

Criminal Law

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# Faculty Blog at Five Years Old

Since its establishment on September 1, 2008, the *Marquette Law School Faculty Blog* has flourished. It has welcomed more than 2,300 posts touching on law, the legal profession, public policy, and any number of other matters. Most posts are by faculty members, but the blog also regularly features an alumnus and a student blogger of the month. The blog is updated year-round, usually daily, as the following excerpts from the past spring and summer will give a sense. They are variously by Daniel D. Blinka, professor of law; Mike Gousha, distinguished fellow in law and public policy; and Kelli S. Thompson, L'96, Wisconsin's state public defender. **Visit the blog at [law.marquette.edu/facultyblog](http://law.marquette.edu/facultyblog).** ▶▶

Posts by  
**Daniel D. Blinka**

June 28, 2013

### Who Screamed? Experts, Rules, and the Zimmerman Trial

The Zimmerman homicide trial in Florida is an important bellwether on many levels. My colleague David Papke remarked in a previous blog post on the jury's composition and its possible effect on the outcome. The evidence, too, is controversial and contested. The notorious 911-call recording is deemed critical, yet the trial judge excluded expert testimony on voice identification as unreliable. Her ruling rippled across the country and may even hold lessons here in Wisconsin.

The 911 call recorded a man's voice "screaming" for help. The screamer's identity is disputed. George Zimmerman has claimed self-defense. Prosecution experts asserted, however, that the plea came from the victim, Trayvon Martin, moments before he was shot dead. A bevy of defense witnesses, including specialists with the FBI and the NSA, attacked the methods used by the state's experts.

The judge ruled that those techniques were not "generally accepted" by competent experts in the field. Put differently, she found the state's expert testimony unreliable. The jury thus will be on its own in divining whether Martin or Zimmerman screamed for help moments before the shooting.

By happenstance, the judge's ruling coincided with Florida's adoption of the *Daubert* "reliability" standard

for expert testimony just several weeks earlier. Tort reform motivated the change. The new rule, which takes effect in July, replaces the "general acceptance" standard that governed her ruling on voice identification. Does the standard applied—"general acceptance" or *Daubert*—make any difference? Probably not.

Wisconsin also adopted the *Daubert* standard, as part of tort reform in January 2011. It is remarkable that nearly two and one-half years later we have yet to see a published case on this issue, despite the ubiquity of expert testimony in civil and criminal cases. Why the dearth?

First, evidence law is not algebra. Admissibility rulings are quintessentially discretionary; the choice of standard is rarely outcome determinative, and appellate courts defer to trial courts. The Zimmerman trial judge would have almost certainly excluded the evidence under either test. And to speculate what a Wisconsin judge would have done is no more revealing than asking what a different Florida judge might have done.

Second, since January 2011, Wisconsin lawyers and judges have tried cases in the same competent manner as before the switch. *Daubert* has made little or no difference here because there was no "junk science" problem to begin with. Rulings have been restyled to accord with the new rule's language, but the end result—in or out—is likely the same.

Finally, Florida and Wisconsin both exemplify that *Daubert* is more about the politics of tort reform than the imperative of assuring reliable evidence. Florida's venerable *Frye* test (general acceptance) worked just fine here. Time and money are better spent on improving forensic sciences and the quality of expert testimony in court, especially in under-resourced criminal cases, than on bromides masquerading as evidence rules.

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July 10, 2013

## Do I Need to Draw You a Picture? The Zimmerman Trial and CGI Evidence

The Zimmerman trial nicely illustrates how messy trials can be. Witnesses contradict one another on most critical issues. For example, a bevy of witnesses have split over whether it was the victim, Trayvon Martin, or the defendant, George Zimmerman, screaming for help on the 911 recording. Moreover, the split among witnesses is, predictably, along party lines: friends and relatives of each claim the voice for their side. To make things messier, some of these witnesses seem to have contradicted themselves, asserting earlier that they couldn't recognize the voice but offering trial testimony that now positively identifies it. Adding to the confusion, some witnesses deny making the earlier inconsistent statements.

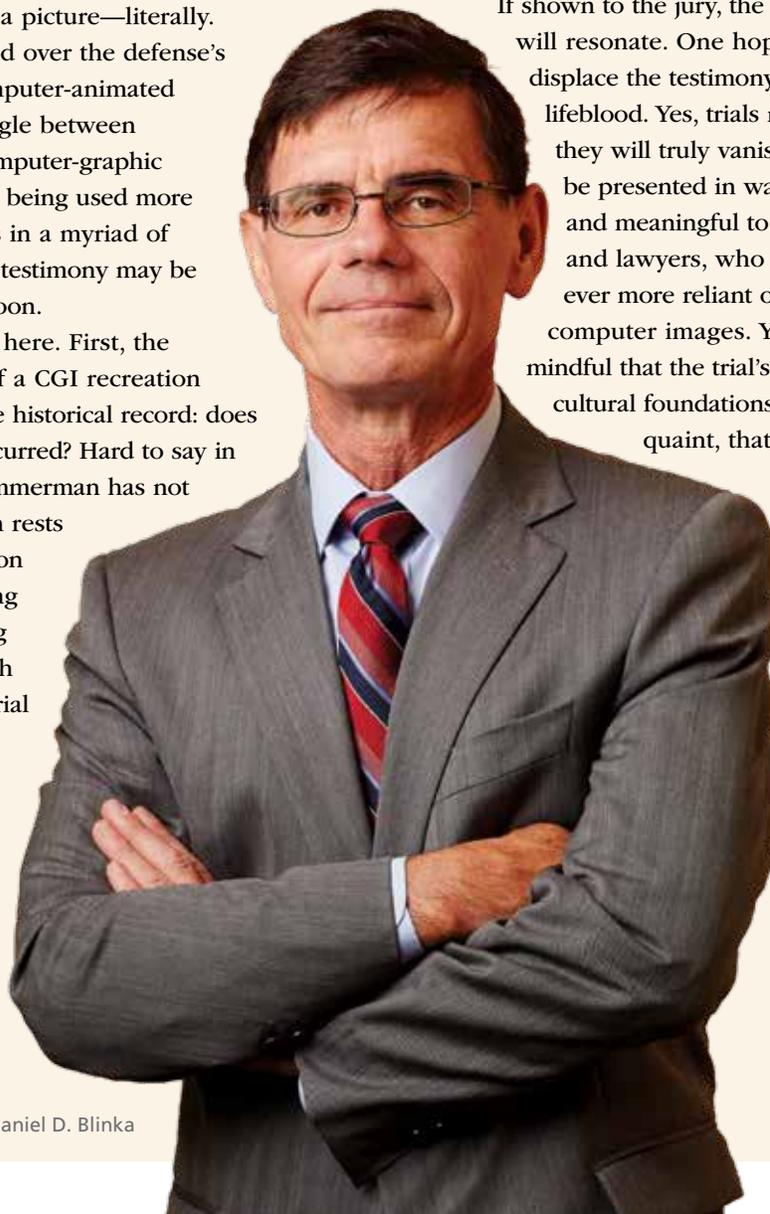
So, what's the jury to make of this morass? The defense solution is to draw a picture—literally. Yesterday the parties sparred over the defense's attempts to introduce a computer-animated recreation of the fatal struggle between Zimmerman and Martin. Computer-graphic imaging (CGI) technology is being used more and more to recreate events in a myriad of cases. A week of conflicting testimony may be reduced to a 60-second cartoon.

There are two problems here. First, the accuracy (authentication) of a CGI recreation depends on its fidelity to the historical record: does it accurately reflect what occurred? Hard to say in this case. Martin is dead. Zimmerman has not testified. The CGI recreation rests on the creators' reconstruction of events based on conflicting pretrial statements, including Zimmerman's, some of which have been contradicted by trial testimony, itself no model of clarity.

Put differently, the CGI recreation is the animators' version of the shooting, resting heavily on the defense version of events. It is tantamount to Zimmerman's story of what occurred with one crucial difference: Zimmerman does not have to take the stand and face cross-examination under oath about any of it. My own view is that it should be excluded unless Zimmerman takes the stand and testifies that it "fairly and accurately" depicts what happened.

And this underscores a second problem. Trials are predicated on testimony: oral statements made under oath in the presence of the trier of fact in the courtroom. Trial lawyers have long used demonstrative evidence to illustrate testimony, but diagrams and pictures of a crime scene are of a different order from a CGI reconstruction. Trials depend on word pictures: testimony by witnesses and persuasive arguments by lawyers. The jury's deliberation and verdict, we hope, embody its picture of what happened, assuming any comes into focus.

If shown to the jury, the CGI reconstruction will resonate. One hopes it doesn't displace the testimony that is the trial's lifeblood. Yes, trials need to change, or they will truly vanish. Evidence must be presented in ways understandable and meaningful to jurors, witnesses, and lawyers, who have become ever more reliant on technology and computer images. Yet we must be mindful that the trial's constitutional and cultural foundations are in a time, now quaint, that valued people coming together, face-to-face, so that they could publicly answer questions. Not a bad idea. ▶▶



Daniel D. Blinka

July 15, 2013

## Lessons from Zimmerman?

Predictably, the Zimmerman verdict has triggered headlines, sharp controversy, and protests. This was bound to happen regardless of whether he was acquitted or convicted. I leave it for others to tell us about the grand lessons this trial teaches about race, violence, and firearms. I will note, however, that the trial was not about any of these larger themes, and the jury's verdict spoke only about Zimmerman's conduct when he shot Trayvon Martin to death. It was not, in short, a show trial of any sort.

The trial's meaning for me reaches backward and forward in time. It reaches backward to a moment in my professional life when I was on the receiving end of the same verdict as a prosecutor—an acquittal in a highly publicized murder case in which the defendant claimed self-defense. As for the forward look, its lessons will undoubtedly permeate my One-L Criminal Law class in the fall (students are hereby placed on notice). The lesson is not one that dwells on the sensational publicity the Zimmerman trial garnered or the emotional devastation suffered by the Martin family but, rather, on its banality as an exemplar of a criminal trial—how it illustrates workaday principles relating to the definition of crimes, the elements of defenses, and, most important, the burdens of proof.

Zimmerman's defense lawyer was quoted as saying, "We proved George Zimmerman was not guilty." Assuming a correct quote, the statement is nonsense on about every level. The defense proved no such thing and was under no duty to do so.

In a murder case like this one, where there are no true eyewitnesses and nary a surveillance camera, only two people know what happened. The state's best witness, the victim, is dead—killed by the only surviving witness, the defendant. And the latter cannot be compelled to testify, unless, of course, it is in his best interest to do so. Let's agree that this creates some serious hurdles for the prosecution.

Proving the murder charge here is relatively straightforward: it is undisputed that Zimmerman shot

Martin to death. The proof problems relate to the self-defense. Once self-defense is raised, as Zimmerman did through his police-conducted interviews and some physical evidence, the burden is on the prosecutor to "rebut" it beyond a reasonable doubt. Like many jurisdictions, Florida law (apparently) authorizes deadly force whenever the defendant "reasonably believes" he is in danger of death or great bodily harm. What was Zimmerman thinking the moment he pulled the trigger, taking Martin's life? Did he "really" believe he was in grave danger, or was he enraged by Martin's defiance? Self-defense also asks what a "reasonable person" in Zimmerman's shoes would have done—which, of course, begs the question of whether any reasonable person would be on such a patrol to begin with.

The difficulty of negating Zimmerman's asserted beliefs beyond a reasonable doubt cannot be gainsaid. The best way is to catch him in a lie. But where the defendant elects not to testify—which is his constitutional right—the state is left with the slim pickings from his prior statements or other evidentiary scraps. Perversely, then, the State's objective was to prove that Zimmerman lied—a heck of a way to prove he murdered Martin. The very difficulty also tempts prosecutors to overcharge cases in an effort to coax a guilty plea from the defendant or a compromise verdict by the jury. Neither happened here, but the temptation is omnipresent.

As the nation obsesses about the verdict's meaning, perhaps we should think about the banalities of self-defense law along with race and firearms policies. In insanity cases, for example, most jurisdictions now impose the burden of proof on the defense, a procedural innovation sparked by outrage over the John Hinckley verdict (remember?). In light of the nation's passion for firearms permits, perhaps it's time to talk about restructuring who must prove what in self-defense cases. In the end, though, I'm glad the case was tried to a jury. In a system dominated by plea bargaining, it's institutionally healthy for us to know that the trial is a viable option for both defendants and prosecutors. As distraught as the Martin family surely is, I can't imagine they would have felt better had the prosecutors finagled a guilty plea to a "reckless-something" charge.

*"As the nation obsesses about the verdict's meaning, perhaps we should think about the banalities of self-defense law along with race and firearms policies."*



Posts by  
**Mike Gousha**

April 16, 2013

### **Metro Milwaukee Is Doing Better Than a Lot of Residents Think**

A couple of years ago, I was talking with one of the boosters of the effort to brand the Milwaukee area as a global water technology hub. He told me the biggest challenge the initiative would face would be Milwaukee's inferiority complex, or at least our unwillingness to brag about our assets.

I was reminded of that conversation recently, when the Law School collaborated with the *Milwaukee Journal Sentinel* on two major projects. On April 8, we hosted a conference in Eckstein Hall exploring the pros and cons of building a new downtown sports and entertainment facility. Those in attendance heard the president of the Oklahoma City Chamber of Commerce describe how his city had been dramatically transformed by a series of projects that had broad community support. Then, this past Sunday, the newspaper published the first in a four-part series examining the economic future of metropolitan Milwaukee. Called "A Time to Build," the series was reported by Rick Romell of the *Journal Sentinel*, under a six-month Law School fellowship established through the school's Sheldon B. Lubar Fund for Public Policy Research.

As part of that current series on the metro area's economic prospects, the newspaper created an interactive graphic that allows the reader to compare the nation's top 50 metropolitan areas. It's easy to use, and educational, too.

After hearing so much about the Oklahoma City success story, I thought it might be interesting to see how metro Milwaukee stacks up against Oklahoma City in several key categories. It turns out we do pretty well. We have more college graduates, higher per capita income, and a slightly lower poverty rate. I then added the metropolitan Dallas area to the mix, given Dallas's reputation as one of the stars of the Sunbelt. Again, the comparison was favorable. Milwaukee and Dallas had remarkably similar numbers in several key indices. The comparative data are available [here](#).

The major differences came in categories that looked at population growth (we're growing, but slowly compared to Oklahoma City and Dallas) and at residents who were born in the same state (we win that competition hands down). Does that "born here, stayed here" factor explain our inability to acknowledge Milwaukee's virtues? Does it create an insular way of thinking, more focused on problems than possibilities?

Metro Milwaukee faces some major challenges. We have a jarring income and education disparity. Our suburbs are prosperous, but our central city is poor. And unlike Oklahoma City, we struggle for consensus on what's best for the region. Still, the census data suggest this area, as a whole, is faring better than some observers might think, its residents included. ▶▶

April 23, 2013

## The Mayor and His Map

The next time you see Milwaukee Mayor Tom Barrett, ask him about his map. It's the mayor's latest weapon in his battle to stop the state from eliminating residency requirements for municipal employees in Wisconsin. More than 120 municipalities have rules spelling out where their employees can live. But Governor Walker wants to change that. He says residency requirements are unnecessary and outdated, even counterproductive, and he has included language in his state budget that would end them.

Mayor Barrett says the governor's proposal doesn't belong in the budget, since it's not a fiscal item. But Barrett's concerns go much deeper. In a recent email to supporters, Barrett said an end to the city's 75-year-old residency requirement could "destabilize" Milwaukee. I pressed the mayor on that claim in a recent television interview. He said that philosophically he agrees with the notion that people should be able to live where they want, but that local municipalities should be able to determine the conditions of employment for the people they hire. In Barrett's world, that translates into a simple reality. If you don't want to live in Milwaukee, don't apply for a job with the city. He said there's been no shortage of applicants.

Perhaps more important, Barrett said the value of assessed property in Milwaukee had fallen \$5 billion because of the economic downturn. He argued that based on experiences in other cities, such as Detroit, Minneapolis, Baltimore, and Cleveland, significant numbers of city employees were likely to leave the city should the residency requirement be lifted. Barrett was making the case that there was great risk to his city, and he wanted to show me a map he carried with him into the television studio. You can see it [here](#). Because of the amount of data in the file, it takes about 10–15 seconds to present itself.

The map shows the gravity of Milwaukee's foreclosure crisis. Foreclosed properties are in red. As of last week, there were nearly 2,600. Blue represents where the more than 7,000 city employees live. Besides helping stabilize struggling sections of Milwaukee, city employees are the backbone of a number of healthy, middle-class neighborhoods, including Bay View and the southwest, far south, and far west sides. These neighborhoods are home to hundreds of police officers and firefighters. But

what happens if, as the mayor believes, 40 to 50 percent of those blue dots—city employees—move outside the city? Will there be a dramatic downward pressure on property values?

The mayor contends the end of residency was a promise Governor Walker made to the Milwaukee police and firefighters unions in an effort to gain their support during his bid for governor. Walker argues that personal freedom should trump conditions of employment, and that, at the end of the day, it's up to the city to become a more attractive place to live. Neither man knows exactly what will happen should the requirement be eliminated. Nor do they know what Mayor Barrett's map will look like 10 years from now. But if Barrett is right, it will be a lot less blue, and Milwaukee could be a very different city.

June 4, 2013

## That's the Way It Was—and Is

When I was studying journalism at UW-Madison, we would sometimes end our day at Vilas Hall by grabbing a cold one at a nearby tavern on University Avenue. Bob and Gene's is no longer there, but a particular memory remains. One of the television sets at the bar was tuned each night to the *CBS Evening News*, and when anchorman Walter Cronkite came on the air, the place got quiet and remained that way until Cronkite's signature sign-off: "And that's the way it is." On the heels of Watergate and a long war that threatened to tear the nation apart, there was a sense that we had witnessed history.

We witnessed history again in Wisconsin last year, and this time it threatened to tear the state apart. One year ago—June 5—Wisconsin went to the polls in the recall election for governor. The protests of 2011 had been replaced by a political movement aimed at ousting Governor Scott Walker from office. It was an election that divided not just Republicans and Democrats, but friends and families, some of whom simply stopped talking about politics rather than run the risk of a nasty argument. Bitter and contentious, there was little middle ground. In the waning days of the race between Governor Scott Walker and Milwaukee Mayor Tom Barrett (a rematch of 2010), the Law School found itself in the middle of the fray. We released our final Marquette Law School Poll of the election cycle, showing Governor Walker leading by seven points (ultimately, his margin of victory). The Law School also played host to the final

debate of the campaign. As I moderated the event, I was struck not only by the sharpness of the exchanges between Barrett and Walker, but by how the evening had a certain rhythm to it, each candidate giving as good as he got. The two men knew each other well. They had done this several times before, and their familiarity along with their fundamentally different visions for the state produced an hour of compelling conversation. But I also remember the overwhelming silence in a packed Eckstein Hall when both Barrett and Walker would briefly pause to collect their thoughts. *Intense* doesn't begin to describe it.

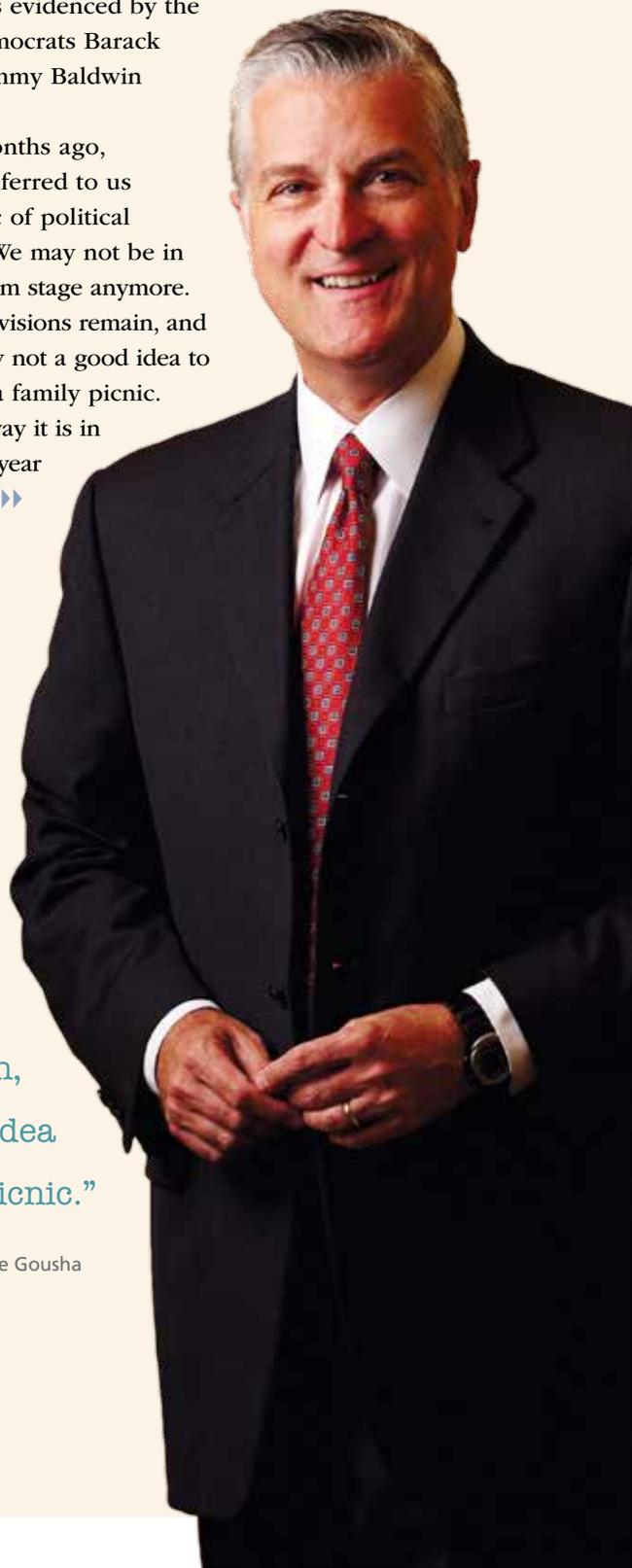
When Election Day was over, Scott Walker had won. Again. And life went on in Wisconsin. So what has happened in the year since the historic recall? In some ways, the debate seems remarkably familiar. We're still arguing over jobs numbers and the performance of the state's economy. According to our latest Marquette Law School Poll, the governor's job approval rating remains about the same, slightly more positive than negative. But one fact is beyond dispute: Wisconsin continues to undergo a rapid and fundamental transformation, one that could change its future course for not only years, but decades. With Republicans in control in Madison,

the state is quickly moving away from its progressive past, plotting a future built on a philosophy of lower taxes, less government assistance, fewer regulations, and more school choice. Election laws are also likely to change in ways that could benefit Republican candidates. For now, Democrats can do little but watch and wait for 2014, the next major election cycle. And yet, in many respects, Wisconsin is still a purple state, neither red nor blue, as evidenced by the victories of Democrats Barack Obama and Tammy Baldwin last November.

About 18 months ago, *Businessweek* referred to us as the "republic of political unhappiness." We may not be in the primal scream stage anymore. But our deep divisions remain, and it's still probably not a good idea to talk politics at a family picnic. And that's the way it is in Wisconsin, one year after the recall. ▶▶

"About 18 months ago, *Businessweek* referred to us as the 'republic of political unhappiness.' We may not be in the primal scream stage anymore. But our deep divisions remain, and it's still probably not a good idea to talk politics at a family picnic."

Mike Gousha



June 18, 2013

## Milwaukee: The \$5,000 House and Other Thoughts

I was having lunch the other day with someone who works in city government, and we were talking about the serious foreclosure problem in Milwaukee. He was lamenting the fact that in some of the poorest sections of the city, the housing market is fundamentally broken. Homes, now owned by the city, can be purchased for as little as \$5,000, and yet they still aren't selling. If you want some sobering evidence of the magnitude of the nation's housing market collapse and the impact of the Great Recession, check out the listings [here](#). They're stunning, really.

Mayor Tom Barrett estimates the foreclosure crisis has cost Milwaukee \$5 billion in assessed value. The city has tried to get a handle on the problem, but it persists, eating away at once-stable neighborhoods. In 2008, the mayor helped launch the Milwaukee Foreclosure Partnership Initiative, which tries to prevent foreclosures and stabilize neighborhoods. There's a branch of city government that directly addresses housing issues. And last week, the mayor announced he would be committing another \$2.3 million to address the foreclosure problem. As part of that initiative, scores of empty homes will be torn down because they're a blight on city neighborhoods. As a longtime Milwaukee resident, I'd be less than honest if I didn't say the specter of Detroit came to mind when I heard the news.

But the next Detroit is hardly the image thousands of newcomers have of my hometown. After losing 20 percent of its population from 1960 to 2000, Milwaukee is growing again. It's not a population explosion, but it's growth. Recent census numbers show that from 2010 to 2012, the city added 4,000 residents. What's most interesting is who's choosing to live in Milwaukee. Reporting by the *Milwaukee Journal Sentinel* (part of a collaboration with Marquette Law School) found that, in the last decade, there has been a migration of young people to the city. Many are college graduates. They live downtown, on the city's east side, and in "hot" neighborhoods like the Third Ward, Walker's Point, Bay View, Brewers Hill, and Washington Heights. Their presence has brought a new energy and economic vitality to parts of Milwaukee, with restaurants and shops racing to meet the demands of younger consumers. These newcomers are helping fuel a change in Milwaukee's risk-averse entrepreneurial culture and

have created a dynamic arts and entertainment scene. Their arrival is also welcome news to established Fortune 500 companies like Northwestern Mutual, which is planning a new skyscraper for its downtown campus, along with hundreds of news jobs.

To be sure, none of this diminishes the enormous challenges our city faces. Can a city truly be great when some neighborhoods are so undesirable that homes sell for \$5,000 or less, while others are so prosperous that apartments regularly rent for \$2,000 a month or more? It's hard to make the case for greatness when you have such jaw-dropping disparity in income and housing.

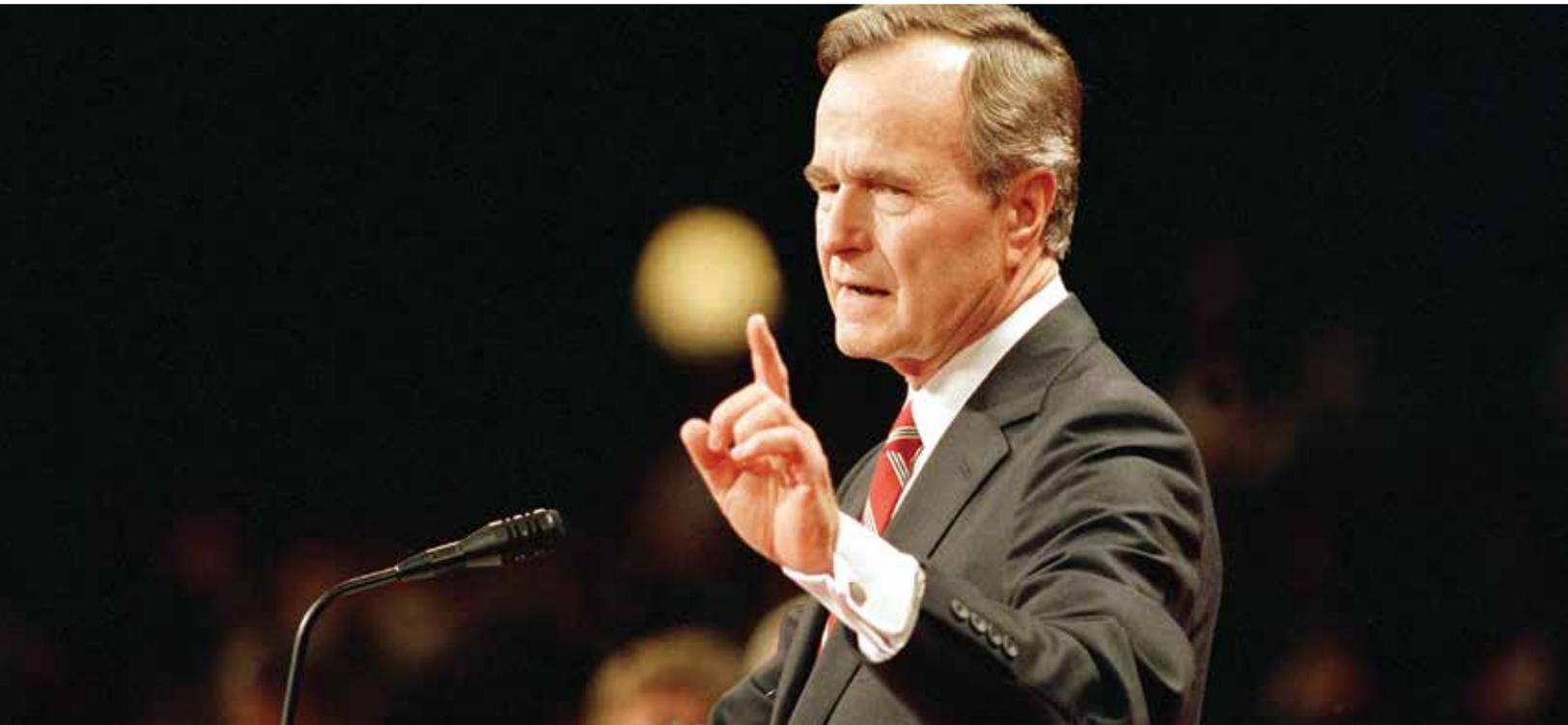
So what role, if any, should government play in addressing the challenges facing Milwaukee? During the last gubernatorial race, Governor Walker said other towns and cities in Wisconsin "don't want to be like Milwaukee." It's true that you don't have to travel far outside the city to hear that sentiment expressed, sometimes a bit more bluntly. It's also true these other places can't be like Milwaukee. We're simply bigger and more diverse, our problems larger and more complex. But no matter how people feel about Milwaukee, its future matters. In a recent interview with the *Cap Times*, the retiring director of the University Research Park in Madison, Mark Bugher, said, "The secret to the Wisconsin economy is still Milwaukee." Bugher is a Republican, a former member of Governor Tommy Thompson's administration. "My advice to elected officials," he said, "is to do all you can to help the Milwaukee economy, the school district, the infrastructure there. That will pay dividends for the balance of the state."

There are no easy answers to Milwaukee's foreclosure crisis. But Bugher's larger observation is worth noting: Milwaukee, with its chaotic mix of dirt-cheap houses and million-dollar condos, its Fortune 500 headquarters and underemployed workforce, offers plenty of challenges. But it also offers plenty of potential. And it may offer Wisconsin its best chance for economic success in the future.

July 17, 2013

## The Promise

The promise. It's long been a staple of political campaigns, and it's easy to understand why. Candidates need to find a way to connect with voters, to cut through the messaging clutter, and nothing does the trick quite like a simple, direct "This is what



I'm going to do" statement. The promise, after all, is about much more than words. It reflects a candidate's vision and confidence. I mean, who wants to vote for someone who's not so sure what the future holds? We want our candidates to be bold, decisive, and optimistic.

There's just one danger. What if a candidate gets elected and fails to deliver on a promise or falls short of it? Is a broken promise fatal, or do voters today see the promise as a different animal: more a statement of goals and aspirations than a contract with (as we say in television) no "outs"?

They're questions worth asking, because in Wisconsin's 2014 race for governor, a promise will almost certainly be front and center. It's the one Governor Scott Walker made in February of 2010, when he said Wisconsin would create 250,000 new private-sector jobs in his first term in office (fewer Wisconsinites are likely to remember Democratic candidate Tom Barrett's goal of creating 180,000 new jobs). Then-candidate Walker based his pledge on numbers that had been achieved by former Republican Governor Tommy Thompson in his first four years, and he repeated it again and again to voters and media around the state. When Walker appeared on my *UpFront* television show late that February, I asked him, "Is this a campaign promise? Something you want to be held to?" Walker didn't hesitate. "Absolutely," he replied. "To me, 250,000 is a minimum. Just a base."

The governor is now more than halfway through his first term. At the current pace, businesses in the state would create about half of the 250,000 jobs he promised in his first four years. Walker says he's making progress and still working to achieve the 250,000 goal but has acknowledged it won't be easy.

So here's the question. What would be the political fallout if the governor fell short of his goal? While he still has another 18 months in his term, Democrats are already hammering Walker on his jobs record, accusing him of backing away from his pledge. To be sure, the state's job performance will play a major role in next year's race, but will "the promise" be a make-or-break issue?

Recent history provides some interesting food for thought. In 1988, Republican presidential nominee George H. W. Bush brought down the house at the GOP national convention by promising, "Read my lips: no new taxes." But by 1990, President Bush had been forced to raise taxes, and by 1992, his opponents in the fall election, Democrat Bill Clinton and independent Ross Perot, were questioning Bush's trustworthiness. While a slumping economy may have had more to do with his defeat, the "read my lips" promise dogged Bush throughout the fall campaign, hurting him with conservative and independent voters.

Breaking a political promise may have kept the Brewers in Milwaukee, but it cost former Republican state Senator George Petak his job. It was 1995, and Petak had promised his Racine County constituents that ►►



Mike Gousha welcomes Governor Scott Walker and Mayor Tom Barrett to Eckstein Hall's Appellate Courtroom on May 31, 2012, for the gubernatorial recall election debate.

he would oppose any bill that included their county in the stadium tax district. But at the last minute, with the Miller Park funding legislation in jeopardy, Petak had a change of heart. He voted for the legislation. Voters were furious, and their punishment was swift. Petak faced a recall election in June of 1996, and his Democratic opponent, State Representative Kimberly Plache, pummeled Petak with his *promise*. His political career was over. Petak would have the distinction of being the first Wisconsin legislator to be successfully recalled from office.

In contrast, what was perceived as a broken promise did not prove fatal in the 2012 presidential election. In January of 2009, Obama administration officials projected that because of the \$825 billion stimulus spending package, unemployment would not climb above 8 percent. By October of 2009, unemployment stood at 10 percent. It was still above 8 percent as the 2012 election year began. Republicans claimed the president had broken his “promise.” While the report from his administration referred to “significant margins of error” in its projections, and Obama didn’t specifically use the word *promise*, it was viewed as such by millions of voters. But Obama overcame the criticism to win reelection. He won easily in Wisconsin, by seven percentage points.

Which brings us to 2014 and how the Walker promise of 2010 might play with voters. First, Walker’s promise is somewhat different from the ones made by Bush and Petak. They pledged specifically not to do something, and then did it. For some voters, the flip-flop—no matter what the explanation—is unforgivable. Combine that with a red-hot issue (tax hikes or Miller Park), and you have an enraged, engaged electorate. But would Walker’s failure to deliver on his 250,000-jobs pledge generate the same

intense voter reaction? Or have most voters already made up their minds about the governor? Polling suggests that Walker supporters are fiercely loyal to the candidate. The question is whether failure to hit his 250,000 target would sufficiently motivate enough dissatisfied Democrats and independents to impact an election.

Second, the broken promise as a campaign weapon is only as effective as its Democratic messenger. In the hands of Bill Clinton, George Bush’s “read my lips” promise was a gift from the political gods. It’s not clear who Walker’s Democratic challenger will be, but he or she will have to articulate not only a convincing critique of Walker’s promise, but an appealing economic roadmap for the future.

Finally, whether some Wisconsin voters are in the mood to overlook an unkept promise will depend on what happens to the state’s jobs numbers in the next 12 months. If the pace of job growth improves, the 250,000 pledge may seem less important to voters. The governor is already beginning to use a “We’re on the right track, don’t turn back” theme in interviews and speeches. He makes no apologies for aiming high, and says that initial job growth was slowed by the recall turmoil. But if Wisconsin continues to trail its Midwestern neighbors in job creation, his explanation could ring hollow with voters. Ironically, the governor may have to hope that Wisconsin residents come to the same conclusion about him that they did about President Obama: that enough progress has been made on the jobs issue to warrant a second term in office.

There is a certain peril in the political promise. But for most candidates, it’s a risk worth taking. The promise Governor Walker made three and one-half years ago helped lead him to victory. And as any political strategist will tell you, you can’t govern unless you win.

Posts by

Kelli S. Thompson

July 3, 2013

## The Legacy of *Gideon v. Wainwright* in Wisconsin

I'd like to take the opportunity through my posts this month to talk about some of the trends and milestones that I see in the field of law, particularly as it pertains to our criminal justice system.

*Gideon v. Wainwright*, the landmark 1963 U.S. Supreme Court case, started with a handwritten petition from Clarence Gideon. The decision in *Gideon* set the country's criminal justice system on a different course: defendants who could not afford legal counsel have the right to be provided with such representation.

Although the scope of the constitutional right to counsel was established with the *Gideon* decision, the responsibility and the details of its implementation were left to the individual states.

In the early years following the decision, Wisconsin complied with the requirement through a county-by-county system.

This county-based approach changed in 1977 when

Wisconsin took the strategic step of adopting a statewide model of indigent defense, establishing the Office of the State Public Defender (SPD) as an

independent, executive-branch state agency. SPD trial offices started to open across the state, and the appellate representation, previously overseen by the Wisconsin Supreme Court, was transferred to the agency. The SPD ensures that our state meets the constitutional requirements set forth in *Gideon*.

Wisconsin's statewide approach offered through the SPD afforded consistency of operations, equal access to justice throughout the entire state, and economies of scale. Today, Wisconsin is one of about 20 states that rely on a statewide public defender system, with the remaining states largely relying on a county-by-county system.

The SPD's jurisdiction reaches all of Wisconsin's courtrooms. Staff are located in 35 trial offices located around the state, in two appellate offices located in Milwaukee and Madison, and in one central administration office in Madison. In fact, this very month we will honor the 35th anniversary of the opening of our first trial offices. In addition to SPD staff, over 1,000 private attorneys represent clients who meet the criteria for SPD services. These private attorneys are certified to accept public defender appointments in conflict-of-interest and overflow cases. Through the combined effort of our staff and our partners in the private bar, the SPD represented clients in almost 140,000 new cases in the last fiscal year.

The SPD is one component of a very strong criminal justice system that also includes judges, prosecutors, law enforcement, corrections officials, and court personnel. I am proud to say that Wisconsin has a long tradition of supporting all parts of this criminal justice system, in spite of fiscal challenges. In the area of providing effective defense services to those unable to hire an attorney, we recognize the decision in *Gideon v. Wainwright* as an important and historic part of this tradition. ▶▶

“Through the combined effort of our staff and our partners in the private bar, the SPD represented clients in almost 140,000 new cases in the last fiscal year.”

Kelli S. Thompson



July 11, 2013

## Evidence-Based Decision Making: The Increasing Use of Research in Our Criminal Justice System

There is a growing trend in the criminal justice field to integrate evidence-based decision making, or EBDM, into local justice systems. At its simplest, EBDM can be described as the practice of using what has been proven to work. It places the primary reliance upon current and sound research, rather than upon anecdotal information, guesswork, or solely the experience of an individual. While the use of evidence-based decision making is relatively new to the field of criminal justice, the health care industry has embraced EBDM for some time.

The promise of evidence-based decision making is that it produces more consistent and better outcomes, as confirmed by the underlying research. In the criminal justice system, the benefits include the implementation of policies and practices that meet the goals of maximizing public safety, reducing the risk of reoffending, more appropriately allocating limited resources, and reducing costs.

Wisconsin is at the forefront of the trend toward the introduction of EBDM into its criminal justice systems. Substantial efforts are underway to integrate evidence-based decision making into our local criminal justice systems. Both Eau Claire County and Milwaukee County are currently researching and applying the methodologies and processes of EBDM into their respective criminal justice systems. The National Institute of Corrections (NIC) has provided great support in these efforts: NIC honored Eau Claire County and Milwaukee County as two of three jurisdictions among a nationwide pool of candidates to receive full technical assistance grants focusing on EBDM. As recipients of two of the three awards, both Eau Claire and Milwaukee are receiving the highest level of technical assistance offered by NIC.

Eau Claire and Milwaukee have already seen practical impacts from the adoption of risk-assessment screening after an individual is arrested but before his or her first court appearance. Assessment tools help guide the court's decision on issues such as bail amount and conditions. Use of this information appropriately places defendants on a track that maximizes the benefits previously listed.

The integration of evidence-based decision making into our criminal justice systems requires a substantial

level of expertise and coordination. Both of these elements are reflected in the partnerships NIC has formed in Eau Claire and Milwaukee, specifically with the respective county criminal justice coordinating councils. EBDM has also had an impact on state policy makers, as evidenced by increased resources for treatment, diversion, and drug courts in the most recent state budget as well as the formation of Wisconsin's first Statewide Criminal Justice Coordinating Council.

All that is learned through these partnerships will help serve as a model for other Wisconsin counties and for other jurisdictions across our country.

July 19, 2013

## The Continued Expansion of Treatment Courts in Wisconsin

Wisconsin was an early adopter of problem-solving, or treatment, courts. Starting with Dane County's Drug Court Treatment Program in June 1996, Wisconsin is now home to 56 operating treatment courts according to the Wisconsin Court System website. In addition to treatment courts that address drug addiction, our state also has treatment courts that focus on alcohol, mental health, veterans, and tribal wellness. Some are hybrid (or co-occurring disorders) courts. While most courts are operated by one county for cases arising in that county, we are starting to see regional courts that address offenders from multiple counties.

Treatment courts, as the name suggests, treat or solve an issue while still holding the offender accountable for his or her criminal activities. Removing an offender's addiction, for instance, decreases the likelihood that the person will reoffend in order to "feed" his or her addiction. Successful treatment can lead to a reduction in crime and recidivism while restoring an individual to have a greater opportunity to be a valuable member of the community.

One of the drivers behind the proliferation of treatment courts is the proven outcomes they are able to produce. In fact, according to a UW Population Health Institute study of treatment alternatives and diversion programs, communities received a \$1.93 return on each \$1.00 invested in these programs.

The treatment court model relies on a team-based approach to oversee and assist the individual to treat his or her addictions. Judges, prosecutors, defense attorneys, probation agents, law enforcement, and treatment providers all come together in a nonadversarial model

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to promote problem-solving responses tailored to each offender. Nationally, research shows that specific aspects of treatment courts, such as this team approach and the direct interaction between the participants and the presiding judge, help the courts achieve the goal of reducing recidivism.

The Statewide Criminal Justice Coordinating Council and the Wisconsin Association of Treatment Court Professionals are working to create state standards for treatment courts to facilitate implementation in counties that may lack the resources to start a specialty court but that could sustain it once started.

The documented success of treatment courts makes it likely that Wisconsin will continue to see the development of new courts of this nature. The time, energy, and resources necessary to plan and operate these courts properly are a smart investment with significant benefits for individual participants, for public safety, and for taxpayers.

July 26, 2013

## The Role of Specialized Practice Groups in a Public Law Firm

The Wisconsin State Public Defender (SPD) has dual responsibilities: we are a large law firm and a state agency. Although there is overlap, each function has its own set of expectations and stakeholders, and we strive to achieve harmony between both roles. In this blog post, I am going to discuss an area where we achieve congruence by developing specialty practice groups.

From the beginning of the SPD, we organized ourselves based on specializing in appellate and trial work. The agency continues to maintain both of these general areas of practice, and we have identified additional specific practice areas: juvenile, forensics, termination of parental rights, racial disparity, immigration, and sexually violent persons (Ch. 980).

The SPD benefits in several ways. From a state agency perspective, specialty practice groups allow us to share specialized knowledge and expertise efficiently,

lessening the need for staff and private attorneys to “reinvent the wheel” in these complex practice areas. From a law firm perspective, specialization allows us to enhance the quality of legal representation provided to our clients statewide.

Each practice group is led by a coordinator. That person stays abreast of the latest developments in the practice area and shares this expertise as an advisor, mentor, and educator to other SPD practitioners. Coordinators serve as a clearinghouse of sorts as they assist others in quickly changing areas of legal practice. Staff contact them as needed when they are preparing a client’s case or have a question in a new or undeveloped area of the law.

Each coordinator pulls together practice materials, including motions, briefs, transcripts, case outlines, and research/articles/studies to share with practitioners. Coordinators keep track of the legal nuances and mundane details in their practice areas and catalog them for easy dissemination to attorneys when requested. They assist with the agency’s training efforts, including presenting at the annual conference. Some coordinators conduct or assist with expert examinations at motion hearings and trials. The coordinators also assist private bar attorneys with their questions related to the respective practice areas.

Cases involving clients charged as sexually violent persons typically involve a number of very intricate and arcane actuarial statistics. A practitioner who only occasionally takes such cases would find it challenging to build the expertise needed to work with statistics. In this example, the Ch. 980 practice group assists the attorneys with training in these math and statistical elements. Similarly, the forensics coordinator helps others with the technical aspects of this practice area. In fact, as I write this post, the coordinator for our forensics practice group is assisting in a jury trial by focusing on the forensic elements of the case.

As the agency continues to utilize such specialties, we will, as necessary, change and adapt to the ever-evolving and changing field of criminal justice in Wisconsin. ■