

# MARQUETTE LAWYER

MARQUETTE UNIVERSITY LAW SCHOOL MAGAZINE SUMMER 2017



## CONFIDENCE IN THE JUDICIARY

The Fourth Circuit's Judge Albert Diaz  
on Judicial Term Limits—and a Reaction  
from Judge James Wynn, L'79

### ALSO INSIDE:

IP Law: Friend or Foe of High-Tech Advances?  
Barkow and O'Hear on the Proliferation of Criminal Laws  
Prosser on His Law Clerks  
Marquette's Water Law and Policy Initiative

## Announcing the Lubar Center for Public Policy Research and Civic Education

Early in my deanship, I gave a speech questioning the tendency of some institutions to support specific political, economic, or social policies that seem by any measure to be beyond the expertise, purpose, or purview of the particular institutions. That was some time ago (my remarks appeared in the Summer 2004 issue of this magazine), but I have maintained the view. For example, it is partly on its basis that, as dean, I rarely take a public position on proposed legislation. Marquette University Law School is a venue more than a litigant—a forum more than a contestant.



Michael R. Lovell, Sheldon B. Lubar, and Joseph D. Kearney

It is scarcely coincidental that, during this time, Marquette Law School has become, in the characterization of the *Milwaukee Journal Sentinel*, “Milwaukee’s public square.” To be sure, this is not our *fundamental* purpose: *that* is to help men and

women form themselves into Marquette lawyers. But through public programming such as the Marquette Law School Poll, debates featuring candidates in significant political races, Mike Gousha’s “On the Issues” conversations with newsmakers, public lectures by leading scholars, and conferences on significant issues of public importance, Marquette Law School serves as the region’s leading venue for serious civil discourse about law and public policy matters. Eckstein Hall increasingly has become the place where the community takes the hard problems, the ones that affect us all.

We can do this, in large part, because of numerous donors, who—in addition to supporting scholarships for students, research by faculty, and summer fellowships through our Public Interest Law Society—have underwritten our public policy initiative, as we have come to call it, primarily through their support of our annual fund. In this regard, no donors have been more generous than

Sheldon and Marianne Lubar, beginning with their seven-figure gift in 2010. More recently—indeed, since this magazine was in page proofs and with the support of another such gift—we have announced the creation of the Lubar Center for Public Policy Research and Civic Education. An endowment of \$7 million will support this project.

Marquette Law School’s Lubar Center will sponsor research, support journalism projects, and underwrite partnerships with other institutions whose exploration of public policy topics contributes to the common good. Some of these projects will result in specific proposals or reflect particular worldviews, even though the Lubar Center itself—like the Law School more generally—will maintain no position. We scarcely expect a lawyer or academic presenting at Marquette University Law School to represent no cause or make no suggestion. In all events, regardless of the particular topic, as the history of our public policy initiative convincingly demonstrates, it is possible to share passionate views in a dispassionate setting that receives all reasoned views reasonably expressed. All this will be among the key roles of the Lubar Center.

The Lubar Center for Public Policy Research and Civic Education is a concept and an institution, but it also will be a place. We have renamed the Appellate Courtroom in Eckstein Hall as the “Lubar Center.” This magnificent room, flanked by portraits of Marquette lawyers and faculty who have served on state supreme courts or federal courts of appeals, has become *the* place in which not just moot court arguments but, more frequently, distinguished lectures, “On the Issues with Mike Gousha” conversations, policy conferences, political debates, and other large-scale forms of public discussion and education unfold.

We will have occasion in the next issue of this magazine to celebrate this gift and explore its significance. Meanwhile, on behalf of Michael R. Lovell, president of Marquette University, and Daniel J. Myers, our provost, as well as the entire Marquette Law School community, permit me to thank the Lubars for their confidence in us. We look forward to realizing our collective ambition.

Joseph D. Kearney  
*Dean and Professor of Law*



## FEATURES

**8** How Long Should Supreme Court Justices Serve?  
Balancing Judicial Independence and Judicial Accountability  
by Hon. Albert Diaz—with a comment from Hon. James Wynn

**20** A Student and Teacher of American Progress  
An Interview with Judge Wynn

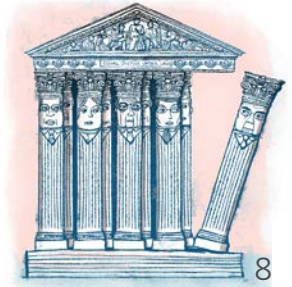
**24** Insights from Inside the Tech World

**26** Finding a Trustworthy Path Through the Cloud—  
Remarks at Marquette Law School  
by Brad Smith, president and chief legal officer of Microsoft

**32** Innovation, Disruption, and Intellectual Property—  
A View from Silicon Valley  
Nies Lecture by Ted Ullyot, partner at Andreesen  
Horowitz and former general counsel of Facebook

**42** Wisconsin's War on Drugs—The Cocaine Front, 1986–1990  
by Michael O'Hear, professor of law

**56** Water Works: Selected Marquette Law School Faculty Blog Pieces  
by David Strifling, director of the Water Law and Policy Initiative



---

## FROM THE PODIUM

**48** Prisoners of Populism—Understanding the Politics of Mass Incarceration  
Barrock Lecture on Criminal Law, delivered by Rachel E. Barkow of the NYU School of Law

**55** Investiture of Judge Cynthia M. Davis, Milwaukee County Circuit Court  
Remarks by Dean Joseph D. Kearney

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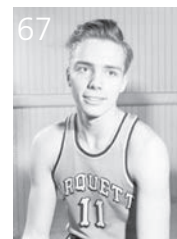
**2** From the Dean

**4** Law School News

Bria Kelly: Finding a Warm Setting in the North, 4  
Students Join Pro Bono Eviction Defense Project, 5  
Yale Historian Excavates the Roots of the Holocaust, 6

**62** Class Notes

Justice David Prosser and His Clerks  
from Marquette Law School, 64  
When Ray Eckstein Played Basketball  
for Marquette University, 67



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Cover photo taken by  
Stephen Voss at the  
Lewis F. Powell, Jr.,  
United States Courthouse  
in Richmond, Va.

## Bria Kelly: Finding a Warm Setting in the North

When she was choosing a law school, Bria Kelly was impressed by something Marquette's Professor Paul Anderson told her: That she would thrive at Marquette Law School.

But she was more impressed by a second thing Anderson told her: That she would thrive wherever she went.

That confidence in her meant a lot. Kelly said some people doubted whether she should go to law school. But she was determined. "I don't like to discourage myself," she said.

Discouragement was the last thing she found when she visited Milwaukee.

Kelly was surprised to be visiting Marquette at all. Panama City, Fla., is home, and Florida A&M in Tallahassee was where she did her undergraduate work. She assumed she would go to a law school in the South. She had never lived in the North and

knew no one in Wisconsin except one person she met in college. "I didn't even know where Milwaukee was on the map," she said.

But she noticed that Marquette was offering a waiver of application fees at the time when she was looking at law school materials. So, why not?

The impulse turned into a serious thought. The Marquette people responded. Kelly visited. Once she was at the law school, her assumptions about where she was going changed. For one thing, Kelly was interested in sports law—when she visited, she learned that sports law is a Marquette Law School specialty. Other schools she looked at didn't offer nearly as much in that area. More broadly, Kelly just felt that things looked promising in Milwaukee.

On the airplane home, Kelly weighed the pluses and minuses. She saw a lot of pluses. The minuses? Winter. But she decided, "If the only downfall in choosing this school is that it snows, that's crazy."

So Marquette it was. Kelly coped with the demands of her first year ("You have to learn a whole new way of thinking") and was excited about what she was learning as her second year headed toward its end in 2017. She still likes sports, but she's become interested in intellectual property matters such as trademarks.

Milwaukee's still a long way from Panama City, but Kelly said it's working out well. She's made friends. She's gotten involved in pro bono programs for law students in the community. She lives downtown, in walking distance to both Marquette and entertainment attractions, including Milwaukee Bucks basketball games. "Milwaukee's cool," she said. "I definitely like the cheese curds." Even the snow hasn't been so much to cope with.

Kelly is a living lesson in a lot of the character traits that educators are increasingly saying are keys to a student's success at any level. Determination. Resilience. Curiosity. Optimism. Eagerness to learn. Willingness to try new things.

Marquette Law School—that was one big thing she was willing to try. "I don't regret that decision at all," she said with an understated smile. ■



Bria Kelly

# Students Join Pro Bono Eviction Defense Project

“I think if you’re part of a community, there are things from the community that you take,” said Khatija Choudhry. That obligates you to give back to the community, by her lights.

In her first year in law school, Choudhry, from Rochester, Minn., is enthusiastic about Marquette Law School and Milwaukee. And the ways she has been giving back include her participation in a new pro bono effort, the Eviction Defense Project.

Evictions became a hotter subject nationwide, and particularly in Milwaukee, following the release in early 2016 of *Evicted: Poverty and Profit in the American City*, by Matthew Desmond. The book focuses on Milwaukee and was named by the *New York Times* as one of the 10 best books of 2016. (The first event upon publication of the book was an “On the Issues with Mike Gousha” program with Desmond at Eckstein Hall.)

Raphael Ramos, L’08, an attorney with Legal Action of Wisconsin, said the Eviction Defense Project was in the works before the book was released, but the book spurred interest in offering legal assistance to people facing eviction. In the book, Desmond described how people with little or no knowledge of the system were overwhelmed by the hubbub in the small claims court in the Milwaukee County Courthouse when multiple eviction actions are underway at the same time.

A grant from the Legal Services Corp., created by Congress, is supporting a two-year effort to help some of the people who have received eviction notices. Legal Action is leading the effort, with Ramos as the coordinator. Pro bono attorneys, many from the Quarles & Brady law firm, and a dozen Marquette law students are among the volunteers who are helping.

Begun in January, the project offers low-income people facing eviction the opportunity to meet with an attorney—in many cases with a law student assisting—ahead of their court appearance. Ramos said that while most are indisputably behind on their rent, in some cases proper procedures have not been followed and facts are in dispute. In other cases, there are circumstances that make negotiating an agreement, with a lawyer’s help, a better route for both the landlord and the tenant than an eviction.



Khatija Choudhry and Jillian Lukens

There can be defenses to an eviction, Ramos said. “Each case is surprisingly unique. There are often opportunities to work with the tenant and to try to work with the landlord to see if there is some amenable solution that both parties can reach.” A goal is to do what can be done to stabilize peoples’ lives.

Angela Schultz, the Law School’s assistant dean for public service, said students were impassioned about getting involved in the eviction project. The dozen volunteer positions for the spring semester filled quickly. Schultz hopes the program will grow.

Jillian Lukens, a 1L from Bucks County, Pa., expected that taking part would be both a way to help people and a good learning experience. That was proving to be true. “I like being able to see what they’re teaching us in its application,” she said. “You can see the immediate effect” on the people facing eviction when they enter the small claims court better able to understand what is going on. The work, she said, “grounds you in why you’re in law school.” ■



## Yale Historian Excavates the Roots of the Holocaust

People think that they understand the Holocaust. Not as Timothy Snyder sees it: His goal is to provide much deeper insight into the roots of the killing of six million Jews and millions of others in the World War II era. It's a provocative exploration, one that has helped make Snyder a prominent scholar of the events of that time.

Snyder is the Levin Professor of History at Yale University; his writings include two recent acclaimed books about the Holocaust and the political mass murder by the Soviet and Nazi regimes between 1933 and 1945. He described his purposes and conclusions during an "On the Issues with Mike Gousha" program at Eckstein Hall on October 19, 2016.

"[M]y whole point in this discussion, for which I'm very grateful," Snyder said, "is that the Holocaust is something that we not only have to understand but that we can understand because some elements of it just aren't that far away, either from the world we know or from the world as we unfortunately might be about to know."

Snyder said most people's idea of the Holocaust focuses on the Auschwitz concentration camp. "We have an image of the icon of the railway tracks, which lead from a place we can't see to another place that we can't see. The odd thing about this image is that—and this is sad to say, and brace yourselves a little bit—but the sad thing about this image is that it minimizes the Holocaust. It separates us from the Holocaust. What we don't see is how the Holocaust could actually begin. Auschwitz was the end."

Snyder's perspective includes aspects such as Nazi Germany's goal of seizing control of agriculturally fertile parts of eastern Europe to assure its food supply; Adolf Hitler's extreme view of racial struggle; and the importance of the absence of government control in places



Timothy Snyder speaks with Mike Gousha in Eckstein Hall.

where mass killing was the most widespread.

"The fertile soil of Ukraine was the central goal, the main goal, of Hitler's war in the east," Snyder said. "[Hitler's] view of the world was this: that the planet had only so much fertile soil, only so many resources. It was a finite space. That's what he says on the first page of *Mein Kampf*. It's a finite space."

Snyder described Hitler's belief as follows: "[T]here's no such thing as humanity. We are members of races, and the destiny of races is to struggle for that land. The same way that he thinks species struggle in the natural order, races must struggle. That is what we do. And if we are doing anything else, if we're having a civilized conversation, if we have political institutions, if we have walls, if we believe in human solidarity, if we believe in Catholic

*“I think the Holocaust was such a rupture, such a central event of the century, that if . . . learning about it doesn't shake up the way we see things, then we haven't really learned about it.”*

— Professor Timothy Snyder

mercy, if we believe in any idea of reciprocity, which allows me to see you and you to see me as human beings, that idea, says Hitler, is Jewish.”

Many people associate the mass killings of the Holocaust with intensely authoritarian government. Snyder said the opposite is the case: The killing was at its worst in places where there was no functioning government. “There’s a whole body of social science which says it’s not strong states that kill people,” Snyder said. “It’s generally states that are falling apart. It’s generally conditions of state failure where ethnic cleansing takes place. And what’s . . . special about Nazi Germany is that it was a state that cultivated [an] institution, the SS, to destroy other states and then take advantage of the anarchy.”

He said one of the important lessons of the Holocaust is that “people who are . . . very much like us can kill other people very much like us for no particular reason in very, very large numbers.” He added, “[T]his was face-to-face, this was intimate . . . , this was brutal.”

Snyder elaborated: “To be very clear, anti-Semitism is a bad thing. We should condemn it. It was central to Hitler’s worldview. You can’t imagine the war without anti-Semitism. You can’t imagine the Holocaust without anti-Semitism. It’s a central part. But it’s not the only thing that happens. And the idea which we like or we’re drawn to, that the Holocaust was caused by anti-Semitism and that one

can line those things up in a simple way, that is far, far too optimistic.

“The reason why it’s too optimistic in contemporary terms is that we think, okay, so long as I’m not an anti-Semite and you’re not an anti-Semite, then everything is all right. Everything is not all right because views like this can change very quickly.”

Snyder told Gousha, “When I look at all of this, Mike, . . . the point is not that the Holocaust as such will repeat itself in the same form. The point is that if we understand the causes of the Holocaust as causes, we can see where one or two of these things line up” in some situations in the world today.

Snyder told the audience, “I think the Holocaust was such a rupture, such a central event of the century, that if . . . learning about it doesn’t shake up the way we see things, then we haven’t really learned about it.”

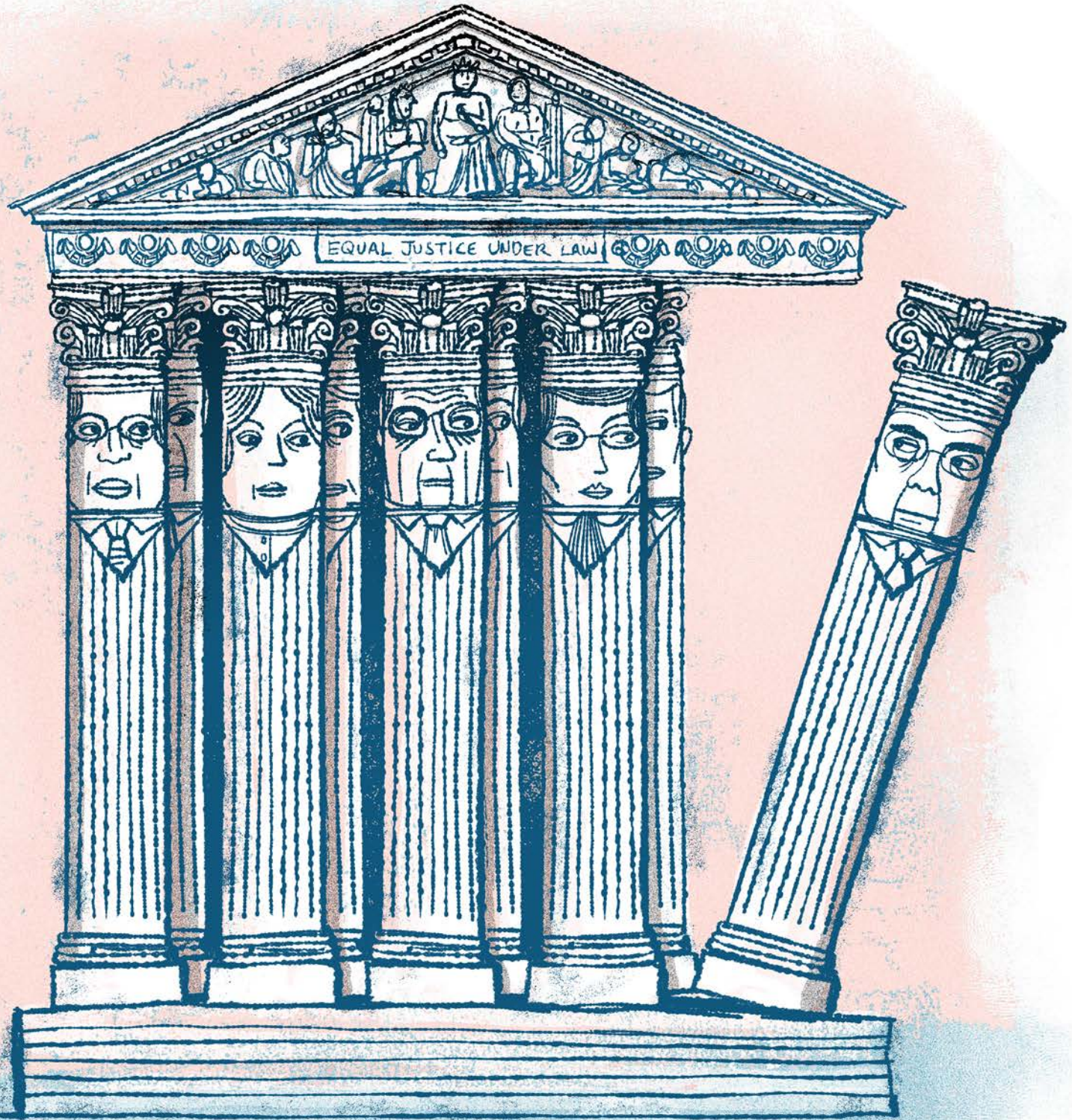
Snyder’s books include *Bloodlands: Europe Between Hitler and Stalin* and *Black Earth: The Holocaust as History and Warning*. The hour-long program with Gousha, attended by an overflow crowd of more than 250 people in Eckstein Hall’s Appellate Courtroom, can be viewed on the websites of both the Law School and Milwaukee Public Television, which broadcast the conversation. ■



Victims' suitcases from the Nazis' Auschwitz concentration camp in Oswiecim, Poland, in operation between May 1940 and January 1945.

Photo by Santi Rodriguez/  
Depostiphotos.com





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# HOW LONG

## Should Supreme Court Justices Serve?

### BALANCING JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

BY HON. ALBERT DIAZ

I appreciate the return visit to Marquette Law School and the opportunity to give the E. Harold Hallows Lecture. I hope that my remarks will be worthy of the man for whom this lecture is named.

Permit me to begin with a disclaimer, a note of thanks, and a recollection. The disclaimer is that I offer today my personal thoughts on the topic of life tenure on the bench; I'm fairly confident that they do not reflect the views of many of my judicial colleagues, perhaps to understate the point. The thanks go to two people: One is my former law clerk, Michael McIntosh, whose research assistance was invaluable in my preparing this lecture. The other person you can see—at least his picture: Over there on the courtroom wall, we have the smiling face of my good friend and colleague, Jim Wynn, a Marquette lawyer. I have him to thank (or blame) for my being here tonight.

For the recollection: When I accepted the invitation in 2015 to give this lecture, we had, of course, no way of foretelling the passing of Justice Antonin Scalia, just a few weeks ago, and the firestorm that has erupted over the choice of his successor. I will leave it to others to ruminate over that and concerning the rich legacy that is Justice Scalia's jurisprudence. Indeed, the latter subject would provide ample material for a law school seminar, such has been the influence that Justice Scalia has had on how judges perform their craft. I take here a moment to share a more personal reflection on the man. ▶▶



Albert Diaz

**Albert Diaz** is a judge of the U.S. Court of Appeals for the Fourth Circuit. His previous judicial experience includes service as a state trial judge in North Carolina and as an appellate judge on the Navy-Marine Corps Court of Criminal Appeals. Judge Diaz is a native of Brooklyn and holds degrees from the University of Pennsylvania (B.S. in economics), New York University (J.D.), and Boston University (M.S.B.A.). This is a lightly edited version of Judge Diaz's 2016 E. Harold Hallows Lecture at Marquette University Law School.

I had the good fortune to spend time with Justice Scalia in several social settings. As so many have confirmed since his passing, he could not have been more kind and gracious in those instances. In April 2004, I was a North Carolina state trial judge and Marine reservist invited to attend a dinner, at Camp Lejeune, for

**The question, then, is how to maximize the positive attributes of judicial independence, and in particular how best to do that on the front end, when society plucks from what President John Adams described as the “lot of humanity” those thought to be best suited for the work.**

Marine lawyers. Justice Scalia was the guest of the honor—and he took to that task with relish. His remarks were filled with his usual biting wit, but what was clear was the genuine respect and admiration that he had for the young lawyers in uniform. Perhaps that is not surprising, given that one of the justice’s sons is an officer in the United States Army. Justice Scalia stayed until the last autograph was signed and the last picture taken, before repairing to the officers’ club to spend more time with the Marines over cigars and Scotch. That night was, without question, a highlight for many of those

young lawyers and showed a side of the justice that few knew. The nation rightly mourns this giant of the law. He will be missed.

### **Striking a Balance Between Independence and Accountability**

Preparing my remarks put a serious dent in my TV binge-watching time. Among the shows that proved most distracting recently is the Netflix documentary series entitled *Making a Murderer*. Given that it recounts the protracted involvement of one Steven Avery with the Wisconsin judicial system, I imagine that most if not all of you either have seen it or at any rate know about the 2007 headline-grabbing case on which the documentary is based.

Why do I mention it? Well, in many ways, the high-stakes drama that was the Steven Avery trial brings to the forefront the theme of my talk tonight: specifically,

how best to balance the tension between judicial independence and judicial accountability. Wisconsin, of course, elects its judges. My home state of North Carolina does the same, save for a small group of so-called special superior court judges appointed by the governor.

Manitowoc County Circuit Court Judge Patrick Willis had been on the bench for 10 years when he drew the Steven Avery murder case. He was appointed in 1997, winning election to a six-year term the following year. If you’ve seen the television series, you know that Judge Willis made several tough and controversial (at least in the minds of some) rulings during the trial, from refusing to allow the defense to test a vial of Avery’s blood that the defense claimed had been tampered with, to allowing the admission of expert testimony favorable to the prosecution on the chemical attributes of blood samples found in the victim’s car. And Judge Willis presided over this blockbuster case against the backdrop of a system where the electorate would be poised to assess his work three years later. He won reelection in 2010 without opposition and retired two years later.

Contrast that with the environment in which my colleagues and I on the federal bench perform our work. Once nominated and confirmed, we keep our office “during good Behaviour”—effectively for life. This the Framers of the Constitution thought necessary to ensure judicial independence. More about the Framers later.

For many, however, the independence granted federal judges through life tenure is anathema, in that it purportedly immunizes the bench from criticism or rebuke. In my experience, however, nothing could be further from the truth. As Judge Willis can surely attest, the art of judging is not for the faint of heart. In every case, and after every decision, the winning party believes you to be the second coming of Oliver Wendell Holmes, Jr., Learned Hand, and Thurgood Marshall all rolled into one, while the loser is certain that your judicial acumen compares unfavorably with that of Judge Judy.

Assessed fairly, however, “judicial independence” means nothing more than a judge’s freedom to decide, with a minimum of outside influence or bias. My qualification here reflects the reality that judging is a human endeavor, and therefore the results, despite our best efforts, are not always free from taint.

The question, then, is how to maximize the positive attributes of judicial independence, and in particular how best to do that on the front end, when society plucks from what President John Adams described as the “lot of humanity” those thought to be best suited for the work.



Having campaigned (unsuccessfully) for judicial office in North Carolina, I see several difficulties with electing judges: The first is a practical one for those (like me as a state judge) who are first appointed and then must run. As the incumbent, and assuming that you take seriously your oath, the campaign must always cede to the court's docket. Needless to say, a rookie judge has much to learn, but for the judge who has to stand before the voters, mastering his or her craft runs headlong into doing all that must be done to keep the job.

But the problems go far beyond that. Forcing judges to act like politicians is, it seems to me, patently inconsistent with the role of the judicial branch. Judges, at least those who remain true to their oaths, don't have a constituency, nor do they make campaign promises—at least not any that mean anything. Instead, on the campaign trail, they often resort to banalities, promising to be “fair and impartial,” as if that required some superhuman effort and concentration. Moreover, in my experience, judicial races are often nothing more than white noise for most voters, particularly during presidential or gubernatorial election cycles when the judges are relegated to the bottom of the ballot.

To make matters worse, what little traction judicial candidates gain is almost always a function of the cash they can pry from the bar, largely from the very same lawyers and parties who appear before them. And the amount of cash that is being funneled into judicial races (particularly at the top of the ticket) is staggering. In 2015, candidates and independent groups spent more than \$16.5 million to fill three vacancies on the Pennsylvania Supreme Court, topping the previous record of \$15 million spent in Illinois in 2004. To say that this system of selecting judges undermines the public's perception of the courts as fair and impartial is, in my view, an understatement.

Ironically, despite the public's insistence on electing its judges, most of our fellow citizens are woefully uninformed when it comes to that task. That ignorance is due in part to the limited information typically available on judicial candidates, but it is also a reflection of how little most Americans know or understand about our form of government. According to a 2014 survey, only 36 percent of Americans can name the three branches of our federal government. And two-thirds of Americans cannot name a single Supreme Court justice. This dearth of knowledge has potential for great mischief.

In short, at least when it comes to judicial races, an uninformed electorate is the norm. Or it is until a Steven

Avery sort of case comes along, at which point the election often devolves into a referendum on the judge's handling of that one case.

Now I am not so naïve as to believe that appointing judges is a panacea for what ails us. Indeed, such a process can rightly be criticized as trading one set of politics for another, albeit more-focused, political tussle. Particularly troubling is the view that an appointed system tends to narrow the field of candidates and may limit opportunities for minorities and women or those who have devoted their professional lives to public service. If judicial independence means anything, it must mean that our bench should reflect the voices and experiences of our diverse society.

Of course, fixing on the manner of selecting a judge is but half of the puzzle. The related, equally important question is just how long is too long for a judge to hold office. I turn to that now.

### Looking Back at the Framers' Debate

Some of you may have heard that we have an election coming up. President Barack Obama is set to end his second term, and another man (or woman) will soon take the oath of office as our chief executive.

Many of those running for president have taken direct aim at what they view as federal courts run amok, deciding controversial issues in defiance of the will of the people. And it is certainly true that the federal courts, and the Supreme Court in particular, have been thrust into some of the most contentious issues of the day. Senator Ted Cruz has proposed a constitutional amendment that would require Supreme Court justices to be subject to retention elections every eight years. Both Hillary Clinton and Senator Bernie Sanders have vowed to appoint justices committed to overturning what they consider to be the abomination that is *Citizens United*. And before they bowed out of the presidential race, Mike Huckabee and Rick Santorum suggested that Supreme Court rulings were not necessarily binding.

Despite the charged rhetoric, the federal judiciary, which Alexander Hamilton characterized as the “least dangerous branch” of government, will go about its business largely immune to the frenzy that has become our election cycle. And that, of course, is precisely what the Founders intended.

In declaring our nation's independence and announcing certain “self-evident” truths, Thomas Jefferson delineated a host of grievances that the colonies had against the British crown: Among them were (1) that >>





20



the king was “obstruct[ing] the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers,” and (2) that he “made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”

Those concerns framed the debate as to the scope of judicial power in the new government being sketched in Philadelphia during the long, hot summer of 1787. As the late U.S. Circuit Judge Irving Kaufman aptly noted in a 1978 speech to the New York City Bar Association, “Our Founding Fathers were determined that the judiciary of the new republic would not be so feeble.” Perhaps that is why the convention accepted with relatively little debate the provisions for judicial service during good behavior and for fixed salaries. The merits of those provisions, however, became the subject of animated discussion during the debates leading to ratification of the Constitution in the states.

In the Framers’ most detailed examination of the reasons for providing life tenure to federal judges, Alexander Hamilton (now taking a star turn on Broadway) explained its virtues in *The Federalist* No. 78:

The standard of good behavior for the continuance in office of [a judge], is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

Beyond the soaring rhetoric, Hamilton’s defense of life tenure for federal judges included some practical considerations. He noted that the nature of judicial service—and, in particular, the need for “long and laborious study” to acquire competence in the law (the students here this evening can attest to that)—means that “but few [people] will have sufficient skill in the laws to qualify them for the stations of judge,” and a “still smaller [number] who unite the requisite integrity with the requisite knowledge.” A temporary duration in office, said Hamilton, would provide little incentive for these select few to quit their practices for a seat on the bench, but would instead “throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.”

This line of reasoning echoed comments made by Benjamin Franklin at the constitutional convention.

As the Framers grappled with whether judicial appointment should be by the legislature as a whole, the Senate alone, or the executive, Franklin declared this to be “a point of great moment.” He then somewhat tongue-in-cheek twice commended a mode of appointment practiced in Scotland whereby judicial nominations emanated from the bar, which according to Franklin invariably selected “the ablest of the profession in order to get rid of him,” so that the lawyers could then divide up the nominee’s practice among themselves.

But Hamilton’s defense of the judiciary went far beyond the practical. He contended that “the judiciary is beyond comparison the weakest of the three departments of power” and thus required special care (including life tenure) to defend against the legislature and the executive.

Moreover, said Hamilton, the comparative weakness of the judiciary meant that the people had little to fear from the courts.

Hamilton also argued that judicial independence was needed as a check on the legislature, emphasizing that “[l]imitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose

duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.” Life tenure, said Hamilton, was crucial to fortify the judges in taking on this formidable task.

In addition to preventing the legislature from exceeding its limited powers under the Constitution in the abstract, Hamilton argued that life tenure was needed also to protect the rights of individuals from misguided and oppressive laws. In Hamilton’s view, the legislature’s awareness that an independent judiciary acted as a check on its powers would act as a deterrent against a legislature run amok.

Tying all of these threads together, Hamilton offered this powerful defense of life tenure for federal judges:

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of ▶▶

**Of course, fixing on the manner of selecting a judge is but half of the puzzle. The related, equally important question is just how long is too long for a judge to hold office.**



justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

### Jefferson: Life Tenure Is “A Very Dangerous Doctrine”

Of course, not everyone in Philadelphia favored life tenure. Although the view that the judiciary should be granted independent authority and filled by judges with life tenure prevailed in the framing, a vocal minority objected to what it viewed as unchecked power in the hands of an unelected—and unaccountable—few.

As but one example, Virginian George Mason, who refused to sign the proposed constitution, voiced concern that the power of a national judiciary would be such as to suppress and destroy the state courts, making

justice unattainable and enabling the rich to oppress and ruin the poor.

Anti-Federalists were not opposed to life tenure in the abstract. Rather, most agreed that life tenure and a salary not subject to diminution were necessary and appropriate means to ensure judicial independence. Of greater concern was that the Constitution did not provide a mechanism for ensuring judicial accountability.

These concerns were most prominently spelled out in two essays by “Brutus” (likely Robert Yates of New York), which now are considered part of the “Anti-Federalist Papers.” Brutus first stressed the novelty of an independent and powerful central judiciary, noting that “those who are to be vested with [the judicial power] are to be placed in a situation altogether unprecedented in a free country.” The judges would be “*independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven.”

Brutus argued that the unchecked and substantial authority granted the judiciary by the Constitution was only the beginning—given that courts, in his view, naturally would broadly interpret the Constitution to expand the reach of the federal government. At bottom, Brutus “question[ed] whether the world ever saw, in any



period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible.”

Brutus’s proposed solution for the constitutional problem was to create an institutional body that could hold the judiciary accountable. He conceded that it would be improper to elect the judges because that would compromise their ability to remain firm and steady in their decisions. Brutus proposed instead that the decisions of the judicial branch should be reviewable by representatives of the people.

Even after the Constitution—with its provision of life tenure to the judges in a judiciary with markedly enhanced authority—was ratified, opponents of life tenure continued the fight. Four times between 1789 and 1809, Congress considered amendments to limit the tenure of federal judges. Three of these amendments called for term limits, and the fourth sought to impose a mandatory retirement age of 65.

And some who supported life tenure during the ratification debate later rejected it. The most prominent of these was Thomas Jefferson, who became a fierce opponent of the concept following the Supreme Court’s decision in *Marbury v. Madison* (1803). Jefferson wrote in 1820 that “to consider the judges as the ultimate arbiters of all constitutional questions” was “a very dangerous doctrine” and “one which would place us under the despotism of an oligarchy.” This was particularly troubling, said Jefferson: Given that impeachment was the only means of removal, the judges “consider themselves secure for life; they skulk from responsibility to public opinion.”

In colorful prose, Jefferson proposed term limits as the answer to this supposed constitutional defect:

Before the canker is become inveterate, before its venom has reached so much of the body politic as to get beyond control, remedy should be applied. Let the future appointments of judges be for four or six years, and renewable by the President and the Senate. This will bring their conduct, at regular periods, under revision and probation, and may keep them in equipoise between the general and special governments.

One can only imagine what Jefferson would think today of the power of the federal judiciary (particularly the Supreme Court) and the tenures of those entrusted with it. In surveying this scene, Jefferson might well observe that our nation is alone “among the constitutional courts of western democracies” (in the words of Vicki Jackson and Mark Tushnet), and alone

save for one state (Rhode Island), in providing for unfettered life tenure for members of the highest courts. He might also note that the first 10 justices served on average only eight years, perhaps in part because they were then required to ride circuit on horseback. The 2016 presidential candidates may have made a number of suggestions regarding the judiciary, but thankfully I am unaware of any candidate’s proposing to issue each justice or judge a horse upon commissioning.

Finally, Jefferson would no doubt mention that the average age of the country’s first 10 Supreme Court justices to leave the bench was just shy of 60; and he would likely contrast that with the average of 80 years for the last 10 justices to have left the bench. Indeed, before 1970, as Stuart Taylor has noted, the average tenure of an individual justice was about 15 years. But justices who have left since then have averaged over 25 years on the bench. I have little reason to doubt that extended tenure is a phenomenon that stretches across the district and circuit court benches, thus fully supporting Judge Richard Posner’s observation that “[t]he judiciary is the nation’s premier geriatric occupation.”

There are a number of reasons why this is so. First, life expectancy for all Americans (including judges) has increased substantially since the founding. The Supreme Court’s workload also lends itself to longevity, given that (unlike the district and circuit courts) justices have virtually unfettered control over their docket. In recent years, the Court has decided some 80 cases a term (from about 7,000 to 8,000 petitions submitted), or approximately nine majority opinions per justice. Compare that with 140 to 150 cases per term, as often decided by the Warren Court—even at a time, by the way, when justices counted on the help of but two law clerks instead of four. And, as that last observation suggests, the Court has help from some of the brightest young minds that law schools can offer, allowing even an aging justice to stay current with the work. ▶▶

**... Jefferson would no doubt mention that the average age of the country’s first 10 Supreme Court justices to leave the bench was just shy of 60; and he would likely contrast that with the average of 80 years for the last 10 justices to have left the bench.**

Finally, there is no gainsaying that the Court plays an outsized role in the functioning of our republic. In the last 20 years alone, it is scarcely too much to say that justices have chosen a president, substantially curbed the power of that president's authority, dramatically defined the reach (and limits) of Congress's power to legislate, and told Americans whom they may marry, when and how they may speak, and what they may do to defend themselves in their homes. Justice Ginsburg, aka "Notorious RBG," is the subject of a major motion picture of her life, and Justice Sotomayor, aka "Sonia from the Bronx," has written a memoir that is a runaway best seller and was the first justice to officiate over the New Year's Eve ball drop in Times Square. Heady stuff, indeed—and little wonder then that one might be tempted to stay as long as humanly possible.

Many scholars have raised concerns about this extended tenure on the federal bench. Some scholars argue that the appointment process acts as a check on

**Some scholars argue that the appointment process acts as a check on the power of the Court. But even they concede that the lengthening tenure of the justices dilutes its efficacy.**

the power of the Court. But even they concede that the lengthening tenure of the justices dilutes its efficacy. To highlight one extreme example in the modern era, President Richard Nixon appointed four justices in his five years as president; President Jimmy Carter appointed none in his single term; and President Ronald Reagan followed with four appointments. And when vacancies do arise, we have been witness to

pitched confirmation battles that have become routine in our political culture, certainly when it comes to Supreme Court nominees, but now increasingly enveloping lower court nominees as well. Given the stakes, there are now substantial incentives and pressures for a president to favor youth on the federal bench as a means of ensuring a legacy far beyond the president's time in office.

Other scholars argue that the comfort of life tenure gives free rein to a judge hell-bent on reigning as a philosopher king rather than applying the law. Of course, where that line is drawn is often a fine one, but there is little question that many justices have "evolved"

in the job far beyond what the nominating president and confirming senate contemplated.

### **Staying on the Bench into "Mental Decrepitude"**

Another not insignificant concern is the judge who hangs on well past the time when he can competently serve. In an invaluable article written in 2000 for the *University of Chicago Law Review*, Professor David Garrow provides a number of examples of what he describes as "mental decrepitude" on the bench that has affected the Supreme Court and its work. According to Garrow, at least two justices (Justice Frank Murphy and Chief Justice William Rehnquist) became dependent upon prescription medications while on the bench. One justice (Justice Charles Evans Whittaker) suffered from an anxiety and depression so severe as to lead him to contemplate suicide.

As Garrow recounts, the problem of mental or physical decrepitude plagued the original members of the Court. William Cushing was appointed to the Court in 1789 and served until his death in 1810. Although Cushing was nominated and confirmed as chief justice in 1796, he refused the promotion on grounds of ill health. According to one senator, Cushing's health issues included mental impairment, but he nonetheless continued to serve on the Court primarily because he was dependent on the salary (this was before there was any provision in the law for judicial retirement at full pay and senior status).

Justice Henry Baldwin of Pennsylvania was appointed to the Court in 1830. Hospitalized for the entire 1833 term for what was described, Garrow recounts, as "incurable lunacy," Baldwin nonetheless remained on the bench for 11 more years. According to the Supreme Court's reporter of decisions at the time, most courtroom observers of the Court believed that Baldwin's mind was "out of order."

Garrow also describes the events leading up to the January 1932 retirement of Justice Oliver Wendell Holmes, who by then was almost 91 years old. Universally admired for his eloquence and brilliance on the Court throughout his 31-year tenure, Holmes often recounted to friends about "the mistake that I have seen it to be in others to remain on the bench after seventy," but he of course served well beyond his threescore years and ten. According to Garrow, by 1931, Holmes "found it harder and harder to write" and he "was often visibly drowsy on the bench." By 1932, a majority of the



justices persuaded Chief Justice Charles Evans Hughes to talk to their colleague in the hope of avoiding embarrassment to Holmes personally and criticism of the Court. To his credit, Holmes accepted the advice of his colleagues and resigned.

Sad to say, others have not gone as gracefully. On New Year's Eve 1974, 76-year-old Justice William O. Douglas, who had been appointed to the Court by President Franklin Roosevelt at the age of 40, suffered a stroke from which he never fully recovered. For the next two years, recounts Garrow, the Court struggled to complete its work in the face of a justice clearly unable to shoulder the load but unwilling to step down. A *New York Times* account of Justice Douglas's return to the Court, in March 1975, described him as "a frail and fragile old man, his voice thin and uncertain, his left arm hanging useless at his side, most of the once remarkable vigor . . . drained away."

Observers remarked that "Douglas's mental condition [had] deteriorated" and noted that he "addressed people at the Court by their wrong names, often uttered non-sequiturs in conversation or simply stopped speaking altogether." The *Times* reported that, given Justice Douglas's weakened state, the other justices privately agreed to hand down no cases in which Douglas's vote would determine the outcome; this was later said to include even votes on petitions for certiorari.

Douglas returned to the Court for the October 1975 term, displaying moments of "lucidity and energy followed by near incoherence and sleep." Given the circumstances, Garrow writes that the justices kept to their unwritten agreement regarding the votes of Justice Douglas. Douglas was again hospitalized at the end of October, before announcing his retirement on November 12, 1975. Even then, Garrow recounts, Justice Douglas continued reporting to work and "repeatedly tried to participate in the Court's consideration of pending cases."

Garrow provides many other troubling examples of justices who stayed too long, and his piece, of course, does not begin to describe the episodes of mental decrepitude that have no doubt plagued the lower courts. Fortunately, since 1980, the Judicial Conduct and Disability Act has provided a process by which any person can file a complaint alleging that a federal judge has become, by virtue of disability, "unable to discharge all the duties" of the judicial office. But given the life tenure afforded judges, the remedies available to a circuit judicial council making a finding of disability are quite limited. It can order the temporary suspension of case assignments, issue a public or private censure or

reprimand, ask a judge to retire voluntarily, or certify a judge's disability so that a vacancy is created. The judicial council may not, however, order removal from office of any judge appointed to hold office during good behavior. An even more glaring problem is that the act does not apply to Supreme Court justices, who are effectively left to their own devices with respect to disability.

### **An Idea to Consider: Long Tenure but Limited**

So, what to do? Any proposed change, I submit, must safeguard the judicial independence that life tenure offers federal judges and which is a glaring omission in many of our state courts. In that regard, I note that, in a piece published in the *Marquette Lawyer* last fall, your dean highlighted this very problem when he endorsed a solution for Wisconsin's high court: one 16-year nonrenewable term, albeit via election.

That solution is not far removed from the operation of a court in front of which I practiced before joining the bench and on which I recently had the honor of sitting by designation. Before entering private practice, I was a military lawyer. I spent the bulk of my time handling criminal appeals, appearing frequently before the U.S. Court of Appeals for the Armed Forces.

Not many people know about the Court of Appeals for the Armed Forces, but it is the military's highest appellate court, created under Article I of the U.S. Constitution to hear appeals of service members convicted of crimes at courts-martial. The court's judges number five civilian members, all of whom are nominated by the president and confirmed by the Senate to one 15-year term. At the end of the 15 years, each judge is politely shown the door, albeit with a full pension and the right to continue serving the court as a senior judge.

In my view, this system (or something like it) would promote the requisite level of judicial independence on the federal bench. It would leave judges free to decide cases solely on the facts and the law, with no concern about being recalled (except for bad behavior) or incurring disfavor with the parties and lawyers who appear before them. At the same time, there is a light at the end of the tunnel for each appointee, and (for what it's worth) Court of Appeals for the Armed Forces judges have historically left with most of their wits about them.

Fortunately, there are many scholars far brighter than I who have given a great deal of thought to this subject. To give one example, Laurence Silberman, longtime judge of the D.C. Circuit, has proposed a system ▶▶

whereby circuit judges would be selected to sit on the Supreme Court by designation for a term of five years and then would automatically revert to the federal courts of appeals for life. My own sense is that five years is not quite long enough. It takes time to get used to the work of a justice—someone would have barely obtained the requisite confidence and comfort level by the time of the term’s being up. And a too-short term runs the very real risk of ever-shifting sands of constitutional interpretation, which would not benefit our republic.

**Replacing justices at fixed 18-year intervals would also provide fresh intellectual thought and energy to the very difficult constitutional questions that come before the Court . . . .**

A proposal that I think attractive was outlined in great detail by Professors Steven Calabresi and James Lindgren in a 2006 piece published in the *Harvard Journal of Law & Public Policy*. Their term-limit proposal focuses exclusively on the Supreme Court. While the concept of fixed terms may well have merit beyond the Court, implementing such a regime across the federal judiciary might be too much to chew in one sitting.

Professors Calabresi and Lindgren propose fixing the current number of justices on the Court at nine and instituting “a system of staggered, eighteen-year term limits for Supreme Court Justices,” such that “a vacancy would occur on the Court every two years.” In effect then, every president would get to appoint at least two justices, and every two-term president would get four appointments. Although the professors do not suggest it, I believe that, to minimize the impact of recurring vacancies on the effective functioning of the Court, the Senate would have to agree to severely curtail or eliminate outright the filibuster of Supreme Court nominees—vacancies would increase and so there would be a need promptly to fill them. Alternatively, the system could allow for so-called senior justices (i.e., those who have completed their term of office) to sit by designation on the Court (as now happens in the circuit courts) until a vacancy is filled.

As the professors note, such a system, though not completely eliminating the partisan battles that would continue to erupt over nominees, would dramatically lower the temperature in the room, if for no other reason than that there would generally be a predictability as to the timing of such fights. There would also be some protection (albeit no absolute guarantee) against the “mental decrepitude” concern that I discussed earlier. On the other hand, it would also increase the odds of some of our most brilliant and seasoned legal minds serving on the Supreme Court. Each of us, I suspect, could name a number of outstanding jurists, lawyers, and—yes—academics whose primary disqualifier for service on the Court is that they are a bit too long in the tooth, at least under current standards. A fixed term would provide a pathway for these individuals to lend their talents in service of the nation.

Replacing justices at fixed 18-year intervals would also provide fresh intellectual thought and energy to the very difficult constitutional questions that come before the Court, while allowing for a sufficiently long term so as to guard against the frequent whipsawing of the Court’s jurisprudence.

That said, I recognize, as Dean Kearney observed when I mentioned my topic to him some months ago, that the odds of enacting such a revolutionary change are difficult, at best. I am inclined to believe that an amendment to the Constitution would be in order (although some scholars believe that Congress may have the statutory power to change the contours of life tenure). The Framers went to great lengths to ensure that their magisterial work would not be tinkered with lightly. I happen to agree with the Framers’ wisdom on that score, but it does present a substantial hurdle to reform.

Nonetheless, the presidential campaign has shown us that the American people (and the candidates) are in a foul mood and are eager for change. Whether that anger results in a push for reform of what some now believe has morphed into the “most powerful” branch of government remains to be seen. I note, however, that just this past month, the *Associated Press* and the editorial board of the *Washington Post* have published pieces calling for term limits on the Supreme Court.

My advice: Stay tuned.

Thank you very much for your attention. ■







# Maintaining Public Trust in the Judiciary

## A Comment from Judge James Wynn on Judge Diaz's Hallows Lecture

In his Hallows Lecture, my colleague, Judge Albert Diaz, rightly identifies several important debates facing the judiciary today—the increasing politicization of the bench, the enduring need for judicial independence, and the interplay between those topics. Judge Diaz offers thoughtful commentary on how to improve the mechanisms through which we select state and federal judges—whether by election or appointment—and on the continuing debate regarding whether federal judges should be subjected to term limits. I take up several of Judge Diaz's points with an eye toward what I believe is, and must remain, the fundamental focus of these vibrant debates: the public's confidence and trust in the integrity of the judiciary.

As Judge Diaz notes, the judiciary has become increasingly politicized in recent years. Politicization is a threat to judicial independence, which contemplates a judiciary free from partisanship, political pressure, special interests, and popular will, and instead envisions courts guided by the will of the people as embodied in the United States Constitution and its amendments. Judge Diaz points out that a judge's commitment to deciding cases in accordance with the law of the land is undermined when our mechanisms for selecting judges require judges to act like politicians, whether by adhering unswervingly to a political party's ideals in the hopes of receiving an appointment or by making campaign promises to decide cases along lines designed to please the electorate.



James A. Wynn, Jr.

Politicization is particularly problematic in the context of elected judges. Today, races to fill judgeships look more and more like traditional, political elections. Judicial candidates make promises to be “tough on crime,” or forecast how they will decide cases involving controversial issues like abortion or the death penalty. Candidates' propensities to make these predictions are exacerbated by the exponential growth of judicial campaign contributions, particularly by special interest

## A Student and Teacher of American Progress

### In an Interview, Judge James Wynn Sees Progress—and How Gradual It Can Be

Judge James Wynn said recently that he was reading a book about Julius L. Chambers, a prominent lawyer in North Carolina and a leading figure in some of the major civil rights cases of a half century ago. Wynn described what happened when Chambers made his first appearance before the North Carolina Supreme Court: The chief justice left the courtroom. “He didn't want to hear a black man arguing a case,” Wynn said.

Wynn asked, “So how did we move from the '60s, where someone would have the audacity and the approval to do that—to walk out—to today, when it would be impeachable behavior?” Many younger people don't seem to realize how such behavior was common not so long ago, Wynn said. “The pendulum has moved so far from that kind of conduct.”



groups that may be future litigants in the judge's court. Judges who hope to win their races face increasing pressure to raise money—and lots of it—from these powerful interest groups, which in turn request promises to decide issues in accordance with the groups' positions. The fundamental problem with this phenomenon is not that judges' deliberations are actually influenced by these contributions, but that such contributions lead the public to *believe* that justice goes to the highest bidder. As Chief Justice John Roberts said at his confirmation hearing, "Judges are like umpires. Umpires don't make rules, they apply them." From that analogy, it is easy to glean that allowing judges to raise money from special interest groups is akin to permitting major league baseball players to contribute money to influence the selection of the umpires who call their games. Who could have confidence that an umpire selected due in no small part to a pitcher's financial contributions would accurately call that pitcher's balls and strikes? How can the public—when it sees judges making promises about their decisions before understanding the facts and the law, or accepting financial support from future litigants—trust in the system's integrity and have confidence in its outcomes?

But while the presence of politics in judicial elections seems evident, choosing to appoint judges rather than elect them does not end politicization—it simply changes the type of politics involved. After all, every judge is "elected" by some influence of politics, whether directly

by the public's choice in the voting booth or indirectly through appointment by elected officials. In particular, special interest groups that urge judges to forecast how they will rule on certain issues, in exchange for endorsements, lobbying efforts, and favorable press, increasingly wield persuasive power over the public. This influences elected officials' appointment decisions and renders even appointed judges subject to the judiciary's increasing politicization.

One proposal for enhancing the public's confidence in the integrity of the judiciary in the face of politicization is to impose judicial term limits. A primary concern with such a plan is, as Judge Diaz recognizes, that judges' terms will expire just as they hit their stride, creating the risk that the public will be deprived of judges who are experienced and efficient in administering justice. Methods for combating this effect have consequences ▶▶

**The fundamental problem with this phenomenon is not that judges' deliberations are actually influenced by these [campaign] contributions, but that such contributions lead the public to *believe* that justice goes to the highest bidder.**

Trailblazers have been at the heart of the sometimes slow, certainly incomplete, but undeniable progress on race-related issues. Wynn cited as personal role models people such as Chambers and other African-American lawyers of past decades, such as Henry Frye, who became the first African-American chief justice of the North Carolina Supreme Court, and Clifton Johnson, who was a judge on the North Carolina Court of Appeals.

Let us update the more general list by adding the name of James A. Wynn, Jr., L'79. Now a judge on the United States Court of Appeals for the Fourth Circuit, which encompasses Maryland, Virginia, West Virginia, North Carolina, and South Carolina, Wynn was born in the mid-1950s and grew up on a farm in the highly segregated world of eastern North Carolina. He has credited a close family that valued education for giving him the drive to go to college. In fact, he graduated from the University of North Carolina at Chapel Hill in three years, with a degree in journalism. He began to look for jobs in that field but decided to consider law school. ▶▶

of their own. For instance, in an attempt to fill the bench with experienced judges and sidestep the risk that judges' terms will expire as they reach peak understanding of the job, the judges who are selected to fill vacant judgeships increasingly may be older. Similarly, a one-term limit on judicial service

could dissuade elected officials or the electorate from choosing younger candidates, depriving the system—and the public—of judges with fresh ideas, diverse viewpoints, and varied backgrounds. An alternative to term limits would be to impose an age cap on judicial service or a mandatory retirement age. Setting such a cap at, for example, 80 years of age would give judges the freedom to make hard

decisions by insulating the judges, to some extent, from public opinion, while allowing the public to reap the benefits that arise from years of experience on the bench. Setting an age cap rather than a term limit could also minimize the risk that qualified, young jurists would be overlooked.

Judge Diaz also discusses whether life tenure during good behavior creates the risk that judges will remain on the bench longer than their intellectual acuity

permits. That could indeed be addressed to some extent by term limits or age caps. But the more plausible approach would be to develop independent competency committees to review internal complaints regarding a judge's continued ability to perform his or her duties, as some states have already implemented. Keeping the complaint process internal would allow fellow judges to express concerns about a colleague's continued ability to fulfill the duties of the bench without opening the door for displeased litigants or ideological opponents to submit frivolous complaints. Another reasonable proposal would be to include competency provisions in the Judicial Code of Conduct, requiring federal judges to self-report health issues that may affect their capacity to handle the court's demands.

I thank Judge Diaz for using his Hallows Lecture to add to the continuing dialogue on how to improve our judiciary. As we search for ways to promote and enhance the public's perception of the judiciary, we should remember the words of Justice Hugo Black from *Chambers v. Florida* (1940), reminding us that "courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement" and that judges serve as the "constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion." But we should also remember that the public's *perception* that their judges are fulfilling this calling matters most. ■

**... choosing to appoint judges rather than elect them does not end politicization—it simply changes the type of politics involved.**

### A Student and Teacher of American Progress (continued)

"It occurred to me that I did not want to go to a law school in North Carolina," he said. "And you say 'Why?' Because I felt I had been born there, reared and raised in North Carolina. I felt if I went to law school in North Carolina, I would never leave North Carolina."

Wynn can't say exactly what led him to take an interest in Marquette Law School. He considered other schools, but Marquette became his focus. It wasn't that he had come to visit Milwaukee to check things out. In fact, he had never been to the Midwest before arriving as an enrolled law student. And it wasn't a personal connection to Milwaukee or Marquette. Maybe it had something to do with his religious nature—he's a Baptist, but he liked Marquette's Catholic, Jesuit identity and underlying religious values.

Whatever led him to choose Marquette, Wynn said that it was one of the best decisions he has ever made. He credited Robert Boden, dean of the Law School then, with offering financial aid that made it possible for him to enroll. Boden also took a personal interest in Wynn that helped him adjust to ▶▶



living in a new place offering new challenges (such as winter). Wynn says that he found law school intimidating at first and didn't always find the course material engaging.

But he realized in later years that some of the coursework that didn't appeal to him was very valuable. And he developed lifelong friendships with fellow students and an enduring connection not only with the Law School but with Marquette as a whole. He serves currently on the university's board of trustees.

Marquette was the setting for another life-shaping decision for Wynn. A Navy recruiter visited the school, and Wynn was persuaded to enlist in the Judge Advocate General's Corps. He did four years of active duty, based in Norfolk, Va., and 26 years in the Navy Reserve. He retired from the Navy at the rank of captain. "I love the Navy," he said, and his service has meant a lot to him.

Wynn's law practice in Raleigh, N.C., led him to become a judge on the North Carolina Court of Appeals and also to serve as a justice of the North Carolina Supreme Court.

In 1999, President Bill Clinton nominated Wynn to the U.S. Court of Appeals for the Fourth Circuit. Wynn would have been the first African American to serve on that court. But Jesse Helms, who was then a senator from North Carolina, kept the nomination from going forward. In 2009, President Barack Obama nominated Wynn to the Fourth Circuit, and in 2010 he was confirmed. (In the interim, Roger L. Gregory had become the first African-American judge on the court.)

For all that has changed in courtrooms and in society as a whole since the Jim Crow days, Wynn is well aware of what hasn't changed and the continuing need for the law to be a force for equal treatment and opportunity for all. But his years as a judge have taught him the need to make change wisely and deliberately.

"The law is a powerful, powerful tool which, if used properly and used in a manner in which you're able to work within a system gradually, can effectuate positive change," he said.

Now in his 60s, Wynn said he has become more interested in "the philosophical side of life." He's more interested, both on the bench and in other settings, in motivating people to reflect on their lives and on what they should be doing, and he is less interested in telling people what to do.

Wynn said, "I increasingly look to this role as a judge and check myself. Am I being the best judge I can be?" He said judges need to keep asking themselves whether they are being fair and impartial and whether they are adhering to the law and precedent and not just pushing causes. "Ultimately, we have to work to have a judiciary that has the public's confidence." This means doing all that can be done so that "the integrity of the judiciary is the highest we can make it."

He applies similar standards to his involvement with Marquette. Are the Law School and the university doing all they can to fulfill their missions? To a major degree, his answers are "Yes." Said Wynn, "I love the way the Law School is going, and Dean Kearney has been wonderful for the school. I believe the overall quality of the Law School has risen tremendously over the years."

Wynn is glad to have introduced his colleague, Judge Albert Diaz, to Marquette Law School, and vice versa. His colleague's most recent trip to Marquette was to deliver the E. Harold Hallows Lecture, which provides the cover story of this issue of the *Marquette Lawyer* (with a comment by Judge Wynn beginning on page 20).

Wynn agreed to become a trustee of the university because "I have so many wonderful, positive feelings about Marquette." He has great praise for the initiatives launched by President Michael R. Lovell and his administration.

But that brings his thoughts back to justice and making communities better places. Marquette, Wynn says, needs to keep its focus not only on academics but also on the spiritual sides of all who are involved with the university, and it needs to do all it can to serve the Milwaukee area, particularly neighborhoods in the heart of Milwaukee. He knows that the university's leadership agrees on the need for striving to serve others better. ■

# INSIGHTS FROM INSIDE THE TECH WORLD

In talks at Marquette Law School, two cyber industry leaders share thoughts on the present and future

Edited excerpts from remarks by Brad Smith and Ted Ulyot at Marquette Law School begin on page 26 and page 32, respectively. ▶▶

Illustrations by Stephanie Dalton Cowan

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"We need to build a cloud that is trusted, responsible, and inclusive. And every one of these areas involves new challenges and new changes for important aspects of the law, including intellectual property."

**Brad Smith**, president and chief legal officer, Microsoft



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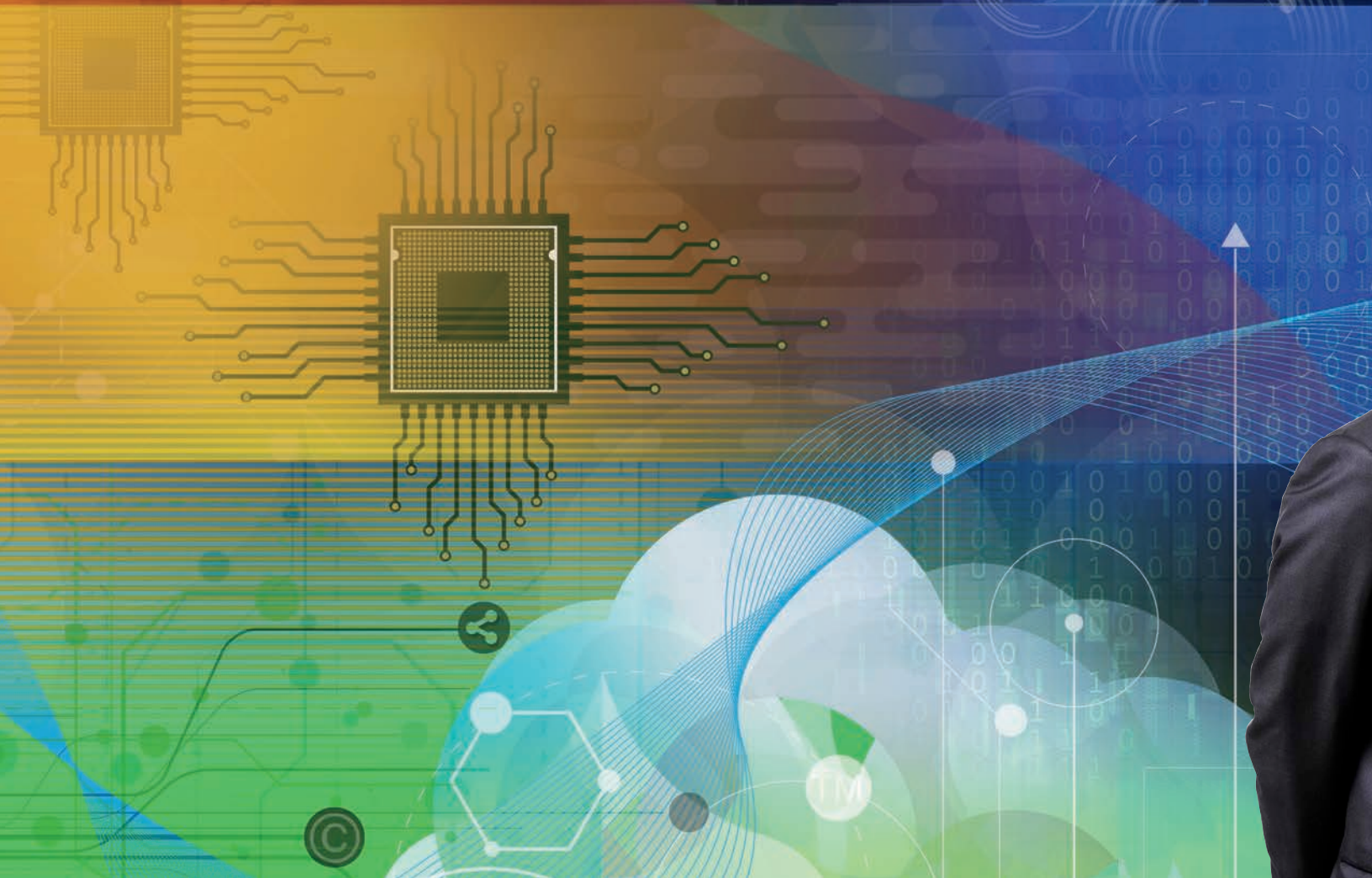
NOVATION

OPERTY

"[In Silicon Valley], there's an emerging belief that the fundamental underpinning of American intellectual property law—to wit, the free-market concept that innovation is best achieved by giving inventors the incentive of an exclusive right to exploit and profit from their inventions—is misplaced, or no longer operative."

**Ted Ulyot**, partner at Andreessen Horowitz and former general counsel of Facebook







# Finding a Trustworthy Path Through THE CLOUD

Brad Smith, president and chief legal officer of Microsoft, made two public appearances at Marquette Law School on November 15, 2016. Smith delivered this academic year's Helen Wilson Nies Lecture in Intellectual Property and participated in an "On the Issues with Mike Gousha" program. Smith is responsible for Microsoft's corporate, external, and legal affairs and leads a team of 1,300 professionals working in 55 countries. Here are edited excerpts from his remarks during these appearances.

## The Arrival of the Fourth Industrial Revolution

In the late 1700s, the First Industrial Revolution, powered by the steam engine and locomotion, permanently changed human imagination. For the first time, people could build a machine that traveled faster than a horse, which had defined the fastest speed at which humanity could move for literally millennia.

This First Industrial Revolution was in many ways exceeded in importance by a second wave of innovation, which began in the 1870s. By September 1882, the Second Industrial Revolution brought the first hydroelectric power plant to the United States in—I'm proud to say—my hometown, Appleton, Wisconsin. It brought other miracles as well. Mr. Harley and Mr. Davidson, by 1903, were working on the first motorcycle just down the street from where we are today in Milwaukee. The shift from horses to engines for locomotion, of course, meant sweeping changes for the economy. In 1905, 25 percent of all agricultural produce in the United States was used to feed horses. But 20 years later, the population of horses had fallen from 6.5 million to 1.5 million.

The jobs that had existed in urban areas to feed horses, to care for horses, to drive horses, to clean up after horses had disappeared. The effects of this wave of innovation were also felt outside of the city. By 1925, the entire Midwest was experiencing an agricultural recession. Each horse that worked in the city had consumed the equivalent of four acres of produce. Fewer horses meant less need for food.

You can see the way these things reshape the economy and society. We saw it again in the Third Industrial Revolution, a revolution which we at Microsoft participated in. A revolution that changed how people create, the way they connect, and the way they learn from each other.

In many respects, I believe the single most important contribution of the Third Industrial Revolution is the foundation it has laid for the Fourth Industrial Revolution, which is beginning to unfold. It's an industrial revolution largely founded on three broad sets of technological changes.

The first is in the physical world, as we see advances in robotics, new materials, and 3D printing, which will change manufacturing and autonomous vehicles. If that were the only change coming, it would be of huge importance. This new era will also bring changes in the world of biology, founded on genomics and genetic engineering, that will change human health, and agriculture, and the care and feeding of livestock. And we're seeing changes in the world of digital technology, from the internet of things to blockchain and a variety of new, disruptive business models. ▶▶



Brad Smith



These industrial revolutions were all fundamentally driven by one or two critical, enabling technologies—technologies that drove everything else. It was the steam engine for the First Industrial Revolution. It was electricity and then a combustion engine for the Second Industrial Revolution. It was the microprocessor for the Third.

When we think about all the advances of the Fourth Industrial Revolution, they all depend on one thing: the cloud, which enables us to make use of massive computing power in data centers distributed around the country and, indeed, around the world. This is why, as we look ahead to the future of law, to the future of public policy, it is important to think about the broader issues we will need to address.

### **“A Cloud That Is Trusted”**

We need to build a cloud that is trusted, responsible, and inclusive. And every one of these areas involves new challenges and new changes for important aspects of the law, including intellectual property.

Let me first take the theme around trust. All of our data are moving to the cloud. As we’ve thought about what we need to do to ensure a trusted cloud, we believe it’s important to be clear and pursue laws that ensure security for our information; protection for our privacy; transparency so we know how our information is being used; and compliance so that those of us who are in the business of running data centers, providing cloud services, and serving as custodians of information are managing your information so that it is compliant with the law.

In many ways, all of these things often boil down to one thing. I’m so often struck when I meet with

people around the world—it almost doesn’t matter what culture or country—people basically want the same thing. They basically want one thing. They want the confidence that the traditional protection they have had for their information stored on paper will persist when their information moves to the cloud—not more protection, not less protection, but a comparable level of confidence.

### **“For Those of Us Who Are Lawyers”**

For those of us who are lawyers, there is a lot of work ahead of us. There’s a lot of work that will align labor laws with the changing workforce. The country’s labor laws, I would argue, are very much a product of the twentieth-century economy. Under federal labor law, every person who works is one of two things: either an employee or an independent contractor.

And yet, when you look at the people who are working for companies like Uber and Lyft, it becomes increasingly difficult to conclude that they fit into either one of those two categories very well. And so, therefore, people are starting to suggest that our labor laws need to evolve. We should add new independent-worker classifications that will better encourage innovation by employers and protection for employees.

And, as we do that, as people work in this variety of different situations, there are opportunities to think about new models for worker benefits as well—more affordable benefit models that can be used with people, especially if they’re working for multiple entities at the same time. And there’s so much opportunity for experimentation in the private sector and among state and local governments.





## Technology in Service of People with Disabilities

As we think about a world where technology is ubiquitous, we constantly need to keep in mind, I believe, the need to ensure that technology addresses the needs of people with disabilities. The reality is that there are 1.2 billion people on this planet who have some kind of disability. That's why we're seeing more laws and regulations around the world.

That's why we're seeing more focus, rightly so, on technology companies such as Microsoft, so that we do a better job of developing technology that can be used by people who may be blind or visually impaired, who may have other physical disabilities, who may have cognitive challenges. We have to recognize that technology can make or break their ability to be successful in the workforce.

### America: 4½ Percent of the World

We live in a world where the American people represent only 4½ percent of the global population. Our future depends on understanding the rest of the world. In fact, we live on a pretty small planet. But I do believe that with the right kind of thought and discussion, and innovation in the law, and with better use of technology, we can ensure that this isn't just a small planet but a better world.

## Dealing with the Consequences of "Disruption"

I sometimes get a little bit of heartburn because I sometimes find, especially in California, that people talk about disruption as if it were an end and a goal

unto itself. And I don't think it is or it should be. I think change is inevitable, but we should address the change that will be good and then work through the adverse consequences.

## The Uneven Geography of Digital Inclusion

There are fundamentally two different aspects to this phrase, "digital inclusion." One is whether people have access to digital technology. I think it's fascinating if you look at a map of Wisconsin and look at what the state has put out in terms of wireless broadband access; you see in the southeastern part of the state high-speed broadband access, and you see in the northern part of the state no broadband wireless access at all. It's very different over the state. So there's the matter of access to technology.

**We have just lived through three decades of enormous technological and economic change, and I would argue the law just hasn't caught up.**

But ultimately I think that the bigger question is to provide people with access to digital skills. Wisconsin is actually like most states in the United States. There are 500 high schools in the state. In 2015, the number that taught the advanced placement course in computer science was 80, so the students in 420 of the high schools did not have the opportunity to study what the students in 80 did. And those students in those 80 schools are given a head start in really mastering the language of tomorrow, I would say. ▶▶



## The Job Boom for Those with Four-Year Degrees

If you look at the data about job creation since 1989—meaning through both Republican and Democratic presidents—you will see that the number of jobs in the United States held by people with a four-year college degree has more than doubled in the last 27 years, up 107 percent. The number of jobs held by people with a community college degree has gone up 47 percent. The number of jobs held by people with a high school diploma or less has fallen by 13 percent. There are 7.3 million fewer jobs in the United States today than a quarter century ago for people who did not go beyond high school.

**The one thing I've learned—and it started when I worked with Bill Gates and then followed with Steve Ballmer—is to focus first on the long term.**

But there is cause for optimism. Our opportunity is to help people of all ages move up that ladder by developing skills and getting certifications that show prospective employers that they have what it takes to be hired.

### Managing for the Long Term

We're not trying to create products, frankly, for today and the beginning of 2017; we're

creating products that will probably see the light of the day in the year 2020 and 2022. The one thing I've learned—and it started when I worked with Bill Gates and then followed with Steve Ballmer—is to focus first on the long term. It eventually arrives.

### Privacy Versus Security

It is one of the profound questions we must grapple with, as a company that has more than 100 data centers, in more than 40 countries, holding the personal information of roughly 1.2 billion people. We defined four principles to guide every decision regarding our customer's information.

- We will keep people's information secure.
- We will protect people's privacy, with a recognition that it is their information, they own it, and we are their custodian, and we are responsible for its safety and privacy.
- We are responsible for managing people's

information in compliance with the law around the world. We worry about compliance, so our customers don't have to.

- We will be transparent in how we handle data, so our customers know what is happening to their information.

When questions arise, we rely on these principles.

It is an approach that has led us four times in the last three years to file lawsuits against our own government, the U.S. government, when we felt that we needed to stand up for transparency or privacy, either for American citizens or for our customers in other countries.

### Coping with Outdated Laws

The Electronic Communications Privacy Act was passed in 1986. The Computer Security Act was passed in 1986. Basically, the last big reform of the tax law was passed in 1986. The last big amendment to the immigration law was in 1986. I wish I could go back to 1986. Ronald Reagan was president, Tip O'Neill was speaker of the house—you had two parties, but two leaders who figured out how to hammer things out. We have just lived through three decades of enormous technological and economic change, and I would argue the law just hasn't caught up. And until it does, it puts enormous pressure oftentimes on the courts to apply old laws to new facts, and that's a tough thing to ask the courts to do. It does sometimes call on us to say, "Hey, we're prepared to go to court to try to get an interpretation that we think makes sense for the era in which we live."

### The Importance of Universities

You will not find a vibrant tech community anywhere in the world that is not next door to a college or university with a good and probably growing computer science department. And the University of Wisconsin at Madison has had one of the leading computer science departments, but it's been shrinking over the last several years. I think that's worth at least talking about.

### "The Intense Pursuit of Curiosity"

The piece of advice that I would share for law students is actually a piece of advice I would share with almost anybody. I think about the people that I've had the opportunity either to work directly for or interact with, whom I would call truly remarkable. I put Bill Gates, Steve Ballmer, and Satya Nadella in that category. I'd put German Chancellor Angela Merkel or Justin Trudeau of Canada in that category. I've been so struck

that there is one trait that every one of these truly remarkable people shares: It is the intense pursuit of curiosity, constantly learning new things, and constantly asking new questions.

When Satya and I met with Chancellor Merkel a month ago, she asked questions for an hour and a quarter: Where do we see technology going? What does it mean for this part of German industry? What does it mean for these issues in German society? Any day you can use whatever position you have, whether it's a position in a company, or a government, or just as somebody who can read a book or be on the internet, to constantly ask new questions and learn new things. Curiosity, I think, is quite possibly one of the most powerful traits in the world.

### What Books Have You Read Recently?

I'm about two-thirds of the way through a wonderful book, *American Ulysses: A Life of Ulysses S. Grant*, by Ron White. I think he's one of the greatest American presidents that most of us don't fully appreciate. He is somebody who had humble origins, was sort of plucked out of obscurity, and rose to huge success in the Civil War. He helped the country through what was almost certainly the most tumultuous time in its history politically—the presidency and impeachment trial of Andrew Johnson, and then Reconstruction. And there's this fascinating part of the book, when you start to

read about Grant's presidency, and a quote that says, in essence, that the two great issues of his presidency were how to achieve economic growth in a difficult time and how to address issues of race and diversity when views and feelings were so fractured. Consider that.

### The Need to Improve Infrastructure

I thought it was fascinating that in a year when the two presidential nominees didn't really agree on very much, they did agree on the need to improve our infrastructure. It is odd to me that we can drive down a highway in South Africa that is bigger and smoother than one in Milwaukee or Seattle or somewhere else in the United States. We do have real issues with our bridges, our roads, our airports. I don't know why we feel in this country that it is simply impossible even to dream about the kind of high-speed trains that people in Europe take for granted—even though there are parts of this country, including between Seattle and Vancouver, where this would just generate, in my view, a lot more economic growth. It's always controversial, and you have to ask where the money will come from, or whether it should be in tax incentives. But take me at the age of 57. Fifty years ago when my parents were driving me in the car, we were probably on some roads that are in a little better condition than they are today. I don't think that's the infrastructure we should leave to our kids. We should aim higher than that. ■







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CREATIVITY

PATENTS

INNOVATION

EMERGING BELIEFS

TRUST





# Innovation, Disruption, and Intellectual Property: A VIEW FROM SILICON VALLEY

Ted Ullyot has been closely involved with major ventures and developments involving the technology industry in the United States. He is currently a partner at Andreessen Horowitz, a leading venture capital firm in Silicon Valley, where he directs the firm's policy and regulatory affairs group. From 2008 to 2013, he was general counsel for Facebook, leading the process of the firm's initial public offering. His previous positions include serving as chief of staff to the attorney general of the United States, deputy staff secretary to the president of the United States, and a law clerk to the late Justice Antonin Scalia. Ullyot delivered the annual Helen Wilson Nies Lecture in Intellectual Property at Marquette Law School on April 12, 2016. The following are lightly edited excerpts of his remarks.

As a lawyer who has spent the last few years advising companies in Silicon Valley—and who has learned a lot and been surprised by a lot over that time—I thought it might be interesting for this audience of intellectual property (IP) law experts to hear a firsthand perspective on how intellectual property law is viewed and is being “disrupted” (as the phrase goes) out in the valley.

The American technology sector, centered in and around Silicon Valley, stands today as a celebrated leader of innovation, disruption, and economic progress. It is home to companies such as Apple and Google (the number one and two companies in the world by market cap); Facebook, which recently passed Walmart to become number 12, barely three years into life as a public company; innovative startups such as Tesla, Twitter, Pinterest, Airbnb, Uber, and Lyft. And that's not to mention the long list of older, more-established technology companies such as Hewlett-Packard, Intel, eBay, and PayPal.

Numerous factors have been cited as contributing to the valley's success as a hub of innovation. Among those frequently mentioned are strong universities, access

to ample venture capital (with its high tolerance for risk), free movement of labor and talent (non-competes are not enforceable in California), maybe even California weather and Napa Valley wines.

As lawyers, we certainly also can be proud of the role that the rule of law has played in Silicon

Valley's innovation culture—and perhaps no aspect of law more than American intellectual property law, whose fundamental purpose, after all, is to promote innovation.

For this expert audience, it's probably not necessary to demonstrate the linkage between IP law and innovation. But just in case, starting with the Constitution, in Article I, section 8, clause 8, Congress is assigned the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” So right from the outset, the stated purpose of patent and copyright law is to promote scientific and artistic progress—i.e., innovation. On trademark, the innovation link is perhaps less discussed and not as direct, but it's still there. As the Supreme Court said (this was in *Qualitex Co. v. Jacobson* ▶▶

**... the relationship between intellectual property law and today's tech innovators is, as the kids say these days, complicated.**



Ted Ullyot



*Products Co.* in 1995): “[T]he [trademark] law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.”

Surely, therefore, IP law has played a critical and well-appreciated role in tech innovation. But the relationship between intellectual property law and today’s tech innovators is, as the kids say these days, *complicated*. And that’s what I want to focus on in my remarks.

## ... the widespread perception among Silicon Valley technologists today is that IP laws are often more of an impediment to progress and innovation than an enabler.

Specifically, it’s complicated in two ways. First: The prevailing view in Silicon Valley today is that IP law is prone to being abused. To be sure, the potential for abuse is a feature of any legal or regulatory scheme. But when it comes to IP law, it’s not simply that the laws are being abused but also, more specifically, that the abuse ends up hindering innovation. So whereas patent, copyright, and trademark laws are designed to promote innovation, according to this view they’re being misused in a way and to an extent that discourages and defeats innovation. Suffice it to say the widespread perception among Silicon Valley technologists today is that IP laws are often more of an impediment to progress and innovation than an enabler.

Second: It’s not just their being prone to abuse that ends up defeating the purpose of the IP laws. In addition, there’s an emerging belief that the fundamental underpinning of American intellectual property law—to wit, the free-market concept that innovation is best achieved by giving inventors the incentive of an exclusive right to exploit and profit from their inventions—is misplaced, or no longer operative. Instead, the increasingly popular view, certainly with respect to software and also with some hardware, is that technological advances are more likely to come through sharing and collaboration than via the exclusive-rights paradigm of traditional intellectual property law. Perhaps the best example of this is the rapid growth in popularity of the open-source movement, in which software designs, and occasionally hardware, too, are shared widely and often for free.

Specifically, it’s complicated in two ways. First: The prevailing view in Silicon Valley today is that IP law is prone to being abused. To be sure, the potential for abuse is a feature of any legal or regulatory scheme. But when it comes to IP law, it’s not simply that the laws are being abused but also, more specifically, that the abuse ends up hindering innovation. So whereas patent, copyright, and trademark laws are designed to promote

I’ll illustrate those points with some case studies and war stories from my time working as a lawyer and adviser in Silicon Valley.

### Some caveats

Before diving into those, a couple of caveats.

One is that my comments regarding IP law today are focused primarily on the software sector, which is where I’ve spent most of my career (at Facebook, at Andreessen Horowitz, and even way back at AOL-Time Warner). In areas outside the software sector—for example, hardware or biotech—we generally see more support for patents and traditional IP rules. But as software becomes integrated into more and more products and more and more facets of life—in the phrasing of Marc Andreessen, founder of our firm (and a Wisconsin native), as “software is eating the world”—the perspective of the software community regarding intellectual property is likely to become increasingly influential.

The other caveat is that I’m humbled to be up here giving the Nies Lecture, for I don’t consider myself an expert in intellectual property law. I didn’t even take an IP law class in law school, and before my going to Facebook, my practice was predominantly in administrative law, antitrust and litigation more generally, and corporate governance. So to be clear—in case of any conflict between what I say today and what Professors Boyden and Murray are teaching you—I strongly advise you to go with what they say.

But I do hope to offer today the perspective of someone who has spent extensive time over the past several years dealing with IP law as it’s being practiced “on the front lines,” in an innovative and rapidly evolving sector where legal doctrines and prevailing theories—and, especially, perceptions of market participants—can change dramatically in a matter of years.

### Forget the framed patents on the wall

Twenty years ago, and maybe even as recently as 5 to 10 years ago, if you walked into the office of a successful computer programmer at a prominent tech company, you most likely would have seen, proudly displayed on her office wall, framed patent certificates from the U.S. Patent and Trademark Office (PTO)—with the nice gold seal and the red ribbon—attesting to patents that the programmer had secured.

Today, that picture is entirely different.

To begin with, in today’s Silicon Valley, there are few if any offices to walk into. Silicon Valley has embraced

the “open desk environment,” first popularized by Facebook, where not even Mark Zuckerberg has an office. They don’t even have cubicles. Instead, employees work out in the open.

But even were there some wall space, most computer engineers today would not think of hanging a patent certificate on the wall. In contrast to the prevailing view only a short few years ago, patents today are viewed with disdain by many programmers.

The attitude of modern software engineers is captured well in this post from the blog of Mozilla Corporation. (Mozilla produces the Firefox web browser and is a “free software community.”) In an April 2015 blog post, Mozilla’s general counsel wrote:

The threat posed by the growing pervasiveness of . . . overbroad and vague software patents is the shroud of [fear, uncertainty, and doubt] they cast over emerging and innovative technologies. It can feel impossible to know whether you are infringing someone else’s software patent, which can slow or frustrate innovation. . . . It is sadly ironic that much of the increasing costs of software patent issues are being borne by innovators themselves[—]the very individuals the patent system was supposed to incentivize.

Congress has also gotten in on the act, with various patent law-reform efforts. In 2011, by heavy bipartisan majorities, Congress passed (and President Obama signed into law) the America Invents Act. Its promoters stated its purposes as “[to] improve patent quality” and “weed out patents that never should have issued in the first place.”

The America Invents Act represented the first major overhaul of the patent system in about 60 years. But calls for patent system reform have continued. For the past couple of years, Congress has been considering

another patent-reform bill, H.R. 9, titled the Innovation Act. House Judiciary Chairman Bob Goodlatte, the primary sponsor, introduced the bill in 2013, saying, “Abusive patent litigation is a drag on our economy.” The perception of many in Congress remains that the patent laws are being abused in a way that hampers innovation.

Certainly that is the prevailing view in Silicon Valley. In my time, there was perhaps no better illustration of this than when Yahoo sued our company (Facebook) for alleged patent infringement in early 2012—and how that played out.

In February 2012, Facebook’s long-awaited initial public offering was imminent. We had just filed our Form S-1 with the SEC, thereby publicly indicating our intent to go public, which we ended up doing in May of that year.

But in late February, Yahoo made its move. After an email from Yahoo and the arrangement of a phone call, my colleagues and I had a pretty good sense of what was going on. The call happened on Monday, February 27, 2012: In it, Yahoo told us that Facebook infringed on many of Yahoo’s patents but that, for an acceptable payment, it would give Facebook a license.

This was the pre-IPO shakedown. Indeed, about 20 minutes after our call ended, we got a call from the *New York Times*, asking us for comment on a report—from unspecified “people briefed on the matter”—that Yahoo was threatening a patent lawsuit against Facebook.

This wasn’t Yahoo’s first rodeo. Eight years earlier, in 2004, Yahoo had pursued a patent lawsuit against Google (a lawsuit Yahoo had picked up in an acquisition) on the eve of the search giant’s IPO. Google ended up settling the lawsuit in August 2004, just weeks before going public, giving Yahoo 2.7 million shares of its stock, worth at least \$290 million at the time and potentially much more. ▶▶





This prior history is why we saw Yahoo's gambit coming. It worked in 2004 against Google, so in 2012 Yahoo figured why not again go after a high-profile internet company on the eve of its IPO, its moment of greatest vulnerability, to coerce a hefty settlement payment.

Not an unreasonable theory. But Yahoo had failed to comprehend that the patent landscape had changed enormously in the intervening eight years since its patent assault on Google. Specifically, Yahoo failed to appreciate just how wildly unpopular a patent lawsuit against Facebook would be.

Yahoo instantly became a pariah in Silicon Valley.

In its complaint, Yahoo claimed that the core features of Facebook were invented by Yahoo: "For much of the technology upon which Facebook is based, Yahoo got there first and was therefore granted patents by the United States Patent Office to protect those innovations," the Yahoo filing said. The lawsuit claimed that "Facebook's entire social network model" was based on patented Yahoo technology.

### Silicon Valley turns against Yahoo

In another era, those Yahoo claims might have garnered some respect among engineers and inspired fear at Facebook. But not so in 2012. The Silicon Valley engineering community erupted with anger at Yahoo. That anger included some colorful examples.

Let me cite, first, David Sacks, a respected Silicon Valley leader (and University of Chicago law school grad). Sacks was the former COO of PayPal and now was founder and CEO of a company called Yammer (later sold to Microsoft). Sacks used Twitter to vent his outrage at Yahoo. He tweeted: "I'm declaring it: Yammer will never hire another former Yahoo employee who

doesn't leave in the next 60 days. Who will join me? #stopYahoo."

Sacks also offered a carrot: "I'm pleased to announce a \$25,000 signing bonus for any Yahoo employee who joins Yammer in the next 60 days."

A few days later, again from Sacks: "Yahoo employees: why are you still there? You work for a patent troll. Quit now to send a message and preserve your dignity."

Sacks explained the basis of his anger: "Every software patent is a law prohibiting the writing of code in a given area. USPTO is prohibiting software creation at alarming rate. Software code is already protected by copyright law. The results of that code should not be patentable."

Fred Wilson, a highly influential venture capitalist and technology leader with Union Square Ventures (based in New York City, but still very much in tune with the Silicon Valley zeitgeist), wrote, "Yahoo! has broken ranks and crossed the unspoken line, which is that web companies don't sue each other over their bogus patent portfolios. I don't think there's a unique idea out there in the web space and hasn't been for well over a decade. Pretty much everything useful is based on prior art going back before the commercial web existed. . . .

"I am writing this in outrage at Yahoo! I used to care about that company for some reason. No more. They are dead to me. Dead and gone. I hate them now."

Plenty of others—including even Mark Cuban, the outspoken entrepreneur and owner of the Dallas Mavericks—chimed in loudly on Facebook's side.

Perhaps most damagingly to Yahoo, one of the company's former programmers, Andy Baio, blasted the company, in an article titled, "A Patent Lie: How Yahoo Weaponized My Work." It perfectly captured the 2012 Silicon Valley attitude toward patents—and the outrage at Yahoo.



Baio wrote: “I’m no fan of Facebook, but this [lawsuit by Yahoo] is a deplorable move. It’s nothing less than extortion, expertly timed during the SEC-mandated quiet period before Facebook’s IPO. It’s an attack on invention and the hacker ethic.”

He recalled that during his time at the company, “Yahoo assured us that their patent portfolio was a precautionary measure, to defend against patent trolls and others who might try to attack Yahoo with their own holdings. . . . I thought I was giving them a shield, but turns out I gave them a missile with my name permanently engraved on it. Yahoo’s lawsuit against Facebook is an insult to the talented engineers who filed patents with the understanding they wouldn’t be used for evil. Betraying that trust won’t be forgotten, but I doubt it matters anymore. Nobody I know wants to work for a company like that.”

Inside Facebook, let’s just say, we were quite pleased to see this furious negative reaction to Yahoo’s lawsuit. But we were not surprised. Perhaps because we were such a young company, or because we were still led by our young computer-engineer founder, Mark Zuckerberg, we understood the modern engineer’s view of patents. And we therefore believed—from the moment that we received the opening phone call from Yahoo—that public opinion (and specifically, the highly influential engineer opinion) would be on our side in this battle.

After being served with Yahoo’s complaint, we were faced with the question of how to respond. Anticipating just this type of pre-IPO shakedown scenario, we had—under the wise guidance of our outstanding head IP lawyer, deputy general counsel Sam O’Rourke—amassed our own stable of patents over the years, both homegrown patents and ones we’d quietly acquired. And we knew that by counterclaiming against Yahoo with some of those patents, we would create risk, uncertainty, and cost for Yahoo, and at minimum raise our negotiating leverage.

But consider also this: Yahoo had infuriated the entire Silicon Valley region by suing us for patent infringement. And that universal scorn was invaluable to us. If Facebook punched back at Yahoo with our own patent counterclaims (as traditional litigation tactics dictated), would the valley similarly turn on us? Would we lose all that goodwill? Would engineers say, “We used to be on Facebook’s side when you were the victim, but now you’re coming forward with your own software patents, so you’re just as bad as Yahoo. A pox on both your houses!” Maybe even *Facebook* engineers would have that reaction.

To lawyers, this probably seems like an easy call: Of course, file the counterclaims. Everyone will understand that you’re just defending yourself. But it was not that simple, so this was a strategic and tactical question we really wrestled with.

### Facebook responds “more in sorrow”

In the end, we decided to file the patent counterclaims against Yahoo. But we did so in a way that was measured and calculated to send a message.

First, while we had many patents at our disposal in our portfolio, we asserted only 10 patents against Yahoo. Why 10? Because Yahoo had asserted 10 against us in its original complaint. That sent the message that we were simply responding in kind, not escalating.

Second, because the public perception of our patent counterclaims (among a lay audience, and one hostile to patents) would be so all-important, we knew that we had to explain and frame our actions. So when we made our filing, we also issued a statement from me as the general counsel of the company (rather than from a corporate spokesman, as is customary). We knew the statement would be as important as, if not more important than, the complaint itself.

The statement from me was as follows: “From the outset, we said we would defend ourselves vigorously against Yahoo’s lawsuit, and today we filed our answer as well as counterclaims against Yahoo for infringing 10 of Facebook’s patents. While we are asserting patent claims of our own, we do so in response to Yahoo’s shortsighted decision to attack one of its partners and prioritize litigation over innovation.”

The tone was “more in sorrow than in anger.” Almost apologetic.

Soon the reactions started rolling in. Our message had been received and understood by the community. The tech leaders were still on our side, notwithstanding their hatred for software patents.

The influential venture capitalist and technologist, Chris Dixon, who is now one of my partners at ▶▶

**But Yahoo had failed to comprehend that the patent landscape had changed enormously in the intervening eight years since its patent assault on Google.**





Andressen Horowitz (but someone I did not know at the time), wrote:

Like many in tech, I believe all software patents should be abolished. That said, I think Facebook made the right move by filing a lawsuit against Yahoo's patent attack. As I see it, Facebook had 4 choices:

- Settle;
- Defend without countersuing;
- Countersue without signaling any aversion to patent lawsuits; or
- Countersue and signal that they are averse to patent lawsuits, which in turn signals that they will drop the lawsuit if Yahoo does. This seems to be what Facebook has done.

Chris Dixon is a smart man! He went on: "Countersuing gives Facebook the best chance of fending off Yahoo's lawsuit—and therefore not rewarding patent lawsuits. And signaling they are only doing so in response to Yahoo (hence might drop the suit if Yahoo does) keeps them on the right side of innovation."

Surveying all of this positive reaction to our counterclaims, TechCrunch, which is one of the leading tech-news websites, wrote: "Facebook has executed a masterful response to Yahoo's patent trolling that protects it legally but still makes it look like the victim." To a roomful of Facebook lawyers, that had a nice ring to it.

That was a pivotal moment in the case—we managed to defend ourselves vigorously, while retaining all the pro-Facebook goodwill and anti-Yahoo sentiment that had come out after Yahoo's lawsuit. Once we had achieved that, it was only a matter of time until the case resolved favorably for us.

I won't go through all the colorful details of how the case played out. That could take months. Suffice it to say that Facebook's IPO went forward, and the Yahoo patent case ended with a quiet settlement in July 2012:

- no payment whatsoever by Facebook to Yahoo
- full cross-license to each other's patent portfolios
- Facebook as something of a Silicon Valley hero, for having stood up against software patent abuse and defending innovation
- And Facebook bought a stable of early internet patents from AOL and Microsoft. Not from Yahoo.

Shortly after the case was settled, the news website *Business Insider* put a capstone on the whole episode. The article's headline: "Just So We're Clear: Facebook Totally Demolished Yahoo in the Patent Fight That Just Ended." And a flavor from the article itself: "Facebook did what it always does in legal battles: it dug a trench, filled it with lawyers, and prepared for war. Since the company was founded, Facebook lawyers have always been exceptionally aggressive. They bring nukes to a knife fight."

I imagine that article is still being used in Facebook legal department recruiting!

But seriously, as much as we would like to claim that this victory was due to good lawyering on the Facebook side (in addition to our excellent in-house team, we used Cooley LLP and WilmerHale), substantial credit must go to the sea change in Silicon Valley attitudes toward patents, which Yahoo had failed to appreciate.

Moving on now from patents, let's consider copyright and trademark.

As the congressional efforts around patent reform suggest, the perception that the patent system is being abused is reasonably well understood. Perhaps less appreciated is the Silicon Valley perspective that copyright and trademark likewise are often barriers to innovation.



### Silicon Valley's case against copyright

Recall that David Sacks, Yammer CEO, in blasting software patents, observed, "Software code is already protected by copyright law. The results of that code should not be patentable." So you might think that Silicon Valley software engineers would be pro-copyright.

In fact, not so much.

The case against copyright, from a Silicon Valley perspective, is that traditional media companies are too aggressive in enforcing their copyrights. In this view, copyright is an antiquated tool used by media giants (music and film, mainly) to hinder innovation and competition in the internet arena.

The case study that best illustrated this to me was the SOPA/PIPA episode of late 2011 and early 2012—an episode that still resonates strongly in Silicon Valley, Hollywood, and Washington.

Here's the background: Hollywood convinced Washington that new rules were needed to combat copyright infringement (a/k/a piracy) on the web. Congress proposed legislation: the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA). These got considerable traction and were close to being passed, when web companies and technologists rebelled. Even MC Hammer (yes, the early-'90s rapper) got into the fray, on the side of web companies.

The anti-SOPA and PIPA argument was that under the guise of combating web piracy (copyright infringement), the big media companies and their allies in Congress were unduly constraining fair-use doctrine, engaging in "censorship" of expression on the web, and hindering innovation and competition.

The activist group MoveOn, which engaged on the anti-SOPA and PIPA side, argued: "Congress is playing

fast and loose with Internet censorship legislation that would have people like Justin Bieber thrown in jail for uploading a video to YouTube." (Let us leave aside that some might not mind seeing Bieber suffer that fate.) "The Internet censorship legislation could severely restrict free speech, and put a stranglehold on one of the most innovative, job-creating industries of our time."

Other users were drawn into the fight. Wikipedia and Reddit, among other sites, shut down for a day to protest the proposed legislation.

Google ran a black banner.

Faced with this intense opposition, Congress blinked. SOPA and PIPA were shelved in early 2012. This would have been inconceivable a few years earlier. Hollywood's powerful lobbyists would have pushed this through. But now, in 2012, the argument that overaggressive copyright enforcement might

constrain web innovation

was unexpectedly powerful. It carried the day.

And finally, some thoughts on trademark.

Even friendly old trademark is subject to its share of criticism in Silicon Valley. This was truly surprising to me.

Traditional doctrine requires aggressive vigilance against trademark infringement—as one hornbook says, "It is crucial for a trademark owner to be vigilant in monitoring the use of its mark as well as the public perception of its mark." That seems uncontroversial. ▶▶

**. . . now, in 2012, the argument that over-aggressive copyright enforcement might constrain web innovation was unexpectedly powerful. It carried the day.**



## We had to adapt and balance classic legal doctrine with the realities of contemporary Silicon Valley attitudes and perceptions.

The case study here is our own trademark-monitoring and enforcement efforts at Facebook. So, Facebook is not always the “good guy” in these stories.

We started off taking a traditional, aggressive posture on trademark enforcement. Not only would we (of course) take action against anyone using the “Facebook” mark in an online social networking context, but, in addition, we challenged many sites that used the prefix Face- or the suffix -book in their names. Teachbook, Dogbook (and other pet-book names).

When Facebook was still a fledgling startup company, say until 2009–2010, this traditional approach made sense. But over time, as Facebook became more established and more powerful, our trademark enforcement efforts—which to a lawyer seemed routine—became controversial to some in Silicon Valley. The sense was that the powerful Facebook was unnecessarily making life difficult for some innovative websites.

Sure, those sites may have been infringing as a matter of customary trademark law. But, come on, man—is Facebook really threatened by a nascent social network site that wants to use book or Face in the name? Who, seriously, is going to be confused? Shouldn’t we be flattered by the use of our name? Wasn’t this a sign the company had arrived?

And if we’re aggressive in going after these sites, aren’t we frustrating the dreams of some young innovators? Some of our own employees had these questions, and you can’t just ignore the questions and cite trademark hornbook law.

Suffice to say that our trademark enforcement standards modified as we went along through the years. We had to adapt and balance classic legal doctrine with the realities of contemporary Silicon Valley attitudes and perceptions.

### The case for “open computing”

I want also to discuss a second notable IP law trend in Silicon Valley circa 2016. In addition to the widespread view that IP laws are too often abused to hamper innovation, there’s an emerging sense that the

fundamental free-market premise of traditional IP law may be out of date and out of touch. That is, there’s a growing sense among some engineers that innovation is best promoted, not by the promise of exclusive rights and reaping the profits of one’s invention, but rather via sharing (including free sharing) and collaboration.

This is the open-source movement, and a prime case study is Facebook’s Open Compute Project.

The Open Compute Project relates to the design of data centers and servers. Servers are essentially computers, dedicated to storing data and serving it up quickly on demand when it’s needed. A data center essentially is a huge building containing hundreds or thousands of servers, connected together and working together to store data and process data requests. In short, data centers (and the servers in those centers) are the “back end” that the user never sees but what makes a site such as Facebook run. And for a consumer internet company like Facebook—which stores and serves up data for 1.3 billion monthly active users worldwide—the cost of buying servers and building and running data centers is its number-one expense.

Whenever Facebook releases quarterly earnings, its expenses number is probably the item most closely watched by Wall Street analysts. And this is true not just for Facebook but also for virtually every web company.

So, presumably, if your in-house programmers and data scientists could design servers and data centers that operated much more efficiently than the industry standard, that would be an important competitive advantage in the highly competitive internet sector. It would be an advantage you would want to keep to yourself and exploit to help build market share, improve earnings, and keep competitors in the rearview mirror.

That would be traditional business thinking. And traditional IP law follows that exclusive-rights paradigm of incentives. But that’s not what happened at Facebook, with Open Compute.

Here’s the story of the Open Compute Project, from the project’s website:

In 2009, Facebook was growing exponentially, offering new services and giving millions of people a platform to share photos and videos. Looking ahead, the company realized that it had to rethink its infrastructure to accommodate the huge influx of new people and data, and also control costs and energy consumption.

That’s when Facebook started a project to design the world’s most energy efficient data

center, one that could handle unprecedented scale at the lowest possible cost. A small team of engineers spent the next two years designing and building one from the ground up: software, servers, racks, power supplies, and cooling. It was 38% more energy efficient to build and 24% less expensive to run than the company's previous facilities—and has led to even greater innovation.

Those are enormous savings, and in traditional business thinking, you'd patent those and take them to the bank. But instead of using these innovative designs for competitive advantage, Facebook shared them publicly . . . for free.

Again, from the Open Compute website: "The [Project] hoped to create a movement in the hardware space that would bring about the same kind of creativity and collaboration we see in open-source software. And that's exactly what's happening."

Why in the world would Facebook do this? This was 2011. Facebook was still a private company, more than a year away from going public. There were still plenty of skeptics who predicted the company would never be successful. Presumably Facebook needed every advantage it could get, especially homegrown, internally developed cost advantages.

Why give the technology away? To a traditional business mind, or a traditional IP lawyer, this seems totally nuts.

But it's really a mindset difference, and one that defines the open-source movement: From the Open Compute website: "We believe that openly sharing ideas, specifications, and other intellectual property is the key to maximizing innovation and reducing complexity in tech components." This perspective—that innovation is best achieved through "openly sharing ideas"—is gaining traction in Silicon Valley.

One other quick, but prominent, example of the open-source, open-sharing movement is one that many of you in the audience may use and have on you right now: an Android phone. Whereas Apple, creator of the iPhone, is famously secretive about its designs, Google—the developer of Android—has taken the opposite tack in the smart phone wars.

Google bought Android in 2005 and released the Android OS in 2007. But, rather than keeping it proprietary and developing Google phones, Google instead open-sources Android, giving it away for free. The strategy here is to get Google's operating system installed on as many phones as possible worldwide.

And, indeed, although some may think of the iPhone as the market leader, Android phones are actually the smartphone market-share leader virtually everywhere other than Japan and Australia, often by wide margins.

In the United States, Android phones have 59 percent market share versus 39 percent for Apple iOS. In China, it's 71 percent Android to 28 percent Apple. In Spain, it's 86 percent to 12 percent.

In Google's case, this is an understandable business strategy, as it hopes to monetize the installed Android base by having all those Android users worldwide using Google (or now, "Alphabet") products and viewing paid advertisements on Google.

But in addition, the sense among many technologists I speak with is that Android phones are superior to iPhones, precisely because the operating system is open-sourced and therefore getting the benefit of collaboration among computer scientists and users around the globe.

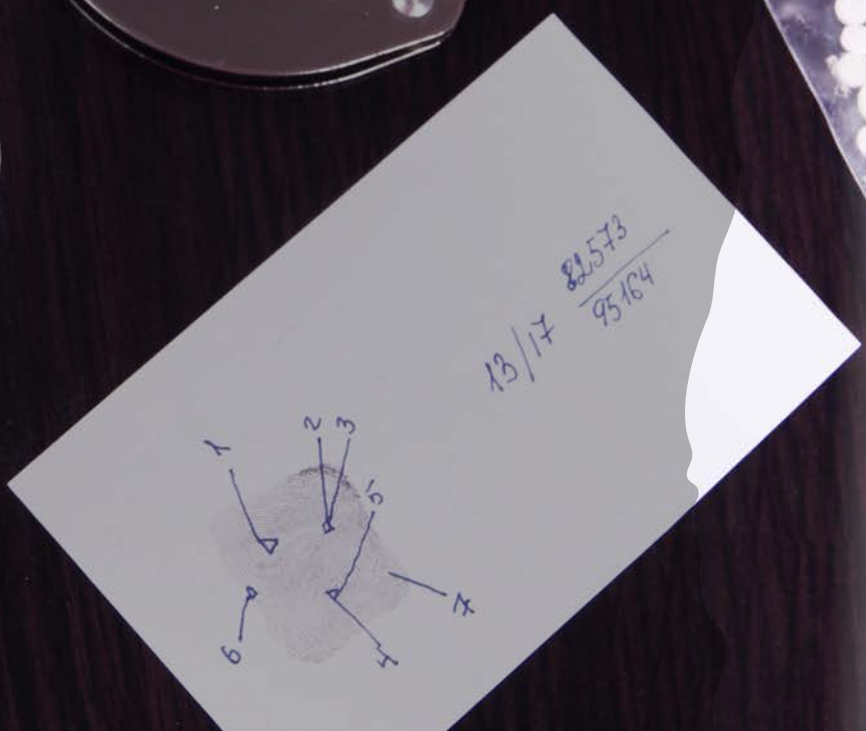
Here is my last point on the rise of open-source thinking: When you view this in combination with the antipathy toward patents, this makes it quite challenging and interesting for in-house lawyers at tech companies. For almost every company—even if the company strongly embraces open source—it's still important to develop a stable of patents, at minimum to deter and respond to attacks like Yahoo's lawsuit. But today's engineers tend to run away from in-house patent lawyers and instead want to open-source almost everything. So it takes special skills—not just legal skills, but probably more to the point, people skills and EQ—for an in-house IP lawyer to build the goodwill and relationships with computer programmers so that they will even come forward with potentially patentable inventions.

At Facebook, I think we did a good job on this—credit not to me but to my colleague Sam O'Rourke and the team he built in the IP department. But it takes a lot of time and effort to get this balance right.

\* \* \* \*

Thank you for enduring such a lengthy discussion of IP law. I hope this conveyed a sense of the interesting challenges faced by in-house IP lawyers in Silicon Valley today, as they try to square traditional IP law principles and rules with rapidly moving trends in a highly innovative sector of the economy. ■





# WISCONSIN'S WAR ON DRUGS—

## THE COCAINE FRONT, 1986–1990

By Michael O'Hear

In the 1970s, Wisconsin's War on Drugs was really a war on marijuana—a police action that came and went without much impact on imprisonment. The surge of several thousand additional drug arrests per year simply did not translate into many additional prisoners. By the mid-1980s, though, the first signs of a new war on cocaine were apparent. This new emphasis on cocaine would result in much greater changes to Wisconsin's drug sentencing laws and would produce many more inmates for Wisconsin's prisons. The Uniform Controlled Substances Act (UCSA), as originally drafted and then adopted by Wisconsin, had placed cocaine into the same severity class as marijuana. However, the war on cocaine effectively resulted in the substance's recategorization as a hard drug in the same class as heroin.

Changes in Wisconsin largely mirrored changes nationally. The United States of the mid- and late 1980s was in full-blown panic mode when it came to cocaine. Historian David Musto has noted the cyclical nature of American attitudes toward cocaine, in which “the perception of cocaine [changes] from that of an apparently harmless, perhaps ideal, tonic for one's spirits or to get more work done, to that of a fearful substance whose seductiveness in its early stages of ingestion only heightens the necessity of denouncing it.” In the 1970s and early 1980s, cocaine's reputation was going through one of its positive phases.

The cocaine-related death of actor John Belushi in 1982 may have served as something of a wake-up call, but it also reinforced cocaine's reputation as a glamorous, celebrity drug. Within a few years, though, crack cocaine changed everything.

Cocaine came to be seen as an insidious drug of the black underclass, linked to a national surge in violent crime and the deepening of ghetto misery.

The crack form of cocaine offered a high that was particularly quick, intense, and cheap. It first appeared in several American cities in the mid-1980s. Hardcore crack users tended to be young, unemployed blacks. Violent gangs handled much of the lucrative distribution business, and their armed confrontations became regular headline fodder beginning in 1985. Public concern seemed to reach a peak in the summer of 1986 in the wake of the overdose death of college basketball star Len Bias, which was repeatedly and incorrectly attributed to crack.

Following Bias's death, national politicians almost immediately put anti-crack legislation on a fast track in Congress, aiming to produce a new law before the November elections. Mandatory minimums for dealing crack would be the centerpiece. There was broad



Michael O'Hear, professor of law at Marquette University, recently published *Wisconsin Sentencing in the Tough-on-Crime Era: How Judges Retained Power and Why Mass Incarceration Happened Anyway*. This excerpt from chapter 7 of the book is reprinted with the permission of the University of Wisconsin Press. ©2017 by the Board of Regents of the University of Wisconsin System. All rights reserved.



agreement that crack sentences should be tougher than regular (“powder”) cocaine sentences, but how much tougher defied logical analysis. One aide described the legislative process as simply “pulling numbers out of the air.” Congress ultimately settled on the now-notorious 100:1 ratio—the mandatory minimums for crack would be triggered by quantities that were only 1/100 of the quantities of powder cocaine associated with the same minimums. Thus, for instance, 500 grams of powder would net you a five-year minimum, but you would face the same punishment for a mere five grams of crack.

Wisconsin lawmakers moved even more quickly, albeit with much less harsh results. In May 1986, Democratic Governor Anthony Earl, facing reelection in the fall, called a special session of the legislature for various specific purposes, including “increasing the penalties for the possession, manufacture, or delivery of cocaine.” The Democratic legislature complied with stunning rapidity, passing Earl’s bill just two days after it was introduced.

The path had been paved by the work of Wisconsin’s Cocaine Task Force, which was sponsored by the State Council on Alcohol and Other Drug Abuse and chaired by Assembly Democrat John Medinger. Following its creation in 1985, the task force consulted with national experts on drug abuse and conducted five public hearings across the state, at which participants repeatedly called for tougher penalties. The task force issued its alarmist final report in April 1986, a month before Governor Earl introduced his cocaine bill. “[C]ocaine,” the task force declared, “is an extremely serious problem that has reached epidemic proportions. . . . Instead of being the benign substance which is commonly believed, cocaine is one of the most addictive substances known.” The task force insisted that “drug abuse must be treated as a public health problem” and drew analogies to communicable diseases. Yet, the task force’s first policy recommendation was to increase penalties for both distribution and simple possession. In part, this reflected the task force’s comparative assessment of cocaine penalties across the United States, which revealed that Wisconsin’s were among the nation’s most lenient; the 30-day maximum for simple possession, for instance, ranked 50th out of 50 states and paled by comparison to the national average of nearly six years. The task force concluded that Wisconsin needed tougher sentences to achieve greater deterrence.

Largely following the task force’s lead, Governor Earl’s cocaine bill, as introduced, contained three key sentencing features. First, the bill revived the concept of mandatory minimums, which had been abandoned only 14 years earlier with passage of the Uniform Controlled Substances Act. Earl’s minimums were comparatively modest—just six months or one year, depending on the volume involved—but established a precedent for the tougher minimums that would be adopted in subsequent years. Second, the bill introduced into Wisconsin law the concept of weight-based sentence enhancements for drug distribution. While distributing as much as 13 grams of cocaine could result in any sentence up to five years, more than 13 grams would trigger a six-month mandatory minimum, and more than 55 grams a one-year minimum. Exceeding 55 grams also triggered an enhanced, 15-year maximum. Such a weight-based sentencing system had precedent in the federal Controlled Substances Penalties Amendments Act of 1984. Third, and finally, the maximum penalty for simple possession of cocaine was raised from 30 days to one year. The overall effect of these three features was to sharply distinguish cocaine from marijuana, which had been lumped together under the Uniform Controlled Substances Act, and to move cocaine much closer to heroin.

With its proud tradition of wide judicial sentencing discretion, Wisconsin did not adopt Earl’s mandatory minimums without a fight. Introduced into the Senate, the governor’s bill was referred to the Committee on Judiciary and Consumer Affairs, chaired by Lynn Adelman, the liberal senator with an impressive track record of quietly killing or watering down tough-on-crime proposals. Adelman likely would have been happy to keep Earl’s bill in his committee indefinitely, but the closer media scrutiny and political pressures of a special session made simple neglect a problematic strategy. Adelman thus adopted a more direct plan of attack. At his behest, the Judiciary Committee simply stripped the mandatory minimums from the bill. At the same time, however, perhaps reflecting a compromise within the committee, the triggering weight for the 15-year maximum was reduced from 55 to 30 grams. Thus modified, the cocaine bill then swiftly passed the full Senate.

Although Adelman and his fellow Senate liberals were often quite successful in the 1980s in holding in

check the Assembly's tougher-on-crime inclinations, it was the Assembly that prevailed on the 1986 cocaine bill. First, conservative Democrats led by Milwaukee's Louise Tesmer restored Governor Earl's mandatory minimums. Then, Tommy Thompson, the minority leader and soon to be anointed as Earl's opponent in the gubernatorial election, secured passage of a series of amendments to further toughen the bill. Most notably, Thompson introduced a school-zone provision, which increased the maximum sentence by five years for cocaine distribution within a thousand feet of a school building. The provision's drafting file indicates that the concept had been borrowed—like so much else in Wisconsin

drug law—from federal precedent; the Controlled Substances Penalties Amendments Act had also included a similar school-zone enhancement. A large share of the Wisconsin Legislature's drug-control efforts over the next four years would be devoted to extending this protected-zone concept in various ways.

The Assembly adopted the toughened cocaine bill by an overwhelming 94–4 margin, and, in an election-year special session, the Senate had no stomach for a fight. Adelman's motion to strip the mandatory minimums from the bill failed, and the Assembly's version became law in short order.

The 1986 cocaine law established the template for the way the legislature would fight the War on Drugs over the coming years. Despite the turn to increased harshness, Wisconsin law never returned to the indiscriminate toughness of pre-UCSA days. Rather, Wisconsin continued to distinguish sharply between distribution and simple possession, and between heroin and marijuana. If the UCSA's sentencing structure can be analogized to a house, several additions have been completed since 1972, but much of the original architectural scheme is still apparent.



*Even simple possession of marijuana saw a severity increase, with the maximum sentence raised to six months for a first offense and one year for a second. This reflected a national trend in the late 1980s to try to ensure greater accountability for all drug offenses, no matter how minor.*

Still, the structure has become rather ungainly. As printed in the Wisconsin Code, the UCSA's sentencing provisions grew from a mere three pages in 1985 to seven by 1997.

In 1988, the legislature essentially normalized the 1986 cocaine sentencing system as the general system for all drugs of concern. Leading the charge were Assembly Democrat Peter Barca from Kenosha, which was always among the state leaders in number of drug arrests, and Republican Attorney General Donald Hanaway, who had promised to focus on drugs after his election in 1986. Their bill extended the weight-based approach from cocaine distribution to heroin, methamphetamine, LSD, and

marijuana, with six-month and one-year mandatory minimums associated with higher-volume distribution. Additionally, the five-year school-zone enhancement for cocaine distribution was extended to all controlled substances. Even simple possession of marijuana saw a severity increase, with the maximum sentence raised to six months for a first offense and one year for a second. This reflected a national trend in the late 1980s to try to ensure greater accountability for all drug offenses, no matter how minor. At about the same time, Congress was adopting a five-year mandatory minimum for simple possession of crack.

By now, the tough-on-drug laws were coming fast and furious. In 1989, the legislature expanded the school zone law yet again. First, the protected zones were extended to include parks, public pools, youth and community centers, and school buses. Then, a three-year mandatory minimum was added to the penalty for distributing heroin, cocaine, or marijuana in any of the protected zones (or just one year for a small quantity of marijuana). And, as if the prison terms were not enough, the legislature also mandated 100 hours of community



service and a loss of driver's license for protected-zone violations. Included in the biennial budget bill, these changes were able to avoid a potentially fatal referral to Lynn Adelman's Judiciary Committee.

But these amendments to the school-zone law proved only a preliminary foray by the 1989–1990 legislature into the drug arena. National polls were indicating that drugs had become the nation's number one public concern, and individual legislators responded by introducing a multitude of new bills on the topic. Pressure for a major new reform package came particularly from two directions. Initially, three Democratic legislators began to press for Governor Thompson to call a special session of the legislature to adopt increased penalties for “drug kingpins.” As they put it in a letter to the governor, “While we properly spend a lot of money on drug education to prevent people from becoming abusers, it is clear that a tougher focus on the drug pusher is long overdue.” With the expansion of the school-zone law less than three weeks old, the letter may have slightly stretched the meaning of “long overdue,” but it is fair to say that the proponents had in mind an extraordinary ratcheting up of penalties for the highest-volume traffickers; their minimums would be upped from 1 to 10 years and their maximums from 15 to 30. The legislators' concerns specifically focused on cocaine, which was said to account for over half of the value of all illegal drugs sold in Wisconsin. But why a special session? Sen. Joseph Andrea, one of the three proponents, publicly cited a desire to circumvent Lynn Adelman's Judiciary Committee. In any event, Governor Thompson, never one to allow the Democrats to outflank him to the right on crime issues, did call a special session in the fall of 1989.

A second key initiative was the Task Force for a Drug Free Milwaukee, which was established in September 1989 and cochaired by a pair of Democrats, U.S. Sen. Herb Kohl and Milwaukee's fiery young mayor, John Norquist. The task force focused on obtaining enhanced funding for drug education, treatment, and enforcement efforts, but also called on the legislature to increase penalties. “Drug treatment is important and needed, but not enough,” the task force opined. “If we are to be successful, we urgently need a combination of drug enforcement,

prevention, education, and treatment programs.”

The work of the task force proceeded parallel to the legislature's special session in the fall of 1989 and early winter of 1990. A Milwaukee prosecutor acted as a liaison between the two efforts and helped to ensure that the law finally passed in Madison in January would embody many of the task force's priorities, including longer sentences for drug traffickers.

Was all of this just a matter of crass politics? It was certainly disingenuous to suggest that the legislature had been ignoring penalties, and perhaps ill-advised to adopt a fifth wave of sentence increases in less than four years—much too soon for anyone to know the costs and benefits of the earlier get-tough efforts. There can be little doubt that political considerations must have figured prominently in many legislators' minds as they put together and enacted the special-session drug law.

On the other hand, putting the superficial political posturing to one side, there were good reasons for Wisconsinites to view cocaine with increasing concern over the course of the 1980s. The 1986 Cocaine Task Force found that the drug had become much cheaper and more readily available in Wisconsin beginning in 1982, and documented corresponding sharp increases in cocaine-related overdose deaths and emergency room admissions by the mid-1980s. Moreover, cocaine trafficking was becoming a significant quality-of-life issue in some Wisconsin communities in this time period. The Milwaukee Police Department set up a new “Community Against Pushers” hotline in October 1984 and within six months had received about 1,300 drug-trafficking complaints, the vast majority of which related to cocaine dealing. Janine Geske, who served at the time as an elected circuit court judge in Milwaukee, recalls hearing a great deal of frustration from community groups over drug-related crime. These groups saw firsthand the adverse effects of drug houses, such as increased muggings in the neighborhood, and worked to draw police attention to the problem. Even when the police took action, however, group members were often disappointed to see the dealers out on bail shortly after arrest and ultimately receiving probationary sentences. Frustrated by such seeming impunity, many Wisconsinites demanded tougher penalties.

When the legislature scheduled a public hearing on the special-session bill, only one hour was initially set aside for public comment, but the length grew to nearly five hours due to the unexpectedly large number of people who turned out to voice their opinions, mostly in favor of stiffer sentences.

In any event, whatever their actual necessity, the complexity and ambition of the special session reforms were beyond doubt. Among other things, they required schools to adopt disciplinary policies for drug violations by students, regulated the use of electronic communication devices on school premises, required juvenile courts to impose additional penalties in drug cases, made it easier for the government to seize the property of drug offenders, criminalized the use or possession of drug paraphernalia, criminalized the attempted possession of drugs, criminalized the use of a juvenile for drug distribution, established a drug court in Milwaukee County, authorized the adoption of ordinances by local government imposing civil penalties for marijuana possession, and facilitated the use of electronic surveillance against drug suspects.

In the sentencing area, the special session added new layers to the weight-based severity scheme, introducing enhanced penalty ranges for higher-volume distributors. These reforms were in line with the calls for tougher sentences for “drug kingpins,” which had been the principal focus of the legislators who requested the special session. The special session also created a new sentence enhancement for the use of public transit as part of a drug distribution offense.

But the special session’s most important sentencing reform was directed specifically to the perceived menace of crack. Previously, Wisconsin law had

recognized no difference between the powder and crack forms of cocaine. Now, however—once again following the federal lead—Wisconsin adopted much tougher penalties for crack. If the 1986 law had moved cocaine from the severity level of marijuana to nearly that of heroin, the 1990 law then moved crack well beyond even heroin. Indeed, as indicated in the table on this page, for any given level of crack, a person might need 20 to 40 times as much powder to trigger the same statutory minimum prison term. Although this was not as sharp a disparity as the federal system’s infamous 100:1 ratio, it nonetheless signaled dramatically different attitudes toward the two forms of cocaine. Also noteworthy was the absence of any triggering quantity for the one-year minimum—distributing any amount of crack, no matter how small, would bring at least one year behind bars.

Yet, amid all of this toughening, the 1990 drug-sentencing law included one notable softening provision, as Sen. Lynn Adelman continued his tenacious resistance to mandatory minimums. After the bill passed the Assembly, a conference committee was formed to make modifications necessary to secure approval in the Senate. Adelman sat on the committee, as did his colleague Gary George, the powerful African-American Democrat from Milwaukee who shared some of Adelman’s reservations about tough-on-crime legislation. At Adelman’s behest, George had a safety valve added to the bill:

“Any minimum sentence under this chapter is a presumptive minimum sentence. . . . [T]he court may impose a sentence that is less than the presumptive minimum sentence or may place the person on probation only if it finds that the best interests of the community will be served and the public will not be harmed and if it places its reasons on the record.” Thus modified, the bill passed the Senate unanimously and the Assembly 89–9. The presumptive minimum provision seemed to attract little attention, and it is unclear whether many of the legislators who voted for the 1990 law were even aware of this brief, last-minute addition to a long bill. ■

### Triggering weight of drugs for statutory minimums, 1990 law

DRUG	1 YEAR	3 YEARS	5 YEARS	10 YEARS
Crack cocaine	>0g	>3g	>10g	>40 g
Powder cocaine	>25g	>100g	>400g	>800g
Heroin	>10g	>50g	>200g	>400g



## FROM THE PODIUM

Rachel E. Barkow

### Prisoners of Populism: Understanding the Politics of Mass Incarceration

On October 25, 2016, Rachel E. Barkow, the Segal Family Professor of Regulatory Law and Policy at New York University School of Law, delivered Marquette Law School's George and Margaret Barrock Lecture on Criminal Law. This is an edited and condensed text of her remarks.



As I wrote my lecture, I couldn't help but feel a little guilty that it's almost guaranteed to make you more dejected after you hear it than when you arrived. That's because I'm going to argue that all the talk you may have heard about how there is a bipartisan movement to address mass incarceration and reform criminal justice in the United States is way overblown. In fact, the politics of criminal law in America remain as irrational and counterproductive as ever, and the reforms that have passed through the political process have been modest at best.

That is not to say that the reforms that have passed are not worth applauding—they are. But if we really want to tackle our sky-high, record incarceration rates and address the deepest problems

of criminal justice administration in America, going through our existing political process and institutions to enact new substantive policies one by one is not the way to do it.

There is an enormous institutional problem in how we approach criminal justice, and nothing fundamental will change until we change those institutions and how they operate. So my goal today is to get you as cynical as I am about criminal justice reforms and to convince you that we need a more significant institutional realignment for real progress.

To do that, I'll break my talk into three parts. First, I am going to give you a brief overview of how sweeping criminal law is in the United States and explain the ways in which it produces laws that are often irrational and undermine public safety. Second, I will explain how these crazy policies come to pass, highlighting the political and institutional dynamics that all but guarantee that these pathological policies will continue with only marginal changes. Finally, I will briefly sketch a different path forward that I believe points the way to real reform—with the caveat that I think we have a long way until we get to that institutional reform moment.

#### I. The Problem of Mass Incarceration

Let's start with what people are talking about when they say that there is mass incarceration in the United States. It doesn't mean people are rounded up in large groups in one proceeding and thrown in prison. What people mean by *mass incarceration* is that we have the highest incarceration rate by far in our history, and we have the second-highest incarceration rate in the world.

You might have thought that we were first, but Seychelles is ahead of us because it has 735 prisoners—*altogether*, but that makes its rate pretty high because it has a total population of around 92,000 people. But other than Seychelles, we're at the top—by far. We have more than 2.2 million people who are incarcerated. To look at in another way: We have 5 percent of the world's population, but 25 percent of its prisoners.

Critically, the jarring statistics are not spread evenly among the population. African Americans make up nearly half of the people incarcerated, even though they are only 13.2 percent of the U.S. population. At our current pace, nationwide, almost one out of three black men in the country can expect to be incarcerated during his lifetime, while only 6 percent of white men face the same expectation. And if we look beyond incarceration to criminal justice supervision, the racial disparity numbers are even more shocking. In some cities, more than 40 to 50 percent of black men are under criminal justice supervision.

Most people agree that these statistics show that something has gone very wrong in our country. For some people, that means addressing the root causes of crime. And I'm all in favor of that. This is an issue that merits close scrutiny because poverty, housing segregation, poor education systems, and lack of employment disproportionately affect communities of color and do feed into higher rates of criminality. But I think that you need to talk about more than root causes to address all the problems we have with criminal justice in the United States.

Whatever we do to adjust the underlying rates of crime by tackling root causes, the fact remains that our *response* to crime is itself problematic, and we need to address that response as well as root causes. All too often, our criminal justice policies are not proportionate to the crime we actually have in the United States, do not promote public safety, and have a disparate impact on racial minorities that cannot be explained by the underlying rates of offending.

Let me give you a few examples of these irrational policies. Just keep in mind that the illustrations I'm giving today are part of a much larger pattern.

### *Lumpy Laws*

We'll start with the fact that our criminal laws often lump together people of vastly different levels of culpability but treat them all as if they were the worst of the worst. I will give you some examples,

starting with sex offender laws. When the average person hears the term *sex offender*, he or she is likely thinking of rapists and child molesters. And that is certainly to whom politicians refer when they pass laws addressing sex offenders. You know these laws—they are often named after a victim (often a child) who was killed after horrific sexual abuse.

But the *actual* laws defining sex offenders go far beyond the child molestations and brutal rapes and killings that prompt their enactment. A Human Rights Watch report found that at least 5 states required people to go on sex-offender registries for visiting prostitutes, and 13 required sex-offender registration for urinating in public. Twenty-nine states required registration for teenagers who have consensual sex with another teenager.

Sentences and collateral consequences for sex offenders are not set with these kinds of cases in mind. They are not set based on children playing pranks, individuals hiring prostitutes, or teens sexting. They're set with the worst of the worst in mind. But all offenders get lumped together as if they were equivalent because the political process does not take the time to sort them out. They all get the same mandatory minimum sentences and are put on a sex offender registry, often for life, not to mention facing bans on where they can live.

Recidivist laws (often called three-strikes or career-offender laws) are another example of lumpy laws because they typically fail to distinguish among the types of crimes that individuals are committing.

The problems of lumping people with different culpability together are exacerbated by the fact that the laws often trigger mandatory minimum sentences and mandatory collateral consequences for everyone in the group without making distinctions.

### *Other Irrational Policies*

These aren't the only examples of irrational and disproportionate policies and laws. Our prison policies suffer from many similar problems. We don't invest in prison programming that has been shown to reduce recidivism and yields more benefits than it costs. For example, about 85 percent of those incarcerated have a substance abuse problem, but only 11 percent of the people in prison and jail are receiving substance abuse treatment.

We see the same thing with respect to mental health treatment, cognitive behavior treatment, vocational ▶▶



training, and educational programming. These interventions work to reduce reoffending, but we're just not offering them.

The lack of support for this kind of programming is not based on a rational assessment of the costs and benefits. If that were occurring, we would make the investment in these programs now to get the benefits of lower recidivism—and therefore lower incarceration costs—later.

We also see irrationalities when we talk about the collateral consequences of convictions. Despite the fact that housing is a crucial need for those released from prison—with one-third of those released from prison being homeless within six months—Congress has passed strict bans on access to public housing for those with convictions. It has targeted its harshest bans for those engaged in drug activity, even when the person wasn't selling or using drugs in public housing.

It is not just housing restrictions. When Congress “ended welfare as we know it” in 1996, it required states to impose lifetime bans on individuals with drug-related felony convictions from receiving federal welfare aid or food stamps. States can take affirmative action to opt out of the lifetime ban, and some have done so, but people with a felony drug conviction are still fully or partially excluded from food stamp benefits in 30 states and from welfare assistance in 36 states.

## II. The Politics and the Power of Stories

So now that you have a sense of just some of the many ways in which our laws are irrational, I want to turn to how we end up with policies like these that undermine public safety, cost a fortune, and disproportionately affect people of color. Here it is critical to understand that these policies are not the result of rational reflection. Our political process is driven by high-profile stories, not by data or weighing costs and benefits.

Let me give you an example of how this works. In the 1980s, Massachusetts and many other states used furlough programs that allowed inmates weekend or other short-term passes to work, visit family, or do community service. These programs aimed to ease people's reentry into society, to assist in the management of prisons by keeping morale higher, and to help the governor make clemency decisions

by seeing what kind of track record people had while on furlough.

Then there was the story of Willie Horton. He had murdered a teenage gas station attendant and was serving a life sentence. He was released on a weekend furlough as part of the Massachusetts program, and he did not return. Instead, while out, he committed horrible crimes against a Maryland couple, Cliff and Angela Barnes. He raped Angela Barnes and pistol-whipped Cliff Barnes.

This story became national news when George H. W. Bush used it in his 1988 presidential campaign against Michael Dukakis, the governor when Horton was furloughed, to paint Dukakis as soft on crime. Many credit the Horton ads as pivotal to Bush's winning the election. Indeed, just about all politicians since that time have been well aware of what it would mean to their political career were they to have their own Willie Horton story.

Because of the fear of these attacks, we've seen furlough programs dismantled and declines in pardons, parole, and any other program that could possibly be pinned to a politician, should someone released on that program go on to commit a violent act. We have also seen programs that could be used to rehabilitate people and reduce recidivism get destroyed or never get off the ground because of a fear that to support these programs was to risk getting labeled as someone who coddles violent criminals.

As for the furlough program in Horton's case, one could agree or disagree that it was a good idea. But when the ads came out, the program was never analyzed beyond the Horton story. It actually had a success rate of 99.5 percent in terms of how many individuals went on furlough and returned to the prison facility with no trouble.

Our political system does not analyze whether a program prevents more crimes than it risks or how it can be modified to maximize public safety. It doesn't consider whether longer sentences make sense or whether they lead to more crime later because the person who is released—and 95 percent of all people in prison are released, 600,000 each year—will struggle to reenter because of the longer sentence. It doesn't factor in whether a collateral consequence will lead to more crime.

I teach administrative law as well as criminal law, and I am always struck by the contrast. We don't approach other areas of government regulation the way we approach the regulation of criminal behavior. We don't ban a vaccine once there's a story of a death or a serious reaction to it. We don't get rid of air bags because one kind happens to be defective.

Instead, we carefully study things to see whether on balance they will do more good than harm. Environmental policy, occupational health and safety, consumer products, pharmaceuticals—we look at the risks presented by something and ask whether it's worth doing because the good outweighs the bad.

Criminal law, where the state power is at its most intrusive, should be as rational in its approach as these other regulatory areas. But it is not. And part of the reason is that it's just not seen as a regulatory area where expertise is needed.

### *The Demise of Checks and Balances*

The Framers knew that the political process would be prone to excess in criminal law. Alexander Hamilton—now of Broadway fame—wrote in the Federalist Papers that “[t]he criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.” (I was hoping that this would make it into the musical, but no luck.)

So the Framers put in place a multitude of constitutional checks, including the president's pardon power, the jury trial guarantee, and the

Eighth Amendment prohibition on cruel and unusual punishment.

Beyond these and other constitutional protections, for most of the country's history, there were additional checks. Judges had the power to individualize punishment in criminal cases, and then parole officers could similarly provide a check. These constitutional and institutional checks started to break down when the tough-on-crime era began in the 1960s.

And when they did, prosecutors began to assume tons of unchecked powers. Criminal codes expanded, giving prosecutors a greater menu of charges from which to choose. In the 1970s, legislators increased statutory maximum sentences, established mandatory minimum sentences, and put in place binding guidelines in many jurisdictions. Many jurisdictions also abolished parole.

These shifts considerably weakened the role played by judges and parole officials and expanded prosecutorial power. With the option of charging offenses with mandatory minimums, prosecutors could effectively sentence defendants—or threaten to do so. This gave them huge leverage in plea negotiations.

The Supreme Court, for its part, allowed the balance of power to shift to prosecutors. Whereas plea bargaining took place in the shadows for most of U.S. history, in 1971 the Supreme Court acknowledged plea bargaining as an acceptable practice, even though there is little to distinguish it from unconstitutional-conditions jurisprudence. After all, prosecutors are putting a big price on the exercise of a defendant's jury trial right. ▶▶

*“Whatever we do to adjust the underlying rates of crime by tackling root causes, the fact remains that our response to crime is itself problematic, and we need to address that response as well as root causes.”*



*“ [I]t is critical to understand that these policies are not the result of rational reflection. Our political process is driven by high-profile stories, not by data or weighing costs and benefits. ”*

Moreover, the Court has put essentially no limits on what prosecutors can threaten if a defendant turns down a plea deal, so long as there is evidence to support the threatened charges. For example, the Court upheld (in a 5–4 decision) a conviction where the prosecutor offered to recommend a five-year deal if the defendant were to plead but threatened to bring different charges carrying a mandatory life sentence if the defendant went to trial. If that is not coercive, it is hard to imagine what is.

The Court also has taken a hands-off approach to the Eighth Amendment, effectively leaving non-capital sentences unregulated. It has upheld a life sentence for a defendant who committed three low-level theft offenses with a total loss amount of \$230. It upheld mandatory life without parole for a first-time offender charged with possessing 672 grams of cocaine.

This one-two punch—legislators arming prosecutors with a choice of charges and severe mandatory sentences and the judiciary giving them unlimited license to use harsh sentences as leverage to extract pleas—virtually knocked out jury trials from the system.

Instead, the new normal in criminal law administration is a system dominated by prosecutors. We now have an endless cycle in which legislators continue to have incentives to pass excessive laws and prosecutors have an incentive to ask for them. Prosecutors lobby for harsher sentences to enhance their position during plea negotiations and to gain cooperation.

In addition to touting those sentences to get cooperation and pleas, some prosecutors have openly admitted that they use long sentences for drug charges to get people they believe are violent, even when they lack proof that the person committed more-dangerous crimes.

It is no wonder that prosecutors fight sentencing reforms—they will fight any inroads on their discretion and the power it gives them to adjudicate cases without judicial oversight.

You will often see prosecutors openly advocating that, even with our current numbers of mass incarceration, we should build even more prisons, despite any evidence that it would reduce crime. Steven Cook, president of the National Association of Assistant United States Attorneys, said, “Do I think it would be a good investment to build more [prisons]? Yeah, no question about it!”

Of course it is easy to see why prosecutors take these views. They do not need to pay for prisons and long sentences out of their budgets, but they get the benefits of having those long sentences on the books because of the bargaining leverage it gives them and because they can appear tough to their constituents.

And yet prosecutors are the only firewall against the excessive legislative judgments that the political system is bound to produce—the “necessary severity” of the criminal code that Hamilton identified. But that is to ask the fox to guard the henhouse: Oftentimes prosecutors are the ones asking for those broad laws and long sentences because of the leverage it gives them.

Prosecutors are thus the real power centers in American criminal law, effectively running a vast administrative system. But unlike other areas of administrative law, where an executive agency faces lots of checks on its discretion, prosecutors face almost no oversight.

Moreover, in the civil regulatory field, agencies recognize that they are making law through their decisions and thus think about broader policy questions. Prosecutors tend not to see their role as big-picture policy makers but instead see themselves as making case-by-case determinations.

Aside from that cultural difference, there are big legal differences.

Civil regulatory agencies must abide by various separation requirements within their agencies and provide various procedural protections. Prosecutors’ offices are under no obligation to provide any kind of

process to individuals during plea bargaining, even though that is effectively a final adjudication for most people. The same individual who investigates a case can make the final charging decision and decide what plea to accept.

The role of reviewing courts is also vastly different. Courts review civil regulatory agencies to make sure their policies are not arbitrary and capricious. Judicial review of prosecutors is almost non-existent.

Prosecutors also escape oversight from other actors. For example, they do not need to perform cost-benefit analyses for their decisions to an overseer in the executive branch. And whereas legislators often keep close tabs on civil regulatory agencies because powerful interests lobby them to do so, the relative weakness of criminal defendants means that legislators often do very little to rein in prosecutors who go too far.

The result of this institutional arrangement is that the political forces I have described face almost no pushback. It should come as no surprise that this institutional arrangement produces policies that defy rationality.

This dynamic is critical to understanding why the current talk about criminal law reform is overstated. When you hear talk about criminal law reform, you have to keep in mind how narrow it actually is.

As Marie Gottschalk at the University of Pennsylvania points out, the efforts so far have focused on what she calls the “non, non, nons—the nonserious, nonviolent, non-sex-related offenders.” These offenders make up only 32.4 percent of the prison population. So even if we legalized all drugs, for example (and we are nowhere near doing that), we’d still have the highest incarceration rate in the world—after Seychelles.

Meanwhile, keep in mind that the reforms for the non, non, nons have hardly been sweeping. In fact, they’ve been quite modest, targeting the lowest-hanging fruit—those charged with drug possession, for example—for sentencing reductions. In addition, it has hardly been the case that new criminal laws have all been in the direction of less severity. Many new laws have passed increasing punishments.

So while reforms might tinker around the edges to deal with the least culpable categories of nonviolent, low-level offenses, they will not do more than that

because this institutional structure is destined to mass-produce incarceration and criminalization.

### III. A Road Forward?

Let me outline a more fruitful approach for reformers to follow. To get better outcomes, we need a better institutional structure that avoids some of these pathological political pressures, as the late Professor Bill Stuntz so aptly labeled them. I want to highlight three key institutional changes that I think are critical places to start.

First, we need to focus on prosecutors because they run this system, and they need to be checked more than they are now. Some changes here could be relatively small things—like changing the internal structure within prosecutors’ offices so that more-experienced prosecutors screen cases because they have a better perspective of what is serious or putting different people in charge of charging decisions from those who investigated cases.

Other needed changes are bigger—such as focusing on metrics that hold prosecutors accountable for how their decisions affect recidivism and reentry. We should force them to think about more than short-term elections and instead look to longer-term facts such as crime rates and recidivism. Because most head prosecutors are elected, reformers can also turn their attention to those elections. A highly organized and interested group could really make a difference.

We’ve already seen this, with Black Lives Matter activists helping to turn out the vote against prosecutors who failed to bring cases against police officers who shot and killed unarmed civilians. If that same energy were also channeled to focusing on how prosecutors exercise their discretion in other areas—when they threaten long sentences, show racial disparities in their charging patterns, and charge juveniles as adults, for example—we might see changes in how that discretion is exercised, at least as long as prosecutors believed it could cost them an election.

The second institutional change that I would focus on would require jurisdictions to see criminal law administration more like the administration of other regulatory areas. One of the biggest institutional flaws in our current approach to criminal justice is that no one actor seems to have an eye on the big





“ *Instead, the new normal in criminal law administration is a system dominated by prosecutors. We now have an endless cycle in which legislators continue to have incentives to pass excessive laws and prosecutors have an incentive to ask for them. Prosecutors lobby for harsher sentences to enhance their position during plea negotiations and to gain cooperation.* ”

picture of using criminal justice interventions to study what works to reduce crime rates and recidivism and to implement those reforms. This task is allocated among prosecutors, prison officials, probation departments, parole officials (where they still exist), and executive officers responsible for clemency—the result being that no one agency is accountable for outcomes. Budgets for these different departments exacerbate the problems, because money saved in one area (e.g., prisons) does not automatically get reallocated to another (e.g., probation or treatment programs), where it might be better spent.

We need a coordinated approach to these issues under one roof that is based on the best data available instead of the intuitions of various actors. Jurisdictions should turn to an agency model—whether a sentencing commission or a reentry commission—that is responsible for setting sentencing guidelines, incarceration policies (where individuals are housed and what programming should be available during their terms of confinement), and collateral consequences. We do this in other regulatory areas, and there is no reason not to do it here. This agency should be required to study policies and keep only those where the costs are justified by the benefits.

Third and finally, the courts need to step up and check the system’s excesses. The Supreme Court has largely failed to accommodate constitutional protections to the world of plea bargaining in which we now live, but it is not too late to change course.

Similarly, while the Court has taken a hands-off approach to the Eighth Amendment outside the death penalty context, there are signs that this, too, could shift. There are various openings for shifting the doctrine so that critical constitutional protections provide their intended check against excessive punishments and preserve an individual’s right to a jury trial.

We also need changes to the composition of the judiciary, which is dominated by former prosecutors, with almost no former defense lawyers or individuals experienced in criminal justice reform. The result is a decided tilt toward the government that must be remedied.

Criminal justice reformers should pay more attention to federal judicial appointees to make sure that there is diversity when it comes to criminal justice experience. Those interested in criminal justice need to be just as attentive to the courts as other interest groups are. They should also focus on judicial elections. Just as we are starting to see a shift in elections involving prosecutors, we may also be able to focus some of the criminal law reform’s efforts on judges.

Not one of these steps will be easy. It will be a very long road, but the key is to make sure we are on the right one. And I don’t think we will be headed in the right direction until we recognize that the problems are far deeper than just changing laws through the existing political institutions. We need significant institutional changes, and only then can we expect to change our current system. ■

Joseph D. Kearney

## Investiture of Hon. Cynthia M. Davis

On September 29, 2016, the Milwaukee County Circuit Court held an investiture of Cindy Davis, L'06, as a judge of the court. Dean Joseph D. Kearney spoke at the occasion.

Some 13 years ago, Cindy Davis came to us at Marquette Law School, having proved herself in the classrooms and on the playing fields of, first, Brookfield Academy and, then, Depauw University. Yet her past accomplishments provided no guarantee of success. Cindy was no longer a teacher or captain or award-winner, but one of a large class of students.

When I greeted those students that August morning in 2003, I impressed upon them the same truth that I had spoken a few months earlier at a memorial service in this courtroom, remembering Dean Howard B. Eisenberg and other lawyers. In both instances, I recalled (for the experienced judges and lawyers here) or observed (for the new law students at Marquette) that law is, among other things, the place to which individuals in our society turn not only to do their deals “but to right their wrongs and protect their freedoms.” I reminded the class of that three years later, at their graduation in 2006.

And in the years in between—the three years of law school—Cindy had proved herself once again. She impressed her professors and won academic awards. She became a leader among her fellow students, who selected her as editor-in-chief of volume 89 of the *Marquette Law Review*. We kept her challenged. Upon her sending me a note relating that she had received the clerkship she had sought with Justice David Prosser, I responded by congratulating her—and concluding, “I presume that you know that this means you will be enrolled in my Supreme Court Seminar in the spring.” What is the value of the deanship if it does not enable you to cherry-pick a few students? Lest there be any doubt here: In the course, Cindy received an *A*.

Cindy so succeeded because she brought to the new endeavor of legal education the same qualities and habits that had carried her to law school. “Preparation, thoughtfulness, and responsibility are her hallmarks,” said one of her recommenders in 2003. “She is one of the best listeners that I have ever



Cindy Davis is pictured in the ceremonial courtroom in the Milwaukee County Courthouse with her husband, Randy Sitzberger, L'09, and mother, Sandy Davis; Chief Judge Maxine White, L'85, is in the background, seated at the bench.

encountered in a student—attentive, open-minded, and sufficiently skeptical without her skepticism dissolving into cynicism,” wrote another. Are these not the very things for which one would hope in a judge?

The answer, of course, is “Yes,” and the happy truth is that Cindy Davis is exceptionally well qualified to serve as a judge of the Milwaukee County Circuit Court. To be sure, she will have to prove herself all over again, for judging is a different art from the practice of law. Her history before, and at, Marquette Law School leaves no doubt that Judge Davis will meet this new challenge at a high level. She is ready to right wrongs and protect freedoms—or, more broadly yet, to do justice. Warm congratulations. ■



# Water Works

## Marquette Law School Faculty Blog Pieces on Water Law and Policy



A civil engineer, a lawyer—and a rising thought leader on water-related issues in Wisconsin and beyond. That describes David Strifling, director of Marquette Law School’s Water Law and Policy Initiative. The initiative focuses on legal and regulatory aspects of water policy. It aims to promote collaboration and exchanges of information among those involved in the water sector and to increase broader knowledge. Professor Strifling is involved in a wide range of water research and associated efforts involving Marquette University and other institutions in Milwaukee. He was the lead organizer of “Public Policy and American Drinking Water,” a major conference at the Law School in September 2016.

Strifling, a 2004 graduate of Marquette Law School, worked for five years as a civil and environmental engineer before entering the legal profession. He holds a B.S. from Marquette in engineering and an LL.M. from Harvard Law School. He taught at Temple University in Philadelphia and practiced law at Quarles & Brady in Milwaukee before joining the Law School.

One venue for Strifling’s insights and scholarship has been the faculty blog on the Marquette Law School web page ([law.marquette.edu](http://law.marquette.edu)). Here are several of his pieces from the blog; in addition to the general editing and trimming done here, notes and, of course, hyperlinks are omitted. Visit the blog for further essays by Strifling and others.

### **Water: 2016 Retrospective (and Issues to Watch in 2017)**

January 16, 2017

The year 2016 brought numerous developments in the water law and policy sector at the national and state levels, and also here at Marquette University Law School’s Water Law and Policy Initiative; 2017 promises more on each front.

Nationally, the Flint drinking water crisis continued to dominate headlines. While the quality of Flint’s drinking water is slowly improving, it’s certainly too early to declare the crisis over. As a stark reminder of that, an ongoing investigation led to a series of criminal charges against those at the heart of the disaster.

Here at Marquette, drinking water issues also took center stage. The Water Law and Policy Initiative’s September “Public Policy and American Drinking Water” conference, organized as part of the Law School’s larger Public Policy Initiative, drew widespread attention and brought together national experts in a variety of water-related fields. It was at this event that Mayor Tom Barrett spoke of the pressing risks of lead in Milwaukee’s

water because of the 70,000 lead laterals serving City of Milwaukee residences. The mayor’s comments at and after the conference provoked intense media coverage and quickly resulted in the city’s making numerous policy changes. For example, Mayor Barrett agreed to provide free water filters to affected citizens and ultimately budgeted to pay a substantial part of the cost to replace (privately owned) lead service lines.

Many other stories also captured headlines in 2016.

The year just ended saw ongoing high-profile national litigation over the Environmental Protection Agency’s controversial “Clean Water Rule,” which generally clarifies the categories of waters the federal government may regulate under the Clean Water Act. In 2016, courts struggled to resolve which of them had jurisdiction to hear the substantive challenges to the rule. Many observers predicted that the case would eventually reach the Supreme Court. In mid-January 2017, in a mild surprise, the Court agreed to take up the jurisdictional question even before the merits are resolved. As I previously wrote in this space, Justice Kennedy’s comments in another 2016 opinion (specifically, his

concurrence in *United States Army Corps of Engineers v. Hawkes Co.*) do not bode well for the rule's fate at the Court. And during his campaign, President Donald Trump severely criticized and promised to repeal the rule, so it's possible that the Trump administration simply will not defend it in court. The Trump EPA could also initiate a rulemaking to withdraw or rewrite the rule. Other Supreme Court litigation that will bear watching in 2017 includes interstate battles between Florida and Georgia over surface water allocation, and between Mississippi and Tennessee over groundwater allocation.\*

Despite his criticism of the Clean Water Rule and his vow to abolish the EPA (which he has now reconsidered), Trump recently underscored the importance of "crystal clear water." His substantive plans in that direction remain unclear, though his administration's general approach to clean water and infrastructure issues has already drawn substantial commentary.

In February 2016, the Law School hosted a meeting of water experts from around the country to discuss American competitiveness in the water sector. The discussion ultimately resulted in a published study analyzing American talent, technology, investment, and infrastructure, using Milwaukee and the surrounding region as a case study.

At the state and local levels, too, groundbreaking developments arose. The City of Waukesha's first-of-its-kind application under the Great Lakes Compact to use Lake Michigan water for its public water supply generated substantial local and regional attention. As part of the Law School's "On the Issues with Mike Gousha" series and within the broader context of the university's sustainability-themed Mission Week, we arranged a conversation between the mayors of Waukesha and Racine that significantly advanced the public debate over Waukesha's request. The city's application was eventually approved, although it faces ongoing legal challenges (a 2017 story to watch).

In January 2016, I wrote on this blog about the erosion of the public trust doctrine in Wisconsin. That trend continued in May 2016, when the state attorney general issued an opinion taking the position that the Wisconsin Department of Natural Resources could not rely on the doctrine to impose conditions on permits for high-capacity wells. An ongoing legal challenge to that interpretation will be well worth following in the new year.

The Water Law and Policy Initiative also continued its ongoing research into policy solutions to water problems that affect us all, such as excess chloride transport to surface water and drinking water as a result of over-application of road salt and overuse of water softeners; the widespread presence of plastic microparticles in the Great Lakes; and water pollution from agricultural sources.

All in all, 2016 saw the continuing growth of water as an important issue at every level of society, and, in that sense, 2017 is likely to bring more of the same.

## Pathways to Future Environmental Legislation

January 11, 2017

Over the past quarter century, repeated congressional failures to enact any significant piece of environmental legislation led observers to describe such efforts as "gridlocked," "deadlock[ed]," "dysfunction[all]," "broken," the subject of "considerable, self-imposed inertia," and the surrounding atmosphere as "highly inhospitable to the enactment of major environmental legislation." Things weren't always this way; in the 1970s, a remarkable burst of legislative activity largely shaped the field we know today as federal environmental law.

In a paper soon forthcoming in the *Journal of Land Use and Environmental Law*, I argue that a perhaps minor and certainly uncontroversial piece of environmental legislation >>



\*For discussion of Justice Kennedy's concurrence, see the entry, from June 3, 2016, on page 60. On February 28, 2017, President Donald Trump directed the EPA to begin the process of reconsidering the rule discussed here. – Ed.



known as the Microbead-Free Waters Act of 2015 (“the Act”) reveals potential pathways through or around this modern gridlock. The Act prohibits the manufacture or introduction into interstate commerce of useful—but environmentally harmful—microscopic plastic particles known as “microbeads” that are commonly used in cosmetic products. Its provisions are direct and uncomplicated.

Yet the strategic building blocks underlying the Act—including an emphasis on public health issues and broad stakeholder support driven by industry concerns about unfair competition and opposition to local legislation—may provide innovative and useful foundations for future efforts to pass environmental legislation.



Microbeads present complex commercial and ecological issues. They are cost-effective cleansers and exfoliants intended to be rinsed down the drain as part of the normal cosmetics product lifecycle, but they typically cannot be removed in wastewater treatment facilities due to their lightness and exceedingly small size. Once in open waters, microplastics

(like all plastics) tend to concentrate toxins, and they are attractive to aquatic life as a food source because they appear to be fish eggs based on their size and shape. (The photo above at left shows microbeads ingested by a larval-stage perch.) After initial ingestion, the accumulated toxins bioconcentrate up the food chain and thereby pose a threat to human health. Once present in open waters, microbeads cannot be effectively removed because any attempt to do so would necessarily also capture plankton and other essential parts of the food chain. New research shows that this threat is particularly immediate in the Great Lakes, where microbead concentrations equal or exceed those found in oceans.

The Act banning microbeads sailed through Congress with no real opposition, passing in the House by voice vote and in the Senate by unanimous consent. Dan Farber, a longtime environmental law scholar, labeled this a “minor miracle.”

Although the easy passage can partly be explained by the absence of any determined opposition, a closer examination reveals several positive traits, the emphasis

of which may provide a useful foundation for future efforts to pass environmental legislation. First, the Act was tightly focused and of modest scope. Plastics are the leading cause of anthropogenic pollution in our rivers and lakes, but the Act makes no effort to address that problem in its entirety; instead, it contains simple and direct language closely focused on one clearly delineated aspect of the problem.

Second, the Act attracted a broad coalition of stakeholder support. In one sense, this was not surprising; environmental and community groups have long campaigned for a microbead ban. Support from industry was more unexpected, but not unprecedented; in fact, some public choice theorists believe that almost all public regulation is really private-interest rent-seeking in disguise. By that way of thinking, environmental regulations can be reduced to tools of regulated industry intending to burden rivals. And the national ban imposed by the Act eliminated the risk of a patchwork of substantively different bans enacted by individual states.

Third, the Act focused on public health risks in addition to environmental concerns, perhaps blunting the ordinary partisan blockade to new environmental legislation. Crafting future environmental legislation to fit these constraints will significantly increase the chances of success.

Past experience shows that environmental gridlock doesn’t have to be the norm. During the environmental law revolution of the 1970s, overwhelming majorities of a divided Congress enacted more than a dozen major federal environmental laws, including the National Environmental Policy Act (1970), the Clean Air Act (1970), the Federal Water Pollution Control Act, which is now commonly known as the Clean Water Act (1972), the Federal Environmental Pesticide Control Act (1972), the Endangered Species Act (1973), the Safe Drinking Water Act (1974), the Resource Conservation and Recovery Act (1976), the Toxic Substances Control Act (1976), and the Comprehensive Environmental Response, Compensation, and Liability Act (1980). Few, if any, subject matter areas have ever seen such a concentrated outpouring.

Shortly after I wrote the microbeads article, Congress passed a bill reforming the Toxic Substances Control Act (“TSCA”), the cornerstone of chemical regulation in the United States. In several respects, the effort to pass the TSCA reform bill mirrored and confirmed the strategies

that led to the Act. First, the TSCA package emphasized the public health benefits of the legislation in addition to the environmental benefits. Second, supporters of the TSCA compromise legislation attempted to build broad stakeholder consensus to eliminate a patchwork approach.

In terms of sheer scope, I don't contend that the Act is on the level of the Clean Water Act or the other landmark laws passed in the 1970s. But the Act and the TSCA reform package reveal that Congress can indeed pass smart, targeted environmental legislation. Proponents of future environmental legislation can benefit from the Act's example by setting a reasonable scope and focus; by building a broad stakeholder coalition that includes, rather than demonizes, industry; by eliminating "patchwork" regulation to the extent possible; and by emphasizing the public health aspects of proposed legislation.

## Marquette Law School Poll Reveals Public Perceptions of Water-Related Issues

September 16, 2016

Public perceptions of environmental risk have long been controversial when used as a tool to help set public policy. Many scholars have argued that there is a fundamental mismatch between "notoriously inaccurate" *public* perceptions of the magnitude and sources of environmental risks, on the one hand, and *expert* analyses of the same. Even if that is true, public perceptions would be worth measuring for other reasons: for example, studies have confirmed that "federal environmental laws reflect public perceptions of risks more than they do scientific understanding." And just this year, a gathering of environmental law scholars discussing the future of environmental law stressed the increasing ethical obligation to consider (often-marginalized) community voices, turning environmental law into "a tool for collaboration and connection . . . rather than conflict." In short, perhaps "public perceptions of environmental risk deserve more credit than comparative risk analysts admit."

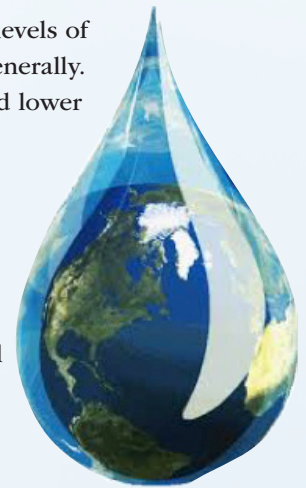
Despite a general sense of increasing public concerns about issues of water quality, surprisingly few efforts have been made to quantify the level of public disquiet over these problems. To help fill that gap in Wisconsin, two surveys were conducted in August 2016 by the Marquette

Law School Poll. They found significant levels of concern over water quality and policy generally. However, most Wisconsin voters reported lower levels of worry regarding their personal sources of drinking water.

Recent reporting has highlighted drinking water concerns across the state—including lead levels, agriculture-related bacterial contamination, and a failed legislative effort to ease municipal water system privatization. Our survey results showed that 78 percent of respondents had heard at least some about the lead crisis in the Flint, Mich., water supply. When asked about the safety of the water supply in Wisconsin's own low-income communities, 68 percent were very or somewhat concerned, 17 percent not too concerned, and just 13 percent not at all concerned. However, when asked about the safety of the water supply in their own community, respondents were more confident. A combined 56 percent were either not too concerned or not at all concerned, with 44 percent being very or somewhat concerned.

People from lower-income households were more concerned about their communities' water quality. Among households making less than \$40,000, 53 percent reported being very or somewhat concerned. This view was shared by 36 percent of those in households earning at least \$75,000. Wealthier respondents were also the least likely to express concern about the quality of water in low-income communities. Thirty-three percent of those earning at least \$75,000 expressed little or no concern about water quality in low-income communities, compared with 19 percent of respondents earning less than \$40,000.

In a tangible demonstration of interest in water quality, 56 percent of respondents reported having had their drinking water tested at least once in the past. As expected, testing is much more common among residents served by private wells. According to the Wisconsin DNR, the state currently holds over 800,000 private wells. Thirty-four percent of registered voters reported receiving their home's drinking water from a private well. Of these private-well users, 81 percent had tested their drinking water—compared to 42 percent of those serviced by public utilities. ▶▶





In January 2016, the state Assembly passed a bill easing the ability of municipalities to sell their drinking water systems to private companies. After widespread opposition from civic groups, the Senate declined to hold a vote. The Marquette poll is the first measurement of statewide public opinion on the issue. Respondents were asked, “How concerned, if at all, would you be if a private company were responsible for treating and delivering your drinking water supply?” Seventy percent of registered voters said they would be very or somewhat concerned, 14 percent not too concerned, and 13 percent not at all concerned. Unlike measures of concern or previous testing, partisanship plays a strong role. Thirty percent of Republicans reported they would be very concerned, compared with 57 percent of Democrats. Republicans, however, divide substantially along geographical lines. Twice as many rural Republicans said they would be “very concerned” by privatization (40 percent) as suburban and urban Republicans (20 percent).

Widespread skepticism of water privatization does not, however, indicate great confidence in government regulation. Views of the state government were middling. Ten percent of registered voters said the state of Wisconsin was doing an “excellent” job in protecting the safety of public drinking water. Forty-two percent said the state was doing a “good” job, 35 percent said “fair,” and 9 percent “poor.” Only 2 percent described the job done by the federal government as “excellent,” 29 percent said “good,” 43 percent “fair,” and 21 percent “poor.” Wisconsin Republicans are significantly more likely to rate highly the job being done by the state government in protecting the water supply. Sixty-seven percent rate the state’s job as good or excellent, compared with just 44 percent of Democrats. Partisan differences in federal approval are less distinct, though Democrats are slightly more positive. These responses may be more indicative of attitudes toward the state and federal governments generally.

## Justice Kennedy Criticizes “Notoriously Unclear” and “Ominous” Scope of the Clean Water Act

June 3, 2016

The Clean Water Act, as characterized by the Supreme Court, requires regulatory agencies to make difficult choices about exactly where “water ends and land begins.” Whether a particular property contains “waters of the United States,” the touchstone for federal jurisdiction

under the Act, is not easy to determine, especially when the question involves not traditionally navigable waters but wetlands. The Environmental Protection Agency defines “wetlands” as areas such as swamps, marshes, and bogs that are periodically inundated with water. Severe consequences flow from unpermitted actions that impact “waters of the United States.” The Act imposes criminal liability and civil penalties to the tune of \$37,500 per day of violation. Upon request, the Army Corps of Engineers will issue jurisdictional determinations (“JDs”), specifying whether a particular property contains jurisdictional waters. In recent years, the Supreme Court has wrestled with various aspects of wetlands issues again and again. The most recent such case, *United States Army Corps of Engineers v. Hawkes Co.*, No. 15-290, raised the question of whether the Corps’ JDs constitute “final agency action” that is immediately appealable in federal court under the *Bennett v. Spear* (1997) analysis rooted in the Administrative Procedure Act.

Earlier this week, the Supreme Court unanimously ruled that JDs constitute final agency action and are immediately appealable. The Court quickly rejected the Corps’ two arguments to the contrary: first, the rather unreasonable suggestion that affected citizens could simply proceed without a permit, risking an enforcement action during which one could argue that no permit was required; and second, that upon receiving a “positive” JD, affected citizens could apply for a permit and seek judicial review of the JD upon the conclusion of the lengthy permitting process (the property owners in *Hawkes* estimated that it would cost well over \$100,000 to “earn” the appeal right under that scenario).

But it wasn’t the majority opinion that had everyone talking; Justice Anthony M. Kennedy stole the show with a three-paragraph concurrence. He wrote that an immediate appeal right was especially important given that the reach of the Act is “notoriously unclear” and subjects landowners to “crushing” consequences, “even for inadvertent violations.” Justice Kennedy described the Act’s reach as “ominous,” and wrote that it “continues to raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.”

The *Hawkes* concurrence is a striking contrast to Justice Kennedy’s opinion in *Rapanos v. United States* (2006), another wetlands case. In *Rapanos*, Kennedy conducted a fairly searching analysis of “the Act’s text, structure, and purpose,” and formulated a relatively

broad test under which federal jurisdiction exists over any wetland or other water with a “significant nexus” to navigable waters. He wrote there that “the significant-nexus test itself prevents problematic applications of the statute,” and recognized that “[i]mportant public interests are served by the Clean Water Act in general and by the protection of wetlands in particular.”

Without question, *Hawkes* was a defeat for the Obama administration. Yet the government’s far greater concern is likely that Justice Kennedy’s position in *Hawkes* doesn’t bode well for one of the administration’s signature environmental achievements, the “Waters of the United States” rule, now known as the “Clean Water Rule.” That rule attempts to clarify the definition of “waters of the United States,” and by extension the scope of the Act’s coverage, to make it more predictable. Dozens of states and other petitioners have already challenged the rule in a variety of federal courts, many on the grounds that it unlawfully expands federal jurisdiction, with most such suits now consolidated in the Sixth Circuit. Most expect that case to end up before the Supreme Court, where Justice Kennedy—who just described the Act’s reach as “ominous,” “unclear,” and “troubling”—will hold a critical vote.

## A Rejuvenated Navigational Servitude?

March 16, 2016

As a general rule, within its borders each individual state holds title to the beds of water bodies that were navigable at the time of its statehood and has jurisdiction to regulate activity upon those waters. State authority over navigable waters is not absolute, however. The “navigational servitude” is an important constraint on state power. It flows from the Commerce Clause and asserts “the paramount power of the United States to control [navigable] waters for purposes of navigation in interstate and foreign commerce.” This power justifies, for example, the acquisition and holding of private lands “to deepen the water . . . or to use them for any structure which the interest of navigation, in [the government’s] judgment, may require.” When validly exercised, the navigational servitude excuses the federal government even from the Fifth Amendment’s Takings Clause, because “the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been

subject.” Today, however, the navigational servitude has largely retreated into obscurity. It is often viewed as a relic from a bygone era when rivers were the nation’s primary mode of commerce and long-distance travel.

The advent of emerging technologies that will make water travel more attractive may catapult the navigational servitude to renewed prominence. In the not-too-distant future, transformational technologies like hovercraft and airships may become common modes of commercial and public travel over navigable waters. Integrating the resulting water-based activity into our legal and social systems would require involvement at all levels of governance, including the courts. In fact, a fascinating example of a related dispute has already reached the United States Supreme Court.



Conceivably, both hovercraft and airships could revolutionize water travel for personal and commercial purposes. Hovercraft—smaller vehicles that slide on a pressurized current of air about nine inches above the surface—are able to fly smoothly over land, still or swift water, flooded or frozen rivers, and thin or broken ice at average speeds of 35 mph or more, and maximum speeds that are much higher. Advocates claim that hovercraft are among the most environmentally friendly modes of travel, using less energy and generating less carbon emissions than comparable craft. Future versions may be powered by hydrogen-electric motors. For longer trips or larger cargos, airships may be the answer. Manufacturers have been working for decades to develop them and now claim that they offer significant reductions in fuel consumption compared to other air vehicles, while remaining significantly faster than today’s land and sea transportation systems. Increased traffic on water networks would also ease roadway congestion. No doubt, however, broad-based use of hovercraft and airships would require the construction of significant infrastructure, and the navigational servitude could play a role in those efforts. ■



# CLASS | NOTES

1973



**Christine M. Wiseman** retired as president of St. Xavier University in Chicago at the end of 2016.

1981

**Ronald R. Hofer** has been named by the National Judicial College (NJC) in Reno, Nev., as the first distinguished professor in the college's 53-year history. He has taught at the NJC since 1994.

1982



**Donald W. Layden, Jr.**, received the Todd Wehr Volunteer Award from the Association of Fundraising Professionals

Southeastern Wisconsin Chapter. He was nominated by the Nathan and Esther Pelz Holocaust Education Resource Center of the Milwaukee Jewish Federation.

1988



**Robert J. Janssen** has opened a new practice in Green Bay. Through the firm, Janssen Law, he will continue to concentrate in the areas of personal

injury, worker's compensation, and civil litigation.

1993

**Patrick E. Kelly** has been appointed deputy supreme knight of the Knights of Columbus, the order's second in command. Kelly serves as executive director of the Saint John Paul II National Shrine in Washington, D.C., and previously held positions in the federal government, including the U.S. Department of Justice.

1995



**Scott J. Yauck** received honorable mention in the *Milwaukee Business Journal's* Executive of the Year awards. He is president and CEO

of Cobalt Partners, a Milwaukee-based real estate development firm.

1997

**Evan N. Claditis**, an attorney in the Milwaukee office of Hupy & Abraham, has joined by invitation the "National Trial Lawyers: Top 100 Lawyers List."

1999

**Mary T. Wagner** recently published *Finnigan the Circus Cat*, which previously won first place in the genre "Unpublished Children's Chapter Book" in the Royal Palm Literary Awards hosted by the Florida Writers Association. Wagner is a part-time assistant district attorney in Sheboygan, Wis.

Quarles & Brady recently announced that three Marquette lawyers, formerly associates in its Milwaukee office, have become partners in the firm:

**Joel A. Austin, L'06**, intellectual property, with an emphasis on patent defense, enforcement, and prosecution of mechanical and electrical technologies

**Hillary J. Wucherer, L'08**, intellectual property, including trademark law and client counseling in copyright, licensing, and other matters

**Katrene L. Zelenovskiy, L'08**, business law, including mergers and acquisitions, private equity and venture capital, and corporate finance



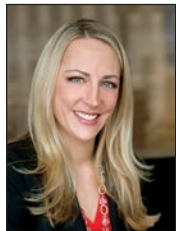
SUGGESTIONS FOR CLASS NOTES may be emailed to [christine.wv@marquette.edu](mailto:christine.wv@marquette.edu). We are especially interested in accomplishments that do not recur annually. Personal matters such as wedding and birth or adoption announcements are welcome. We update postings of class notes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

## 2001

**Mollie A. Newcomb** has joined Ryan Kromholz & Manion, an intellectual property law firm, in Brookfield, Wis.

## 2003

**Marybeth Herbst-Flagstad** has been named the first general counsel for Rogers Behavioral Health in Milwaukee.



**Tara Devine**, a partner at Salvi, Schostok & Pritchard, in Waukegan, Ill., recently obtained an \$18.5 million settlement on

behalf of a child who suffered brain damage due to a clinic's failure to diagnose meningitis. Devine also was named the top female "Emerging Lawyer in the State of Illinois" by the Law Bulletin Publishing Company.

## 2004

**Timothy J. Casey** has accepted a position as general counsel and chief compliance officer with Numotion, a medical device company in Nashville, Tenn.



**Robert W. Habich** has joined Davis & Kuelthau's real estate and finance practice group in Milwaukee.

## 2005



**Danielle M. Bergner** has been named managing partner for Michael Best & Friedrich's Milwaukee office.

## 2006

**Linsey R. Neyt** has been promoted to partner at Levenfeld Pearlstein, Chicago, where she is a member of the firm's real estate practice, representing commercial landlords and tenants.

**Sara B. Andrew** has succeeded her father, Louis J. Andrew, Jr., L'66, as president of Andrew Law Offices in Fond du Lac, Wis.

## 2007



**Michelle Eaton Scimecca** recently became a shareholder in the Minneapolis office of Vogel Law Firm, where she focuses her

practice on employment and family-based immigration. Her clients include multinational corporations, health care organizations,

educational institutions, and individual foreign nationals.

## 2008

**JoHannah Torkelson** has become vice president at Venn Strategies, a government relations and public affairs firm in Washington, D.C. Its public health clients include the Campaign to End Obesity and the University of Wisconsin Hospital and Clinics.

**Dera L. Johnsen-Tracy**, of Horn & Johnsen in Madison, was chosen as the State Bar of Wisconsin's 2016 Pro Bono Attorney of the Year.

## 2009

**Brandon C. Casey** has been named Democratic chief of staff for the U.S. House of Representatives Ways and Means Committee. He most recently served as legislative director and tax counsel for Rep. Richard Neal (D-Mass.), the committee's ranking member.



**Peter M. Young** was chosen as the Wisconsin Association for Justice's 2016 Outstanding Young Trial Lawyer. He is a shareholder at

Habush Habush & Rottier and practices ►►

The following Marquette lawyers have joined von Briesen & Roper in Milwaukee.

**Ann K. Chandler, L'87**  
**Adam R. Finkel, L'10**  
**Aaron J. Foley, L'07**  
**Andrew T. Frost, L'10**  
**Daniel B. McDermott, L'07**

**Randy S. Nelson, L'77**  
**Richard J. Rakita, L'70**  
**David J. Roettgers, L'82**  
**Robert B. Teuber, L'00**



## JUSTICE DAVID PROSSER

### A “Homer” Hits Home Runs with Law Clerks from Marquette

David Prosser said he wanted to be a homer as a justice of the Wisconsin Supreme Court.

A homer, as in someone who favors the home team—in a very specific sense. Prosser’s home team was Wisconsin, and he made a decision, after then-Gov. Tommy G. Thompson appointed him to succeed Justice Janine P. Geske, L’75. Prosser decided that he was going to seek law clerks who had graduated from the two law schools in the state: Prosser’s own alma mater, the University of Wisconsin, and Marquette University.

“I wanted to be a homer in that sense, and it never damaged me in any way,” he said. “In fact, I was always pursuing my best interests. The objective always was to get the smartest person I could find and, at the same time, support our state’s two law schools.”

In Prosser’s view, he got those smart people, and they did great work for him. From the standpoint of Marquette Law School, his approach meant great opportunities for a stream of students and graduates.

Prosser served on the high court for 18 years, winning election twice and retiring in 2016. Of the 18 clerks who worked with him, each for one-year appointments, nine came from Marquette Law School, eight had graduated from the University of Wisconsin, and one was from the College of Law at Northern Illinois University (but was a Wisconsin native).

“Marquette Law School sent me nine spectacular law clerks. Not one of them let me down in any way. Every one of them was stellar,” Prosser said.

Prosser said that he knew little about the workings of the Supreme Court at the time of his appointment. He was a member of the Wisconsin Tax Appeals Commission but had never been a judge. Most of his career had been spent as a Republican legislator from Appleton, rising to the position of speaker of the Assembly.

Prosser said that after his appointment, someone suggested he get in touch with Joseph D. Kearney, then a law professor at Marquette and someone

whom Prosser had not met. Prosser said Kearney, now dean, helped him “immeasurably” over the years.

That was especially true of the selection of Prosser’s first clerk, Allan Foeckler, L’98. Foeckler had just graduated from the Law School, and his coursework his final year had included the Supreme Court Seminar, taught by Kearney in his first year on the faculty. Foeckler “worked out perfectly” and became an important figure in Prosser’s adjustment to being on the court, Prosser said. Foeckler is now an attorney with Cannon & Dunphy, based in the firm’s office in Brookfield, Wis.

Prosser can easily list all of his clerks who were Marquette lawyers, and he is effusive about each of them. They can be found, like Foeckler, in the practice of law (**Philip Babler, L’11**, with Foley & Lardner in Milwaukee, and **Kurt Simatic, L’12**, with the Waukesha office of Husch Blackwell) or the community (**Tyson Ciepluch, L’00**, in Milwaukee); on the bench (**Tom Hruz, L’02**, a judge on the Wisconsin Court of Appeals, and **Cynthia Davis, L’06**, now a Milwaukee County Circuit Court judge); and in any number of other places: e.g., **David Strifling, L’04**, is director of the Water Law and Policy Initiative at Marquette Law School; **Joshua Byers, L’08**, runs a family business, Automotive Color & Supply Corp., in Fort Wayne, Ind.; and **Joel Graczyk, L’15**, stayed on at the court an extra year to clerk for Wisconsin Supreme Court Justice Rebecca Bradley. Prosser is proud of the fact that three of his clerks are now judges. In addition to Hruz and Davis, Clayton Kawski, the Northern Illinois graduate, is now on the Dane County Circuit Court.

Each justice on the Wisconsin high court has one clerk, one judicial assistant, and several interns. “Marquette has always supplied excellent interns,” Prosser said.

Prosser described the importance of the relationship between a justice and a clerk. “At least for a year, my law clerk is, among other things, my best friend,” he said. “It’s someone I have to put



all of my trust in. And I did. No law clerk ever let me down.” The relationship is intense and very personal.

“You have to have law clerks who are prepared to disagree with you and explain why,” he said. “I relied very heavily on my law clerks to put something in front of me. On the other hand, I didn’t necessarily accept what they wrote.” But their views were important, Prosser said, and on occasion could even persuade him—and move him then to persuade his colleagues on the court—that his initial view was not correct.

Clerks need to be excellent researchers and writers, Prosser said. In his case, they generally wrote the first draft of opinions—an important part of the process of reaching a decision.

Yet there is also a human relations element of the job of law clerks. Part of their job for Prosser was to mentor and manage the interns on the staff. Beyond that, it is no secret that some Wisconsin Supreme Court justices have had not only philosophical differences with other justices but also personal differences. In some instances, Prosser said, the clerks for the justices have played important roles in communicating among the justices and moving matters toward decisions by the court.

Reflecting on his clerks from Marquette Law School, Prosser said, “This is an all-star list of people—an absolutely all-star list of people.”

From the Law School’s vantage, Prosser played an all-star role in making it possible for so many graduates fresh out of school to have the valuable experience of clerking for a justice of the state Supreme Court. ■

in the firm’s Wausau, Rhinelander, and Stevens Point offices.



**John G. Long** is of counsel in the Dallas, Tex., office of Jackson Lewis. Formerly with Michael Best & Friedrich in Austin, Tex., he advises and represents educational

institutions, athletic conferences, coaches, and athletes in a broad range of collegiate sports law matters.

## 2010

**Russell J. Karnes** has joined Gimbel, Reilly, Guerin & Brown, in Milwaukee.

## 2011

**Rachel L. Lindsay** will be featured in ABC’s “The Bachelorette 2017” this summer.

**Zachary R. Willenbrink** recently joined Godfrey & Kahn, Milwaukee, as an associate.

## 2012

**Jacqueline L. Messler** recently joined Davis & Kuelthau, Milwaukee, as an associate focusing on estate planning, tax law, and small business law.

**Rachel T. Bernstein** was named community and hospital development manager within the Organ Procurement Organization, a department of the BloodCenter of Wisconsin.

**Kristin R. Pierre** has joined Axley Brynerson’s Madison office in its litigation practice group. ▶▶



**40 Under 40**

Two Marquette lawyers were among the *Milwaukee Business Journal's* "40 Under 40" for 2017. Named for their accomplishments and, in particular, for the difference they are making in the community, they were among the honorees at a February 21, 2017, awards event at the Pfister Hotel in Milwaukee. They are **Denise Greathouse, L'05**, Michael Best & Friedrich (below, left), and **Steven M. DeVougas, L'07**, Quarles & Brady (below, right).



**Melissa R. Soberalski** has opened a solo practice in Milwaukee, Soberalski Immigration Law. She also has been appointed to the Milwaukee County Personnel Review Board.

**2013**

**Justin P. Webb**, of Reinhart Boerner Van Deuren, has been named to the Wisconsin Humane Society Young Leaders Advisory Board.

**Nicole L. Cameli**, formerly mergers and acquisitions counsel for Emerson Corporate in St. Louis, is now counsel for Emerson's Commercial and

Residential Solutions platform in its Kennesaw, Ga., office.

**Amanda A. Bowen** has joined The Schroeder Group, Waukesha, where she practices in trusts and estates.

**2014**

**Kristen D. Hardy** has been promoted to compliance counsel at Rockwell Automation.

Employment data for recent classes, including 2015 and 2016, are available at [law.marquette.edu/career-planning/welcome](http://law.marquette.edu/career-planning/welcome).

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414.288.3167 or [christine.wv@marquette.edu](mailto:christine.wv@marquette.edu)



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## That Time When Ray Eckstein Guarded George Mikan

People know Ray Eckstein, L'49, and his wife, Kay, Speech '49, for being among the most generous donors in Marquette University history. Their landmark donations include \$51 million for construction of the Law School building, which opened in 2010 and is named in their honor. And earlier this year, the university announced that the Ecksteins have pledged \$10 million, as a matching challenge, toward the construction of a new undergraduate dormitory, to be named after Rev. Robert A. Wild, S.J., former Marquette University president.

But if you ask Ray Eckstein, he will tell you, "My claim to fame was to play basketball against George Mikan."

Eckstein grew up in Cassville, in southwestern Wisconsin, and was a basketball standout in high school at Campion Academy, the Jesuit school in nearby Prairie du Chien. That led to playing for Marquette.

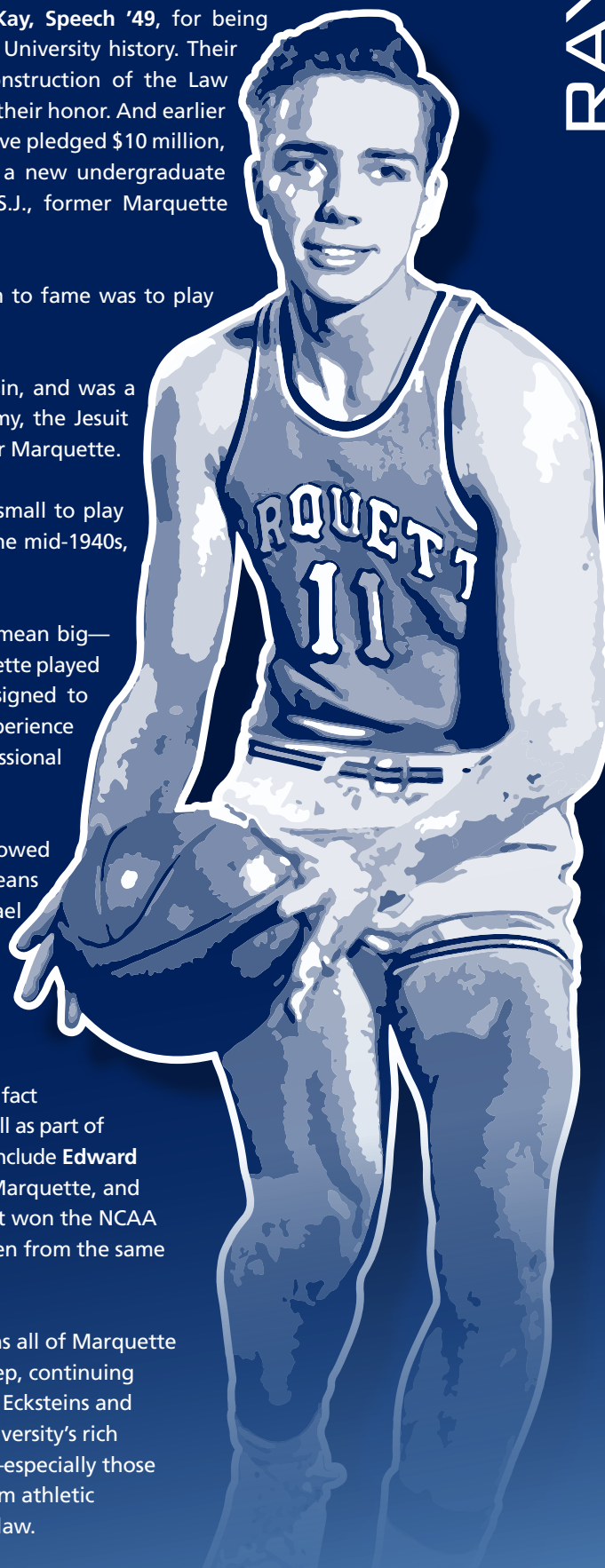
By today's standards, Eckstein probably would be too small to play at the college level—5 feet 11 inches. But, he says, in the mid-1940s, there weren't many players over 6 feet tall.

Mikan was a big—and, at 6 feet 10 inches tall, we do mean big—exception. He played for DePaul University. When Marquette played DePaul, Eckstein was one of two or three players assigned to guard him—at the same time. Eckstein said that the experience with Mikan, who went on to be one of the first professional basketball superstars, stays with him.

A few years ago, his children made donations that allowed Eckstein to play in a charity golf tournament in New Orleans in a foursome that included basketball legend Michael Jordan. Eckstein said Jordan wanted to know how good Mikan really was. The answer: "He was good—but not as good as you."

As Marquette celebrates the 100th anniversary of its intercollegiate basketball program, let us take note of the fact that at least 40 Marquette lawyers played varsity basketball as part of their Marquette experience. In addition to Eckstein, they include **Edward "Boops" Mullen, L'36**, the first All-American player for Marquette, and **Ulice Payne, L'82**, a member of the Marquette team that won the NCAA championship in 1977. The ranks also include two women from the same law class (L'91): **Patrice A. Baker** and **Susan C. Schill**.

The Law School joins all of Marquette in expressing its deep, continuing appreciation to the Ecksteins and in honoring the university's rich basketball history—especially those who have gone from athletic courts to courts of law.



RAY  
ECKSTEIN

1944-1945



# CIVIL TRIALS ARE DOWN 50% IN WISCONSIN'S COURTS.

## WHAT DOES THAT MEAN?

### What's the decline of the civil trial all about—and what's bound up in it?

The statistics, available from the Office of State Courts, are stark. In barely more than a decade, the number of civil cases tried before juries in Wisconsin's courts—not all that high even at the beginning of the period—fell by more than 50 percent. More specifically, the number went from 536 in 2004 (one of the first years for which detailed figures are available) to 269 in 2016. The trend does not hinge on some distrust specific to juries: 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. (These numbers exclude matters such as divorce and small-claims cases.)

**In important respects, this trend is not new, or unique to Wisconsin, or unstudied elsewhere.** But what explains the shift away from trials? What does this shift mean for lawyers in their own practices? **We want to hear from you.** The *Marquette Lawyer* invites comments from members of the Wisconsin bar (or others) on the decline of the civil trial. With support from the Law School's Schoone Fund for the Study of Wisconsin Law and Legal Institutions, we expect to report further on the topic in future issues. Please direct comments to Alan J. Borsuk, editor of the *Marquette Lawyer* and senior fellow in law and public policy, at [alan.borsuk@marquette.edu](mailto:alan.borsuk@marquette.edu). Comments will not be attributed without permission of the writer.



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