

# MARQUETTE LAWYER

MARQUETTE UNIVERSITY LAW SCHOOL MAGAZINE FALL 2017

## OPENING THE DOOR TO MUCH MORE

The Law School's New Lubar Center  
for Public Policy Research and  
Civic Education



### ALSO INSIDE:

Shelanski on Regulatory Politics  
Roggensack Defends the Courts  
The Decline in Civil Jury Trials

# The Various Great Work of Marquette Law School

Try as we might, the *Marquette Lawyer* magazine cannot altogether capture the greatest work of Marquette University Law School. That work consists of the study of the law by individual Marquette law students and their formation of themselves into Marquette lawyers. Whether it is in quiet reading (and, one hopes, rereading) or in discussion with classmates (advisedly sometimes in study groups) or in practice sessions preparing for the culmination of a Trial Advocacy course, this work extends well beyond the classrooms, in the other extraordinary venues of Eckstein Hall, including the Aitken Reading Room, Zilber Forum, Huiras Lounge, and Boden Publications Suite. It also occurs late at night in coffee shops and apartments—and in just about any other place where a Marquette law student may be found.



Dean Joseph D. Kearney

Clinics and other law school programs coordinate but that only individuals directly provide. The preceding entries (pages 4–5) give a sense of some of the professors—experienced (Professor Andrea Schneider) and new (Professor Alex Lemann)—and may hint at why some of our students are inspired in particular directions.

The magazine provides news about other, less-intuitive contributions of Marquette Law School. For example, the new Lubar Center for Public Policy Research and Civic Education is the topic of

the cover story (pages 8–13). The article traces the essential history of our public policy initiative—our Lubar Center, as we now call it—over the past decade or more and should be of wide interest. We are grateful that part of our history includes the interest of Shel and Marianne Lubar in associating with us, and we try to capture parts of their story as well (pages 14–21).

The magazine also promotes our mission through its direct exploration of important issues of law and public policy. Howard Shelanski, the former “regulatory czar” in the Obama administration, expands upon his Boden Lecture last year in an essay here (pages 22–33). He provides a powerful assessment of the challenges that today’s politics pose to policy making in the regulatory sphere. With support from the Law School’s Adrian P. Schoone Fund for the Study of Wisconsin Law and Legal Institutions, we take up (pages 34–43) the question raised on the back cover of the recent issue of magazine: What does the extraordinary decline in the incidence of civil trials mean for the profession and the larger society? Chief Justice Patience Roggensack also sets forth an important question: In her Hallows Lecture (pages 45–51), she asks the Wisconsin legal community to consider and discuss whether some of the criticisms directed at courts these days are more harmful than helpful.

The final pages of the magazine, in their own way, do the most to reflect the Law School’s greatest work. From the short Class Notes, the longer profiles of two alumni, and the remarks at the judicial investitures of two others, we can peek into the careers of individuals who, at the beginning of their time in the profession, found their home—and perhaps some inspiration—in Marquette University Law School.

We offer you such glimpses, news, and essays in this latest issue of the *Marquette Lawyer*.

Joseph D. Kearney  
*Dean and Professor of Law*

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## Schneider Honored by ABA for Scholarship and Leadership in Dispute Resolution

The stated reason for Marquette Law Professor Andrea Schneider's prestigious award from the American Bar Association (ABA) was her research, not her optimism. But, as she made clear in her acceptance speech at a luncheon in San Francisco in April of this year, her positive outlook is a key motivation in her work.



Professor Andrea Schneider

Even beyond her teaching, Schneider said that optimism fuels her extensive lecturing, writing, and other forms of engagement. “We do this work because we believe,” she said. “We believe that behavior can change; we believe that people can learn.”

Schneider, a graduate of Harvard Law School, joined the Marquette Law School faculty in 1996. She has become a national leader in research and education about dispute resolution (sometimes called alternative dispute resolution, or ADR), and she is author of numerous books and articles. “By collaborating with a

broad range of scholars, Professor Schneider has not only enriched her own work but also contributed greatly to others' work and to our field,” the leaders of the ABA dispute resolution section said in announcing her award. The announcement also cited her success in organizing national conferences on the subject, her founding of the *Indisputably* blog, her empirical scholarship, and her work leading training sessions on negotiation beyond the law school classroom.

Past winners of the award include two professors who were important to Schneider at Harvard Law School: her mentor, Robert Mnookin, who serves as the Samuel Williston Professor, and Frank Sander, now Bussey Professor Emeritus.

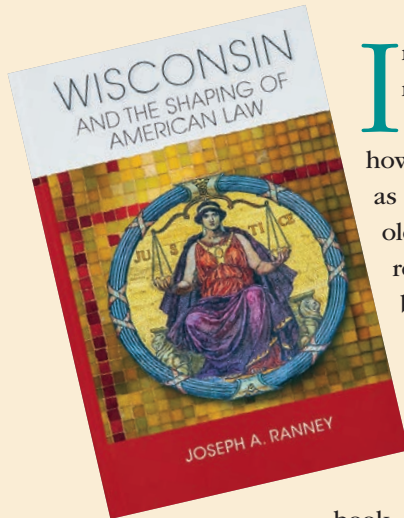
The organization praised Schneider's efforts to build up the ADR field. Schneider told her peers at the luncheon, “We will be better at this when we continually search beyond our own silo, beyond our discipline, and beyond our borders for the most compelling theory and practice out there.”

“It's not that we can eliminate conflict—it's that we can handle it better,” Schneider said. “This work also takes patience and persistence, since we know people and situations do not change easily.” Persistence is one of Schneider's own strengths. “For better or worse, I tend to view ‘no’ as ‘not now,’” she said in her remarks.

Schneider said that her teaching areas—negotiation, dispute resolution, international law, and ethics—all have something in common: “[T]hey look for the best in people.”

“My approach to negotiation and dispute resolution has always been that more is better,” Schneider said. Her work, both in Eckstein Hall and far beyond, is making realities of both “more” and “better.” ■

## Ranney Authors Book on Wisconsin's Role in National Legal History



In the preface to his new book, Joseph A. Ranney recounts how he spent much time as a young lawyer reading old Wisconsin case reports and statutes. “I became curious how these ancient texts had evolved into modern law,” he writes. That helped lead to an earlier

book, published in 1999,

*Trusting Nothing to Providence: A History of Wisconsin's Legal System.*

But that work did not satisfy all of Ranney's interests, which include how law had evolved elsewhere in the country. He pursued that interest through more than 15 years of research. The result is the new book:

*Wisconsin and the Shaping of American Law*, published in 2017 by the University of Wisconsin Press. The book describes in rich detail the development of the law in Wisconsin, the role the state has played as a leader in the law, and the ways the history of Wisconsin law compares to that of other states.

Marquette Law School played a crucial role in the new book. Ranney did much of his research as the Adrian P. Schoone Visiting Fellow in Wisconsin Law and Legal Institutions at the Law School. Throughout his research and teaching on the Law School's part-time faculty, Ranney has remained actively engaged in the practice as a partner in DeWitt Ross & Stevens in Madison.

“Wisconsin has shown a defining streak of legal independence throughout its history, one that has regularly propelled it to national legal leadership,” Ranney says in the new book. “Wisconsin has also been an exemplar of many regional and nationwide trends in state law.” ■

## Post-Katrina Experience Shapes New Professor's Interests

Torts are a major interest for Alex Lemann. Indeed, he is teaching a course in torts in the fall 2017 semester as a new member of the faculty of Marquette Law School.

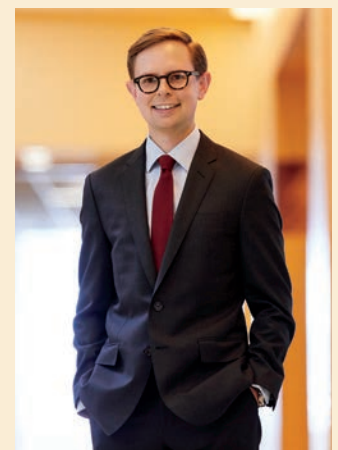
Torts are a primary interest of Lemann's legal scholarship, as well. But his focus there is not on everyday cases. His specialty is disaster law.

That is rooted in his own experiences. From 2006 to 2008, between graduating from Harvard College and beginning Columbia Law School, Lemann worked in New Orleans for a nonprofit organization whose general interest was historic preservation. In the period after Hurricane Katrina devastated much of the city in 2005, the organization helped residents restore their homes to be livable again. While there, Lemann, who grew up in the New York City area, had duties that included helping lead an award-winning publication that promoted the organization's activities.

“That's affected my research interests ever since,” Lemann said.

After graduating from law school, Lemann served as a law clerk for Judge Marsha S. Berzon on the U.S. Court of Appeals for the Ninth Circuit and for U.S. District Judge Denise L. Cote in New York City, and he worked in private practice in New York. With a growing interest in the academic side of the law, Lemann accepted a two-year fellowship at Georgetown Law, where he taught and did research.

That led to his new position at Marquette. “The animating spirit of the university,” with its emphasis on the involvement of students in public service and with the Law School's strong engagement with the broader community, appealed to Lemann. “I'm thrilled to be here,” he said. ■



Professor Alex Lemann

# HERE'S WHY IT'S CALLED THE OFFICE OF **PUBLIC SERVICE.**

TWO WORDS MARQUETTE LAW SCHOOL TAKES SERIOUSLY ARE  
"PUBLIC SERVICE." WHAT DO WE MEAN IN SAYING THAT? HERE  
ARE SOME FACTS.

"I want to thank the law student and lawyer for being kind and patient with me. They did not stop until they were confident that I understood what was going on in my case. I appreciate how they involved me in the process so I knew more clearly what the document needed. Bless you guys!"

—Mary, client at Marquette Volunteer Legal Clinic's House of Peace location



"Very good experience; great service, friendly, kind, extremely helpful, and showed concern toward my questions. Keep up the good work and continue to assist the veterans."

—Mark, client at Marquette Volunteer Legal Clinic's Veteran Services Office location

## **The Marquette Volunteer Legal Clinics**

Our legal clinics serve low-income people at five locations—the House of Peace, the Milwaukee County Veterans Service Office, the Sojourner Family Peace Center, the United Community Center, and the Milwaukee Justice Center. Plus, we have a Mobile Legal Clinic that goes where people who need service are. And we put on estate-planning clinics in several locations.

**4,300** clients are served annually. Of those, 70% live at or below 125% of the federal poverty level.

EXCELLENCE | FAITH | LEADERSHIP | SERVICE

## **. . . And Then There's the Public Interest Law Society**

Putting excellence, faith, leadership, and service into action—those words describe the Public Interest Law Society (PILS), a long-standing and wide-ranging program that supports Marquette law students in public-interest summer internships.

For more than 20 years, Marquette University Law School has sponsored PILS fellowships. Students receive a \$4,000 stipend to support them in unpaid summer internships in public interest organizations in the law. Most fellowships are in the Milwaukee area, but a number are in locations around the country. Fellows are also expected to perform at least 20 hours of PILS service in the following academic years.

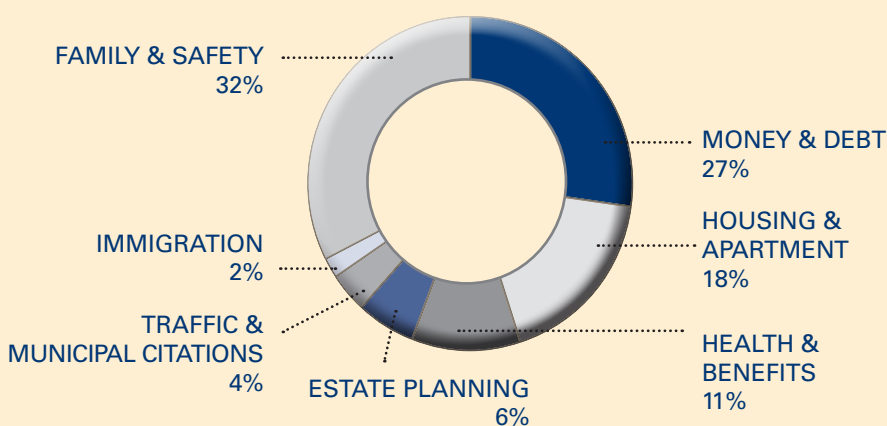
## So Who Supports All This?

Much of Marquette Law School's public service work is underwritten by generous donors. The Gene and Ruth Posner Foundation, established by a Marquette lawyer from the class of 1936, has provided several hundred thousand dollars in grants over the past decade. Also of great significance in supporting the school's public service work have been the unrestricted donations to the Law School's Annual Fund, often called the dean's discretionary fund, ranging from small amounts to Woolsack Society gifts, all generous. The annual "Howard B. Eisenberg Do-Gooders' Auction" each February brings the Marquette Law School community together and attracts additional donations.

## Who Coordinates, Enables, and Encourages All of This?

Well, the Marquette Law School community generally, to be sure, but the school's Office of Public Service more specifically. After study by the faculty and dean, the Law School created the office in 2006 to build upon the Jesuit tradition of public service and to capture the legacy embodied by the late Dean Howard B. Eisenberg. Led by Angela Schultz, assistant dean for public service, the office works with the community at large to offer students, alumni, and other members of the legal profession a range of opportunities. These include pro bono work, community service, and contributions to issues focused on access to justice

## What Types of Questions Do Clients Have?



**67%** Among the current student body, 67% have participated in pro bono work at some point during their law school career.

**52%** In the 2016–2017 academic year, 52% of students were involved in pro bono opportunities and provided 10,631 hours of pro bono legal work to our community.

**50%** Students who complete 50 or more pro bono hours graduate wearing honor cords for service. In recent years, some 50% of graduates have achieved this accomplishment.

## What Else Do You Do Besides the Volunteer Legal Clinics?

Plenty. Here's a partial list:

- Marquette Legal Initiative for Nonprofit Corporations (M-LINC)
- Domestic Violence Project
- Milwaukee Justice Center Family Forms Assistance Clinic
- Second Chance Expungement Clinic
- Bankruptcy Help Desk
- Eviction Defense Project
- Guardianship Clinic
- Legal Action of Wisconsin U-Visa Project

For more information and details, or to volunteer at our clinics, visit us at [law.marquette.edu/community/office-public-service](http://law.marquette.edu/community/office-public-service).



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# OPENING THE DOOR TO MUCH MORE

Creation of Lubar Center for Public Policy Research and Civic Education will build on the Law School's innovative work of the past decade

It was a pair of announcements that raised people's eyebrows. In mid-2006, Mike Gousha, longtime news anchor on Milwaukee's WTMJ (Channel 4) and regarded as the preeminent broadcast journalist in Wisconsin, announced he was leaving the station after 25 years. Several months later, Marquette University announced that Gousha was joining the university's Law School as distinguished fellow in law and public policy.

What did that mean? Gousha wasn't going to teach. He wasn't a lawyer. What was he going to do?

Dean Joseph D. Kearney said at the time that the goal was to add a dimension to the Law School's service. In addition to the core mission of educating students to be lawyers and its secondary mission of public service or pro bono work, the Law School would strive to be a crossroads for serious, evenhanded discussion of major public issues. In programs open to the public, Gousha would interview significant and interesting people; host debates involving candidates in major elections; moderate panel discussions on crucial issues facing Milwaukee, Wisconsin, and the nation; and, in general terms, broaden and elevate public discourse.

To be sure, the plan was not so detailed. Indeed, Kearney acknowledged at the time that he was proceeding as much on an intuition as on a specific proposal. But the general interest was clear: Marquette University Law School would help a broad audience understand the issues facing the community. The school would not be an advocate but a convener—a place where important thinking about issues is offered in constructive ways that are accessible to wide audiences.

That was the aim. And, almost 11 years later, this much is clear: The idea is working.

The public policy initiative, which has grown larger and more far-reaching year by year, has an expanded and newly ambitious future starting this fall. A \$5.5 million gift from Milwaukee philanthropists Sheldon and Marianne Lubar, announced in April, will combine with \$1.5 million donated by the Lubars in 2010 to create a \$7 million endowment to support future policy initiatives. The policy program has been named the Lubar Center for Public Policy Research and Civic Education.

The gift reflects what Marquette University President Michael R. Lovell characterized as "the belief of Sheldon and Marianne Lubar in our university's ability to bring greater understanding through constructive conversations." There is particular reason for that belief, Shel Lubar said when the gift was announced: "In recent years, in particular, Marquette Law School has played a leading role in significant discussions and research in important topics." ▶▶

**"In recent years, in particular, Marquette Law School has played a leading role in significant discussions and research in important topics."**

Sheldon B. Lubar

Indeed, shortly after the opening in 2010 of Eckstein Hall, the Law School's extraordinary home, the *Milwaukee Journal Sentinel* characterized the school as "Milwaukee's public square." But few would disagree with Shel Lubar's coda to his own statement: "There is so much more to do."

So what lies ahead for the public policy initiative—that is, for the Lubar Center? Ambitious ideas are in the works. Charles Franklin, professor of law and public policy at the Law School, called on Shakespeare this past spring to frame the overall answer: "What's past is prologue." That is, the best sense of activities to come can be gained from looking at the growth and accomplishments of the public policy initiative to this point. It is a narrative worth recounting, chapter by chapter.

## CHAPTER ONE

Professor Michael McChrystal gets credit for offering the idea to Kearney that the Law School ought to hire Gousha and have him lead public programs—or, more generally, give him a platform for his work. After some brokering by Professor Janine Geske to help arrange an initial meeting with Gousha, the ensuing conversations led to an attractive vision for Gousha's role in expanded public programming at the Law School.

What resulted? The signature effort has been "On the Issues with Mike Gousha," a series of programs now in its 11th year. They are one-hour programs, free and open to the public and generally held at 12:15 p.m. on weekdays, regularly filling, with audiences of 200-plus, the room at the Law School now known as the Lubar Center (previously the Appellate Courtroom). The programs are also live-streamed and archived for later viewing online.

The gatherings are serious but relatively informal, consisting of a conversation between Gousha and the guest, with time for questions from audience members. Who are the guests? They form a long, diverse, and impressive list, from major public officials to prominent authors to leaders in shaping policy issues to occasional sports or entertainment figures. Name a subject, particularly one shaping life in the Milwaukee area and Wisconsin more broadly, and it's almost certain to have been the focus of an "On the Issues" program.

Gousha has also hosted debates, often shortly before election days, with candidates for governor of Wisconsin, the U.S. Senate, and seats on the Wisconsin Supreme Court. An especially memorable session brought Republican Gov. Scott Walker and Democratic challenger Tom Barrett, the mayor of Milwaukee, to the new Eckstein Hall as the last major campaign event prior to the nationally spotlighted recall election for governor in June 2012. The two had debated before—as the first major public event in Eckstein Hall in 2010. Many of the debates have been broadcast live on television stations in every major market in Wisconsin. Some have been broadcast on the C-Span national cable channel for political events.

Gousha has also helped organize and has moderated sessions at major conferences at Eckstein Hall, addressing issues such as regional development, sex trafficking, capital punishment, water quality, and the metropolitan area's cultural assets. He also anchors a half-hour television program on Sundays, "UpFront with Mike Gousha," hosted by WISN-TV (Channel 12) in Milwaukee and shown statewide, offering a forum for leading figures in political issues to give their views.





Mike Gousha



Alan Borsuk



Charles Franklin

## CHAPTER TWO

The first addition to the public policy team came in 2009 when Alan J. Borsuk ended a distinguished career as a journalist at the *Milwaukee Journal* and *Milwaukee Journal Sentinel* and, three months later, became a senior fellow in law and public policy at the Law School. Borsuk's longtime reporting specialty was kindergarten through twelfth-grade education. He has continued his work on that subject, both through a weekly column on education for the *Journal Sentinel* and by organizing events on education policy at Eckstein Hall.

The education events have brought to Milwaukee national thought leaders such as the chair of the National Assessment Governing Board, best-selling author Paul Tough, and leading researchers and analysts of education trends, often in conjunction with the Marquette University College of Education and Dean Bill Henk. A week before the April 2017 election for Wisconsin Superintendent of Public Education, Borsuk moderated a debate at Eckstein Hall between incumbent Tony Evers and challenger Lowell Holtz. Borsuk also is editor of *Marquette Lawyer* magazine and a frequent contributor to the Law School's Faculty Blog.

## CHAPTER THREE

It was clear in 2011 that the following year was shaping up to be an historic one for Wisconsin politics. Providing insight would be a great public service. And one of the crucial aspects of understanding what was unfolding would be to know what the general public was thinking.

Those thoughts underlay conversations, especially among Gousha, Kearney, and McChrystal, that led to the launch of the Marquette Law School Poll and the arrival of Charles Franklin as director of the poll.

Franklin, an established political science professor at the University of Wisconsin-Madison, took a leave to lead Marquette's polling effort during all of 2012.

The poll is the largest effort ever to understand public opinion in Wisconsin. It quickly earned a reputation as the "gold standard" of polling in Wisconsin by almost uncannily accurate readings of how elections were unfolding. In the course of 2012, Wisconsin saw the special recall election for governor, a U.S. Senate election, and a presidential election—and primaries for each. The last Marquette Law School Poll before election day in each of those cases was almost exactly in line with the actual results.

To build on the success in 2012 of the Marquette Law School Poll and to help build out the public policy initiative, Franklin left the University of Wisconsin and became professor of law and public policy at Marquette Law School. Polling has continued since then on a frequent and in-depth basis. While the "horse race" information heading into major elections is the most widely followed aspect of the poll, the numerous rounds of polling regularly have asked many other questions about what people across Wisconsin are thinking about the economy, major public issues, public leaders, and aspects of their own lives. In specific rounds of polling, questions have focused on everything from water quality to criminal justice practices to use of public libraries.

All results from the poll are made available to the public on the Law School's website ([law.marquette.edu/poll](http://law.marquette.edu/poll)). In total, the results of the poll, now almost six years old, provide an unrivaled warehouse of data on public opinion in Wisconsin that will be available and valuable to researchers for years to come.

The poll has become a source of national attention and engagement for the Law School and the university. ▶▶

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## CHAPTER FOUR

Another initiative has involved Lubar Fellowships for news reporters. With the goal of extending the reach of the public policy initiative, the Law School over the last five years has underwritten in-depth reporting projects focused on major policy issues. Journalists are given lengthy periods—typically, six months or more—to set aside regular duties and immerse themselves in a project, generally leading to a major series of stories easily available to the public. The Law School is involved in selecting the reporters and the topics; the journalists and their news organizations retain control of the work and the resulting stories.

Among the completed projects have been a data-rich analysis of the political polarization of the Milwaukee area and Wisconsin overall, written by Craig Gilbert, the Washington bureau chief of the *Milwaukee Journal Sentinel*; in-depth coverage of the issues and politics involved in the decision to build a new basketball arena in downtown Milwaukee, written by the late *Journal Sentinel* reporter Don Walker; a three-part examination of the future of Milwaukee's Mitchell Field, written for the *Milwaukee Business Journal* by freelance reporter Larry Sandler; and a series of stories on how numerous types of life trauma affect children in Milwaukee, written by *Journal Sentinel* reporter John Schmid.

## CHAPTER FIVE

In 2015, Dave Strifling, L'04, was named director of the water law and policy initiative. With Marquette University increasing its involvement in water-related matters, as part of a broad initiative led by President Lovell and Professor Jeanne Hossenlopp, vice-president for research, Strifling has become recognized for his background and insights on water law and policy. These can be found on the Law School's Faculty Blog, in the classroom (Strifling teaches a course on water law), and in public events such as a conference on public policy and American drinking water at Eckstein Hall in 2016.

Most recently, since fall 2016, Professor Amanda Seligman has been a visiting fellow contributing to the policy initiative on a part-time basis. She is chair of the history department at the University of Wisconsin-Milwaukee, senior editor of the *Encyclopedia of Milwaukee*, and author of several books concerning urban affairs.

Kearney has worked assiduously with university colleagues and alumni and friends of the Law School to ensure that the public policy initiative does not rely on

student tuition money. "The initiative has had a profound effect on our public profile and reputation, especially in this region," he said, "without in any way competing with the program of legal education. Indeed, for interested students, the policy initiative enhances their experience."

## CHAPTER SIX AND BEYOND

So what lies ahead? The future of the Lubar Center's work is beginning to take form, but, as is true of the policy effort to this point, the initiative will evolve. The efforts to date are going to continue: "On the Issues with Mike Gousha" programs; rounds of the Marquette Law School Poll; conferences on education, water, and other subjects; new fellowships for journalists to do in-depth work.

"We'll continue in our role as the region's leading convener, bringing together news and policy makers to discuss and debate the issues of the day," Gousha said. But the Lubar endowment opens the door to new directions, expanded research, and more-ambitious programs.

One new undertaking being launched this fall is called the Milwaukee Area Project. It will be directed by Franklin, in close collaboration with John Johnson, who in 2016 became the Law School's Lubar Research Associate.

"The Milwaukee Area Project (MAP) is a comprehensive examination of public opinion, public policy, and social, demographic, and economic conditions throughout the region," Franklin said. "It will provide a forum for the discussion of issues confronting the area, through public events at the Lubar Center in Marquette Law School." The project will include polling of citizens in the region to provide both the public and elected officials with detailed information on the concerns and preferences of residents, information not available from any other public source.

In addition, Franklin said, "the Milwaukee Area Project will provide state-of-the-art statistical analysis of a comprehensive set of administrative, census, and economic data on the region to provide objective information on the current conditions of the area." MAP will use data from administrative records, census collections, and economic reports, as well as unique and original surveys conducted for the project. "These data together provide an integrated perspective on the region as a whole, how the parts fit together, how one area is linked to another, and where disagreements may hamper mutual benefits," he said.

The focus area for the project includes Milwaukee, Ozaukee, Racine, Washington, and Waukesha counties.

“As the largest geographic concentration of people, jobs, cultural resources, and economic output in Wisconsin, the Milwaukee area represents a vital center for social and economic development,” Franklin said. “But as with every urban center, the region also faces the challenges of inequality, social disorder, and concentrated poverty.”

Franklin envisions a broad and important project. “The Milwaukee area is interdependent. Suburbs do not flourish without central cities that provide large markets and high-end professional jobs. Flourishing regions also provide a wide range of housing, from affordable to extravagant, and jobs from the least skilled to the most skilled. No successful urban area exists as a monoculture of all poor or all rich, all urban or all suburban. Rather, it is the highly varied niches, both economic and social, that create the dynamism that makes metropolitan regions prosper and grow.”

Gousha said, “With MAP, we’ll place a greater focus on the fortunes of metropolitan Milwaukee. We’ll use polling to provide regular snapshots of public opinion and priorities, and we’ll identify and analyze data to help assess the region’s economic and social well-being.”

Borsuk said he viewed the Lubar grant as offering “both an opportunity and an obligation to think bigger and do better.” He said the gift has energized his commitment to organize programs at Eckstein Hall focusing on education subjects in a broad sense of the term. “I want to see us be a crossroads for exploring policies related not only to what is going on in schools but to everything shaping the paths that lead children toward who they become as adults. That includes subjects such as early childhood education and the broad healthiness and stability of children’s lives, including emotional and mental health.”

More broadly, Gousha said, “The new Lubar Center will also be looking to build on the public policy initiative’s reputation as a thought leader. As part of that

mission, we’ll be inviting leading academics, researchers, and public policy experts, whether at Marquette University or from around the country, to join us at the Law School. The goal is to make the Lubar Center a place for new thinking and fresh ideas, as we look to address some of the region’s biggest challenges.”

Daniel Myers, the provost of Marquette University, expressed enthusiasm and optimism about the directions the Lubar Center will pursue and the impact it will have.

A university, he said, can and should be “an intellectual catalyst” for broader communities. The expertise of faculty members, the research they do, and the contributions of the whole university community can and should make Marquette a large contributor to success in addressing the issues of greater Milwaukee. Marquette wants to reach out to Milwaukee, to be a good citizen of Milwaukee, Myers said. Broadly conceiving the area in some instances to include Chicago—as in the Law School’s past conferences with the *Journal Sentinel* concerning the “Chicago Megacity”—is important, he suggested.

Myers said that the Law School and particularly its public policy work have played these beneficial roles well already. He regards the public policy initiative as a great example of filling the need for serious, objective, provocative, constructive work and called the initiative, to this point, “a tremendous contribution.”

Continuing to expand Marquette University’s involvement in various ways with the Milwaukee community is “hugely important,” Myers said.

Reflecting on the \$1.5 million grant the Lubars made in 2010 and the success of the Law School’s public policy initiative to this point, Myers said, “This is a perfect reflection on an investment the university made good on.”

“What a shining star that effort has become,” he said. “It is a jewel for the whole university.”

And yet, at the same time, the mission for the new Lubar Center is to expand beyond what has been accomplished. As Sheldon Lubar said, “There is so much more to be done.” ■





# INVESTING FOR THE LONG TERM

Whether it's in investments or causes they back, Sheldon and Marianne Lubar operate as a team committed to good outcomes.

BY ALAN J. BORSUK

**SHELDON LUBAR** took school seriously when he was a grade-schooler in Milwaukee's Sherman Park neighborhood in the 1930s. Eight decades later, his education continues. He still takes it seriously.

"What I really believe in is education and learning, which is a never-ending assignment," Lubar says. "Education is a lifelong way of living. You're never done learning."

Marianne Lubar says that when she was growing up in Kenosha (as Marianne Segal), she was active and engaged and thought of herself as an artist.

What do you get when you pair someone who sees education as a constant pursuit with someone who wants to put her touch on things? You get one of the first families of Milwaukee philanthropy. Sheldon and Marianne Lubar have been greatly successful in several senses of that word and have sought, as two of their biggest goals, to fuel possibilities of learning for others and to enhance the quality of life in Milwaukee. In business, in the arts, in philanthropy, the Lubars have built impressive records of accomplishment.

Marquette University Law School is a major beneficiary of the Lubars' generosity and vision. In April 2017, the Lubars announced they were donating \$5.5 million to support the Law School. Adding to a gift they made in 2010, the Lubars have created a \$7 million endowment to underwrite the school's public policy initiatives, now known as the Lubar Center for Public Policy Research and Civic Education. In addition, the room in Eckstein Hall that hosts many of the Law School's public events has been named the Lubar Center. It was previously called the appellate courtroom.

The new gift is a great step forward for Marquette Law School's public policy program. But appreciation of what the Lubars have accomplished goes far beyond Marquette University. There's a context that has been building for decades. The Lubars want to make available to others in Milwaukee and elsewhere the pursuits the Lubars have chosen for themselves: Quality education, the opportunity to succeed in business, and rich and vibrant community life.

**"... education is the pathway to success and happiness and financial security."**

Sheldon B. Lubar

**S**heldon Lubar says he grew up in times when a lot of things seemed simple. "Nobody was very well off in the 1930s," he says. But family bonds were strong, everyone in his neighborhood on Milwaukee's west side got along, and expectations for children were high.

Lubar says it was instilled in him that "education is the pathway to success and happiness and financial security." He attended Townsend Street School near Sherman Park. He recalls how firmly the principal was in charge. "When you saw her in the hall, you quivered," he says. And you obeyed.

His family moved to Whitefish Bay after he completed fourth grade. He graduated in 1947 from Whitefish Bay High School. (In thanks for his support, the school's football stadium was named Lubar Stadium when it was renovated in 2007.) ▶▶



TOP: Sheldon Lubar liked baseball as a child, age 6. Lubar & Co. is a part owner of the Milwaukee Brewers baseball team.

RIGHT: Sheldon Lubar shows his Army ROTC uniform to Paul Meissner at UW–Madison, 1948.



Sheldon Lubar enrolled at the University of Wisconsin in Madison, where, in those years, tuition was \$40 a semester, he says. But after two years, he recalls, his father said he couldn't help pay for college and Sheldon would have to do it on his own. He got a job working in food service at a university women's residence known as Shoreland House.

Marianne Lubar says that it was her first day on campus when Sheldon, in his first year of law school, was the waiter at her Shoreland House table. The two immediately connected. Their relationship grew, even though, as she tells it, that was the only day he worked as a waiter—he was reassigned to work in the kitchen thereafter.

Sheldon got his undergraduate degree in 1951 and enrolled in the University of Wisconsin's law school. "Law school tuition skyrocketed to \$60," he recalls. By the time he received his law degree in 1953, he and Marianne were married and expecting their first child.

He needed a job. It wouldn't be to practice law. In fact, Lubar says, he has worked on only two legal cases in his life, both matters involving divorces while he assisted with legal aid during law school.

He was in the ROTC military training program while in college and liked it. After graduating law school, he was accepted into the air force with a commission. But the Korean War was winding down; before he was called up, the program was terminated.

Lubar interviewed at two Milwaukee law firms. He recalls being asked in one interview how much money

he hoped to be making after five years. He hadn't ever thought about this and answered, "Maybe \$20,000." "Who do you think you are?" the interviewer asked. No job offer there.

Lubar was more interested in working in the financial sector. He talked to some banks in Milwaukee, thinking that their personnel departments might offer possibilities. And he began looking at jobs in Chicago. He soon had offers from three banks in Chicago.

But an uncle with whom he was close told him he should stay in Milwaukee. Lubar told him he was having trouble getting a position. His uncle knew Eliot Fitch, the head of Marine Bank, which was then one of the leading financial institutions in Milwaukee. The uncle got Lubar an appointment with Fitch.

Fitch offered him a job. "I loved it. . . . I started in the trust department," Lubar says. He worked with several other lawyers. It was "a great group of people." This is a consistent aspect of Sheldon Lubar's evaluation of any workplace—whether it is staffed by "a great group of people." He uses that phrase in describing parts of his career that he has found particularly rewarding.

His starting salary at Marine Bank job was \$4,000 a year. "I was thrilled," he says. "We had a baby, we bought a house in Whitefish Bay, and I was happy as a clam. I thought we'd be there forever."

That didn't turn out to be the case. One big reason: Sheldon and Marianne had four children in the first five years of their marriage. They soon moved to a larger house, in Shorewood.



“I was pretty wrapped up in my career and raising a family, doing things with the family,” he recalls. The family liked to escape for summer vacations at lakes in northern Wisconsin. Lubar wasn’t eager to get involved in public issues.

But he responded when called on to help with a particular community issue—“the first thing I did of a public nature.” He says, “Our children were at Lake Bluff School, and I was asked to lead a committee to see whether there should be a middle school.” The committee concluded that there should be. Lubar expected that everyone would embrace the report. But there was opposition, based on the potential impact on taxes. Although it was a thornier process than he expected, the middle school was approved. “I learned a lot,” Lubar recalls.

The Marine Bank promoted Lubar to a position working in estate administration. He says he didn’t find it interesting after a time and decided he wanted to find a venture where he could do something for himself. He told his boss he was going to leave. That led to a higher-ranking bank executive’s urging him to stay, telling him not to let go of one trapeze before he had his hand firmly on the next one. Marine put him in the credit department, on track to becoming an officer of the bank. He did well, ascending to become a vice president.

A big change for him came when the bank’s executive vice president told Lubar about a new government program offering loans to small businesses. It allowed commercial banks to take equity positions in the small businesses. Lubar says he recommended that the bank not get involved. It did so anyway—and it put him in charge.

One investment proved to be a turning point for Lubar. The bank invested \$1 million in a business named Mortgage Associates: It processed Federal Housing Administration and Department of Veterans Affairs loans, sold them to the federally based agency called Fannie Mae, and serviced the loans at low cost. The mortgage company had been struggling, but, with Lubar playing a leading role, its fortunes turned around. Within several years, he says, the \$1 million investment was worth \$35 million.

By 1966, Lubar was ready to wind down his involvement with Marine Bank. “I decided it was time for me to try it on my own,” he says.

During the course of the Mortgage Associates experience, Lubar had devised a concept he called “Professional Ownership™.” It’s a term that has guided his work ever since—in fact, Lubar & Co. has a trademark on it.

What is it? It’s the practice of buying or becoming a large investor in an enterprise and becoming strongly involved with selecting leaders and setting strategy for the enterprise. Lubar calls it a way “to build a better and bigger company” by working with the management. “Basically, we are strategists, cheerleaders, and providers of capital,” he says.

Lubar and, in later years, his associates would select a company they thought had potential to grow. They focused on keeping or putting good people in leadership positions. “The measure of a company that we would invest in or buy,” he says, was the people who were involved. “And that’s still the case.” Lubar would work along with the leadership to chart a course for the venture.

Lubar talked to a lawyer who liked the “Professional Ownership™” concept and who had a client who wanted to sell his business. Lubar arranged for two insurance companies to back him in taking over the company, Sorgel Electric, which made dry-type transformers.

Over several years, “we tripled the company’s sales and profits,” Lubar recalls. In 1971, he merged the company with Square D, a larger firm based in Milwaukee, whose board he joined after the acquisition.

“After that, I didn’t know what I was going to do,” Lubar says. But he knew he and his family wanted a break. So they took a sabbatical for most of 1972, renting a place in St. Moritz in the Swiss Alps. The children went to boarding school in Lugano.

“And we learned to ski,” Lubar remembers of that year. Skiing has been a Lubar family passion for decades. The Lubars own a home in Aspen, Colorado, where the family spends extensive amounts of time, both in summer and winter. (Skiing also has also been a source of family tragedy. A grandson, Joseph, then 21, was killed in a skiing accident in 2011.)

After returning to Milwaukee, Lubar began considering new opportunities and investments. And then, “out of nowhere,” as he tells it, while the family was in Aspen, he got a telephone call from an official in the administration of President Richard Nixon. ▶▶

**“The measure of a company that we would invest in or buy,” [Lubar] says, was the people who were involved. “And that’s still the case.”**



ABOVE: James Lynn, then secretary of housing and urban development, speaks at the 1973 swearing-in ceremony for Sheldon Lubar as assistant secretary, as Marianne Lubar and Sheldon Lubar listen.

LEFT: Sheldon Lubar shakes hands with President Gerald Ford, with First Lady Betty Ford next to the president.

Would he agree to be assistant secretary for housing and urban development, responsible for housing and mortgage credit, and commissioner of the Federal Housing Administration?

Lubar said “Yes,” and the family headed to Washington. The secretary of the Department of Housing and Urban Development, James Lynn, asked Lubar to work on restructuring the federal role in housing programs and said that Lubar would serve as an expert for the department on mortgages and finance.

“I never worked so hard in my life,” Lubar recalls, mentioning in particular a five-month period when he was closely involved in preparing legislation that was a key part of a shift in federal policy. The administration wanted to move away from supporting massive low-income housing projects, some of which had become notorious for bad conditions. The new emphasis was on efforts that focused on development of smaller housing projects, use of existing housing, or use of vouchers to pay rent.

Lubar held the federal job for about two years, a period that straddled the resignation of Nixon and the start of the administration of President Gerald Ford. On his office wall, Lubar has a warm, personal letter from Ford praising Lubar’s work and expressing regret that he was resigning.

Lubar would work on behalf of a third presidential administration as well. During the term of President Jimmy Carter, Wisconsin Sen. Gaylord Nelson was head of the Senate committee on small businesses. Nelson

pushed successfully for holding the first White House conference on small businesses and for Lubar to play a lead role in putting together the conference.

**R**eturning from Washington to Milwaukee in 1975, Lubar says, “I really wasn’t too ambitious.” He was already well-off financially.

But a friend, John Kelly, was president of Midland Bank, and when Kelly had a heart attack, Lubar agreed to step in as president. He did that for a year until the bank was sold.

Around that time, Lubar says, a former associate told him that he wanted to get back into the business of “making deals”—to invest in or buy businesses. “Well, we can do deals,” Lubar told him. They started doing that, creating an investment fund called 77 Capital. It drew investors including some influential financial leaders from New York, and it did well. Its controlling approach? “Professional Ownership™,” of course.

Lubar also decided in 1977 to start his own venture, Lubar & Co., although at the start, the “& Co.” part was pretty thin. It was really just Sheldon Lubar.

Forty years later, how has the company done? “Outstanding. We’ve done really well,” Lubar says. Lubar & Co. has substantial investments in more than a dozen enterprises. Sitting in a downtown office where the firm recently moved, Lubar says, “We have a great team here and in every one of the companies.” The companies operate separately, but Lubar & Co. is majority shareholder of them, Sheldon Lubar says.

Lubar & Co. investments cover a wide range of interests. A few examples: American Pasteurization Co., a food processor based in Milwaukee; Approach Resources, a Fort Worth, Texas, company that focuses on “unconventional oil and gas reservoirs,” according to the Lubar website; Erdman Corp., a national leader in designing and building health-care facilities, based in Madison, Wis.; and Rockland Flooring, near La Crosse, Wis., which manufactures laminated wood flooring for trailers and intermodal containers.

Among the more publicly visible Lubar investments: the Lake Express ferry shuttling between Milwaukee

and Muskegon, Mich., and a stake in the Milwaukee Brewers baseball team.

Sheldon Lubar has turned over much of the day-to-day work of Lubar & Co. to others, particularly his son, David, who is now president and chief executive officer. Sheldon Lubar remains chairman, but in a photo of the management team on the company’s website, David is at the head of the table, with his father sitting on the side.

On the other hand, Sheldon Lubar still likes being in the action. He says that, six years ago, he decided to go back into banking. After checking out about 30 banks, he recapitalized the Ixonia Bank, a small ▶▶



TOP: The Lubars and their four children in Norway in August 2015. From left: Kristine Lubar MacDonald, Sheldon Lubar, Marianne Lubar, Joan Lubar, Susan Lubar Solvang, and David Lubar.

ABOVE: Members of the extended Lubar family on a skiing trip in Colorado.

LEFT: At a family gathering: Seated, from left, Sheldon Lubar, Joan Lubar, and David Lubar. Seated on the arms of the couch: Left, Marianne Lubar; right, Madeleine Lubar. Standing: John Crouch, Susan Lubar Solvang, Oyvind Solvang, Kristine Lubar MacDonald, and John MacDonald.

bank based west of Milwaukee, in 2012. The bank, he says, went from losing almost all its capital in 2010 to being highly regarded now. “That’s where I spend my business time largely,” he says.

Lubar’s lifelong interest in education has been a major factor in shaping his involvement in public service roles. Among other undertakings, he has served on the Marquette University Board of Trustees; the University of Wisconsin System Board of Regents, of which he was also president; and the board of Beloit College.



Marianne Lubar announcing the opening of the Jewish Museum Milwaukee in April 2008. She was the founding president.

**M**arianne Lubar describes her adult life in three chapters. In the first, her priority was to be a wife and mother, and with four children that was a major and lengthy involvement. In the second, she emphasized her longtime interest in art and learned to work with clay, making pottery while the family lived in Washington. And in the third, she has become involved deeply and widely in Milwaukee’s civic life, especially in organizations involved in the arts and education.

You can see all three chapters playing out in Lubar’s life now. She still loves to have artwork around her, even if she gave up pottery in the 1980s. The Lubar home is filled with beautiful art, including, tucked almost out of view, a few pieces Marianne Lubar made. Family? The Lubars are a close group. Family dinners and vacations are big deals to them. And Marianne Lubar remains actively involved in numerous causes and organizations.

During the years when their children were young, Marianne Lubar says she was “the implementer” of family

decisions that both she and her husband made. It was, in other words, a more traditional arrangement: Certainly an involved father, Sheldon was strongly involved in his work, while Marianne was the at-home leader.

The kids have thrived. Three of the four children—David Lubar, Susan Lubar Solvang, and Joan Lubar—live in the Milwaukee area. The fourth, Kristine Lubar MacDonald, lives in the Minneapolis area. Marianne Lubar describes them all as strong and accomplished. She is correct: All four have been leaders in community causes of many kinds. “They do good things in the world,” she says.

As for the ceramics chapter, Marianne Lubar says that when the family was in Washington, one of the then-young daughters wanted to take a pottery class. The two of them did that together, and Marianne was launched into a decade of serious work, including an association with Abe Cohn, a well-known potter who had a studio in Fish Creek, Wis.

But, Marianne Lubar says, she reached a point where she asked herself, “Why am I making these pots? What is the point?” This became a big issue to her. And it led to her setting aside ceramics and becoming energetically involved in leading and supporting efforts of a wide range of nonprofit organizations in Milwaukee. She realized that she could be as creative in that work as in making objects.

She recalls first joining the board of the Milwaukee Repertory Theater. Over time, she has been on numerous boards, and she is not a passive member of any of them. Lubar is a donor, an advocate, a worker. Among the boards where she has served: The Marcus Center for the Performing Arts, the Florentine Opera Company, the Milwaukee Public Library Foundation, COA Youth and Family Center, Jewish Museum Milwaukee, Milwaukee Film Festival, and several other music and theater companies. She has been especially involved in—and financially supportive of—the Jewish Museum Milwaukee, whose founding she led.

Marianne Lubar was at the center of the decision to select Santiago Calatrava as the architect for the addition to the Milwaukee Art Museum, a building that is now an international symbol of the entire city. She currently is in her fourth nine-year term on the art museum board and is chair of the acquisitions committee. The Lubars have been large donors to the art museum and have been leaders in shoring up support at points when the financial crunch for the museum was acute.



Sheldon Lubar at home, June 2017.

The three phases of her adult life reflect the path that Marianne Lubar has traveled to become an assured community leader, someone willing to express herself and confident she has a voice equal to anyone else's. "I feel very empowered in the things we do," she says. "I no longer feel the need to play 'the woman's role.'"

When it comes to very large gifts, including the recent \$5.5 million gift to Marquette Law School, Marianne Lubar says the decisions come from both her husband and her. "I'm not Shel's business partner, but I am definitely his partner in life, and he is mine, and we do these things together," she says.

The Lubars have made a number of other major gifts to educational institutions in the past few years. These include the University of Wisconsin-Madison: \$7 million to expand the computer sciences department, \$5 million for its business school, and \$3 million to endow a faculty chair at the law school. They also have supported the University of Wisconsin-Milwaukee: \$10 million to create an entrepreneurship center, in addition to an earlier gift of the same size to support the university's business school, which is now known as the Lubar School of Business. The Lubars have also established scholarship programs at the University of Wisconsin-Madison, University of Wisconsin-Milwaukee, the Medical College of Wisconsin, and Alverno College. The Lubar Family Foundation's public filings reflect \$3.6 million in gifts for 2015 alone, mostly to education, arts, culture, and Jewish organizations in the Milwaukee area.

Sheldon Lubar says he and his wife are glad that they've been able to use their wealth to make donations. "Leaving a mark is as gratifying as it gets," he says.

Marianne Lubar says that they agree to have their name attached to places and programs in hopes of encouraging others with the capacity to make large gifts. Their gifts put them in a better position to solicit others to give, she says. And they want to show that wonderful things can be done with philanthropic

money. She asks: If you have the capacity, what's a better thing to do than to give?

**W**hat do you hope people will say when they hear your name?

Marianne Lubar deflects the question. Pressed, she says her best quality is that "I'm engaged all the time, every minute." That's true whether she's cooking at home or engaged in a major community effort. "I feel very creative," she says. "I feel really fortunate to have energy. And the best part for me is that I've met the most wonderful and talented people along my journey."

Sheldon Lubar has a clear idea what he hopes people would say about him: "He is a great businessman and entrepreneur and innovator, and he believes in giving back to his country and his community. And I hope my children would say, 'He's a great father.'"

What do great business people do? They understand the facts of the world around them, but they nurture visions for opportunity and improvement, too. They are highly practical and bottom-line oriented, but at the same time, they are bold and know that the most important bottom lines may not be about dollars alone. They know how to succeed in the system of which they are part and how to make that system better. They are pragmatic and idealistic simultaneously, always learning, never fully content with the way things are.

No one can doubt Sheldon and Marianne Lubar's greatness. ■



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# WILL TODAY'S POLITICS UPEND SOUND REGULATION?

BY HOWARD SHELANSKI

Americans demand regulatory safeguards but also want limits on government intervention. We take for granted that our tap water is drinkable, that our air is breathable, that the products we buy will perform as advertised, and that our work and living places are safe. Hard experience shows that completely unregulated markets do not reliably or consistently deliver those things. But experience also teaches that regulation is not the answer to every problem and can have harmful consequences.

In these circumstances, those who argue either that American society does not need regulation of any kind or that government should impose a rule to address every problem have deservedly not gained much traction in actual policy making. Instead, regulation has resulted from a more pragmatic process through which government agencies use available knowledge, evidence, and models to develop workable solutions to real problems. Agencies carry out this work within a legal framework that requires them to stay within the scope of their statutory authority, to give the public notice of rulemakings, to afford the public an opportunity to comment on proposed rules, and to justify final rules with a written record subject to judicial review. Even before executive agencies can publish significant proposed and final regulations, those rules are subject to review by the White House Office of Information and Regulatory Affairs (OIRA). Because of such procedural constraints, rulemaking in practice involves incremental analysis of tradeoffs among different things society wants, not one-sided focus on only costs or only benefits; regulations result from detailed explanation and balancing of competing effects, not from overwrought, partisan conjectures. ▶▶

**Howard Shelanski** is professor of law at Georgetown University and a partner at Davis, Polk & Wardwell LLP. In addition to his work in academe and private practice, he has held a number of government positions since graduating from the University of California, Berkeley, with a J.D. (1992) and a Ph.D. in economics (1993). Shelanski's government work has included service as a law clerk to the Hon. Antonin Scalia, senior economist for the President's Council of Economic Advisers, chief economist of the Federal Communications Commission, director of the Bureau of Economics at the Federal Trade Commission, and, most recently (2013–2017), administrator of the White House's Office of Information and Regulatory Affairs, a position popularly called the "regulatory czar" and requiring Senate confirmation. In September 2016, he delivered Marquette University Law School's annual Robert F. Boden Lecture. This essay, which reflects only Mr. Shelanski's views, is based on his Boden Lecture.



In a nutshell, rulemaking and retail politics are different things, driven by different forces. Where nuance and detail are the essence of the former, they are barely an afterthought of the latter. Given the unlikelihood that political rhetoric will moderate any time soon, this difference is one that American society would do well to preserve.

**While Republican and Democratic presidential administrations have certainly differed in their inclinations regarding regulation, neither has in the past questioned the value of a serious and rigorous process for adjusting regulation up or down to respond to market developments and social needs.**

In fact, the distinction between politics and sound regulatory policy unfortunately has been diminishing, and not just at the level of rhetoric. This essay will begin by showing how the regulatory debate has become more politicized in recent years. It will then discuss how that politicization is itself compromising the regulatory process and fueling attacks on the role that science and economics play in sound policy decisions, with important consequences for regulatory quality and stability. The essay will conclude with a discussion of how regulatory reform could help restore and protect

sound rulemaking principles, even within a more politicized environment for regulation.

## I. Regulatory Politics, Then and Now

Regulation does not always work out well. Virtually every regulatory program has both winners and losers: some parties bear the costs of complying with rules while others reap the benefits. When regulation works ideally, the losers are those who caused the problems that the rule curtails, the winners are those who suffered from those problems, and the benefits to the winners outweigh the costs to the losers. Sometimes, however, even the most well-meant rules have harmful, unintended consequences. In such cases, it is important to have a process that brings those problems to light and enables regulatory reform or repeal.

Similarly, markets do not always perform well. This is not to say that government intervention will necessarily help in such cases. When it comes to economic regulation, many economists would still agree with the late Cornell University economist Alfred Kahn that “society’s choices are always between or among imperfect systems, but that, wherever it seems likely to be effective, even very imperfect competition is preferable to regulation.” Such comparably effective market competition does not always exist, however, and even when it does, markets do not inexorably solve all problems related to health, safety, environmental protection, or other difficulties not directly related to prices or the typical targets of economic regulation. Accordingly, it is important to have a process that can recognize market failures and lead to sound regulatory responses to resulting problems.

## That Was Then: Differences but Some Consensus

While Republican and Democratic presidential administrations have certainly differed in their inclinations regarding regulation, neither has in the past questioned the value of a serious and rigorous process for adjusting regulation up or down to respond to market developments and social needs. Thus, it was in the administration of President Jimmy Carter that the Civil Aeronautics Board (CAB), under the leadership of the same Alfred Kahn, determined that airline regulation was doing more to support high prices and prevent competition than to protect consumers. The CAB therefore not only deregulated airline routes and pricing but did so to the extent that the agency itself would go out of existence—the wholesale dismantling of a long-standing regulatory program set into motion under a Democratic administration. The famously deregulatory President Ronald Reagan, on the other hand, signed into law regulatory programs for, among other things, the disposal of nuclear waste after decades during which the industry had set its own standards and for banning firearms that could evade metal detectors or airport imaging technology. It was President Bill Clinton who signed the bipartisan and deregulatory Congressional Review Act into law. Specific deregulatory efforts, for example in financial services and the provision of welfare benefits, also occurred under Clinton, earning the president substantial criticism from many in his own party. Meanwhile, the political right criticized the Republican administration of President George W. Bush for its additions to the Code of Federal Regulations and the resulting net increase in regulatory costs.



The effort here is not to minimize the ideological differences among the Republican and Democratic administrations mentioned above. Rather, the important point is that those differences—often strongly articulated and backed up with significant policy initiatives—did not provoke from either side a sustained attack on the rulemaking process or the underlying principles of the Administrative Procedure Act (APA), enacted in 1946. It is true that President Reagan and a Republican Congress created the Office of Information and Regulatory Affairs as a means of imposing more-stringent review on significant regulations, but it is notable that every administration since, regardless of party, has reaffirmed and strengthened the executive orders under which OIRA reviews rules. If anything, the history of the creation and strengthening of OIRA emphasizes the core principles that rulemaking should be evidence-based and incorporate careful cost-benefit analysis, and it illustrates bipartisan consensus on those principles over time.

### **This Is Now: Growing Division and Shrinking Consensus**

Rhetoric surrounding regulation entered a particularly heated cycle as the administration of President Barack Obama tried to address major challenges such as health care, greenhouse gas emissions, clean water, worker protections, and ozone standards. Such efforts prompted accusations from the right that the administration was creating health-care “death panels,” initiating a “war on coal,” and imposing a sweeping program of “job-killing” regulations. Commentators from the left, meanwhile, accused President Obama of taking too long and doing too little to regulate greenhouse gas emissions, of failing to regulate “corporate agriculture,” of insufficiently regulating big banks, and of quite literally killing people by taking too long, for example, to require rearview cameras in cars.

With such overheated rhetoric, both sides often distorted the facts and circumstances of the targeted regulations and gave especially short shrift to the analysis and evidentiary underpinnings of those rules. In attacking the controversial 2015 Environmental Protection Agency (EPA) rule that reduced the standards for atmospheric ozone, for example, the head of the American Lung Association stated that the rule “simply does not reflect what the science says is necessary to protect the public health”—not then mentioning that the EPA’s level was within the recommended range from the agency’s scientific advisory board and would prevent millions of asthma attacks per year or that the costs of

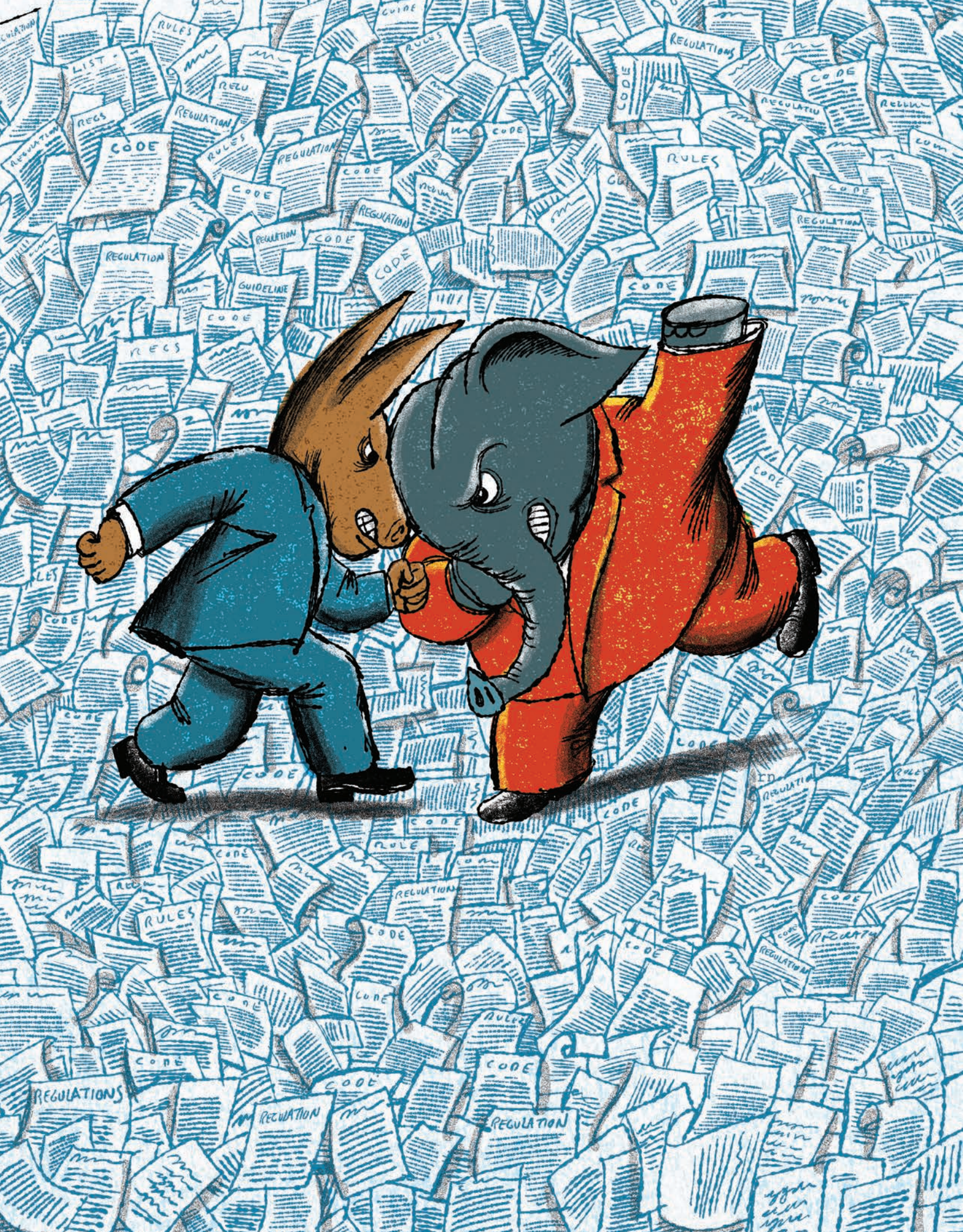
pushing the standard lower would be very high. Business interests, meanwhile, accused the EPA of putting “politics above job creation,” ignoring that the EPA was focused on not politics but respiratory health, with predicted annual health benefits of the rule quantified at roughly \$3 billion to \$6 billion, compared to quantified costs that would reach \$1.4 billion upon full implementation of the rule.

It comes as no surprise that business interests criticize regulatory costs as too high and that advocacy organizations characterize regulatory benefits as too low. Such debate and advocacy from each side are an expected political reality. They are also healthy, so long as the institutions moderating the debate through the rulemaking process retain independence to take in information from both sides and to rigorously analyze the available evidence in determining a final rule, and so long as the institutions that decide challenges to rules are beholden to do essentially the same.

Regulatory benefits often accrue far in the future and are spread broadly across millions of individuals; advocacy groups can usefully represent those diffuse interests in arguing for regulatory benefits. Regulatory costs are generally more concentrated and shorter-term, but business and other interests help ensure that society knows what it is paying for those benefits. Both criticism and advocacy become inputs into the regulatory process through public notice and comment, playing an important role in development of the administrative record and in accountability through judicial review. Whether the criticisms of regulations are fair or accurate might well affect public perceptions and the level of controversy surrounding a particular rule, but they do not fundamentally undermine regulatory institutions or the rulemaking process.

So attacks on specific regulations are a periodic and expected part of our country’s political cycles. Regulation has never been free of politics, and politicians have never ignored regulation as a target when it suits them.

What is different today is not only the scope of regulatory politicization but also the scale of broadside attacks on the key methods and premises of the modern regulatory process. In that regard, at issue are not just the scientific data used for a particular regulation, but the legitimacy of science and empirical evidence itself. Not just challenges to specific administrative records animate regulatory debates; so, too, do deliberate efforts to radically change policy without development or acknowledgment of critical facts. ▶▶



The result is a more direct line from political rhetoric to regulatory policy, without the key, buffering steps of building a factual record and analyzing likely costs and benefits. These changes represent breakdown of a decades-long consensus in which Republicans and Democrats largely respected the rulemaking process, despite regular and often vigorous disagreements about specific rules and about regulation in general. Congress's use of the Congressional Review Act (CRA)—a 1996 statute that allows expedited legislative repeal of a rule within a limited time of its publication—vividly illustrates this breakdown. Before 2017, Congress invoked the CRA only six times in 21 years, and five of those (all vetoed) were in 2015 and 2016. After January 2017, Congress successfully invoked the CRA 14 times in just five months. The broadsides against regulation have gone beyond an increase in rhetoric, to actions that undermine important processes and principles of good policy making, whether that policy is regulatory or deregulatory.

## II. Politics Become Policy

Several recent developments surrounding regulation threaten critical aspects of the American regulatory process and will diminish the quality of our regulatory system. Let us consider three recent lines of attack against regulation and their implications: (1) attacks on how agencies have implemented the statutorily prescribed process of rulemaking; (2) offensives on what constitutes acceptable evidence in rulemaking; and (3) efforts to undermine or shortcut the regulatory process.

### Attacks on Agency Implementation of Rulemaking Requirements

Agencies do not always do things right when they issue regulations. Sometimes their actions fall outside the legal framework established by the Administrative Procedure Act (APA) and do not give the public enough opportunity to comment or do not compile a credible or sufficient administrative record to justify a rule. Sometimes the agencies go beyond the scope of their statutory authority from Congress, and sometimes they try to bypass the APA's process altogether by cloaking regulatory obligations in the language of "guidance documents" or "policy letters."

When agencies do commit such fouls, courts have not hesitated to exercise their review authority by staying, remanding, or vacating the offending actions. The Obama administration issued thousands of regulations, as did the Bush administration. Similarly, just as the Bush administration did, the Obama administration

faced lawsuits over a very small proportion of those rules. The Supreme Court stayed the Obama EPA's regulation of carbon-dioxide emissions pending a decision on the merits of a challenge to that rule in the U.S. Court of Appeals for the D.C. Circuit. Federal courts also enjoined regulations involving clean water, overtime pay, and fracking, while rejecting challenges to rules on energy efficiency, retirement investment advice, and network neutrality. Given that the overwhelming majority of regulations never receive any kind of challenge, the evidence suggests that agencies generally adhere to substantive and procedural requirements but that judicial review is alive and well for those specific cases in which they do not.

Recent rhetoric, however, would suggest an inverse world in which agencies have run amok and ignored basic requirements to the point of lawlessness. The director of the Office of Management and Budget (OMB), the office of which OIRA is a part, is in a particularly good position to know what kind of analysis agencies do when they engage in regulation, how OIRA reviews that analysis, and what the data show on regulatory costs and benefits. It was

therefore surprising to hear the current OMB director, Mick Mulvaney, state in an interview that the Obama administration "simply imposed regulations without proper regard to the cost side of that analysis," and that "we actually plan to look at the costs of regulations . . . . [W]e think the previous administration didn't do that." The public record shows that Mulvaney's statements were simply wrong. A *Washington Post* analysis found that "contrary to Mulvaney's claim, federal agencies were much more likely to only estimate costs (54 rules) than to only estimate benefits (16 rules). In the 16 rules where only benefits were estimated, 15 of them were Interior Department migratory bird hunting rules (e.g. setting duck seasons)." The article concluded that "Mulvaney's sweeping claim is not supported. Instead of ignoring costs, the Obama administration clearly considered the cost side of the equation in a majority of rules." ▶▶

**The broadsides against regulation have gone beyond an increase in rhetoric, to actions that undermine important processes and principles of good policy making, whether that policy is regulatory or deregulatory.**



The especially disheartening aspect of this episode is that the misleading attack came not from an interest group, but from a top executive branch official whose office is responsible for regulatory review. If those with such responsibility elevate political spin over the facts, they undermine the ability and incentive of agencies to mediate among competing interests in the rulemaking based on analysis and evidence. That the OMB director's statements were incorrect does not mean that agencies are beyond improvement. But such improvement comes from identifying real shortcomings and working toward real solutions, not from introducing a false narrative about things that the agencies are working to do well. Such rhetoric does nothing to identify real problems and only serves to cast unwarranted doubt on the general integrity of regulatory agencies and the regulatory process.

Ironically, the Trump administration itself has been turned back by the courts for taking shortcuts in making its own regulatory changes. As a matter of law, once an agency has published a rule, the agency cannot reverse course and change or repeal the rule at will. The APA requirements for changing, replacing, or repealing a rule are the same as the requirements for issuing a new rule. The administration has tried to maneuver around those requirements in the wake of President Trump's public claims that he will get rid of 75 percent of regulations and his executive order requiring agencies to identify two rules for repeal for every new rule they issue. But the U.S. Court of Appeals for the D.C. Circuit

recently blocked the administration's efforts to dodge the APA by delaying the effective date of certain methane-emissions rules. The court rejected the EPA's pretextual argument that the agency under Obama had not allowed enough opportunity for public comment to satisfy the APA, finding that "[e]ven a brief scan of the record demonstrates the inaccuracy of EPA's statements." The court then barred the agency from further delaying implementation of the rule, saying that the EPA's proposed two-year stay was "tantamount to amending or revoking a rule."

The court's ruling in the methane-emissions case is heartening in that it appears that, at least for now, the federal courts are safeguarding proper regulatory process. Process is not, however, the only dimension on which political expedience and rhetoric are affecting rulemaking. Several recent actions have been aimed much more directly at the substantive criteria and evidentiary basis for regulation.

### Offensives Against Science and Economics

One of the most important requirements of the APA is that agencies have a solid factual and analytical basis for their rules. A typical element of the public comment process is criticism of an agency's record and submission of alternative or additional evidence from sources outside the agency. Agencies must have enough evidence to make a reasonable decision and may not arbitrarily disregard contrary facts or studies, regardless

of the source. There is no legal requirement—nor good policy reason—for evidence in support of a regulatory action to be perfect or unambiguous. But agencies must make reasonable judgments given the facts, studies, and analysis available, which sometimes are inadequate to justify any action at all. Thus, the Federal Communications Commission (FCC) in 1999 refused to enact what has come to be called “network-neutrality” regulation because the broadband market was too nascent and evidence of harmful conduct too speculative. By 2015, in contrast, the FCC decided that it had enough evidence to impose network-neutrality regulation, which it successfully defended in court.

The factual basis for many regulatory decisions, particularly environmental, health, and worker-safety rules, involves scientific evidence and economic data. Science rarely brings absolute certainty; it can, however, produce an accumulation of peer-reviewed, replicable studies through which a consensus emerges regarding the evidence for causal relationships and explanations for observed phenomena. This does not mean that there are no contrary results in the literature or that there are no doubters among scientists; what matters is whether there are enough scientific data, and enough consensus about what the data show, to justify an agency’s reliance on the science relevant to a regulatory decision. Scientific evidence provides a basis on which courts can separate regulatory decisions based on good policy from those based on political preference. Thus, in 2008, believing the EPA to have improperly ignored such evidence, private groups and eleven states sued the Bush administration EPA for setting the ambient ozone standard at 75 parts per billion (ppb) and rejecting scientific evidence for a lower maximum level. And in 2015, Murray Coal Company and five states sued the Obama EPA, alleging, among other things, that the EPA improperly relied on the same science to tighten the standard to 70 ppb.

Scientific data are important when estimating regulatory benefits because they can show whether a regulation is likely to achieve health, safety, or other kinds of welfare gains. But science is also important on the cost side of the regulatory ledger, especially in determining what level of compliance is technologically or scientifically feasible. It is one thing to say, for example, that companies must reduce the level of toxicity in some commercially valuable substance; it is another question altogether whether the science and technology exist to reasonably achieve that goal.

Science can therefore help determine the set of feasible regulatory alternatives. Economic data play a similar role, in assessing both the social costs of regulatory compliance and the productivity benefits of, for example, having fewer injured workers over time.

There has long been criticism of cost-benefit analysis in health and safety regulation. Advocacy groups have, to varying degrees, opposed weighing quantified, economic costs against benefits for health and safety. Cost data are, however, an essential part of understanding whether society should want a given rule, even one that is guaranteed to save lives. Despite occasional statements from advocates that we should not trade lives for lower social costs, we do it every day. A speed limit of 15 miles per hour would save thousands of lives and prevent countless injuries every year, yet society would not tolerate the costs of such a rule, and no one has seriously proposed such a policy. Understanding regulatory costs is critical. Even if it is not required (and it should not be) that a rule’s quantifiable benefits always be higher than its quantifiable costs, it is a healthy thing for society to know what it is paying for its policies and protections. Economics has therefore played an important role on both sides of cost-benefit analysis.

Recently, however, economic analysis and data have come under heavy attack. What makes the most recent attacks notable is that they come not from pro-regulatory advocates but from partisans of deregulation, and not from organizations outside government but from the government—notably the executive branch—itsself. On several occasions, President Trump and members of his cabinet have, without any explanation, criticized and rejected the economic analysis and data produced by the government itself. As a candidate, for example, Trump simply declared without basis that unemployment data from the Bureau of Labor Statistics were “totally fiction.” What one might have dismissed as over-the-top ▶▶

**What makes the most recent attacks notable is that they come not from pro-regulatory advocates but from partisans of deregulation, and not from organizations outside government but from the government—notably the executive branch—itsself.**

campaign rhetoric did not yield to more accurate treatment of economic evidence after Trump took office.

Consider what happened after the nonpartisan Congressional Budget Office (CBO), whose current director was appointed by the Republican-controlled Congress, first released an economic analysis showing that a Republican bill to repeal and replace the Affordable Care Act would swell the ranks of the uninsured. Health and Human Services Secretary Tom Price, with no evidence and no specifics, simply claimed that “the CBO is wrong.” OMB Director Mick Mulvaney called the CBO’s estimate “just absurd,” and the White House issued a statement saying “[t]he CBO has consistently proven it cannot accurately predict how health-care legislation will impact insurance coverage” and released a video to try to back up that claim. A *Washington Post* analysis found the video to be incorrect and misleading, and independent

reviews have shown that the CBO analysis was largely on target. Indeed, several Republican governors rejected the administration’s later attempt to use its own analysis to persuade them to support the Senate’s Affordable Care Act repeal-and-replace bill.

While denigrating or denying economic evidence that it does not like, the current administration has taken even stronger aim at the

use of science to inform regulation and public policy. As it did with the CBO, the Bureau of Labor Statistics, and other government entities, the administration has also worked to undermine the institutions that analyze and engage in scientific research. It is worth noting that a much broader phenomenon of popular rejection of science appears to be afoot, as debates over climate change, vaccines, evolution, and the teaching of science in schools suggest. While that broader phenomenon is beyond the scope of this essay, it does provide relevant context for recent events related to regulation. The politicizing of science is nothing new in public policy, tobacco being among the most historically notorious cases. The impediments to bringing science into policy

making, however, have usually come from legislative maneuvering on specific issues. It is harder to find an example of Congress’s or a regulatory agency’s calling into question not just a specific body of evidence but the value of science itself; this is the worrisome development that has recently come out of the EPA and that appears to be spreading across the federal government.

The most obvious example is the Trump administration’s treatment of the science related to climate change through greenhouse gas emissions. EPA Administrator Scott Pruitt ordered the EPA to take down its long-standing climate-science website, which contained a detailed compendium of data and scientific studies. Members of Congress have introduced bills to bar the federal government from taking the costs of greenhouse gas emissions—and therefore the full benefits of preventing such emissions—into account in rulemaking. Even if such bills never become law, President Trump, flanked by his leaders of the EPA, the Department of the Interior, and the Department of Energy, signed an executive order rescinding guidance that agencies take the social costs of carbon emissions into account when making regulatory decisions about air pollution. In the wake of that photo-op, a Department of Energy official issued an order barring staff from using the terms “climate change” or “emissions reduction,” the Department of the Interior reassigned scientists to unrelated jobs, and the EPA removed its climate-science information from public view.

There is good evidence that such actions had no other purpose than to set the stage for repealing regulations without having to acknowledge the evidence that such repeal would have real costs for Americans’ health and welfare. When EPA Administrator Pruitt appeared on the usually sympathetic Fox News to tout his planned repeal of the Obama Administration’s Clean Power Plan regulations, interviewer Chris Wallace pointed out to him that those rules were predicted, upon full implementation, to eliminate 90,000 asthma attacks, 300,000 missed school days and workdays, and 3,600 premature deaths each year. Wallace then asked Pruitt, “Without the Clean Power Plan, how are you going to prevent [such] things?”

Pruitt’s response was to resort to campaign rhetoric: “[T]he president is keeping his promise to deal with that [regulatory] overreach, Chris.”

Wallace immediately pointed out Pruitt’s dodge: “But, sir, you’re giving me a . . . political answer. You’re not giving me a health answer.”

**While denigrating or denying economic evidence that it does not like, the current administration has taken even stronger aim at the use of science to inform regulation and public policy.**



Howard Shelanski, delivering the Robert F. Boden Lecture in Eckstein Hall.

The key issue, beyond the consequences for emissions regulations, is the precedent that this treatment of climate science and health data sets for future uses of science in rulemaking. Climate science has two important characteristics for current purposes: (1) there has been an enormous amount of peer-reviewed research across a variety of scientific fields over many years; and (2) that research has led to a consensus in which 97 percent of scientists doing climate-related research believe that human activity is an important cause of climate change. This does not mean that every emissions regulation is a good thing. But if the EPA administrator can choose at will to reject the validity of such a large amount of research that has garnered such strong scientific consensus, then it is hard to see what would stop any agency official from declaring any collection of scientific evidence to be of inadequate quality when that science would lead to conclusions opposite to the agency head's preferences. The consequences could be costly overregulation or harmful deregulation, depending on political whim.

Indeed, the individual newly nominated to be the chief science official at the Department of Agriculture has no scientific background (he was most recently a talk radio host) and simply declared it to be his opinion that the data and research related to climate change are "junk science." When people who have been in the opinion business are appointed to oversee science of

which they have little understanding, and which they deny without any credible basis, public policy is in deep trouble. When political officials remove career scientists from agency science offices and reassign them to unrelated tasks such as accounting, those officials move beyond denigration of science to the dismantling of agencies' capacity to use or evaluate science when making decisions that can profoundly affect the lives of all Americans.

If marginal uncertainty is enough to make science insufficient to support an agency's decision, then regulation or deregulation based on carefully researched causes and effects becomes practically impossible, leaving an unhealthy vacuum. To be sure, the EPA administrator presented his rejection of climate science as a temporary freeze while the agency initiates a process for debate. But how such a debate can substitute for, or advance beyond, decades of a diffuse and widespread process of research, peer review, replication, and yet more research is unclear. At best, such an agency process will delay important regulatory activity; at worst, it will politicize science through staged debates that fail to represent the actual state of science or scientific consensus.

There is a real risk that the EPA's actions are setting the stage for a much broader undermining of scientific evidence in rulemaking. A draft bill in the Senate titled the Regulatory Accountability Act has, at the time of

this writing, a provision that would require federal agencies to grant petitions for hearings on proposed rules any time “the petition shows that the proposed rule is based on conclusions with respect to 1 or more specific scientific, technical, economic, or other complex factual issues that are genuinely disputed.” This provision may sound innocuous, until one considers the vagueness of the “genuinely disputed” standard. A

strong scientific consensus backed up by the bulk of research and data will often still have dissenters who sincerely disagree. If those dissenters petition the agency, must the hearing be granted, and, if so, to what end? At best, the hearing will delay rulemaking and impose administrative costs while the process confirms that the petitioners are

dissenters from a broader, well-supported consensus. At worst, the agency will discard the weight of the science, in favor of the petitioners, because of a misguided quest for certainty or, worse, because the petition provides cover, under the cloak of a contrived “genuine dispute,” for agencies to elevate politics or the personal views of agency officials over facts and scientific evidence. This is a real risk at a time when federal government leaders have shown a propensity to attack science and economics that are inconvenient for their political agenda. Given that the APA already requires public comment on proposed rules and grants judicial review to petitioners who challenge the record supporting final rules, it is hard to see how the scientific hearing provision of the bill would have benefits outweighing the mischief likely to result.

### Delayed Rules, Bad Rules, and Regulatory Uncertainty

Evasion of established regulatory process and the denigration of science and economics will have several harmful consequences for public policy. Bad process will lead to court remands, as we saw in the EPA methane case discussed above. Such remands are good in that they maintain the integrity of the American regulatory process; but the underlying process foul takes time to be corrected and therefore delays certainty in the regulatory

environment, to the detriment of all stakeholders. Moreover, not all such procedural violations will be caught or corrected, potentially leaving in place policies worse than those they replaced.

The procedural concerns become even more important when politics are undermining substantive analysis. Arbitrary limits on the science or data allowed in rulemaking and reduction in agencies’ expertise to analyze science and economics will greatly reduce the quality of federal regulation. The happenstance of who is in charge could lead to rules that are overly burdensome in costs or underachieving in benefits, either one being harmful for American society. Such bad regulatory decisions also introduce uncertainty for stakeholders because it is unclear how courts will review regulatory actions or how long the contested rules will last even if they withstand judicial review. The attacks on science, economics, and the institutional capacity to evaluate and produce such evidence therefore lead not only to bad rules but also to an unstable regulatory environment in which business planning, investment, and economic growth are more difficult.

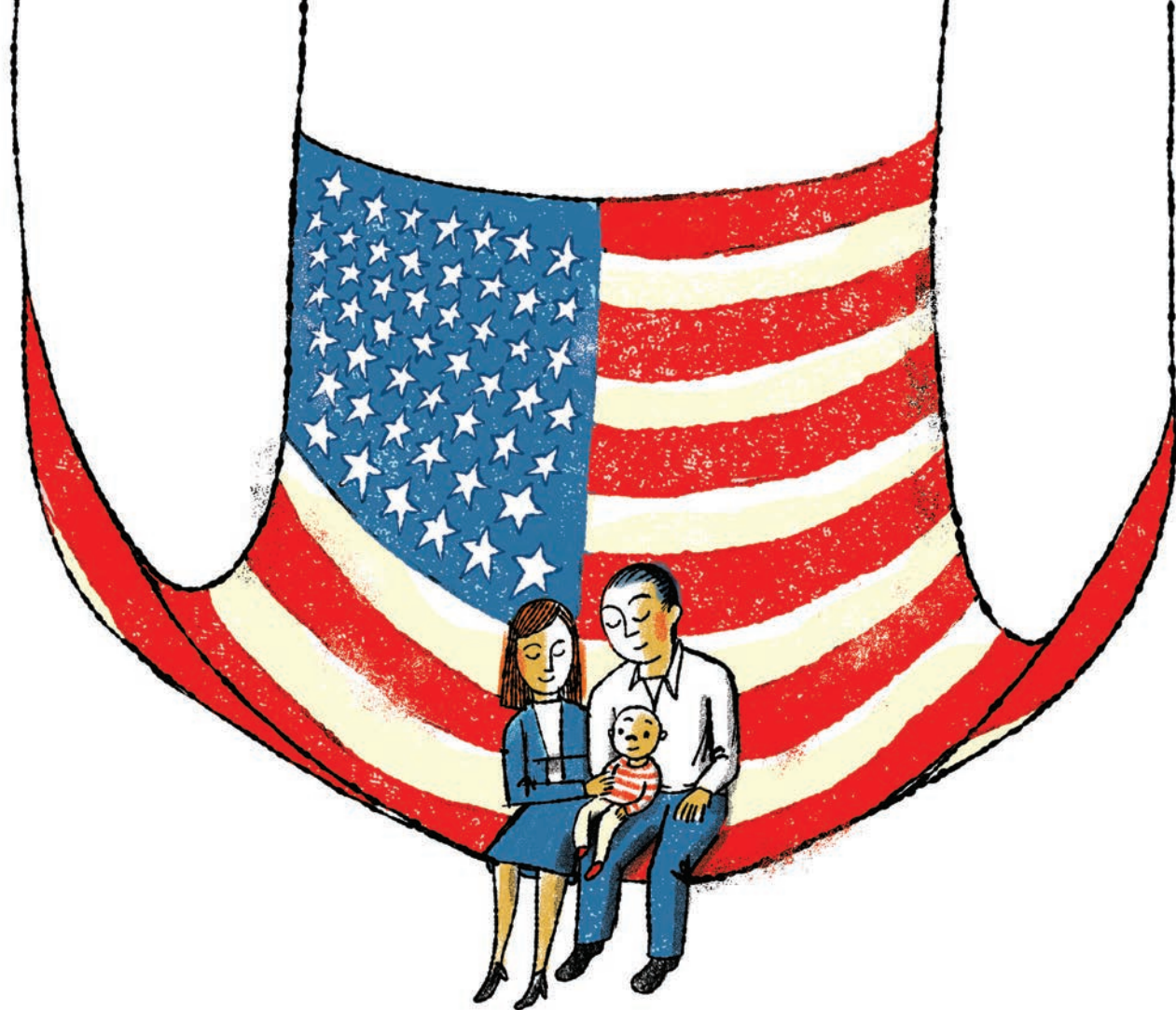
### III. Maintaining the Difference Between Policy and Politics

The fact that the U.S. regulatory system has been subject to misleading attacks does not mean that federal rulemaking is beyond criticism and improvement. Agencies have mostly done a good job with regulation, the evidence of which is contained in the publicly available records and analyses that agencies have compiled to justify their regulations. Agencies have nonetheless sometimes overreached, even in rules that have withstood judicial review. In those cases, public engagement could have been better, cost-benefit analysis could have been more rigorous, or compliance timelines could have been more realistic. In even more cases, the agencies could have done a better job of communicating with the public about a rule’s objectives and requirements. Because much of the analytic framework for rulemaking is today spelled out in executive orders and related guidance documents—all of which apply only to executive branch agencies and not to independent agencies—there is still some variation in practice across agencies that would be less likely if certain requirements were more firmly established by statute.

Salvation for sound rulemaking could therefore lie in regulatory-reform legislation strengthening

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requirements that agencies engage in rigorous cost-benefit analysis, rely on solid data and scientific evidence, and follow a transparent, public rulemaking process. Some might find it counterintuitive to suggest that increasing such requirements could help the rulemaking process, given that they raise the hurdle for agencies working to issue rules in the first place. While heightened requirements along the lines above will in some cases make it harder for agencies to pursue regulatory proposals, they will also serve as a bulwark against the substitution of slogans for policy analysis, of opinion for facts, and of political expediency for proper process—all things that have recently been taking place. The most important criterion for regulatory reforms should not be whether they make rulemaking harder or easier for agencies. The criterion should instead be whether the reforms strengthen the separation between sound policy making and political expedience. In other words, regulatory reform should be judged according to whether it will reinforce the importance of scientific, economic, and other relevant evidence in rulemaking; reinforce and more clearly define the analysis of costs

and benefits in regulation; increase transparency and accountability; and reduce the avenues through which campaign politics, unsupported opinion, and junk data can infect the process.

To be sure, regulatory-reform legislation can go too far and gum up the works without improving regulatory quality or the rulemaking process. The risks of importing junk science into rulemaking under the banner of raising a “genuine dispute” over settled science have already been discussed. Legislative provisions that allow legal challenges to rules before they are final, or that impose too rigid or too vague a cost-benefit standard, or that introduce new layers of hearing and comment requirements could do more harm than good. But so long as regulatory reform takes the direction of reaffirming analytical rigor and the centrality of credible data, good science, and rigorous economics in rulemaking, rather than making the process more porous in those domains, the benefits for sound policy making and economic prosperity could justify stronger statutory governance of federal regulation to protect the health, security, and welfare of all Americans. ■



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# HARDLY TRYING

## THE DECLINING USE OF CIVIL TRIALS IN WISCONSIN

By Larry Sandler

The halls of justice are less important than the conference rooms of justice.

Even as laws multiply, civil trials are playing a shrinking role in both state and federal courts. The vast majority of civil disputes are settled out of court or otherwise resolved without ever reaching trial.

While resolutions after trials may never have characterized a majority of cases, attorneys and legal scholars see developments in recent decades as a fundamental change in how justice is administered. In Wisconsin alone, the number of civil cases tried by juries fell by almost 50 percent, from 536 in 2004 (the first year for which detailed disposition figures are available) to 269 in 2016, according to statistics compiled by the Office of State Courts. During the same period, the number of civil bench trials dropped even more precipitously—by more than 60 percent, from 923 in 2004 to 368 in 2016.

That's a steep drop in a number that wasn't all that large even at the beginning of the period. In 2004, trials resolved fewer than 2.6 percent of Wisconsin civil cases. By 2016, the share of civil cases decided by trials had dropped to fewer than 1.4 percent.

The decline is part of a long-term national trend. Marc Galanter, now a professor emeritus at the University of Wisconsin Law School in Madison, documented that trend in "The Vanishing Trial: An Examination of Trials and



"I think it's essential for the defense bar and potential defendants to have that fear of going before a jury. You take that away, and you take away the incentive to do the right thing."

Attorney Robert Habush

This article follows up on an invitation on the back cover of the summer 2017 *Marquette Lawyer*, especially to the Wisconsin legal community, to weigh in on the decline of the civil jury trial. It is supported by the Law School's Adrian P. Schoone Fund for the Study of Wisconsin Law and Legal Institutions. Larry Sandler is a freelance journalist in Milwaukee, Wis.

Related Matters in Federal and State Courts,” a study commissioned by the American Bar Association’s Litigation Section and first presented as a working paper for the section’s December 2003 Symposium on the Vanishing Trial. Using statistics compiled

by the Administrative Office of the U.S. Courts, Galanter found that the number of federal civil trials nationwide dropped more than 63 percent from 1985 to 2002, a period when all types of federal trials declined to varying degrees. More-recent figures show federal civil trials falling another 31 percent from 2003 to 2015.

The National Center for State Courts also documented declines for all types of state trials in a 2004 study of 21 states and the District of Columbia from 1976 to 2002, and in a follow-up 2013 study of 15 states from 1976 to 2009.

“For 20 years now, lawyers have known they are as likely to be mediating a case as trying a case. We have to be sure our lawyers are ready for the actual practice of law and not the way it was in the 1950s.”

Professor Andrea Schneider

## Why Is This Happening?

Attorneys and legal scholars point to several interconnected reasons why civil trials are on the decline.

**Cost of litigation:** As the cost of litigation has risen, attorneys say, pressure has grown to resolve disputes by less-expensive means. The mounting expenditures reflect not just inflation in legal fees but also higher costs for discovery, including expert testimony.

Nationwide, spending on legal services increased from 0.6 percent of gross domestic product in 1960 to 1.6 percent in 2010, Galanter said in a 2015 lecture at Valparaiso University in Indiana. During the same period, total GDP grew from \$3.1 trillion to \$14.8 trillion in 2009 inflation-adjusted dollars, according to figures from the federal Bureau of Economic Analysis. That means the legal sector expanded from \$18.6 billion to \$236.8 billion, adjusted for inflation, in that period.

“The cost of litigation has grown substantially,” said Janine Geske, L’75, a former Wisconsin Supreme Court justice and retired Marquette Law School faculty member (and a former trial judge). “It’s much cheaper and easier to settle a case.”

One factor has been the cost of expert witnesses, said Beth Osowski, an attorney at Kindt Phillips in Oshkosh and chair of the State Bar of Wisconsin’s Litigation Section. In a personal injury or medical malpractice case, for example, it could cost thousands of dollars to have a doctor waiting for hours to testify. Witnesses also spend hours in depositions, and responses to written interrogatories eat up valuable time for highly paid corporate executives, added James Murray Jr., L’74, a founding partner at Peterson, Johnson & Murray in Milwaukee.

The rise of electronic discovery also has been costly, said Murray and John Rothstein, L’79, a partner at Quarles & Brady in Milwaukee. Starting in the 1980s and accelerating since the start of the 21st century, electronic discovery “just has exploded,” Rothstein said, as attorneys comb through emails, texts, and social media postings for relevant evidence. It is not unusual for 100,000 documents to be produced in discovery, Rothstein said.

**Change in mindset:** Over time, increasing numbers of judges, attorneys, and potential jurors have changed their attitudes toward trials.

The shift in judicial mindset could be glimpsed even several decades ago. “In growing numbers, judges are not only adjudicating the merits of issues presented to them by litigants, but also are meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation,” Judith Resnik, now a Yale University professor of law, wrote in “Managerial Judges,” a 1982 article in the *Harvard Law Review*.

That managerial role has expanded so much that “the whole ideology of what it means to be a judge has changed,” Galanter said in an interview. Judges now see their primary mission as mediating interactions between the parties in a case, rather than presiding over trials, he said.

The change in judicial mindset has raised eyebrows. In a published speech a few years ago, Marquette Law School Dean Joseph D. Kearney attributed some changes in litigation “to the evolving view that judges

have of themselves—over, say, the past thirty years—as case managers.” A case that goes away, he said, “is a case managed, a case processed, a case closed. It goes on the ‘resolved’ side of the judge’s periodic report.”

Changes among lawyers have been consequential also. More lawyers are practicing in large, specialized firms that emphasize processing a high volume of cases, said Galanter; Patrick Dunphy, L’76, of Cannon & Dunphy in Brookfield; and Robert Habush, of Habush Habush & Rottier in Milwaukee.

“The economic incentive in a high-volume practice is quick turnover,” which leads to more settlements and fewer trials, Dunphy said. That has given rise to “a new generation of personal-injury lawyers who couldn’t care less if they go to trial,” Habush said.

By contrast, Habush said, “A lot of people in my generation, and afterward, really wanted to try cases and enjoyed trying cases and were concerned about their reputation for trying cases.” ▶▶

## Trends in Wisconsin Civil Case Disposition

Year	Civil dispositions	Civil jury trials	Civil bench trials	Civil settlements	Civil defaults/ uncontested judgments	Civil dismissals	Other civil dispositions
2004	57,096	536	923	2,893	25,405	24,650	2,680
2005	58,546	512	795	2,743	25,845	26,026	2,543
2006	60,810	430	825	2,835	28,897	25,351	2,123
2007	70,995	444	804	3,184	36,023	28,172	2,022
2008	83,194	396	785	4,075	44,957	30,678	2,303
2009	88,777	356	732	4,138	49,656	31,771	2,124
2010	94,156	353	706	3,937	51,443	35,578	2,139
2011	88,168	366	773	5,907	46,011	30,596	4,515
2012	71,926	305	635	5,419	38,128	24,410	3,029
2013	59,977	256	477	4,724	30,202	21,946	2,372
2014	52,636	269	404	4,345	25,716	19,806	2,096
2015	48,493	265	325	4,316	23,051	18,539	1,997
2016	46,388	269	368	3,747	21,090	18,974	1,940
<b>'04 to '16</b>	<b>-18.8%</b>	<b>-49.8%</b>	<b>-60.1%</b>	<b>29.5%</b>	<b>-17.0%</b>	<b>-23.0%</b>	<b>-27.6%</b>

While the total number of civil dispositions in Wisconsin has declined since 2004, the decline is particularly noteworthy for civil jury trials (down 49.8 percent from 2004 through 2016) and civil bench trials (down 60.1 percent). Source: Wisconsin Office of State Courts.

## The Vanishing Trial Lawyer?

COMMENT by Daniel D. Blinka, Professor of Law



[T]he decline may mark a shift in law culture, featuring a pervasive, deep reluctance to try cases. Better to settle than to take a chance and lose?

The phrase “vanishing trial,” which once seemed hyperbole, is now eerily prescient. The numbers are clear, as shown in the table accompanying Larry Sandler’s article. In Wisconsin, starting from already low numbers in 2004, civil jury trials declined by 50 percent and bench trials plunged by 60 percent through 2016. But why? Is change in the legal climate speeding the trial to its extinction, much like the comet that wiped out the dinosaurs? Observers point to myriad factors, but maybe the most significant one involves us, the lawyers.

One learns very quickly that there are no second-place trophies at trial. One party wins; one party loses. Trials are demanding in every way: intellectually, emotionally, and physically. Not all lawyers have the combination of skills and personality (probably a good thing) necessary for trial practice.

To be sure, some perspective is in order. There never was some halcyon period where most cases were tried to a jury or the bench. Settlements frequently produce good outcomes that both parties sign off on, however begrudgingly. Trials are less predictable and more difficult for parties to control. But this has always been true. What then explains the decades-long decline of late?

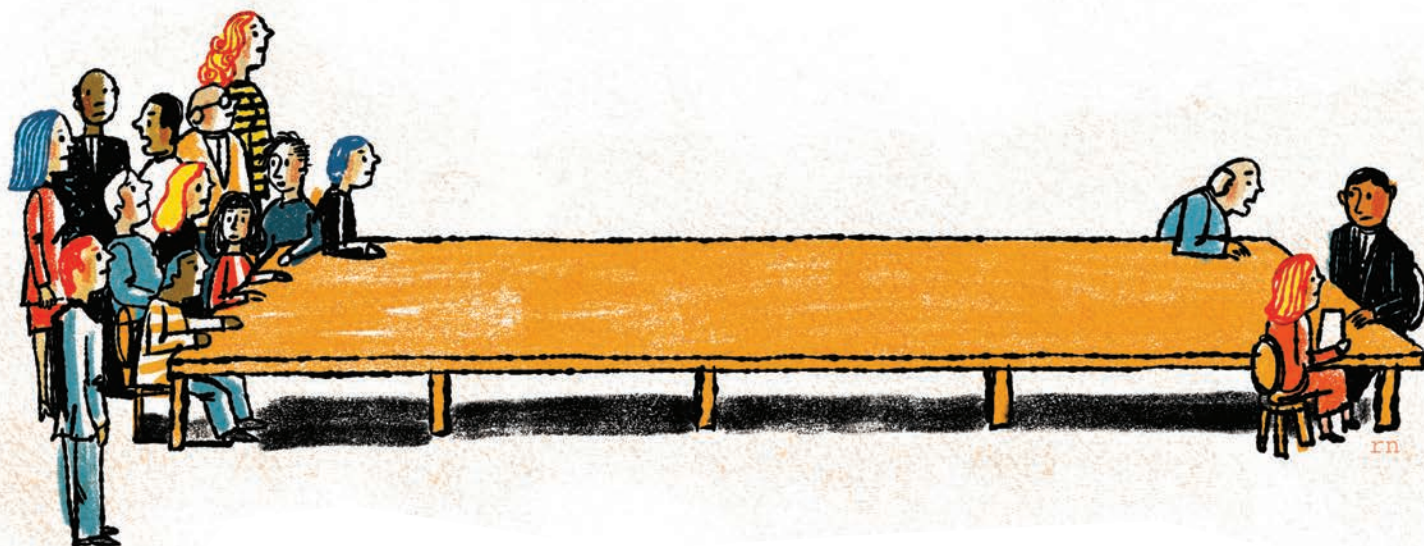
The factors usually cited are the uncertainty, expense, time, and increasing complexity of trials, along with declining faith in juries. Yet these factors are difficult to reconcile with the even greater drop in bench trials, which are often less expensive and less technically complex than jury trials.

Perhaps we need to look beyond money, time, and complex rules and ask ourselves whether the trial bar is itself vanishing. Put

differently, the decline may mark a shift in law culture, featuring a pervasive, deep reluctance to try cases. Better to settle than to take a chance and lose?

The declining number of trials warps the adjudicative process. Fewer trials mean a shrinking number of lawyers with the skills and experience to try cases. What sense does it make to talk about “pretrial” procedure if there is no serious intent to try a case? What sense does it make to speak of “alternative” dispute resolution (ADR) if a trial is not seriously considered among the alternatives? Discovery and motion practice, the lifeblood of pretrial practice, are based on the adversary trial. One takes depositions and demands documents to learn (“discover”) the facts and evaluate the case’s strengths and weaknesses, an undertaking difficult under the best of circumstances but that becomes chimerical without some trial experience and an inclination to try cases. Settlement is also affected. A client’s options are circumscribed by a lawyer lacking the willingness or skills to try the case, whether the settlement is laundered through mediation or other negotiation.

In sum, the stark decline in trials suggests we need to rethink a wide range of issues: the contours of pretrial practice, dispute resolution, and, of course, the trial itself. Within the profession, we need to assess how much of the decline is attributable to external factors (e.g., time and money) and, frankly, how much of it stems from lawyers who are reluctant or, worse, unable to try cases. And maybe some of the blame falls on legal education. One wonders whether 20 years from now the “alternative” in ADR will refer to trials, not mediation or negotiation. There’s much to ponder.



Jurors and potential litigants also have grown skeptical of trials, Osowski said. Publicity about large verdicts for cases that seemed frivolous to some in the public has led attorneys to consider “how many of the jurors are going to think our clients are greedy and lazy for being there,” she said.

John Becker, of Becker, French & Durkin in Racine, said that as a plaintiff’s attorney, he had encountered what he called “jury bias” against larger awards in civil cases. There is “a general perception in the population that people are getting too much money from lawsuits,” Becker said. “Because of that, verdicts do not seem to be as favorable as in the past, and plaintiffs are more cautious about going to trial.”

But few plaintiffs are really abusing the system, Osowski and Becker said. On the defense side, many insurance companies believe that settlements are less expensive than trials, in Habush’s estimation. Charles Stern, L’76, recently retired general counsel of Wisconsin Mutual Insurance, said, “In the good old days, we could try a run-of-the-mill auto case with little discovery, just with a small file of medical records, in less than two days. Now hundreds of pages of medical records, and seven or more (depositions) later, we have a four-day trial. . . . If I can get a case settled for somewhere near its midpoint value at arbitration, why would I risk a jury and costs?”

**Rise of other methods:** As trials have fallen out of favor, various forms of alternative dispute resolution have become more prevalent.

At a 1976 conference in St. Paul, Minn., Warren Burger, chief justice of the United States, called for more informal means of resolving disputes. Another speaker at the conference, Harvard Law Professor Frank Sander, is widely credited with laying the foundation for alternative dispute resolution, or ADR.

That vision has largely been realized, as judges in Wisconsin and elsewhere routinely steer litigants toward mediation, often before retired judges, before allowing their cases to proceed to trial. Although Wisconsin rules (Wis. Stat. § 802.12) empower, rather than require, judges to order mediation, Rothstein said, “In practice, I don’t know any judge who doesn’t.”

An overwhelming majority of cases referred to mediation are settled. From 2004 to 2016, the number of Wisconsin civil settlements jumped almost 30 percent, from 2,893 to 3,747, according to the Office of State Courts.

But that number reflects only the settlements that are formally approved by a judge, Murray noted. Far more cases are settled out of court, and many of those out-of-court settlements are recorded in official statistics as among “dismissals,” he said. The 18,974 civil cases dismissed in 2016 constituted almost 41 percent of the 46,388 civil cases resolved by Wisconsin courts that year. The remainder were resolved by default, uncontested judgments, or other means.

At the same time, a growing number of disputes never reach the courthouse steps in the first place. Numerous businesses and other organizations ►►

have written clauses into their contracts that mandate customers, employees, vendors, and other parties to resolve any differences through arbitration rather than litigation.

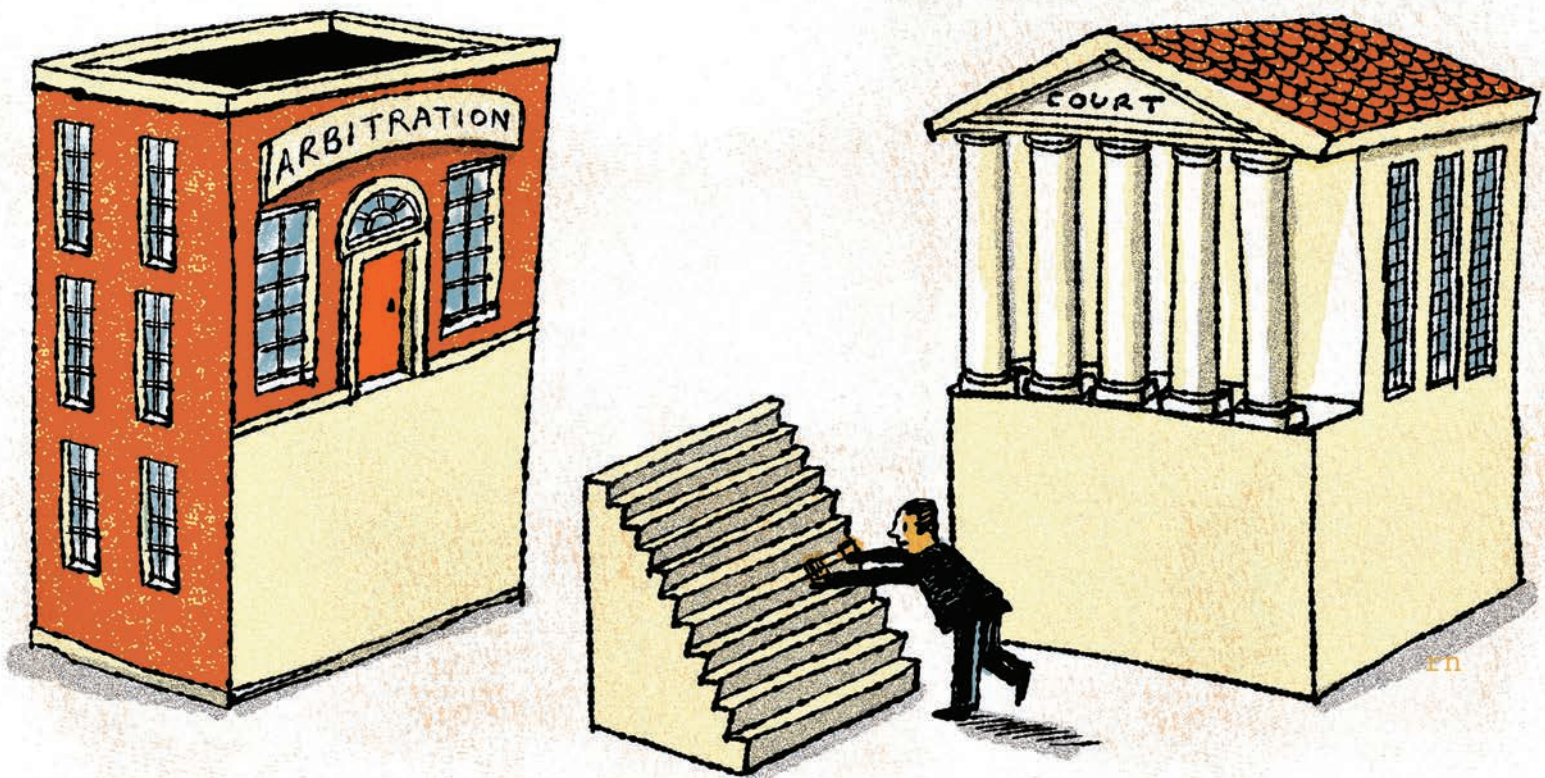
The effects have been widespread. “By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices,” *New York Times* reporters Jessica Silver-Greenberg and Robert Gebeloff wrote in the first part of “Beware the Fine Print,” a three-part series in 2015. “Over the last few years, it has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration. The same applies to getting a job, renting a car or placing a relative in a nursing home.”

In recent decades, the Supreme Court of the United States has consistently upheld or required application of arbitration clauses under the Federal Arbitration Act.

Congress passed the act in 1925, but only in the 1980s did the Court begin to hold that it preempts state law even in state court litigation.

Whatever the causes—arbitration, other forms of alternative dispute resolution, or something else altogether—the number of civil cases resolved in Wisconsin courts has declined steadily over the past half decade or more, even apart from the number of trials. Whereas 2010 saw the resolution of 94,156 civil cases, according to the Office of State Courts, by 2016 that figure had dropped almost 51 percent, to 46,388.

And other cases are being decided in government forums apart from the courts. “In 2010, when the federal courts held trials in fewer than 14,000 cases, the Immigration Courts heard 122,465 cases with representation and 164,742 without, the Board of Veterans Appeals heard over 13,000 cases, and the Social Security Administration’s Office of Disability Adjudication and Review heard over 700,000,” Galanter said in his Valparaiso lecture. “There is a lot of adjudication going on, but it occurs in institutions





that enjoy a less distinguished ceremonial pedigree than courts—absent the robes, elevated benches, honorific titles, deferential retainers, and the distinctive etiquette that distinguishes a court from more pedestrian decision-making bodies.”

**Tort reform:** Changes in tort laws, and particularly Wisconsin’s cap on medical malpractice awards, have reduced the financial incentive for bringing some cases to the point that they have become financially infeasible, said Osowski, Dunphy, and attorney Robert Menard, of Menard & Menard in Milwaukee. Dunphy also pointed to an insurance-industry survey that found doctors won more than 90 percent of medical malpractice cases nationwide from 2008 to 2012.

Indeed, the number of medical malpractice cases filed in Wisconsin fell more than 50 percent from 1999 to 2013, *Milwaukee Journal Sentinel* reporter Cary Spivak wrote in “No Relief,” a two-part series in 2014. In a 2015 follow-up article, Spivak and reporter Kevin Crowe found that Wisconsin was last among all states in the number of medical malpractice claims.

“Malpractice lawyers blame the decline on state laws that they say are skewed in favor of doctors and hospitals; medical groups contend that malpractice suits have declined because health care professionals have gotten better at their jobs,” Spivak wrote in the 2014 series.

Wisconsin’s medical malpractice cap has been controversial. A 1995 cap of \$350,000 on noneconomic damages, such as pain and suffering, was ruled unconstitutional by the state Supreme Court in 2005. A \$750,000 cap replaced it in 2006, but in July of this year, the state Court of Appeals ruled that cap unconstitutional as well. The latest ruling is expected to be challenged in the state high court.

Looming larger than the cap, however, Spivak wrote in his series, is the state’s Injured Patients and Families Compensation Fund, which pays the portion of verdicts exceeding \$1 million. (The fund had total assets of \$1.3 billion, as of June 30, 2016, according to its website.)

“Fund officials argue the money is needed in case a series of medical mistakes results in major payouts,” Spivak wrote. “But malpractice lawyers

say the huge treasury instead enables private insurance companies to dig in and fight claims even when malpractice is obvious, because the most a private insurer would have to pay out if it lost a multimillion-dollar verdict is \$1 million.”

**Other factors:**

Dunphy cited additional factors contributing to the decline of civil trials. “Because of decades of product litigation, products became safer,” reducing the number of product liability cases, he said. Similarly, as industrial machinery became safer and the number of manufacturing workers fell, the number of cases involving industrial accidents also declined.

## What Does This Mean?

The increasing rarity of civil trials has broad implications for the practice of law, the court system, and even the concept of justice in American society, attorneys and legal scholars said. Among those implications are:

**Less experienced lawyers:** As trials become scarcer, so do attorneys who know how to handle them—and to do so well. “A whole generation of lawyers is going to mature without having the kind of trial experience their predecessors had,” Murray said.

When civil trials were more prevalent, it would be common for law firms to assign younger lawyers to smaller cases to build their experience, but “at least in the civil arena, that’s going away,” Geske said. “Some lawyers have gone years and years and years without a trial.”

As a result, “even the old hands . . . get rusty,” said Milwaukee County Circuit Court Judge Richard Sankovitz.

The lack of practice shows when a case does reach trial, Rothstein and Sankovitz said.

“If you want to be good at golfing, you have to play a lot of golf,” Rothstein said. “It’s the same with a trial attorney.” ▶▶

“A whole generation of lawyers is going to mature without having the kind of trial experience their predecessors had.”

Attorney James Murray Jr.

From the bench, Sankovitz sees the impact in the way attorneys ask questions. Voir dire is often “wooden and fruitless” for attorneys unfamiliar with the complexities of juror selection, he said. And disastrously for their clients, the judge added, inexperienced attorneys will conduct cross-examinations like depositions, asking questions to which they don’t know the answers, instead of

guiding witnesses toward responses that will help the attorneys make their cases to juries.

Meanwhile, law schools have also changed the way they educate lawyers, said Andrea Schneider, professor of law at Marquette University. “For 20 years now, lawyers have known they are as likely to be mediating a case as trying a case,” said Schneider, who directs the Law School’s ADR program. “We have to be sure our lawyers are ready for the actual

practice of law and not the way it was in the 1950s.”

In addition to a separate litigation certificate, Marquette makes an ADR certificate available to law students whose coursework includes mediation, arbitration, and negotiation, along with internships and other fieldwork to give students practical experience in using those skills.

“Lawyers are still busy,” Murray said. “They’re just not as busy with trials.”

**Less experienced judges:** As with lawyers, judges also are getting less trial experience as trials occupy less of their time. Sankovitz said he saw the contrast

during his two tours of duty in the civil division of the Milwaukee County Circuit Court, first from 2004 to 2008 and then from 2012 to 2016. “On my first tour, I presided over 50 jury trials that went to verdict,” he said. “On my second tour, only 19 went the distance, a drop of more than 60 percent.”

The practice in larger Wisconsin counties of rotating judges so that they handle different kinds of cases over the years has been both praised and criticized in light of the trend toward fewer trials. Some said it helps judges keep courtroom skills current because they end up presiding over trials in criminal courts. Others said that judicial rotation means that judges with little and sometimes even no experience with civil trials end up doing subpar work when the occasion arises and that lawyers consequently avoid trials.

**Less knowledgeable jurors:** With fewer trials, fewer citizens have experience sitting on civil juries. And those who end up on a jury may have unrealistic ideas about attorneys’ skills, based on how lawyers are portrayed in popular television courtroom dramas. Sankovitz said. “I warn jurors: ‘You can try 200 trials and not make it look as good as it looks on *Law & Order*.’ Jurors come in with this expectation about how good the lawyers are going to be, and they are routinely disappointed.”

**Less visible decisions:** As disputes move out of courtrooms, they move from public forums to situations whose results may never be known by anyone other than the parties involved. In previous decades, attorneys deciding whether to settle or try a case could factor in the size of verdicts in similar cases, Osowski said. Now they can base their calculations only on other settlements of which they know. She said, “I don’t think that’s as valid a way of deciphering the value of a case.”

Also, keeping a product liability settlement secret could endanger public safety if the settlement doesn’t lead to correcting a dangerous condition, Geske said.

And because settlements and arbitration awards don’t set legal precedents, Geske added, “The major impact of the reduction in cases going to judgment and appeals is that the law doesn’t get a chance to develop. That’s where our law comes from. . . . A lot less law is being developed.”

“There is a lot of adjudication going on, but it occurs in institutions that enjoy a less distinguished ceremonial pedigree than courts—absent the robes, elevated benches, honorific titles, deferential retainers, and the distinctive etiquette that distinguishes a court from more pedestrian decision-making bodies.”

Professor Marc Galanter



### Is This Positive or Negative?

Attorneys and legal scholars see some advantages, but perhaps more disadvantages, to the reduction in trials.

Chief among the advantages is that arbitration and mediation can be quicker, more accessible, and more affordable ways to fairly resolve certain types of disputes, Schneider and Geske said. Schneider points to neighborhood disputes and divorces, among others, and says more generally that ADR “makes a ton of sense when you have two equal parties.”

But “that’s not the case in consumer and employment cases,” Schneider said. “Much of the world prohibits” arbitration in such cases, because of the differential in power between individuals and corporations.

“Our court systems cannot simply be for individuals who have money,” Rothstein said. “That’s a society that I don’t think any of us would want to live in. . . . We need to ensure that all levels of our society have their rights protected.”

The trends led the New York University (NYU)

School of Law to launch the Civil Jury Project in 2015. Funded by a \$2 million grant from trial attorney Stephen Susman, the four-year project is researching why civil jury trials are declining—and trying to figure out what, if anything, can or should be done about it. Susman, an adjunct professor of law at NYU and managing partner of Susman Godfrey in New York and Houston, is leading the project as executive director.

“We should not let this institution [of the jury trial] die quietly without asking questions,” Susman told *The Wall Street Journal’s Law Blog* in July 2015.

Yet there is no question, Sankovitz said, that the pool is shrinking of “the people we count on to shepherd trials and season jury panels, especially in high-profile, societally significant cases.”

Even when a case is going to be settled, the possibility of a trial is needed to ensure the settlement is fair, Habush and Dunphy said. “I think it’s essential for the defense bar and potential defendants to have that fear of going before a jury,” Habush said. “You take that away, and you take away the incentive to do the right thing.” ■

## FROM THE PODIUM

Joseph D. Kearney

### Investiture of Hon. Timothy Dugan

Governor Scott K. Walker recently appointed the Hon. Timothy Dugan, L'78, to the Wisconsin Court of Appeals. Dean Joseph D. Kearney was among the speakers at the investiture at the Milwaukee County Courthouse on March 30, 2017.

**B**e careful with Tim Dugan: he comes from the Marquette University Law School Class of 1978. A member of the class, urged on by others, once held a blade near my throat. My provocation? Showing up, at the group's 30-year reunion at Mark and Julie Darnieder's house, wearing a tie. Apparently, they had made a pact. "Justice" was swift. A scissors was produced—I said only that it was a *blade*—and my tie cut off. Admittedly, I promptly received this very nice blue and gold tie from Mark Darnieder—to be worn only after departure. I also have here my erstwhile tie, which I learned just this week my associate dean received as a sort of souvenir.

Why do I relate this? For starters, it reflects a point that I made in this courtroom some 14 years ago, in delivering the Milwaukee Bar Association's Memorial Address. "Out of the ould fields must spring and grow the new corne," I said, borrowing from the great jurist, Edward Coke, in 1600 (who himself leaned on Chaucer). That, three decades after graduation, the class of 1978 felt it necessary ritualistically to slay Professor Jim Ghiardi, himself of our class of 1942—for that's really what the tie cutting was all about—reflects just how much they were products of the "ould fields." To be sure, they knew better than to touch Professor Ghiardi, even in his emeritus years: And it was a *gesture*, really. In fact, these Marquette lawyers know just how much they took after Professor Ghiardi—and, with the passage of years, they know what a compliment that is.



Judge Tim Dugan, fourth from right (including the baby), with members of his family on the occasion of his investiture as a judge of the Wisconsin Court of Appeals.

For another thing, the story reflects how much time we spend with—and how much we learn from—our peers. The class of 1978 did some great things together—as I remind myself each day when I enter my office in Eckstein Hall, where a plaque remembers the class. So, when Judge Dugan and I spoke recently, he recalled especially his law school classmates—including Jack Miller (now in Alaska) and Julie Darnieder and others with whom he raised funds so that they could go to a moot court competition in New York City, as well as law school classmates with whom he participated in the Marquette Law School Project Outreach Program on Saturdays.

And in this there is a large truth. I noted it to students at the beginning of this semester, borrowing (always borrowing) from what I had heard in this room a few years ago in Tom Shriner's remarks at another annual memorial service: Where do we learn

things? “Almost always from other lawyers,” Tom said, “who tell us or show us by their own conduct how to pick up that new knowledge that we need to be good lawyers.” This is true of judges as well: Tim Dugan has learned an extraordinary amount from his peers during his decades on the trial bench—or even already on the court of appeals.

Even as we look ahead, it is useful to recall the past. To continue (and conclude) with my theme of the fields: A few years ago, I heard

another member of the class of 1978, Jim DeJong, refer to “the law of the harvest—don’t decide to plant a seed on Friday and expect to harvest on Monday.” Wise counsel, indeed. Tim Dugan planted seeds many years ago, in law school, in private practice, and on the trial bench. We are fortunate for his interest in harvesting the crops, for society’s common storehouse, through his work on the Wisconsin Court of Appeals. My congratulations, and thanks, to Judge Dugan. ■

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## Chief Justice Patience Drake Roggensack

# Hallows Lecture: Tough Talk and the Institutional Legitimacy of Our Courts

On March 7, 2017, the Hon. Patience Drake Roggensack, Chief Justice of the Wisconsin Supreme Court, delivered Marquette Law School’s annual Hallows Lecture. The lecture remembers E. Harold Hallows, a faculty member at the Law School (while a lawyer in Milwaukee) from 1930 to 1958 and then a member of the Wisconsin Supreme Court for 16 years, including service as the Court’s chief justice from 1968 until his death in 1974. The following is an excerpted and edited version of Chief Justice Roggensack’s lecture.

**I**t is a distinct honor to appear before you today and to deliver this year’s Hallows Lecture. My hope is to start what I believe to be a necessary public conversation about a rising challenge to the institutional legitimacy of our courts, state and federal.

As has often been said, courts have neither the purse nor the sword. Nevertheless, they have been able to serve as an independent branch of government, in part because the public has had confidence in court decisions. Stated otherwise, public confidence in our courts contributes to institutional legitimacy. Institutional legitimacy is also supported by the necessary decision-making role that courts play in our tripartite, democratic form of government.

Institutional legitimacy is critical to the effectiveness of the judicial branch of government because voluntary compliance with court decisions is at the foundation of judicial authority. It is also critical to peaceful dispute resolution in our democratic system of government. ▶▶



Chief Justice Patience Drake Roggensack

By institutional legitimacy, I do not mean to imply that everyone who reads or hears about a particular court decision must always agree with the court's ruling. It is true, to give an historical example, that President Franklin Roosevelt's Court-packing plan arose in response to judicial decisions negatively affecting his New Deal agenda. However, generally, even when a decision has generated significant public disagreement about its merits, the institutional legitimacy of the court rendering the decision was not globally attacked. There may have been grumblings, but generally those who opposed a decision were respectful and stated their views in ways that did not tear at the fabric of the court's institutional legitimacy. Most commentators did not state or imply that judges' impartiality and ethics were subject to question because of the outcome of a particular controversy.

Times have changed. Let me give you a few recent examples of comments about the Wisconsin Supreme Court. From the *Milwaukee Journal Sentinel* editorial page: "The court's 5-2 decision . . . came from the same swamp. . . ." From a former representative of the Wisconsin Assembly: "I hesitate to call Wisconsin's current Supreme Court a 'kangaroo court' only because that might be deemed an insult to marsupials." By the Democracy Campaign, the Wisconsin Supreme Court has been labeled as "corrupt, rigged, and renegade . . . an embarrassment to the state [and] a joke on the justice system."

These are purely political attacks on judicial decisions and the justices who made them because the speaker did not get the result from the court that he wanted. They are not criticisms of court decisions based on the underlying reasoning or the application of the rule of law.

Attacks on all courts have been facilitated by internet access to pieces written about courts by bloggers and other forms of social media. We all saw the effect that social media had on the November 2016 presidential election. It is having an effect on the institutional legitimacy of courts as well. Comments that were historically too rough or disrespectful to appear in newsprint now are sent over the internet and repeated and

repeated through social media. People simply get their information about courts in different places than they once did, and more people are hearing about court decisions, often with no real understanding of how courts actually function.

Wisconsin is not unique in the frequency of such tough talk. In Kansas, where all judges are appointed by the governor but face retention elections every six years, bitter comments about justices who had made politically unpopular decisions led to an all-out attack on the judiciary. A bill introduced in the Kansas Senate authorized impeachment of justices if their decisions "usurp" powers of the executive or the legislature. The bill did not pass, but it led to concerted efforts to defeat the justices whose decisions did not please Governor Sam Brownback. However, former Kansas governors, both Republican and Democratic, stepped into the fray and campaigned to retain the judges. They were successful. None of the members of the Kansas Supreme Court up for retention election was defeated in the retention election.

The election experience of Kansas justices differed from the 2010 retention election for Iowa Supreme Court justices. There, three justices were removed based on tough talk that generated anger with the court following its unanimous decision that approved same-sex marriage. The justices' response to being defeated shows their concern for the institutional legitimacy of courts. They said, "[T]he preservation of our state's fair and impartial courts will require more than the integrity and fortitude of individual judges, it will require the steadfast support of the people." This is certainly true: Public goodwill toward state and federal courts has a significant effect on institutional legitimacy of those courts.

Institutional legitimacy has been the cornerstone of the judicial branch of government since Alexander Hamilton, John Jay, and James Madison wrote of the benefits of a strong and independent judiciary in *The Federalist*. As *Federalist No. 51* explained, "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."

Attacks on the legitimacy of our courts and on the integrity of judges who serve on them come

from within, as well as from outside, the courts. For example, in a recent separate writing, Justice Shirley Abrahamson and Justice Ann Walsh Bradley characterized a colleague's opinion as "traveling through another dimension . . . into a . . . land whose [only] boundaries are that of imagination." The dissenting writers were referring only to the process by which a fellow justice's writing was labeled the "lead opinion." However, their tough talk was repeated in the press as an appellation that judged the merits of the opinion.

Justice Antonin Scalia was well known for his sarcastic attacks on the writings of his colleagues, such as, "The Court's argument . . . is, not to put too fine a point on it, incoherent," and "The Court's portrayal . . . is so false as to be comical." Perhaps his most dramatic assault on the institutional legitimacy of the United States Supreme Court came in his dissent in *King v. Burwell*, an Affordable Care Act opinion. Initially, he dismissed the majority opinion as "jiggery-pokery," and concluded by attacking the integrity of his colleagues. He said, "[*King*] will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites." Even though Justice Scalia reasoned through what he concluded the rule of law required in *King*, press and internet comments focused on his tough talk.

Am I opposed to dissenting opinions? Of course not. When well reasoned, they may help shape future developments of the law. However, too often sarcastic attacks unnecessarily tear at the fabric of institutional legitimacy because of the language

they choose. They imply that court opinions that they oppose are nothing more than the personal predilections of the authoring judges and are entitled to no respect. As Marie Failinger complains in her discussion of Justice Scalia's writing style, "[Y]ou seem to delight in using language which casts doubt on the character of the Court as an institution."

A recent article in the *Wisconsin Law Review*, authored by Professor Brian Christopher Jones of Liverpool Hope University, voiced concerns about the effect that disparaging comments about the United States Supreme Court may have on the Court's institutional legitimacy. He reasoned that tough talk by justices about colleagues' opinions will increase disrespect for the Court by others who follow that example. He also notes that disparaging comments do not attach to a single legal conclusion; rather, tough talk has become increasingly critical of the Court as an institution. He sees this as a significant change in public discourse about the Supreme Court. Professor Jones's focus is on the legitimacy of the Supreme Court's constitutional review. However, much of the tough talk about court decisions is not limited to constitutional review; instead, tough talk attacks courts' institutional legitimacy based on the speaker's position on many legal issues that courts decide.

The press picks up comments such as those made by Justice Scalia because they are colorful and often quite witty. A justice who writes in this way knows that the press prefers repeating colorful language rather than critiquing legal analyses. Such a justice purposefully writes to engage the press in discrediting decisions of the court with which ▶▶

“My hope is to start what I believe to be a necessary public conversation about a rising challenge to the institutional legitimacy of our courts, state and federal.”

the writing justice disagrees. Perhaps justices also use tough talk in an attempt to shape public opinion and increase public comments favorable to their individual points of view on the issues presented.

However, their comments on individual court decisions have the potential to reduce the institutional legitimacy of courts in general by implying that justices decide controversies before them based solely on their own personal policy preferences.

Furthermore, sarcastic writings that come from within a court of last resort give others license to choose disrespectful terms when speaking of the courts, as do careless statements by a former justice who gives many interviews, has an opinion on everything, and never has anything complimentary to say about the Wisconsin Supreme Court (examples being “I think that’s awful that they don’t meet and conference those cases” and “[P]eople lose faith that the court is anything but a political machine”).

Freedom of the press is critically important to a democratic society. The rights to speak freely and to have an uncensored press are enshrined in the First Amendment to the United States Constitution. Yet perceptions of the institutional legitimacy of our courts are also critically important, and speech has consequences. Sometimes those consequences travel far beyond what the speaker intended or even considered.

In that regard, some have concluded that with the constitutionally protected position of the press comes considerable responsibility. “The freedom of the press means at least this, that it is to be exempt from censorship, and may publish what it deems proper, being responsible only for the abuse of that privilege.” When the press yields its reputation for reporting facts objectively and accurately, it may lose public respect for its product and its relevancy in public discourse. This was so even in 1899, as explained in the *Yale Law Journal*: “The public has become so accustomed to the unreliability of press statements, whether through error, political warfare or spite, as to give them little heed. . . .”

Accordingly, even before the advent of the internet and social media, the press, in which phrase I include all mainstream media, had a responsibility that accompanied its constitutional privilege: Check

your facts; be objectively accurate; or be dismissed by the public as irrelevant. With all the alternative sources from which the American public now gets information, the press remains critically important. However, the continued survival of mainstream media is more dependent than ever on its shouldering its responsibility to be reliable in the facts it relates.

And, to be sure, the press has its own way of sending the message that a court decision, or an entire court, is not worthy of respect. It does so when it chooses disrespectful language such as describing the origin of an opinion as arising from a “swamp.” It also does so when it repeats again and again tough talk by a speaker who wants public attention but has no facts to back up his disparaging statements.

In regard to elected judges, some who employ the internet imply that accepting lawful campaign donations impairs a judge’s ability to be fair and impartial. It has been asserted that “in states where judges are elected, there’s a new form of judicial corruption: purchasing influence through election donations.” The same writer criticized the United States Supreme Court’s 2010 opinion in *Citizens United v. Federal Election Commission* as a “brazen judicial bribery.”

But judges who are appointed also have their impartiality attacked. Therefore, whether a judge is elected or appointed is not the determinative factor in regard to whether their decisions are subject to tough talk or are perceived as fair and grounded in the rule of law.

In regard to appointed judges, the press impugns their fairness when it comments on federal court decisions by including whether the deciding judges were appointed by a Republican or Democratic president. These comments have no relevance to the issue under consideration. Their purpose appears designed to imply that the voting judges favor a Republican or Democratic position on the issue under review, depending on the party of the president or the governor who appointed the judge.

For example, earlier this year, the *Milwaukee Journal Sentinel* reported about issues that arose from a John Doe case pending in federal court. The reporter relayed that, of the panel of Seventh Circuit judges hearing the case, “[Judge Diane]



“ [G]enerally, even when a decision has generated significant public disagreement about its merits, the institutional legitimacy of the court rendering the decision was not globally attacked. . . . Times have changed.”

Wood was appointed by Democratic President Bill Clinton. [Judge William] Bauer was appointed by Republican President Gerald Ford and [Judge Ilana] Rovner by Republican President George H.W. Bush.” This information has nothing to do with the controversy that was pending in federal court. It *does* have the potential to diminish the validity of the decision when the court concludes its work.

Whether federal judges are loyal to the views of the president who appointed them or whether they exercise independent judgment in judicial decision-making has received significant attention. In a recent study, Professors Lee Epstein and Eric A. Posner, of Washington University and the University of Chicago respectively, were concerned with determining whether the “suspicion that justices are not actually independent” was supported by objective data.

They reviewed the voting patterns of Supreme Court justices from 1937 to 2014. Their hypothesis was that “justices vote in a way that favors the president who appointed them” out of loyalty to the president who made the appointment. They concluded that United States Supreme Court decisions did favor appointing presidents who brought issues to the Court as petitioners, with such presidents sometimes succeeding 70 percent of the time, as did President Ronald Reagan and President Gerald Ford. Presidents were significantly more successful as petitioners than when the appointing president was a *respondent* in the litigation, although they also prevailed at a higher rate than did all other respondents (55 percent to 39 percent).

Professors Epstein and Posner concluded that, of the 38 justices they studied, “Justices are more like[ly] to vote in favor of the government of the president who appointed them than in favor of later governments. . . . [T]he effect is much

stronger for Democratic judges than for Republican judges.” They concluded that justices appointed by a Democratic president may have favored the president who appointed them more frequently than justices appointed by a Republican president because “many Democratic justices did have prior relationships with the president, while none of the Republicans did.” For example, President Franklin Roosevelt appointed men that he knew favored his New Deal policies.

In my view, Professors Epstein and Posner failed to consider an important part of the histories of the 38 justices they studied. They should have considered the voting patterns and public statements that occurred before these individuals were appointed. If they had done so, they may have learned that the presidents appointed various individuals to the court because the appointing presidents knew that they shared common philosophies on issues that were likely to come before the court. Professors Epstein and Posner might then have concluded that votes of the justices reflected their common understanding of constitutional prerogatives and constraints on judicial decision-making, not gratitude toward the appointing president. Indeed, such a conclusion may fairly be implied from prior relationships that Democratic presidents had with their appointees.

Another factor that may bear on the more global criticism of courts lies in the nature of the cases accepted by courts for final decisions. Many of the controversies presented to the United States Supreme Court and other courts of last resort have strong political overtones.

Certainly this was the case in *Bush v. Gore*, a 2000 decision. Tough talk followed that decision, where many writers expressed their opinions about the Court’s decision in favor of George W. Bush because in so doing the Court inserted itself into

a partisan political contest where it conclusively determined the outcome of the presidential election. One article went so far as to imply that the Court knew that because “the eventual winner would potentially be able to appoint several justices, [therefore,] the Court also engaged in a battle over the conditions that would perhaps create future voting coalitions on the Court.” Clearly, the institutional legitimacy of the Court was under attack.

However, as *Bush v. Gore* recedes into history and other concerns arise, some writers have concluded that there is little evidence that the Court’s decision has damaged its institutional legitimacy. This may be so, at least in part because a tripartite system of government requires the Supreme Court to navigate and determine contests between the executive and the legislative branches and to protect the rights of all people as provided in the United States Constitution.

Linda Greenhouse, who has reported on the Supreme Court for many years, recently noted that the current Court will face repeated challenges based on separation-of-powers issues. She observed earlier this year that it is extremely important to maintain a strong Supreme Court that will uphold foundational legal principles.

Furthermore, it matters not whom the Court’s decisions appear to favor. There simply are occasions when final decisions on complex controversies must be made. In tripartite systems such as our democratic federal and state governments, it is courts that fill the role of the necessary decision-maker. In order to fill that role and also maintain their institutional legitimacy, court decisions must be fair and independent. Tough talk undermines the perceived fairness and independence of courts on a broader basis than the decision at issue when a speaker chooses words that imply the court is biased, rather than choosing words that explain why the rule of law was incorrectly applied by the decision under review. The more colorful and sarcastic the choice of words, the greater is the likelihood that they will be repeated in the press, on the internet, and in social media.

Independence of judicial decision-making is closely related to the institutional legitimacy of courts because independent judges are perceived

as fair judges. Students of judicial decision-making have studied various factors that bear on judicial independence. Professor Corey Rayburn Yung studied the independence of federal circuit court judges. He reviewed case outcomes by statistically measuring independence and partisanship. He concluded that in judicial panels where judges have more independence, they wrote more separate concurrences or dissents. Using that measure, no one would doubt that the Wisconsin Supreme Court is independent.

Independence of the judiciary is not a new idea. Judicial independence was essential to the Founding Fathers, as is repeatedly expressed in *The Federalist*. Independence is a key component of courts’ institutional legitimacy because courts are charged with keeping the necessary fine balance between competing interests of the other two branches of government. Stated otherwise, court independence from other branches of government is a cornerstone of the checks and balances that underlie our tripartite government. Without courts providing a separate and independent function in our government, as the Founders noted, no liberty will be had. “In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger. . . .”

Recent presidential elections have increased the tone and frequency of conversations about appointments to the United States Supreme Court. Concerns about the type of person who would be appointed have been front and center. Before the election, both Donald Trump and Hillary Clinton asserted that the opportunity to appoint a justice to fill the Supreme Court seat that had been occupied by Justice Antonin Scalia was a compelling reason to vote for them. President Trump promised a “pro-life justice.” Secretary Clinton assured that her appointment would protect all guaranties for women set out in *Roe v. Wade*. Louisiana Governor Bobby Jindal said in a written statement while traveling in Iowa during his presidential primary campaign, “If we want to save some money, let’s just get rid of the court.” Apparently President Trump has not taken Governor Jindal’s advice, given his appointment of Judge Neil Gorsuch to the Court.

“*These are purely political attacks on judicial decisions and the justices who made them because the speaker did not get the result from the court that he wanted.*”

Campaign promises during a judicial election caused one law professor to say, “An undesirable consequence of the court’s partisan divide is that it becomes increasingly difficult to contend with a straight face that constitutional law is not simply politics by other means, and that justices are not merely politicians clad in fine robes.” Quite a comment, but how would he have us proceed? When judges are elected, their independence is questioned because money was raised to run campaigns; and when judges are appointed, their independence is questioned by implying that they will favor the position of the party of the appointing president or governor. In both occasions, the institutional legitimacy of our courts is attacked.

It is quite clear. We have an emerging challenge for our judiciary, state and federal, elected and appointed. We must maintain and protect the institutional legitimacy of our courts. How do we meet that challenge, with attacks that have come from within and outside of the courts, by mainstream media, the internet, and social media?

The words of then senator John F. Kennedy, delivered during his campaign for president, provide a starting point for our challenge. He said, “Let us not seek to fix blame for the past. Let us accept our own responsibility for the future.”

I invite you all to recognize where we are now and to begin with me to accept responsibility for the future. The examples I relayed earlier are my effort at beginning what I believe is a necessary conversation about attacks on the institutional legitimacy of our courts. Without reviewing what has been said and done, we cannot assess how to move forward. Even though there are those who would diminish the role of courts in our government without recognizing the result such an injury could have, they are a distinct minority. Most of the tough talk comes from those who have no conscious intent to harm the institutional legitimacy of courts, but who

have not considered the unintended consequences that may follow from their fully protected speech.

As Emily Dickinson reminded us so long ago: “A word is dead / When it is said, / Some say. / I say it just / Begins to live / That day.”

It is a privilege to be a member of the judiciary, but with that privilege comes considerable responsibility. When we speak, as judges and former judges, we need to choose language that expresses our concerns about court opinions and judicial administration. We need to hold the judiciary’s feet to the fire and demand well-reasoned opinions and effective judicial administration. However, we can do so by choosing language that maintains the institutional legitimacy of our courts and by recognizing the necessary role that courts play in our democratic system of government. Recognizing that colleagues at the bench and the bar, on university faculties, and in the press and social media do not speak with the intent to harm the institutional legitimacy of our courts, we should be unafraid to discuss the unintended consequences of tough talk with them and give all speakers an opportunity to choose language that does not go farther than the speaker intends.

We should reach out to members of the communities in which we live. We should speak at local Rotaries, neighborhood Parent Teacher Association meetings, and other civic events where people gather. We need to educate those who are interested in the courts but do not understand how they work, why an independent judiciary is so important in a free society, and how tough talk can erode public confidence in our courts’ institutional legitimacy.

And so, I conclude as I began, with a sincere thank you to Marquette University Law School for providing me with the opportunity to begin this public conversation and a thank you to those who chose to attend today. We are all invested in and responsible for maintaining the institutional legitimacy of our courts. ■

Theodore F. Chisholm

## Investiture of Hon. Jean Kies

On February 16, 2017, the Milwaukee County Circuit Court held an investiture of Jean Kies, L'91, as a judge of that court. Ted Chisholm, a campaign supporter, spoke on the occasion.



Good afternoon, ladies and gentlemen. As a young Milwaukeean and as someone who, in many ways, has grown up around this courthouse, it is truly an honor to speak here today.

We're here today for two reasons. First, we're here to celebrate Jean Kies's exemplary record of service to this community. Look around this room, and you'll see lawyers, judges, politicians, and the hard-working people who make this community strong—and whose interests Jean has defended, as an attorney and as a civic advocate, over the past two decades.

We're also here because we, as Milwaukeeans, care about our future. Our community, as it heals the scars of racial, economic, and political divisions, is moving uphill, but slowly. These are times that rightly trouble those who are young and idealistic, but all too often unheard; those who are old and wise, but growingly dispirited; those who make our society vibrant and complete, but who nevertheless live in fear of its authorities.

The word *judge* has Latin roots that mean “to speak the law.” Every member of this community—and especially the young, the old, the marginalized, the afraid—deserves judges who speak the law clearly, courageously, and with no aims but justice and equity.

We're here today because Jean Kies is that kind of judge.

I first met Jean during her campaign for Branch 45, in late 2015. It is remarkable—and so incredibly rare—to meet someone so genuine in the political world. Within 30 seconds of talking with Jean, you know that she doesn't see you as simply a color, a voter, a name on a misdemeanor court docket sheet. Whether it's at a community forum or on the bench, Jean sees you for who you are—a member of this community, worthy of deep respect and possessing inherent human dignity.

These are the qualities that a judge needs in our era. Our society and our community demand judges who consider the entirety of the person who appears before them. As a young person who has been raised by two public servants who care viscerally about social justice, I don't want my peers—particularly those who don't share the privileges of my race or economic background—treated as rap sheets.

That's why Jean's background as a defense attorney, as a family law practitioner, and as an advocate for some of our community's most challenged youth is so valuable. Jean sees court cases not as numbers but as instances where the human experience has gone awry and requires healing. Sometimes, that healing requires firm and decisive action, and I think every prosecutor in this room knows that Jean is tough when toughness is in order. But just as importantly, I think all in this room know that they'd get the fairest of fair shakes if they appeared before Jean.

Before I conclude, I want to remark on one other quality that Jean brings with her to the bench—her tenacity. We all know the importance of a judiciary that is fiercely independent and tireless in its defense of civil liberties. I've seen Jean hold her own across Milwaukee County, explaining a consistent, principled vision of justice to her constituents at 9th and Locust and at Brust and Oklahoma. I've seen her work three events in a couple of hours, treating every person she meets with the same kindness and genuine interest. I have no doubt that she will devote the same vigor to preserving equal justice under the law—in criminal court and wherever her career takes her from there.

Thank you. ■



Photos by Lee Matz

U.S. Senior District Judge Charles N. Clevert Jr. administers the oath of office to Milwaukee County Circuit Court Judge Jean M. Kies.

# CLASS | NOTES

1971



**Martin J. Greenberg**

received the 2017 Leonard L. Loeb Award from the State Bar of Wisconsin. The award recognizes a

senior lawyer who has improved the legal system and has shown leadership in advancing the quality of justice for all.

1978



**Julie and Mark Darnieder** received the Friends of the Hispanic Community Award from the United Community Center. The award recognizes “individuals who have made immeasurable contributions to the development and well-being of the community.” Their work has included extensive service to Dominican High School and Marquette University Law School.

**Stephen C. Lepley** has been named assistant director of Pepperdine University School of Law’s Straus Institute for Dispute Resolution.

1982



**Michael J. Gonring** is the new executive director of the Legal Aid Society of Milwaukee. He previously was a partner and

national pro bono coordinator at Quarles & Brady in Milwaukee.

1983



**Paul T. Dacier** has a new position as general counsel for Indigo, a Boston agriculture-technology startup. He was among business leaders

recently quoted in a *New York Times* article on noncompete clauses.

1984

**Thomas E. Reddin** is a shareholder in the labor and employment practice of the national firm Polsinelli, in Dallas, Texas.



**Michael T. Jones** has been appointed by Gov. Scott Walker to the University of Wisconsin Board of Regents. He is of counsel at Michael

Best & Friedrich in Milwaukee, focusing on corporate governance.

1987



**Philip J. Miller** has been named a Fellow of the American College of Trust and Estate Counsel (ACTEC). Miller is a partner in Husch Blackwell’s

financial services and capital markets group and its private-wealth practice. He is based in the firm’s office in Waukesha County, Wis.

1990

**Theodore D. Kafkas** is the author of a new book: *Economic Crisis & Solutions: Unemployment Bubble, Technology, Federal Reserve and Government*. Information about his book can be found at <https://wwwcreatespace.com/6987316>.

1991

**Timothy S. Jacobson** has joined Fitzpatrick, Skemp & Associates, in La Crosse, Wis., practicing environmental, business, and personal injury litigation. He also serves as assistant wing legal officer of the Wisconsin Wing of the U.S. Air Force Auxiliary (Civil Air Patrol).

1994

**Michael C. Holy** has opened a new firm, Holy & Schultz, concentrating in health care, general litigation, and employment law. The firm is based in Naperville, Ill. ▶▶

## JEFF NORMAN, L'02

### Joining Forces

As a kid playing in his Milwaukee neighborhood, Jeffrey Norman recalled, “We played cops and robbers. I always wanted to be the cop.”

That’s easy to believe as you look at him on the other side of a table in the basement cafeteria of the Milwaukee County Courthouse. Norman is wearing the uniform of a Milwaukee Police Department captain. He joined the department as a patrol officer in 1996 and has risen to detective to lieutenant to captain. He previously served as a criminal investigator and patrol commander; his current duties put him in an administrative role, not out on the street.

Norman graduated in 1992 from Milwaukee’s North Division High School and from the University of Wisconsin-Milwaukee, where he majored in criminal justice, in 1996. The police department was his next stop.

Soon, he was working as a patrol officer on the south side of Milwaukee, which is largely white and Hispanic. “That opened my eyes to a bigger Milwaukee,” said Norman, who grew up in predominantly African-American neighborhoods on the north side.

“A crossroads moment,” as he called it, when another officer did not follow proper procedure involving a prisoner, led Norman to act on his longtime interest in becoming a lawyer. He enrolled



in Marquette Law School as a part-time student, continuing to work as an officer full time. He completed law school in four and a half years.

A law firm or a job in a corporate office didn’t appeal to Norman. But the Milwaukee County district attorney’s office did. He became a prosecutor and speaks highly of the experience. But after a year, he decided that he could serve the community better as a law enforcement officer and returned to the police department. He’s been there since.

Has his law degree been useful? “Absolutely,” Norman said. On duty, in particular, he said, it has

made him a better supervisor and a better police officer more generally, partly because he understands legal aspects of many of the issues police face—probable cause, searches, even how to write up reports effectively.

“Balance.” Norman said the word with emphasis as he talked about what he likes to do on his own time. Police officers see a lot of bad things. He tries to offset that when he’s off duty. “You have to be proactive in seeing the world as positive.” He engages in volunteer work, including Marquette Law School alumni activities such as service on the diversity committee in recruiting students.

And beyond that? “I love a good cigar. . . . I like good company and good conversation.” This interview was held after he returned from a trip on his Harley to Cincinnati for a jazz festival. Norman’s wife, Sharniecia, is a doctor. They have two children, a son, Kyle, 11, and a daughter, Sydney, 8.

Norman does practice law on a limited basis, mostly matters for clients he knows personally. Now 43, he will be eligible in several years to retire from the police department. Then? He’s not sure. But expect him to stay involved in broader issues in some fashion. He said, “I strive to do things that contribute to the community.” ■

## 1995

**Bethany M. Rodenhuis** is senior vice president—transformation at Northwestern Mutual. She has held leadership positions with the company since law school, most recently heading the company’s distribution strategy and planning.

## 1998

**Kimberly R. Walker** has been named chief operations officer of the Boys & Girls Clubs of Greater Milwaukee.

**Jason G. Wied** has been elected to the board of the Green Bay Packers Hall of Fame, a nonprofit corporation independent of the Green Bay Packers that guides the hall as an historical national sports venue and educational resource.

## 1999



**Jason J. Pfeil** has accepted the position of staff attorney supervisor at the newly opened trial office of the Kentucky Department of Public Advocacy in Princeton, Ky.

## 2001



**Michael M. Smith** has joined Church Mutual Insurance Company, Merrill, Wis., as vice president, secretary, and general counsel.

**Mark J. Andres** has joined the Brookfield office of Davis & Kuelthau as a shareholder in its corporate and trusts and estates practices.

Congratulations to the Marquette lawyers recognized as 2017 “Leaders in the Law” by the *Wisconsin Law Journal*:

**Craig Christensen, L’85**  
Habush Habush & Rottier

**Jeff DeMeuse, L’86**  
Corneille Law Group

**Jerome Janzer, L’82**  
Reinhart Boerner Van Deuren

**Bradley Kalscheur, L’95**  
Michael Best & Friedrich

**Raymond Manista, L’90**  
Northwestern Mutual

**Erin Strohbehn, L’06**  
Gimbel, Reilly, Guerin & Brown

**Jeffrey Zarzynski, L’81**  
Schiro & Zarzynski



**SUGGESTIONS FOR CLASS NOTES** may be emailed to [christine.wv@marquette.edu](mailto:christine.wv@marquette.edu). We are especially interested in accomplishments that do not recur annually. Personal matters such as wedding and birth or adoption announcements are welcome. We update postings of class notes weekly at [law.marquette.edu](http://law.marquette.edu). ▶▶

## 2003

**Kristin R. Muenzen** recently joined the general counsel's office at Princeton University. Muenzen previously was an attorney for the United States Department of Justice in Washington, D.C.

**Kirk L. Deheck** was elected vice president of the board of directors of Boyle Fredrickson, an intellectual property law firm in Milwaukee.

Congratulations to the Marquette lawyers chosen by the *Wisconsin Law Journal* as "Women in the Law" awardees for 2017:

**Susan Allen, L'06**  
Stafford Rosenbaum

**Laura Crivello, L'93**  
Milwaukee County District Attorney's Office

**Terese Halfmann, L'85**  
Hupy & Abraham

**Erin Karshen, L'03**  
Milwaukee County District Attorney's Office

**Tanner Kilander, L'02**  
Kilander Legal Services

**Laurie Petersen, L'86**  
Lindner & Marsack

**Susan Tyndall, L'85**  
Habush Habush & Rottier



**Joshua P. Grube** has become a shareholder in Brennan Steil, in Janesville, Wis., where his practice involves criminal law, labor law, and civil litigation.



**David D. Cherner** has joined Moss & Barnett, in Minneapolis, as a member of the firm's creditors' remedies and bankruptcy team.

## 2004

**Jason R. Oldenburg** has left the partnership at The Previant Law Firm to start his own law firm, Injury and Disability Law Office of Wisconsin. He continues to practice in the areas of worker's compensation, personal injury, and Social Security Disability.

## 2007



**John W. Halpin** has become a partner in the Milwaukee firm Laffey, Leitner & Goode.

## 2005

**Beth Conradson Cleary** has been appointed executive director of the City of Milwaukee Deferred Compensation Plan.

## 2008

**Melissa (Lauritch) Papaleo** has become assistant general counsel for the DC Lottery in Washington, D.C.

**Annie L. Owens** has assumed the post of counsel to the ranking member of the Senate Judiciary Committee, the Hon. Dianne Feinstein of California.

**Dirk A. Vanover** has published a book, *Comics Startup 101: Key Legal and Business Issues for Comic Book Creators*.

## 2006



**Jeffrey R. Ruidl** has become vice president of acquisitions at Hammes Partners, Milwaukee, a private equity platform that invests on behalf of institutional investors, with an exclusive focus on the real estate market in U.S. health care.



**Mauri Whitacre-Hinterlong** is part of the energy team at the Dallas firm of Gray Reed & McGraw. ▶▶



## JULIE FLESSAS, L'88

### Once a Nurse, Always a Nurse—but Also a Lawyer

Julie Flessas dreamed of following in the footsteps of her favorite aunts by becoming a nurse. And she did, working as a registered nurse in nursing homes and, later, in intensive care units. “Working with the sickest of the sick demanded an enhanced knowledge of nursing practice,” she said. “I loved working in critical care. It demanded a type of thinking that went beyond any single moment. One witnesses human resiliency, as well as unimaginable pain, suffering, disability, and death.” Her observations would eventually be of great use in a career in personal injury litigation.

“Of course, there are also times when, for many reasons, one witnesses patient care that is not optimal,” Flessas said. On one occasion, she spoke to a superior about an incident she had seen and was rebuked. Go to law school if you want to be lawyer, she was told.

After hearing about lawyers who were looking for help in reviewing cases involving medical matters, Flessas began her transition to legal work. One law firm offered her a part-time job, which supplemented her nursing income. “My background fit perfectly with reviewing medical records and helping with personal injury trial prep,” she recalled.

She was encouraged by Gerald Turner, one of the lawyers she helped, to enroll in law school, with the goal of working with him full time upon graduation. That second prod to go to law school was effective, and she then joined Turner’s law firm.

The energetic commitment that she brought to critical-care nursing transferred perfectly to the courtroom. “Litigation takes a lot of time, preparation, and a very thick skin,” Flessas said. “When I started, it was predominantly a male world. It was interesting.” She meant that as an understatement.

Within a year of becoming a lawyer, she was contacted to serve as co-counsel in a case where a faulty connector allowed transposition of an oxygen and carbon dioxide hose during surgery, a hazard she had been trained to avoid. The family received the largest wrongful death settlement in Ohio for a single male.

In 2003, she expanded her practice, representing more than 225 people who had used a then-popular diet drug known as fen-phen and later struggled with



varying degrees of heart-valve damage that research would eventually find to be a side effect of the drug. Nationwide, the drug manufacturer ultimately paid billions of dollars in damages. “Those were busy years for me as a wife, mom, nurse, and lawyer,” said Flessas.

With retirements and a revamping of the firm, Flessas Law Firm emerged. The firm represents clients injured from accidents, malpractice, pharmaceuticals, and medical products. Flessas said she has learned the ABCs of running a firm: Acumen in law. Business sense. Courage.

Flessas has a strong sense of justice and helping others. She works with abused women and high-risk youth. She has retained her nursing license, both because it is valuable in her legal work and because she continues to help several elderly individuals in need of nursing care and medication guidance.

Flessas is grateful for the opportunities her law degree has afforded her. She emphasizes the profusion of knowledge a law degree provides. She said that merging nursing and law helped her find her place. She saw that the passion she had caring for others in nursing was easily transferable to law. She said, “It is and has been a very interesting and rewarding journey.” ■



In a ceremony that included remarks by Marquette University President Michael R. Lovell (pictured below), the Law School presented its annual alumni awards this past April. The recipients are pictured above (left to right):

*Alumna of the Year Award*  
**Maxine A. White, L'85**

*Lifetime Achievement Award*  
**Thomas M. Olejniczak, L'74**

*Howard B. Eisenberg Service Award*  
**Katherine McChrystal, L'10**

*Charles W. Mentkowski Sports Law Alumna of the Year Award*  
**Susan K. Allen, L'06**



President Michael R. Lovell

Only a flavor of the citations accompanying the awards can be conveyed here. White has served on the Milwaukee County Circuit Court for 25 years and currently is chief judge. Her commitment and breadth of service to the legal profession and the larger community are prodigious. Olejniczak is a partner in Conway, Olejniczak & Jerry and a sought-out lawyer in Green Bay; his nominators emphasized his "tireless integrity, advocacy, and energy" to "so many of this region's charitable and civic organizations." McChrystal, with Gagne McChrystal De Lorenzo and Burghardt, has used her family-law expertise in

the development of the Milwaukee Justice Center and served the AIDS Resource Center of Wisconsin in numerous capacities. And Allen's involvement in Marquette's National Sports Law Institute began even when she was an undergraduate and has continued since law school graduation in numerous ways, with service as an alumna coach of Marquette's sports-law moot court teams being simply an example.

On **Thursday, April 26, 2018**, the Law School will present this academic year's alumni awards. The ceremony celebrates the mission of Marquette University—Excellence, Faith, Leadership, and Service—and the general ideal of the Marquette lawyer. It is a premier and important event. We hope that you will join us at it.

**Thomas E. Howard**, of Peoria, Ill., has been reappointed to serve on the Illinois State Bar Association's Standing Committee on Judicial Evaluations Outside of Cook County and is a member of the association's section on commercial banking, collections, and bankruptcy.



**James B. Barton** has been promoted to partner at Hansen Reynolds, Milwaukee, where he concentrates on complex commercial disputes in state and federal courts.

## 2009



**Dale M. Johnson II** has been named a partner at Shook, Hardy & Bacon, in Kansas City, Mo. He represents clients in complex product liability, personal injury, premises liability, and class action matters.

## 2010



**Nathan S. Fronk** has been promoted to shareholder in the Milwaukee office of von Briesen & Roper. He focuses his practice on transactional matters, with an emphasis on representing businesses and financial institutions in complex commercial lending transactions.



**Meghan C. O'Connor** has been named a shareholder in von Briesen & Roper's Milwaukee office, where she chairs

the health information privacy and security section.



**Russell J. Karnes** has been appointed as a member of the Milwaukee Young Lawyers Association (MYLA) Board of

Directors. MYLA is an organization for attorneys who are not yet 38 years old or who have been practicing law for not more than five years.

## 2011



**Andrew F. Spillane** recently joined Godfrey & Kahn's banking and financial institutions team.



**Edward R. Tybor, III**, has joined the real estate group NewLAWu.s., a national law firm designed to reduce client

costs. He and his wife, Amy, welcomed a son, Edward R. Tybor, IV, in October 2016.

## 2012

**Scott W. Brunner** has joined Husch Blackwell's financial services and capital markets group in Milwaukee. His practice will continue to focus on mergers and acquisitions, real estate, and securities.



**Joseph P. Trevino** has been promoted to partner at SmithAmundsen's Milwaukee office, where he is a member of the

construction, product liability, and professional liability practice groups.

## 2013



**Patrick C. Greeley** has joined the law firm of Kendricks, Bordeau, Adamini, Greenlee & Keefe in Marquette, Mich., where he

maintains a general practice with an emphasis on civil litigation.



**Max T. Stephenson**, who practices at Gimbel, Reilly, Guerin & Brown, is president-elect of the Milwaukee Young Lawyers Association.



**Ryan J. Truesdale** practices with Hupy and Abraham in Milwaukee. He is a member of the nursing home abuse and neglect group.

## 2014



**Kristen D. Hardy**, compliance counsel for Rockwell Automation, has been chosen as the youngest

recipient of the *2017 National Summit of Black Women Lawyers Emerging Leader Award*. The award is given to outstanding young lawyers graduating in 2010 or later (aged 36 or younger), whose accomplishments and contributions within their legal careers and in promoting diversity within the legal profession demonstrate a high level of leadership.

Employment data for recent classes, including 2015–2017, are available at [law.marquette.edu/career-planning/welcome](http://law.marquette.edu/career-planning/welcome).



## CONSIDER THE POSSIBILITIES

**Open yourself to big dreams.** Reach for your fullest potential. Marquette Law School encourages that for all students. This includes students in the five-year-old Summer Youth Institute. This past summer's program included two dozen students entering eighth, ninth, and tenth grades in public, charter, and private schools in the Milwaukee area. Students from low-income and minority families are especially encouraged to take part in the program, which is a joint program of Marquette Law School and the Eastern District of Wisconsin Bar Association (and is in collaboration with Johnson Controls, Inc.; Kids, Courts & Citizenship; and the Wisconsin Chapter of the Association of Corporate Counsel).

The students spend seven weekdays learning about career possibilities in the legal world, whether as judges or bailiffs or lawyers. They visit courts, law firms, and businesses and hear from people in the legal world through sessions at Eckstein Hall. And they study and work: The program culminates with each student's taking part in oral arguments before actual judges and with a celebration luncheon. Participants and guests this year included the Hons. Tom Barrett, mayor of Milwaukee, Nancy Joseph, U.S. magistrate judge, and numerous other involved judges and lawyers. For the long term, students are paired with mentors. The underlying message: You should explore valuable paths, and we want to help.

