

MARQUETTE LAWYER

MARQUETTE UNIVERSITY LAW SCHOOL MAGAZINE

FALL 2016

Judge Brett Kavanaugh on
SEPARATION OF POWERS
IN THE BUSH AND OBAMA ERAS

Comments by Akhil Amar and Paul Clement

ALSO INSIDE:

Chief Justice Roggensack on
Race and Sentencing in Wisconsin

Tom Merrill on the Future of Law Reviews

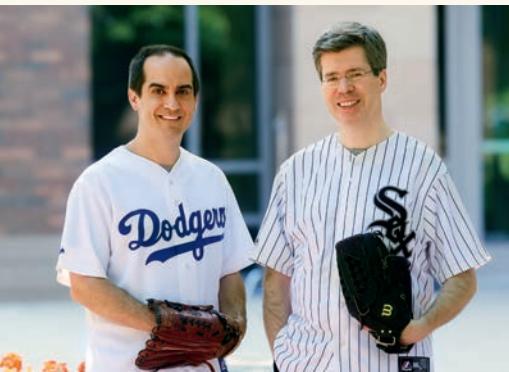
Papke on Hollywood Legal Comedies

The Supreme Court and Religious Liberty



A Reflection on a Law Faculty

The character of a school is found in its faculty, where it is not uncommon for individuals to spend an entire career—a lifetime, almost. The latter may be a bit uncommon, but Professor Jim Ghiardi stands as an example at Marquette Law School: As we remembered in the previous issue of this magazine, Professor Ghiardi's faculty service covered some 70 years, until his death this past January. We faculty are primarily responsible for guiding our students as they form themselves into Marquette lawyers. This work captures—and captivates—many of us until we retire from Marquette Law School.



Matt Parlow and Joseph Kearney

To be sure, there is the occasional earlier departure. This past spring we said farewell to two of our younger colleagues: Matt Parlow and Janie Kim, both professors of law, who now find themselves at Chapman University in Orange County, Calif., where Matt is dean of

the law school and Janie serves on the faculty. We shall have to come up with a new brag, now that we can no longer tout our having recruited this husband-and-wife team away from law teaching positions in their native southern California in 2008. Yet, while they spent just eight years of their careers with us, they did great things for us at Marquette, both on the faculty and administratively (in particular, Matt's service as associate dean for academic affairs). In fact, there can be no doubt that they enriched us and our students in ways that will last. We even permitted them to take their children—native Wisconsinites—with them, provided that they all visit us on occasion.

Michael Waxman, though retired, will be no visitor when he comes to Eckstein Hall: He has elected to remain one of us, taking on the rank of emeritus professor. Michael was a pioneer on the Marquette Law School faculty: He does not mind my saying that the Law School had not hired Jewish boys from Yonkers before 1980. But that is not the extent of it—or even most of it. Whether it was his experience as a lawyer on the East Coast, his

Fulbright Program grants to teach and research in Japan, or his election to the American Law Institute, Michael enriched and expanded the law faculty for the past 36 years. I always think emeritus status to be a great gift *from* the retiring faculty member: It is a statement that someone thinks well enough of Marquette University Law School as a community that he or she favors a continuing association. So it is with Professor Waxman and several other colleagues in recent years: Professors Carolyn Edwards, Jack Kircher, and Phoebe Williams.

During their years of active faculty service, all of these individuals did more than enrich the minds and lives of their colleagues on the faculty or even Marquette law students (again, their primary work). They also enriched the Milwaukee community more generally, serving in important roles in governmental, religious, and civic organizations. At the same time, there are limits to their local loyalties. My own affinity for Milwaukee is well known, from past magazines and columns (and in more-substantive ways, I hope), but it is equally public that, on the sports front, my affinity remains with the teams of my youth: in particular, the Chicago White Sox (this has been a tough year for us White Sox fans). Others are even more demonstrative: Matt Parlow, for example, routinely represented Los Angeles sports teams in his sartorial choices in Milwaukee.

So, just as our forebears tolerated—no, welcomed—our joining Marquette Law School from other places, we follow their example. If Howard Eisenberg, as passionate a fan of the Chicago Cubs as I ever knew, could appoint me to the faculty, surely I had it within me to name Professor Chad Oldfather as Matt's successor as associate dean for academic affairs. Whether “Minnesota nice” is always applicable to fans of the Twins insofar as baseball is concerned, we know, from the past decade, of Chad's commitment to Marquette Law School and its students. This is the sort of commitment that brings and keeps us together. While we never quite let go of the past, we will always reach for the future.

Joseph D. Kearney
Dean and Professor of Law

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Editor: Alan J. Borsuk
Design: Douglas Frohmader,
Andy Haas Schneider
Copy editor: Amy Bauman
Photography: John Nienhuis
Cover Illustration: Taylor Callery
Please send address changes to:
Marquette University Law School
Office of Alumni Relations
Eckstein Hall, P.O. Box 1881
Milwaukee, WI 53201-1881
Phone: (414) 288-7090
Fax: (414) 288-6403
law.marquette.edu
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National Security, Individual Liberty, and You

Few legal issues are as important today as how to navigate the sometimes-conflicting imperatives of personal liberty and national security. A conference in June at Eckstein Hall brought together leading figures in dealing with this challenge. The conference was sponsored by Marquette Law School, the Milwaukee Lawyer Chapter of the American Constitution Society, and the Milwaukee Lawyers Chapter of the Federalist Society, and it received support from the Law School's Lubar Fund for Public Policy Research.

A recording of the conference is available online at the Law School's website. Here are a few of the provocative thoughts presented.



"Our democracy depends on the proper flow of information between the government and the citizenry. Information about the government's activities generally should be available to the people so they can engage in informed and effective self-governance. Conversely, personal information about law-abiding citizens generally should be off-limits to the government. In the last 15 years, these principles have been stood on their head, as the government claims the right to withhold more and more information about its own conduct while aiming to obtain more and more information about our personal lives."

— Faiza Patel, codirector of the Liberty and National Security Program of the Brennan Center for Justice at New York University School of Law

"Never has the government had more access to information about every single one of us than now. . . . Most of you are probably carrying very sophisticated tracking devices in your pockets or purses right now, devices that allow extraordinarily invasive searches to be conducted, subject in most cases to appropriate legal authorization. Far from being 'dark' [keeping government unable to find out what people are doing], intelligence surveillance now has never been brighter."

— Alex Abdo, staff attorney with the American Civil Liberties Union's Speech, Privacy, and Technology Project

"It's not just the golden age of surveillance [as Abdo described it]; it's the golden age of terrorism."

— Stewart A. Baker, former first assistant secretary for policy of the Department of Homeland Security, now in private practice in Washington, D.C., arguing for allowing the government to be able to break encrypted material

► “Absolutely.”

— Janan Najeeb, president of the Milwaukee Muslim Women’s Coalition, when asked if she felt her individual liberties have been affected by security concerns



“According to what you’ve just heard [from Patel], the National Security Agency greeted 9/11 by instituting a program in which it rifles information belonging to Americans, having absolutely no effect at all on terrorism, doing nothing to fight terrorism, simply satisfying promiscuous curiosity or promoting some other impermissible but secret government purpose that has affected the lives of all of us, but none of us can point to a particular way in which it has affected us. That frankly strikes me as utter nonsense. The fact is, we are engaged in a war with a death cult.”

— Michael B. Mukasey, U.S. attorney general from 2007 to 2009, now in private practice in New York City

► **Patel and Mukasey, discussing whether Edward Snowden, who leaked vast amounts of NSA secrets, should be regarded as a whistle-blower or someone who betrayed U.S. security:**

Patel: “I doubt he’s very comfortable in Russia.”

Mukasey: “Good.”

► **“Courts are struggling hard to try to figure out what that reasonable expectation of privacy is in a world where we’re no longer talking about the four walls of my house or the inside of my car.”**

— U.S. District Judge Pamela Pepper of the Eastern District of Wisconsin, discussing law enforcement surveillance of people’s smart phones and social media

► **“A year later, I’m very pleased by how this law works in practice.”**

— U.S. Rep. James Sensenbrenner (R-Wis.), who played a central role in passing the USA Freedom Act in 2015, which trimmed the latitude of the federal government to collect bulk data about Americans

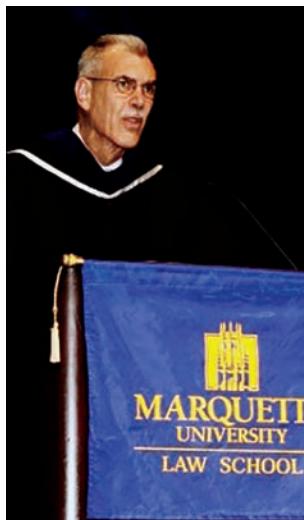
► **“Our bidding laws pretty much guarantee we’ll be at a permanent disadvantage against sophisticated cyber adversaries, all right? Forget about it. We’ve lost that arms race.”**

— Milwaukee Police Chief Edward Flynn

► **“We have accomplished something that is very much our essential purpose. . . . I know a very good deal more about the government programs, the regulatory oversight, the distinction between federal and local capabilities, the extent of judicial involvement, the possible future of the government programs, the particular concerns of one minority community, and the emerging conflict between law enforcement and private commercial interests. That’s a lot, and that’s not the extent of it.”**

— Marquette Law School Dean Joseph D. Kearney, concluding the conference

Solicitor General Tells Graduates to Show Character in the Little Things They Do



As the speaker at the May 2016 Hooding Ceremony for graduates of Marquette Law School, Donald B. Verrilli, Jr., said that he was not going to talk about pursuing big dreams.

Verrilli, who was solicitor general of the United States, told the graduates at the Milwaukee Theatre, "Find your passion, reach for the stars—you're already doing that."

Instead, he said, he wanted to talk about little things, the day-in, day-out things they would do as lawyers. Those little things will add up to showing whether the graduates will be genuine advocates of the rule of law and the pursuit of justice.

"As far as I'm concerned, the question of character has everything to do with your success in this profession," said Verrilli to the 180 graduating students.

Character will show up in whether they give of themselves to others or whether they act selfishly. Whether

they cut corners or do things right in the fullest manner. Whether they assume the worst about others without grounds for that. Whether they are candid about the law and the facts in court.

"Integrity is what really matters," Verrilli said. If they act with integrity, they will be the lawyers other lawyers want to be and the ones clients seek out, Verrilli told the graduates. They will be the ones who are there for others in hard times. They will be leaders of their communities.

Realizing the big dreams and achieving the big successes follow from doing little things right and well, Verrilli said. The graduates' legal education at Marquette Law School has given them the opportunity to pursue paths that will "make this a more perfect union."

Verrilli earned a reputation for excellence as a lawyer, both in private practice and in his years as solicitor general, Marquette Law School Dean Joseph D. Kearney said in introducing Verrilli at the hooding ceremony.

As solicitor general, Verrilli was the principal lawyer representing the federal government before the Supreme Court of the United States. His unusually long service in that position began in 2011 and lasted five years, until he stepped down in June 2016. ■

Anderson Named Director of National Sports Law Institute

My focus is 100 percent on working for the students." Paul Anderson means it when he says that. Just ask anyone who has been involved with the sports law program at Marquette Law School or with the National Sports Law Institute, based at the Law School. In the 21 years since Anderson himself graduated from the Law School, he has been at the heart of the program.

In recognition of that and to advance the program, Anderson has been named director of the National Sports Law Institute and the sports law program. Matt Mitten, who was director, now is executive director of

the institute, and he continues as a professor of law.

Anderson said his focus has increased in recent years on creating opportunities for students, both while they are in law school (outside internships being one important example) and after graduation. He also leads the work on more than two dozen sports-law-related conferences and events each year at Marquette Law School. ■



Alexis Leineweber: Using Every Minute to Pursue Her Goals

At the end of a typical day, Alexis Leineweber counts up how many minutes she has not used productively that day. She typically finds the answer she's hoping for: Very few.

At 7 a.m., Leineweber, now in her second year of law school, is one of the people waiting outside for the doors of Eckstein Hall to open. She focuses intently between then and 5 p.m. on being a law student. That includes long stretches in the Aitken Reading Room.

At 5 p.m., she leaves Eckstein Hall and switches into a second role: Leineweber owns and runs a furniture upholstery and design business. She works with a roster of interior designers, specializing in reupholstering old furniture and making "soft furnishings," including draperies, pillows, and poufs (they're like big pillows). She usually has work lined up for the next six months.

At 8 p.m., she takes a dinner break. Then it's back to upholstery. Then sleep—and, at 7 a.m. the next day, she's at the Law School door.

"It's not an accident that I'll end up as an attorney," Leineweber says. She grew up in Richland Center in western Wisconsin. Her father is an attorney and entrepreneur, and he served as a circuit judge for 14 years. After high school, Leineweber attended and graduated from the University of Wisconsin–Milwaukee. She taught in France for a year, returned to Milwaukee,



and worked in banking-related jobs for five years.

Her mother is an artist who allowed Leineweber as a teen to redo her bedroom each year. That built her interest in interior design. While working in banking, she took courses on upholstery and worked as an apprentice. Then she opened her own business. "Nobody does it anymore," she says. "Pretty much everyone is short of upholsterers."

But her long-term focus is now on the law. Leineweber loves law school—it requires good time management, dedication, diligence, and the ability to stay calm under pressure, all strengths of hers, and it calls for the kind of creativity in thinking that she values. Her goal is to work with businesses—helping others meet the kind of goals she has set for herself. ■



Illustrations by Taylor Callery

ONE GOVERNMENT, THREE BRANCHES, FIVE CONTROVERSIES:

Separation of Powers Under Presidents Bush and Obama

Brett Kavanaugh began by showing his credentials when it comes to Marquette basketball. He grew up in the Washington, D.C., area, but he said, "I loved Al McGuire." Recalling the semifinal game in the NCAA tournament in 1977, he asked the capacity audience in Eckstein Hall's Appellate Courtroom, "Does anyone know who scored the winning hoop in that game?"

Several people called out the answer: Jerome Whitehead.

"Got it," Kavanaugh said. "I knew it; I knew it. Just checking my crowd. Who threw the pass?"

From the audience: Butch Lee. "There we go. All right," said Kavanaugh to the first respondent. "He's my guy."

It was an engaging way to start the E. Harold Hallows Lecture at Marquette Law School on March 3, 2015.

Then Kavanaugh showed his knowledge on the subject of his lecture: separation of powers in the federal government and, in particular, during the tenure in office of President George W. Bush and of President Barack Obama. Kavanaugh is a former high-ranking official in the former's White House. He is now a judge on the United States Court of Appeals for the D.C. Circuit. As the country marks another presidential transition, we provide here an edited version of Kavanaugh's Hallows Lecture, together with comments by Akhil Amar and Paul Clement.

By Hon. Brett M. Kavanaugh

E. Harold Hallows was a prominent Milwaukee attorney and an extraordinary justice on the Wisconsin Supreme Court. He taught—and taught well—at this law school. When he took the bench on May 1, 1958, he said the following words that are worth repeating today: "Individual freedom under law and equality before our courts distinguish our system of government and our whole way of American life. The whole complex of our social order is erected upon a framework of law and justice." Justice Hallows vowed that he would, as a judge, "zealously rededicate" himself "to those divinely inspired ideals and principles." And he concluded: "May I be worthy of the past and equal to the opportunities of the future."

What a great line: "May I be worthy of the past and equal to the opportunities of the future." A perfect motto for judges, attorneys, and law students. May we all be worthy of the example set by Chief Justice Hallows.

I've been a judge on the D.C. Circuit for more than eight years. And as Dean Joseph Kearney pointed out in introducing me, I did not arrive to the D.C. Circuit as a blank slate. People sometimes ask what prior legal experience has been most useful for me as a judge. And I say, "I certainly draw on all of them," but I also say that my five-and-a-half years at the White House and especially my three years as staff secretary for President George W. Bush were the most interesting and informative for me.

My job in the White House counsel's office and as staff secretary gave me, I think, a keen perspective on our system of separated powers. And that's what I'm going to talk about today. I participated in the process of putting together legislation. I helped out, whether the subject was terrorism insurance or Medicare prescription-drug coverage. I spent a good deal of time on Capitol Hill, sometimes in the middle of the night, working on legislation—it's not a pure or pristine process, just in case you weren't aware of that. ►

I worked on drafting and revising executive orders, as well as disputes over executive branch records. I saw regulatory agencies screw up. I saw how regulatory agencies try to comply with congressional mandates. I saw how agencies try to avoid congressional mandates. I saw the relationship between agencies and the White House and the president. I saw the good and the bad sides of a president's trying to run for reelection and to raise money while still being president. I was involved in the process for lots of presidential speeches. I traveled almost everywhere with the president for about three years.

I mostly recall the massive decisions that had to be made on short notice. Hurricane Katrina—one of the worst weeks of the Bush Presidency—I remember it so

well. I remember sitting on my couch that Saturday night and getting a call from Communications Director Dan Bartlett saying, "Chief Justice Rehnquist died. The president wants to meet tomorrow morning at 7:00 to discuss whom to nominate for chief justice and to announce it before we go back to New Orleans on Monday." And

I sat on my couch trying to absorb all that—from Katrina to the chief justice—and the enormity of the decisions that had to be made so quickly.

And from that White House service, you learn how the presidency operates in a way that I don't think people on the outside fully appreciate. I've said often, and I'll say again, we respect and revere the job of president of this country, and I think we know how hard a job it is. But even then I think we dramatically underestimate how difficult the job is, as compared to being a judge or a member of Congress, or even a justice. The job of president is extraordinarily difficult. Every decision seems to be a choice between really bad and worse. And you have to simultaneously think about the law, the policy, the politics, the international repercussions, the legislative relations, and the communications. And it's just you. It's just one person who's responsible for it all.

So my White House service gives me great respect, and gives all of us who worked there great respect, for

the presidency. As a judge, however, I think it's also given me some perspective—perspective that might be thought to be counterintuitive. For starters, it really helps refine what I'll call one's "BS detector" for determining when the executive branch might be exaggerating, or not fully describing how things might actually work, or overstating the problems that might actually be created under a proposed legal interpretation.

Prior White House experience also helps, I think, when judges need to show some backbone and fortitude, in those cases when the independent judiciary must stand up to the president and not be intimidated by the mystique of the presidency. I think of Justice Robert Jackson, of course, as the role model for all of us executive branch lawyers turned judges. We all walk in the long shadow of Justice Jackson.

So at the heart of my White House experience and my time on the D.C. Circuit has been the separation of powers, including the relationship between the executive and legislative branches and the role of the judiciary in policing that relationship. And, today, I want to discuss five central aspects of that system of separation of powers: war powers, the Senate confirmation process for judges, prosecutorial discretion, statutory interpretation, and independent agencies. Now each topic could occupy a book, indeed a whole shelf in the library. But on each issue, I just want to give a brief assessment on where we have been in the Bush and Obama years, where we stand now, and what may lie ahead.

One of my key thoughts is that our system of government works best when the rules of the road are set ahead of time, rather than thrashed out in the middle of a crisis or controversy. In some areas, we're doing okay. In other areas—not so much.

War powers

Let me begin with war powers. The day most seared into my memory at the White House is September 11, 2001. The uncertainty, the fear, the anxiety, running out West Executive Drive as the Secret Service agents yelled, "Run! Run! Everyone, run!" The Secret Service, at that point, thought that Flight 93 was headed toward the White House or Capitol. It was only a few years ago, but the communications were so primitive. No such thing as an iPhone, no one had Blackberries, no cameras on phones. Even our cell phones, primitive as they were, didn't work amidst the chaos that day.

And then the next day, that's what I really remember so well: going into the White House the next day,

The job of president is extraordinarily difficult. Every decision seems to be a choice between really bad and worse.

I sat on my couch trying to absorb all that—from Katrina to the chief justice—and the enormity of the decisions that had to be made so quickly.

And from that White House service, you learn how the presidency operates in a way that I don't think people on the outside fully appreciate. I've said often, and I'll say again, we respect and revere the job of president of this country, and I think we know how hard a job it is. But even then I think we dramatically underestimate how difficult the job is, as compared to being a judge or a member of Congress, or even a justice. The job of president is extraordinarily difficult. Every decision seems to be a choice between really bad and worse. And you have to simultaneously think about the law, the policy, the politics, the international repercussions, the legislative relations, and the communications. And it's just you. It's just one person who's responsible for it all.

So my White House service gives me great respect, and gives all of us who worked there great respect, for

September 12, 2001. Going into the West Wing for our daily counsel's office staff meeting at 8:10 a.m. Everything had changed for the country, for the president, for all of us.

For President Bush, I often say, every day for the rest of his presidency was September 12, 2001. The calendar never flipped for him. The core mission was, "This will not happen again." President Barack Obama no doubt feels that same pressure and shares that same goal: "This will not happen again."

On the legal side, this new war presented a variety of issues for the country to deal with. We're still dealing with those issues today, and we'll be dealing with them a long time into the future. This was a new kind of war. And what does "new kind of war" mean?

Three things: First, there are not the traditional battlefields. American airports, Paris newsrooms, Madrid trains, London buses, Bali nightclubs—those were, and are, the battlefields. Second, the enemy does not wear uniforms or identify itself. The enemy hides and plots in secret, seeking to make surprise attacks on the United States and its allies. And third, the enemy openly attacks civilians. This is not just a soldier-on-soldier war.

This new kind of war has meant that the United States has had to adapt in its approach to surveillance, targeted killings, interrogation, detention, and war crimes trials, among many other issues. And I think as we look back over the Bush and Obama years, there are several themes that we can discern in terms of our structure of government, our separation of powers system.

First, it's clear, as we look back now, that both Congress and the president have important roles to play in wartime. The president does not operate in a law-free zone when he or she conducts war. As Professor Jack Goldsmith has pointed out, throughout our history Congress has heavily regulated the president's exercise of war, whether it be the Non-Detention Act, the Foreign Intelligence Surveillance Act, the War Crimes Act, the Anti-Torture Act—the list goes on. And, importantly, Congress has continued to do so since September 11, 2001, with laws such as the Patriot Act, the Detainee Treatment Act, and the Military Commissions Act. Congress is involved.

Second, for the most part, presidents must and do follow the statutes regulating the war effort. There are occasional attempts by presidents to claim an exclusive power to conduct some national security action, even in the face of a congressional prohibition. But those



Hon. Brett M. Kavanaugh

assertions of presidential power are rare, and are successful even more rarely, except in certainly narrowly cabined and historically accepted circumstances. This is *Youngstown* category three, to borrow Justice Jackson's famous framework. And that's a bad place for a president to be in wartime.

Third, in cases where someone has standing—a detainee, a torture victim, someone who has been surveilled—the courts will be involved in policing the executive's use of wartime authority. The Supreme Court has made that clear, in cases such as *Hamdi*, *Hamdan*, and *Boumediene*. But that, too, is not new. That has been the American system for a long time. To take only the most prominent example, the Supreme Court played a key role in the *Youngstown* case, ruling unlawful President Harry Truman's seizure of the steel mills to assist the war effort.

So, in cases arising out of this different kind of war, what exactly is a court's role? Well, we should not expect courts to relax old statutory rules that constrain the executive. We saw that in the Supreme Court's *Hamdan* case and other cases. At the same time, just because it's a new war, we should not expect the courts to unilaterally create new rules in order to constrain the executive. Rather, for new rules, it is up to Congress to act as necessary to update the laws applicable to this new kind of warfare. And Congress has done so on many occasions.

Fourth, as we look back, I think one issue looms in significance well above all others. There has been a lot of noise over the last 13 years about a lot of different war powers issues, and about the power of the president, the power of Congress, and the role of the courts. But one issue that looms particularly large is the question ➤



whether the president can order U.S. troops to wage war in a foreign country without congressional approval. The Constitution gives Congress the power to declare war, and the War Powers Resolution requires congressional authorization within 90 days of hostilities, except in cases of self-defense and similar emergencies.

But with regard to larger ground conflicts, most notably the Persian Gulf War, the war against Al-Qaeda that began in 2001, and the Iraq war that began in 2003, modern presidents have sought advance approval from Congress before acting. Indeed, the only major ground war in American history that was congressionally undeclared or unauthorized was the Korean War.

When we look back on the war powers precedents set by the Bush administration, it's important to note that the war against Al-Qaeda and the war against Iraq were both congressionally authorized. In the wake of September 11, Congress overwhelmingly passed the Authorization for Use of Military Force that is still the primary legal basis today for the president's exercise of wartime authority against Al-Qaeda and now apparently ISIS as well. And Congress also overwhelmingly authorized the war in Iraq, by a vote in the Senate of 77–23 and a similarly overwhelming vote in the House.

Those precedents loom large. It will be difficult going forward, decades, generations, for a president to take the nation into a lengthy ground war without congressional authorization. One can imagine what many in Congress would say to the president: "George W. Bush got congressional authorization, and so must you."

So in sum, on war powers issues, my first topic, there will always be heated debate, as there should be—and is today. But the basic framework in which the president, Congress, and the courts all play defined

roles on national security issues has stood the test and adapted reasonably well to this new kind of war. It was not at all obvious in the wake of the September 11 attacks that the legal system would hold, but it has done pretty well, in my estimation. The rules of the road are generally known and generally followed, and for that we can all be grateful.

Judicial appointments

Next I want to discuss—a controversial issue—the Senate confirmation of judges. Now, some history on that: At the start of the Bush administration, the president had some trouble filling judicial vacancies on the courts of appeals in the Democratic-controlled Senate. The Republicans took over the Senate in the fall 2002 elections, and with the Republican Senate there was a sense that President Bush would be able to quickly fill those lower court vacancies.

In 2003, however, the Democrats in the Senate chose to use the filibuster rules of the Senate and require 60 votes rather than 51 votes for certain court of appeals nominees. (I'm going to try to describe this all as neutrally as possible.) On the one hand, there had not been a tradition before then of requiring 60 votes for confirmation of lower court judges, or even Supreme Court justices. Justice Clarence Thomas was confirmed by a vote of 52–48; lots of lower court judges have been confirmed by a majority but without 60 votes.

At the same time, the Senate rules did provide a clear mechanism under which 41 senators could block consideration of just about anything. This is commonly termed—I'm sure you've all heard the term—a filibuster, although that's really a misnomer because it's really just a vote. No one has to talk himself to death on

the Senate floor for a filibuster. It's just a vote for or against "cloture," for those who want to sound versed in Washington speak (which I don't recommend for anyone who wants to maintain friends).

In 2003 and 2004, 10 federal judicial nominees were blocked because of the 60-vote requirement. Those nominees included people such as Miguel Estrada, who had been nominated to the D.C. Circuit. Each apparently had the support of a majority of the Senate, but none of them had the support of 60 senators.

In the 2004 election, President Bush was reelected, and the Republican majority in the Senate increased to 55 members. But 55 is still not 60. So frustration began to build on the Republican side. In 2005, Senate Republicans threatened to change the Senate rules to prohibit a minority of senators from blocking confirmation of federal judges and instead to allow confirmation by a majority vote. This was dubbed the "nuclear option" in some quarters, and it was dubbed the "constitutional option" in other quarters. You can guess which side used which term at that time. In any event, the matter came to a head in May 2005, and then a compromise of sorts was reached. A so-called gang—and I don't know why they're always called that in the Senate—but a "gang of 14" senators reached an agreement under which judicial nominees would be confirmed by majority vote, except in "extraordinary circumstances."

So the deal worked for several years, and the blockade was lifted to a large degree. Of course, the term "extraordinary circumstances" was bound to create problems down the road. And it did.

In 2009, President Obama took office and had the rare historical circumstance of 60 Democrats in the Senate for two years, so in that time he did not need any Republicans to obtain 60 votes. But that did not last: In the 2010 elections, the Democrats retained control of the Senate but no longer had 60 votes. So that meant a choice for the Republicans in the Senate. Would they now turn around and require 60 votes for Obama nominees to the courts of appeals, as the Democrats had done in the Bush years? And the answer is that the Republicans did require 60 votes for nominees such as Goodwin Liu to the Ninth Circuit and Caitlin Halligan to the D.C. Circuit.

This time around, the roles were reversed. Frustration began to build on the Democratic side. And not surprisingly, in 2013 after the next presidential election, the pressure came to a head—just as it had eight years earlier in 2005. This time, however, no gang of 14 stopped the nuclear/constitutional option (depending on

your choice of term). Rather, this time, the majority of the Senate established a Senate precedent to make clear that judicial nominees to the federal courts of appeals and federal district courts would require only a majority in order to be confirmed. Now, notably, the Senate did not set any rules for Supreme Court nominees. So it is not entirely certain going forward whether a Supreme Court nominee will need 51 votes or 60 votes.

What can we expect in the future, having seen this history of Senate confirmation of judges and the rule changes?^{*} Most people expect that the 51-vote requirement is probably here to stay for lower courts. But there is cause for concern and debate for the Supreme Court confirmation process because the rules of the road are not clear. And in the separation of powers arena, when the rules of the road are not clear, trouble often ensues.

We can look back on the Supreme Court confirmation process for the past 25 years before today and see that it's been relatively smooth. For the last six vacancies since 1993, the president has nominated a justice at a time when the president's party

controlled the Senate and when, at least in crude political terms, the appointment was not expected to cause a major shift in the Supreme Court.

Those are optimal conditions for a relatively smooth process. And indeed Justices Ruth Bader Ginsburg, Stephen Breyer, John Roberts, Samuel Alito, Sonia Sotomayor, and Elena Kagan all had such processes. Each process had bumps along the way, but in the grand scheme of things, they were pretty smooth.

Looking forward over the next generation, what if a president has to nominate someone when the Senate is controlled by the other party? We have not had that since 1991, some 24 years ago when the political process in this country was quite a bit different than it is now. Or suppose we have a nomination that's expected to cause a shift in the direction of the Supreme Court? We haven't had that since 1991 either. ►

. . . in the separation of powers arena, when the rules of the road are not clear, trouble often ensues.

* As noted on p. 9, Judge Kavanaugh delivered this Hallows Lecture in 2015, before the Supreme Court vacancy created by the death of Justice Antonin Scalia on February 13, 2016. – Ed.

And critically, and to connect it back up to the nuclear and constitutional option, what number of votes will be enough? Will a minority of 41 senators be able to block the nomination by invoking the 60-vote cloture requirement? And if so, will the president and the majority of the Senate simply accept that result and not try to change the rules? Suppose that a nominee has 57 or 58 or 59 votes but can't quite get to 60. Does the president withdraw the nominee and try again with someone else?

In a country such as ours, it's rather amazing that there is such uncertainty about such an important issue. And again to stick with my theme, it always seems to me that it's good to try to agree on the rules of the road ahead of time. When you're in the Rawlsian position, you don't know who will be president, and you don't know who will control the Senate. I've said this for many, many years in speaking about lower court nominations. And now, apparently, we do have a settled majority-vote rule for lower courts, but not yet for the Supreme Court. It's not my place; I wouldn't dare say whether the rule should be 51 or 60 votes, and I didn't do that for lower court nominations either. But I think I can appropriately say, because I see trouble on the horizon, that it would be best if the ground rules, whatever they turn out to be, are agreed upon ahead of time, if at all possible.

Executive branch treatment of statutes

The third is another controversial topic. (I didn't pick any easy ones for the discussion today.) I've been teaching separation of powers at Harvard Law School for eight years. Every year, I tell my students that there's this one issue that's really hard and really controversial: In what circumstances can the president decline to follow or enforce a statute passed by Congress? I give them the history, and I say, "The president clearly has some authority to decline to follow or enforce a statute passed by Congress."

But it's about the most controversial thing a president can do. I warn all of them: If you are ever in the executive branch, and you find yourself saying, "We don't need to follow that statute," or "We don't need to enforce that statute," you'd better know what you're doing legally, you'd better have a thick skin politically, and you'd better hope you don't have a Senate confirmation process in the near future.

Now both President Bush and President Obama have faced very loud criticism that they were nullifying the law or disregarding the law as enacted by Congress. I think back to President Bush's era: It mostly took the form of criticism in the war powers arena. The president



sometimes would issue signing statements. These became very controversial. The statements said that the president would not follow certain statutes that, in his view, would unduly infringe on his constitutionally bestowed commander-in-chief powers. In President Obama's case, he, too, has faced criticism for such signing statements and for supposed disregard of statutes regulating the executive branch.

And recently, as we know, he's been criticized for his reliance on the doctrine of prosecutorial discretion, in which he says he's not going to enforce certain laws in certain ways. Now I'm not going to purport to solve this problem today (nor would it be proper for me to do so), but I'm going to give you a framework in which to think about these issues. And I think the first thing to do is to distinguish between the executive branch's following a law that regulates the executive branch and the executive branch's enforcing a law that regulates private entities. Let me explain that.

Some statutes regulate the executive branch: The Freedom of Information Act, the Anti-Torture Act, the War Crimes Act, the Foreign Intelligence Surveillance Act—the list goes on. These are laws passed by Congress telling the executive branch that the executive branch has to do something or has to refrain from doing something. As to laws that regulate the executive branch, it's generally accepted that the president has a duty to follow those laws, unless the president has a constitutional objection—a big “unless.” If there's a reasonable constitutional objection, then the president may decline to follow the law unless and until a final court order tells him otherwise.

There's a pending Supreme Court case with exactly that scenario: the *Zivotofsky* case, where both President Bush and President Obama have refused to follow a statute requiring that U.S. passports be stamped “Israel” for any interested U.S. citizens who were born in Jerusalem.*

Now, this question about presidential power is always controversial, but it's generally settled that presidents have such a power. We've had debates about whether particular constitutional objections are permissible. But the basic framework is understood. Presidents have the duty to follow the law that regulates the executive branch unless they have a constitutional objection, in which case they can decline to follow the law unless and until a final court order.

* *Zivotofsky v. Kerry* was subsequently decided, on June 8, 2015, with a divided Supreme Court holding that the president's sole power to recognize foreign states meant that the statute was unconstitutional. —Ed.

So that's the executive branch's declining to follow laws that regulate it.

Of course, most federal laws do not regulate the executive branch. Rather, they regulate private individuals and entities. They might prevent polluting the rivers, or insider trading, or bank robbery, or cocaine dealing. Those laws are backed by sanctions, either criminal or civil, such that people must pay or serve time if they violate the laws. So here's the question: Does the executive branch have the duty to enforce every such law against every known violator of the law?

Most people instinctively recognize that the answer to that question must be “No.” But how do we draw the line? Can the executive branch decline to enforce a law only because of resource constraints, the idea that there's not enough money to have enough prosecutors and investigators to enforce every law against every person? Can a president decide not to enforce a law because of his or her own constitutional objections to the law? And most critically, can the president decide to not enforce the law because of policy objections to the law? That's the question of prosecutorial discretion.

And how do we answer that question? What does history tell us; what does the text of the Constitution tell us about that? We know that the president has the duty to take care that the laws be faithfully executed. But the Take Care Clause has not traditionally been read to mandate executive prosecution of all violators of all laws. After all, when the president declines to enforce some draconian law, that decision is often applauded as enhancing liberty and as a check against overcriminalization or overregulation by Congress.

The leading historical example, and the one that stands the test of time, is President Thomas Jefferson and the Sedition Act. After he became president in 1801, President Jefferson decided that he would no longer pursue prosecutions against violators of the Sedition Act, against those who spoke ill of the government. That's a settled and respected executive branch precedent that suggests that the Take Care Clause encompasses some degree of prosecutorial discretion. The Take Care Clause, in other words, does not prohibit prosecutorial discretion. ►

In what circumstances can the president decline to follow or enforce a statute passed by Congress?

In this regard, consider the interaction of the power of prosecutorial discretion and the pardon power. The president has the absolute discretion to pardon individuals at any time after commission of the illegal act. It arguably follows, some would say, that the president has the corresponding power not to prosecute those individuals in the first place. The theory is, what sense does it make to force the executive to prosecute someone, only then to be able to turn around and pardon everyone? That does not seem to make a lot of sense. As Akhil Amar has written, the greater power

to pardon arguably encompasses the lesser power to decline to prosecute in the first place.

Of course, some say that prosecutorial discretion cannot be used based on policy disagreement but can be used based on resource constraints. Query whether that is a real or phony distinction. The executive branch can almost always cite resource allocation or resource constraints in choosing to prosecute certain offenses rather than others, even if the choice is rooted in policy.

The executive branch can almost always cite resource allocation or resource constraints in choosing to prosecute certain offenses rather than others, even if the choice is rooted in policy.

As we've seen in recent years, recent months, this is far from settled, either legally or politically. And that uncertainty has real costs. Take the current shutdown crisis that has been going on for the last week. What does that stem from? That stems from disagreement over the scope of the president's prosecutorial discretion in the immigration context.

So what's the answer? I will admit that I used to think that I had a good answer to this issue of prosecutorial discretion: that the president's power of prosecutorial discretion was broad and matched the power to pardon. But I will confess that I'm not certain about the entire issue as I sit here today. And I know I'm not alone in my uncertainty. In any event, on this issue, like the others that I've talked about, it's better to have the rules of the road set in advance before the crisis of a particular episode in which the president asserts this power. Put simply, prosecutorial discretion is an issue that

warrants sustained study by scholars, executive branch lawyers, and Congress to see if we can come to greater consensus about the scope of the president's power of prosecutorial discretion.

Statutory interpretation

Let me turn next to statutory interpretation, another issue that is front and center in Washington this week. Tomorrow there is a big health care case being argued in the Supreme Court. And at its core, it's about how to interpret statutes.* If you sat in the D.C. Circuit courtroom for a week or two and you listened to case after case after case (as I do not advise for anyone who wants to stay sane), you would hear judge after judge, from across the supposed ideological spectrum, asking counsel about the precise wording of the statute: "What does the text of the statute say, counsel?" And if you listen to Supreme Court oral arguments, you consistently hear, "What does the text of the statute say?" from all of the justices across the spectrum. And that's in large part, of course, due to the influence of Justice Antonin Scalia on statutory interpretation over the last generation. That influence has been enormous. Enormous. Text is primary.

But to say that text is primary still leaves a host of questions about how best to interpret the text. There are a number of canons of interpretation that judges employ to help them interpret statutory texts: semantic canons, such as the canon against surplusage or the *ejusdem generis* canon; substantive canons that sometimes actually cause us to depart from the best reading of the ordinary text, such as the constitutional-avoidance canon or the presumption against extraterritorial application; and related principles such as the *Chevron* doctrine, which tells courts facing certain sorts of ambiguous statutes to defer to an agency's reasonable reading of the statute.

These canons are hugely important. Text is primary, but how do we interpret the text? Consider *Yates v. United States*—the so-called fish case, decided just last week. If you want to read a fun case in the Supreme Court, you will see Justice Ginsburg for the plurality, and Justice Kagan in dissent, really battling over how to apply the canons of construction to a seemingly straightforward statute. ►►

* The case was *King v. Burwell*, and the Court would go on to decide, on June 25, 2015, by a five-to-four vote, that the Affordable Care Act, which authorized tax credits to individuals receiving insurance through "an Exchange established by the State," also thereby included exchanges established by the federal government. — Ed.

COMMENT

In Defense of a Little Murkiness

by Paul D. Clement

In his Hallows Lecture, Judge Brett Kavanaugh bravely tackles five separation of powers controversies (six, if you count Dez Bryant's failure to "complete the process," but that was a controversy only in Texas). As he promised, he did not shy away from hard issues. His selection of topics was noteworthy in two respects.



First, statutory construction made his list. It is easy to think of separation of powers in terms of disputes between the president and Congress, with the courts sitting in judgment. But the courts' own rules about standing and statutory construction dictate the scope of the courts' power vis-à-vis the other branches and thus are a vital component of the separation of powers, as Judge Kavanaugh recognizes. We were all reminded of this by Justice Antonin Scalia, constantly while he was with us, and poignantly as we have reflected on his legacy. Justice Scalia scolded litigants for straying from the text and invoking legislative history because only the former complied with the Constitution's requirements of bicameralism and presentment, which give each political branch a distinct role in the lawmaking process. For Justice Scalia, statutory construction was all about the separation of powers.

Second, it is no accident that Judge Kavanaugh included at least one topic—the confirmation process—where disputes between the political branches are extremely unlikely to be definitively resolved by judicial opinions. As long as the presidency and the Senate majority are in the hands of different parties, the president and the Senate will dispute the exact contours of the president's power to appoint and the Senate's advice-and-consent function. But those differences will not find their way into a justiciable dispute brought by a litigant with Article III standing.

This is as the Framers designed it, and confirmation is hardly the only important separation of powers controversy of this type. Disputes over impeachment powers and procedures, the scope of the pardon power, the proper use of executive agreements versus treaties, and executive-branch testimony before Congress, to name a few, are unlikely to produce judicial opinions on the merits. Some issues are expressly deemed political questions (though this seems out of vogue with the current Court), and others are unlikely to produce a plaintiff capable of satisfying the courts' standing requirements (the current Court's preferred mechanism for winnowing disputes). Nonetheless, convention provides reasonably clear answers to some questions (Cabinet secretaries routinely appear before congressional committees, while assistants to the president resist). As to other questions, the contours remain murky.

Judge Kavanaugh generally prefers that the answers to separation of powers questions—the rules of the road, as he terms them—be clear. Yet it is not obvious that every question can or should be answered with the kind of clarity that a Supreme Court decision on the merits provides. Judge Kavanaugh distinguishes between the president's discretion to enforce statutes limiting presidential authority and those regulating private conduct. An earlier jurist who also had extensive executive-branch experience before joining the bench made a similar distinction. In *Marbury v. Madison* (1803), Chief Justice Marshall, fresh from his service as secretary of state, distinguished between cases implicating vested individual rights and "cases in which the Executive possesses a constitutional or legal discretion." Marshall viewed the latter as "only politically examinable," suggesting that sometimes the Framers expected and tolerated a little murkiness.

Paul Clement is a partner at Kirkland & Ellis in Washington, D.C. He served as the solicitor general of the United States from 2005 to 2008.

The problem here, as elsewhere, is that we do not have consensus about how to apply the canons. The gap has been filled well by Justice Scalia and Bryan Garner in their book, *Reading Law*, which really should be on the shelf of every judge and lawyer. They identify and explain 57 different canons of construction, which gives you a sense of the magnitude of the task here. Of course, their view about how some of those canons should be applied was bound to be contested, and has been. For example, Professor Bill Eskridge and Professor Abbe Gluck have written pieces.

What is the outlook going forward on the issue of statutory interpretation? We've made such progress in bringing people together about the importance of statutory text. Justice Scalia has really instigated that progress. But the academy and the bench and the bar, I think, have an opening and a responsibility to take us to the next level of consensus—to study these canons, to crystalize them, and to reach an agreement about how they should be applied. There's more work to be done—a lot of work.

When the rules of the road are not agreed upon in advance, they have to be fought out in the crisis of a particular case, as will happen tomorrow in the Affordable Care Act case in the Supreme Court. If we can agree on the rules of the road in advance, we can narrow the grounds of

disagreement. We can avoid situations where things are fought out in the crucible of a particular case, and that helps people of this country grow even more confident in the rule of law and in our judges as umpires, not just politicians in robes.

I don't want to sound like Yogi Berra, who said that if you just moved first base, there would be no more close plays. That doesn't work, as you know. What I'm saying is that you reduce the number of close plays by achieving better consensus on the rules of statutory interpretation—on the canons, which are really the next step in this generation-long project on statutory interpretation.

We've made such progress in bringing people together about the importance of statutory text. . . . But . . .



Independent agencies

The last subject—**independent agencies** such as the FCC, SEC, and FTC. This is my life: the alphabet soup of federal agencies. There are two types of agencies. There are executive agencies that work for the president: e.g., the Defense Department, the Justice Department, and the State Department. There are independent agencies whose leaders are removable only for cause, and they don't directly report to the president. They're not controlled by the president. They are unaccountable to Congress or the president.

The big issue: What are independent agencies? How do those independent agencies fit within the constitutional structure? Here's the answer: uneasily. Within the constitutional structure, if you think about the first 15 words of Article II of the Constitution, “[t]he executive power shall be vested in a President of the United States of America.” But it's pretty settled law that independent agencies are constitutional. In a case called *Humphrey's Executor v. United States* (1935), the Supreme Court upheld independent agencies as constitutional, at least so long as the agencies did not perform core executive functions. President Franklin Roosevelt was incensed about the court decision. It's one of the things (probably the primary thing) that led him to propose the court-packing plan, which as you all know didn't go well. But that's how important he thought it was to the structure of government.

Yet *Humphrey's Executor* remains the law. Independent agencies since the time of *Humphrey's Executor* continue to exist and continue to exercise important power. What are the ramifications? What are the rules of the road for independent agencies? I'll tell you, from working in the White House, I know that the

president's White House staff is very uneasy about what, if any, role they have in independent-agency decisions. They tend to be hands-off on independent-agency decisions. What does that mean, then?

That means that massive social and economic policy decisions are made not by Congress, and not by the president, and not even by an agency that is accountable to the president, but by an independent agency. The most recent example (I'm not going to comment on the merits of it, but just offer it as an example of a massive decision made by an agency) is the FCC's net-neutrality proposal—an independent agency's making a big decision for our country.

Where is the Supreme Court on independent agencies? There was a case a few years ago called *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2010), in which the Court clearly cabined and refused to extend *Humphrey's Executor*, but didn't question the *Humphrey's Executor* precedent itself. In that case, the chief justice did say that Congress cannot reduce the president to a "cajoler-in-chief" and that "[t]he buck stops with the President." But that said, *Humphrey's Executor* continues to exist. To my mind, the rules of the road on independent agencies are clear, but they are still cause for thinking about the accountability of independent agencies in our structure.

Conclusion

So that's my brief overview of five major separation of powers issues in the Bush and Obama administrations and what lies ahead. One of the things I've taken away from my years in the White House and as a judge, and one of the things that frustrate me and make me think we can do better as a system of separated powers, is to try to think about things ahead of time. Trying to settle controversies before they arise. Our system of government seems so often to be reactive, to make rules in crisis situations rather than systematically thinking about how we can prevent the crises. How can we make the rule of law more stable, and how can we increase confidence in judges as impartial arbiters of the rule of law? Whether it's war powers, or the Senate confirmation process, or prosecutorial discretion, or statutory interpretation, or independent agencies, the system works best when the rules of the road are set ahead of time.

Or to put it in terms of the memorable January 2015 playoff game between the Green Bay Packers and the Dallas Cowboys, it's better when the rules governing a

catch are set forth before Dez Bryant falls to the ground. Because the rule was set, that was it. No catch. (Right?) If we can do it in the NFL, we can do it here as well. It'll ensure the like treatment of like cases and give the people of the country better confidence in our system.

I've talked about controversial issues today and some difficult topics. But I do want to emphasize that what unites us as a country is so much greater than what divides us—despite the controversies that we see in Washington today, and that we'll see in Washington tomorrow.

And I think about the difficulty of the job of president, as I've mentioned before, and particularly in times of wartime. I'll just close with this story. Before his 2004 speech at the nominating convention in New York City, President Bush was doing a last run-through in the hotel room that afternoon of the speech. I was there, with Mike Gerson, John McConnell, Dan Bartlett, and others. The speech was pretty well set and locked down, as you would hope on the day of the speech, and he was doing just a last practice run to make sure it was all exactly as he wanted it. We were reading along on our paper drafts as he was reading it out loud.

Anyway, toward the end of the speech, there was a passage that read as follows: "I've held the children of the fallen who are told their dad or mom is a hero, but would rather just have their dad or mom. I've met with parents and wives and husbands who have received a folded flag and said a final goodbye to a soldier they loved." And as President Bush finished reading that sentence in that hotel room, with just a few of us there in our gym clothes, there was a pause. After a few seconds we looked up, and President Bush had stopped because he was choking up.

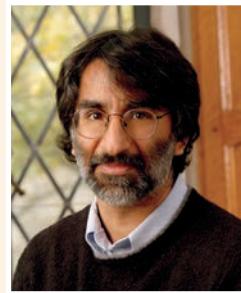
And of course, President Bush being President Bush, he caught himself after a few seconds and said, "Don't worry; I'll be okay tonight." But in that moment, in that moment and so many others, I think of the enormity of the responsibility that the president carries. I think of the role of our military in our society, defending our freedom. I think of how, when I was in Dallas just a few years ago, all five living presidents stood on the stage at the opening of the Bush Library. I think how lucky we are to live in a country with a system of checks and balances and separated powers. And for its flaws, and for its holes, and for its inability to solve every problem in advance, that system does so well in protecting our liberties and protecting our freedoms.

What unites us as Americans is far greater than what divides us. ■

COMMENT**Walking in the Long Shadow
of Justice Jackson**

by Akhil Reed Amar

There are many gold nuggets in my friend Brett Kavanaugh's engaging and enlightening Hallows Lecture. One that particularly caught my eye was his shout-out to Robert Jackson, a jurist who, like Kavanaugh himself, spent time working closely with a wartime president before taking the bench.



Perhaps Jackson's greatest opinion was his concurrence in the 1952 *Youngstown* steel seizure case. It is Jackson's concurrence, and not Hugo Black's faux majority opinion, that has come to be viewed over time as canonical in the field of separation of powers. Indeed, Kavanaugh himself expressly invokes the basic framework of this concurrence.

Black argued that in general a president could not seize private property far from a theater of active war, to settle a labor dispute, unless Congress affirmatively granted the president authority to do so. On Black's view, the text of the Constitution was clear: The president has only "executive" and not "legislative" power, and the power to take private property in the situation at hand fell exclusively to the legislature. The history of actual governmental practice in the years between 1789 and 1952 was largely irrelevant, said Black; he refused to credit the Truman administration's legal argument that various past presidents, with apparent congressional acquiescence, had in certain situations done things similar to what Truman was now doing.

To create the impression of a unified Court, Jackson purported to join Black's opinion; in fact, Jackson sharply disagreed with both Black's interpretive method and Black's central substantive conclusion, as Jackson made clear in his own separate concurring opinion. On method, Jackson explicitly condemned "the rigidity dictated by a doctrinaire textualism"—an obvious swipe at Black. Relatedly, Jackson suggested that the history of actual presidential practice and congressional reaction between the Founding and the Korean conflict—the history that Black dismissed out of hand—contained important insights about how best to construe the respective powers of the president and the Congress.

On substance, Jackson argued that Black had gone too far. There was no need to say, as Black had said, that a president must always have an affirmative congressional statute on his side to do what Truman had done. It was enough to decide the case, Jackson argued, to note that a congressional statute had in effect prohibited the very thing that Truman had done. When Congress had already clearly said "No," Truman could not act in contravention of Congress. But if Congress had merely been silent, then perhaps Truman might have prevailed, depending on various practical factors and settled customs.

Although I share Hugo Black's reverence for constitutional text, I confess that some issues cannot be resolved simply by textual analysis. The ultra-terse constitutional text of Article II must be supplemented by analysis of actual presidential practice, beginning with the practices of George Washington himself. Particular attention must be paid to how Congresses and presidents over the years have worked things out between themselves, thereby glossing ambiguous patches of constitutional text with institutional settlements among the very branches of government to which and about which the texts speak, albeit imprecisely.

And this is exactly the analysis that Jackson's *Youngstown* concurrence provided, canvassing the practices of prior presidents and Congresses. This was just the sort of thing that one would wish for from an outstanding attorney general experienced at advising the president himself about the proper scope of presidential power—and just the sort of thing that might have exceeded the skill set and the knowledge base of a jurist who had never advised a president day after day and face to face about high matters of law and statecraft.

Jackson's Youngstown concurrence repeatedly called attention to his own past professional life. His opening words reminded his audience that he had served "as legal adviser to a President in a time of transition and anxiety," an experience that, he candidly confessed, was probably "a more realistic influence" on his view of the case than anything else, including the Court's prior case law. From his unique vantage point, judicial precedent was not the be-all and end-all that some blinkered lifetime judicialized folk might imagine it to be. "Conventional materials of judicial decision . . . seem unduly to accentuate doctrine and legal fiction." Later passages echoed this opening theme, with additional and obviously autobiographical references to "executive advisers" and "presidential advisers."

Jackson took pains to stress that he was not bound as a justice to endorse all the things he might have previously argued as the president's lawyer. "A judge cannot accept self-serving press statements of the attorney for one of the interested parties [i.e., the president] as authority in answering a constitutional question, even if the advocate was himself." Once a pol (or a pol's mouthpiece), but now a judge. Black robes and life tenure freed Jackson to act in a judicial fashion even though he had not been entirely free to do so in some of his earlier assignments. In all these openly autobiographical musings by Jackson, we see that one of the most canonical decisions of all time was greatly and self-consciously enriched by the non-judicial experience that one of its notable members brought to the bench.

Our current chief justice, John Roberts, directly descends from Jackson, insofar as Roberts clerked for William Rehnquist who in turn had clerked for Jackson. And like Jackson, Roberts brought to the Court years of service as a lawyer within the executive branch.

Now consider the biggest judicial decision of John Roberts's career—his decision in the 2012 case of *NFIB v. Sebelius* to provide the decisive fifth vote to uphold the Affordable Care Act as a simple exercise of the sweeping congressional power to raise revenue. The act is among other things a tax law, and the Constitution was emphatically adopted and later pointedly amended to give Congress sweeping tax power. None of the other conservative justices credited this basic point, but Roberts did.

One reason that John Roberts may have been more able to see this basic point is that he had spent more time than had any of the other conservatives in executive-branch positions in which the tax power was highly relevant. Anthony Kennedy, the current justice who exudes the most confidence in the judiciary itself in his voice and votes, never worked in the federal executive branch, or in Congress, for that matter. Before joining the Court, Clarence Thomas had executive-branch experience only in matters far removed from the federal fisc. Both Samuel Alito and Antonin Scalia did have wider experience within the executive branch. But neither of them had anything close to John Roberts's many years of experience operating at a moderately high (albeit subcabinet) level within the executive branch, dealing with a very broad range of complex federal laws raising revenue and regulating the economy.

I doubt that Robert Jackson would agree with everything that his grand-clerk wrote in the defining opinion of his still-young career as chief. But John Roberts did reach the right legal result in this key case. And he did so, I suspect, thanks in part to his own executive-branch experience; and he did so even though the party that had put him on the Court was none too pleased with this act of judicial integrity. Somewhere, Robert Jackson is smiling.

Akhil Reed Amar is Sterling Professor of Law and Political Science at Yale University. Some of the themes sketched herein are explored at greater length in his 2015 book, The Law of the Land.

RACE AND SENTENCING

IN WISCONSIN CRIMINAL COURTS —
A PRELIMINARY INQUIRY



By Hon. Patience Drake Roggensack

The disparity between the percentage of African Americans incarcerated in Wisconsin prisons and the percentage of African Americans in Wisconsin's population has caused some to suggest that racial disparity may be caused by racial bias in Wisconsin courts.¹ Because of this suggestion, we began to study whether being African American had an adverse effect on sentences imposed for criminal convictions. As explained below, with some research and other assistance (hence the term "we"), we developed a protocol to statistically analyze sentencing in Wisconsin; we promoted the adoption of a uniform personal identification number, the state ID (SID), to enable tracking convicted persons in the courts and in the Department of Corrections (DOC); we created mathematically proportional severity weights for felony and misdemeanor classes; we conducted preliminary statistical analyses showing for some felony classes African-American males plead guilty less frequently than Caucasian males; and we concluded that African-American males are not disproportionately represented in Wisconsin prisons because of drug-offense convictions.

However, due to lack of staff and other resources, we could not complete statistical analyses of race and sentencing in Wisconsin courts.² I write to explain what we did and why, and to encourage those who have resources necessary for statistically analyzing sentencing in Wisconsin courts to complete the work we only began.

Our Study

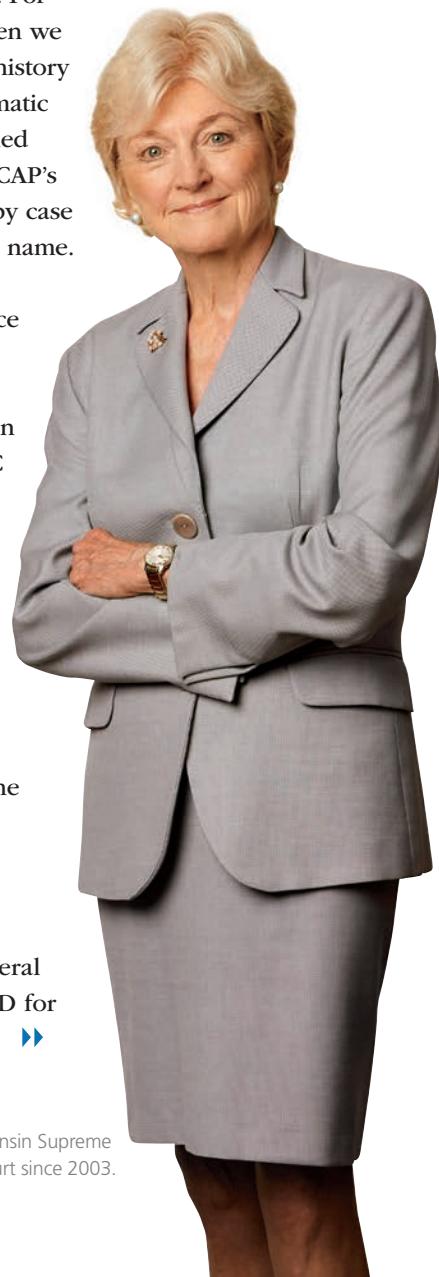
Because of the enormity of the task of comparing all facets of sentencing that could be affected by race, we limited our study to attempting to analyze statistically whether similarly situated African-American and Caucasian male defendants were sentenced similarly.³ This goal was simple to state and amazingly complex to achieve.

Throughout our efforts, staff of Wisconsin's Consolidated Court Automation Programs (CCAP), led by Jean Bousquet, worked closely with statistician Nicholas Keuler, my law clerks,⁴ and me. CCAP's

database contained information helpful to our study, and DOC's database contained additional useful information.⁵ As I will explain below, neither database contains all of the information necessary to make sentencing truly transparent or to provide sufficient data for comprehensive statistical analyses of sentencing practices. However, because both databases contained useful data, we decided to combine them to permit us to track defendants from conviction through incarceration, in the hope that we could then determine whether race played a role in sentencing African-American men. Combining two databases may sound like an easy task, but it was not. For example, simply identifying when we were reviewing the sentencing history of the same person was problematic because DOC's database identified inmates by DOC number and CCAP's database identified defendants by case number and, to some extent, by name.

During the course of our combined efforts in studying race and sentencing, CCAP began to consider using a common personal identifier in conjunction with DOC. With CCAP and DOC having a common personal identifying number, an individual defendant could be tracked from conviction throughout his term of incarceration.

Today I am happy to report that CCAP and DOC do have a common identifier, known as the state ID or SID.⁶ And, although this funding is not yet in place, the statewide Criminal Justice Coordinating Council's data subcommittee has sought a federal grant to establish a standard SID for defendants across the criminal



Patience Drake Roggensack is the chief justice of the Wisconsin Supreme Court. She has served as a member of the court since 2003.

justice system. The Wisconsin Department of Justice (DOJ) issues a unique SID to each defendant booked in jails and prisons and shares this identifier with DOC for inmates. SID links are being created between DOJ and the district attorneys' statewide case management system, which will be shared with CCAP. Once work in all of those systems is complete, we will be able to track a defendant from arrest through incarceration because defendants in the CCAP system will be connected with DOJ, DOC, and the district attorneys' statewide case management system via SID. This will be a huge improvement for following defendants in Wisconsin's criminal justice system from charging through all that may follow. It will help us determine how defendants enter the system and what results from being charged with a crime.

As I spoke with those interested in racial disparity and read articles about race and sentencing, I encountered suggestions that racial disparity exists in Wisconsin prisons because convictions of crimes involving drugs fall more heavily on African Americans than on

Caucasians.⁷ An implication was that, in order to reduce racial disparity in its prisons, Wisconsin should not prosecute drug abusers, even when they are selling drugs.⁸

In order to address the suggestion that racial disparity in Wisconsin prisons is caused by drug-offense convictions, I sought assistance from DOC because DOC keeps

statistics on the type of conviction that resulted in each inmate's incarceration. Those statistics show the gender and race of inmates and the category of the most serious crime for which inmates were incarcerated. DOC's report lists four conviction categories: violent offense, property offense, drug offense, and public-order offense. DOC provided a copy of its report that shows the number and percentage of inmates who fell into each of these four categories from June 30, 2000, through December 31, 2014.⁹

DOC's report shows that on December 31, 2014, only 934 of the 8,024 African-American men then incarcerated were confined with drug-related offenses as their most serious crime.¹⁰ Stated otherwise, conviction of a



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more serious crime than a drug-related offense caused incarceration of 7,090 African-American men. This DOC report reflects a reduction of the number of African-American men whose incarcerations were caused by drug-offense convictions, with those convictions having peaked in 2004. However, while the number of drug-related convictions of African-American men that resulted in incarceration has fallen, the number of incarcerations of African-American men for violent crimes has risen. As of December 31, 2014, 73.2 percent of male African-American inmates were incarcerated in part because of convictions of violent crimes.¹¹

Since it does not appear that racial disparities in imprisonment are simply a result of racial disparities in convictions for drug-related offenses, we focused more broadly on the role of race in sentencing. Our goal was to examine whether similarly situated African-American and Caucasian male defendants were sentenced similarly. Initially, we assumed that defendants were similarly situated when two legally relevant variables were similar: offense seriousness and record of prior convictions.¹²

It would have been ideal to compare defendants of different races who were charged with and convicted of exactly the same crimes and who also had exactly the same prior conviction histories. However, we could not obtain samples of a size sufficient for analyses that met those parameters because of the many crimes that form the bases for conviction (and thus incarceration) in Wisconsin prisons. Therefore, we decided to compare defendants who were convicted of the same class of felony and had similar conviction histories, again based on the class of felony for which they had been convicted. We used data from Milwaukee County because Milwaukee County provided the most data with regard to African-American defendants. ►

Our goal was to examine whether similarly situated African-American and Caucasian male defendants were sentenced similarly.

COMMENT

Priority for Courts: Don't Make Injustices Worse

by Pamela E. Oliver

The 2007 Wisconsin Sentencing Commission study, *Race & Sentencing in Wisconsin*, found what you might think of as probable cause to believe that whites were less likely to be sent to prison than blacks and Latinos, after controlling for both offense severity and several measures of prior record. Chief Justice Roggensack has worked for years to get better measures of criminal history and other relevant legal factors either to assure that there is no racial bias after proper controls or to ferret out the problems so that they can be fixed. I worked with her on this project briefly about six years ago, but did not solve the data problems. She kept working and has finally achieved common person-identifiers across DOC and CCAP, something that reports have been asking for since at least the late 1990s.



The chief justice's article here discusses why this enterprise is harder than it may seem on the surface, proposes a way of combining past convictions into one composite measure based on adding up the putative sentence lengths of prior convictions depending on felony class, and provides a preliminary report on racial patterns in pleading guilty or going to trial in some recent years in Milwaukee.

The Milwaukee analysis focuses on plea bargaining, because most sentences are results of plea bargains and sentencing disparities probably arise from these bargaining processes rather more than from overt judicial decisions. In Milwaukee, black people charged with felonies are less likely than white people to plead guilty and thus more likely to risk trial where, if they are found guilty, their sentences are likely to be longer. The data also show that, for Class C felonies, blacks are less likely to be found guilty in a trial. CCAP shows charges that are ultimately dismissed, permitting some study of plea bargains in future research. For example, although CCAP does not directly record custody status, this can be determined from coding the address field, and my own analysis of 2004 Dane County CCAP information suggests that pleading guilty to a less serious charge than the worst filed was more common for those not in custody when sentenced.

As the article suggests, the problem of "prior record" is the most difficult to solve. It is unlikely that either researchers or legal professionals will ever agree that any one composite measure captures everything about prior record that should be captured in sentencing. There is also a small but growing criticism of the practice of punishing people more harshly for a given offense based on their prior record.* For one thing, the more intense policing in some communities (even if these practices are justified for crime-control reasons) has the effect of giving minority youth longer "records" of police contact and arrest than white suburban youths with exactly the same behavioral profiles. There is also a growing criticism of using "risk assessment" tools, for both juvenile and adult offenders, that can be shown to have racial bias.

I fully support Chief Justice Roggensack's efforts to improve our data so that we can monitor the judicial system better. But I would hope that the courts would also learn to think about how other systems impact what comes to their benches. Too often the criminal justice system amplifies and exacerbates inequality. The courts cannot cure inequality that arises in socioeconomic systems. But we can ask that they not make it worse.

Pamela Oliver is professor of sociology at the University of Wisconsin–Madison.

* See, e.g., Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to Apprendi*, 97 MARQ. L. REV. 523 (2014).

Because statistics operate on numbers, defining when defendants were similarly situated also required constructing a numerical offense-severity score and a numerical prior-conviction score for each defendant. We constructed a numerical value for each class of felony, A – I, and misdemeanor classes A – C, by establishing mathematical ratios for the maximum sentence for each felony and misdemeanor class and their relative weights, as set forth below:

TABLE 1 (CLASS SEVERITY WEIGHTS)

CLASS	MAXIMUM SENTENCE	WEIGHT
A felony	Life without release	20
B felony	60 years	15
C felony	40 years	10
D felony	25 years	6.25
E felony	15 years	3.75
F felony	12 years	3
G felony	10 years	2.5
H felony	6 years	1.5
I felony	3.5 years	.875
A misdemeanor	9 months	.1875
B misdemeanor	90 days	.0417
C misdemeanor	30 days	.0208

The above chart weights criminal convictions according to the maximum sentence length of each crime's class. For example, the maximum sentence for a Class B felony is to that for a Class H felony (60 years and 6 years, respectively) as the weight of a Class B felony is to that of a Class H felony (15 and 1.5, respectively). Stated otherwise, the maximum sentence for conviction of a Class B felony is 10 times the maximum sentence for a Class H felony; therefore, the weight used in our study for a Class B felony conviction is 10 times the weight used for a Class H felony conviction.¹³

By way of example, if a defendant had a current Class C conviction for which he was then incarcerated, his offense-severity score would be 10. If he also had two prior convictions, one for a Class C felony and one for a Class D felony, his prior-conviction score would be 16.25, the additive of the weights of the two felony classes (10 + 6.25).

Initially, it seemed that the offense-severity score and the prior-conviction score would be reasonably reliable tools to assist in determining when African-American

and Caucasian male convicted defendants were similarly situated. However, because most convictions result from pleas, wherein crimes initially charged could be modified prior to conviction, the severity scores provided less precise guidance than we would have liked.

To explain further, although pleas of guilty can occur without discussion with the prosecutor, the majority of pleas come about through bargaining between the prosecutor and the defense counsel. If charge bargaining occurs during the plea-bargaining process such that the charges initially filed are dismissed and read-in or simply reduced and if the initial charges cannot be determined, as may be the case with a negotiated issuance, the offense-severity score may not accurately represent the severity of the defendant's conduct.¹⁴ However, the circuit court will know of the initial charges through parts of the record not evident from review of data that CCAP maintains, such as presentence investigative reports (PSI) or sentencing comments of counsel. Therefore, counts dismissed and read-in and amendments of the pleadings may affect the sentence given for reasons that may not be apparent. Furthermore, because plea-bargaining terms are by their very nature imprecise, varying from prosecutor to prosecutor and criminal charge to criminal charge, prior-conviction scores also could be affected by plea bargaining that occurred with earlier criminal prosecutions.

The concern that the crime of conviction may not represent the severity of the defendant's offense is not present with convictions that result from trials. There, offense-severity scores were reasonably reliable tools to begin comparing the sentences of African-American and Caucasian defendants who were sentenced subsequently to conviction at trial. However, because sentences after trial are affected by defendants' prior convictions, those sentences also could be affected by variables that occurred previously.

Furthermore, after discussions with many circuit court judges, we concluded that judges frequently sentence defendants who were convicted after jury trials more harshly than defendants convicted of the same crime following pleas. The reasons given were defendants' accepting responsibility and evidencing remorse when pleading, as well as facts developed at trial showing more blameworthiness on the part of defendants and more-specific effects of crimes on victims. Therefore, sentences of defendants with similar offense-severity scores who pleaded should be analyzed separately from sentences of those whose convictions resulted from trials.

In one very preliminary comparison of sentencing in Milwaukee County, we separated convictions of African-American and Caucasian male defendants into felony Classes A – I.¹⁵ We asked questions of our data: (1) Do African-American men plead guilty at a different rate than Caucasian men; and (2) Given a “not guilty” plea, were African Americans found guilty at a different rate than Caucasian defendants in jury trials? Our data produced some interesting results that warrant further study.

First, we found that there are times when African Americans and Caucasians plead to the same class of felonies at different rates and sometimes those differences were statistically significant. A difference is statistically significant when it is probable that the difference in the data is caused by something other than random chance. As a standard statistical convention, a difference is statistically significant when the “p-value” is ≤ 0.05 .¹⁶ Statistical significance depends not only on the percentage difference but also on the sample size. For example, getting 60 percent heads in 10 flips of a coin is not sufficient evidence that something other than random chance caused the results. But getting 60 percent heads in 1,000 flips would be sufficient evidence that the coin is biased toward coming up heads. The p-value assesses both the percentage difference in plea rates between African-American and Caucasian defendants and also whether there are enough cases to reach a statistically significant conclusion.

In Class B felonies, Caucasians were 2.55 percentage points more likely to plead guilty than were African Americans, but the difference is not statistically significant, with a p-value of 0.3328, which is not smaller than or equal to the p-value of 0.05 required for statistical significance. For Class C felonies, the rate of guilty pleas was higher for both African Americans and Caucasians, but in this case the difference of 4.40 percentage points is statistically significant.

TABLE 2A (PLEAS)

	GUILTY	NOT GUILTY	PERCENT GUILTY	P-VALUE
Felony Class B				
African American	841	259	76.45%	0.3328
Caucasian	316	84	79.00%	
Felony Class C				
African American	2,901	317	90.15%	≤ 0.0001
Caucasian	1,302	75	94.55%	

Second, when African-American men went to trial before a Milwaukee County jury on a Class C felony, they were found guilty 65.56 percent of the time. This is less frequently than Caucasian defendants, who were found guilty of Class C felonies 78.57 percent of the time.¹⁷ This difference also is statistically significant. See the data below.

TABLE 2B (JURY TRIALS)

	GUILTY	NOT GUILTY	PERCENT GUILTY	P-VALUE
Felony Class C				
African American	198	104	65.56%	.0458
Caucasian	55	15	78.57%	

However, from the data that currently exist, it is not possible to determine why African-American men chose jury trials for Class C felonies. One cannot determine whether they did not get a plea offer they found acceptable, or whether they believed that they would not be found guilty by a Milwaukee County jury, or whether some other reason supported the choice. In any case, if it is true that judges sentence defendants to longer prison terms

following convictions after a jury trial than those with convictions arising from pleas, it may be that those convicted by a jury received a longer sentence than if they had pleaded to the same Class C felony. In addition, it is likely that probation is ordered more frequently for defendants who are convicted based on a plea

rather than after trial. Of course, those who were found not guilty at trial came out much better than those who pleaded.

Third, in regard to Class D felonies, again, African-American males pleaded guilty less frequently than Caucasian males, and that difference is statistically significant. By contrast, when not pleading, they were convicted by a jury at a rate similar to Caucasian defendants. See the following tables. ►

Sentencing should be transparent, so that all who examine it, either for an individual or for a group, will be able to see it is fair and evenhanded.

TABLE 3A (PLEAS)

	GUILTY	NOT GUILTY	PERCENT GUILTY	P-VALUE
Felony Class D				
African American	1,802	145	92.55%	≤0.0001
Caucasian	806	31	96.30%	

TABLE 3B (JURY TRIALS)

	GUILTY	NOT GUILTY	PERCENT GUILTY	P-VALUE
Felony Class D				
African American	115	27	80.99%	1.0000
Caucasian	22	5	81.48%	

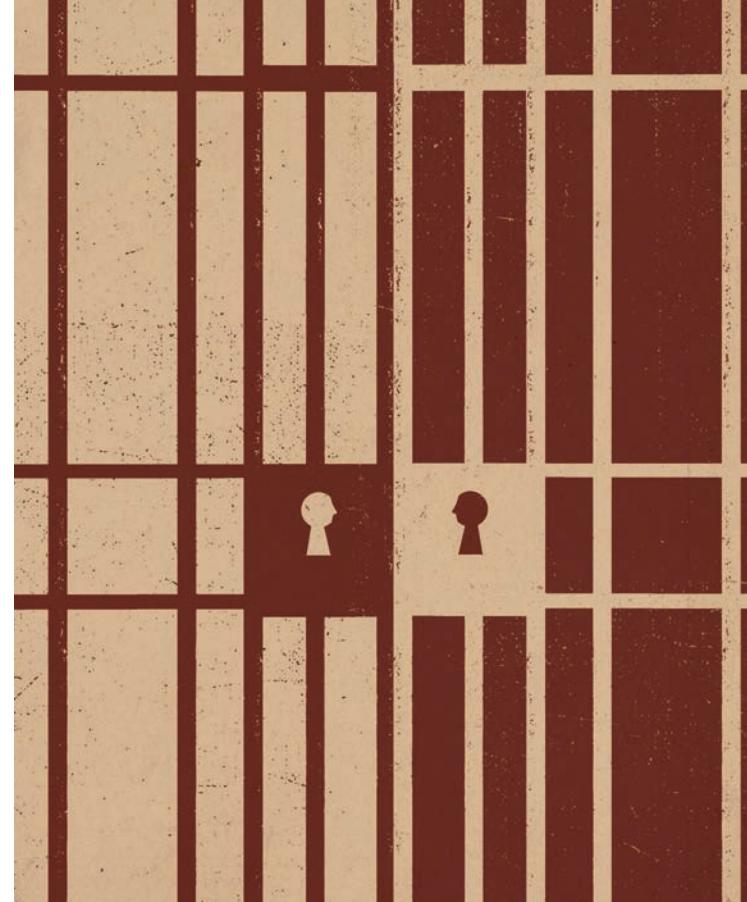
Fourth, in regard to Class E felonies, once again, African-American males pleaded guilty less frequently than Caucasian males, at a rate that is statistically significant. Jury trials, on the other hand, did not result in a statistically significant difference in the rate of conviction for African-American males when compared with Caucasian males. Similar results were seen in plea rates and trial-conviction rates for Class F felonies. See the tables below.

TABLE 4A (PLEAS)

	GUILTY	NOT GUILTY	PERCENT GUILTY	P-VALUE
Felony Class E				
African American	2,969	209	93.42%	≤0.0001
Caucasian	1,113	36	96.87%	
Felony Class F				
African American	2,651	158	94.38%	≤0.0001
Caucasian	905	22	97.63%	

TABLE 4B (JURY TRIALS)

	GUILTY	NOT GUILTY	PERCENT GUILTY	P-VALUE
Felony Class E				
African American	134	62	68.37%	0.5403
Caucasian	25	8	75.76%	
Felony Class F				
African American	105	43	70.95%	1.0000
Caucasian	15	6	71.43%	



Why is a difference in rates of pleading of concern when studying race and sentencing?¹⁸ It is of concern because for felonies in Classes C, D, E, and F, African-American males, *as a group*, could be getting, on average, longer sentences from judges who tend to sentence those who are convicted after jury trials to longer terms of imprisonment than those who plead, and *as a group*, they could be getting probation less frequently, given the lower plea rate. Therefore, even though data as currently entered in CCAP are not sufficient to test whether similarly situated African-American and Caucasian males are sentenced to statistically significant different terms of imprisonment, and our study of pleading frequency is very preliminary, the differences in pleading frequency could have a racial impact on African Americans as a group because they plead guilty less frequently.

Sentencing should be transparent, so that all who examine it, either for an individual or for a group, will be able to see it is fair and evenhanded. CCAP's database is a necessary component to any statistical determination of whether sentencing practices have contributed to racial disparity in Wisconsin's prison population. Some of the data that CCAP currently stores are necessary to considering race and sentencing, but they are not sufficient to answer the question I posed: whether similarly situated African-American and Caucasian males are sentenced similarly. ►

Statistical Complexity Shouldn't Slow Pursuit of Justice

by Joe Donald

The general problem is clear: Wisconsin has the highest percentage of incarcerated black men in the nation. In Milwaukee County, more than half of African-American men in their 30s have served time in prison.¹

Here is some of my own background: As a trial court judge in Milwaukee County for 20 years, I have handled thousands of criminal cases where I imposed sentences on guilty defendants. I have also presided over both types of drug courts: the drug treatment court, which addresses underlying issues of addiction as opposed to just imposing confinement, and the drug court calendar, which handles all types of drug-related offenses, such as possessing, manufacturing, and delivering drugs. Besides my work, I have further insight into the criminal justice system from a family member who has worked as a police officer—and from other family members who have been stopped, arrested, prosecuted, or incarcerated.

In short, I am greatly interested in any examination whether there is a disproportionate number of African-American men in Wisconsin's prisons due to a racial bias in Wisconsin courts—and in continuing the discussion.

So I would like to begin by commending Chief Justice Patience Drake Roggensack for initiating this discussion on racial disparity in Wisconsin's prisons. I also would like to applaud her for promoting the development of a state ID (or SID), which would help others continue this research by making it easier to identify appropriate cases for future statistical analysis. Finally, I am grateful the justice welcomes others to continue this study.

The chief justice's study is very timely. In cities across our nation, people are protesting racial biases and injustices. Although these injustices have existed for generations, cell phone cameras and social media have made some of today's most egregious injustices accessible for all to see.

In many ways, today's unrest is a continuation of the 1960s civil rights movement. Justice is still not granted equally to all Americans, and those who experience or witness injustices have a legitimate right to protest.

Our nation and our criminal justice system can no longer turn a blind eye to racial biases. Nor can we conclude that they do not exist simply because we lack the "statistical methodology" to study such large and complex issues.

Unfortunately, it appears Chief Justice Roggensack's study has done just that. Despite enumerating the many limitations that she and her staff encountered while conducting their research and analysis, she concludes that

African-American males are not disproportionately represented in Wisconsin prisons because of drug-offense convictions.



I find this conclusion troubling and hard to accept, especially considering that the study itself admits lacking the necessary staff, data, and resources to perform a complete statistical analysis. At best, the conclusion is premature.

I also have trouble with the methodology where the study classifies Caucasians and African Americans using an "offense-severity score" and a "prior-conviction score" to perform a numerical analysis. In my opinion, this methodology is like comparing apples to oranges; it simply does not allow for an accurate analysis.

Furthermore, the study fails to evaluate whether judges have implicit biases when imposing their sentences. Human brains are programmed to make sense of the world by fitting information into categories. It's only natural for judges, like everyone else, to categorize individuals by their ethnicity and past experiences with similar people.

If we are to move forward in addressing the racial disparity in Wisconsin prisons, judges must first learn to recognize their own racial biases. Studies show that becoming aware of a racial bias is the first step in reducing the problem in that it allows people to develop strategies to account for it.²

We must also work harder to refine the methodology used in studying racial bias in Wisconsin's criminal justice system. To do so, future studies must have the right data and ask the right questions.

If anything, Chief Justice Roggensack's study illustrates the enormity of the task of trying to assess all the variables that go into sentencing. Although I see flaws in the study, it is an important step in creating a more just and equitable criminal justice system.

Joe Donald, L'88, is a judge of the Milwaukee County Circuit Court.

¹ Project Milwaukee: Black Men in Prison, a series of WUWM and MPTV, reports on these matters: <http://wuwm.com/topic/project-milwaukee-black-men-prison#stream/0> (visited Sept. 4, 2016).

² A summary and links to the studies can be found at <http://www.brookings.edu/research/papers/2014/02/awareness-reduces-racial-bias-wolfers> (visited Sept. 4, 2016).

Were all the necessary data available, we would have conducted multiple linear regression analyses to answer whether similarly situated African-American and Caucasian men are sentenced similarly. In order to permit analysis of sentencing data using statistically proven functions, CCAP should collect and report the data as described below.

To explain further: To enable statistical analyses of sentencing on an individual basis and on a group basis, such as by race, data entry in CCAP's system must be modified so that it contains the values necessary for mathematical comparisons of the various components of sentencing. In furtherance of transparency in sentencing, each entry for a convicted defendant should begin with the defendant's SID.¹⁹ The defendant's gender and race, as self-reported, should be entered. Each *charge* filed should be entered indicating the severity class, e.g., felonies A – I and misdemeanors A – C, and also the specific statute alleged to have been violated.²⁰ The disposition of each charge should be listed as dismissed, read-in, not guilty, or guilty. Each *conviction* should be listed separately by class and by the specific statute violated. It would be very helpful to comparing race and sentencing if severity weights were programmed by CCAP so that when a charge or conviction class is entered, the severity weight for the charge and the conviction class are generated automatically.²¹ Whether the conviction arose from a plea or following trial

should be entered. Past convictions should remain available for each defendant by reference to SID. Other data would be helpful as well: e.g., the prosecutor's sentencing recommendation, whether a PSI was done and if so what the sentence recommendation was, and whether defendant had retained or appointed counsel.

Perhaps the next person or group who attempts to statistically analyze race and sentencing will come up with a statistical model to assess all components of sentencing.

Convicted defendants receive probation—with sentence imposed and stayed or with sentence withheld—fine, jail, or a term of imprisonment. Each applicable alternative is entered at sentencing. Imprisonment includes a period of incarceration and a period of extended supervision. Both parts of the sentence should be entered, as well as whether the period of incarceration followed revocation

of probation. Sentences should be entered in terms of the number of days, as that is the unit of measure DOC employs. Employing the same unit of measure in CCAP's and DOC's databases will facilitate tracking and comparing individuals from conviction through DOC's custody.

When a defendant is convicted of multiple charges, the term of imprisonment is affected by whether the sentences for multiple convictions entered at the same time are concurrent with or consecutive to each other. Information detailing the conditions of each sentence often is contained in CCAP's "sentencing text." However, due to a lack of resources, we did not establish how to address this sentencing concern to be sure that it is racially neutral. One could examine only those sentences that were concurrent, but then it would be only the most serious crime of conviction that would be measured.

It is not possible to incorporate sentencing text into a statistical model without assigning numbers to the stated conditions. Sentencing conditions vary significantly, which due to the total lack of resources currently available to study race and sentencing in Wisconsin resulted in our not developing a uniform system for evaluating all sentencing conditions. Perhaps the next person or group who attempts to statistically analyze race and sentencing will come up with a statistical model to assess all components of sentencing.

Although I am disappointed by our inability to make a definitive statement about what role, if any, race plays in sentencing in Wisconsin, the problems we encountered are not unique to our study.²² However, our efforts will not have been without effect if others, who have the resources and staff necessary, continue our study to assure that race plays no role in sentencing. We have enabled the continued study of race and sentencing in Wisconsin through CCAP's adoption of SIDs; by the creation of mathematically proportional severity weights for felony and misdemeanor classes set out in the chart above; with initial research showing that for felony classes C, D, E, and F, African Americans may be pleading guilty less frequently at a rate that is statistically significant; and by demonstrating that African-American males are not disproportionately represented in Wisconsin's prisons *chiefly* because of drug-offense convictions.

Race and sentencing in Wisconsin criminal courts is a serious topic worthy of further study with statistically reliable methods, so that emotional responses are set aside and rationality prevails. It is my hope that this writing will encourage and enable further statistical study of whether similarly situated African-American and Caucasian defendants are sentenced similarly. ■

¹ Racial disparity in incarceration occurs when the percentage of a racial group incarcerated is significantly disproportionate to the racial group's representation in the population. In Wisconsin prisons, as of December 31, 2014, 42 percent of the incarcerated males and 24 percent of the incarcerated females identify themselves as African American. According to the last census data, 6.5 percent of the state's population identified as being solely African American; however, biracial men and women often identify themselves as African American, and persons from other states are present in Wisconsin prisons.

² While we focused only on comparing African-American and Caucasian males, there is a growing Latino population in Wisconsin prisons. Therefore, ethnicity may become a concern, with the concomitant need to examine fairness in Wisconsin courts to those who have Latino backgrounds. Cf. Kenneth E. Fernandez & Timothy Bowman, *Race, Political Institutions, and Criminal Justice: An Examination of the Sentencing of Latino Offenders*, 36 COLUM. HUM. RTS. L. REV. 41 (2004).

³ As we progressed, we limited the study to incarcerated men because women are incarcerated at a much lower rate than men. Therefore, including incarcerated women would have complicated our task of attempting to isolate whether race affected sentencing.

⁴ Attorneys Andrew Hebl, Amy MacArdy, Jennifer Beach, Gabe Johnson-Karp, Megan Stelljes, Rachel Zander, and Cody Brookhouser, all of whom were my law clerks over the years that this study was my "summer project," provided invaluable assistance and suggestions. I am grateful for their thoughtful advice, support, and encouragement. Nicholas Keuler, of the University of Wisconsin-Madison, provided statistical support and guidance. I speak only for myself in this essay.

⁵ CCAP's staff members were very helpful. They were committed to assisting appropriately our attempt to analyze whether sentences imposed upon conviction were affected by the race of defendants. Our court system benefits in so many ways from their skill and dedication. Yet, as the article explains, additional CCAP programming in regard to data collection is necessary if we are to make sentencing transparent and available for meaningful review through CCAP.

⁶ As I understand it, efforts were made to coordinate the SID with the defendant's fingerprints as well.

⁷ It may be noted that there are crimes for which Caucasians are convicted much more frequently than are African Americans. For example, in regard to men who are convicted of driving while intoxicated, 83 percent are Caucasians and only 6 percent are African Americans.

⁸ See, e.g., Steven Elbow, *Going After the Gap*, CAP TIMES (Madison, Wis.), June 16–22, 2010, at 8.

⁹ See JOSEPH R. TATAR II, WISCONSIN DEPARTMENT OF CORRECTIONS, PRISON INMATE PROFILE: MOST SERIOUS OFFENSE BY RACE AND GENDER (2000–2014) (July 2015).

¹⁰ On December 31, 2014, 752 of 10,219 Caucasian male inmates were incarcerated for drug-related convictions. *Id.*, Table 5.

¹¹ The percentage of incarcerated Caucasian males who have a conviction of a violent offense also has grown, from 59.6 percent on December 31, 2004, to 65.5 percent on December 31, 2014. *Id.*, Table 4.

¹² In *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, the Wisconsin Supreme Court thoroughly discussed legally relevant variables that a circuit court judge could consider when sentencing a defendant convicted of a crime to which Truth-in-Sentencing applies. However, neither database contained all the sentencing variables that *Gallion* identifies as legally relevant.

¹³ Because the Wisconsin statutes do not contain a chart that lists each statute that falls into each felony and misdemeanor class, I have created such a chart as an appendix; it is available online at <http://perma.cc/KH2A-HB78>.

¹⁴ Charge bargaining may occur during plea bargaining, when some of the counts charged are dismissed, when the charge of conviction was agreed upon and the criminal complaint or information was amended to allege a new charge that replaced the charges initially filed, or when a negotiated issuance of a criminal complaint occurs.

¹⁵ This study is very preliminary because of the way in which data are currently maintained and the resulting inability to correct for individual variations that may affect why defendants choose to plead. However, as the article explains, because of its potential significance, the matter should be pursued further.

¹⁶ The p-value is the probability that the difference observed was due to random chance.

¹⁷ Some defendants who did not plead guilty elected bench trials rather than jury trials.

¹⁸ The connection between race and pleading guilty has been studied in Pennsylvania. See Celesta A. Albonetti, *Race and the Probability of Pleading Guilty*, 6 J. QUANTITATIVE CRIMINOLOGY 315 (1990). The data Albonetti reviewed also suggest that "defendants who plead guilty, compared to those who pursue a trial, receive less severe sentences." *Id.* at 315.

¹⁹ CCAP currently enters the same SID as DOC. This is a benefit that has resulted, in part, from our study.

²⁰ CCAP currently enters the statute and class of conviction.

²¹ Further CCAP programming is needed for CCAP to generate combined severity weights for prior convictions without further manual data entry. This task also could be accomplished if one had the resources necessary to create a program that upon entry of the CCAP data calculations would be done without further data entry. We did not have those resources.

²² A 2007 study, which considered only five types of criminal offenses, concluded, "More and better data regarding race and sentencing in Wisconsin is necessary before we can gain a better understanding of the role race may or may not play in sentencing decisions." BRENDA R. MAYRACK, WISCONSIN SENTENCING COMMISSION, RACE & SENTENCING IN WISCONSIN: SENTENCE AND OFFENDER CHARACTERISTICS ACROSS FIVE CRIMINAL OFFENSE AREAS (August 2007).

COMMENT

Looking Beyond the Streetlamp's Glow

By Michael M. O'Hear

There is no question that Wisconsin's prisons reflect massive racial disparities in incarceration. More than 40 percent of the state's prisoners, but only 6.6 percent of its residents, are black.¹ Indeed, one recent study found that Wisconsin has the nation's highest rate of black male incarceration.² The important and uncertain empirical questions are not whether a disparity exists, but (1) whether the disparity is unwarranted—that is, unjustified by reference to any legitimate, race-neutral reasons—and (2) assuming the disparity is at least to some extent unwarranted, what actors in the criminal justice system are responsible for it.

These are not new questions. Researchers have grappled with them for decades, both in Wisconsin and nationally. From the start, however, such efforts have been plagued by limitations in the available data.

Research in this area recalls the old joke about a man looking intently for a lost quarter in the light of a streetlamp at night. A passerby inquires where the quarter was dropped. The man replies, "Down the block, but I'm looking here because the light is better."

Similarly, researchers have been drawn to study disparity where the light is best—that is, at the sentencing stage. The sentencing decision is a public one, and becomes part of a permanent case record that also includes the offense of conviction and various other data points. Collecting such data from thousands of cases, researchers can perform multivariate regression analysis to determine which variables correlate with longer sentences, holding all other variables constant.

For instance, in what was probably the earliest systematic study of sentencing disparities in Wisconsin, researchers supported by the Wisconsin Supreme Court's Office of Court Operations gathered data on 2,417 felony defendants who had been sentenced between the start of 1977 and the middle of 1980.³ They broke out their results by offense type. By way of illustration, they found that sentence length in armed

robbery cases correlated in a statistically significant way with ten variables.⁴ Those with the greatest effect on sentence length were the following: number of serious charges in the particular case, whether the defendant went to trial, whether the defendant had a prior conviction for a violent crime, whether the defendant had an alcohol problem, and the defendant's race. Holding all other measured variables constant, a non-white armed robber could expect to receive a sentence that was 409 days longer than a white armed robber.⁵



One might be inclined to conclude that a number of Wisconsin's sentencing judges in the late 1970s were racially biased. However, while the researchers tracked 142 variables, they were still unable to account for most of the case-to-case variation in sentence lengths.⁶ Additional, unmeasured variables were obviously playing a big role in driving armed robbery sentences, and it is possible that if researchers could hold some of those other variables constant, the race effect would wash out.

On the other hand, the regression analysis might well underestimate the true level of racial bias in the system, for it simply accepted as a given many variables that resulted from the system's operation. For instance, as important as race was in the analysis, going to trial was even more important. Holding race, criminal history, and all of the other measured variables constant, the armed robber who went to trial could expect a prison sentence 591 days longer than the armed robber who pleaded guilty. However, whether a defendant pleads guilty or not is largely a function of the plea-bargaining behavior of prosecutors and defense counsel. If that behavior differed based on the defendant's race—e.g., if prosecutors were less inclined to offer generous plea bargains to black defendants—then it is conceivable that bias at the plea-bargaining stage played a much more important role in driving the system's overall racial disparities than did any judicial bias at the sentencing stage.

This gets us back to the problem of only looking where the light is best. Unfortunately, in Wisconsin and the United States as a whole, police and prosecutorial decision making tends to be a black box. Yet judicial decision making cannot be fully assessed without understanding what happens at the earlier stages in the process.

Chief Justice Patience Roggensack's paper should be welcomed as an effort to focus attention on one part of the process that has traditionally rested outside the streetlamp's light. She finds statistically significant differences in the guilty-plea rates of blacks and whites convicted of similar offenses in Milwaukee County. This is an intriguing finding, although she properly recognizes that it can only be reported as a matter warranting further research. Before one could fairly criticize the plea-bargaining process in Milwaukee, one would need much more data, in order to control for many more variables. This work would be facilitated by the much-belated creation of a single identifying number for defendants across all major criminal justice agencies in Wisconsin, which, happily, Chief Justice Roggensack reports is in the works. The streetlamp's reach may be growing.

Yet, as fascinating as all of this empirical work is, the goal of definitively proving and quantifying a pure race effect in punishment will likely continue to be frustratingly elusive. There are simply too many variables at play, many of which defy easy, reliable measurement and many others of which are themselves socially constructed in ways that may reflect bias (like going to trial). Perhaps we are focusing too much attention on the quixotic goal of pinning down the cause of racial disparity in our prison population. It should not distract us from the pressing imperative—in Wisconsin and nationally—of reducing our bloated and historically unprecedented incarceration rate.⁷

Michael O'Hear is professor of law at Marquette University.

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¹ CHRISTINA D. CARMICHAEL, WIS. LEG. FISCAL BUREAU, INFORMATIONAL PAPER 55: ADULT CORRECTIONS PROGRAM 13 (2015); U.S. CENSUS BUREAU, QUICK FACTS: WISCONSIN, <https://www.census.gov/quickfacts/table/RHI225215/55,00> (visited Sept. 4, 2016).

² JOHN PAWASARAT & LOIS M. QUINN, UNIVERSITY OF WISCONSIN—MILWAUKEE, WISCONSIN'S MASS INCARCERATION OF AFRICAN AMERICAN MALES: WORKFORCE CHALLENGES FOR 2013, at 2 (2013).

³ SANDRA SHANE-DUBOW ET AL., WISCONSIN SENTENCING GUIDELINES: PHASE I AND III OF RESEARCH AND DEVELOPMENT 145 (1982).

⁴ *Id.* at 157. Statistical significance here means that the chance that the reported correlation resulted from random variation was less than 5 percent.

⁵ I refer here to nominal prison sentences. At that time, Wisconsin's Parole Board had the authority to release most prisoners well before the completion of the full nominal sentence.

⁶ *Id.* at 141, 164. The researchers' initial model accounted for only 28 percent of the variance. When judge identity was added to the model, the R² rose to 0.39. In the final model (judge identity included), the race effect diminished somewhat, but remained statistically significant. *Id.* at 174.

⁷ As I detail in a forthcoming book, there are many reasons to think that Wisconsin's current incarceration rate might be sharply reduced without any adverse effect on public safety. MICHAEL O'HEAR, WISCONSIN SENTENCING IN THE TOUGH-ON-CRIME ERA: HOW JUDGES RETAINED POWER AND WHY MASS INCARCERATION HAPPENED ANYWAY ch. 6 (2017).



Walter Matthau (left) as Attorney "Whiplash Willie" Gingrich
in *The Fortune Cookie* (1966), United Artists/PhotoFest

Hollywood Legal Comedies— Fun, Laughter, and a Dose of Critique

By David Ray Papke



The American film industry has frequently portrayed heroic lawyers and stirring courtroom proceedings. Almost everyone is familiar with Atticus Finch's stand for racial justice in *To Kill a Mockingbird* or Frank Galvin's moving summation in *The Verdict*. But Hollywood has also used lawyers and courtrooms as sources of humor rather than drama more often than one might think. Countless delightful lawyers and hilarious trials have appeared on the big screen over the past century of feature-film production.

Like comedies in general, Hollywood legal comedies are designed to amuse and to provoke laughter. They present enough mistakes, incongruities, and ironies to enable viewers to feel vaguely superior, but legal comedies are charitable at the same time they are being shrewd. From the moment the opening credits scroll, viewers know the major characters will eventually find happiness and contentment. The various narrative twists and turns can be complicated and even outrageous, but viewers find comedies "easy" to watch because they know things will work out in the end.

That is not to say, meanwhile, that comedies are always the same. Comedy, after all, takes many forms, and the forms overlap and combine in sundry ways. Hollywood legal comedies range from raucous musicals and clownish slapstick on the one hand to

witty parodies and playful romances on the other. In recent years, legal comedy has even taken a turn toward satire, which self-consciously uses fictional characters and narrative twists to expose actual persons, types of people, social institutions, and noteworthy events as ridiculous and corrupt.

Satire in particular and also comedy in general can have a serious side. While Hollywood's primary goals are to charm and divert, legal comedies also make somebody or something the "butt" of the joke. Lawyers and judges might therefore take note that while Hollywood legal comedies are light entertainment, these comedies also speak subtly to the public's resentment of lawyers and courts.

Hollywood Classics

The American film industry relocated from New York City to southern California in the years immediately before and during World War I. The weather and the scenery were ideal for outdoor filming, and the first film moguls could hold wages down because Los Angeles was at the time the nation's largest open-shop, nonunion city. Before long, the overall enterprise became known as "Hollywood," and powerful studios were producing distinctive feature films relying on both a star system and established genres. Comedy was a staple for Hollywood's ➤



Larry, Curly, and Moe on the courtroom floor in *Disorder in the Court* (1936), Columbia Pictures/PhotoFest

filmmakers, and certain of the cinema's "classics" revolved around lawyers and courtroom proceedings.

An entertaining early example of a legal comedy was Warner Brothers' *The Night Court* (1927). One of the earliest sound films, it begins with a raid on the Paradise Night Club on West 45th Street in Manhattan, where, it was alleged, the performances were obscene. The police transport the club's entire troupe to the courthouse for a trial the very next day. A resourceful defense lawyer then convinces the judge that the troupe be allowed to perform a dance number right in the courtroom. Some of the dancers wear what appear to be swimsuits, and, quite conveniently, the jury consists of assorted musicians, who provide the music. After swaying happily to the music and quite obviously enjoying the performance, the judge decides that he will have to visit the Paradise Night Club in person in order to watch the troupe's midnight show. The judge also decrees that the puritanical prosecutor is not welcome to come along, a sure indicator that the obscenity charges will soon disappear.

The great comics of the 1930s and '40s—W. C. Fields, Mae West, the Marx Brothers, Laurel and Hardy, and Abbott and Costello—were for the most part not song-and-dance-performers, but they frequently poked fun at lawyers and courtroom proceedings with particular portrayals and scenes in their film shorts. Lawyers were not the comics' primary target, but their quips could sting. W. C. Fields, for example, said, "There are seven natural openings in the head and body, but a lawyer is the only human being with eight. The extra one is a slot to store money." Chico Marx advised people to get a lawyer whenever they were in trouble but warned: "Then you got more trouble, but at least you got a lawyer."

The Three Stooges produced a film that was a legal comedy from beginning to end. In *Disorder in*

the Court (1936), the Three Stooges played nightclub musicians called as defense witnesses in the murder trial of a friend and dancer named Gail Tempest. When Curly is told to take the stand, he asks, "Where should I put it?" Later in the trial, Larry mistakes the prosecutor's toupee for a tarantula, whereupon Moe snatches the bailiff's gun and heroically guns down the hairpiece. Moe manages to swallow his harmonica, and then later Curly bops jurors on their heads while trying to capture a parrot that has escaped in the courtroom. In the end, the Three Stooges identify the true murderer and finally stop slapping faces, poking eyes, and twisting noses. Vaudevillian slapstick must be exhausting for the actors, and it sometimes has the same effect for viewers.

Two appreciably more-refined Hollywood legal comedy classics are *Miracle on 34th Street* (1934) and *The Devil and Daniel Webster* (1941). In the former, Macy's hires one Kris Kringle to be a store Santa Claus, but then Kringle claims he actually is Saint Nick. A mental competency hearing follows in which 21 bags of cards and letters addressed to "Santa" are delivered to Kringle in open court. In *The Devil and Daniel Webster*, Webster defends an American farmer in a curious debtor-creditor action. The farmer, it seems, has sold his soul to the Devil, and the Devil has arrived to collect. Webster's jury consists of some of the most dastardly figures of American history.

Beyond the films already mentioned, a large number of the classic legal comedies were so-called romantic comedies. A well-established genre, the romantic comedy features unlikely lovers who routinely



Edmund Gwenn (sitting with beard) as Kris Kringle in a competency hearing in *Miracle on 34th Street* (1934), 20th Century Fox/PhotoFest

miscommunicate with one another before realizing that they are truly meant for each other. The leads in romantic comedies, of course, need not be lawyers, but a certain type of oblivious lawyer proved almost perfect for the genre. What's more, the Hollywood courtroom was a good setting for wacky behavior.

The romantic comedy classic involving lawyers that has attracted the most critical attention is *Adam's Rib* (1949). New York City prosecutor Adam Bonner, played by Spencer Tracy, and his spouse and criminal defense lawyer Amanda Bonner, played by Katharine Hepburn, square off in the trial of Doris Attinger for attempted murder of her cheating husband. Amanda prevails, in part because of the "testimony" of a female circus performer, whom Amanda calls to the stand. Supposedly showing that women deserve the same treatment as men, the woman performs giant somersaults in court and demonstrates her strength by lifting a frightened Adam above her head. Adam, not surprisingly, is upset and briefly moves out of the Bonners' apartment, deplored Amanda's involvement with women's causes and lack of respect for the law. Fortunately, the separation is short-lived, and before long the Bonners reconcile and go off to the country to play with the dogs who are their proverbial child-substitutes. As already noted, romantic comedies, like comedies in general, almost always manage to end happily.

Modern Legal Comedies

Historians of the American cinema point to the 1960s as the time when the so-called "classical period" of film production came to an end. Americans moved in large numbers to the suburbs and turned to network television for entertainment and relaxation. The film industry did not disappear, but filmmakers pitched their products to various specialized audiences, including but not limited to maturing baby boomers. Hollywood's biggest hope became the smash "blockbuster," and in 1972 the top 20 films were responsible for over half of all box-office receipts. Comedy remained a part of the mix, and goofy lawyers and outrageous courtroom scenes continued to appear.

As in the "classical period," romantic comedies revolving around lawyer characters and including courtroom scenes were especially common. However,



Spencer Tracy and Katharine Hepburn as Attorneys Adam and Amanda Bonner in *Adam's Rib* (1949), MGM/PhotoFest

these films were bawdier than in the past and, in some cases, even a tad indecent. Then, too, against the backdrop of soaring divorce rates, modern romantic comedies were increasingly likely to involve lovers restarting rather than initiating marriages and romantic relationships. As was the case with Adam and Amanda Bonner in 1949, the efforts at reconciliation usually succeeded, while of course providing lots of laughs along the way.

The best romantic comedies featuring lawyer characters and courtroom hijinks include *Barefoot in the Park* (1967), in which a tightly wound lawyer, played by Robert Redford, learns how to share a minuscule sixth-floor walk-up with his free-spirited wife, played by Jane Fonda; *Blume in Love* (1973), in which a California lawyer, played by George Segal, wins back his ex-wife from her lazy boyfriend Elmo, played by Kris Kristofferson; *Legal Eagles* (1986), in which Robert Redford again plays a lawyer—this time a prosecutor who falls for the defense attorney, played by Debra Winger, in an art theft case; *Two Weeks Notice* (2002), in which an earnest, activist lawyer, played by Sandra Bullock, falls for a juvenile billionaire, played by Hugh Grant; and *Laws of Attraction* (2004), in which opposing divorce lawyers, played by Pierce Brosnan and Julianne Moore, travel to Ireland to take depositions only to marry accidentally after a wild and romantic night at a folk festival. All are great fun to watch.

According to the online Internet Movie Database, the most commercially successful of the modern romantic comedies with a lawyer protagonist is *Liar Liar* (1997). The film stars Jim Carrey as lawyer Fletcher Reede and includes Carrey's distinctive facial contortions and slapstick at every turn. Carrey's humor is not universally appealing, but thousands of movie-





Swoosie Kurtz (far left) and Jim Carrey as Attorneys Dana Appleton and Fletcher Reede in *Liar Liar* (1997), Universal/PhotoFest

goers were pleased. According to the Internet Movie Database's "All Time Box Office" listings, *Liar Liar* made \$182 million at the American box office.

In *Liar Liar*, Attorney Reede is a man on the make but not particularly loyal to his son Max, who lives with Reede's ex-wife. Max wishes at a birthday party that his father would have to tell the truth for a day, and when the wish is granted by someone on high, all sorts of complications ensue. Lawyers, after all, are supposedly congenital liars. In a divorce trial, Reede has to physically bash himself in a courthouse men's room in order to honestly say he needs a continuance. At the end of the trial, Reede prevails, but he then objects to the judge's ruling because he does not truly consider his own client worthy. The judge, in turn, jails Reede for contempt. Oh, well, at least Reede and ex-wife reconcile, providing Max with a warm and loving home life.

If the romantic comedy is not one's cup of tea, a modern-day moviegoer has other types of lawyer and courtroom comedies as options. *War of the Roses* (1989), which classifies as "black comedy," considered the darker aspect of human behavior and human nature. The ambitious, materialistic lawyer Oliver Rose, played by Michael Douglas, battles in the film with his yuppie, entrepreneurial wife, played by Kathleen Turner, for their elegant family home and for other parts of their marital estate. Both end up dead in the home's foyer. *Chicago* (2002) is a musical comedy, featuring not only various singing murderesses but also the slick criminal defense lawyer Billy Flynn, played by Richard Gere. Flynn explains to the other characters and to viewers that practicing law is "a

three-ring circus." If things go badly during a trial, the lawyer can, in keeping with the film's musical-theater format, literally tap-dance around the problems.

Most notably, the film industry of the modern era also turned to the form of comedy known as satire. In general, the latter seeks smirks rather than laughs from its audiences by making characters look and sound foolish. As a satire alienates the audience from the specific fictional character, the satire also customarily points to flaws in an actual person or type of person outside the work itself. Unfortunately, an increasing number of satiric characters and external references have been lawyers.

The grandfather of these satiric law-related comedies from the modern era is *The Fortune Cookie* (1966). It features the money-hungry lawyer William Gingrich, played with great flair by the comic Walter Matthau. Nicknamed "Whiplash Willie," Gingrich specializes in phony personal-injury cases and is purportedly able to find loopholes in the Ten Commandments. Gingrich convinces his brother-in-law Harry Hinkle, played by Jack Lemmon, to fake a back injury in order to scam an insurance company, but in the end Hinkle's conscience gets the best of him. He rejects what is said to be the largest settlement offer in Ohio history and calls Gingrich "one cheap, chiseling shyster lawyer." The butt of the two-hour satiric joke in the film is the personal-injury lawyer, and, somewhat undeservedly, Matthau won an Oscar for his performance.

Subsequent films have satirized other types of lawyers. The hilarious *My Cousin Vinny* (1992), for example, portrays the brash, ethnic lawyer Vincent Gambini from New York City, who seems *not* to be embarrassed that he has failed the state bar exam five times. Although he has absolutely no litigation experience, Gambini serves as defense counsel when his cousin is tried for murder in Alabama. At one point, Gambini's girlfriend has to explain to him how discovery works. The Coen Brothers' *Intolerable Cruelty* (2003) uses the narcissistic divorce lawyer Miles Massey, played by George Clooney, to satirize divorce lawyers in general. Massey has developed a model prenuptial agreement that is supposedly indestructible, but of course both Massey and his master document are hopelessly flawed.

For a satiric portrayal of the courts rather than the legal profession, *Trial and Error* (1997) merits watching. It stars the buffoonish Michael Richards—Kramer of television's *Seinfeld* series—as a man holding himself out as a lawyer in a mail fraud case and actually doing quite well at it. One secret to the

fake lawyer's success is the advice he receives during trial through a hidden baby monitor, and it also helps that the presiding judge is obtuse and incompetent.

Hollywood films have also satirized law students and law schools. The disturbing *Soul Man* (1986) pokes fun at the Harvard Law School and especially its fictive affirmative action program. *Legally Blonde* (2001) also ridicules the school's admissions process, especially because it accommodates and is influenced by an application video promoting the bikini-clad Elle Woods, played by Reese Witherspoon. The daffy but likable Woods is a misfit among Harvard's hard-driving first-year students, but, while still a student, Woods manages to defend a murder suspect by pointing out at trial that one would surely never shower right after getting a perm. Harvard Law School is easily the most-known American law school among members of the lay public. Hence, in Hollywood satire set there, Harvard Law School functions as a synecdoche, as a cultural device in which one part of something effectively represents the whole. When Harvard Law School is ridiculed, all of legal education is the butt of the joke.

Conclusion

Stories about lawyers with engaging courtroom scenes occupy a large and important place in the American cinema, but a surprising number of these legal movies are comedies. They range from "low



comedy" featuring physical slapstick such as The Three Stooges' *Disorder in the Court* or Jim Carrey's *Liar Liar* to "high comedy" with drier, wittier humor such as *Two Weeks Notice* or *Intolerable Cruelty*. Even recent comedies with a sharper satirical edge are intended to make viewers smile. Audiences know, after all, that in a comedy things will work out in the end, and viewers delight in cinematic comedies primarily as pop cultural vehicles providing relaxation and escape.

But lawyers and judges might beware that these comedies also have a critical thrust. The biting satires of recent years are especially likely to ridicule lawyers and courts, but in more-subtle, overlooked ways almost all legal comedies make fun of lawyers and courts.

Why might this be? The film industry's chief goal is not to educate members of the audience but rather to engage them with an eye to turning a profit. Hollywood is not attempting to change people's minds but rather to coordinate feature films with what they take to be the public's attitudes and sentiments. The public, alas, has come to harbor no shortage of negative thoughts about the legal profession and the courts.

By most accounts, a period of pronounced negativity regarding lawyers and the courts commenced in the 1970s and then built steam during the 1980s and '90s. Indeed, the legal profession's standing plummeted during the final decades of the twentieth century more so than that of any other profession or occupational group. One study found that the only group the public on average distrusted more than lawyers was radio talk show hosts!

A survey of public sentiment regarding the courts undertaken by the American Bar Association at the turn of the twenty-first century is equally discouraging. The survey revealed that 47 percent of the surveyed respondents considered the courts racially and economically biased, and a whopping 90 percent thought that wealthy and large corporations had unfair advantages in courtroom proceedings.

Lawyers and judges cannot do much about these polls and surveys, but we might beneficially reflect on why the public finds legal comedies amusing. While it is always fun to hear and join in the laughter in neighborhood movie houses and cineplexes, it is worth considering the reason people are laughing. In essence, the films offer a gentle critique of lawyers and courts, and audiences tend to respond approvingly. Lay viewers enjoy it when lawyers and courts, to use a term the novelist Booth Tarkington liked, receive their "comeuppance." ■

David Papke is professor of law at Marquette University.

FROM THE PODIUM

Thomas W. Merrill

The Digital Revolution and the Future of Law Reviews

On April 8, 2016, Thomas W. Merrill, the Charles Evans Hughes Professor at Columbia Law School, delivered these remarks at the University Club of Milwaukee on the occasion of the *Marquette Law Review*'s annual banquet.

Let me begin by congratulating the *Marquette Law Review* on reaching the threshold of its 100th anniversary. As you may know, Harvard established the first student-edited law review in 1887. Once the Harvard experiment was seen to be a success, other schools followed suit. Marquette was an early adopter, establishing its law review in 1916. By comparison, the school I attended, the University of Chicago, did not start a law review until 1933.

The title of my remarks could be "Will the *Marquette Law Review* Survive Another Hundred Years?" Or, perhaps, "Will the *Marquette Law Review* Survive Another Hundred Years, or Whenever Dean Kearney Steps Down as Dean, Whichever Comes First?" You will have to wait to the end for the answer.

Let me begin with a brief overview about the state of scholarly journals in the field of law. Based on a recent survey by Washington & Lee University's School of Law, it appears that there are today about 980 active journals in the United States devoted to law. Of these, I estimate that about 800 are student-edited law reviews. Since there are some 200 accredited law schools in the country, this means that the average law school has four student-edited law reviews. Obviously, some have more. Harvard has 18; Columbia and Yale have 11 each. Some have only one. Marquette, which has 4, is right at the mean.

Law reviewing is a growth industry. According to one source, in 1997 there were an estimated 400 student-edited law reviews. This means that the number of student-edited reviews has doubled in fewer than 20 years. The growth appears to be almost entirely in the form of new specialty law reviews at schools that already have a generalist law review and one or more specialty reviews. Lest the numbers astonish you, consider that in the field of biology

there are now 550 academic journals. Knowledge, or at least academic inquiry, is multiplying at an incredible rate. The growth in the number of law reviews in a significant sense simply mirrors a more general proliferation of scholarship, including legal scholarship.

The specific topic I wish to address is how the digital revolution is likely to affect law reviews, especially the 800 student-edited law reviews, in the coming years. About a month ago, the librarian at Columbia Law School sent a remarkable email to the Columbia faculty. He announced that the law school was cancelling its subscriptions to 450 law reviews. I was stunned by this. But, truth be told, I did nothing to protest. As far as I am aware, none of my colleagues did, either.

The explanation for the indifference, certainly in my case, is simple. It has been years since I went to the library to look up a physical copy of a law review. Instead, when I want to peruse a law review article, I look it up on a website called HeinOnline. If it's not there, I use Westlaw or Lexis. As a last resort, I go to the law review's web page. For heavy consumers of law reviews, which I consider myself to be, the world of law reviews has gone digital. Hard copy is obsolete.

How did the librarian pick which 450 subscriptions to cancel? Again, a simple answer. He cancelled every review that immediately uploads its content to HeinOnline. For these reviews, there is a digital facsimile of the hard-copy version available as soon as the hard copy is published. Only those



reviews that delay their migration to HeinOnline (including Marquette, I should note) were spared. But given that these reviews are more-or-less-immediately available on Westlaw and Lexis, or on the law review web page, it is not hard to imagine that their cancellation, too, is not far off.

What are the implications for law reviews? The principal lesson is straightforward: All or nearly all law reviews will eventually cease publishing in hard-copy form and will publish only online. It is a matter of simple economics. Subscribers will continue cancelling print subscriptions. Reviews will find it more and more difficult to justify the cost of hard-copy publication, given the dwindling subscriber base. Indeed, the primary source of revenue for most law reviews today is the license fees and royalty payments they obtain from HeinOnline, Westlaw, and Lexis. If reviews switch to online publication, they can stay afloat, perhaps with a modest subsidy from the law school. Otherwise, the subsidy will have to get larger and larger, to the point where the law schools will force them to go online.

The migration is already underway. Of the 980 active law journals published in the United States today, 89, or almost 10 percent, are already published only online. Most of these are student-edited publications. Columbia, for example, has two student law reviews that are published only online. I would also note that many of the top generalist law reviews have recently started publishing online supplements, featuring shorter essays and commentaries on articles published by the review. Thus, the idea of online publication is already familiar to the top law reviews. Outside law, in fields such as biology and medicine, online journals are even more widespread.

In these fields, only a handful of the oldest and most prestigious journals still publish in hard-copy form. It is reasonable to predict that, soon, all or nearly all law reviews will switch to online publication, in parallel to what is happening in other scholarly fields.

What will be lost? As I have already indicated, for heavy consumers of law reviews, nothing. That consumer is already consuming online. Some faculty and students will lament the passing of the physical reprint of the article or note they have authored. But there is a fairly good near-substitute: a photocopy of a PDF version of the article or note. I already receive many of these from authors. An even better solution is to send an email to colleagues, family, and friends, announcing the publication of an article, with a PDF copy attached. Since most reprints end up in the circular file in any event, online distribution would have environmental benefits as well.

Another way in which the digital revolution has affected law reviews involves the article selection process.

Here it is necessary first to mention an oddity of law review practice. In most scholarly fields, journals follow what is called a single-submission policy. An author submits a manuscript to one journal; if the journal thinks the article may be worth publishing, it sends the piece out to two or three experts for what is called peer review. If the article is turned down, the author then starts with another journal.

Law reviews, for reasons that are lost in the mists of time, follow a multiple-submission policy. An author can send a manuscript to as many journals as he or she wants; at least in theory, all these reviews then consider the article simultaneously. The first journal to make an offer of publication that the author accepts gets the publication rights. This basically establishes



What are the implications for law reviews? The principal lesson is straightforward: All or nearly all law reviews will eventually cease publishing in hard-copy form and will publish only online.

a race among law reviews to see who is the first to capture the submission. Because this process requires that law reviews make quick publication decisions, law reviews cannot use peer review. The articles editors—third-year law students—make the decisions about which articles are worthy of publication and which should be rejected.

I have long regarded this system as crazy, and I think most of my colleagues do, too. What you end up with is dozens or even hundreds of editors at different schools, swamped by large numbers of submissions, acting under great time pressure to make decisions to accept or reject. This necessarily means that articles are placed—or not—based on dozens or even hundreds of superficial evaluations. The Marquis de Condorcet proved many years ago that large numbers of individuals guessing the number of beans in a jar will produce a more accurate aggregate guess than any individual acting alone. But this depends on aggregating the guesses, whereas the judgments of the articles editors at different law reviews are not aggregated. And, besides, law review articles are not beans in a jar—at least not all of them.

I recently interviewed two articles editors on the *Columbia Law Review* to get a sense of the current reality of the process. There are seven articles editors at Columbia. Each has, at any given point in time, a portfolio of about 200 pending

submissions to evaluate. About 90 percent of these are rejected, they said, after reading about the first 10 pages of the submission. This means, as many law professors have intuited, it is important to write a snazzy introduction. The editors also acknowledged using a variety of proxies to zero in on articles for closer consideration. The academic affiliation of the author is one. Professors at higher-ranked law schools get more attention. The author's past publication record is another. Those with long bibliographies get more attention. A third, which was news to me, is that submissions by post-graduate fellows or visiting assistant professors at top law schools are also given careful consideration. The theory here is that these authors have been carefully vetted as promising scholars by the schools at which they have temporary appointments and that these debut articles will have received great attention in their preparation.

The use of these proxies is obviously distressing from the perspective of an ideal meritocratic system. It means that those who have already achieved success have a built-in advantage in gaining more success. This is a source of bitterness on the part of ambitious young scholars trying to break into the system. The only justification for the process is that, given the reality of multiple submissions, some system of proxies is inevitable. No human being can give careful



“Why don’t law reviews give up on the multiple-submission policy and adopt a single-submission policy like journals in other scholarly fields?

The answer, I think, is that this would require some kind of collective action on the part of all or nearly all law reviews acting together.”

consideration to 200 manuscripts in a short period of time. Proxies are better than what happened when I was an articles editor years ago, which was that manuscripts just got tossed out unread when one editorial board turned over to another.

The system has been modified in recent decades by something called the expedited review. This, too, is maddening, but I think it may be a modest improvement relative to just using proxies such as the school of affiliation of the author. You all know how expedited review works. When an author receives an offer of publication, typically with a short deadline, the author will notify other reviews in which he or she would prefer to publish, and many of them will scramble to consider the submission on an expedited basis. In effect, reviews regard the initial offer of publication as a signal of quality, which justifies their zeroing in on this submission. There are lots of reasons why this is not a perfect system. But one can also see it as another device for dealing with the information overload created by multiple submissions. It also contributes in a small way to the rationality of the ultimate decision about where a submission will be placed, because it generates a modest aggregation of judgment: at least two law reviews are guessing how many beans are in the jar, rather than just one.

What then has been the impact of the digital revolution on the article selection process? Not very much, truth be told. The primary development has been the emergence of two competing web-based services, ExpressO and Scholastica, that authors can use to submit manuscripts for consideration. The author sends the manuscript to the service, indicates the journals to which it is to be submitted, and pays a fee based on the number of journals selected. The

service then distributes the manuscript electronically to the designated journals and keeps a running tab on the status of the manuscript for the benefit of the author and the journals. Within the law review itself, the services can be used to divide manuscripts among articles editors, keep track of the status of each submission, and provide for wider distribution if “reads” by additional editors are deemed appropriate.

In some respects, the advent of these digital services has improved the article selection process. Editors can more easily keep track of the status of articles as they work their way through the evaluation process. Fewer manuscripts get lost or ignored—or just pitched out when the board turns over. The services also make it easier to maintain accountability among multiple articles editors and to provide access for other editors when additional reads are deemed appropriate.

In other respects, the digital services probably exacerbate problems associated with the multiple-submission system. Perhaps most obviously, they greatly reduce the transaction costs to authors of making large numbers of submissions. So the cascade of submissions has risen to a torrent. It is also possible that the digital services encourage even greater use of proxies in selecting articles for publication. Scholastica includes the author’s CV along with the manuscript, so editors do not even have to look it up to figure out where the author teaches and how much he or she has published in the past. And the services do little to enhance aggregation of judgments among different reviews.

Why don’t law reviews give up on the multiple-submission policy and adopt a single-submission policy like journals in other scholarly fields? The answer, I think, is that this would require some kind of collective action on the part of all or nearly all



law reviews acting together. Single submission, certainly if combined with outside peer review, takes time. If one review adopted a single-submission policy, and the other reviews did not, then the other reviews would presumably grab the best articles before the review with a single-submission policy could act. No review wants to lose all the best articles to competing reviews. So no review is in a position to adopt single submission unilaterally. And with editorial boards turning over every year, reviews find it impossible to make long-term commitments to other reviews, such as would be necessary to achieve a comprehensive agreement to move to single submission.

The bottom line is that the digital revolution has regularized and magnified features of the article selection process, but has not fundamentally changed its character. As long as student-edited law reviews adhere to the norm of permitting multiple submissions—as I believe they will—the logic of that system will continue to dictate the way content is allocated among student-edited law reviews.

The most far-reaching question posed by the digital revolution—and here I get to one of my facetious alternative titles—is whether it will lead to the elimination of law reviews altogether. Some of my more tech-savvy colleagues predict that this will happen. They envision a future of open-access publication of scholarship on the Social Science Research Network (SSRN) or its equivalent, in which individuals seek out articles to read based on download counts, citation counts, and references in blogs and other online sources. The traditional function of journal publication will become increasingly irrelevant. SSRN or

something like it will become the dominant source of publication. Law reviews, lacking enough decent content to publish, will wither away and die.

The hypothesis here is based on what is called disintermediation. Something like this has happened to newspapers and booksellers. Newspapers and booksellers used to perform a gatekeeping function, determining what sort of information would be made available to the public, based on their judgment about its accuracy and quality. With the rise of the internet, consumers are increasingly bypassing these gatekeepers and seeking out information from a variety of alternative sources. My skeptical colleagues think something similar will happen in the realm of legal scholarship. No one will care whether an article was published in the *Harvard Law Review* or the *Slippery Rock Law Review*. All that will matter is how many times it has been downloaded or cited, and whether it was mentioned by the *Volokh Conspiracy* or *Prawfsblawg*.

There is no question that law reviews do not perform the strong gatekeeping they once did. When I was a young law professor, a long time ago in a law school far, far away, the library would circulate, once or twice a month, photocopies of the tables of contents of law reviews as they were published. One would peruse these tables of contents to see if articles or student notes had been published germane to one's research, or perhaps simply of general scholarly interest. The library would also route certain law reviews to faculty members for examination before the articles were put on the shelves. These practices reflected the gatekeeping function of the law reviews. If one

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wanted to keep up with cutting-edge scholarship, one looked at recent issues of the law reviews.

These practices have largely stopped. Faculty members rely less on the table of contents of law reviews to tell them what to read, and more on other cues, such as discussions on blogs. I also think that faculty are more focused on seeking out publications that are narrowly relevant to their own specialty than was formerly the case. In this respect, changing habits reflect the explosion in the volume of legal scholarship and the increasing specialization among legal academics.

What has not happened—and what I see no sign of happening—is that legal scholars are forgoing opportunities to publish in law reviews. Many of my colleagues—especially the younger ones—post their manuscripts on SSRN before they submit them to reviews. And some insist that SSRN is more important to them as both a vehicle for dissemination of their scholarship and a source for finding other scholarship. But, oddly enough, they continue to submit their work for publication in law reviews. Indeed, no young scholar interested in getting hired to teach at a law school, or in receiving tenure at a law school, or in securing a lateral offer to teach at another law school, would think of building a résumé consisting solely of

postings on SSRN. This would be a very high-risk strategy—indeed, I would think, the kiss of death.

At least two things of importance are revealed here. First, everyone—by which I mean senior faculty, junior faculty, and aspiring faculty—continues to behave as if getting published in law reviews is a significant measure of quality. The multiple-submission policy may be crazy, and the expedited-review process may be nuts. But getting one's scholarship accepted for publication in a law review is still regarded as a meaningful signal that the work is serious and should be taken seriously. Second—and here I think we alight on the secret to the enduring success of law reviews—law reviews provide something that SSRN is never going to supply: namely, free editorial service.

Law reviews rest on the following unstated bargain: Students supply free labor. In return, they get the prestige and the educational experience of running a professional journal. Let us look at this unstated bargain from both the faculty side and the student side.

From the faculty side, the faculty get both an outlet for their scholarship and the benefits of a rigorous editing process by the best students, at no out-of-pocket cost. In contrast, in many other scholarly fields, scholars are required to pay for the privilege of having their scholarship published in an academic journal. To be sure, law professors constantly grouse



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about the editing they receive from student-edited law reviews. Everyone has a story about student editors who insist on changing every *which* to a *that*, or every *that* to *which*, or maybe either in a random pattern. And professors love to complain about the excesses of *The Bluebook*. But, in the end, law professors recognize that the careful scrubbing of the manuscript by law review editors makes the work stronger, more reliable, and more professional. Publishing in a law review adds value relative to the posting on SSRN or any other open-access source. Given this reality, professors will continue to publish in student-edited law reviews. There are a handful of faculty-edited law reviews, which have the advantage of using single-submission policies and peer review. But they cannot compete with the unpaid labor available to the student-edited reviews. This helps explain why the student-edited reviews continue to proliferate at a rate far in excess of the growth of faculty-edited reviews, which has been quite slow.

So what about the student side of the bargain? I mentioned unpaid labor. Isn't that the definition of slavery? Why isn't law review membership just a lot of hard work, toiling over articles that no one is going to read, for which the authors hardly ever give the students any thanks? But there is more to it than that.

For one thing, as many of you have noticed, employers like students who have served on law reviews. This is not just because law review membership is a proxy for good grades. Employers can read transcripts to see grades. More importantly, it is because serving on the law review makes you a better lawyer. It instills all sorts of good habits: attention to detail, insistence on accuracy, continual

striving for clarity in expression, intellectual honesty. Serving as an editor makes you a better wordsmith, and all lawyers are ultimately wordsmiths. When I was an articles editor, I edited a piece by Walter Gellhorn, who took the time to explain to me, ever so patiently, when to use *which* and when to use *that*. That was a lesson which I never forgot. (Or should I say, “*Which* was a lesson *that* I never forgot”?)

Serving on law review also teaches students a lot about the law. Half of what I learned about the law in law school I learned through my work on the law review, both in writing a student comment and in selecting and editing articles in a wide variety of fields. Law review work requires a deep level of engagement with a legal topic that is usually missing in classwork and preparing for exams. What you learn in writing and editing tends to stay with you.

Last, but surely not least, serving on the law review—an intense experience that involves working with other editors—is a source of lasting friendships. Nearly all of my law school classmates with whom I stay in touch are people with whom I served on the law review.

So the student end of the bargain is by no means the lesser one. All those long hours and frustrations will eventually be rewarded. You will not regret the investment you have made.

I draw two modest normative suggestions from these ruminations. One is that law reviews should continue to take the article selection process seriously—as seriously as is possible given the avalanche of manuscripts with which they are inundated and the time pressure they operate under in vetting these manuscripts.

The other is that law reviews should continue to strive to provide constructive editorial revisions to the articles they accept, including assuring that citations accord with the edicts of the tyrannical *Bluebook*. Good editing is the key to the success of law reviews, and the key to its continued success in the future. If law reviews pursue their editorial functions with diligence and good faith, they will continue to flourish as the preferred medium for publication of legal scholarship.

To sum up, I would predict that sometime in the next 100 years, or perhaps when Dean Kearney is no longer dean, the *Marquette Law Review* will

become an online publication. I also predict that it will continue to follow a multiple-submission policy, notwithstanding all the imperfections associated with this method of selecting content. But I also predict that the *Marquette Law Review* will be around to celebrate its 200th anniversary, even if Dean Kearney is not available to serve as toastmaster. Certainly, if future generations of students adhere to the standard of excellence that has prevailed over the first 100 years—including in the publication of volume 99, which we celebrate here tonight—it will have a very bright future, matching its proud past. ■

Joseph D. Kearney

The Supreme Court and Religious Liberty

Archbishop Jerome E. Listecki invited Marquette University Law School Dean Joseph D. Kearney to deliver the Archdiocese of Milwaukee's Pallium Lecture in the fall of 2015.



This is a great privilege. I never would have expected to be on this side of the podium for the Pallium Lecture.

Tonight's topic is the Supreme Court and religious liberty. It is along the lines of what Archbishop Listecki suggested (and we Chicago White Sox fans have

to support one another). So let's get right into it. After all, we have only a little more than an hour together—or 50 minutes or so on my account, and as much time thereafter as the good judgment of the moderator, John Rothstein, supports.

We must start with the fact that the First Amendment to the United States Constitution provides for religious liberty. It is not the only guarantee of religious liberty, and the Supreme Court of the United States is not the only entity with authority on some questions of

religious liberty. Those are related points. On the first point, almost every state has, in its own constitution, an analogue to the First Amendment, though sometimes speaking in notably different terms. For example, just to give you a local flavor, Article I, Section 18 of the Wisconsin Constitution begins as follows: "The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent. . ." And it goes on from there. Thus, on my second point of a moment ago, *state* supreme courts have authority to protect against interferences with religious liberty by state and local governments. Additional complications arise because legislative bodies are capable of *granting* rights as well as interfering with rights. This is a point to which we shall have to return before we are finished.

Yet I think it quite justifiable to focus the bulk of our attention on the Supreme Court and the First Amendment. First, the Court has the final authority to interpret, where a case presents the question, the First Amendment. It has that authority because it announced as much in 1803 in *Marbury v. Madison*—



“ . . . it is striking to note that, for more than half our history, religious liberty was a matter that simply was not a notable portion of the Supreme Court’s work.”

surely the most important case that the Court ever decided. This was not, of course, a case involving religious liberty (Mr. Marbury had no claim of religious entitlement to receive the commission as justice of the peace that President Adams had signed at figuratively midnight before his departure from office). But the reference to *Marbury* is worthwhile not simply because, as Tom Shriner and I emphasize in our Federal Courts class, one referring to *Marbury v. Madison* feels important (as should one hearing the reference, by the way). It's worthwhile because, given *Marbury* and its use over the years, the Supreme Court's supremacy in constitutional pronouncements now is an established fact or convention. So while a state or Congress may provide additional liberty, the First Amendment as interpreted by the Court provides a baseline—a floor—below which no government entity may go. Second, in terms of justifying our focus, let us not forget that our primary identification as citizens is overwhelmingly with the national government, not the state. We are Americans. This was not always so, of course—consider our pre-Civil War forebears—but there is no doubt about it now. In short, when we think of religious liberty and legal rights, as with so many other things, we think especially of federal protections—which means that we think especially of the First Amendment and of the Supreme Court.

So on to the First Amendment, which says: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” What has the Supreme Court done with this? The Court and the Amendment have been with us for a while—225 years, give or take a year in the different instances—and it is useful to divide the Court's work into three eras. These are not of equal length (the

first era would last into the 1960s) and are not watertight compartments. But the division is a useful framing device (he says hopefully).

To begin, for a long time—almost a century—the Court did very little with the First Amendment. How could that be? Well, recall that the amendment speaks in terms of *federal* power—*Congress* shall make no law. That limited reach meant that there was little for the United States Supreme Court to do. Yet there was one nineteenth-century case of note: *Reynolds v. United States*, decided in 1879. Reynolds had been convicted in a federal court of bigamy, which federal law proscribed in the Utah territory (Utah was not yet a state, hence the applicability of federal law). He contended that this violated his First Amendment rights. The contention did not get him far. The Court unanimously held that Reynolds had been subject to legal sanction not for his religious belief but for criminal activity; the First Amendment protected the former but not the latter. The Court said that “those who make polygamy a part of their religion” cannot be “excepted from the operation of the statute.” Laws “cannot interfere with mere religious belief and opinions, [but] they may with practices,” the Court went on, whether bigamy, human sacrifice, or suicide. The *Reynolds* case reflects the first era's reigning principle: specifically, that the First Amendment's Free Exercise Clause provides no exemption from laws of general applicability. The case is a touchstone to which we will return.

What happened to end this first era? Well, an awful lot had to occur, as the era did not end for more than another 80 years. So there is a lot for us to unpack in the era itself. For a most important, threshold matter, the Civil War happened. Or, more precisely, after the war, in 1868, the people of the

United States adopted the Fourteenth Amendment to the Constitution. Or, more precisely yet, that amendment eventually was held to apply, against the states, most of the same restrictions applied under the Bill of Rights to the federal government. This is the so-called incorporation doctrine, well known to any lawyers and a number of others here, I am sure. The Fourteenth Amendment's protections were held to include the First Amendment's guarantees, and it therefore no longer mattered that the earlier amendment spoke in terms of things that *Congress* might not do. The First Amendment's prohibitions now applied to the states as well.

Before we discuss some of the cases in and around the time of incorporation, let's be clear that we understand the late eighteenth and early nineteenth centuries. I make no suggestion that nothing happened during this time affecting religious liberty. Indeed, it was a rich era. If you stretch its time boundaries a little bit, it included Virginia's Statute for Religious Freedom (written by Thomas Jefferson) and James Madison's Memorial and Remonstrance Against Religious Assessments—in fact, these 1770s and 1780s matters preceded the First Amendment by a few years. The time period also saw the disestablishment of various Protestant churches—that is, their separation from the state governments that had supported them—with the last of these occurring

in Massachusetts in 1833. And, much later (in the 1870s), it saw the so-called Blaine Amendments, which changed various state constitutions to ban government support of seminaries or church schools.

But the salient point for us is that the Supreme Court had little to do with developments around religious freedom. This may seem a long time ago, and in many respects it was, but it is striking to note that, for more than half our history, religious liberty was a matter that simply was not a notable portion of the Supreme Court's work.

Nor did even incorporation end the first era—or at least not right away. Yet in the same general time frame as incorporation—let us call it 1925 to 1950—there were hints, however incomplete, of things to come. In this regard, we must discuss *Pierce v. Society of Sisters*, an important case. *Pierce* was a 1925 decision involving a challenge to an Oregon law requiring children between 8 and 16 years old to attend school—*public* school. As a treatise coauthored by one of my colleagues, Professor Scott Idleman, has described it, “[t]his public school monopoly law was narrowly enacted by an electoral initiative led by an ignoble crew of nativists, Ku Klux Klanners, Scottish Rite Masons, and anti-Catholics” But this crew proved no match for the sisters—the Society of Sisters of the Holy Names of Jesus and Mary, to be precise.



CONGRESS SHALL MAKE NO LAW respecting
*an establishment of religion, or prohibiting the free
exercise thereof; or abridging the freedom of speech,
or of the press; or the right of the people peaceably
to assemble, and to petition the Government for a
redress of grievances.*

The Supreme Court struck down Oregon's law. It did *not* invoke the First Amendment. It relied on something rather more vague: the Fourteenth Amendment's Due Process Clause—which prohibits states from depriving persons of life, liberty, or property without due process of law. The Court indicated that there was a *liberty* interest in a parent's or guardian's right to decide how his or her children were to be educated. Let's listen to its words:

Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act . . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.

The Court went on to say that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”

So it was *liberty* that formed the basis for the Court's ruling in *Pierce*, but not specifically religious liberty; indeed, the key precedent had nothing to do with religious liberty. In *Meyer v. Nebraska* (1923), a couple of years before *Pierce*, the Court had struck down a 1919 state law requiring all grade-school education—public or private, including parochial—to be in the English language. It was not enough to have won World War I, apparently; even afterward, Nebraska's statute, like laws elsewhere at the time, targeted German-language instruction. In the brief opinion striking down that statute as unconstitutional, the Court invoked “liberty” under the Fourteenth Amendment.

So these were Fourteenth Amendment concepts, but application of the First Amendment—that is, incorporation—was near at hand. This was part of a gradual process, with different parts of the Bill of Rights being held to be incorporated in a series of cases over the years. But within about two decades of *Pierce*—that is, by the time of *Everson v. Board of Education*, in 1947—the Court would say that the religion clauses of the First Amendment apply to the states.

The cases in between are interesting and deserve discussion. They include *Cantwell v. Connecticut*, a 1940 decision invalidating the conviction of three Jehovah's Witnesses for distributing religious literature on the streets of New Haven (aggravating the Catholics in the neighborhood, by the way) and, in the process, soliciting contributions. This violated a law requiring solicitors of such funds to obtain a certificate of “approv[al]” from a state official. *Murdock v. Pennsylvania* in 1943 struck down an ordinance that required solicitors to purchase a license from the local borough—at least striking it down as applied to one asking for contributions in exchange for religious books and pamphlets. And that same year, the famous case of *West Virginia State Board of Education v. Barnette* held that children in a public school could not be required to salute the flag and say the Pledge of Allegiance.

These cases all share an important characteristic. It is not that they all involved Jehovah's Witnesses, although that is true and even interesting. The *important* point is that these were at least as much—indeed, they seem to have been more—free-speech cases as (or than) free-exercise-of-religion cases. This need not have been the case. That is, under some conceptions, the First Amendment's Free Exercise Clause could have provided a sufficient basis for striking down laws whose effect was to prohibit distribution of religious literature or to require one to proceed against the dictates of one's conscience by (for example) saluting the flag. But the Court did not go that route.

I have focused on free exercise cases because they go plainly to religious liberty. That is, they typically involve some citizen's defending himself *against* state action by claiming a First Amendment right. Yet I should note that there were some important Establishment Clause cases along the way. For example, in *Everson*, our 1947 case, the Court rejected a challenge to a New Jersey law whose effect was to reimburse parents variously providing public-bus transportation of their children to both public and private schools, including religious ones. The case may have seemed a victory for Catholics, but it came at a cost. The entire Court—even those justices in the majority, which *rejected* the Establishment Clause challenge—thought especially significant in interpreting the First Amendment the controversies in 1770s and 1780s Virginia that had prompted Jefferson to draft Virginia's

statute for religious freedom and Madison to write his remonstrance against religious assessments. This has seemed unfortunate to many, not least because it enabled the Court to observe in the process that “the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’” Indeed, it described that wall as “high and impregnable.” Much criticism has been directed at this reasoning, especially as it has subsequently been used to *sustain* various Establishment Clause challenges—e.g., to the government display of various crèches or menorahs or the Ten Commandments (even as the Court has *rejected* some such challenges and thus upheld certain other displays). Yet I am not spending much time on Establishment Clause cases because they generally involve the citizen’s complaining not about the government’s direct interference with his religious liberty but rather about its lack of neutrality or its support of religion. Those can be important complaints, but they are outside my focus here.

So let us return to the Free Exercise Clause—secure in the knowledge from *Everson* that the religion clauses were incorporated and not even concerned that, despite the press of time this evening, we are still in the first era. In these mid-twentieth-century circumstances, although we were living fully in an era of incorporation of the First Amendment, there was little basis for thinking that anything substantively had changed otherwise from the *Reynolds* era. Indeed, as late as 1961, in *Braunfeld v. Brown*, the Court held that a Sunday-closing law did not violate the rights of Orthodox Jewish merchants who wanted to be closed on Saturday but open on Sunday. It said that the law imposed only an indirect burden on the exercise of religion—that is, it did not make unlawful any religious practice itself. Essentially, the approach of *Reynolds* (which the Court cited) prevailed in *Braunfeld*, and there was no meaningful scrutiny of this generally applicable law.

One of the dissenters in *Braunfeld* was Justice William Brennan. And only two years later Justice Brennan would command a majority of the Court for his views. The case was *Sherbert v. Verner* (1963), and it brings us—at last—to the second era of the Supreme Court’s free exercise jurisprudence. The underlying circumstances were hard to distinguish from *Braunfeld*. Sherbert, a Seventh-day Adventist, was fired from her job after she refused to work on Saturday, the Sabbath Day in her religion. The South Carolina Employment Security Commission denied her benefits, finding unacceptable her religious justification for refusing Saturday work. In finding a violation of Sherbert’s First Amendment rights, the Court engaged in a balancing of interests: It held that the state’s eligibility restrictions for unemployment compensation imposed a significant burden on Sherbert’s ability to freely exercise her faith and that there was no compelling state interest that justified this.

Justice John Marshall Harlan II dissented in *Sherbert*. He noted that the state law was one that the state supreme court had “uniformly applied.” He even was concerned that allowing an exception for Sherbert based on her religion amounted to a violation of the Establishment Clause. And he noted the incompatibility of the decision with *Braunfeld*, which only two years earlier had upheld the right of a state to prohibit businesses from being open and to provide for a day of rest on Sunday—without any balancing of the costs imposed on an individual citizen. Justice Harlan was joined in dissent by Justice Byron White. It might be interesting to note that the former would be gone a decade later when the Court decided *Roe v. Wade* (1973), but the latter would find himself in dissent there as well.

Let us leave aside any path from the restrictions on the government in *Sherbert* to such restrictions in *Roe* (it is an understatement that the cases are distinguishable, but I am right to be provocative here). ▶

The Reynolds case reflects the first era’s reigning principle: specifically, that the First Amendment’s Free Exercise Clause provides no exemption from laws of general applicability.

*The important point emerging from *Sherbert* is that the Court might require an exception based on religion to a law or government rule, even where that law or rule was neutral and of general application.*

The important point emerging from *Sherbert* is that the Court might require an exception based on religion to a law or government rule, even where that law or rule was neutral and of general application. That the First Amendment could require such an exception would become the hallmark of the Court's second era of free exercise jurisprudence.

And while it did not last nearly as long as the first, it was, unquestionably, an era. *Sherbert* led to such decisions as *Wisconsin v. Yoder*. In defending against a criminal action, Amish parents challenged the Wisconsin compulsory-education law. In 1972, the Court held that the First Amendment, as incorporated, prevented the state from requiring that Amish children remain in school past the eighth grade, until age 16. The Court was most sympathetic, ruling that Wisconsin's law violated the Amish parents' free exercise rights.

Let me return to being provocative. It should not go unremarked that the timeframe that we have thus far discussed in this second era—the 1960s and early 1970s—was one in which the Court was rather willing to recognize rights well beyond free exercise of religion. Some of this involved other First Amendment rights—such as *Cohen v. California*, a 1971 decision involving the defendant's wearing a shirt with an obscenity concerning the Vietnam War draft. But some of it also was less tied to the text of the Constitution, including such famous (and to some infamous) cases as *Griswold v. Connecticut*, which in 1965 found a constitutional right on the part of married couples to use birth control products, and *Roe v. Wade*, recognizing a constitutional right to abortion in 1973. These rights were found not so much in the specific text of the Constitution as in a right of privacy emerging from the Constitution's "emanations" and "penumbras" (to use words from *Griswold*). The key precedents in these decisions? Well, it would be far afield to dig deeply into them, but it may be noted that in *Griswold* the Court could say, "[W]e reaffirm the

principle of the *Pierce* and the *Meyer* cases." You will recall those as our 1920s cases invalidating a state ban on German-language instruction (*Meyer*) and a state requirement of public as opposed to religious education (*Pierce*). It is a jurisprudential challenge to applaud the one set of cases while booing the other—not an impossible one, no doubt, but a challenge.

In all events, given this, it should not come as a large surprise that the emergence of a different Supreme Court in the 1980s and beyond, with some (though never yet most) of its members intent on undoing *Roe v. Wade*, also brought with it less interest in maintaining the approach of *Sherbert* and *Yoder*. This is not to suggest that *Sherbert* and *Yoder* were the entirety of the second era. For example, in *Thomas v. Review Board*, the Court in 1981 validated the free exercise rights of a Jehovah's Witness who had quit his job after a transfer to a position that required that he build military equipment in violation of his religious tenets. In overturning Indiana's refusal to accord unemployment benefits, the Court said that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." Once again, the Court employed a balancing test that permitted exceptions to laws of general applicability for the individual religious needs of citizens. It would still be doing so as late as 1989—in *Frazee v. Illinois Department of Employment Security*, a unanimous unemployment benefits case and a generation after *Sherbert* by conventional measures (although Justice Brennan was still on the Court).

The era would soon end. A year later, we entered into what can reasonably be termed a third era, although some would characterize it as a return to the first.

The key decision is *Employment Division v. Smith*, from 1990. It involved two Native Americans who worked as counselors for a private drug

rehabilitation organization. They ingested peyote—a drug that was hallucinogenic—as part of their religious ceremonies and were consequently fired. The state denied their claim for unemployment compensation because the reason for their dismissal was considered work-related “misconduct.” The state supreme court concluded that this denial of benefits violated the First Amendment’s Free Exercise Clause. The United States Supreme Court reversed: Justice Antonin Scalia spoke for the Court in ruling against the free exercise claim. “We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.” Scalia invoked *Reynolds v. United States*—you will recall that 1879 case upholding the conviction of a Mormon for bigamy.

And he noted that “[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press” Hybrid situations, as Justice Scalia would term them—and let us pause for a moment to note that, on this front, he cited *Cantwell* and *Murdock*, some of our Jehovah’s Witnesses cases. “[O]r,” the Court continued, cases that involved “the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children,” and for this it invoked *Yoder*.

Let us leave aside the other cases that Justice Scalia cited (for he certainly had to engage with *Sherbert*) and return to his language in *Smith*—the Court’s language, which concludes with a quotation of a 1971 precedent:

Respondents urge us to hold, quite simply, that when otherwise prohibitible conduct is

accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon’s drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one’s children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls. “Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.”

Smith was decided in Justice Brennan’s final months on the Court, concluding some 34 years of service, and it would find him in dissent, together with Justices Thurgood Marshall and Harry Blackmun.

We continue to be in this third era of constitutional law that *Smith* ushered in. The constitutional decisions that follow *Smith*, even where they have ruled for the citizen’s free exercise rights, have not involved some balancing test. For example, in 1993, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court ruled for the Santerian religious claimant, but that was a case of pretty well overt discrimination. Local ordinances aimed at the church’s practice of ritual animal sacrifice. The problem was that the ordinances contained so many exemptions for all sorts of animal killings that the only conduct to come within the scope of the law was *this church’s* ritual sacrifice. Here we had a law that was neither neutral nor generally applicable, so *Smith* did not apply, and the city could not meet the compelling state interest requirement.

There is little else by way of constitutional law in this third era. How can this be? And should I therefore declare my remarks concluded with respect to my topic and open it up to questions—or, better yet, simply sit down? Well, it is not yet time to yield the floor. For we have finished the story of the Supreme



It is a jurisprudential challenge to applaud the one set of cases while booing the other—not an impossible one, no doubt, but a challenge.

Court's engagement with the First Amendment's Free Exercise Clause but not that of its grappling with religious freedom. The reason is that, shortly after *Smith*, the United States Congress got into the act and gave to citizens broader free exercise rights and to the courts the responsibility of protecting them. Specifically, in 1993, Congress, with the concurrence of President Bill Clinton, enacted the Religious Freedom Restoration Act (or RFRA). There is no doubt as to its purpose: It was to vindicate Justice Brennan over Justice Scalia. Well, that is to personalize it a little too much, I admit, but it *was* to reject *Smith* (Scalia's opinion) and to enshrine *Sherbert* (Brennan's). That is what the *Restoration* portion of the Act's title meant. To put it in doctrinal terms (legal doctrine, not church doctrine), RFRA reinstated the strict scrutiny standard even for neutral and generally applicable laws.

Let's discuss that a bit. RFRA lays down a general rule that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . ." Then it provides for the possibility of exceptions—that is, circumstances in which the government *can* impose a substantial burden. An exception will apply if the burden—the government obligation or regulation, say—"(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." That's quite the different standard from *Smith*; in fact, it's *Sherbert*. It's also unconstitutional, the Court said in 1997, insofar as its scope included (as Congress intended) actions of state and local governments within this standard. But let us not get lost in that 1997 decision, *City of Boerne v. Flores*, interesting as it was for other constitutional reasons (involving Congress's ability, or inability, to go beyond the Supreme Court's recognition of rights in enforcing the Constitution).

I say that for two reasons: One is that RFRA itself continues to restrict or control the actions of the *federal* government. That portion was not struck down in 1997, and its continued viability has subsequently been made clear by the Court. This is a big deal because the federal government is a big deal: The federal government of today has become rather more a government of general jurisdiction than ever previously. It is involved in protecting lands, issuing mandates about water and

air, governing housing, and regulating employment, just to scratch the surface. So there is a lot of federal government action for which federal law now requires accommodations based on religious liberty. The other reason not to get lost in the 1997 decision striking down RFRA with respect to the states is that in 2000 Congress passed the Religious Land Use and Institutionalized Persons Act (or RLUIPA), which contains the same substantive standard for religious liberty as RFRA and applies to state and local governments but avoids the constitutional problem (largely by tying Congress's restriction of state and local governments to those governments' acceptance of federal funds). And the result of this—i.e., the combination of RFRA and RLUIPA—is that in the lower courts there has been a veritable explosion of successful religious liberty claims in the past decade and a half, well beyond (in my estimation) anything that we saw in the second era of First Amendment free exercise law, which *Sherbert* ushered in and *Smith* then sent packing.

Something else has been at work also—a point that I have thus far avoided but that bears comment, even emphasis: One aspect of the Free Exercise Clause that the Court has expanded and maintained in its expanded version, and that seems to have made its way into the new statutes, is the meaning of the term *religion*. Over the past 140 or so years (so roughly *Reynolds* forward), the Court has moved from a largely monotheistic view to a more broadly theistic view to an essentially spiritual, non-theistic (though not necessarily atheistic) approach to religion. In 1981 (in *Thomas*), for example, the Court had the following to say:

The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

The matter is complex, and I wish to bottom-line it: Even today, the reach of the Free Exercise Clause is broad, in terms of the range of beliefs covered under the rubric "religion," even if post-

“ . . . it will be interesting to see how we as a society proceed with both a broad definition of religion (as we have had for a while) and broad protection (as with RFRA and RLUIPA we have had for only a short time so far).

In fact, the early returns are already interesting.

Smith the punch that the clause packs typically is ineffectual, in the sense that it is much harder to use the clause to obtain heightened scrutiny than it was during the second era. It is possible that this breadth of availability (again, tied to a broad conception of religion) may—ironically but logically—have been one of the reasons for *Smith*. The clause may be manageable with either a broad definition of religion or a low bar for heightened scrutiny, but not with both.

Let me postulate this as well of the Court’s expansive approach to what “religion” means: Much like *Sherbert* and *Yoder*, it has less to do with a principled and robust theory of religious freedom, and more to do with concerns about inclusiveness and autonomy, coupled with a modernist or post-modernist crisis in epistemology. This is a huge problem for a robust theory of religious liberty independent of other liberties. If the judiciary is no longer protecting practices because they stem from obligations arising from one’s creator, discerned from scripture and supported by the teachings of church leaders and theologians, but instead because a claimant simply feels a higher power or inner calling (perhaps as much conscience as religion), then the judiciary is not operating with a coherent theory of religious freedom but rather just deferring to individuals’ idiosyncratic senses of self-realization, autonomy, etc. (Or, as worded in the *Planned Parenthood v. Casey* joint opinion in 1992, the Court is actualizing “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”) This may all seem very cynical, but viewed across multiple lines of cases, inferences or conclusions such as these are difficult to avoid. But this is to begin to get far afield.

To return to the state of the law, it will be interesting to see how we as a society proceed with both a broad definition of religion (as we have had for a while) and broad protection (as with RFRA and

RLUIPA we have had for only a short time so far). In fact, the early returns are already interesting. For example, in the case underlying *Cutter v. Wilkinson*, a 2005 Supreme Court decision, inmates of an Ohio prison—including adherents of Asatru, a minister of the white-supremacist Church of Jesus Christ Christian, a Wiccan, and a Satanist—challenged the state’s failure to make certain accommodations of their non-mainstream religions. The question before the Supreme Court was not the merits of the accommodations sought but the state’s argument that, insofar as it required such accommodations, RLUIPA violated the Establishment Clause—an argument that the Court rejected. I mentioned something about the case’s facts or parties more so that you get a flavor of the sort of challenges that are now possible.

The important doctrinal point under RFRA is the difference from *Smith*, and the Court’s decision in 2006 in a case called *Gonzales v. O Centro Espírita Beneficente União do Vegetal* lays plain that difference. The federal government seized a sacramental tea, containing an illegal hallucinogenic substance, from a New Mexico branch of a Brazilian church. The church challenged this in court, and the United States Supreme Court ruled for the church. Unanimously adopting a strong reading of RFRA, the Court invalidated the government’s application of the federal Controlled Substances Act to the hallucinogen at issue. It refused to accept a *generalized* compelling interest in drug law enforcement and instead required an explanation of why enforcement of the *specific* prohibition against the *specific* religious group would be compelling. There being no such explanation, the church prevailed.

But you likely have some sense that we are a long way from *Smith*. For, more recently and more famously, the Court in 2014 decided the *Hobby Lobby* case. There the question was whether RFRA enabled closely held private corporations (including

Hobby Lobby) to claim an exemption from federal regulations that implemented the Affordable Care Act by requiring employers to provide health insurance coverage for various contraceptive methods. There was no unanimity here. It was a 5-to-4 decision, reflecting a split precisely aligned with the parties of the presidents who appointed the members of the Court: the five Republican appointees forming the majority and the four Democratic appointees in dissent.

The Court in *Hobby Lobby* held that RFRA required the government to accommodate the interests of a private corporation as employer in not providing such insurance coverage. To listen to the dissent by Justice Ruth Bader Ginsburg, this was “startling”: “[T]he Court holds that commercial enterprises . . . can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.” We need not decide whether the dissent’s characterization of the Court’s opinion was exactly correct. The point to emphasize for us is that the decision was based on *RFRA*. That was a good thing for the claimants, by the way: Given *Smith*, it would have been much harder to prevail under the Free Exercise Clause—to underestimate the point.

Hobby Lobby is not the Supreme Court’s latest word on religious freedom. Within the past year, under RLUIPA, the Court decided *Holt v. Hobbs* (2015). There it ruled that an Arkansas prison policy preventing a Muslim prisoner from growing a half-inch beard in accordance with his religious beliefs was unlawful—not unconstitutional, but a violation of RLUIPA. Here the Court was unanimous.

So where are we? Well, some things suggest themselves immediately from the recent cases—or from *Hobby Lobby*, at any rate. One is that the extent of religious freedom provided by the federal government is scarcely a settled matter. As with any 5-to-4 decision, we can say that a change in one member of the Court might well bring with it a different result. Another is that things are becoming more intense as a political matter. This involves different forms. They will include the phenomenon of Supreme Court appointments. But they also include traditional politics: the contents of legislation. The consensus that existed in Congress and in the larger public about RFRA is gone. Earlier this year, for example, the ACLU announced that, while it had supported RFRA at the time of its

passage, “we can no longer support the law in its current form.” It maintains that RFRA has become not just a shield for protecting people “whose religious expression does not harm anyone else” but also “a sword to discriminate against women, gay and transgender people and others.” This will especially be the case, the ACLU’s spokesperson maintained, in a world where same-sex marriage is a right—and we Americans now live in that world. The reaction earlier this year to Indiana’s mini-RFRA—a state law largely tracking the language of the federal law—can give you some sense of this.

To conclude (or to begin to do so), we have established that the Supreme Court’s affirmative contribution to the tradition of religious freedom in the United States has been modest under the First Amendment’s religion clauses. That is a carefully worded statement. There is a robust tradition of religious freedom in this country, and the First Amendment has had much to do with it. But much of that much has been the result of not decisions by the Court but rather the good judgment of government actors in generally not trying to marry together state and church, at least outside the context of public education. And other parts of the robust tradition have come either from state courts and the state constitutions or from the United States Supreme Court but in its reading of other provisions of the Constitution. Sometimes those provisions have been more general—for example, the Due Process Clause in *Pierce v. Society of Sisters* and its antecedent, *Meyer v. Nebraska*—and other times they have included other parts of the First Amendment (as in the Jehovah’s Witnesses cases in the 1940s, such as *Cantwell, Murdock*, and *Barnette*). Only for about three decades—the second era, from *Sherbert* through *Yoder* and up until *Smith*—did the Court apply the Free Exercise Clause in a way independently to compel government actors to make exceptions to rules of general applicability such as compulsory-education laws.

And when that happened, it came from individuals, such as Justice Brennan, who were also hard at work using some of the same concepts to recognize other constitutional rights, such as those in *Griswold* and *Roe*. And the First Amendment developments would be met with the opposition of individuals such as Justice Harlan and Justice Scalia. All of these

“ . . . things are becoming more intense as a political matter. . . . The consensus that existed in Congress and in the larger public about RFRA is gone.”

are careful statements, I hope. So, for example, Justice Scalia was with the majority in *Hobby Lobby*—but there the issue was one of statutory interpretation (RFRA) and not a First Amendment matter. One would have to imagine that, if the Court had had to get to the First Amendment claims in the case, the principles of *Smith* would have led Justice Scalia in the other direction.

In short, I think us to have entered into a new era of the law of religious freedom in this country—a fourth era. On the one hand, it resembles the second era in terms of its willingness to carve out exceptions based on religious grounds to neutral and generally applicable government policies. On the other hand, it is proceeding with a much broader conception of religion than that with which the second era began (the Seventh-day Adventists in *Sherbert* and even the Amish a decade later in *Yoder* were reasonably traditional religions by standards of what now falls within the courts’ conception of religion).

This is going to be a dynamic era. To give you a sense of it, a discussion has recently begun among some intellectuals whether there is—under RFRA-type laws—an ability of people to claim an exception to anti-assisted-suicide laws on the grounds that it violates their religious beliefs to be forbidden to help a patient or a spouse or anyone else to escape pain (or what the person feels to be indignity) by helping him end his life if he so wants. For Catholics, this might be an astonishing thing, and such an argument was rejected by a court a number of years ago—but, as one fair-minded and prominent commentator, Eugene Volokh, has pointed out, “only because it was brought under the free exercise clause, which [under *Smith*] doesn’t mandate religious objections from generally applicable laws.”

“But what,” this sober commentator asks,

“of the more than half the states that either have state [RFRAs], or have state constitutional religious freedom guarantees that state courts have interpreted as generally providing religious exemptions?” Rather than analyze a possible RFRA right to help with assisted suicide, let me conclude this point with the commentator’s observation: “A complicated question, which I expect that courts might well be turning to soon, especially given the extra publicity and credibility given to religious objection claims by recent cases such as *Hobby Lobby*. ”

Let me take a few minutes to conclude more broadly as well. To do this, let me note something about what judges do. Yes, in the context of specific cases, they interpret the Constitution and statutes, but in doing this they never get away from their education in the common law, which involves grappling with concepts such as “reasonableness.” And what does this involve—or, at any rate, where do judges get the notions and precepts underlying this grappling? They get it, Oliver Wendell Holmes, Jr., instructed us in the late nineteenth century, not so much from “logic” as from “experience.” This is relevant here because there will be much common-law reasoning in applying RFRA, as judges determine whether a government obligation “substantially burden[s] a person’s exercise of religion” and, if so, whether it is in “furtherance of a compelling governmental interest.” There will, in other words, be much occasion for exercising *judgment*. That is what judges do, for better or for worse, and they will be influenced, as judges with discretion always have been, less by the “syllogism” (or logic) and more by “experience”—or, to complete the quote from Holmes, by “[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or



unconscious, even the prejudices which judges share with their fellow-men [and women, we might add].”

So, without doubt, we must hope for good judgment. At the same time, the last word here should not be from Holmes or RFRA but from a source both less and more authoritative. Consider that a broad theme of my lecture has been that people are wrong to think that the Supreme Court has protected religious liberty for the past two centuries. In fact, it has done rather little in that regard—and even less by way of protecting *religious* liberty separate and apart from “liberty” more generally. And so, in closing this Pallium Lecture, I am reminded of the wisdom of Psalm 146: “Put not your trust in princes”

“Put not your trust in princes.” I confess that the admonition is taken out of context, but is this not the right attitude for citizens of a democracy to cultivate? Princes in black robes are no more to be trusted to protect our freedoms than are any others. In the end, it is only the hard work of influencing elected representatives to pass laws (such as RFRA, perhaps) and of electing executives who truly cherish religious liberty themselves that will give its proponents a fighting chance.

I thank Archbishop Listecki for his confidence in inviting me to deliver this year’s Pallium Lecture. And I thank all of you for your kind attention to the lecture. I hope that you have found something of value in it. ■

Nicola Lacey

Barrock Lecture: Criminal Responsibility and the Purposes of Criminalization

Nicola Lacey is School Professor of Law, Gender and Social Policy at the London School of Economics. Lacey delivered Marquette Law School’s annual George and Margaret Barrock Lecture on Criminal Law this past academic year. Her Barrock Lecture was published as an article in the spring 2016 issue of the *Marquette Law Review*: “Socializing the Subject of Criminal Law? Criminal Responsibility and the Purposes of Criminalization.” This excerpt is from the introduction to that article.



Most accounts of criminal responsibility depend on the claim—in somewhat different guises—that the paradigm subject of criminal law is an individual with rational agency. In other words, she is a subject whose conscious acts, or whose actions expressing her constitutive

psychology or settled traits, attitudes, or dispositions, in some sense express her rational self. Moreover, these standard accounts of what it is to be a subject of criminal law assume that these features of agency can be clearly distinguished from features of a subject’s situation, environment, history, or circumstances. Circumstances of poverty or of wealth; our experiences of privilege or of disadvantages such as racism, violence, or sexual abuse;

the quality of our parenting and education: all of these undoubtedly shape our lives in fundamental ways. But, while operating causally on us in various ways, these external factors do not, it is argued, define us as agents—as subjects of criminal law.

In this article, I will argue that this distinction between environment and agency is in fact more problematic than it first appears. Cases in which environment or socialization fundamentally affects the judgment and reasoning of the individual subject pose, I shall argue, a real challenge to the basis for the practices of responsibility attribution on which legal judgment depends. Such cases also put in question the standard assumption that questions of responsibility can be analytically separated from questions of criminalization. The clue to meeting this challenge, I will argue, is to recognize that the criteria for criminal responsibility must be articulated with an understanding of the role and functions of criminal law. And this in turn, I shall suggest, underlines an important

Cases in which environment or socialization fundamentally affects the judgment and reasoning of the individual subject pose, I shall argue, a real challenge to the basis for the practices of responsibility attribution on which legal judgment depends.

distinction between the contours of responsibility in legal and in moral contexts. It also has significant implications for method in criminal law scholarship.

In what follows, I shall set out a standard model of what it is to be criminally responsible, encompassing the engagement of standard powers of self-control and understanding. I shall then go on to consider the ways in which external factors may affect the extent to which these volitional and cognitive conditions are met. In relation to the volitional condition of responsibility, I shall consider criminal law's difficulties with the defenses of duress of circumstances and of necessity as threatening to a model of individual responsibility which is functional to law's regulatory ambitions: to admit a defense which in effect allows the defendant to rely on her own interpretation of what is required may seem to run counter to the very rationale of criminal law. I shall then go on to consider external factors which shape the cognitive rather than the volitional conditions for responsibility. While probably the standard example here is that of ignorance of law, I consider a broader set of cases in which "implicit bias" or "mispresentation" potentially undermines the cognitive basis for criminal responsibility. These biases themselves proceed from deeply embedded aspects of experience or education, and they have the power to shape the subject's reasoning process in such a way as to call into question whether she genuinely enjoyed a fair opportunity to conform her conduct to the precepts of the criminal law. In each of these contexts, I conclude that external conditions indeed pose real challenges—challenges moreover which derive from our social practices of mutual interpretation—to the capacity of the concept of criminal responsibility to fulfill its standard role in legitimating and coordinating the imposition of criminalizing power. Further, they call into question the idea that there is a clear definitional line between the individual subject of criminal law and her social environment.

In the final part of the article, I will move on to consider ways in which the resulting challenge to criminal law's legitimacy might be met. To many criminal law theorists, the issue is essentially one of moral philosophy: responsible agency being a moral category, the task of the criminal law theorist is simply to delineate the conditions of responsibility and to come to the best judgment possible about whether they have been met. By contrast, I shall argue that the normative question whether the conditions of criminal responsibility have been met cannot be answered in the abstract. Rather, our deliberations here must proceed in the light of the meaning and social functions of criminalization as a complex social practice, itself located within a broader set of understandings about the proper relationship between individual and state. This relationship—like the institutions through which it is realized and implemented and the interests which shape its development—changes over time. And this implies that the question of where we should draw the line around responsibility is itself historically contingent. This is not to say that, within modern western legal systems, there has been no core understanding of responsibility. But it is to insist that the question of where responsible agency for the purposes of criminal law begins and ends in difficult cases such as those already canvassed is a matter for social evaluation. It is, at root, a decision which depends on a judgment about the proper purposes of criminal law and about the broader obligations of the state, rather than a question which can be determined by an ahistorical metaphysics or, to be sure, by sciences such as psychology or neuroscience. In conclusion, I shall draw out the implications of this analysis for the methodology of criminal law theory and for how we should conceive the relationship between criminal law scholarship and historical and social scientific work on the criminal process more generally. ■

CLASS | NOTES

Words of Recollection and Reflection from Marquette Lawyers

Marquette Law School honored five individuals at the annual alumni awards ceremony this past April in Eckstein Hall. Because these men and women, as selected by the Law Alumni Association Board, help exemplify the ideals of the Marquette lawyer, we offer on the following pages edited brief excerpts from their remarks on the occasion. In addition, we begin with an excerpt from the remarks of Marquette University President Michael R. Lovell at the Eckstein Hall event and conclude with the remarks of Louis J. Andrew Jr., L'66, upon receiving the Service to Marquette Award from the university at a separate event in April. These remarks are interspersed with the class notes.

Receiving the Law School's honors were the Hon. Diane S. Sykes, L'84, judge of the U.S. Court of Appeals for the Seventh Circuit, Alumnus of the Year Award; Bill Staudenmaier, L'61, and Mary Staudenmaier, L'71, Lifetime Achievement Awards; Bernard J. Westfahl, Jr., L'04, Howard B. Eisenberg Service Award; and Brent Moberg, L'04, Charles W. Mentkowski Sports Law Alumnus of the Year Award. More information about the award winners is available on the Law School's website; here, we provide a glimpse into the ideals and spirit of the Marquette lawyer.



Law School Dean Joseph D. Kearney (left) and Law Alumni Association Board President Arthur T. Phillips (right) flank the award winners in Eckstein Hall on April 28, 2016: Diane Sykes, Bill Staudenmaier, Mary Staudenmaier, B.J. Westfahl, and Brent Moberg.

Congratulations to the following Marquette lawyers—and a Law School administrator—whom the *Wisconsin Law Journal* has honored as "2016 Women in the Law." They were selected for their outstanding achievement in the law.

Christine Nelson, L'79

Nelson, Connell, Tallmadge & Slein

Karen Flaherty, L'80

City of Brookfield

Tracey Klein, L'84

Reinhart Boerner Van Deuren

Ann Barry Hanneman, L'89

Simandl Law Group

Ellen Nowak, L'98

Wisconsin Public Service Commission

Kelley Chenhalls, L'03

Hochstatter, McCarthy, Rivas & Runde

Kristen Scheuerman, L'10

Herrling Clark Law Firm

Sheila Shadman Emerson, L'11

Halloin & Murdock

Angela Schultz, Assistant Dean for

Public Service, Marquette Law School

1972

Michael F. Hupy and his firm, Hupy & Abraham, received a "2015 Litigator Award" for outstanding representation in the category of "Dangerous Conditions: Slip and Fall." The particular case involved more than six years of litigation and resulted in an award of \$22 million.

1979

Randall D. Crocker, president and CEO of von Briesen & Roper, has announced that the firm has opened offices in Appleton and Green Bay.

William S. Woodward, Jr., L'89, and **Frank W. Kowalkowski, L'92**, are shareholders in the Green Bay office.

1981

Susan Hansen was featured in a story on Fox 6 News (Milwaukee), "Getting a Divorce? Why One Family Court Judge Advocates Mediation." She is a partner at Hansen & Hildebrand.

Mark D. McGarvie is a scholar-in-residence at the Institute of Bill of Rights Law at the Marshall-Wythe School of Law, College of William and Mary. He recently completed a Fulbright Scholarship teaching at the University of Zagreb School of Law, Croatia. His third book, *Law and Religion in American History: Public Values and Private Conscience*, part of the New Histories of American Law series, Cambridge University Press, was published in May 2016.

José A. Olivieri, a partner in Michael Best & Friedrich's labor and employment relations practice group, received the 2016 Executive Leadership Award from the Hispanic Professionals of Greater Milwaukee.

1982



Michael J. Gonring was honored as "Alumnus of the Year" by Marquette University's Father Danihy Alumni

Club of Alpha Sigma Nu, the Jesuit Honor Society. He has been a partner at Quarles & Brady and was the inspiration for Marquette Law School's Mobile Legal Clinic, which helps extend legal counsel to underserved neighborhoods and areas.

Marquette University President Michael R. Lovell at the Law Alumni Awards

It's very humbling for me to hear about the accomplishments of our alumni and the ways they are truly living their lives in the spirit of St. Ignatius—setting the world on fire. The individuals we honor make it very easy for me to be proud of Marquette University, and I deeply appreciate their leadership and service to others. They really do embody the mission of Marquette University. We have four pillars: excellence, faith, leadership, and service. Certainly, the individuals being honored tonight all are great examples of what we try to strive to produce in our students. . . .



Donald W. Layden, Jr. received the Distinguished Eagle Scout Award from the Three Harbors Council, Boy

Scouts of America. The award is the National Eagle Scout Association's highest honor. Established in 1969 to acknowledge Eagle Scouts with extraordinary national-level recognition, fame, or eminence within their field and a strong record of voluntary service to their community, it has been awarded to only one other Wisconsinite: Gov. Scott Walker.

1983

Paul T. Dacier has been appointed by Massachusetts Gov. Charlie Baker to a special commission to assist the governor with an

unprecedented number of vacancies in the Massachusetts Supreme Judicial Court. Dacier, general counsel of EMC, a data-storage company, is co-chair of the SJC Nominating Commission, which helps recruit and screens candidates for three seats on the court.

1984



Tracey L. Klein was nominated by Gov. Scott Walker and unanimously confirmed by the state senate to serve on the University of

Wisconsin System Board of Regents. Klein is chair of Reinhart Boerner Van Deuren's health care practice.



1986

Sheila Hill-Roberts has been appointed assistant family court commissioner by Milwaukee County Circuit Court Chief Judge **Maxine White, L'84**. Hill-Roberts was chief staff attorney with the Legal Aid Society's guardian ad litem division for its children's court office.

1987

Mark L. Thomsen has been appointed to the State Elections Commission by State Assembly Democratic Leader Rep. Peter Barca.

Thomsen is an attorney with Cannon & Dunphy, in Brookfield, Wis.

1988

Peter M. Garson was elected to serve on the executive committee of DeWitt Ross & Stevens, where he will join other members in assisting with the governance and strategic direction of the firm. A member of the firm's Madison office, he practices in the areas of business, real estate, land use and construction, tax and tax advocacy, and trusts and estates.

THE HON. DIANE SYKES

Alumnus of the Year Award

I am so proud to be a Marquette lawyer. My association with Marquette Law School has immeasurably enriched my life, and it's a very special honor to receive this award this evening. I came to the Law School with the goal of using my legal education in some form of public service, and here at Marquette I received not just an excellent legal education but also a strong sense of the vital role of lawyers and judges in sustaining our public institutions and the institutions of civil society. . . .

As Dean Kearney noted at my investiture in 2004, the very first judge to hold the seat on the Seventh Circuit that I now occupy was Judge James Jenkins, who later became the first dean of Marquette Law School after he left the bench. When I joined the Wisconsin Supreme Court in 1999, I succeeded Justice Donald Steinmetz, another great Marquette lawyer. The Milwaukee County Circuit Court, where I served as trial judge for seven years, is well-populated with Marquette lawyers. It's an honor and a privilege to be part of this long and venerable tradition of Marquette lawyers serving in the judiciary.

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 at law.marquette.edu.

Peter L. Ramirez has launched his own firm, Ramirez Law, in Milwaukee. Ramirez is current president of the Marquette University Law Alumni Association Board.

1990

Rodney W. Carter was added to the real estate practice group of the Milwaukee office of Husch Blackwell, formerly known as Whyte Hirschboeck Dudek.

1991

David L. Borowski has become a member of the board of directors of Messmer Catholic Schools in Milwaukee. A 1984 Messmer graduate, he is currently the presiding judge of the probate division of the Milwaukee County Circuit Court and handles a combined civil/probate calendar.

Jennifer Schmidt is now a complex claims director for Berkshire Hathaway Specialty Insurance. BHSI recently celebrated its three-year anniversary.

1992



Kevin M. Long, national chair of Quarles & Brady's litigation & dispute resolution practice group, has been inducted as a member of the Greater Milwaukee Committee. The GMC is composed of 200 CEOs and CEO-level executives working to make Milwaukee the best place to live, learn, work, and play.

1993

Timothy S. Trecek has been selected to join the Legal Aid Society of Milwaukee's board of directors. Trecek is a shareholder and a member

of the executive committee at Habush Habush & Rottier and serves as managing partner of the firm's Milwaukee and West Bend offices.

1994



Jane Pribek Salem is now a member of the Tennessee bar and was promoted to staff attorney at the Tennessee Court of Workers' Compensation Claims in Nashville. She was formerly the editor-in-chief and editor-at-large of the *Wisconsin Law Journal*.

Christine E. Woleske was recently named chief operating officer of Bellin Health, in addition to her service as the company's executive vice president. She has been affiliated with Bellin, which is located in the Green Bay area, since 1998. ►

MARY STAUDENMAIER

Lifetime Achievement Award

My father, L. W. Staudenmaier, went to Marquette Law School during a very tough time—the early 1930s. He needed financial aid, and Marquette didn't have scholarships back then. He managed by working like crazy. Upon graduating from law school, he owed \$250, and they weren't going to write it off. But he managed to talk to some friends who had family who had gone to law school. They were wonderful people, and they said to my dad, "Well, don't worry about it—we'll take care of it." They wrote a check for \$250 so that he could graduate, with honors, from Marquette Law School. . . . He taught me how to make a difference, to take the opportunities that come forward and try to make them perfect.

BILL STAUDENMAIER

Lifetime Achievement Award

A little bit of history—ancient history. September 1958: I entered the Marquette Law School. I was astute enough to pick out the people who were the real brains in my class and sign on with them as a study group. I don't know whether the students still do that, but a half dozen of us stayed together for three years and studied, and it helped my grades. But, more importantly, I had some of the finest professors that one could imagine teaching the law. Some of you will remember Francis Darnieder; future dean, Bob Boden; Father Jim Orford, a Jesuit; Leo Leary; and, most importantly, a longtime friend, Jim Ghiardi, who passed away just a few months ago. It was a marvelous experience, and I am so grateful for that education.

1996



Gregory J. Heller was recently elevated to the position of executive vice president and chief legal officer for the Atlanta Braves. He is in his 16th season

with the Braves, where he manages all legal affairs for the team and its wholly owned minor league affiliates.

1997

Cynthia G. Fletcher has joined the Milwaukee office of Husch Blackwell (formerly Whyte Hirschboeck Dudek) as part of its corporate and finance practice group.

Daniel G. Radler, a partner in the Milwaukee office of Quarles & Brady, will become the firm's managing partner, effective December 1, 2016. He currently serves as a section

chair of the firm, working directly with national practice group chairs and industry team leaders to help strengthen strategic areas of the firm.

2000



Katie Maloney Perhach, managing partner at Quarles & Brady's Milwaukee office, received a 2016 Philanthropic 5 award from the United Way of Greater Milwaukee

& Waukesha County. This award was created by United Way's Emerging Leaders Council to recognize five community leaders in their 20s, 30s, and 40s who have made extraordinary commitments of leadership, volunteerism, mentoring, and philanthropy to Greater Milwaukee and Waukesha's nonprofit community.

2001

Robert R. Gagan has opened an office in Green Bay for the law firm of O'Neil, Cannon, Hollman, DeJong & Laing.

2003



Tara R. Devine, a partner at Salvi, Schostok & Pritchard, in Waukegan, Ill., recently obtained a \$1.6 million verdict on behalf of a client in a wrongful-death case,

a record in Stephenson County, Ill. She has become a member of the Lake County Bar Association Board of Directors.

Kimberley C. Motley was the subject of a *New York Times* article on her legal work in Afghanistan and a documentary highlighting her work there, *Motley's Law*.

2004

Paul J. Krause has joined Harley-Davidson Motor Company as senior counsel for compliance and employment.

2005

Travis DeLucenay has been named a partner at Zetley Law Offices in Milwaukee, where his practice continues to focus on tax law and representing clients in both state and federal tax controversies.

Sara Elizabeth Dill is the new director of criminal justice standards for the American Bar Association, Washington, D.C. She will oversee development and revision of standards for criminal justice reform, as well as work to implement those standards in state and federal jurisdictions through policy and legislative advocacy. She will also oversee the Supreme Court amicus brief project for the criminal justice section.

2006



David B. Carr is a shareholder in the Milwaukee office of Husch Blackwell (formerly Whyte Hirschboeck Dudek), where his practice involves complex commercial litigation.



Cynthia M. Davis has been appointed by Gov. Scott Walker to serve as a judge in Branch 21 of the Milwaukee County Circuit Court. Davis was an assistant district attorney in Milwaukee County and also is an adjunct professor at Marquette Law School.

Kyle R. Hartman and his wife, Kathy (Arts & Sciences '04), welcomed Hudson Michael to the family on November 6, 2015. Hudson joins brother Henry and sister Lucy. Kyle is a partner at Seyfarth Shaw in Chicago, with a national practice in labor and employment law.

Anthony K. and Andrea (Neuman) Murdock

Murdock welcomed their daughter, Corinne Lila Murdock, on August 24, 2015. Big brother Ryan is excited to have a little sister with whom he can share his love of Legos and superheroes. Anthony and Andrea are both shareholders at Halloin & Murdock in Milwaukee, focusing on construction, real estate, and insurance coverage litigation.

Trent Nelson recently became a partner in Kummer, Lambert, Fox & Glandt in Manitowoc, Wis.

Jeremy P. Shapiro-Barr is a founding member of Health Sciences Law Group in Milwaukee, a boutique law firm formed in spring 2016 to work with health care and life sciences companies in order to promote and protect innovation.

Andrew J. Warmus has become a partner in the corporate and securities practice group of Baker & McKenzie in Chicago, where he advises clients on transactional matters, including mergers and acquisitions, joint ventures, and strategic transactions.

2007



Malinda J. Eskra has joined the litigation practice of the Milwaukee office of Reinhart Boerner Van Deuren. She spent the previous six years as a law clerk for Judge Kitty K. Brennan at the Wisconsin Court of Appeals, District I.

B.J. WESTFAHL *Howard B. Eisenberg Service Award*

It's an honor and a privilege—and very bumbling—to receive an award named after the late Dean Eisenberg. I want to say thank you to the Law School, Dean Kearney, the teachers and staff for continuing Dean Eisenberg's effort in educating, training, and grooming the next generation of lawyers to be men and women for others. And I'm very grateful to the Marquette community. I spent a lot of time on Wisconsin Avenue—11 years in fact, from high school through college and law school. That community, like the community at large, has given me a great deal, and I'm very grateful for the opportunity to give back the small bit that I can.



BRENT MOBERG

Charles W. Mentkowski Sports Law Alumnus of the Year Award

From my first days as a Marquette law student, I was continually challenged by great professors, great classmates, great alumni, and great mentors to be bold and to strive to achieve excellence in all things. All of those people helped me take on the world of intercollegiate athletics at the NCAA Division I level, with its exciting and ever-changing structure. My time at Marquette strengthened my resolve to embark on a career of continual service. In my world, that service is creating a culture of compliance, with strong relationships, so that I can serve institutions, colleagues, alumni, boosters, fans, coaches, and, most importantly to me, student athletes.



Aaron P. McCann has joined Godfrey & Kahn in Milwaukee as a member of the firm's labor, employment, and immigration

practice group. His practice focuses on counseling and advocating for employers in all aspects of an employment relationship.

2013



Charles A. Walgreen recently joined the Chicago office of Weltman, Weinberg & Reis, a full-service creditors' rights firm.

2014



Christopher K. Flowers is one of the recipients of the 2016 Small Business Administration Wisconsin Awards. An associate in the litigation practice

group of Godfrey & Kahn in Milwaukee, Flowers was recognized for his extensive pro bono work with Wisconsin Women's Business Initiative.

2008

Justin M. Mertz has joined Michael Best & Friedrich as an attorney in the firm's transactional practice group.

2009

Anna M. Kees has joined the State Public Defender's Office.

2010

Allison A. Markoski, now living in Washington, D.C., has been named assistant parliamentarian of the United States Senate.

2011

Nancy Morris recently joined the guardian ad litem division at the Legal Aid Society of Milwaukee.

Erica N. Reib has been appointed to the board of the Wisconsin State Bar's Labor and Employment Section. She is a member of O'Neil, Cannon, Hollman, DeJong & Laing's employment law practice group.

2012

James D. Carlson recently joined the Rockford, Ill., office of Hupy & Abraham.

Bailey M. Larsen has joined Fox, O'Neill & Shannon in Milwaukee as an associate. Larsen is part of the firm's taxation, estate planning, and corporate practice groups.

Kyra K. Plier is now an associate in the Madison office of Hupy & Abraham.

2015



Alexandra K. Suprise has joined the Madison office of Michael Best Strategies. Suprise assists clients in

identifying strategic opportunities to grow their business and provides services related to government relations, lobbying, strategic planning, and public relations.

2016

James T. Hornstein is serving as a law clerk for Judge Debra L. Olsson of the Rhode Island Workers' Compensation Court in Providence.

Ryan M. Spott has joined the Milwaukee office of Davis & Kuelthau as an associate practicing in the areas of appellate, commercial, employment, and municipal matters.



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LOUIS J. ANDREW *Service to Marquette Award*

I want to thank a few people. Let me begin with Dean Joseph Kearney. His friendship and his willingness to listen to my ideas about the Law School have been very gratifying. I have really enjoyed participating. I also want particularly to thank Janine Geske, a professor, former justice of the Wisconsin Supreme Court, and, for a while, acting dean of the Law School. She and her husband, Mike, have become our dear friends and in many ways have allowed us to be of service. I recall also Dean Howard Eisenberg, who showed us how to be people for others, and—if you want to go back 50 years—Dean Bob Boden, for his decency and friendship.



Louis J. Andrew, left, with Marquette University President Michael R. Lovell at the ceremony during which Andrew received the Service to Marquette Award.

All of these people I thank for allowing me to participate in helping Marquette, and particularly the Law School, become a better institution for the benefit of the students, faculty, and others. I also want to thank my wife, Sue, who has been with me all the way. Both of us want to look forward and offer both Dean Kearney and Dr. Mike Lovell our help. We like giving service—truly, we believe you receive more than you give. Under Dr. Lovell's leadership, Marquette University is just going to keep getting better and better.

PUBLIC SERVICE

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WE HONOR IT
WE DO IT



MARQUETTE
UNIVERSITY

LAW SCHOOL

At Marquette Law School, the words “public service” and “pro bono” have roots as deep as our core mission of “Excellence, Faith, Leadership, Service” and branches as vibrant as the clinics and organizations where our students and faculty members provide free help to thousands each year. Almost half of our students graduate with an honor cord for pro bono service.

Marquette Volunteer Legal Clinics—House of Peace, Milwaukee County Courthouse, United Community Center, Milwaukee County Veterans Service Office, Mobile Legal Clinic. Wills for Veterans. Marquette Legal Initiative for Nonprofit Corporations. Public Interest Law Society Fellowships. Project Homeless Connect. Milwaukee Justice Center. Family Law Forms Assistance. Domestic Violence Injunction Project. Guardianship Clinic. Internships with nonprofits throughout Milwaukee and beyond.

Our programs have many names. But they all serve the same mission: Do good.