indicate that support for at least some early-release policies is strongest in cases where the argument is not one of saving money but one of doing the right thing, especially when convicts have taken responsibility for their crimes or taken steps to show they want to do better in life, such as getting treatment for addictions or pursuing educational goals. ►►

Doing what people see as morally right could provide a path for reviving some forms of early release and reducing Wisconsin's prison population, O'Hear suggested in the "On the Issues" session. "Wisconsin voters do not see truth in sentencing as an absolute overriding imperative," he said, and a well-designed early-release plan has potential to gain public support and success in the Wisconsin Legislature, he told Gousha and an audience of about 200. O'Hear was joined by Charles Franklin, director of the Marquette Law School Poll and professor of law and public policy, to discuss the poll results.

Truth in sentencing certainly had strong support in the polling done in 2012 and 2013. Among the results from 2013:

- 73 percent agreed that "truth in sentencing sends a message that society will not tolerate crime," while 23 percent disagreed.
- 57 percent agreed that "truth in sentencing helps to reduce crime and make Wisconsin safer," while 34 percent disagreed.
- 30 percent strongly agreed with the statement, "The courts are too lenient with criminals," while 32 percent said they somewhat agreed, a total of 62 percent. Saying that they somewhat disagreed with that were 25 percent of those polled, with 9 percent strongly disagreeing, totaling 34 percent.

But O'Hear noted other results that can be seen as offering contrasting majority sentiment:

- 55 percent agreed that "if a prisoner serves half of his term, he should be released and given a less costly form of punishment if he can demonstrate that he is longer a threat to society," with 35 percent disagreeing.
- 50 percent said a "prisoner's record of good behavior in prison" is very important in determining whether a prisoner should be released, while

39 percent said it was "somewhat important." This totals 89 percent. Only 11 percent said a record of good behavior was not important. O'Hear pointed out that Wisconsin is one of very few states that in their truth-in-sentencing laws eliminated "good time"—that is, a record of good behavior in prison—as a factor in earning early release.

- 68 percent said it was "very important" in making a decision on releasing a prisoner whether the prisoner "has accepted responsibility for his crime." Another 24 percent said it was "somewhat important," and 8 percent said it was "not important."
- 41 percent said it was "very important" in decisions on release whether a prisoner had obtained a GED, generally regarded as equivalent to a high school diploma, or completed other educational programs while in prison. Another 41 percent said it was "somewhat important," and 18 percent said it was "not important."

Completing treatment for addiction or mental illness was valued by those polled. Responses from 72 percent said it was "very important" to the determination whether a prisoner should be released, 21 percent said it was "somewhat important," and 7 percent said it was "not important."

O'Hear said, "We punish people for doing antisocial things because it is morally appropriate to do that. . . . But the flip side is that when people engage in pro-social behavior, it is morally appropriate to recognize that by mitigating punishment." He pointed out that 58 percent of those polled agreed that even if earned release does not reduce crime, it is the right thing to do.

Is the climate actually going to change in ways that would bring forms of early release back into practice? Don't look for anything dramatic, in part because almost no politician wants to look soft on crime. Even some of



Respondents weighed in on whether a prisoner's having accepted responsibility for his or her crime should be a deciding factor in his or her release: **68 percent** said it was "very important," **24 percent** said it was "somewhat important," and **8 percent** said it was "not important."

“We punish people for doing antisocial things because it is morally appropriate to do that. . . . But the flip side is that when people engage in pro-social behavior, it is morally appropriate to recognize that by mitigating punishment.”

—Professor Michael O’Hear

the avenues in place now are not being used very much. For example, parole remains an option for inmates in prison for earlier crimes (basically, those occurring before 2000), and a state parole board for such inmates continues to exist. In reality, there have been few grants of parole in recent years.

Yet some people who are involved in advocacy around incarceration issues are encouraged by what they see as small but significant steps recently by the Republican-controlled legislature in funding treatment and diversion programs for some people charged with crimes, with some legislative leaders supporting further increases. Among the latter is Rep. John Nygren (R-Marinette), co-chair of the legislature’s Joint Finance Committee, who has called for new efforts to help prevent and treat addiction to heroin and other opiates, in light of his own daughter’s history of addiction, overdosing, and incarceration.

In the state budget passed in 2013, the allocation to programs offering “treatment, alternatives, and diversions” for those who would most likely otherwise be imprisoned was increased from \$1 million to \$2.5 million. That may seem minuscule compared to the full budget, and it was far less than advocates of such programs wanted, but it was a 150 percent increase.

A citizen-action group known as WISDOM has undertaken what it calls an “11 X 15” campaign, calling for reducing the state’s prison population to about 11,000, roughly half the current total, by 2015. David Liners, the director, said that such a decrease would put Wisconsin more in line with Minnesota in terms of incarceration rates and, in WISDOM’s view, could be accomplished without compromising public safety.

Liners called truth in sentencing “really misguided” and said that restoring early-release options would give inmates incentives to take part in rehabilitation efforts. Is this politically saleable? “It’s getting there,” he said.

State Rep. Evan Goyke, a Milwaukee Democrat who is on the Assembly Judiciary Committee, said there was debate within the ranks of both Republicans and Democrats over how to deal with issues such as alternatives to imprisonment and early release. There is, he said, “a bipartisan movement to really examine

corrections and criminal justice policies in Wisconsin,” with eyes on both state spending and doing what is right.

No one is advocating to shorten sentences or provide early release to those convicted of violent crimes. Goyke said the focus is on those involved in drug-related offenses and nonviolent crimes.

If a goal is to reduce spending on corrections, Goyke said, drug courts and diversion programs aren’t enough to have an impact. How to navigate the competing interests related to truth in sentencing and early release has to be considered.

In what may well be a sign of the continuing political sensitivities on the subject, several Republican legislative leaders declined to be interviewed for this story.

Developments at the federal level nonetheless suggest that some cross-party common cause may be possible. In January, Sen. Dick Durbin, a liberal Democrat from Illinois, and Utah Sen. Mike Lee, who has strong ties to the tea party faction of the Republican Party, cosponsored legislation that would give federal judges more discretion in setting sentences, particularly in drug-related cases. The two were reported as sharing concerns about both the fairness of sentences and the rising budget for federal prisons, and they have drawn support from others on both sides of the political aisle. More than 200,000 people are currently in federal prisons, about half for drug offenses. Almost all of the drug-law violators were sentenced under mandatory minimum sentencing laws. But while alliances between politicians such as Durbin and Lee are eye-catching, such proposals face major hurdles to becoming law.

Back in Wisconsin, O’Hear said one interesting result in the Marquette Law School Poll surveys was the support that was shown for having decision on early release made by something that might resemble a parole board. Asked who should decide on early release, 52 percent of those polled supported “a commission of experts,” while 31 percent said it should be the judge who sentenced the person.

O’Hear said an early-release plan that is seen by the majority of the public as protecting safety, operating on the basis of well-grounded decisions, and doing the right thing has potential to gain strong public support. ■



ONE TERM, SIXTEEN YEARS

STATE BAR TASK FORCE SAYS THAT'S THE ROUTE TO RESTORING WISCONSIN SUPREME COURT'S LUSTER

By Alan J. Borsuk

Christine Bremer Muggli says, “I wouldn’t be a plaintiff’s personal injury lawyer if I weren’t a hopeless optimist.” That degree of optimism may be needed in pushing a proposal that the State Bar of Wisconsin has endorsed and which Bremer Muggli helped draft.

The proposal would amend Wisconsin’s Constitution so that justices of the Supreme Court would serve 16-year terms, with no possibility of reelection. The plan calls for the seven justices to continue to be picked in statewide elections but would replace the system of justices serving 10-year terms—and as many as they win—that Wisconsin has used during most of its history.

Proponents of the idea say that it would allow justices to focus exclusively on their work, brushing off political considerations. That would go far toward depoliticizing the high court and improving its standing in the eyes of the legal community and the people of Wisconsin.

“It’s such a good proposal, and it makes such sense,” said Bremer Muggli. “It could have really profound influence on the way our courts are put together in the future.” A four-member task force of the State Bar of Wisconsin agreed on the plan unanimously, and the board of governors of the state bar endorsed it by an overwhelming majority.

But will it fly politically? That seems to be the biggest question facing the idea. Critics suggest that it will not gain ground with the Wisconsin Legislature or the public. Debate about the merits of the idea has been muted thus far, but it could become vigorous if the proposal begins to gain momentum. At the earliest, that will be in spring 2015.

But the past and present of the proposal should be described before the future is considered.

Politics, Controversy, and the Declining Court Image

Divisions within the state Supreme Court and the intense politics around court elections are well known. As the report of the bar’s task force summarized, “Concerns about public confidence in the judiciary arose after a series of bruising and expensive elections for seats on the Wisconsin Supreme Court. Recent elections appeared to many to have been dominated by special-interest spending on negative attack ads that collectively undermined the public perception of the integrity of the candidates and, necessarily, of the court itself.” The report also referred to “lack of collegiality” within the court.

Leaders of the bar appointed four respected lawyers to come up with proposals “to improve public confidence

in the independence of the judiciary.” By intention, two of those appointed were generally considered conservative, two liberal. The task force was chaired by Joseph Troy, a former Outagamie County judge now a partner at Habush Habush & Rottier. The other members were Bremer Muggli, of Bremer & Trollop in Wausau; Catherine Rottier, a partner at Boardman & Clark in Madison; and Thomas Shriner, a partner at Foley & Lardner in Milwaukee and adjunct professor of law at Marquette University.

The task force began work in June 2012, with the four members agreeing quickly that they wanted to recommend only ideas that were politically feasible. With that in mind, they agreed to drop from consideration two ideas that have been advocated in recent years: merit appointment of justices and campaign-finance reform.

Wisconsin has elected judges and justices since its founding in 1848, and there is no realistic prospect of legislative approval of eliminating judicial elections, the task force members said.

The members also had concerns about the value of merit selection, which generally involves a nonpartisan panel’s recommending qualified candidates and a governor’s choosing among them. Plans in other states generally include provision for “retention elections” in which a justice faces voters after serving a period on the court, without an opposition candidate and with a ballot that allows only an up or down vote. The task force’s report said, “The problem is that retention elections, with increasing frequency, have developed the same kind of politically charged, special-interest-funded campaigns that the merit selection process was designed to avoid.” With no opponent, “challenges are inherently negative and often driven by single-issue special-interest groups.”

As for campaign finance, the group concluded, “Many proposed changes are simply constitutionally prohibited.” It is a fact that Supreme Court campaigns have seen a huge increase in spending, and there is wide agreement that the dignity of court races has suffered. But the task force said U.S. Supreme Court decisions that shape much of the matter are beyond the influence of the Wisconsin Legislature.

What emerged is the proposal for a single, 16-year term. The four task force members came to the conclusion that it would go far to reduce the intensity of politicking around justices. “[W]e do not see the people’s interest as best served by requiring elected justices to become politicians >>

in search of support for a reelection campaign,” their report said. Under the plan, one justice would be elected in spring elections generally every two years.

During an “On the Issues with Mike Gousha” program at Marquette Law School on November 19, 2013, and in subsequent interviews, the four task force members argued that, without the option of running for reelection, justices would not have to worry about future support from major campaign donors. They suggested that the structure could tamp down spending because donors would feel less incentive to spend money on a justice who, once seated, might not follow the course donors supported. Justices “wouldn’t be looking over their shoulders at big donors for next elections,” Shriner said. It would mean for a justice that “you can just spend your time being a judge.”

Troy said that the founders of the federal system made judgeships lifetime appointments so judges would be immune to political pressure. The 16-year term, he said, would allow election of justices while providing the longevity on the bench that would encourage judicial independence. Troy said a term longer than 10 years is not inherently troubling. The average service of Supreme Court justices in Wisconsin has been about 14 years, Troy said, so the 16-year terms wouldn’t change that overall reality by much.

The task force report said that reelection campaigns at times have increased tensions within the court, with some justices openly or privately opposing the reelections of others. “We want a court that operates without the factions and frictions that can result from opposing a colleague’s reelection bid,” the report said. The single-term provision “will remove the most

powerful force interfering with collegiality on the court: the potential for factions developing over the reelection of a fellow justice.”

Furthermore, the report explained, even with the recent rounds of heated elections, it is unusual for a justice seeking a new term to fail in the effort. In fact, only once in almost a century has a previously elected justice been defeated: In 1967, Chief Justice George Currie lost his reelection bid, a year after he voted with the majority in a decision that allowed the Milwaukee Braves baseball team to move to Atlanta. The other few instances in this long period of an incumbent’s falling short have involved justices appointed to fill a vacancy and thus with only relatively short tenures. In short, the power of incumbency is strong, and the power of previous election is even stronger—some considerable evidence, in the estimation of the task force, that there is not much accountability in the election process.

The Other Proposed Amendment: How the Chief Justice Is Picked

The idea of a single, 16-year term is being readied for consideration while another idea for changing the way the Supreme Court operates is advancing. That proposal calls for the majority of justices every other year to elect who will be the chief justice. It would replace the practice in place in Wisconsin since the 19th century in which the most senior justice is the chief.

The chief-justice-selection plan is described by proponents as nonpartisan. But there is no question that it has attracted strong support from Republicans and almost no support from Democrats. Why the partisan divide? Partisan perspectives on the current chief justice, Shirley Abrahamson, provide a giant clue. Abrahamson



State bar task force members Joseph Troy, Catherine Rottier, Thomas Shriner, and Christine Bremer Muggli were panelists for “On the Issues with Mike Gousha” at Marquette Law School.

has been on the court since 1976 and, as the justice with the most seniority, has been chief since 1996. She is regarded as a powerful figure on the liberal side of the court, with a majority of four justices on the conservative side. As things stand now, if the chief were selected by majority vote, it is all but certain that one of the conservatives would be chief.

To amend Wisconsin's Constitution, the state assembly and senate must each approve the amendment in two consecutive legislatures. Then the amendment must win a statewide referendum vote. The chief-justice amendment was approved in both houses in 2013. Backers hope to have it approved by each house early enough in the 2015 legislative session to go to voters in 2015.

Troy said that the two proposed amendments are not incompatible. "One does not in any way change the other. Both could be passed," he said. He added, "We do like to explain to supporters of that plan, if our plan were adopted, probably that revision wouldn't be necessary." For under the single-term proposal, whichever process were used for the selection, it would be unlikely anyone would serve as chief justice more than about a half-dozen years, at the outside.

Rottier said, "I think ours is a more fundamental and groundbreaking response" than the chief-justice amendment.

Nonetheless, it may prove relevant politically that the chief-justice-selection amendment has already been approved the first time by the legislature, and that it has strong support from the current majority party.

A Nonpolitical Idea in a Political World

Rottier said that some people have said the single-term proposal is too simple. "But that's the beauty of it," she said. All four task force members said a virtue of the plan is that it does not benefit or have greater appeal to either the left or right politically. "It is a good-government idea," Rottier said.

But if the beauty of the plan is its nonpartisan nature, the reality is that, if it is to gain life, it will need to attract support in the highly partisan arena of the legislature, where almost everything seems to advance or fail along party lines.

As Shriner put it, "How do you get a movement going among politicians to do something that isn't political?"

Early indications are that it won't be easy. "It's just a nonstarter politically," said Michael McCabe, executive director of the Wisconsin Democracy Campaign, a nonprofit organization that favors campaign reform.

"I don't think there's a realistic possibility that it can gain traction really on either side in the Capitol." Republicans, he suggested, are generally happy with the way court elections have turned out in recent years, and Democrats have focused their interest on public financing of races.

On the political forecast, Richard M. Esenberg, founder, president, and general counsel for the Wisconsin Institute for Law & Liberty, a nonprofit generally associated with conservative legal causes, agreed. "I just think it's going to be really difficult" to attract support, Esenberg said.

For different reasons, McCabe and Esenberg both were critical of the proposal on its merits.

Esenberg said, "The evidence that justices are being influenced by reelection prospects isn't particularly strong. And the theory that reelection causes discord within the court—I'm not convinced that is a very strong argument." He added, "The thing that troubles me about it is if you think that judges should be elected because you believe, in some sense, that holds them accountable, you've lost that accountability [with this plan]. Sixteen years is an awfully long period of time."

McCabe objected to the one-term limit on justices, saying, "We have term limits; they're called elections." He also did not think that the proposal would reduce the intensity of politics or the amount of spending in Supreme Court elections. Candidates for the court would still have to raise large sums, and partisan intensity might even increase because of the single-term element, McCabe said.

The earliest that the proposal will be placed before the legislature is 2015. If passed then, it could come back in 2017, with a statewide vote possible later in 2017. But action in 2015 may be complicated by the second round of votes and, likely, a referendum on the amendment on chief-justice selection. It is not known what effect, if any, the 2015 election for the Supreme Court will have; the seat up for election that April is now held by Justice Ann Walsh Bradley, a member of the liberal side of the court.

Rep. Evan Goyke, a Milwaukee Democrat who is on the Assembly Judiciary Committee, held out hope that the single-term idea would be taken seriously in the legislature at some future point. Republicans and Democrats have both expressed concern about eroding confidence in the Supreme Court. Letting justices pick a chief doesn't restore that, he said, but the single, 16-year term might. And circumstances might open the door to full consideration of the idea in the Capitol.

"It's almost always the signal of a good idea when both parties try to spin their way out of liking it," Goyke said. ■

Fellows of the Wisconsin Law Foundation

Remarks by Dean Joseph D. Kearney on the Future of Legal Education

On October 3, 2013, Dean Joseph D. Kearney spoke to the Fellows of the Wisconsin Law Foundation at the group's annual meeting, in Madison, Wis. Together with his law school counterpart from the University of Wisconsin, Dean Kearney was asked to address the future of legal education. The following is Dean Kearney's part of the presentation.

Let me begin by thanking you for tonight's invitation. I spoke to the Wisconsin Law Foundation fellows in the fall of 2003, my first year as dean, and I should like to think that the passage of 10 years between invitations does not reflect some judgment as to the quality of my remarks on that occasion. While my intervening membership in the group suggests that it does not, I am, in any event, glad to speak with you again this evening, a decade after. I am especially pleased to do so with my colleague, Dean Margaret Raymond. We have come to know one another over the past two-plus years. I admire the intelligence and energy that Dean Raymond has brought to leading the University of Wisconsin's law school.

Dean Raymond shared with me a few weeks ago the list of 10 critiques or "reforms" of legal education that she had compiled from her reading (this is not to say that she endorsed them). I was reminded, as a native Chicagoan, of the old phrase that "Chicago ain't ready for reform"—and of what may be an even older phrase, "When someone starts talking about reform, reach to protect your wallet." This is not to be dismissive of the interest in change in legal education. Indeed, my skepticism about much of the current call derives less from any willingness to defend each particular aspect of legal education today and more from my appreciation that these are *systemic* questions. This is where I must begin.

To get at my point of systeminess (perhaps to coin a word), let us consider the most basic requirement for admission to the practice in most places: the prerequisite of formal legal education. Few would doubt that there are some folks who, by reasons of temperament, intelligence, and other native gifts, could practice in some areas of law *without* formal



Joseph D. Kearney

legal education (even to leave aside the question of *three* years of school). Yet to acknowledge this is scarcely to agree that the *system* in which even a person such as that must go through formal education is not an appropriate one. For questions about the value of systems depend upon net accountings of costs and benefits.

More could be said along the foregoing lines, but I think this enough to establish my point that we are speaking of the system. This is rather important, as I have mentioned, for one largely defending the current system or form of legal education does not need to defend each aspect or actor in it. To take merely the example of tenure, one defending even just that component of the current system is under no obligation to suggest that there is no downside of tenure. A system with tenure serves many purposes, including the instrumental one of helping attract from practice (and higher salaries) and into law faculties individuals of substantial talent. Would the system of legal education be better if there were no tenured faculty? Well, it is possible that the net costs and benefits might so

indicate, but that is scarcely clear. And as dean of a school whose faculty are considerably more national in their origin and orientation than was the case during most of the school's history, I am not prepared to suggest that a setup in which Marquette Law School did not have substantial ability to recruit to its faculty talented individuals with impressive backgrounds and numerous other options for their future would make for a better legal profession or society.

This is all a bit of a warm-up for the point on Dean Raymond's list that I selected for myself: the 10th point, the *ne plus ultra* of the critiques of legal education today. As Dean Raymond has summarized the critique, it may be stated as "less theory, less scholarship, less 'ivory tower' nonsense." One gets the sense that the concluding noun—*nonsense*—has been toned down, made less earthy.

To find this criticism overbroad—as I generally do—is not to doubt that it is possible to overdo it on the theory front. I recall a conversation—it was more of a monologue for which I was present—in which one of my former employers considered whether to interview for a position a graduate of a certain law school (it may have been in New Haven). The applicant's transcript was pretty well devoid of courses such as evidence, administrative law, jurisdiction and procedure, and the like, and was replete instead with courses rather more resembling what most of us in the legal profession would expect to find in a graduate school of philosophy. The conversation concluded with the prospective employer's saying, "I need a *lawyer*," and putting the transcript and application down, never to pick them up again.

Nor does one defending theory in legal education have to doubt that we are educating—even training, for a word that some might avoid—individuals for the practice of law. I am dean, after all, of *Marquette* Law School, and even the most iconoclastic of my predecessors, the late Howard Eisenberg—who came to the Law School seeking to recruit a more national faculty—even he would not have doubted the importance of ensuring that the Marquette law faculty maintained its longtime interest in ensuring that its graduates were reasonably ready for the practice the day of graduation. After all, Howard had been the state public defender of Wisconsin in the 1970s.

My own background was in a large Chicago law firm, doing litigation, mostly of an appellate and regulatory sort, but leaving me with enough general affinity for litigation that I did not hesitate, eight years away from Chicago and two years into my deanship, to represent a high-school classmate in a long-running divorce case in the DuPage County Circuit Court outside Chicago. That activity had the incidental benefit of enabling me to work up a different talk, "10 Things That I Learned During My 28 Days as a Divorce Lawyer," which I have given a few times at Marquette. In short, I am a *lawyer*, licensed in my native Illinois and adoptive Wisconsin, and my own classes over the years, through today, include what one might term "skills courses."

So what, then, is the affirmative case for theory, scholarship, or "ivory tower" thinking in legal education, at least to the general extent that it is present today? To begin, it is that lawyers by and large are not mere scribes or clerks whose duties ▶▶

“Most practicing lawyers in my experience are not cynics, at least not most of the time, and wish, if anything, that they had picked up more legal theory before they got thrown into the struggle of helping people solve their problems.”

“ I am not Matthew Arnold, and neither should you be. One does not need to be a pre-legal-realist or a legal formalist to believe that the law matters and that when we say that one is educated or even trained in the law, it should mean that that has included study of some considerable amount of law.”

consist simply of filling out forms or applying in a semi-mechanical manner established practices to the problems of the next person in the queue outside the door—and the progress of technology and of global markets will probably ensure that even fewer graduates of our law schools are needed for such tasks. Instead, they are largely dealing with a substantial range of human experience and a diverse set of needs, and many of the solutions or approaches that they can offer will require creativity, judgment, research, and good habits of which a legal education including a substantial amount of theory can be especially conducive.

To be sure, I do not defend here a purely theoretical education, and no one familiar with Marquette Law School would think me to be inclined to do so. Most of our students actively engage—as part of their curriculum—in supervised field placements and externships with courts, other government agencies, and nonprofits. Even before this, they take courses that are marked by an emphasis on “skills” to a greater degree than their predecessors even a dozen years ago.

To resume with the affirmative view, part of it simply rests on the amount of law that one encounters in trying to sort through the implications of many clients’ primary conduct—and the recognition that this law is knit together in large part in ways that can only be described as “theory.” In speaking, along with Chief Justice Shirley Abrahamson, at the dedication of Eckstein Hall, Marquette Law School’s new home as of 2010 (that is the modest building next to the Marquette Interchange in Milwaukee), Justice Antonin Scalia said that the “aspect of legal education that the

law schools do best” is “the conveying of a systematic body of knowledge concerning discrete areas of the law.” He used as an example bankruptcy law, which to this day he regrets not having taken in law school. We may acknowledge that a Supreme Court justice has more need of *law* than the average practitioner, but I think the point to be broadly applicable. My own hobbyhorses (and not out of any self-interest, in the sense that this is not among the courses that I teach) include the class that some law schools call “corporations” and that we at Marquette denominate “business associations.” This is scarcely intended just for the transactional lawyer: it seems to me that one practicing in family law, the personal injury field, or employment law simply *must* have an understanding of the corporate form (broadly speaking) whereby so much happens in our society (and wherein or whereby, for my crudest statement tonight, so much money can be found or protected).

Yet it is not just the knowledge of law for its strict relevance to a client’s problem that recommends an education that includes substantial legal *doctrine*, to use a word new in this speech, in order to capture a concept overlapping substantially with *theory*. Perhaps the essence of my view can be captured succinctly in one of my colleagues’ comments a number of years ago, in response to someone advocating still more emphasis on “skills education” and correspondingly less focus on “doctrine” or “theory.” He asked, “When did *ideas* stop being important to one’s work as a practicing lawyer?”

When I spoke 10 years ago, I characterized myself as seeking to be “somewhat provocative”—and I

wish to make another effort here. When one talks about the “ivory tower” and the need for still more practical education, I worry that an anti-intellectual spirit is reflected, which seems jarring in post-graduate education. I wonder whether among some this does not reflect a view that all that really matters in the world nowadays is politics and that every legal issue is political. In such a world, theory and scholarship and all that other high-minded stuff just get in the way, and insisting on them is more than slightly ridiculous, since none of them will ever really matter. Criminal law is primarily about oppression, particularly of minority men; such topics as contract law are just about legitimizing corporate power and holding down the poor. Let me not allude simply to my friends on the left. Those on the right are susceptible of the same cynicism: Chief Justice Roberts could not *really* have believed that the Affordable Care Act’s individual mandate does not amount to a tax for Anti-Injunction Act purposes but *does* for purposes of falling within Congress’s taxing power. Et cetera. I am more naïve, less cynical even while skeptical (or such is my effort to be), more inclined to see gray than black and white, capable of persuading myself that the law matters.

I hope that you are as well. Most practicing lawyers in my experience are not cynics, at least not most of the time, and wish, if anything, that they had picked up more legal theory before they got thrown into the struggle of helping people solve their problems. Unless we are just going to throw out law, it turns out that one still has to persuade judges to rule in his client’s favor, and understanding the theoretical background of a body of law usually helps in that endeavor.

I do not know whether this is the speech that you envisioned either when the invitation was made or even when Dean Raymond yielded the podium. I believe that I have kept faith with the invitation, as fairly construed my remarks have touched upon, at least implicitly, not only no. 10 on Dean Raymond’s list summarizing current proposals but also nos. 1 (the two-year degree), 2 (no more tenured faculty), 3 (more skills training), 7 (two kinds of law schools),

perhaps even 8 (the lawyer “residency”), and 9 (“more externships!”). And I acknowledge that mine is more of an apology for the status quo and a *hope* for the future than it is a *prediction* of the future. The American Bar Association will have a good deal more to do than Marquette Law School in determining the future direction of legal education.

Yet this seemed a suitable occasion, after a decade on the job and even as the dean who has broadened Marquette Law School’s mission on both the public service and public policy fronts, to say a few words in favor of the status quo. And when I am back at the podium next week in my Federal Courts class, talking about Judge Henry Friendly’s statement in *T.B. Harms* that Justice Oliver Wendell Holmes’s characterization in *American Well Works* of the well-pleaded complaint rule for determining “arising under” federal-question jurisdiction “is more useful for inclusion than for the exclusion for which it was intended,” I will do so not because I like talking about Justice Holmes and Judge Friendly and reading the cases (although all this is true). Rather, I will do this because I expect that some of those students may want to get a case into or out of federal court some day, and I think that ensuring that one’s complaint satisfies the jurisdictional requirements of the federal courts actually requires not only knowledge of the sections of a complaint required under Rule 8 but understanding the law.

My Federal Courts class is a place to end. Our class reading for this past week (I teach the course with ▶▶



Tom Shriner) included then-Justice William Rehnquist's concurrence in *Northern Pipeline v. Marathon Pipe Line*, the 1982 case striking down aspects of the bankruptcy system as violating Article III (presumably because some bankruptcy practitioner had made the argument). The concurrence characterized Justice Byron White's dissent as treating certain precedents as "landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night." The allusion (indeed, the quotation) comes, of course, from Matthew Arnold's 19th-century poem, "Dover Beach." My own mind tonight ranges a few lines earlier in the poem,

where Arnold refers to "[t]he Sea of Faith" as having been "once, too, at the full," but now he only hears "[i]ts melancholy, long, withdrawing roar." I am not Matthew Arnold, and neither should you be. One does not need to be a pre-legal-realist or a legal formalist to believe that the law matters and that when we say that one is educated or even trained in the law, it should mean that that has included study of some considerable amount of law.

Thank you for your kind attention. Dean Raymond and I would be pleased to respond to any questions or comments. ■

Professor Alan R. Madry

Remarks at Midyear Graduation

On December 15, 2013, Marquette University Law School celebrated its midyear graduates with a hooding ceremony and luncheon. The tradition over the past decade is for a faculty member to deliver remarks. This year, Professor Alan R. Madry spoke.

What a wonderful day. Congratulations to all of you—to our graduates in particular, but also to your family and friends who have supported you these past few years and share in your success. It's a privilege for the faculty who have shared so much with you in and out of the classroom to be able to celebrate this enormous achievement with you. Having been through it ourselves, we know well what an achievement this is. Parents, significant others, children—you are part of our extended family. The Law School is much more than just a school; it is also a center of public policy discussion for the entire community, and you are always welcome to visit and join in those presentations and discussions.

Let me begin with a deeply insightful minor country hit from the mid-1970s, written and recorded by



Alan R. Madry

England Dan and John Ford Coley. This song reflects one among the common themes of country music. There are no freight trains; no one goes to prison. The song is a lament for what the singer gave up as a young man to follow his muse. Among the things that he gave up was the love of a young woman. The song, titled "Lady," is addressed to this woman, and in its three or four verses, the singer reminisces about their time together.

But it is in the refrain where he addresses her most directly, in the present, and he asks her, pointedly: "Do you still seek the mysteries of life? Or have you become some businessman's wife?" I heard this song the first time some 30 years ago on a cross-country drive with my wife. It came on the radio somewhere in a snow-covered valley outside of Telluride, Colorado. That refrain buried itself deep in my imagination: "Do you

“Don’t make the mistake of thinking that because the answers aren’t obvious there are no answers. There is too much in the great traditions of wisdom to suggest otherwise, in the testimony of great men and great women.”

still seek the mysteries of life? Or have you become some businessman’s wife?”

There is so much captured here in so few perfectly chosen words. Let’s dwell on them a bit.

In the contrast of the refrain, the reference to becoming a businessman’s wife seems to suggest complacency; giving up the search for some deep meaning, and instead surrendering uncritically to the shallow ethos of our time: to the materialism and consumerism that our corporate culture too often promotes.

Yet the reference to business cannot be a simple rejection of business per se as inherently shallow. After all, we all need to make a living, to provide for ourselves and those we love. The singer himself has been selling his songs. Something so essential as making a living, commerce, has to be part of the deeper meaning of life. We know ourselves that working, being a productive and contributing member of a community, can be profoundly meaningful. But finding the proper place for and manner of work within the larger understanding of a complete life has to be part of the search.

Now consider the other side of the contrast: “seek[ing] the mysteries of life.”

One thing immediately striking about the question is that the singer is asking his old love if she’s still seeking. Remember that he is addressing her decades after he’s last seen her, and yet he isn’t asking whether she has solved the mysteries of life, whether she has discovered life’s elusive meaning. He is asking if she’s *still* seeking.

Why? He doesn’t say. Let me suggest a couple of possible reasons.

First, the singer most likely believes, from his own searching, which he clearly values, that the search, finding the meaning, is difficult. Returning to the contrast, it may be very difficult in the first instance to get below the dazzling and often demanding surface of life and ask hard questions. You’ve surely already discovered this for yourselves; after all you’ve just been

through the ordeal of law school. They say that the law is a jealous mistress. She can be very demanding and not leave you time enough to pause and reflect.

Second, it may also be that the mysteries are deep and complex. A journalist once asked the great Nobel Prize-winning physicist Richard Feynman if he could summarize in a few sentences the discoveries that earned him the Nobel Prize. Feynman replied that if he could do that, they wouldn’t be worth the Nobel. And Feynman was talking only of physics; we’re talking about metaphysics, about finding the meaning of life.

Don’t make the mistake of thinking that because the answers aren’t obvious there are no answers. There is too much in the great traditions of wisdom to suggest otherwise, in the testimony of great men and great women. We may need to become familiar with them, to avail ourselves of the accumulated wisdom of the past.

And then, too, if the mysteries are deep and complex, and they certainly seem to be, then it would also seem that every time we get a glimpse into the mystery, some insight, it transforms us in some way, makes us better able to see more comprehensively and deeply. Every insight then opens ever more horizons of mystery and meaning. How often have you come to some insight, only to have to abandon it the next week or month for some more comprehensive and deeper insight? After a few of those, you begin to understand that this may be a lifelong process.

But that experience in itself, the constant opening up of new horizons, adds an element of adventure to the search: it suggests the possibility of ever-greater things ahead, of a search that potentially promises enormous riches. The experience of those successive plateaus suggests the breadth of the promise.

So, we wish you the very best good fortune in your careers and your lives. Don’t let the jealous mistress have her way all of the time. Enjoy the search and do come back to visit us and share your adventures. Stay in touch. ■

Real-World

Nicholas Cerwin recalls the day he was at lunch with others who were working in the Milwaukee County District Attorney's Office, and he was asked to handle a hearing coming up that afternoon. He had about 20 minutes to prepare. Even with an experienced lawyer overseeing what he was doing, he was the one on the line to handle matters. "It's definitely not for the faint of heart," he says.

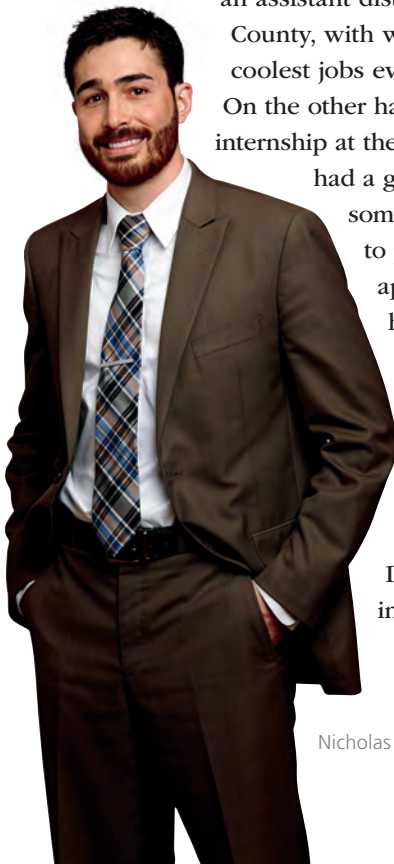
Things went well, especially considering that Cerwin was still a student at Marquette Law School. His internship as part of the school's Prosecutor Clinic allowed him to show what he was capable of. And it gave him both incentive and momentum in choosing a career path—which is to say he is now an assistant district attorney for Milwaukee County, with what he calls "one of the coolest jobs ever."

On the other hand, **Robert Hampton**, did an internship at the United States Attorney's Office, had a great experience, but found out something important: "I don't want to prosecute. It's not in me." As he approaches graduation, he says he learned that being a defense lawyer—working on "the underdog side," as he puts it—fits him better. He was able to pursue that passion by undertaking internships with the Wisconsin State Public Defender and at Centro Legal in Milwaukee.

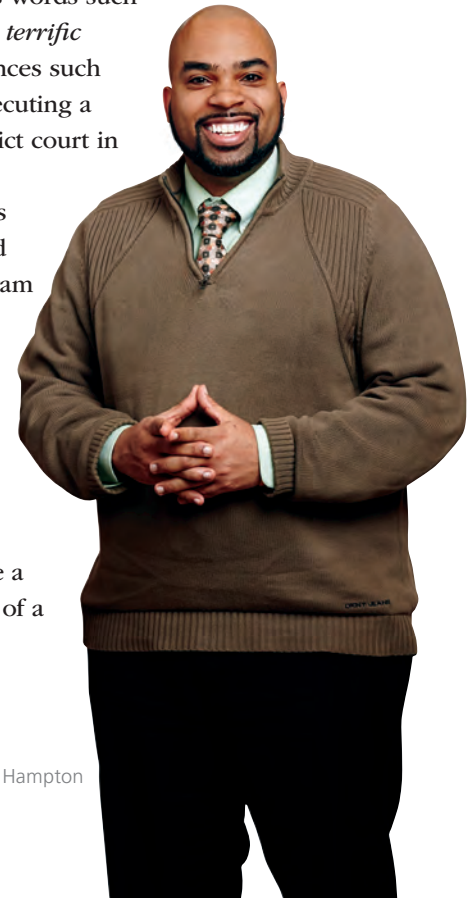
Internship experiences have been part of the Marquette Law School experience for students since the 1960s, but the program has grown substantially since 2000, in terms of both the number of placement opportunities for students and the number of students taking part. The real-world experience offered through internships is a highlight of the Law School's education of hundreds of students.

"I would urge students to take as many internships as they can because it really puts into practice what you're learning in class," says Priya Barnes, who took part in three internships as a student and who is now in private practice, based in Pewaukee, Wisconsin. She uses words such as *phenomenal* and *terrific* to describe experiences such as assisting in prosecuting a case in federal district court in Milwaukee.

Professor Thomas Hammer has headed the internship program since 2001. He says that the goal of the placements is to provide "meaningful, supervised learning experiences" so that students "learn to be a lawyer at the elbow of a lawyer."



Nicholas Cerwin



Robert Hampton

Lessons

Wide-Ranging Internship Program Gives Law Students Experience

Internships fall into three categories: judicial internships with judges and justices; placements in clinical programs including the Prosecutor Clinic, Public Defender Clinic, Mediation Clinic, and Unemployment Compensation Clinic; and fieldwork placements at more than 40 nonprofit organizations and government agencies. “There is opportunity to get experience in just about every practice area of the law,” Hammer says. Annual enrollment in the program has gone from a little more than 100 students in 2000–2001 to about 350 in 2012–2013. Participation is now roughly equally divided among the three categories of internships, whereas a dozen years ago the large majority of students (again, fewer in number then) were in the clinical programs.

In the judicial program, students can intern not only for state court trial judges in Milwaukee but also with the U.S. Court of Appeals for the Seventh Circuit, all 7 justices of the Wisconsin Supreme Court, 11 judges in Wisconsin’s federal trial courts, and 7 state appeals court judges. Hammer said students “become part of the judicial family in every chambers in which they serve.”

As for the fieldwork programs, they offer a wide range of experiences, with new partnerships added each year.

In the 2013–2014 year, the South Milwaukee School District, the Federal Defender, and the corporate counsel’s office of the Blood Center of Wisconsin were examples of new

participants. Hammer says that he makes it a priority for the fieldwork programs to fit the broader mission of Marquette University to work on community needs.

Hannah Rock took part in four internships and speaks highly of them all. But she says her favorite internship was with the Metro Milwaukee Foreclosure Mediation Program. Why? “Because I got my job through that internship.” Thanks to networking with lawyers involved in the program, she is set to join a small Milwaukee firm focused on family law and mediation upon her graduation.

Lisa Galvan also took part in four internships during her Law School years and, as her graduation approaches, is sorry she didn’t take on at least one more. The placements allowed her to experience in the larger world many of the things she was learning in classes. An internship with Legal Action of Wisconsin developed into work there as a legal assistant during school, and Galvan hopes to pursue similar public interest work as a lawyer.

Some students choose internships in line with their interests. Others choose ones in areas that are new to them. But none interviewed for this story described an internship that didn’t offer valuable lessons.

Sam Berg, who also is approaching graduation, said that he would suggest students take part in a range of internships. “You might never again be able to bounce around so freely among organizations and practice areas,” he said. “My internships have helped me find out what I’m good at and what I like.” ■



Hannah Rock



Lisa Galvan

Selected Recent Faculty Publications

Paul M. Anderson, "Gender Equity Forty Years Later: A Look at Title IX's Impact on American Sport," 13 *International Sports L. J.* 3 (2013).

Daniel D. Blinka, "The Modern Trial and Evidence Law: Has the 'Rambling Altercation' Become a Pedantic Joust?," 47 *Georgia L. Rev.* 665 (2013); "Character, Liberalism, and the Protean Culture of Evidence Law," 37 *Seattle U. L. Rev.* 103 (2013).

Bruce E. Boyden, "Regulating at the End of Privacy," 2013 *U. Chicago Legal Forum* 173.

Jay E. Grenig, *Case Preparation and Presentation: A Guide for Arbitration Advocates and Arbitrators* (2013) (with Rocco M. Scanza).

Nadelle E. Grossman, "The Duty to Think Strategically," 73 *Louisiana L. Rev.* 449 (2013).

Anna Jane High, "Grassroots NGO Regulation and China's Local Legal Culture," 9(2) *Socio-Legal Rev.* 1 (2013).

J. Gordon Hylton, *Wisconsin Law of Trusts and Estates: Cases and Materials* (2013).

Joseph D. Kearney, "Contested Shore: Property Rights in Reclaimed Land and the Battle for Streeterville," 107 *Northwestern U. L. Rev.* 1057 (2013) (with Thomas W. Merrill).

Janine Y. Kim, "Postracialism: Race After Exclusion," 17 *Lewis & Clark L. Rev.* 1063 (2013).

Vada W. Lindsey, *Ira Shafiroff, Property Law: Fundamental Principles and Moral Concerns* (2013) (coeditor).

Lisa A. Mazzie, *Interactive Citation Workbook* (Tracy McGaugh Norton & Christine Hurt eds., 2013) (chapter contributor with Deborah Moritz).

Judith G. McMullen, "Scientific, Social & Legal Perspectives on Obesity: What Grown-Ups Need to Know," 14 *Marquette Elder's Advisor* 305 (2013).

Matthew J. Mitten, *Sports Law and Regulation: Cases, Materials, and Problems* (3d ed. 2013) (with Timothy Davis, Rodney Smith & N. Jeremi Duru); "The Penn State 'Consent Decree': The NCAA's Coercive Means Don't Justify Its Laudable Ends, But Is There a Legal Remedy?," 41 *Pepperdine L. Rev.* 321 (2014).

Michael M. O'Hear, "The Holder Address: Two Cheers for the New Paradigm," 26 *Fed. Sentencing Rep.* 86 (2014); "(The History of) Criminal Justice as Morality Play," 161 *U. Pennsylvania L. Rev. PENumbra* 132 (2013) (book review).

Chad M. Oldfather, "Limitations (A Response to Judge Posner)," 51 *Duquesne Law Review* 67 (2013); "Turtles," 16 *Green Bag 2d* 220 (2013) (contribution to micro-symposium on Orin Kerr's *A Theory of Law*).

David R. Papke, "Oil and Water Do Not Mix: Constitutional Law and American Popular Culture," in *Law, Culture, and Visual Studies* (Anne Wagner & Richard K. Sherwin eds., 2013); "The Rise and Fall of the 'Underclass,'" in *Property and Sovereignty: Legal and Cultural Perspectives* (James Charles Smith ed., 2013); "Transracial Adoption in the United States: The Reflection and Reinforcement of Racial Hierarchy," 15 *J. L. & Family Studies* 179 (2013).

Matthew J. Parlow, "Whither Workforce Housing?," 40 *Fordham Urban L. J.* 1645 (2013).

Andrea K. Schneider, *Mediation: Practice, Policy, and Ethics* (2d ed. 2013) (with Carrie Menkel-Meadow & Lela Love); "Beyond Theory: Roger Fisher's Lessons on Work and Life," 29 *Negotiation J.* 171 (2013); "The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration," 18 *Harvard Negotiation L. Rev.* 71 (2013) (with Nancy Welsh); "Negotiation Barometry: A Dynamic Measure of Conflict Management Style," 28 *Ohio State J. Dispute Resolution* 557 (2013) (with Jennifer Gerarda Brown).

Ryan M. Scoville, "The New General Common Law of Severability," 91 *Texas L. Rev.* 543 (2013); "Legislative Diplomacy," 112 *Michigan L. Rev.* 331 (2013).

Paul M. Secunda, "Explaining the Lack of Non-Public Actors in the USA Social Insurance System," in *Non-Public Actors in Social Security Administration: A Comparative Study* (Frans Pennings et al. eds., 2013); "Cultural Cognition Insights into Judicial Decisionmaking in Employee Benefits Cases," 3 *American U. Labor & Employment L. Forum* 1 (2013).

Irene M. Ten Cate, "The Costs of Consistency: Precedent in Investment Treaty Arbitration," 50 *Columbia J. Transnational L.* 418 (2013).

Three Cheers for Three Retirees

If it is ever acceptable to propose a toast in a law school magazine—and let's agree that it is—then this is the right time to do it:

A toast, filled with appreciation, warmth, and thanks, to three people who have been important parts of Marquette Law School and who are retiring from active duty (not that we don't continue to regard them as part of the Law School family). To mention them in alphabetical order, they are:

Jane E. Casper



In 16 years at the Law School, Jane Casper touched the lives of hundreds of students, from making the wheels of the system work for them to giving them personal boosts when they were in need. She was attentive to details but saw the big picture, whether the matter at hand was the mechanics of graduation ceremonies or the intangible pulse of the lives of both individuals and institutions. In recent years, Casper had the title of assistant dean for students. And students knew that she was, indeed, for them. The same was true during the rest of her nearly 40 years working for Marquette, including many years of work in undergraduate admissions.

Janine P. Geske



Janine Geske joined the Law School in 1998 as distinguished professor of law—or rejoined it, having graduated in the Class of 1975 and then having served on the faculty, among other professional positions. In the meantime, she was a Milwaukee County Circuit Court judge from 1981 to 1993 and a Wisconsin Supreme Court justice from 1993 until 1998. Geske served as interim dean of the Law School from summer 2002 to 2003 and as acting Milwaukee County executive for several months in 2002. Geske, whose talents include bringing people together through mediation and otherwise, established the Law School's Restorative Justice Initiative (featured in the

Summer 2004 *Marquette Lawyer*) and has earned numerous recognitions for her positive impact in addressing needs in Milwaukee and across the world.

Phoebe Williams



Phoebe Williams, associate professor of law, grew up in the segregated South and has been a role model at every stage of her life. She has been a model of determination to get a top-notch education, which brought her north to Marquette as an undergraduate in the 1960s. She graduated from the Law School in 1981 and has been a model of service, including in private practice, in volunteer roles in Milwaukee, and, since 1985, on the faculty of Marquette Law School. She has been, throughout, a model of wisdom, caring, and dignity. (A profile of Williams appeared in the Fall 2013 *Marquette Lawyer* magazine.) Williams will assume emerita status. ■

All three retirees inspired the people with whom they engaged, especially students. As they step down, it is appropriate to think how magnificently each has lived up to something Jane Casper said a few years ago when she received Marquette's Excellence in University Service Award (as quoted then in the Spring 2009 *Marquette Lawyer*):

“Never forget the impact you have on a student, a colleague, an unexpected visitor. . . . Never forget the impact we have on each other. Be patient and kind, have faith in the basic goodness of the people around you, share your expertise and skills, be the professional you know you are. It's in those single moments of care and respect and service that we make a difference in the lives we touch.”

A toast

Providing Coast-to-Coast Legal Expertise

Eric Van Vugt didn't set out to achieve an unusual career goal, but he succeeded. He realized several years ago that he had been involved in legal work in 49 of the 50 American states. The one not on the list? Maine. Without Van Vugt's seeking it, a short time later one of his clients asked for help on a legal matter—in Maine, of course. Van Vugt had completed the full set, so to speak.

More important than the geography of his legal work over 38 years, Van Vugt is able to look back, appreciate his good fortune, and say, "I have nothing but great feelings. . . . What a great career." His work, primarily as a litigator, has been rewarding, and he's had great colleagues and clients.

He is also able to look forward eagerly. A partner at the Milwaukee-based firm of Quarles & Brady, he has been transitioning into a newly created position at the firm: general counsel. More law firms are creating their own general counsel's offices as the firms recognize, with their growing size and complexity, that they have many of the same legal needs their clients have, Van Vugt said. He has continued to work with some of his previous clients, but his main emphasis now is "having basically 450 lawyer clients," dealing with issues such as liability, regulatory compliance, and cybersecurity. "It's a good time and a logical transition," he said.

Van Vugt grew up in western Michigan and met his wife, Wendy, when both were students at Calvin College in Grand Rapids. She was from the Chicago area, and, when he decided to go to law school, they agreed to focus on choices within range of Chicago. One reason for picking Marquette Law School was the scholarship help he was offered. He said he appreciates to this



day what that meant to him, and one result is his and Wendy's generous support of scholarship funding at Marquette Law School now.

Van Vugt figured that he would spend the three years in law school in Milwaukee and then move on. But he and his wife decided Milwaukee was an appealing place,

and, with the help of Professor James Ghiardi, he was offered a position with a local law firm. The 1970s were “the heyday of the litigator,” Van Vugt recalls, and his practice went well. He joined a different law firm in 1986, which merged in 1991 with Quarles. Van Vugt developed specialties including issues related to aviation and public pension plans.

Beyond his duties with the firm, he is an avid traveler. He has been able to combine his professional and personal interests in trips such as one he took this past spring to Honduras as part of a group of lawyers advising that country’s local bar on enforcing land title laws.

Van Vugt said that the fast start he got to his practice—he was trying a case in court a month after graduating— isn’t likely to occur in today’s much-changed world. But he is confident that career paths offering important and exciting work for new lawyers are still out there. That’s another reason for his continuing support and encouragement for the students at Marquette Law School today. ■

Congratulations to the following Marquette lawyers, inducted as members of the Class of 2013 into the **Fellows of the Wisconsin Law Foundation**. This honorary program recognizes a select number of lawyers for their high professional achievements and outstanding contributions to the advancement and improvement of the administration of justice in Wisconsin.

Steven M. Biskupic, '87

James F. Boyle, '84

Patrick W. Brennan, '81

Megan Patricia Carmody, '94

Randall D. Crocker, '79

William T. Curran, '75

Frank J. Daily, '68

John R. Decker, '77

Julianna Ebert, '81

Harry G. Holz, '58

Michael F. Hupy, '72

Kimberly A. Hurtado, '87

Barbara J. Janaszek, '81

Ralph J. Tease, Jr., '81

1968



James E. Duffy, Jr., a former associate justice of the Hawaii Supreme Court, received the National Center for State Courts’ Distinguished Service Award this past September.

NCSC President Mary McQueen said, “Justice Duffy has been a tireless advocate for the legal profession and for the people of Hawaii. His commitment to continuing legal education has made great strides in strengthening the profession and improving the public’s trust and confidence in the courts.”

1972



John F. Maloney has joined Quarles & Brady’s Milwaukee office as of counsel in the firm’s trusts and estates practice group. He brings to the firm

the experience of more than 40 years of practice in commercial litigation at both the trial and appellate levels.

1979



James A. Wynn, Jr., was elected this past fall to the Marquette University Board of Trustees. Wynn is a judge of the U.S. Court of Appeals for the Fourth Circuit.

1983

Paul T. Dacier was featured in a recent *National Law Journal* article about the Boston region’s top in-house law departments and their general counsel, denominating Dacier’s team at EMC Corp. “Boston Legal Department of the Year.” EMC, which Dacier joined in 1990 as its sole attorney, now has more than 60,000 employees and 120 lawyers.

1984



Daniel M. Chudnow has opened a museum featuring his father Avrum’s (L’37) collection of memorabilia from Milwaukee in the 1920s and 1930s. The museum is located at 839 North 11th St., near

the Marquette campus. Information can be found at chudnowmuseum.org. ▶▶

1985



Mark A. Cameli, of Reinhart Boerner Van Deuren in Milwaukee, has been recognized by *Benchmark Litigation 2014*, which recently named Reinhart a “highly recommended”

litigation firm. Cameli is a shareholder in the firm’s litigation practice, where he chairs the white-collar litigation and corporate compliance team.

1986

Thomas J. Krzyminski has been appointed Spokane County (Washington) public defender. He oversees the public defender’s office staff, which comprises 82 attorneys and support staff. Krzyminski also has held professional positions in the Air National Guard.

1989

Jack A. Enea has joined the Milwaukee office of Whyte Hirschboeck Dudek as a member of the corporate and finance practice group. Enea is also a certified public accountant.

1991

David Stegeman was recently honored at the *Milwaukee Business Journal’s* Top Corporate Counsel Awards Luncheon. Stegeman is general counsel at Michels Corp. and received the award as “Diversity Champion.”

1994

Lee Ann N. Conta has joined the Milwaukee office of von Briesen & Roper as a shareholder in the litigation and risk management practice group. Conta’s practice concentrates on insurance coverage disputes and other litigation.

2002



Joshua J. Brady has joined Galanis, Pollack, Jacobs & Johnson in Milwaukee as a shareholder. His practice focuses on the areas of creditors’ rights and commercial business litigation.

2003

Lydia J. Chartre has been elected a shareholder of Whyte Hirschboeck Dudek. She is a member of the real estate practice group in the firm’s Milwaukee and Madison offices.



Sherry D. Coley has been elected chairperson of the State Bar of Wisconsin’s Board of Governors. A member of the litigation practice group in Godfrey & Kahn’s Green Bay office, Coley is one of the youngest attorneys to receive this honor.

2004



Gwendolyn J. Cooley has been appointed vice chair of the American Bar Association Antitrust Section State Enforcement Committee for 2013–2016. She is an assistant attorney general at the Wisconsin Department of Justice in Madison.

John C. Gardner has been promoted to partner at the Madison office of DeWitt Ross & Stevens. He practices in the firm’s labor and employment relations and litigation practice groups.

Adam J. Sheridan has been named senior counsel for Meijer, Inc., in Grand Rapids, Michigan.

2005

Danielle M. Bergner was recently appointed a deputy city attorney for the City of Milwaukee. Her new responsibilities include managing the legal aspects of the city’s foreclosure, housing, and neighborhood revitalization initiatives.

Bridgette DeToro has been named a partner in the Milwaukee office of Quarles & Brady. She practices in the area of public finance. ▶▶

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



Davis Positions Herself for Success On and Off the Job

It seems in character that Cindy Davis has excelled even when it comes to relaxation.

It's been eight years since she became a Marquette lawyer, and in that time she has thrived in three positions where high-quality work was expected—first as a clerk for Wisconsin Supreme Court Justice David T. Prosser Jr.; then as an associate working on business law matters in the home office of Foley & Lardner, Milwaukee's largest law firm; and now as a prosecutor in the Milwaukee County District Attorney's office.

Each position has brought demands and pressures. Although she handled them well at work, Davis wanted outlets to balance her life. She turned to yoga about five years ago—or as she put it in a written piece, “Yoga found me . . . at a time when I was simply looking for a way to relax from the stresses of everyday life.” She wrote, “Yoga has been my safe-haven during both the good times and the bad and has empowered me through not only increased physical strength but also increased mental and spiritual strength.”

The yoga studio became, as Davis put it, “my home away from home, my club.” She became a certified instructor one year ago at YamaYoga studio, working with classes of 5 to 10 people one evening a week.

Davis described her year working for Justice Prosser as a great experience that combined many of her interests in the law. She spoke highly of her time with Foley & Lardner as well. “But my true passion was more with criminal law,” she said, so she joined the staff of Milwaukee County District Attorney John Chisholm in January 2011. Chisholm told her when she started that his central expectation is for prosecutors to “do the

right thing.” That instruction has stuck with her as she has worked in the drug, domestic violence, and child protection units in the district attorney's office. “It's worked out very well,” Davis said. “I feel I'm giving back to the community in which I grew up.”

Davis gives back to the community in her personal life as well. In addition to her yoga instruction, she is on the boards of Brookfield Academy, the school she attended from kindergarten through 12th grade, and First Congregational Church of Wauwatosa.

Davis's grandfather was a prominent lawyer in Milwaukee—he was the (Walter) Davis in the Davis & Kuelthau law firm, founded in 1967. Although her father, the late Stewart Davis, went into business, by the time Cindy Davis was in middle school she had developed an interest in becoming a lawyer. That led her to Marquette Law School, where she served as editor-in-chief of the *Marquette Law Review*. Davis remembers her student experiences not only for the training they gave her but also for the sense of warm community among faculty members and students and the ways the philosophy of *cura personalis* was given meaning and life.

Davis is reluctant to speculate on what is ahead for her. But it is clear that it will involve pursuing her commitment to work that serves the community and fulfills her own drive to do well. And, when it comes to her personal life, it will include ways to enhance her strengths, the way her yoga practice does. ■



From Small-Town Iowa to a Los Angeles Law Practice, Via Marquette Law School



Peter Roan didn't set out to be a successful lawyer with a specialized practice in Los Angeles. He started out as a public defender in Milwaukee, without a clear long-term plan.

But things have worked out differently and well—and that underlies the advice he has for law students now. In short: Aim to develop a specialty.

"I kind of fell into it," Roan said of his own specialty, health care litigation. He no doubt understates the work and knowledge that have gone into building his practice and, in recent years, led him to join Crowell & Moring, a 500-lawyer firm with offices around the world. But, Roan suggests, his advice reflects how the legal world has changed since the 1980s, when he started his career.

"There's always a degree of serendipity," Roan said, in anyone's life and career path. For him, the path started in Traer, Iowa, a town with a population of about 1,800 during his childhood. From there it led to the University of Iowa, where he got his bachelor's degree. After that he set his sights on law school and considered several, including Marquette Law School. "I just liked the feel of the place," he recalled. That feeling remained during law school: He remembers both working hard and having fun at Marquette.

Roan participated in the Public Defender Clinic in law school, and after graduating in 1985 accepted a position as an assistant public defender—a job that he greatly enjoyed. But when his then-girlfriend said she was moving back to her native southern California, "that sounded to me like a splendid idea."

In California Roan joined a small law firm. "When I started, I did anything that came in the door," Roan recalled. Increasingly, clients in health-related businesses

were the ones coming in that door. The firm grew over the next 18 years to about 50 lawyers, with a significant health care focus.

The health care world kept changing, and those changes have produced much litigation over the years. Another large change in the health care industry is underway now, of course, with implementation of the new national health care law. As Roan put it, a large number of people and organizations have been working hard on the front end of the new law—aiming to get the licenses, contracts, systems, practices, and policies in place to implement the law. "I'm kind of on the back end," which he said means that when things unravel or parties have disputes, he gets more involved.

Overall, Roan said, a lot of the things that young lawyers used to do as they started out, such as document review, are in declining demand because of technological change and outsourcing of services. Clients are looking for lawyers who know "everything there is to know" about a specific industry or field. "You're trained as a generalist, but you need to be a specialist," he suggested.

Roan still has ties to the Midwest, including family members who live in the region. An important remaining tie: "I'm still a Packers fan, and I have a share" of the stock the football team sold a few years ago. But he enjoys his life with his wife and two teenage daughters in a town near the California coast.

As much as the legal world is changing, Roan remains optimistic about prospects for those starting out. He said, "My advice for law students is to take action, not to hang your head." ■

2006

Nicole C. Maher, senior vice president/general counsel at Waterstone Mortgage Corporation, was honored at the *Milwaukee Business Journal's* Top Corporate Counsel Awards Luncheon as a mentor/coach.

Jessica D. Poliner, with Caterpillar Inc., has been promoted to a district manager position located in Panama City, Panama. She leads a team of individuals whose responsibilities include divisions of the company located in Colombia, Ecuador, Panama, and Venezuela. Within Panama, she serves as Caterpillar's main contact for governmental affairs.

2007

Steven M. DeVougas, an attorney with Hinshaw & Culbertson, has been appointed by Milwaukee Mayor Tom Barrett to the Milwaukee Fire and Police Commission.

2008

Melissa M. Ostrowski was recently named research compliance officer at Marshfield Clinic in Marshfield, Wisconsin, which currently has approximately 350 active research studies. She and her husband, Michael, welcomed a daughter, Allison, to their family in October 2012.



Amy Ruhig, attorney and manager—retail leasing at Jockey International, Kenosha, has been honored as one of the

Milwaukee Business Journal's "40 Under 40" for 2014.

Daniel R. Suhr has been appointed chief of staff to Wisconsin Lieutenant Governor Rebecca Kleefisch. He manages all aspects of Kleefisch's office, including communications, legislative relations, external engagement, and policy.

2009



Charles R. Stone, an attorney with Weiss Berzowski Brady in Milwaukee and adjunct professor of business at Peking University's Market Economy Academy,

was interviewed in Chinese by Yinan Wang of *Voice of America Chinese* for a video and series of articles on JP Morgan Chase in China.

2011

Daniel M. LaFrenz has joined the Milwaukee office of Michael Best & Friedrich. He is part of the firm's growing transactional practice group, specializing in tax matters.

2012



James N. Law has joined the Milwaukee office of Reinhart Boerner Van Deuren as an associate in the litigation practice. He previously served as a law

clerk in Green Bay for the Hon. William C. Griesbach, L'79, chief judge of the U.S. District Court for the Eastern District of Wisconsin.



Kurt M. Simatic has joined the Milwaukee office of Whyte Hirschboeck Dudek, where he practices in the areas of commercial

litigation, municipal law, civil rights, and

real estate and eminent domain. Before joining the firm, he served as a law clerk to the Hon. David T. Prosser Jr., justice of the Wisconsin Supreme Court.

2013



Joseph D. Birdsall has joined the Milwaukee office of Whyte Hirschboeck Dudek, practicing in the firm's human resources law practice group. His experience includes successfully pursuing appeals to the Wisconsin Labor and Industry Review Commission.

Rachel H. Bryers has joined Quarles & Brady's Milwaukee office as an associate in the health law practice group.

Holly E. Courtney has joined the law firm of Michael Best & Friedrich as an associate in the employment relations practice group in the firm's Madison office.

Patrick C. Greeley has joined the Milwaukee office of von Briesen & Roper as an associate in the firm's banking, bankruptcy, business restructuring, and real estate practice group.

Matthew J. Ludden has joined the corporate practice group in the Milwaukee office of Godfrey & Kahn.

Ariane C. Strombom, an attorney with Whyte Hirschboeck Dudek in Milwaukee, practicing corporate and technology law, has blogged about "data hoarding" at the website of *IB In Business*, based in Madison.

Kathryn K. Westfall is an associate in the business law practice of the Milwaukee office of Reinhart Boerner Van Deuren.

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MILWAUKEE JUSTICE CENTER

Mobile LEGAL *Clinic*

A project of **MARQUETTE UNIVERSITY LAW SCHOOL** and the **MILWAUKEE BAR ASSOCIATION**

This past year marked the introduction of the Milwaukee Justice Center Mobile Legal Clinic, a project of Marquette University Law School and the Milwaukee Bar Association to bring volunteer legal services closer to members of underserved communities.

A gift to Marquette Law School from Frank J. Daily, L'68, and Julianna Ebert, L'81, in honor of their fellow Quarles & Brady partner, Mike Gonring, L'82, provided not just the means but the inspiration of the project.

