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

Even as we look ahead, it is useful to recall the past. To continue (and conclude) with my theme of the fields: A few years ago, I heard another member of the class of 1978, Jim DeJong, refer to "the law of the harvest—don't decide to plant a seed on Friday and expect to harvest on Monday." Wise counsel, indeed. Tim Dugan planted seeds many years ago, in law school, in private practice, and on the trial bench. We are fortunate for his interest in harvesting the crops, for society's common storehouse, through his work on the Wisconsin Court of Appeals. My congratulations, and thanks, to Judge Dugan.

Chief Justice Patience Drake Roggensack

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

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

It is a distinct honor to appear before you today and to deliver this year's Hallows Lecture. My hope is to start what I believe to be a necessary public conversation about a rising challenge to the institutional legitimacy of our courts, state and federal.

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

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

Chief Justice Patience Drake Roggensack

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

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

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

Attacks on all courts have been facilitated by internet access to pieces written about courts by bloggers and other forms of social media. We all saw the effect that social media had on the November 2016 presidential election. It is having an effect on the institutional legitimacy of courts as well. Comments that were historically too rough or disrespectful to appear in newsprint now are sent over the internet and repeated and repeated through social media. People simply get their information about courts in different places than they once did, and more people are hearing about court decisions, often with no real understanding of how courts actually function.

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

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

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

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

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

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

Am I opposed to dissenting opinions? Of course not. When well reasoned, they may help shape future developments of the law. However, too often sarcastic attacks unnecessarily tear at the fabric of institutional legitimacy because of the language they choose. They imply that court opinions that they oppose are nothing more than the personal predilections of the authoring judges and are entitled to no respect. As Marie Failinger complains in her discussion of Justice Scalia's writing style, "[Y]ou seem to delight in using language which casts doubt on the character of the Court as an institution."

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

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

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

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

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

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

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

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

Accordingly, even before the advent of the internet and social media, the press, in which phrase I include all mainstream media, had a responsibility that accompanied its constitutional privilege: Check your facts; be objectively accurate; or be dismissed by the public as irrelevant. With all the alternative sources from which the American public now gets information, the press remains critically important. However, the continued survival of mainstream media is more dependent than ever on its shouldering its responsibility to be reliable in the facts it relates.

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

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

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

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

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

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

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

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

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

Professors Epstein and Posner concluded that, of the 38 justices they studied, "Justices are more like[ly] to vote in favor of the government of the president who appointed them than in favor of later governments. . . . [T]he effect is much stronger for Democratic judges than for Republican judges." They concluded that justices appointed by a Democratic president may have favored the president who appointed them more frequently than justices appointed by a Republican president because "many Democratic justices did have prior relationships with the president, while none of the Republicans did." For example, President Franklin Roosevelt appointed men that he knew favored his New Deal policies.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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