

# MARQUETTE LAWYER

SUMMER 2019

## Ernest A. Young on **DYING CONSTITUTIONALISM** and the Fourteenth Amendment

With a response from David A. Strauss

### ALSO INSIDE

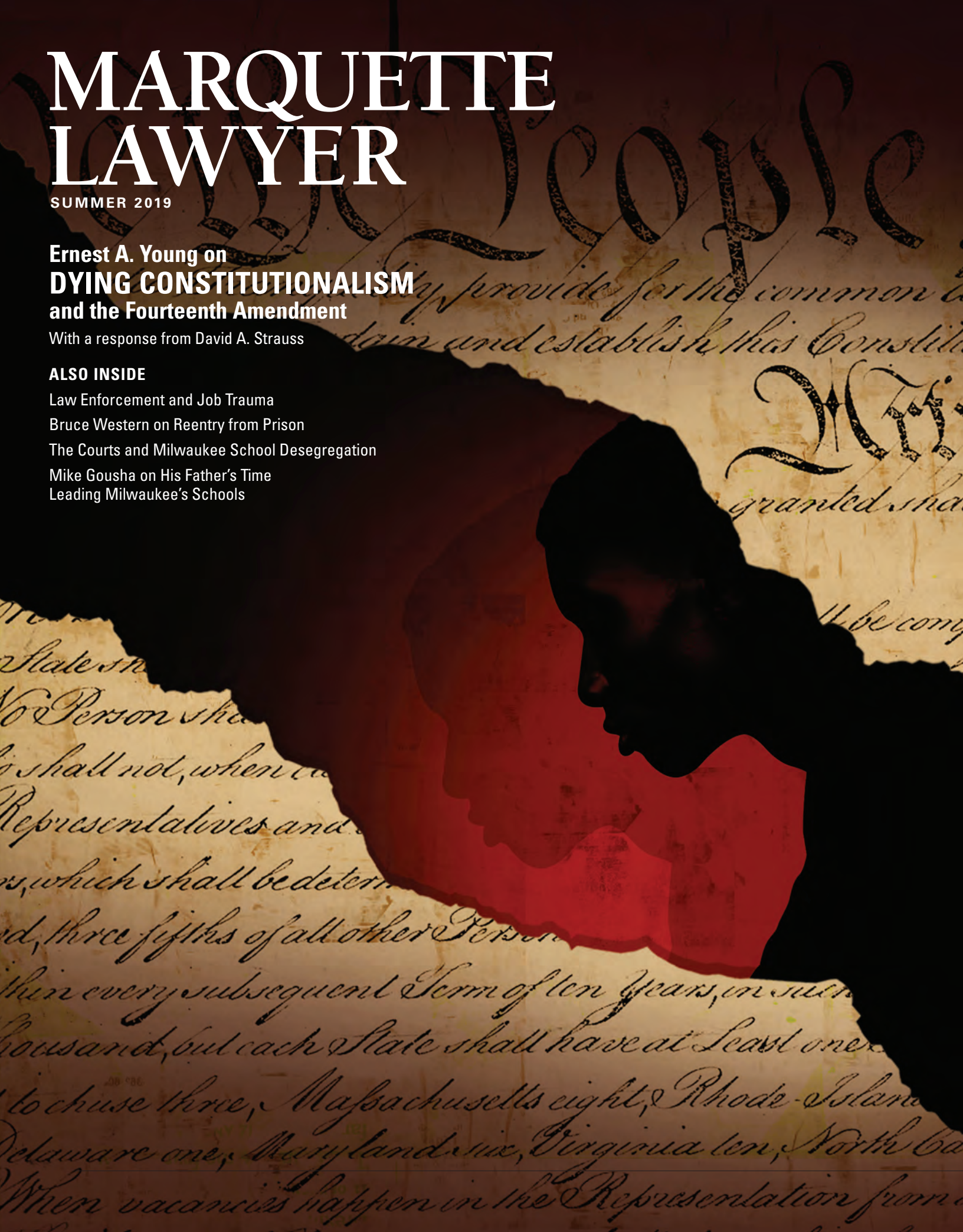
Law Enforcement and Job Trauma

Bruce Western on Reentry from Prison

The Courts and Milwaukee School Desegregation

Mike Gousha on His Father's Time

Leading Milwaukee's Schools



## Of Human Nature—and Thus of Both Law and Culture

Our legal system is a human endeavor. Men and, in modern times, women have declared the law and had responsibility for interpreting, applying, and enforcing it. The results thus have been imperfect. They also have been important and inspiring. Often they have been all of these things—and much else—simultaneously.

Consider the Fourteenth Amendment to the U.S. Constitution. At Marquette Law School, we marked its sesquicentennial last year with the Robert F. Boden Lecture, delivered by Ernest A. Young of Duke Law School. There is no greater commitment in the history of the United States than the amendment's guarantee of "the equal protection of the laws." At the same time, apart from only slavery itself, there is scarcely any unhappier story than that of the first 75 years of the amendment's life.

This goes well beyond the Supreme Court's failure, in cases such as *Plessy v. Ferguson*, to appreciate the import of the constitutional words. In its shortcoming, the judiciary was part of the larger American society and culture, which by 1896 had largely abandoned the commitment to equality. In his essay here (p. 8), "Dying Constitutionalism and the Fourteenth Amendment," Professor Young uses this history to make a point about constitutional interpretive methodology and its challenges—even dangers. Professor David A. Strauss, of the University of Chicago Law School and author of *The Living Constitution* (Oxford 2012), responds (p. 23). Professor Young's essay already has been characterized as an important and insightful contribution to the debate over constitutional interpretation, not only by Professor Strauss but also by a legal scholar with greater sympathy for originalism (Ilya Somin, writing on the well-regarded Volokh Conspiracy blog).

To be sure, the *second* half of the Fourteenth Amendment's history has not all been a straight or level path. We as a society point to *Brown v. Board of Education*, but we must recall *Brown II*, which followed only a year later, in 1955, with its allowance of "all deliberate speed" for enforcing the judgment. The history is replete with complexity and ambiguity well beyond the *Brown* decisions. Alan Borsuk's article (p. 40), "A Simple Order, a Complex Legacy," provides an important example: It looks back on the 1976 decision of U.S. District Judge John W. Reynolds in a lawsuit challenging segregation in the Milwaukee Public Schools. The case itself lasted from 1965 to

1980, and it is unclear that, considering it anew today, the Supreme Court would reach the precise same result in its key 1973 decision (from Denver) upon which Judge Reynolds relied. Yet even for this column that is of secondary interest at best. The article focuses on the 1976 decision's aftermath in Milwaukee—its effects, some positive and others not, in the larger society and culture.

The interest here in culture as much as doctrine is not hard to justify. Consider the following statements, made without reference to or awareness of one another. Judge Reynolds, looking back on the desegregation case, said in 1997, "The fact is you can issue all the orders you want to, but the people aren't going to comply with them unless they want them." Professor Strauss concludes his comment on the Boden Lecture, which focused on the *earlier* history of the Fourteenth Amendment, with this observation: "As Professor Young's lecture shows, in the end, there is only so much the law can do to save a society from its own moral failings." The law may have changed; human nature perhaps not so much.

This brings home the importance of the individual to the government and the culture in which legal commitments are realized—or not. Mike Gousha's reflection (p. 50) on his father's work as the superintendent of the Milwaukee Public Schools during much of the pendency of the litigation before Judge Reynolds thus is an important companion piece to Alan Borsuk's article. Similarly, Bruce Western, the Columbia University sociologist around whose work our Lubar Center for Public Policy Research and Civic Education formed a conference last fall, thinks that his and others' efforts with respect to reentry by prisoners from incarceration into society will not succeed until there is a "reckoning with history" and "we [find] moral urgency" (this is in the article beginning on p. 34).

You can read from or about these and other people—including law enforcement officials delivering raw and powerful testimony about trauma in their profession (see the article beginning on p. 28)—in the pages of this magazine. And if you remain at all uncertain about the importance of individual people to the culture of a group, simply consider the case of Bev Franklin (p. 60). It will remove all doubt, even as Bev—whether you have met her or not—will bring a smile to your face.

**Joseph D. Kearney**  
*Dean and Professor of Law*



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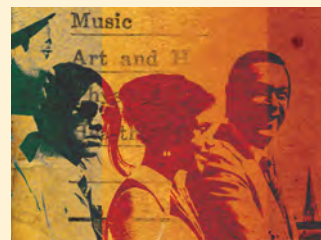
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**MARQUETTE**  
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**LAW SCHOOL**

# Reaching for Olympic-Size Dreams

**Aurusa Kabani** was graduating from the University of Texas at Austin, wanted to go to law school, and loved sports. So she decided to visit Marquette Law School because of its sports law program.

During the visit, Professor Paul Anderson, director of the National Sports Law Institute at Marquette Law School, asked Kabani what her dream job would be. She gave a specific answer: Working as an arbitrator at the Olympics. She is a Muslim woman, and currently no Muslim women and only a few Muslim men do that work, she said.

Kabani ultimately chose to attend Marquette and was impressed at an orientation event several months after that first conversation when Anderson remembered the details. "Let's make your dream come true," he said.

Kabani is completing law school this spring. Is she making progress toward her goal? It sure looks like it.

The biggest highlight so far: A lawyer who works in sports law in China got in touch with Marquette Professor Matt Mitten, executive director of the National Sports Law Institute, to ask if he could recommend a student to work as an intern in Beijing in the summer of 2018. It was short notice, but Kabani, who loves to travel, was in Beijing within a few days and spent 5½ weeks working in the JunZeJun Law Offices.

Was it interesting? "Absolutely," Kabani said. For much of her time in Beijing, she assisted

Chinese soccer players who needed their contracts renegotiated with their league. (She worked in English, with an associate who was fluent in English and Chinese.) But Kabani's efforts went beyond the individual clients: She also took part in training 300 sports agents on ethics codes for international sports events. And she attended a conference between Chinese and American sports leaders who were making arrangements for future events.

"It was just a phenomenal experience," Kabani said. She has continued to provide some long-distance help to the Beijing firm since her return to Milwaukee.

Kabani said she benefited as well from two other internships, both through Marquette University Law School: one in the athletics compliance office at the University of Wisconsin-Parkside, located south of Milwaukee in Kenosha, and the other with the enforcement division of the National Collegiate Athletic Association (NCAA) in Indianapolis. She has spent a lot of time in Eckstein Hall as well, serving as managing editor of the *Marquette Sports Law Review*.

In all of this, she continues working on plans toward her goal. One specific aim: To work for FIFA, the world soccer organization, during the World Cup in 2022 in Qatar.

Was selecting Marquette a good decision? "Hands down," Kabani said. "I've always felt everyone here was helping me reach my dreams."



"I'VE ALWAYS FELT EVERYONE HERE WAS HELPING ME REACH MY DREAMS."

Aurusa Kabani

FIND THE VIDEO  
ON YOUTUBE:  
SEARCH *KATIE  
GOULD AIRPORT*

## Missed a Plane? It's Time to Dance

As **Kaitlyn (Katie) Gould** sees it, she had a choice between getting upset and using some unexpected free time in a fun way. Thanks to slow traffic and long lines at security, she missed a flight from Atlanta to Milwaukee this past January, returning from her winter break at home in Georgia to start her second semester at Marquette Law School. The next flight wasn't for 4½ hours.

Time to dance. It was an impulse, Gould says. She was listening to music, and the 1980 song by Daryl Hall and John Oates, "You Make My Dreams (Come True)," came on. The second part of the impulse: to record her airport dancing on her phone, turn it into a video with the music, and post it on Twitter . . . which she did, just before boarding.

"When I got off the plane, the video had something like a thousand 'hits,'" Gould said. She drove home and went to bed. By the next morning, "it had 5 million views, and that was pretty insane."

But the video, with a variety of scenes in Atlanta's Hartsfield-Jackson airport as background and, in some scenes, Gould's cat, Bowie, as a co-star, is just fun to watch. Within a few weeks, the video had passed 9 million views. Hall and Oates themselves posted that they liked it, as did two of Gould's favorite movie stars, Judd Apatow and Seth Rogen.

Gould is a graduate of the University of Tennessee. She loves sports, wanted to go to law school, and chose Marquette for its sports law program—and because she had visited Milwaukee and loved it right away.

She is by nature someone who chooses to look at things positively. How about law school? She loves what she is learning in her classes. And the stressful parts of school life? "If anything, I'm letting it improve who I am."

Which may well put her on the path to making her dreams come true, like the song says.



Katie Gould

## Sports Law and Dispute Resolution— An Overlap

Here is something that the cases of Matt Harrington and Alex Hyatt have in common: They both help illustrate what it means to practice sports law in a world where representing clients well and settling disputes are often crucial to the outcome of games or competitions. And the stories of these two lesser-known athletes provide lessons for students at Marquette Law School about strategies for navigating issues that are big parts of the sports law field.

At a lunch this past semester for sports law students, Paul Anderson, director of the National Sports Law Institute at Marquette Law School, told students that, while some people think of sports law and alternative dispute resolution—the latter being another prominent program at the Law School—as two different interests, they actually fit together. That is true to the point that students wanting to receive a sports law certificate upon graduation are required to take an alternative dispute resolution course.

Anderson brought together Professor Andrea Schneider, who directs the Law School's nationally recognized dispute resolution program, and Professor Matthew Mitten, executive director of the National Sports Law Institute and an experienced arbitrator, to offer students insights into both of their specialties.

Schneider said that success for lawyers involved in negotiations on behalf of players or teams requires many of the skills basic to representing people in general: setting reasonable goals, communicating well with clients as well as those on the other side of the matter, and carefully choosing strategies that avoid big mistakes.

She described the case of Harrington, who, in the early 2000s, was a highly regarded baseball prospect. At one point, in fact, he was the seventh pick in the annual Major League Baseball draft. But his agent insisted that the player was worth more than the team that picked him was offering, and Harrington refused to sign. He was drafted again in four other

years, even when his performance in independent leagues was not stellar. But each time, his agent sought more compensation than teams were willing to offer. Harrington never did sign a contract and, according to a 2009 story from ESPN, worked at a tire shop.

Schneider said that the agents who represented Harrington chose strategies that were “appalling.” Bringing other cases into the conversation, she offered some general advice in negotiations: “Don’t trash talk or brag unless you’re sure of what you’re saying. . . . If you’re going to blow up the negotiations, make sure there’s an alternative in the wings.” And behave well: “Your really bad or unethical negotiation behavior will get around in a second” in your legal community.

Mitten described a 2014 case in which a competitor in a major women’s judo event was given a half hour past the stated deadline to meet the maximum-weight standard to qualify to compete. She made it and went on to win, qualifying for national competition. Alex Hyatt, the woman who had taken second place, filed a grievance over the extra time, and Mitten was brought in as the arbitrator. He ruled in favor of Hyatt, who then went to the national competition.

Mitten told the students that almost any dispute between a player and team or league can go to arbitration. He said that almost all arbitrators are experienced in labor law, and he suggested to those students interested in getting into sports arbitration that gaining general arbitration experience is important.

Anderson told the students that there is a lot of overlap between sports law and alternative dispute resolution. “We’re trying to encourage people to do both,” he said. “You can benefit from doing both.”



Professor Andrea Schneider



Professor Matthew Mitten

## Public Service Program Gains Recognition as “Difference Maker”

On January 23, 2019, **Michael R. Lovell**, president of Marquette University, presented a Difference Maker Award to **Angela Schultz**, assistant dean for public service at Marquette University Law School, for her work in the Milwaukee Justice Center, a collaboration among the Milwaukee County Clerk of Courts, Milwaukee Bar Association, and Marquette Law School. The Milwaukee Justice Center addresses unmet legal needs of low-income individuals through court-based programs and legal resources.



Pictured (from left): Mary Ferwerda, executive director of the Milwaukee Justice Center (MJC); John Barrett, Milwaukee County Clerk of Courts; Michael R. Lovell; Angela Schultz; Josh Gimbel, attorney and MJC volunteer; Ernesto Romero, attorney and MJC volunteer; Katie Mertz, Law School director of pro bono and public service; Robert Maniak, 1L and MJC volunteer; Mark Vannucci, MJC clinic supervisor; Kyla Motz, MJC legal director; Maggie Frawley, 2L and MJC volunteer; Matthew Sowden, 3L and MJC volunteer; Nancy Cattani, MJC legal assistant; Jack Ceschin, AmeriCorps Public Ally at the Mobile Legal Clinic; and DMari Gizsel Belmontes, MJC information specialist.

## Overheard in Eckstein Hall

Here are a few thoughts, in 25 words or less, from the wide range of in-depth lectures, conferences, and “On the Issues with Mike Gousha” programs in recent months in the Lubar Center at Marquette Law School.

### ***“I use real estate as a tool for social change.”***

–Julie Kaufmann, president, Fix Development, describing her involvement in development projects in low-income neighborhoods, October 17, 2018

### ***“I want people to understand that they’re not alone, and I want people to listen to us.”***

–Amarii Collins, a student at Milwaukee Rufus King International Baccalaureate School, speaking to a conference on youth mental health, March 22, 2019

### ***“To give people the information they need to govern themselves in a democracy.”***

–Angie Drobic Holan, the editor of *PolitiFact*, describing the goal of the national journalistic effort to assess the truth of public statements, October 23, 2018

### ***“For me, there’s no more powerful medium than cinema. . . . It’s this weird communion with your brain in the dark.”***

–Jonathan Jackson, CEO and artistic director for Milwaukee Film, October 9, 2018

### ***“When everything is an emergency, nothing is an emergency.”***

–Anna Clark, author of *The Poisoned City: Flint’s Water and the American Urban Tragedy*, on how that Michigan city’s array of problems let complaints about water quality go unheeded, January 23, 2019

### ***“Clearly, we don’t have unanimity on any issue.”***

–Governor Tony Evers, intentionally understating the deep partisan divisions in Wisconsin politics, February 19, 2019

### ***“What have you been lulled into?”***

–Broadcast journalist Soledad O’Brien, describing her response when people say some news reports make them uncomfortable, February 26, 2019

### ***“Give me five years.”***

–Keith Posley, superintendent of Milwaukee Public Schools, when asked how long it will take to realize his goal of MPS’s reading and math scores exceeding Wisconsin averages, September 26, 2018

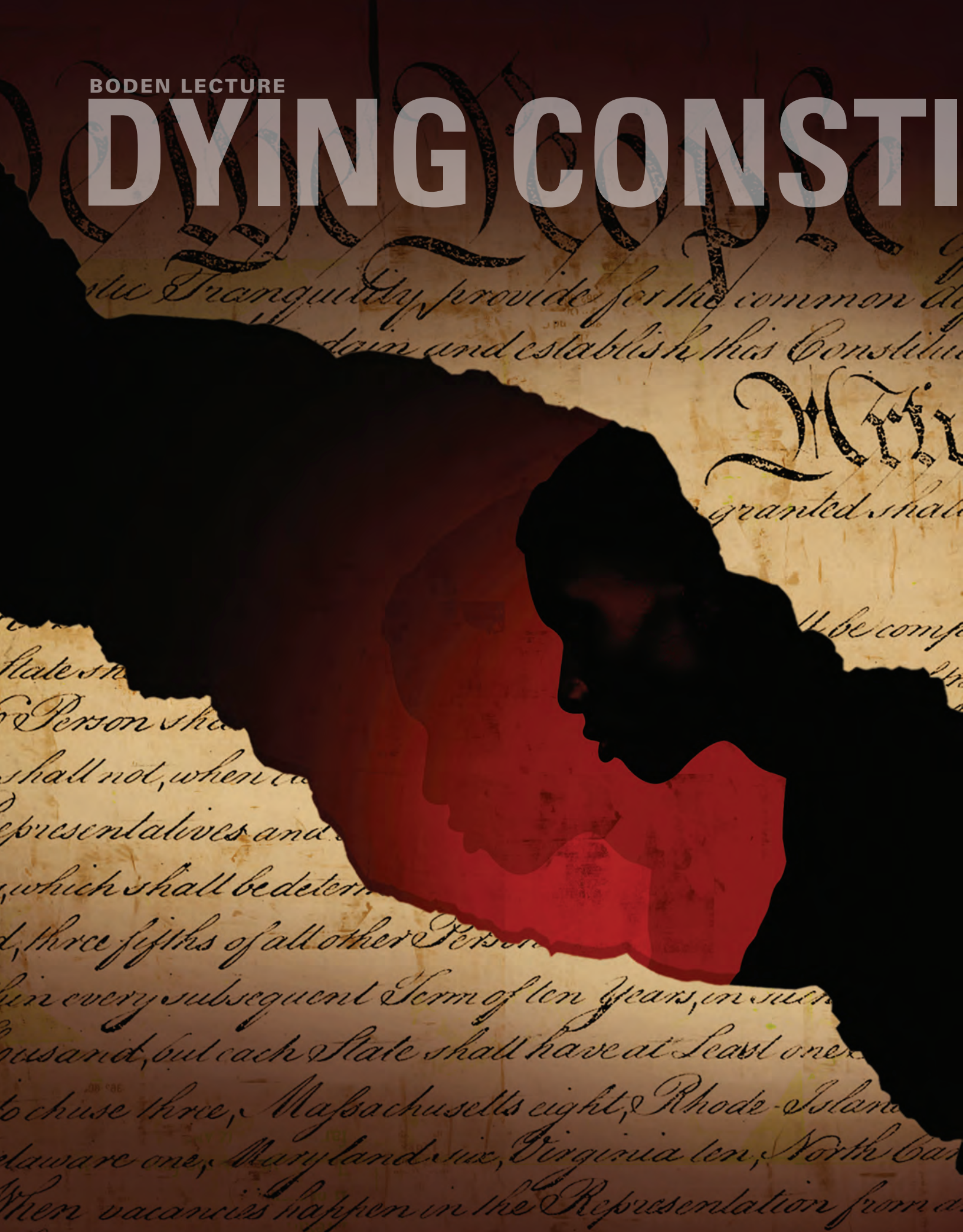
### ***“We lock up too many people for too long.”***

–Former Governor Tommy Thompson, describing his regret about a surge of prison building while he was governor in the 1990s, September 5, 2018

# OVERHEARD IN ECKSTEIN HALL

BODEN LECTURE

# DYING CONSTITUTION





# TUTIONALISM

## AND THE FOURTEENTH AMENDMENT

**M**y marching orders from Dean Kearney for this year's Boden Lecture are to commemorate the sesquicentennial of the Constitution's Fourteenth Amendment, which was ratified in 1868. This ought to be a much easier task now than it would have been at the demisesquicentennial—halfway between 1868 and today—because I think it's fair to say that the Fourteenth Amendment largely *failed* to live up to its promise during the first half of its existence. At that halfway mark in 1943, African Americans, who were supposed to be the amendment's primary beneficiaries, suffered under a pervasively authoritarian Jim Crow regime in the South and faced rampant discrimination and hostility in the North. The Supreme Court had begun to chip away at Jim Crow in a few isolated decisions, but these hadn't made much practical difference. Fourteenth Amendment demisesquicentennialists—if there *were* any—would have had very little to cheer about in 1943.

We live in a very different constitutional world today, with a robust and vital Fourteenth Amendment at its center. And so it would be easy to tell you a heartwarming story about the amendment's second act as one of the great comeback sagas in American history. But failures are often more interesting than successes. I want to focus on the Fourteenth Amendment's bad years, because I think that they can tell us something important about constitutional theory.

On the surface, at least, contemporary constitutional theory is dominated by a debate between originalism, which holds that judges should interpret the Constitution in line with the original public meaning of its text at the time that the constitutional provision in question was adopted, and living constitutionalism, which holds that constitutional meaning should evolve over time. The Fourteenth Amendment has been a critical battleground of this debate. In particular, lawyers, scholars, and judges have disagreed about whether the amendment's Equal Protection Clause should be interpreted to prohibit school segregation, as in *Brown v. Board of Education* (1954), even though the amendment's framers probably did not envision this particular reform,

and whether the amendment's Due Process Clause can be stretched to include rights of privacy and reproductive freedom that would have surprised the generation that ratified the amendment. In a nutshell, these debates posit that living constitutionalism would allow courts to read what many regard as the moral progress of the last 50 years or so into the Fourteenth Amendment and use that amendment as a vehicle for further reform.

I believe that the Fourteenth Amendment's bad early years put a different spin on this debate. Living constitutionalists identify a number of different mechanisms or modalities by

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**Ernest A. Young** is the Alston & Bird Professor at Duke Law School. His past positions include the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law and service as a law clerk to Justice David H. Souter at the Supreme Court of the United States. This essay is a lightly edited version of the Robert F. Boden Lecture presented at Marquette Law School on September 20, 2018. A version with footnotes appears in the spring 2019 issue of the *Marquette Law Review*.

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which judges should assess the extent to which constitutional meaning has “evolved” over time. These include broad changes in public opinion, electoral or legislative victories by proponents of a new constitutional interpretation, the achievements of social movements, and the common-law-style development of constitutional meaning through decisions of the judges themselves. I am here to tell you that, in the Fourteenth Amendment’s first 75 years, *every one* of these modalities strongly supported the compromise or even abandonment of the amendment’s core purpose of freedom and equality for black Americans. Strong social movements supported the end of Reconstruction and the reestablishment of white supremacy in the South, as well as the reunion of North and South predicated on a reinterpretation of the Civil War’s meaning. These movements influenced both major political parties, affected electoral outcomes, and then legislated their interpretation of constitutional meaning into law. And the judiciary responded by interpreting the Reconstruction Amendments narrowly and redirecting their concern with racial equality into other channels as a limitation on government regulation of the market.

That is why my title for this lecture is “Dying Constitutionalism.” Justice Antonin Scalia used to insist that the Constitution was “dead” in a quite different sense: He meant that constitutional meaning was static, and that the whole point of having a constitution was to lock in particular rights and institutional arrangements and make them nearly impossible to change even if we might want to, later on. Constitutionalism is about tying yourself to the mast; you don’t want a loosey-goosey constitution, such that you can slip out of it and throw yourself overboard to meet the pretty Sirens.

But this static model may not fit something like the Fourteenth Amendment very well. That amendment was adopted by men who were themselves caught in an unstable tension between their own racism—the best of them were still products of their times—and the political principles of the Declaration of Independence, which told them that God had created all men equal. It makes sense to view the amendment as aspirational or redemptive, aiming at a state of affairs that had not yet been achieved. And so rather than protecting existing values against future backsliding, the amendment is importantly a source of forward pressure.

This makes the Fourteenth a favorite amendment for living constitutionalists. But progress isn’t

**Progress can and does happen, but it is by no means inevitable, and sometimes constitutional law goes to hell in a handbasket. That is what happened in the Fourteenth Amendment’s first 75 years.**



inevitable, even when a constitutional marker has been laid down. Living things don’t always *grow*, *mature*, or *flower*; sometimes they *mutate*, *wither*, or *decay*. It’s not hard to think of constitutional provisions that have “evolved” right out of the Constitution—the Contracts Clause in most of its applications, for example, or the Fourteenth Amendment’s own protection of national “privileges or immunities.” These clauses have been laid low by “dying constitutionalism.”

This potential for constitutional corruption and decay poses a serious problem for any organic model of constitutionalism. But while I certainly don’t come to praise living constitutionalism, neither am I here to bury it. At the end of the day, despite it all, I consider myself a living constitutionalist, not an originalist. And as I will explain, even many originalists agree that some sort of evolutionary approach is inevitable, especially for open-ended and aspirational provisions such as the Fourteenth Amendment. But it is essential that living constitutionalists understand the downside risks that come with any evolutionary model of constitutionalism. Living constitutionalism needs a cultural shift, based on a sense of tragedy, to temper its progressive optimism. Progress can and does happen, but it is by no means inevitable, and sometimes constitutional law goes to hell in a handbasket. That is what happened in the Fourteenth Amendment’s first 75 years.

## I. THE FOURTEENTH AMENDMENT’S LOST YEARS

The Fourteenth Amendment’s central aim, as historian Eric Foner has stated, was to confer on black Americans “equality before the law, overseen by the national government.” Equality before the law did not exist in 1868, either in the South or in the North. The Fourteenth Amendment was a promise to *create* that equality. Its framers understood that one could not simply write out new rights on paper and expect them to be respected; that is why the Fourteenth Amendment, more than any other amendment in the Constitution, is centrally concerned with institutional mechanisms for its own implementation. Section 2 created strong electoral incentives to let black people vote, with the hope that the franchise would in turn allow them to protect their own interests politically. Section 3



aimed to destroy the existing political class in the South, which had held black people down for so long, by disqualifying ex-Confederates from office. And—most important—Section 5 empowered Congress to implement the amendment’s provisions by “appropriate legislation.” Congress thus gave itself a primary voice in fleshing out the meaning of Section 1’s open-ended phrases.

The Fourteenth Amendment was, in Foner’s words, “an effort by Republicans to constitutionalize the ‘fruits’ of the War.” The Civil War had begun as a war for *union*—not *emancipation*, and certainly not *equality*. But by 1863, President Abraham Lincoln’s Emancipation Proclamation made official what was already generally acknowledged: that is, that freedom had become a Union war aim. And although there is no “equality proclamation” to go with emancipation, historians argue that equality had become a third Union war aim by Appomattox. Once the guns fell silent, Congress set about following through on that aim with a series of Civil Rights Acts and three constitutional amendments. Southern historian C. Vann Woodward, looking back, concluded that “[s]o far as it was humanly possible to do so by statute and constitutional amendment, America would seem to have been firmly committed to the principle of equality.”

“And yet,” Professor Woodward noted, “we know that within a very short time after these imposing commitments were made they were broken. America reneged, shrugged off the obligation, and all but forgot about it for nearly a century.” White

Southerners fought Reconstruction with fraud, deceit, and terroristic violence. Northern Democrats largely opposed black equality, and Republicans mostly gave up on it after 1876. “[T]he evidence” drove Woodward “to the conclusion that the radicals committed the country to a guarantee of equality that popular convictions were not prepared to sustain, that legal commitments overreached moral persuasion.”

In the beginning, though, there *was* progress. It is true that, as Professor Michael Klarman has observed, “Reconstruction delivered far less to blacks than they hoped.” In particular, the national government disappointed hopes that it would confiscate slaveowners’ property and redistribute it to the freedpeople. Nonetheless, with the Fifteenth Amendment soon in the books and the Union Army occupying the defeated Southern states, black people exercised real political power in the South.

But enthusiasm for Reconstruction faded quickly, for both good and bad reasons. The good reason was that Americans have always been profoundly uncomfortable with military rule, and even Republicans worried about the incursions on civil liberties that such rule often entailed. The bad reason is that white Northerners were simply never sufficiently committed to equality for black people to stay the course of Reconstruction in the teeth of Southern violence and recalcitrance. And so, one by one, Southern state governments slipped back into the hands of white supremacist “Redeemers.”

An illustrative battle in this long war occurred over Mississippi’s election in 1875. White Democrats

**[E]nthusiasm for Reconstruction faded quickly, for both good and bad reasons. . . . [O]ne by one, Southern state governments slipped back into the hands of white supremacist “Redeemers.”**



had been forming (and arming) “White Men’s Clubs” as a vehicle for restoring white supremacy. When Democrats swept the 1874 congressional elections nationwide, it was widely interpreted as a repudiation of Reconstruction. Mississippi’s White Men’s Clubs saw it as a green light and vowed to “carry the election [of 1875] peaceably if we can, forcibly if we must.” On reflection, they went straight for “forcibly,” producing “dead books” with the names of black Republicans, disrupting Republican meetings and running off Republican politicians, and assaulting or murdering black leaders and burning black homes.

As the death toll mounted into the dozens, Mississippi’s Republican governor, Adelbert Ames, asked President Ulysses S. Grant for federal troops. Grant responded that the public was “tired out with these annual autumnal outbreaks in the South” and refused to intervene unless Mississippi Republicans first raised their own militia. Well-armed whites were spoiling for exactly that sort of fight and threatened to wipe a black militia “from the face of the earth”; Republicans declined in order to avoid igniting a race war. On election eve, armed white riders drove freedpeople from their homes and threatened to murder them if they voted. It worked. The overwhelmingly black Yazoo County, for example, returned only 7 Republican votes against more than 4,000 Democratic ones. Democrats took control of the legislature, removed the lieutenant governor, and impeached Governor Ames. He fled the state. Mississippi had been “redeemed.”

A year later, in 1876, the nation deadlocked over the presidential race between Democrat Samuel J. Tilden and Republican Rutherford B. Hayes. The election came down to three not-yet-redeemed Southern states—Florida, Louisiana, and South Carolina—in which rampant fraud and violence had marred the voting. Republican state election officials decreed Hayes the winner, but Democrats “cried fraud and threatened to march on Washington and reignite the Civil War.” A special commission including several Supreme Court justices failed to transcend partisanship and resolve the dispute. But Republicans struck a deal with Southern Democrats, who agreed to support Hayes for president in exchange for the withdrawal of troops from the South. The remaining Republican governments in the South fell as Hayes took office. One Louisiana freedman remarked that “[t]he whole South—every state in the South—had got into the hands of the very men that held us as slaves.”

**Let’s be clear: The failure of the Fourteenth Amendment was not simply a failure to progress far enough or fast enough.**

In Eric Foner’s judgment, the compromise of 1877 “marked a decisive retreat from the idea, born during the Civil War, of a powerful national state protecting the fundamental rights of American citizens.” Blacks’ Reconstruction-era gains did not evaporate overnight. But by 1890, race relations in the South “had begun what was to be a long downward spiral.” Between 1895 and 1900, lynchings of black Americans averaged 101 per year. Although Southern states generally avoided formally disenfranchising blacks, they adopted poll taxes and literacy tests, which largely prevented blacks from voting. And when this didn’t do the trick, there was always fraud—and, especially, mayhem.

In the 1890s, for example, a rare alliance of Republicans and Populists managed to take over the state government in North Carolina, but Democrats resolved to take it back in 1898 under the banner of white supremacy. In Wilmington, a Democratic party leader told his followers that if a black man tried to vote, “kill him, shoot him down in his tracks.” The day after the Democrats prevailed in the general election, a large white mob burned down the Wilmington offices of a black newspaper. The mob intimidated white Republican officials into resigning their offices and fleeing the city and then rampaged through black neighborhoods—murdering a dozen black residents and driving nearly 1,400 from the city.

Episodes such as “Bloody Wilmington,” as it became known, persuaded many Progressives that legal segregation and disfranchisement were humane alternatives to violence. That—and a fair dose of racism—may explain why Progressives did so little to challenge segregation and sometimes even acted to further it. Restrictions on voting, administered by white officials exercising broad discretion, “virtually eliminated black political participation in the South” early in the twentieth century’s first decade. Black voter registration in Louisiana fell from 95.6 percent, before an 1896 registration law, to 1.1 percent in 1904; estimated black voter turnout in Mississippi fell from 29 percent in 1888 to 2 percent in 1892 to 0 percent in 1895.

Formal segregation, which had not been the rule in the decades immediately after Reconstruction, began to increase about the same time. The first wave of railroad-segregation laws, beginning in Florida, passed in the late 1880s and early 1890s; much of the remainder of the South followed beginning in 1898. These laws may have reflected the increased political power of lower-class whites, who valued segregation for boosting

their own precarious status; it also didn't help that in 1883 the Supreme Court struck down the 1875 Civil Rights Act, which would have preempted state segregation laws.

It's important to understand that the deterioration in conditions for black Americans was not simply a Southern phenomenon. As Professor Klarman has explained, "[w]ithout northern acquiescence, southern racial practices could not have become so oppressive." Northern concern for Southern blacks declined for a variety of reasons. The early stirrings of the Great Migration sent increasing numbers of blacks north around the turn of the century, leading there to "discrimination in public accommodations, occasional efforts to segregate public schools, increased lynchings, and deteriorating racial attitudes." The influx of millions of southern and eastern Europeans, beginning in the 1880s and accelerating after 1900, made the situation worse by exacerbating concerns about racial purity in the North; this naturally led some Northerners, especially in New England, to sympathize with Southern racial attitudes. That sympathy was further compounded by national-imperial dilemmas arising from the Spanish-American War in 1898 and the consequent acquisition of Puerto Rico and the Philippines—territories inhabited by peoples that both Northerners and Southerners tended to consider inferior. Finally, a strong desire in both North and South for national reconciliation encouraged the sections to sweep their differences over race under the rug.

As the Great Migration of Southern blacks to the North got underway in earnest at the beginning

of the twentieth century, "northern discrimination and segregation proliferated." For example, "[m]any northern public schools became segregated for the first time in decades, even in former abolitionist enclaves such as Boston and Ohio's Western Reserve." Newly arrived in the North, blacks found jobs that traditionally would have been available to them to be going to European immigrants instead; worse, they faced hostility from labor unions, which generally excluded them and feared their use by employers as strikebreakers.

And the North had its own anti-black violence. In Chicago in 1919, for example, a swimming-beach altercation resulting in the death of a black teenager touched off a rampage of white gangs through black neighborhoods; 38 people (23 blacks and 15 whites) were killed, and more than 500 others were injured before the state militia subdued the combatants. As author Isabel Wilkerson has put it, "riots would become to the North what lynchings were to the South . . . . Nearly every big northern city experienced one or more during the twentieth century."

In both North and South, then, social practices became more oppressive after the end of Reconstruction, and those practices were increasingly given legal sanction by state and local officials. This new state of affairs, moreover, was increasingly reflected in federal statutory and constitutional law. As Southern governments moved to disfranchise black voters, Congress failed to invoke Section 2 of the Fourteenth Amendment, which provided for a reduction in the congressional representation of states excluding male voters on

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**[T]he Fourteenth Amendment's lost years can be understood not simply as a failure of constitutionalism, but also as a form of constitutionalism.**

the basis of race. Section 2 lay dormant even though proponents of the amendment, such as Thaddeus Stevens, had insisted that it was “the most important [section] in the article,” because it would “either compel the states to grant universal suffrage or so . . . shear them of their power as to keep them forever in a hopeless minority in the national Government.” And when Democrats attained control of both Congress and the presidency in 1893–1894, they repealed much of the federal voting rights legislation enacted during the 1870s to enforce the Fifteenth Amendment; Republicans made no effort to reenact these measures when they regained control in 1897.

And, of course, the Supreme Court significantly affected both the statutory and constitutional landscape by striking down the 1875 Civil Rights Act’s prohibition of discrimination in public accommodations in the *Civil Rights Cases* (1883) and upholding state segregation laws in *Plessy v. Ferguson* (1896). There were occasional victories. Most prominently, *Strauder v. West Virginia* (1880) struck down a state law limiting jury service to whites and offered a ringing affirmation that the Fourteenth Amendment “was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons.” “What is this,” Justice William Strong’s majority opinion asked, “but declaring . . . that all persons, whether colored or white, shall stand equal before

the laws of the States, and in regard to the colored race . . . that no discrimination shall be made against them by law because of their color?”

*Strauder*’s holding seems obvious today, but there were plausible arguments the other way. The Court’s holding is thus all the more impressive as a reaffirmation of the Fourteenth Amendment’s commitment to equality. But the holding had little practical effect. Few states formally barred blacks from juries, and nothing in *Strauder* foreclosed exclusion based on criteria such as not being on the list of registered voters. Hence, in Professor Klarman’s summary, “[a]s whites suppressed black voting, blacks disappeared from juries.” Moreover, many states excluded blacks from juries by imposing discretionary criteria administered by white supremacist officials. Although the Supreme Court held that such executive discrimination was actionable, subsequent decisions made such a case nearly impossible to prove. Even civil rights victories such as *Strauder* thus failed to impede the re-entrenchment of racial oppression in the Fourteenth Amendment’s early decades.

Let’s be clear: The failure of the Fourteenth Amendment was not simply a failure to progress far enough or fast enough. That sort of failure would still be consistent with a Whig history of ineluctable progress: even if we are frustrated at the slow pace of change, it’s still always onward and upward. But the arc of the moral universe does not always bend

toward justice—sometimes things get a little better, then take a turn for the worse. Thus, as Professor Woodward related, “racial segregation in the South in the rigid and universal form it had taken by 1954 did not appear with the end of slavery, but toward the end of the century and later.” Lynchings and other forms of violence against blacks plainly got worse toward the end of the nineteenth century, and they extended into the North as blacks migrated there after 1900. National authorities’ willingness to intervene on blacks’ behalf peaked during Reconstruction and dwindled to little or nothing after 1876. W. E. B. DuBois summed it all up in what has to be one of the most heartbreaking lines in American history: “[T]he slave went free; stood a brief moment in the sun; then moved back again toward slavery.”

All this went on for some time. Others have charted the Fourteenth Amendment’s comeback in the second half of the twentieth century, and while it would be interesting to pin down the key turning points and their causes, that is not my subject. My question is what we can learn from the amendment’s initial, long-lasting failure. The first step, I submit, is to realize that the Fourteenth Amendment’s lost years can be understood not simply as a *failure* of constitutionalism, but also as a *form* of constitutionalism. The Southern Redeemers who recaptured state governments and implemented Jim Crow; the Northern Democrats who sought to minimize the results of the war and repealed Reconstruction measures when they had the chance; the liberal and moderate Republicans who withdrew federal troops from the South and redirected their agenda away from civil rights; and the judges who narrowly construed the Reconstruction Amendments’ terms—all these groups had their own constitutional visions, and their words and actions all contributed to the shaping of the Fourteenth Amendment’s meaning over time.

This is living constitutionalism in action. Different theorists of living constitutionalism stress different mechanisms by which changes over time get translated into constitutional meaning. But, as I hope to demonstrate in the next section, the same mechanisms that living constitutionalists rely on to make constitutional meaning better and better over time—social movements, movements of public opinion, electoral and legislative politics, common-law development—all took the Fourteenth Amendment, during the first 75 years of its life, further and further from its noble aspirations.



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## II. THE LIVING CONSTITUTIONALIST CASE FOR RE-ENTRENCHED RACIAL OPPRESSION

The resurgence of white supremacy after Reconstruction took place across a wide range of social and political contexts—for example, segregation of public accommodations, schools, transport, and residential neighborhoods; voting and jury service; peonage and other forms of labor relations; and the operation of the criminal justice system. Each of these contexts raised different legal issues, implicated the three Reconstruction Amendments to varying degrees, and was resolved by courts and government officials with varying degrees of plausibility. To oversimplify greatly, courts tended to strike down formal or particularly blatant violations of the amendments, and they sometimes went further when racial equality intersected with key elements of the Court’s agenda in other areas, such as the protection of property rights. But courts narrowly construed certain provisions, often ignored discriminatory motives for facially neutral laws, and tended to permit discriminatory administration of the law to do what formal discrimination could not. Other government actors—such as Congress and the President—likewise largely failed to read the Fourteenth Amendment as obliging them to intervene on behalf of black Americans.

The evolving social and political context in which the Court and other officials construed the Reconstruction Amendments could have affected the Court’s interpretation, regardless of whether justices of the day considered themselves to be living constitutionalists. A provision such as the Fourteenth Amendment, which purports not to entrench an existing set of rights or institutional arrangements but rather to force reform to achieve some desired future state, is particularly prone to indeterminacy. Different proponents and supporters, after all, may have quite different visions of that future state, and they may or may not express those visions with any degree of precision in the text. To the extent that a provision’s original meaning is uncertain, the evolving social and political context is likely to press courts and other interpreters in the direction of one resolution or another. The influence

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of context can be conscious or unconscious, and when it is conscious, judges may be candid or not. In any event, my question is whether standard living constitutionalist arguments could have provided plausible reasons to interpret the Fourteenth Amendment the way that courts interpreted it in this period. If they could have, then we must grapple with the risk that living constitutionalism can be a recipe for constitutional failure.

To be clear, my argument is *not* that this problem of “dying constitutionalism” proves we should reject evolutionary or organic theories of constitutional meaning in favor of some other methodology. I doubt that a better methodology is out there. My point is simply that there is no necessary connection between living constitutionalism and moral progress. Nor do I think we are likely to find a way to build in such a guarantee. I suggest that, rather, we will get better results out of living constitutionalism if we spend more time worrying about the downside risks.

To illustrate those risks, it will help to be more specific about the mechanisms of living constitutionalism. Like constitutional interpretation generally, living constitutionalism has its modalities—that is, its methods of justifying particular propositions of constitutional meaning. From this perspective, constitutional meaning is at least partially a function of evolving public opinion or consensus; the more specific activities of social movements; political events and actions such as elections, landmark legislation, or established official practices; and the evolution of doctrine through common-law processes of judicial reasoning. Different scholars emphasize different modalities, but I want to cast my net broadly. The modalities I have just listed are generally the ones identified as means by which constitutional meaning grows, evolves, and generally becomes more just. My point is that they can also be means by which it mutates, decays, and dies.

Start with public opinion. We lack polling data for the nineteenth and early twentieth century, but there is little question that the proponents of the Reconstruction Amendments and of the civil rights laws passed pursuant to them walked a tightrope between their commitment to some measure of black equality and the residual racism and resistance to change of even the Northern electorate. That electorate had a far more limited conception of equality than would be acceptable today; perhaps more important, it was weary of conflict after four years of war in which 360,000 Union soldiers died.

To the extent that the general views of the American public exercise a gravitational pull on constitutional interpretation by the Court, Northern weariness and reluctance, as well as the South’s violent recalcitrance, were bound to impede realization of the amendments’ redemptive ideals.

The Reconstruction Amendments were especially dependent on the acts of the political branches. The open-ended text of the Fourteenth Amendment’s first section needed more detailed legislation to specify and flesh out its meaning. Consequently, the three Reconstruction Amendments were the first to include their own enumerated-powers provisions conferring on Congress the authority to implement their provisions by appropriate legislation. The Civil Rights Act of 1866, for example, has always played a prominent role in construing the Fourteenth Amendment’s meaning. Statutes of that sort are important to living constitutionalists who stress the role of political institutions in shaping evolving constitutional meaning.

But constitutional theories according a prominent role to political branch “constructions” of constitutional meaning or the operation of “constitutional politics” in times of foundational political ferment must take account of what happened not just in the 1860s but also in the 1870s, 1880s, and 1890s. The election of 1876, for example, bears many indicia of Professor Bruce Ackerman’s “constitutional moments”; it had the highest participation rate in American history (at least among white voters), and fundamental issues about Reconstruction and the propriety of military intervention in the South were on the table. And although the resulting electoral deadlock hardly demonstrated any kind of national consensus, the machinations that resolved the deadlock did effectively shape the implementation and interpretation of the Reconstruction Amendments for generations. Likewise, congressional decisions not to invoke Section 2 of the Fourteenth Amendment for the purpose of reducing Southern representation as a result of black disfranchisement and to repeal much of the Reconstruction-era voting rights legislation reflected a changed sense of Congress’s constitutional responsibilities, with profound consequences for the nation. The rules of recognition for constitutional change arising from elections or political-branch actions have never been clear. But if such things are to count toward constitutional meaning, then the actions of the late nineteenth century have a plausible claim on our attention.



What about social movements? The re-entrenchment of racial oppression in the late nineteenth and early twentieth century featured contributions from a variety of mobilized social groups, including white supremacist Redeemers who retook control of Southern state governments; anti-immigrant populists and progressives who came to sympathize with Southern racialism; labor unions fearing competition from black workers; and significant components of the women's movement, which had opposed the Fourteenth and Fifteenth Amendments on the ground that they failed to extend their gains to women. I want to focus, however, on a more seemingly benign social movement: the broad effort to achieve national reunion and heal the wounds left by the Civil War.

A favorite Republican electioneering tactic in the postwar nineteenth century was to “wave the bloody shirt”—that is, to tie Democrats to the late Rebellion and to campaign on Republican loyalty to the Union cause. So the strength of the movement for reunion and reconciliation during the same period may be somewhat surprising. And yet a prominent movement soon developed around decoration days to remember the war dead, a burgeoning and generally nostalgic popular literature telling soldiers' stories, and veterans' organizations and reunions that eventually reached across sectional lines. This movement tended to emphasize the valor and honor of the combatants and to soft-pedal the divisive issues, especially slavery and race, that underlay the war.

Historian David Blight has written that because “race was so deeply at the root of the war's causes and consequences, and so powerful a source of division in American social psychology,” it was “the antithesis of a culture of reconciliation.” For that reason, “[t]he memory of slavery, emancipation, and the Fourteenth and Fifteenth Amendments never fit well into a developing narrative in which the Old and New South were romanticized and welcomed back to a new nationalism, and in which devotion alone made everyone right, and no one truly wrong, in the remembered Civil War.” Hence, in 1913, President Woodrow Wilson gave a commemorative address at Gettysburg, on the fiftieth anniversary of the great battle:

“How wholesome and healing the peace has been! We have found one another again as brothers and comrades in arms, enemies no longer, generous friends rather, our battles long past, the quarrel forgotten—except that we shall not forget the splendid valor, the

manly devotion of the men then arrayed against one another, now grasping hands and smiling into each other's eyes. How complete the union has become . . . .”

On the one hand, the reunion *was* marvelous. No one wants to be Yugoslavia, where people still kill each other over grievances from centuries ago. Reunion not only brought real healing to many, but also permitted the nation to become the preeminent defender of democracy and human rights on the world stage not long after Wilson spoke.

But President Wilson also symbolized the cost of the forgetting that made reunion possible. The first Southern president since the Civil War, he presided over segregation of much of the federal government. And so, as Professor Blight has written, “[i]n the half century after the war, as the sections reconciled, by and large, the races divided.”

The reunion movement had another consequence that mattered for constitutional interpretation. Anyone who thinks history is always written by the winners hasn't studied the historiography of the Civil War and Reconstruction. For much of the twentieth century, that historiography was dominated by the “Lost Cause” myth of the war, which held that the South had fought for its freedom, not for slavery, and the Dunning School of Reconstruction history (so called after Professor William A. Dunning, its leading expositor), which insisted that Reconstruction was a malicious attempt by vindictive radicals to punish the South and foist freedom on a black race that was fundamentally unready for it. “The demeaning of black people as helpless, sentimental children and the crushing of their adult rights to political and civil liberty under the Fourteenth and Fifteenth Amendments,” as Professor Blight has recounted, were integral parts of this ideology. These interpretations would hold sway until the late twentieth century and inform the Supreme Court whenever it turned to history in its deliberations.

One could, of course, focus on other social movements—the Redeemers, for instance—that challenged the legitimacy of the Reconstruction Amendments, pushed for as narrow an interpretation as possible, and tried (often with considerable success) to block their enforcement. The central point, however, should already be obvious. Living constitutionalists such as Professor Jack Balkin extol social movements as motors of moral progress. “[W]e understand many important social movements in American



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history,” Balkin has written, “as working out the meaning of the Declaration and the Constitution, engaging in popular uprisings that help to redeem their promises.” But as Professor Scot Powe has pointed out, “mass movements . . . that have set themselves out to overturn an existing legal order have sometimes been wonderful—the Civil Rights Movement jumps first to mind—but equally as often they have been horrible.”

Many living constitutionalists—such as Professor David Strauss—have turned to courts as more-institutionally-regular expositors of evolving constitutional meaning. The extent to which the Republican architects of Reconstruction eschewed reliance on the courts has sometimes been exaggerated. Despite the debacle of *Dred Scott* and continuing concerns that the Court would undermine military Reconstruction, Congress made Section 1 of the Fourteenth Amendment self-executing—that is, directly enforceable by courts. Congress also expanded federal court jurisdiction and created federal civil rights causes of action and federal prosecutorial authority to enforce the amendment’s promises. The federal court system as we know it dates from Reconstruction.

But the courts’ record in the amendment’s early decades would likely have disappointed many of its framers. In key decisions, the federal courts read aspects of the amendment narrowly, accorded significant discretion to biased state and local administrators, and refused to provide effective remedies for potential violations.

Some have accused the Supreme Court of strangling the Fourteenth Amendment in its crib, but that charge is overstated. In the *Slaughter-House Cases*, to be sure, the Court did interpret the amendment more narrowly than it might have done. The New Orleans ordinance challenged in *Slaughter-House* conferred a local monopoly on the owners of a particular abattoir. Some butchers left out by this law challenged it under Section 1 of the Fourteenth Amendment. But the Court insisted that “the one pervading purpose” of the Reconstruction Amendments was “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.” The majority found little connection between that purpose and the plaintiffs’ legal claim. Notwithstanding the broader scope of Republicans’ free-labor ideology, it is hard to argue with the

Court’s conclusion: the Civil War was not fought to uphold the rights of white butchers to defy local sanitation laws.

Critics complain that *Slaughter-House* wrongly construed the Fourteenth Amendment’s Privileges or Immunities Clause not to apply the Bill of Rights to the states, but it’s hard to see how that would have helped the butchers. And, in any event, that dictum has been readily circumvented since then by incorporating the Bill of Rights into the Due Process Clause. What the butchers needed was for the Court to adopt into the Fourteenth Amendment Justice Bushrod Washington’s open-ended formulation of “privileges and immunities,” under the similar language of Article IV, from an 1823 case called *Corfield v. Coryell*. Justice Washington’s capacious formulation—which included “the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety”—may be broad enough to include the right to dismember animals wherever you want, but it could also include just about any other right one might dream up. That’s mostly all right under Article IV, because that provision allows *states* to define which privileges and immunities they actually wish to protect and then simply restricts them from discriminating with respect to those rights between in-staters and out-of-staters. But what the butchers wanted in *Slaughter-House* was for the *Court* to define these broad privileges and immunities and protect them against any encroachment, whether discriminatory or not. That was tantamount to an invitation to write a new constitution, and it is not hard to see why the Court declined.

It’s more plausible to point the finger at the *Civil Rights Cases*. Those cases were federal prosecutions, under the 1875 Civil Rights Act, of various operators of public accommodations—including Maguire’s Theatre in San Francisco and the Grand Opera House in New York City—for refusing to serve black patrons. The Court struck down the act on the ground that it exceeded Congress’s power under Section 5 of the Fourteenth Amendment, which confers legislative authority to prohibit and punish actions that would be unconstitutional under Section 1. The trouble, the Court said, was that *private* discrimination is not unconstitutional under Section 1, which imposes obligations on *states*, and thus Congress had no authority under Section 5 to legislate against such discrimination.

I have never heard a serious argument that the Constitution should not have a state-action





requirement, and that requirement is absolutely basic to modern constitutional law. Without it, I as a private citizen would have to give my son notice and a hearing under the Due Process Clause before grounding him for staying out too late on Saturday night. The better criticism is that the failure of states such as California and New York—and, obviously, the recalcitrant states of the Old Confederacy—to prohibit race discrimination by places of public accommodation *was* state action. After all, “public accommodations” in the law are largely defined by their legal obligation to serve all comers, and the refusal to enforce this preexisting and general requirement on behalf of black people surely denied them the “equal protection of the laws.” Public-accommodations laws, however, were subject to an exception for “reasonable” requirements. And in the railroad context, common-law decisions since the 1850s had upheld segregation on the ground that “‘repugnancies’ between the races arising from natural differences created friction that segregation could minimize.” From this perspective, the *Civil Rights Cases* prefigure the Court’s later holding in *Plessy v. Ferguson* that separate but equal public accommodations satisfy the reasonableness requirement for valid police-power legislation.

It is fair to say that, in the Fourteenth Amendment’s early decades, the common-law development of the amendment’s meaning pushed in the same direction as the other modalities of living constitutionalism—that is, to undermine and narrow the amendment’s commitment to black equality. It is not clear how much practical impact the courts’ decisions had. Michael Klarman has written that “[t]he 1875 [Civil Rights] Act was

essentially a dead letter before the Court invalidated it in 1883 . . . . Blacks seeking to enforce their statutory rights of access to public accommodations frequently encountered hostility and violence.” It is thus no coincidence that none of the consolidated *Civil Rights Cases* came from the Deep South. But “[e]ven public accommodations laws in northern states had proved inconsequential in practice.” More broadly, the Court’s decisions in this era likely “reflected, far more than they created, the regressive racial climate of the era.”

There is one last modality to consider: violence. Echoing Clausewitz, historian George Rable has written of Reconstruction that “for the South, peace became war carried on by other means.” The Fourteenth Amendment’s first decades offer a history of violence and death—lynchings, murderous race riots, and other forms of terrorism and intimidation. No one thinks that violence is a legitimate modality of living constitutionalism. But it is equally obvious that violence powerfully affected aspects of history that *are* the raw material of evolving constitutional meaning. Any method of living constitutionalism that takes into account changes in the political and social world offers a route by which the violence that is part of that world can creep into constitutional meaning. Just as the violence of the Civil War settled a long-standing debate about whether the Constitution permitted secession, the violence and terror of whites’ rejection of black equality powerfully shaped the political, social, and even legal meaning of the Fourteenth Amendment. As historian James McPherson put it: “The road to redemption was paved with force. Power did flow from the barrel of a gun.” I would add that *law* flowed from that barrel, too.

**Just as the violence of the Civil War settled a long-standing debate about whether the Constitution permitted secession, the violence and terror of whites’ rejection of black equality powerfully shaped the political, social, and even legal meaning of the Fourteenth Amendment.**

**Much debate in constitutional law proceeds as if by getting the methodology right, we could perfect American constitutionalism and guarantee good results. But it's hard to see how any methodology would have helped all that much in confronting the hostile environment into which the Fourteenth Amendment was born.**

Violence determined, for example, whether there would be litigation invoking the Fourteenth Amendment. Mounting a legal challenge to segregation was frightfully dangerous for African Americans, and until well into the twentieth century they tended to do so only under very special circumstances. Violence also framed the possible judicial resolutions of the cases brought. In *Giles v. Harris*, for example, a black plaintiff alleged that an Alabama law requiring registered voters to be of “good character and understanding” effectively discriminated on the basis of race and demanded an injunction compelling registration of black voters. Writing for the Court in 1903, Justice Oliver Wendell Holmes said that even if the administration of such a requirement could be challenged as discriminatory, the plaintiff would have to seek relief from the national political branches. He explained:

“[T]he great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff’s name to be inscribed upon the [voting] lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form.”

It is instructive to compare *Giles* with the 1958 decision in *Cooper v. Aaron*. *Cooper* held emphatically that Arkansas Governor Orval Faubus’s effort to mobilize “the great mass of the white population”—not to mention the National Guard—in order to prevent blacks from attending white schools could *not* be permitted to interfere with a federal injunction under the Fourteenth Amendment. President Dwight D. Eisenhower’s deployment of federal troops to Little Rock was a statement that the federal government would no longer tolerate the “autumnal uprisings in the South” that President Grant had been unwilling or unable to suppress. The irony of *Cooper v. Aaron*, then, is that the most categorical statement of judicial supremacy in the *U.S. Reports* depended for much of its power on the Executive’s demonstrated willingness to enforce the Court’s decree through force if necessary. There was no such willingness during the Fourteenth Amendment’s lost decades.

Finally, a word about originalism is in order. As I stated earlier, my critique of living constitutionalism is not an argument for originalism as an alternative

mode of constitutional interpretation. I don’t really think that originalism can help. The first reason is that many originalists have concluded that the original understanding of the Fourteenth Amendment entails a general and fairly open-ended commitment to equality. Robert Bork, for example, said that the Fourteenth Amendment’s framers “intended that the Supreme Court should secure against government action some large measure of racial equality,” but that “those same men were not agreed about what the concept of racial equality requires. Many or most of them had not even thought the matter through.” Hence a court applying the Equal Protection Clause must fall back on a “core idea of black equality against governmental discrimination,” defined at a relatively high level of generality. Bork was comfortable with courts working out this principle in specific cases and untroubled by the prospect that this might entail consequences that the framers themselves did not foresee.

Critics of originalism decry this account as giving away a chief advantage claimed by originalism—constraining unelected judges—by leaving contemporary judges unconstrained as they fill in the meaning of the Equal Protection Clause’s open-ended language. That is fair enough, but it hardly means that Judge Bork’s reading of the Fourteenth Amendment’s original understanding is wrongheaded. That reading strikes me as almost certainly correct. It does mean, however, that originalism cannot rescue us from the perils of living constitutionalism when it comes to the Fourteenth Amendment. If originalism respects the original understanding of constitutional text when that understanding is open-ended, then its prospects will basically dovetail with those of living constitutionalism.

Originalism is unlikely to bail us out for a second reason. The Supreme Court’s decisions interpreting the Fourteenth Amendment narrowly rest on plausible—if not indubitably correct—interpretations of the historical evidence of original meaning. Where the legal arguments are close on the merits, the social and cultural forces expressed in the modalities of living constitutionalism tend to play a decisive role. In other words, even if a good originalist case could have been made against the result in *Plessy* or the *Civil Rights Cases*, it would be a lot to expect for a court to buck the forces of contemporary politics on a matter that is admittedly close. Living constitutionalism is not just an alternative

methodology to originalism; it also sums up a variety of forces operating on courts regardless of the method that they set out to employ.

Neither of these points means that originalism will never have comparative advantages over living constitutionalism in preventing the deterioration of constitutional norms over time. Where the original understanding is clear and specific, originalism will generally do a better job at preserving a constitutional principle intact. But the Fourteenth Amendment's text and history are sufficiently open-ended and uncertain to leave originalists and living constitutionalists in essentially the same leaky boat.

### III. THE LESSONS OF CONSTITUTIONAL FAILURE

I promised at the outset that if you walked with me through the dark valley of the Fourteenth Amendment's early decades, we would come out the other side with some insights about constitutional theory. I did not promise, however, that they would be sunny or uplifting. For me, the lessons of the amendment's years of failure are as follows.

To begin, this is at least in part a story about the limits of constitutionalism itself. Importantly, I do not simply mean the limits of *judicial review*. Judicial review doesn't come off that well in my story, but neither do political-branch actions or popular constitutionalism. After what is still the most devastating war in American history, Americans tried to resolve the central issue of that war—the oppression of black Americans—through a flurry of constitutional creativity that had not been seen since the Founding and has not been equaled since. The resulting amendments, in and of themselves, failed to do what their framers set out to do. They could not prevent the condition of the freedpeople from deteriorating radically after the withdrawal of Union troops from the South. And they did not achieve real progress until the country itself had changed, nearly a century later. You cannot change basic social conditions simply by changing the Constitution.

One might think this to be simply a problem with the subset of constitutional principles that purport to be “redemptive” or “aspirational” in nature. And surely it is easier to constitutionally entrench a state of affairs that has already been achieved than it is to move the social mountain by ratifying words on paper. But the story of the Civil

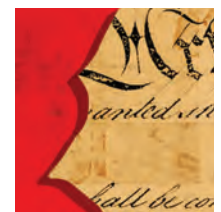
War, Reconstruction, and the subsequent reassertion of racial oppression involves a failure not just of the aspirational amendments but of any number of other constitutional principles. For example, the original constitutional structures of federalism and separation of powers, designed to mediate conflict and preserve liberty, failed of that mission both before and after the war. Conflict over race is the central drama of our national story, and when push came to shove, constitutionalism was unequal to it.

To that cheery observation let me add another: This is also a story about the limits of constitutional methodology. Much debate in constitutional law proceeds as if by getting the methodology right, we could perfect American constitutionalism and guarantee good results. But it's hard to see how *any* methodology would have helped all that much in confronting the hostile environment into which the Fourteenth Amendment was born. As I've suggested, originalism offers no solace here. The basic point is that *any* methodology can be conducted well or poorly, and as far as I can tell, interpretive methodologies generally do not themselves do much to ensure excellent rather than miserable application. My aim here is to say something about how the history I've canvassed might encourage living constitutionalists to do their job well rather than poorly.

The first thing that living constitutionalists need to get straight is that there is nothing inevitable about moral progress. The use of organic metaphors such as “evolving meaning” can cause us to confuse constitutional development with natural processes that may have some sort of direction hardwired into them. Sometimes living constitutionalists seem to acknowledge that progress is not inevitable. Jack Balkin, for instance, states that “[a] story of *constitutional redemption* is . . . a story of contingency” that “does not claim that the eventual redemption is assured. It claims only that we should strive to achieve it.” Yet most living constitutionalist accounts of our history have an optimistic, onward-and-upward feel to them. Professor Balkin does not seem to recognize that the very title of his book—*Constitutional Redemption*—dovetails precisely with the name that the nineteenth-century Redeemers, who reestablished white supremacy, had for *their* constitutional project.

To overcome this myth of inevitability, living constitutionalism needs a sense of tragedy. This may be the great contribution that the Fourteenth Amendment's lost years can offer to constitutional law. C. Vann Woodward made a similar point about

**What I am suggesting is that constitutional culture may be more important than constitutional method when it comes to hanging on to constitutional values. I think we need to change the culture of living constitutionalism if we are going to prevent future tragedies, like the dying constitutionalism of the Fourteenth Amendment's lost years.**



[T]he Fourteenth Amendment is the Constitution's South. It's the part of the Constitution that failed (before rising again to something better).

what the South had to offer America more generally. Writing before Vietnam, Professor Woodward proposed Southern history as an antidote to the "American . . . legend of success and invincibility." He noted that "Southern history, unlike American, includes large components of frustration, failure, and defeat":

"An age-long experience with human bondage and its evils and later with emancipation and its shortcomings did not dispose the South very favorably toward such popular American ideas as the doctrine of human perfectibility . . . . For these reasons the utopian schemes and the gospel of progress that flourished above the Mason and Dixon Line never found very wide acceptance below the Potomac during the nineteenth century."

In this sense, ironically, the Fourteenth Amendment is the Constitution's South. It's the part of the Constitution that failed (before rising again to something better). It brings to constitutional law "[t]he experience of evil and the experience of tragedy" needed to remind us that moral progress is not inevitable, that social forces can push constitutional meaning in bad as well as good directions, that living can turn into dying constitutionalism if we are not very, very careful.

I don't have much to offer beyond this. I doubt that there is some identifiable methodological tweak that can guard constitutional interpretation effectively against the possibility that history may move in the wrong direction. If we let the *movement* of history into interpretation—as opposed to history's state at an originalist snapshot in time—then we let in the contingency that comes with it. What I am suggesting is that constitutional *culture* may be more important than constitutional *method* when it comes to hanging on to constitutional values. I think we need to change the culture of living constitutionalism if we are going to prevent future tragedies, like the *dying* constitutionalism of the Fourteenth Amendment's lost years.

To be more specific, we need not only to keep the downside risks of evolving constitutional meaning firmly in mind, but also to make living constitutionalism a little less lively. There needs to be a bit more locking-in and a little less pushing forward, because forward motion can end up not being forward at all. This is harder when a provision is, like the Fourteenth Amendment, profoundly aspirational. But even there, we might have done better had the amendment's subsequent interpreters held a little more fast to the amendment's central, basic commitment to equality and been a little less willing to modify that commitment in light of more-contemporary imperatives. We need to remember that the Fourteenth Amendment's retrogressive earlier interpreters thought that they, too, *were* shaping constitutional meaning to conform to current notions of justice. If we remember that, we'll subordinate our impulse to keep the Constitution "in tune with the times" to a principle of "first do no harm."

There is a cost to this, of course. A less frisky version of living constitutionalism—we could call it "stiff-necked constitutionalism"—would give up the exciting potential for surprising and inspiring moral growth. The Constitution would still evolve, but more slowly and only in response to very sustained trends over time. It might be harder, for example, to go from the categorical rejection of gay rights in *Bowers v. Hardwick* (1986) to the embrace of that principle in *Lawrence v. Texas* (2003) in just 17 years. That would be a loss. As my friend Professor Marin Levy has observed, "the trouble with tying yourself to the mast is that, sooner or later, you're on the mast." But a stiffer, creakier, even *grumpier* living constitutionalism might also make it harder to go from ratification of a Fourteenth Amendment committed to black equality to the *Civil Rights Cases* in 15 years, or from a Fifteenth Amendment committed to black suffrage to the abandonment of black voters to murderous white supremacist mobs in just 5. ■



# THE LIVING CONSTITUTION AND MORAL PROGRESS: A Comment on Professor Young's Boden Lecture

David A. Strauss

Professor Ernest Young's Robert F. Boden Lecture is exemplary in any number of ways. It tells an important story, and it tells that story well. It does not shy away from confronting the ugliness in our history. There is no hint of unwarranted self-congratulation. At the same time, Professor Young's account, characteristically for him, is thoughtful and careful. One of his central themes is that there is a serious weakness in the "living constitution" tradition, a weakness illustrated by the way that the promise of the post-Civil War constitutional amendments was compromised—destroyed, really—over the following decades. But he does not go from there to a stump-speech attack on living constitutionalism or a simplistic claim that originalism, the approach that is usually contrasted with living constitutionalism, must be correct. On the contrary: he suggests that some form of living constitutionalism is probably the right way to think about constitutional law. He recognizes that questions about how to understand the Constitution are complicated. But beyond that, he sees that, in the end, deeper cultural forces, rather than theoretical insights, are likely to determine whether we make progress. In both substance and style, Professor Young has a lot to teach us.

Professor Young's lecture highlights two common fallacies in the ways people think about how the law develops—indeed, in the ways people think about how history develops. One fallacy is the idea that moral progress is inevitable. Maybe the arc of the moral universe bends toward justice, although, as Professor Young says, we don't even know that. But we do know that, at best, it is a long arc, and in the meantime many lives can be ruined. Professor Young suggests that the "living constitution" tradition is associated with the idea that moral progress is inevitable.

The other fallacy is the golden-age myth. It is the idea that things were great at some magical point in the past, and if we could only go back, things would be great again. As Professor Young shows, while the past had admirable aspects—the promise of the immediate post-Civil War constitutionalism, for example—there are less admirable aspects as well. Uncritical adulation of the past and the naïve belief that all change is change for the better: both are terribly misguided. If you don't think so, read Professor Young's lecture.

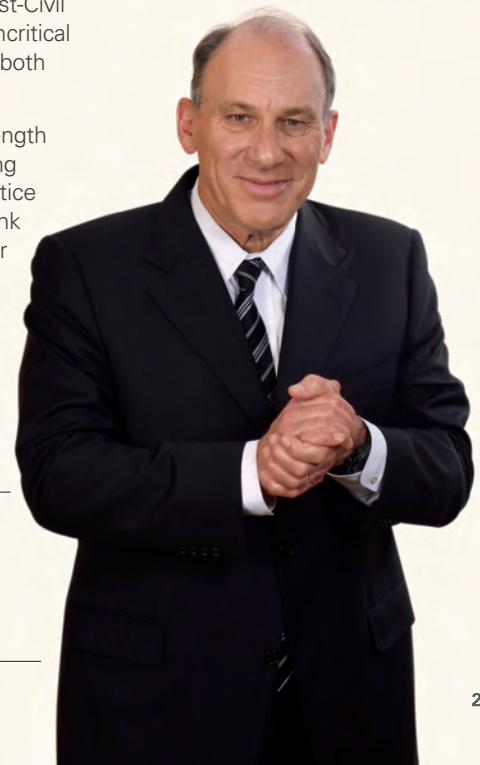
For me, though, Professor Young's account shows not the weakness but the strength of the idea of a living constitution. As I understand it, the idea that we have a living constitution makes two claims. One is a claim about what our constitutional practice has been in fact. The other is a claim about what it should be: how we should think about the constitutional issues that we confront, whether we are judges, or other public officials, or commentators, or citizens.

The descriptive claim—the claim about what we have actually done in the past in deciding constitutional issues—is that the Constitution is "living" in the sense that our understanding of what is required by the Constitution has changed over time. If there were a bar exam in 1868 with a constitutional law section, and you wanted to get credit for your answers, you'd have to give different

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**[A]ny account of the Constitution and constitutional law has to acknowledge the possibility of retrogression, not just progress. Living constitutionalism can—and must—do so.**

answers from the ones that would get you (hypothetical) credit in 1896, or 1937, or 1954, or 2019. The answer to the question “What does the Constitution require?”—the answer that would be accepted by the mainstream of the legal profession or even the country generally—has changed over time. Not all of those changes (in fact, relatively few of those changes) were brought about by formal amendments to the Constitution. That is one important sense in which we have a living Constitution.

Those changes over time have not always been for the better. That is exactly Professor Young’s point. But it does not follow that the idea of a living constitution is mistaken. On the contrary: it should not be part of the idea of a living constitution to claim that these evolutionary developments always improve things. That would accept the myth of inevitable moral progress. As Professor Young says, any account of the Constitution and constitutional law has to acknowledge the possibility of retrogression, not just progress. Living constitutionalism can—and must—do so.

It might be tempting to say that this is why the other aspect of living constitutionalism—the prescription for how we should think about the constitutional issues that we confront—is wrong. Evolution in constitutional law, the argument would go, is precisely the problem. Instead of allowing, or endorsing, evolution, we should hold fast to the Constitution as an anchor against drift. As often as not, drift will run us aground; evolution will go in a bad direction; a supposedly living Constitution will be a degrading one. That is the argument that originalists make. And a less subtle thinker than Professor Young would draw that lesson from his story.

But that argument just substitutes the golden-age myth for the myth of inevitable moral progress. There is no single time that we can look back to for the solution to our problems, and that includes the time when the Fourteenth Amendment was adopted. Of course, we would have been much better off if the commitments of the generation that adopted the Fourteenth Amendment had been honored in the decades that followed. But by the middle of the twentieth century, the understandings of that generation would have been an obstacle to progress. They were comfortable with racial segregation in many settings, and they had ideas about, for example, women’s equality that we would unequivocally reject today.

As I understand it, at least, the prescriptive part of living constitutionalism draws on two sources. One is a version of Professor Young’s “stiff-necked” or “grumpy” constitutionalism, although maybe it should be not quite as stiff-necked or grumpy as he envisions. The idea is to approach the past with an

attitude of humility and to take the lessons of the past seriously—all the lessons of the past, not just the teachings of the supposed golden age but what has been done by generations since then. This is a familiar idea in the law. It is the idea behind the common law. Law is derived from past practices. Those practices include judicial precedent, and they also include what you might call nonjudicial precedent—the practices of other branches of government and even of society at large.

The other source of living constitutionalism—a crucial source—is moral judgment. Sometimes, of course, the law is clear. But when the law is not clear, the judgment that certain principles are more fair, or more just, or better as a matter of policy can be part of deciding what the law *is*—along with precedent, tradition, text, and other distinctively legal sources. The common law has always blended moral judgment with other sources of law.

Precedent, for example, even if limited to judicial precedent and certainly if conceived more broadly, does not dictate a single direction for the law. Among the possible paths that precedent leaves open, a judge—or another official or a citizen—has to choose on the basis of a moral judgment of some kind. Sometimes it might even be necessary to depart from the path that precedent identifies, because, even giving the lessons of the past full credit, they are simply unacceptable. In all of these instances—whether the question is how to understand the multifaceted lessons of the past, or whether to decide to go in a different direction—the basis for the decision will be the kind of moral judgment I have described. What other basis can there be, for such a choice? And, as I said, that kind of evaluation—a moral or policy evaluation within a context defined by precedent—has always been characteristic of the common law.

I think that living constitutionalism, so understood, gives us a way to approach the ugly chapter of our constitutional history that Professor Young describes. Precedent alone, however broadly conceived, is not adequate to that task. Professor Young shows this. He says that the “mechanisms” of living constitutionalism, which he identifies, led to the degradation of constitutional law. Precedent is among those mechanisms, and it alone did not prevent—in some ways, it promoted—the authoritarian and racist regime that Professor Young describes. But I am not sure that Professor Young’s go-slow, stiff-necked constitutionalism would have done better. In many ways, the architects of racial segregation were the small-c conservatives, the ones who wanted to go slowly. Racial equality was a radical idea in the mid-nineteenth century. It would not have been surprising if go-slow constitutionalists had resisted it.





It is the other aspect of the living constitution tradition—the candid acknowledgment that moral judgments should play a role in the law—that gives us a way to say what we want to say about the racist regime Professor Young describes. The past left open several paths after the Civil War, as of course it often does. There was a tradition of racism and white supremacy. But there is an American tradition of equality that extends back at least to the Revolution. There was an abolitionist tradition that, during the war years, had moved from the fringe to the mainstream. There was a mainstream acknowledgment that African Americans were entitled to certain rights, even if not full racial equality.

The generation that Professor Young describes had a choice of what to make of those historical currents that it inherited—which ones to promote and extend, and which ones to abandon. They made the wrong choice—the morally wrong choice. The regime of white supremacy was morally evil. Our understanding of the Constitution should accommodate that view. That is not the whole of the law, but it is part of the law.

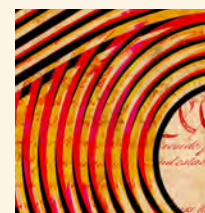
Two questions naturally arise. To say that living constitutionalism is an amalgam of precedent and moral judgment seems to leave things too indefinite; how can we decide when one should leave off and the other begin? And, maybe most obviously, whose moral judgment? In many ways, the point of a legal system is to resolve issues in a society in which people's moral views differ.

There is no algorithmic answer to the first question. The best we can do is to approach the problem with an attitude of humility—a recognition that we can learn from the past. But humility does not preclude shaping our inheritance from the past in a way that makes it better or even making more radical alterations. Take, for example, the common assertion that *Plessy v. Ferguson* was “wrong the day it was decided” in 1896. It was morally wrong, of course, but as Professor Young says (in addressing originalist claims about *Plessy*), we are kidding ourselves if

we think it is an easy question whether *Plessy* was *legally* wrong. There was substantial support in the usual sources of law—including both precedent and original understandings—for the Court's decision. It is true that some of those usual legal sources (for example, the common-law principle that common carriers may not discriminate among customers) could be used to support the opposite conclusion. But if we don't recognize that moral judgments can sometimes play a role in legal decisions, then it is very hard to make the case that *Plessy* is legally wrong. If we do recognize that role, *Plessy* becomes legally far more questionable. But it's still not a question that can be resolved axiomatically.

As for the final issue—isn't it troubling to allow controversial moral judgments to resolve legal issues?—the answer is that, troubling or not, it is unavoidable. And it is important to acknowledge that it is unavoidable. Distinctively legal materials settle a lot of issues but not every issue, and when more than one path is left open, we must confront the question: How else should we decide what the law requires? Part of the reason that *Brown v. Board of Education* was legally right is that segregation was morally wrong. That is not all of the reason, but that is part of the reason. And part of the reason that the regime described by Professor Young was legally wrong is that it was morally evil. Why shouldn't that be part of the reason, in each instance? And we should admit that it is.

That point, I think, identifies two of the virtues of living constitutionalism. It enforces a duty of candor. Judges (and officials and commentators and citizens) will, in fact, allow their moral views to affect their legal judgments sometimes, and they should admit it. They should expose their views to criticism, rather than hiding behind, for example, the framers. And living constitutionalism, understood in this way, also forces us to recognize the limits of the law. As Professor Young's lecture shows, in the end, there is only so much the law can do to save a society from its own moral failings. ■







# IN SEARCH OF BETTER OUTCOMES

BY ALAN J. BORSUK

The lasting wounds and scars aren't always visible. Often they don't prompt big concern. Or they are dismissed as part of the job, the price one pays. But the wounds and scars are important—and there are ways to reduce them, sometimes even remove them.

The path toward better outcomes for all who are part of the world of law enforcement has been a long-time concern of Marquette Law School. A leading example: For more than 15 years, the Restorative Justice Initiative, led by Janine Geske, a former justice of the Wisconsin Supreme Court and a now-retired distinguished professor of law, has been an important part of the Law School's life. Through efforts in communities and at correctional facilities and through annual conferences, the Restorative Justice Initiative has tried to provide repair where individuals and groups have experienced harm.

Two recent conferences at Marquette Law School provided insight and candor in addressing the scars and wounds on all sides of the law enforcement world. The following pages give some snapshots of each of the conferences, whose full proceedings are available online.

The annual Restorative Justice Initiative conference, on November 9, 2018, was titled "The Power of Restorative Justice in Healing Trauma in Our Community." Beginning here on page 28, an edited and excerpted transcript of one of its panel discussions—this one involving four people in law enforcement—focuses on how police officers and others are affected by what they face in the line of duty.

The Law School's Lubar Center for Public Policy Research and Civic Education hosted another conference on October 4, 2018: "Racial Inequality, Poverty, and the Criminal Justice System." This conference spotlighted the difficulties faced by people who leave incarceration and reenter the general community. A report on the conference, including some broader context, is offered, beginning on page 34.

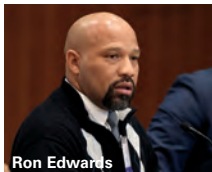
A common theme to the two events: There are ways to do better, when it comes both to individuals and to our communities.



# BEHIND THE BADGE:

## A Growing Sense of the Need in Law Enforcement to Cope with Trauma

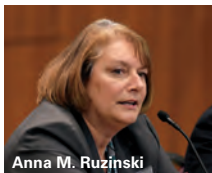
**M**arquette Law School's Restorative Justice Initiative conference, on November 9, 2018, was titled "The Power of Restorative Justice in Healing Trauma in Our Community" and was introduced by an original, one-hour film featuring law enforcement and community members discussing trauma in their lives and their efforts to overcome or address it. One of the panels then examined an issue that traditionally has received little attention: the impact on law enforcement officers of dealing with a nearly constant stream of severe and painful human episodes and needs and the growing efforts to help officers who develop signs of trauma as a result of dealing with many other people's traumas.



Ron Edwards



Terrance Gordon



Anna M. Ruzinski



T. J. Smith

This panel discussion, titled "Trauma Through a Law Enforcement Lens," included four veterans of law enforcement:

**Ron Edwards**, a Milwaukee police officer

**Terrance Gordon**, chief inspector of the Milwaukee Police Department

**Anna M. Ruzinski**, chief of police in the Milwaukee suburb of Menomonee Falls and formerly a high-ranking officer with the Milwaukee Police Department

**T. J. Smith**, former chief of communications for the Baltimore Police Department

Rita Aleman, program manager for the Law School's Lubar Center for Public Policy Research and Civic Education, moderated the session. This is an edited and excerpted transcript of the discussion. The full conference, including the film and the other panel discussions, is available on the Law School's website.

**Aleman:** You told me after you watched the film that it was the first time that you started to process the trauma you had witnessed yourself or experienced yourself as a police officer. Can you talk about the trauma you've experienced as an officer and as a chief?

**Ruzinski:** I've been in law enforcement for 38 years. So, as you can imagine, working the streets of Milwaukee and in mostly impoverished areas, I saw a lot. I was asked this morning whether I have ever been a victim, whether I have ever experienced trauma. The only thing I could really think of was in

the 1960s, when there were the riots in Milwaukee and my dad was a police officer. We'd hear on the news how many officers were injured, and we wouldn't see him walk through that door at 11 o'clock every night like he was supposed to, and we would wonder: "Is he one of the ones who've been killed or injured?" And then I thought of my career as a police officer, and I thought of things I've seen that I never thought of processing.

One of the first crimes I ever investigated was a situation of domestic violence. My partner and I went to the residence, and we knocked on the door.

We could hear screaming and yelling inside, and just before we kicked the door down, the woman on the other side opened it. Well, she was six months pregnant, and her boyfriend was burning her belly with a hot iron. He was taking a hanger and trying to gouge her stomach. So, we were able to make the arrest; we were able to get her care. But then it comes time to go to court. Well, you can imagine, there's some time in the criminal justice system before that case goes to court. By that time, she had had the baby, she was back in love with him, and they were together, and she was cussing me out for arresting him to begin with. And I couldn't comprehend why someone would go back to that type of atmosphere.

So there are things like that through my career that I've experienced. I never really considered them trauma or things that affected me because, as law enforcement, we're the tough guys, right? Even as a female, you know, I'm supposed to be the macho one. We just put it all away, and we don't think about it. Our training kicks in, we're there to go in and handle a situation and take care of it. We never stop to think of the effect it has on us. . . . In law enforcement, we're so busy taking care of the laws and preserving the peace and helping the public that we never seem to think about where it all started, and that's what we're starting to do now. We're finally getting to a point where we need to work as a community, we need to start at the beginning, we need to start with young kids, we need to start with mental health, we need to start

with a family unit, and if we can start to fix some of those things on the front end, then we're not going to be dealing with some of the people in the criminal justice system later on in their lives.

**Gordon:** We had a former [Milwaukee] chief who said that apparently there's no ill in the world that can't be solved by more training for the police. It was a different context, but that's partially true: Training is extremely important. And in the context of trauma, when you talk about training, obviously, if your police officers aren't experts in victims and victimization, I don't know who else in the criminal justice system should be. We have contact with more victims than anybody else in any segment of society—even than prosecutors.

So when you talk about trauma and training for the police, it's extremely important to approach it from both sides: victims, which there's no shortage of for us, and then the person who is the police officer. And we have a very comprehensive approach. You wouldn't know it because we're not very good at marketing what we do in law enforcement, except what you see on the body cameras, and we don't always want you to see that. But we have a very comprehensive approach in Milwaukee and in a lot of police departments now. A lot of people don't know about it, but we are seeing the results, believe it or not. It started a long time ago, in the '80s, with peer support. I've been a member of the peer-support team for 20 years. This team still has a very special place in our department,



**“So when you talk about trauma and training for the police, it’s extremely important to approach it from both sides: victims, which there’s no shortage of for us, and then the person who is the police officer. And we have a very comprehensive approach.”**

Terrance Gordon

even though we have some more-institutionalized things now. We’re beginning to implement some aspects of trauma-informed care, particularly in our districts where we see the highest volume of violent crime, and particularly where our work involves juveniles. We’re focusing on the person; we’re asking our officers to focus on the self. Right now, we’re in the middle of a very large and hopefully impactful study on resilience.

We have an early-intervention program that has been around for a few years now and is getting more robust. In this early-intervention program, information about officers is put into a system. When an officer amasses a certain number of events—of certain types of events—there’s a trigger, and then it’s mandatory at that point that a supervisor has an intervention—not disciplinary—with that person. One of the things I’m most proud of is that I implemented a wellness coordinator and got a police psychologist on our police department staff. She has been extremely well received.

**Aleman:** Ron, you faced the deaths of two of your brothers and then your dad, and you still reported for work. Can you describe for us what that period of time was like for you and what kind of supports you actually needed from your colleagues?

**Edwards:** The first death to occur was my brother—my baby brother, Mario—where he died in police custody. So, the police actually knew what happened, but family members did not.

It hit home when my cousin called me a sellout, because I’m going to be working with a bunch of people who just killed my brother. Other family members said, “Don’t worry about him; don’t pay any attention to him.” So, I kind of brushed it off and kept moving forward.

Moving forward, I’m a full-blown police officer, working. I was on an off day, and we get the call from my mom to get over there. She’s long-faced, my father’s long-faced, and they say they have something to tell me about our brother in Atlanta. He died. But then they tell me that it was by a police officer in the city of Atlanta. So now this is the second time.

This has to sink in with me because now I’m a police officer and I’m working for a police department, and I’m having doubts. Maybe my cousin was right; maybe I’m in the wrong field; and why is this all happening to me? Why, why, why? My dad pulled me aside because he knew I was having a hard time; that was probably, I would say, the most sincere conversation that we had ever had.

He told me: You have to remember how hard you worked to get this job, the things you went through to get it, and why you are there doing it. That kept me wanting to move forward.

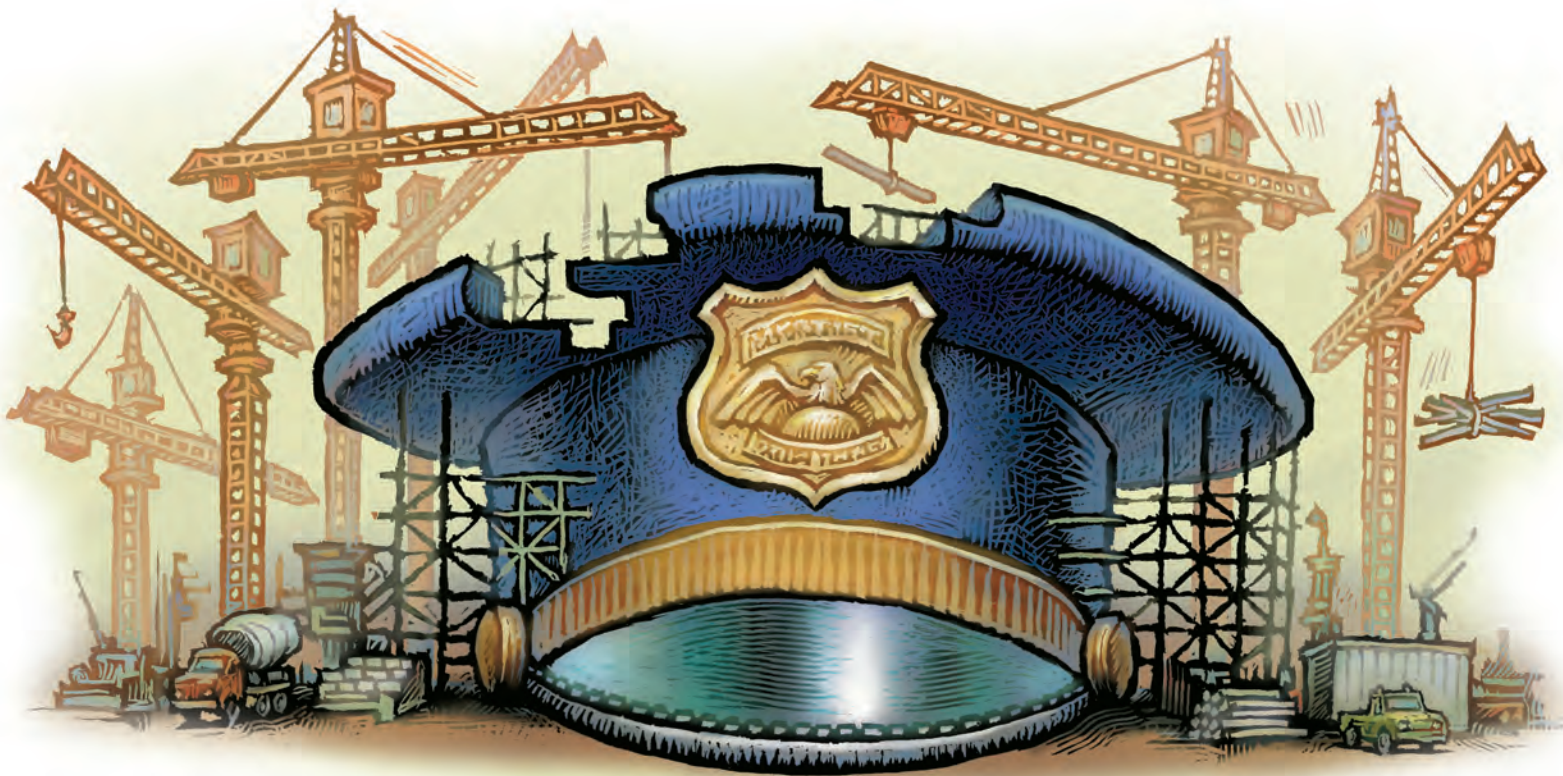
Moving forward: A year later, before the young man who committed the act against my brother could even go to trial, I lost my dad. As he was coming home, parking his truck in the garage that was off the alley, [he was murdered]. That’s when everything really hit and sunk in on me—like, what am I supposed to do? My wife, my family—they really helped me pull through things. And then at work, as far as peers—they really helped me pull through. So, between having family members and peers like I had at work—those are the reasons why I’m still able to cope, talk about, and deal with the issues that I’ve gone through.

**Smith:** In Baltimore, we started talking about post-traumatic stress disorder among the community and the police officers, going through a riot. At the time that this occurred, this was something that hadn’t been seen in the city in more than 40 years, and we have these officers who are being put in these volatile situations. And, obviously, many of us are ill-equipped. We all probably came up in our career where our mental health was secondary. Under the twenty-first-century policing model, officer wellness is a pillar, no different from crime fighting. And that’s critically important because we’re being thrust into these atmospheres and these environments.

We’re ill-equipped to handle a lot. We’re getting better—our profession is getting much better.

We’re just all so ill-equipped to deal with [trauma within the police department], but we have started, at least in Baltimore and, I hear, here in Milwaukee. It’s like we’re brother/sister cities with a lot of the same things. Wellness programs—we’ve even got a wellness dog now. We joke about it, but the dog makes you feel better. Something as simple as that fluffy creature coming around makes you feel better. But five years ago, even in many cities, that would have been taboo.

**Ruzinski:** What we’re trying to say is, as law enforcement, we’re human, just like everybody else. There is no police officer in this world who wakes up and says, “I think I’m going to use excessive force today. I think I’m going to go out and shoot someone today.” I guess what I’m saying by that is this: We are wired to help people and protect people, and when we don’t take care of our own



**“We need to educate our officers; we need to have them understand that what they experience can affect the way they do their job. We need to watch out for them so that they can continue to watch out for the citizens.”**

Anna M. Ruzinski

and they experience that trauma within their life, it could be our not addressing that trauma and the wellness of that officer that causes him to act out and become a bad officer later on. And that’s on us.

We’re just getting into officer wellness. There are three times the number of officers committing suicide every year as are killed in the line of duty. I had an officer commit suicide, an officer who worked for me, and we all wondered, “Why didn’t we see it? What could we have done? What didn’t we see?” So the kind of trauma that [non-officers] can experience and may cause them to act out or commit a crime could be the very same type of trauma that police officers experience from all the trauma that they see and may cause them to act out. We need to educate our officers; we need to have them understand that what they experience can affect the way they do their job. We need to watch out for them so that they can continue to watch out for the citizens.

**Gordon:** For a very, very long time now—in policing, that’s like five or six years, because things come and go so fast, but for a while—we have been actively working on reducing the stigma of needing and asking for help. What we Gen Xers have done very poorly is that we spoiled the heck out of Millennials. However, what we’ve done very well is let them know that it’s okay to say, “I’m drowning—please help me.” What we’re also doing is—one of my favorite phrases is—to rat them out. I’m not talking about ratting people out for chewing gum

in uniform. But if you see somebody struggling, tell somebody, go to a boss. If your boss can’t handle it—well, first of all, I need to take the stripes off that person’s arm. But if your boss can’t handle it, you go to another boss and another boss, and, finally, if you can’t find somebody, you call me.

**Ruzinski:** In recent years in law enforcement, we’ve really had to do a paradigm shift. Our approach was “get into a situation, solve it as fast as you can.” And 20 minutes to a half hour was thought to be way too long: the sergeant would be on your rear end, “What’s taking you so long?” But then we did this thing called crisis-intervention training. I am a firm believer in it. I started it back in the Milwaukee Police Department, when I was there as a deputy inspector, before I retired from the force. I quickly picked up that charge in Waukesha County when I got out there. I’m happy to say that I have the only police department in Waukesha County—or it’s probably sad to say—that has been entirely crisis-intervention-trained. And when I say we had to do a paradigm shift, this meant that when police officers go into a situation where they are dealing with traumatized victims—be it someone in a mental-health crisis or the victim of a crime—the officers are to take as much time as they need to mediate that situation, to communicate with that person, to use active-listening skills, to really find out what it is that that victim or that person in mental crisis needs. They don’t need to get in a scuffle; they don’t need to arrest a person who’s in



mental crisis because he's committed a disorderly conduct. They need to know and understand that that person needs services, whether it's getting back on meds, getting a counselor, or getting a safety plan with the family. They need to look at it from that angle. What that does is to reduce the amount of use-of-force situations that we have because those officers are actively listening to those victims, to those people in crisis, and getting them the help they need, as opposed to sticking them into the criminal justice system. We need to continue to move in that direction as law enforcement.

**Smith:** Our profession is progressing; policing is progressing. Unfortunately, it's taken a long time, it's taken crises, and it's taken incidents. None of us, I can say with certainty, came up in a police-academy environment that focused on the mental health aspects and the crises that people were going through. But officers today are coming up in that environment. One of the things that have been mentioned is the time that you take on a call. We're these paramilitary structures. It might be time in modern policing to go away from [the thinking that] we're kind of marching into an environment and we're the strong people who aren't really concerned about your mental well-being. Because you can have an officer who's one year on the street, who is engaged in a productive dialogue with the person going through the crisis, and that officer doesn't need to yield his or her authority to the corporal or the sergeant or the lieutenant; rather, that officer has the rapport.

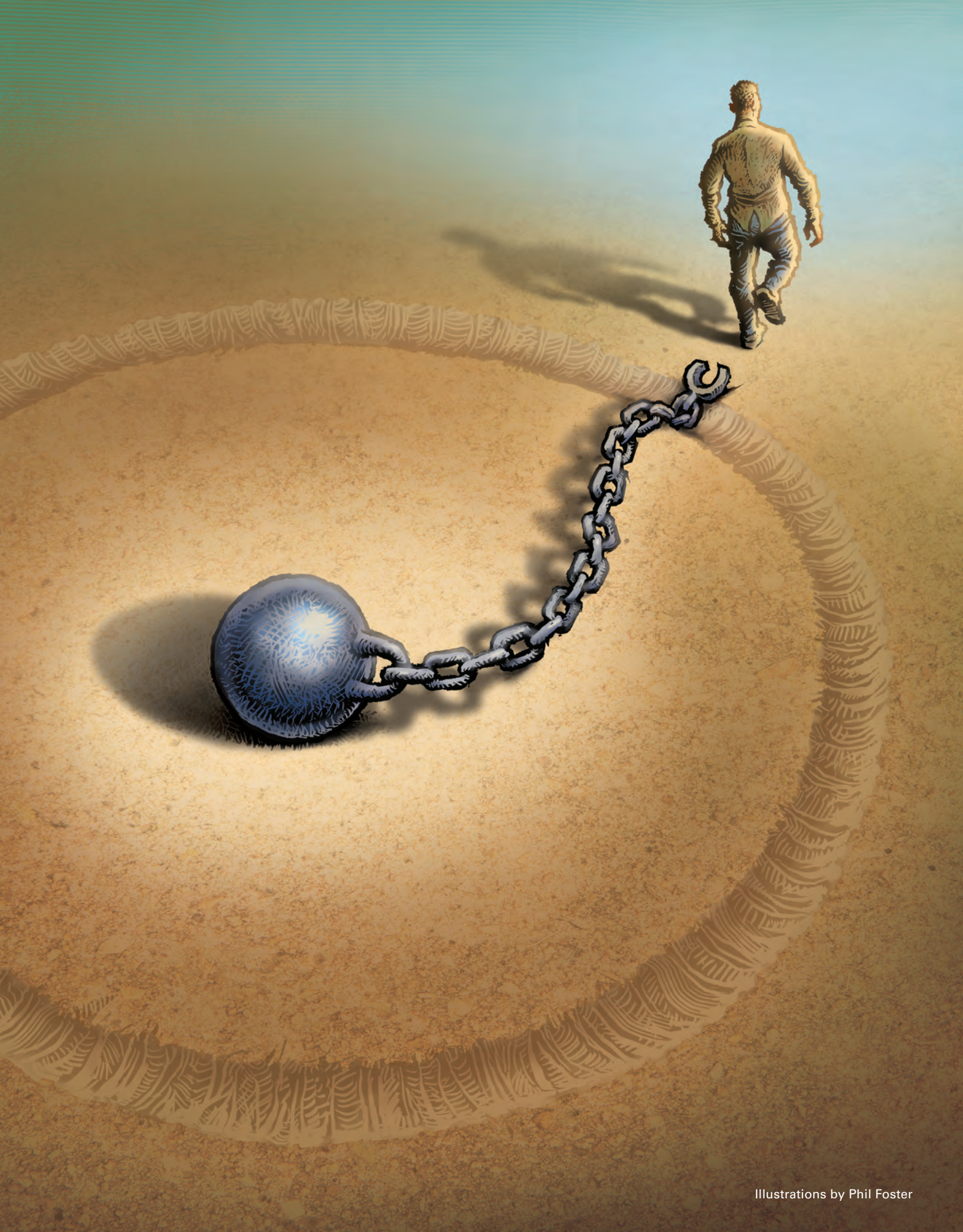
**Gordon:** I completely agree with T. J. [Smith] and with Chief Ruzinski. Our profession is changing. I remember, before the unrest all over the country, I was having a discussion with a researcher, and I said, "Policing is entering this golden age of training right now. We're been inviting people into our academies and participating in research." And then the wheels came off, because there is so much video out there. The profession was forced to look at itself in a way that we hadn't before. And we grew up saying, "Oh, that's just an isolated event; that's just an isolated event. Oh, that other one—that's just an isolated event." We're at a point now where we've had to say, "Well, this sure is happening a lot." We can't really say it's isolated anymore. What are we going to do about it? The transparency—it's getting much better. You won't find a profession that does as much policing of itself, believe it or not, as police departments, and we discipline ourselves much

more harshly than you'll find in the private sector. If there's a bad cop, we want him gone.

**Aleman:** Can you talk a little bit about the training, about implicit bias, and about the efforts to try to prevent the shootings that may happen as a result of implicit bias?

**Gordon:** I'm a student of psychology. I just love the implicit-bias training. A lot of established police officers don't buy into it because their take is that they're being told that they're racist. And that's not it. It's just that every person has bias—every person does. And then the thought is, well, you can't do anything about that if everybody has it. Of course, there are things that you can do. And I like it because, if you accept the training, it allows you to realize that there are things you can do to overcome your bias and that affect your decision making. I heard Jesse Jackson say one day as he was illustrating this point—not realizing that he was helping me with training, but as he was illustrating this point, he said—"I heard footsteps behind me, I turned around and looked, and I was relieved to see that it was a white kid." The black dash crime association—the black-crime association—exists in most Americans, particularly in urban areas, including black people, black police officers. So I like the training.

**Ruzinski:** The hardest part for me was to come from working in Milwaukee to now being the chief of a suburban department. And I can tell you that a lot of education has to be done on the suburban side. Because I can tell you as a matter of fact that 85 percent of the offenders who come into Menomonee Falls are from Milwaukee. I can tell you that a great percentage of them are African American, not all of them. But now you take people who are in the suburbs to begin with because they moved out of the big, bad city, who get their car broken into once, and, my God, they're ready to move. So we have to do a lot of education in the community. We have some officers who have grown up their entire time in the suburbs and have only been on a suburban department. And then we have our officers who have left Milwaukee and have come to join our department, and they tell those officers, "You have no clue." So, we have to do a lot of education in regard to that implicit bias. I think our officers have come a long way. I think the younger officers are certainly more tolerant than some of the older officers. ■



# PUTTING A PERIOD AT THE END OF THE SENTENCE

BY ALAN J. BORSUK

**“When does the sentence end?”** Albert Holmes says he is asked that question often by people who have faced hard times after being released from prison. Holmes heads an organization in Milwaukee called My Father’s House. It works with people who feel that the negative impact on their lives from serving time continues long after their incarceration has ended.

The question has few easy answers, but a conference at Marquette Law School, held on October 4, 2018, and titled “Racial Inequality, Poverty, and the Criminal Justice System,” focused on the issues facing people reentering the general community from incarceration, some ways those issues might be addressed, and various efforts that are showing success in helping former inmates lead stable lives.

As with much of the work of the Law School’s Lubar Center for Public Policy Research and Civic Education, the October conference can be seen as an additional step in a continuing conversation at the Law School. On this particular topic—post-incarceration issues—a recent contribution to the conversation includes a lecture during the previous academic year by Gabriel “Jack” Chin, who holds the Edward L. Barrett Chair of Law and is the Martin Luther King Jr. Professor of Law at the University of California, Davis. In the annual George and Margaret Barrock Lecture on Criminal Law, Chin described the continuing burdens—post-incarceration—placed on many people by criminal convictions. These “collateral consequences” are built into law and involve such things as losing the ability to rent publicly subsidized housing, forfeiting voting rights, and facing possible deportation. An excerpted version of the lecture appeared in the Fall 2018 *Marquette Lawyer*.

This academic year’s conference focused on other aspects of what happens to people after they are released—social as opposed to legal consequences, if you will. The problems are complicated and many, yet the general tenor of the event was guardedly positive. From success found admittedly in anecdotes to advocacy for large-scale policy changes, the ways in which things have begun to get better—and can get significantly better—were emphasized.

Bruce Western, the keynote speaker at the conference, is a sociology professor at Columbia University and author of a new book, *Homeward: Life in the Year After Prison* (2018). The book describes the lives of 122 people who talked to interviewers several times during a survey project, called the Boston Reentry Study, that Western led while on the faculty at Harvard University.



Bruce Western

**Western said that people who are going through reentry generally live with violence, physical and mental health problems, and chronic pain. Drug abuse is common.**

### **Three Keys to Successful Reentry: Income, Health Care, Housing**

Western described three urgent needs faced by the people in the study and by almost all those reentering society from prison: reliable sources of income, ways to get health care, and stable housing. Each is hard to attain, and the lack of any one of them can trip up people who are otherwise good candidates to get on paths that would keep them out of prison and allow them to be productive members of their communities.

Western said that the people in the study generally lived in “deep poverty” and faced a formidable list of personal issues. But many were also brilliant and creative. A year after release, two-thirds of them had stayed out of prison, and some seemed to have reached stability in their lives. But it wasn’t easy.

How many in the study found steady, reliable work after release? “Not many,” Western told Mike Gousha, the Law School’s distinguished fellow in law and public policy, during a conversation before the audience at the conference. About half worked in some job, but it was often marginal, informal work, such as shoveling snow or doing small, short-term construction work. Six out of 122 got steady jobs in construction, and they were mostly older white men with skills and connections, Western said.

In their first year after incarceration, the median income among those in the study was \$6,000. The

people endured “an incredible level of hardship,” Western said. Their most stable income was food stamps worth \$200 a month. Younger people who had been released had more problems finding stable circumstances than older people.

Overall, Western was critical of the lack of help for those reentering communities and of the broader picture of American policies related to imprisoning people.

Western said that people who are going through reentry generally live with violence, physical and mental health problems, and chronic pain. Drug abuse is common. The reentrants have high rates of arthritis associated with opioid use. Many of them are prone to anxiety attacks, while some just withdraw socially.

### **Reality Is “Very Complex” for Those Reentering**

Many people assume that there is “a bright line” between criminals and victims, Western said, “but we didn’t observe that.” The reality is very complex, he stated, and some people are both victims of crime and perpetrators of crime or live among others who fit that description.

Western said that the surge of incarceration across the country has negatively affected, in major ways, American society and, especially, low-income communities, often predominantly African-American



**Many issues in criminal justice are being given fresh attention, [Western] stated, including bail reform, changes in drug policy, and diversion programs to keep people out of prison.**

ones. He said that, until that surge, beginning in the early 1970s, incarceration rates had generally been around 100 for every 100,000 people. Now, he related, the rates are 700 for every 100,000 people in the United States—as is the case nowhere else in the world. And the result, he stated, has not been safer communities.

Western called mass incarceration “a historic mistake,” not consistent with American values. “I would like to think this is an aberration in the progress of our society,” he said. “Criminal justice right now is not serving justice.” Rather, he said, “This is a system that is reserved for poor people.”

But, Western said, he sees signs across the country that things are changing for the better and that there is movement toward helping more people avoid reincarceration and successfully reenter society.

One of the biggest signs nationally of a change came 2½ months after the conference. Congress passed and President Donald Trump signed legislation known as the FIRST STEP Act (an acronym for the “Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act”). Backed by prominent conservative organizations such as Americans for Prosperity and prominent liberal organizations such as the American Civil Liberties Union, it was approved by large bipartisan majorities in both the House of Representatives and the Senate.

While not as sweeping as some advocates would have liked, the new act’s provisions include changes in the law allowing prisoners to earn time off their sentences through participation in recidivism-reduction programs, requiring federal prison guards to undergo conflict-deescalation training, and funding a number of reentry programs. Overall, the new law is viewed by supporters as a step to reduce the federal prison population and to help make prison and post-prison experiences more humane and helpful. The Brennan Center for Justice at the New York University School of Law called it “a major win for the movement to end mass incarceration.”

Western said in an interview during his visit to Marquette Law School that, nationwide, “we are in a reform moment” on policies that have led to the big increases in incarceration. Many issues in criminal justice are being given fresh attention, he stated, including bail reform, changes in drug policy, and diversion programs to keep people out of prison.

Wisconsin “hasn’t quite caught up to that national conversation,” Western said. But he took

the conference at the Law School as one sign of building interest in Wisconsin. He said that he was impressed both with the energy in the room during the conference and with the roster of people who were present. Those in attendance included two Wisconsin Supreme Court justices, Daniel Kelly and Rebecca Dallet, who are considered to be on different ends of the court’s ideological spectrum. Also present were several circuit court judges and prosecutors, including Milwaukee County District Attorney John Chisholm, and numerous defense attorneys and people who work in agencies that aim to help those getting out of prison or jail. Western praised Chisholm as a leader nationally in reforms designed to make the justice system fairer to low-income and minority people.

Western also praised comments from Tommy Thompson, a former governor of Wisconsin, at an “On the Issues with Mike Gousha” program at the Law School the month previous (in September 2018). Thompson surprised many people when he said that one of his biggest regrets about his 14 years as governor was his role in a large increase in Wisconsin’s prison population and construction of new prisons.

“We got caught up in the hysteria of locking them up,” Thompson told Gousha. The large majority of people who are imprisoned end up being released back into society, Thompson said, and they need more help than they now get while in prison to deal with problems such as drug and alcohol addictions and weak educational backgrounds. More needs to be done to enable people to get jobs and establish stable lives after release, Thompson said.

## **Polling Shows Support for Giving Second Chances**

Public sentiment in Wisconsin may be more open now to relatively moderate penal policies than was true in the period when Thompson was governor and Wisconsin passed a “truth in sentencing” law, which nearly eliminated both early release from prison and parole.

The October conference included discussion of results from a half dozen times since 2012 that the Marquette Law School Poll has included criminal justice questions. The Law School’s Professor Michael O’Hear told the audience that the results showed consistently high levels of support among registered voters in the state for giving second chances to people who have been released from



**Public sentiment in Wisconsin may be more open now to relatively moderate penal policies than was true in the period when [Tommy] Thompson was governor . . . .**

prison and for helping them with rehabilitation while they are incarcerated. O’Hear said that there was “overwhelming support” in a 2016 poll for programs aimed at helping prisoners establish stable lives after release.

But, he cautioned, people want the criminal justice system to do many things, some of which are in tension with each other, such as punishment and rehabilitation.

O’Hear and Professor Charles Franklin, director of the Marquette Law School poll, said that there were more similarities than differences on criminal justice issues between Republicans and Democrats and between white people and black people. Lack of partisan differences could be “an opportunity of the moment” for bipartisan agreement on prison-related issues, Franklin said. But poll results also show that criminal justice issues do not rate as a high priority for many people, he said. Issues such as health care, jobs, K–12 education, and roads are higher priorities, overall.

A subsequent Marquette Law School Poll, conducted in January 2019, included several questions on attitudes toward early release. The results showed that voters were willing to consider releasing some prisoners before they have completed their full sentence, but the level of support varied with how much of the sentence

a prisoner had served. A sample of voters was asked whether they agreed or disagreed with this statement about prisoners who have “served at least half of their sentence”: “They should be released from prison and given a less costly form of punishment if they can demonstrate that they are no longer a threat to society.” The result was split, with 42 percent of voters agreeing with that statement and 43 percent disagreeing. A second group of voters was asked the same question, except it specified that the time served would be at least two-thirds of a sentence, instead of half. In that group, 51 percent agreed and 34 percent disagreed.

**“This time, I had my mind made up”**

Putting a face on the issues at the October conference, Janine Geske, a former Wisconsin Supreme Court justice and retired distinguished professor of law at Marquette University, interviewed L. T. Austin, who served 15 years in prison in six incarcerations. He now describes himself as “a reentry advocate,” and he works for an organization that helps released prisoners meet their needs.

Austin described how, after many of the times he was released, he had difficulty with housing and income. He said that he was embraced by gang members, who got him back into trouble. Finally, he broke the cycle.

What was the difference? “This time, I had my mind made up,” Austin said. He connected with someone he called his sponsor, who helped keep him on the right track. He also said that he realized finally how much his family was suffering because of him. Austin said that he now is trying to extend to others the kind of support that made a difference to him. His conversation with Geske ended with applause from the audience when he said that he was about to be released from parole.

A panel discussion with leaders of organizations that provide help to those reentering the community underscored the focus that Western put on housing, income, and health care as keys to reaching stability beyond prison.

Megan Wynn, community justice director of the Benedict Center in Milwaukee, said that housing is “a huge issue” for women leaving prison. They have extremely low incomes, she said, and many are custodial parents, which means that they have to deal with issues resulting from having had their children in the daily care of others, often family members, while they were incarcerated. Wynn said also that it is harder for women than men to find psychiatrists, and many need help with mental-health issues.

Terri Strothoff, executive director of Milwaukee’s Alma Center, said that other countries put much more emphasis on how to restore people leaving prison to functioning roles in society. It is ethically and socially wrong that the United States doesn’t do more, she said.

Holmes, of My Father’s House, suggested program ideas, including offering more classes on how to be a good father, in places such as the Milwaukee County House of Correction, as well as more anger-management programs for middle-school students.

Geske said, “It’s a huge waste of human life” that we don’t do more to help people get going after leaving prison.

### **Student Internships Connect with People Reentering**

Ed de St. Aubin, associate professor of psychology in the Klingler College of Arts and Sciences at Marquette, described in one session a seven-year-old internship program that places Marquette undergraduate students for a full academic year on the front lines of helping people who are reentering the community from incarceration.

Professor de St. Aubin said that when he moved to Milwaukee in 1999, he realized quickly that “we’ve got different worlds living next to each other, with different experiences. So it seemed to me like an obvious call to social justice work was around race.” That led to the internships. He said that he wants the students to experience the realities of the people whom they are helping and to get involved in the sometimes-gritty work of an agency, such as cleaning old basements.

The internships are a valuable educational experience, de St. Aubin said. “I love textbooks, I love classrooms, but you need this as well,” he said. “Life doesn’t come with a syllabus where you have really easily prescribed assignments and really clear testing dates. Life is messy. So the internship is about ‘dive in and do something.’”

Alex Miceli, a Marquette junior who is double-majoring in psychology and social welfare, described the internship she was doing at Project Return in Milwaukee. She said it took her outside of the “bubble” of a college student’s life and got her involved with the kind of people she wants to work with in the future. Miceli said, “I’m finally in a space where these conversations [with people reentering the community] are happening and I can be part of them. . . . I’ve loved every second of it so far.”

The conference included personal stories and anecdotes about people who had succeeded in reentering the community.

But, in a conversation with Gousha at the conclusion of the conference, Western said that much needs to be done to heal communities that have been heavily affected by the impact of over-incarceration. He said that, with African Americans, it is particularly an issue that people who are still affected by a legacy of losing freedom to slavery are the ones most likely to lose their freedom through criminal justice processes.

Western stressed the importance of pursuing work on social reintegration of people coming out of prison and healing communities that have been affected by crime and violence.

But, he said, “Fundamental change requires a reckoning with history,” especially America’s history of racism. There are tangible things that are needed, such as funding for programs. But a crucial element, Western said, is intangible: “We need moral urgency. We have not yet seen moral urgency.” ■

**“We need moral urgency. We have not yet seen moral urgency.”**

Bruce Western,  
Columbia University  
sociology professor

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SCHOOLS WITH NONWHITE PUPILS





# A SIMPLE ORDER, A COMPLEX LEGACY

**In 1976, a federal court ordered the desegregation of the Milwaukee Public Schools. What did this decree change, how much of that change was intended, and what did it not change?**

BY ALAN J. BORSUK

“I shall accordingly order that the Milwaukee school system be integrated . . .”

Ah, if only things were that simple.

Those words, from a decision issued by a federal judge, John W. Reynolds, on January 19, 1976, sum up the intent of an important moment in the history of metropolitan Milwaukee, a pivotal point in shaping the school and social landscape of the area. They also are at the heart of an important lesson in the limits of what a court can do to influence people’s attitudes, actions, and behavior.

The 1976 decision concluded that the Milwaukee Public Schools (MPS) system was racially segregated, that intentional actions by the school board and administration were among the causes of this, and that the situation violated the constitutional rights of African-American children in the city. A sweeping process of change, aimed at desegregating schools, followed.

Where are we today? Milwaukee schools, both public and private, are predominantly segregated by race.

Further: Although the Reynolds decision did not directly address educational outcomes, an underlying motivation of advocates for school integration was to close the gaps in school success between black children and white children. That has not happened any more than has integration. The gaps in reading and math achievement,

measured by scores on Wisconsin’s standardized tests for all students, remain huge. Results on tests such as the National Assessment of Educational Progress consistently put the disparities in Milwaukee and in the entire state of Wisconsin among the nation’s largest.

The legacy of the Reynolds decision has some bright spots. But, overall, the picture is one of how a court decision, even one supported by many civic and education leaders, can’t make some things happen.

Who says so? Reynolds did, for one. He died in 2002. In an oral history interview in 1997, he looked back on the case and said, “The fact is you can issue all the orders you want to, but the people aren’t going to comply with them unless they want them.”

Or, as Phoebe Williams, an emerita law professor at Marquette University, said in a recent interview, “There are a lot of limits to the law. I think most people don’t realize, when it comes to certain private decisions, the law is very limited.”

The school desegregation era in Milwaukee offers a tale signifying how hard it is to change the realities around race-related issues. At the same time, the effects of that period and of the Reynolds decision itself continue to shape Milwaukee education in ways that are felt daily.

In these circumstances, it is valuable to take a fresh look at what happened in that period, what followed, and what lessons are available.

**“The fact is you can issue all the orders you want to, but the people aren’t going to comply with them unless they want them.”**

Judge John W. Reynolds in a 1997 interview.





**A central part of the MPS defense in the school segregation case would be that it was the powerful degree of residential segregation that led to school segregation, not any action by school policy makers.**

### The Context

Milwaukee Public Schools adopted a policy in 1919 of sending students to their neighborhood schools. At that time, no substantial motivation of the policy was to segregate schools by race: After all, Milwaukee had few residents who were not white.

This changed. The large wave of African Americans migrating from the South to the North reached Milwaukee later than many other Northern cities. But in the 1950s and '60s, the black population of Milwaukee began to rise quickly. African Americans were all-but-formally confined to living in an area just north of downtown, and black students attended a short list of public schools.

As the black community expanded on the north side, the list of schools grew. But there was minimal integration.

The Milwaukee school board stuck firmly to the neighborhood school policy into the 1970s. Neighborhoods being segregated, so were schools. A central part of the MPS defense in the school segregation case would be that it was the powerful degree of residential segregation that led to school segregation, not any action by school policy makers.

The social reality of the time certainly was that white people, as a generalization, wanted blacks neither in their neighborhoods nor as students in their children's schools. At best, they didn't want

very many black children, and the elected school board knew this. MPS leaders and others feared that some schools and neighborhoods would reach "tipping points" where the number of blacks would lead to large numbers of whites moving out. Some put the tipping point at 25 to 30 percent.

The law was developing at the same time. On the one hand, the landmark 1954 decision of the Supreme Court of the United States did not directly address this sort of situation. *Brown v. Board of Education* had unanimously held that a policy of dual school systems, one white, the other black—the sort of setup prevalent in the American South—was unconstitutional. On the other hand, the principles elucidated in *Brown* could be argued to encompass some of the sorts of segregation found in Northern cities.

This extension or application did not happen immediately or, for a long time, with much contribution from the Supreme Court itself. In fact, in 1963, the U.S. Court of Appeals for the Seventh Circuit, encompassing Wisconsin as well as Illinois and Indiana, turned aside such a suit. In *Bell v. School City of Gary, Indiana*, the court held that the law does not require "that a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races, must

be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the district is populated almost entirely by Negroes or whites.”

That did not describe Milwaukee’s system by that time, in the estimation of a number of the city’s African-American activists and leaders. In 1965, led by Lloyd Barbee, an attorney and a member of the Wisconsin legislature, some of these residents filed a lawsuit in federal court in Milwaukee, maintaining that the city’s schools were unconstitutionally segregated.

This was not an isolated lawsuit. During the quarter century from 1961 to 1985, dozens of federal lawsuits challenged school segregation even of a sort outside the paradigm held unlawful in *Brown*. Especially in the first half of this period, lower courts nationwide struggled with these school desegregation cases, without much guidance from the Supreme Court.

As summarized last year by two researchers at Pennsylvania State University, Erica Frankenberg and Kendra Taylor, federal courts in the northern and western United States had difficulty applying the Supreme Court’s precedents to the situations before them. The Court had addressed the situation in the South: There segregation was unquestionably the product of law and official policy, and it clearly had been found unconstitutional. But elsewhere in the country, segregation was rarely the result of overt policies of separating black and white children in school, let alone operating two different systems. Indeed, neighborhood school assignment—developed in another era and for other reasons—was a big factor in segregation since so many cities, including Milwaukee, had become so starkly segregated residentially.

Nor did the lawsuit stand alone in Milwaukee: Efforts to try to change the situation of black students in MPS grew in the 1960s, as did activism on other fronts affecting the lives of black Milwaukeeans. Civil disturbances in 1967 and marches for 200 consecutive nights, stretching into 1968, in support of an open-housing law for the city of Milwaukee, were major events of the period.

The Milwaukee lawsuit itself barely moved forward in court for years. Finally, after it was assigned to Reynolds, a former governor of Wisconsin who had been on the federal bench since 1965, it went to trial in 1973. The trial ended in January 1974, after 30 days of proceedings, but it would take almost two years for Reynolds to issue his decision.

## The Reynolds Decision

By then, Reynolds had the benefit of a recent decision by the Supreme Court, finally taking up the question of school segregation, not imposed by statutes or ordinances but existing because of official policies, outside the South. In 1973, in *Keyes v. School District No. 1, Denver, Colorado*, the Court held that certain decisions in pursuit of neighborhood schools and other actions similar to those in Milwaukee could be the basis for a determination that a district was unconstitutionally segregated.

Reynolds quoted at length from the *Keyes* opinion in his decision. Among the quotes: “[W]here plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.”

He also relied on a subsequent federal appellate decision involving the school district of Omaha, which had stated as follows in 1975: “[I]t has since [*Brown*] been made clear in a series of ‘northern and western’ cases that no intentionally segregated school system can be tolerated under the Constitution. It is equally clear that the ‘intent’ which triggers a finding of unconstitutionality is not an intent to harm black students, but simply an intent to bring about or maintain segregated schools.”

Turning to the Milwaukee case before him, Reynolds accepted the contention of MPS that its actions had motivations other than racial separation. He elected not to doubt that the Milwaukee “[b]oard has pursued its neighborhood school policy with the conviction that it is consistent with and best promotes its policy of providing the children enrolled in the system with the best possible education limited resources will permit.”

The judge described the board’s basis for its conviction: “The Board believes that this policy is convenient for pupils and their families, maximizes parental involvement in and support for the neighborhood school, involves the school in the community, fosters the utilization of school programs geared to the particular needs of pupils residing in the neighborhoods of the schools, and minimizes departmentalization of the student’s life between school, family, and neighborhood.” In short, the board “believed, in good faith, that [the neighborhood school] policy would produce

**This was not an isolated lawsuit. During the quarter century from 1961 to 1985, dozens of federal lawsuits challenged school segregation even of a sort outside the paradigm held unlawful in *Brown*.**



**[A] number of specific decisions by the board and MPS administrators showed intent to keep white and black students separate, Reynolds concluded.**

the best possible educational opportunities for all students in the system, regardless of race.”

At the same time, a number of specific decisions by the board and MPS administrators showed intent to keep white and black students separate, Reynolds concluded.

Those decisions included both the particulars of the ways some school-attendance-area boundaries were changed and a policy of keeping black students separate from white students when classes of black children were bused to white schools due to overcrowding at the sending school. The latter policy, known as “intact busing,” was defended by MPS as a way of keeping classes together when they were being relocated, sometimes for short periods, while their own schools were being remodeled or temporary classrooms were being installed. But the fact that black students were kept separate from white students sometimes even in using gymnasiums, playgrounds, and cafeterias led Reynolds to conclude that it was part of a policy of keeping children separated by race.

Overall, Reynolds found, MPS “acted with the knowledge that the total effect of their actions in furtherance of that policy [of neighborhood schools] would be the segregation of black and white students in separate schools.” Alternatives were available that would have resulted in “substantially lower” percentages of black students in some schools, but they were not adopted because they were not consistent with the neighborhood school policy.

The decision was also grounded in other official actions. The judge found that decisions on construction of new schools and additions to schools had furthered segregation and favored white students. Reynolds determined that assignment of teachers to schools based on their preferences according to seniority had resulted in black teachers, relatively newly hired, being assigned disproportionately to predominantly black schools, while white teachers were able to transfer to predominantly white schools more often.

“The evidence establishes that [school] Board or Administration acts or omissions . . . contributed substantially to the present student body racial percentages in the predominantly black schools,” he wrote.

Reynolds’s decision found that the Milwaukee school board was opposed to taking steps to increase racial integration because of opposition among white residents. Board members feared that people would move out of the city or enroll children in private schools. “Board members are particularly concerned that the overall percentage of black students in the system is presently at the ‘tipping point’ of 30-35%. In their opinion, efforts at obtaining greater racial balance would probably ‘tip’ the entire city and school system within a very few years,” Reynolds wrote.

Reynolds concluded his analysis with something of a flourish, saying in part this: “I was astonished at trial to learn from the testimony of the Milwaukee school officials that they honestly believed that



twenty years after *Brown v. Board of Education of Topeka* . . . they could knowingly and intentionally operate a segregated school system because they believed it was educationally superior to an integrated system.”

In short, Reynolds ruled that MPS met (i.e., failed) the standard of engaging in intentional segregation of students by race. It was not precisely *Brown*, he acknowledged: There was an “absence of statutes or other legislative enactments requiring racial separation.” But it was still unlawful, he said. “[R]acial isolation or imbalance constitutes unlawful and unconstitutional segregation [where] it was brought about or maintained by intentional state action.” Such was the case in Milwaukee, he ruled.

Reynolds ordered that work begin immediately on creating plans to desegregate schools. He appointed John Gronouski to be special master to oversee development of plans. Gronouski was a Wisconsin native who had been U.S. postmaster general and ambassador to Poland.

## The Legal Aftermath

The 15-member Milwaukee School Board was split between those who wanted to fight the Reynolds decision and those who wanted to implement it with plans developed largely by MPS administrators. Both factions won, with approval of an appeal while plans were developed.

The case lingered in the courts for several years. An immediate interlocutory appeal was permitted on the question of liability, and within barely six months the Seventh Circuit upheld as “not clearly erroneous” (the relevant legal standard on appeal) Reynolds’s “finding that defendants acted with the intent of maintaining racial isolation.” The Supreme Court would vacate the decision in 1977, and the case returned to Reynolds.

A second trial followed in 1978, with Reynolds, now proceeding more promptly, once again finding MPS liable for actions that intentionally segregated students by race. The next year brought a decision by Reynolds, on February 8, 1979, that a remedy covering all of Milwaukee Public Schools was necessary. He ordered attorneys representing the class of all black students in Milwaukee to prepare such a plan.

MPS might yet settle the case, but with liability having been upheld on initial appeal (even if set aside by the Supreme Court) and now reconfirmed by the trial court and with the plaintiff class now

having a mandate from the court to prepare a plan that the court might decree as its remedy, the school system could not negotiate from a position of strength.

The parties indeed entered into a settlement, which Reynolds approved on May 4, 1979. It called for 75 percent of MPS students to attend desegregated schools. Because of the demographic realities of MPS by then, the settlement allowed 20 all-black schools to continue, but it prohibited all-white schools. Some objections were made to the settlement, but in 1980 the Seventh Circuit affirmed Reynolds’s approval of it.

By this time, both the culture and the law had changed or, at any rate, developed. Certainly this was toward the end of the era of large-scale school-desegregation lawsuits. Frankenberg and Taylor, the Penn State researchers, describe 1976–1980 as a period of “declining activity” in terms of decisions finding segregation different from the *Brown* paradigm to be actionable under the Constitution and, further, 1981–1985 as the time when the “window close[d].” In a sense, the Milwaukee case, begun in 1965, was a holdover from another era.

Without question, a decision of the U.S. Supreme Court in 1974, *Milliken v Bradley*, affected the incentives for any further such suits. In this case, arising from the Detroit area, the Court held that courts could order, as a remedy, desegregation of schools across urban school district lines only if there were *de jure* policies in suburban districts keeping out minority children or otherwise violating their constitutional rights.

Another lawsuit would nonetheless be brought—by MPS itself. In 1984, as the provisions from the 1979 settlement were expiring, MPS filed a lawsuit seeking an order to require many Milwaukee *suburban* districts to take part in desegregation. U.S. District Judge Thomas J. Curran denied a motion to dismiss the case in 1985, but trial went better for the defendants than it had for MPS a decade or more earlier.

The eventual result was another settlement, but here—with no finding of liability having been entered—the defendants had considerably more leverage. The most important aspect of the settlement was legislative: an expansion of a city-suburban voluntary desegregation plan known as Chapter 220. Chapter 220 had been state law since 1975 but had involved a relatively small number of black students enrolling in suburban public schools



**There was broad agreement among civic leaders, MPS leaders, and Gronouski on a goal that could be summed up in this phrase: We don't want another Boston.**

and white students from the suburbs enrolling in MPS. The 1987 settlement led to much larger numbers of participants, peaking in 1993–1994, when almost 6,000 city students attended suburban schools and more than 800 suburban students attended MPS.

### **The Aftermath in the Schools and the Metro Area**

Whatever was happening in the courts of the era, desegregation plans became a reality in MPS. Indeed, by the first day of school in 1976, less than eight months after the first decision by Reynolds, changes in school programs and assignment policies were in place, with a goal of integrating a third of Milwaukee schools in that year—and all schools by two years later.

Four aspects of what happened in Milwaukee summarize the era of school-desegregation efforts:

#### **Major efforts to keep things calm in the city.**

There was broad agreement among civic leaders, MPS leaders, and Gronouski on a goal that could be summed up in this phrase: We don't want another Boston. Beginning in 1974, Boston was torn by heated and sometimes violent protests arising from white communities against a busing plan ordered by a federal judge to achieve desegregation.

The goal of those shaping Milwaukee's plans was to make attending integrated schools an attractive choice for students, especially white students, and not to force students, again especially

white students, to be bused to school. Community meetings were held across the city to get buy-in for plans to integrate schools. A group called the Committee of 100 was created, with representatives from many parts of the city, to have a voice in the plans (although critics say the committee really didn't have much influence). Gronouski went to leaders across the city, including influential U.S. Congressman Clement Zablocki, who represented the south side of Milwaukee. Gronouski urged the leaders to support the plans that were emerging, in the name of civic peace.

**Creation of "magnet" schools that could attract integrated student bodies.** Lee McMurrin, who became superintendent of MPS in 1975, and his deputy, David Bennett, were architects of major changes that converted some schools to specialty programs intended to attract students from broad areas.

"We wanted to locate in what some would have perceived as the least desirable areas and schools," Bennett recalled in a recent interview. He gave the example of Fourth Street School, an elementary school north of downtown. It was relaunched as a school for gifted and talented children and renamed Golda Meir School (the late Israeli prime minister had attended school in that building when she was a child in Milwaukee).

Some of today's highly regarded schools in Milwaukee emerged from this period. Rufus King High School on the north side was one of the most

troubled schools in the city until it was restarted as a college-prep school with an international baccalaureate program. Initially, it had separate admission lists for white and black students so that it would stay integrated. West Division High School was restarted as the Milwaukee High School of the Arts.

**A major increase in busing of students.** Yellow school buses had been part of the Milwaukee scene for years, but under the desegregation plans, busing increased sharply. Students going to the magnet schools were one reason. But giving all students lots of options within MPS, many of them not involving specialty schools, became part of the system. And many black students were assigned to schools in other parts of the city, with little choice about getting on a bus. Critics called it “one-way busing”—i.e., of black children only—and said that the plans were designed for “white benefit.”

Milwaukee Public Schools changed from a system built on neighborhood schools to one in which fewer than half of its students attended the school in their elementary-attendance area. In a city where neighborhood schools had been a pillar, busing became so widespread that some have wondered whether there is another city in the country where the presumption is weaker that children will attend their neighborhood school.

**Large-scale demographic change.** A hope among advocates for school desegregation in Milwaukee was to stabilize the population of the city as black and white children went to schools together. But MPS leaders, among others, had warned that white people would leave the city in large numbers. The warning, not the hope, would be proved correct.

School desegregation was hardly the only reason, but it was clearly a factor in the enormous change in the racial and ethnic makeup of Milwaukee. In 1976, the first school year when court-ordered desegregation steps were taken, MPS was about 65 percent white. The definition of a desegregated school was based on that: A school was considered desegregated if black students made up 25 percent to 45 percent of enrollment. That changed quickly. A recent analysis of demographic data by John Johnson, a research fellow with Marquette Law School’s Lubar Center for Public Policy Research and Civic Education, found that 77,000 white people moved from the city of Milwaukee to surrounding suburbs between 1975 and 1980.

The white population of Milwaukee had already been on the decline. Census data show that the white population of the city dropped from 674,103 in 1960 to 583,268 in 1970, a decline of more than 90,000. The longer-term figures are jaw-dropping: By 2000, the white population was 270,989, a decline of more than 400,000 from 1960.

The city’s black population over those 40 years rose from 62,445 to 220,432, an increase of almost 160,000. The overall population of the city dropped from 743,301 in 1960 to 596,974 in 2000, a decline of almost 150,000.

An additional big change in the makeup of Milwaukee was the rise of the Hispanic population. At the start of implementation of the desegregation plan, Hispanics made up between 3 and 4 percent of Milwaukee’s population; for purposes of the desegregation plans, they were counted as white. By 2000, the Hispanic population of 71,646 was 12 percent of the city’s population.

As of the fall of 2018, according to the Wisconsin Department of Public Instruction, 51.5 percent of MPS students were African American, and 27.2 percent were Hispanic. Almost as many were Asian (7.3 percent) as white (10.5 percent).

In short, the first several years of desegregation efforts, on the face of things, went fairly well. Change was accomplished peacefully. And a large number of schools met the definition of being desegregated. Bennett said that the goal for 1977–1978 was to have 101 schools integrated, and that was accomplished. That was the high-water mark of desegregation, although many schools continued into the 1980s to meet the definition of being integrated.

But as time went on, it became increasingly clear that desegregation was not going to take hold. By the 1990s, the huge decline in white students meant that there were simply too few white students to achieve meaningful racial desegregation on a citywide basis.

Today’s reality for schools in the city of Milwaukee is this: With a relative handful of exceptions, it is easy to identify the predominant racial or ethnic makeup of any school, especially kindergarten through eighth-grade schools, and there is no large effort to change that.

As for progress in closing the outcome gaps for academic success between black and white children in Milwaukee, overall, the issue remains huge and seemingly intractable. Only approximately 20 percent of students in the city in

**In a city where neighborhood schools had been a pillar, busing became so widespread that some have wondered whether there is another city in the country where the presumption is weaker that children will attend their neighborhood school.**

**Are there positive sides to the legacy of Reynolds's decision? Marquette Law School's Phoebe Williams said, "Yes."**

both public and private schools tested as proficient in reading and language arts in the spring of 2018, and the math figures were several points lower. The racial differences within the overall picture were large.

One interesting effect of the demographic changes in the Milwaukee area is that many of the suburbs closest to the city have become more integrated in the four decades since the Reynolds ruling, and some suburban schools that were close to 100 percent white in the 1970s are now quite diverse. Several examples: West Allis–West Milwaukee schools are close to half nonwhite, students in Wauwatosa and Shorewood schools are almost one-third from minority groups, and Brown Deer schools are less than a quarter white.

### The Legacy of the 1976 Decision

Are there positive sides to the legacy of Reynolds's decision? Marquette Law School's Phoebe Williams said, "Yes." "The idea of intact busing and assigning black teachers to work only in schools that had predominantly African-American populations—all of those things were addressed," she said. The desegregation era "gave us hope that discrimination could be addressed." The decision "led to creation of some creative and good educational options, and it led to more suburban schools enrolling city black kids."

Williams said that the settlement of the case in 1979 barred MPS from acting in racially discriminatory ways. As the agreement put it, the defendants "are hereby permanently enjoined from discriminating upon the basis of race in the operation of the public schools of the City of Milwaukee with respect to any matter which was the subject of this litigation." That was a valuable long-term commitment, she said.

At the same time, Williams said, "A lot of benefits were derived from those decisions. But we expect the law to accomplish too much."

John Gilligan, who was Gronouski's assistant, said, "I learned quickly that there are limits to desegregation cases." He differentiated between the words *desegregation* and *integration*, suggesting the former could be achieved by assigning students to schools and the latter only by personal relationships. The Milwaukee plan, he said, made progress for a time on desegregation, but did not really achieve integration.

But, he said, "Milwaukee should be very proud of the leadership that was in place." Milwaukee leaders

succeeded in their goal of avoiding confrontation and disorder. Gilligan said that some excellent schools were created in that period. He also suggested that the seeds were planted for the rise of school-choice programs beginning in the 1990s as people began thinking in terms of what schools were the best for their children.

"What it all comes down to is: what is the will of the people?" Gilligan said. "Do people really want to integrate? . . . I'm not sure we're capable of achieving too much more than what was done."

Laurence C. Hammond Jr. was a prominent attorney in private practice in that era and led the defense of MPS in court. He regrets the results. "I've always thought these sorts of later school cases were social engineering and the courts were not well suited to handle that," Hammond said. "But it was better than fighting in the streets."

Hammond remains partial to neighborhood schools and is sorry that assignment by neighborhood ended. Were the magnet schools a good idea? "No—because they ruined everything else," he said. MPS was built on the logical premise of a neighborhood school system that served all the people of the city, he said. This is not to suggest that he prefers all aspects of Milwaukee's past: The best solution would have been "if we could just have figured out a way to get the neighborhoods integrated."

Bennett, the former deputy superintendent, sees what happened in Milwaukee in the decade after the Reynolds decision in a positive light. Many schools were desegregated, innovative magnet schools were launched, and achievement trends for both white and black students were encouraging at the time. He left in 1986 to become superintendent of schools in St. Paul, Minn., and he said he has not stayed up on the Milwaukee scene.

But, asked if anything could have been done to stem the long-term decline of white students in MPS, he said, "I think that was absolutely inevitable." In his view, things would have been as bad or worse if any other path had been taken. If neighborhood assignment had remained the prevailing practice? That would have brought worse results than the desegregation plan did, he said.

Should anything have been handled differently? Bennett answered, "I was personally disappointed at the time that we didn't move more aggressively in racially balancing the remaining black schools." But, he said, with the changing population trends of the school district, "we were fighting a losing battle."







Dennis Conta is associated in many people's minds with proposals to create school districts that included both city and suburban areas. Meeting for a recent conversation, he brought along a copy of his "East Shore District Plan" from 1974, which was put out before the Reynolds decision. It proposed a school district that would have included the attendance areas of Milwaukee's Riverside and Lincoln High Schools and all of Shorewood and Whitefish Bay.

Conta was a member of the state assembly then and co-chair of the legislature's powerful joint finance committee. He tried to sell the "East Shore" plan to school leaders in the area, as well as to civic leaders and the legislature. He said that he got as far as being able to count 46 votes in favor of the plan in the Assembly. But he needed 50 to gain a majority. "I couldn't get those last four," he said. It never came to a vote, and the idea was shelved.

Others also favored metropolitan solutions to school segregation. These proposals include dividing the Milwaukee area into several districts, shaped like pieces of pie, that would include both central city schools and suburban schools. But such ideas never gained traction.

Desegregation didn't work in Milwaukee, Conta agrees. But, he adds, "It didn't work throughout the country, not just in Milwaukee. It didn't work anywhere."

Reynolds would not talk publicly in later years about his perspective on the aftermath of the school desegregation case. But he did discuss it in an oral history interview conducted in 1997 by Collins T. Fitzpatrick, circuit executive of the U.S. Court of Appeals for the Seventh Circuit, and subsequently made available.

"I don't think that busing really helps," Reynolds told Fitzpatrick. "I think that just mixing people up—I lay greater emphasis on opening doors. I think pulling people, whatever support people have in their neighborhood, in their families, to pull them away from that was not a good idea. It didn't work out well. . . ."

"We all know what it involves, all the sociological things—the neighborhood, the family support groups. . . ."

"It also taught me, at least it made me think—I haven't become more conservative as I have grown older, but I am more willing to recognize the limitations on our courts' ability to do things."

You can issue all the orders you want, as Reynolds put it in the interview. But if people aren't going to go along, you will learn a lot about race, class, and poverty, a lot about sociology and demographics, a lot about the dynamics of change and resistance to change—and a lot about what a court order can't do. ■

**Reynolds would not talk publicly in later years about his perspective on the aftermath of the school desegregation case. But he did discuss it in an oral history interview conducted in 1997 . . . .**



Spelling

English (Language  
Composition)

Prose and Poetry

Handwriting

Art

Geography

Nature

History

Civics

Music

Art and P



I—Improving; ~~Indic~~  
satisfactory.

U—Unsatisfactory.

Remarks by Teacher: \_\_\_\_\_

Attended \_\_\_\_\_

School Days

Days Absent

Tardy

# A FATHER'S TIMELESS WORDS FROM A TURBULENT TIME

A veteran journalist looks back, through the thoughts of the then-superintendent, on the Milwaukee Public Schools of the late '60s and early '70s

BY MIKE GOUSHA

My dad and I are sitting in a sun-filled apartment in California's Silicon Valley, 2,200 miles from Milwaukee, surrounded by files, folders, photographs, speeches, transcripts, newspaper clippings, and notes. On this late December morning, we are talking, as we often do, about his days as superintendent of the Milwaukee Public Schools.

My dad, Dr. Richard P. Gousha, is now 95 years old. He has lived in northern California for 15 years, close to family. He moved there from Indianapolis, after his wife—my mother—died. For the better part of his time in California, he has been writing about his life, mostly about his experiences as an educator. Aided by the meticulous records he has kept and a memory far sharper than his son's, he has produced volumes of text detailing his life's work. From his first teaching job in a small town in Ohio to his final job at Indiana University, where he was first the dean and then a tenured professor, it's all there. But one job seems to stand above the rest: his stint as superintendent of the Milwaukee Public Schools (MPS). A half century later, Milwaukee remains very much on my dad's mind.

He arrived in Milwaukee in the long, hot summer of 1967, two years after a federal lawsuit was filed against the Milwaukee Board of School Directors, alleging that city schools had been intentionally

segregated because of actions by the board. The district disputed that claim, saying that racial imbalance in the schools was a result of residential housing patterns. Milwaukee, like many American cities, was experiencing racial turmoil and unrest. My dad's first month on the job coincided with rioting in Milwaukee that left four people dead and resulted in more than 1,700 arrests. The 200 nights of tense, fair-housing marches had just begun. My dad was still in his first year on the job when the civil rights leader, Dr. Martin Luther King, was assassinated. I was a sixth-grader at 81st Street elementary school at the time.

My father spent seven years in Milwaukee. At the time he left for Indiana University in the summer of 1974, he was the second-longest-tenured big-city school superintendent in the United States. The trial in the desegregation lawsuit filed against MPS had occurred in federal court, but the case was still a year and half from a decision.



Dr. Richard P. Gousha during his tenure as MPS superintendent

**“I want to spread the message far and wide—and make it loud and clear—that a healthy Milwaukee public school system is essential not only to the city of Milwaukee, but also to the greater Milwaukee area and to the entire state of Wisconsin.”**

My father delivered nearly 200 addresses during that seven-year period. Some were brief welcoming remarks. Others were lengthy and detailed policy speeches to local and national groups or parts of the state and federal government. How do I know this? My dad has a copy of every single one of them.

In recent months, I've spent hours reading those speeches. They provide a fascinating, first-person account of what was happening in the Milwaukee public schools during the tumultuous period of the late '60s and early '70s. Before I wrote this story, I asked my dad if he would mind sharing his thoughts and words from that time with the readers of this magazine. He agreed, and expressed the hope that others, especially other educators, might be interested in his experiences from a half century ago.

So what do these words from decades ago tell us? The answer is a contradiction: Milwaukee's public schools have changed dramatically, but in some ways the issues confronting MPS haven't changed at all.

One of the biggest changes between now and then has been the steady decline in the number of students who attend Milwaukee public schools. The district was once nearly twice as large as it is today. The sheer size of MPS was a point of emphasis for my dad in speeches he gave early in his tenure. Here's what he told the Wisconsin Association of School District Administrators on November 2, 1967:

“Each week I absorb more facts and figures about the school system of which I am superintendent. Facts like these: The Milwaukee public schools are currently educating one out of every seven public school pupils in the state of Wisconsin. Milwaukee has the eleventh-largest school system in the United States. Currently, it is educating 128,408 students . . . Next September . . . this figure will increase by another 3,500.”

In 1967, there were 5,000 professionals—teachers, principals, vice-principals, and assistant principals—to serve those 128,408 students, who attended class in 155 school buildings. Forty percent of graduating seniors went on to colleges and universities. The district had a 93 percent attendance rate. Like most large cities, student test scores lagged the national average. And among the 16 largest school districts in the United States, spending per pupil in Milwaukee ranked next to last.

Still, Milwaukee, unlike many of its peer Midwestern cities, was growing in 1967. So, too, was the MPS student population. Parochial and private school enrollment was declining. By 1970, the student population in MPS would peak at just over 132,000, before beginning its steady descent. To keep pace, the district was hiring new teachers by the hundreds—some 600 for the 1969–1970 school year alone. By 1970, the number of professional staff had risen to 5,700, of whom 700 were African American. Seventy-five percent of MPS students were white. Twenty-five percent were nonwhite.

The importance of the state's largest city and school district was something that my dad wanted others to understand, especially those who didn't live in Milwaukee. On November 21, 1967, he spoke to the Brookfield–Elm Grove Rotary Club. This was among the things he said:

“Wisconsin is in grave danger if the citizens of this state ever come to the conclusion that Wisconsin can get along without Milwaukee or that Milwaukee can get along without Wisconsin. We need a healthy Wisconsin and a healthy Milwaukee if both are to survive. If either one becomes ill, the other one will suffer also.”

The “Milwaukee is not an island” theme became a familiar refrain early in my father's tenure. The following is from a speech, on December 6, 1967, to the City Club of Metropolitan Milwaukee:

“I began this noon by saying that any large-city school superintendent who looks at his school system in isolation is not facing reality. I do not intend to be that kind of school superintendent. I want to spread the message far and wide—and make it loud and clear—that a healthy Milwaukee public school system is essential not only to the city of Milwaukee, but also to the greater Milwaukee area and to the entire state of Wisconsin.”

But winning the messaging battle would prove difficult. My dad's first year on the job was particularly turbulent. During the 1967–1968 school year, there were boycotts, student walkouts, fights, threats of a teachers' strike, and protests over what was being taught. News reports painted the district in an unflattering light, something my dad acknowledged in a speech on June 4, 1968, at Rotary Youth Recognition Day in Milwaukee:

“Allow me to make it perfectly clear that I am in no way advocating that we should deny

the right of protest to persons and groups who feel they are aggrieved. To do so would deny our citizens one of their basic rights guaranteed by the Constitution. I think we would all agree that our world is not perfect and there are many people who have just grievances. It is a mistake, however, to give all the attention to the 2 percent and overlook the contributions of the other 98 percent.”

“Our school year will end one week from today,” he noted. “While I do not wish to be boastful at this time with five school days remaining in a school year filled with uncertainties, Milwaukee’s school attendance record for the 1967–1968 school year will stand with the best—in fact, it is the best—of all the major school systems of the country.”

Two days later, my dad spoke to the Hartford Avenue School Parent–Teacher Association: “In Milwaukee, as in all major cities of the country, we have had a most unusual school year. There was no textbook on the market that could have been used as a guide by administrators to cope with some of the problems that arose in the 1967–1968 school year now ending.”

By 1971, my dad’s speeches reflected a growing frustration over the toll that negative news coverage was taking on the city and its schools. Here are two excerpts from a speech on January 20, 1971, to the Women’s Court and Civic Conference of Milwaukee County:

“Too many of our metropolitan residents, I’m afraid, . . . are looking down their noses at the urban center only as an escape from taxes, from race problems, from pockets of poverty, from the tired, the aged, and the poor. In doing so, they paint a broad brush across the whole city and declare it unsuitable for their lifestyle and unworthy of their moral support. Milwaukee doesn’t merit that kind of reputation. . . .”

“This phenomenon has been a product of the post-World War II era, which saw a growing population, by necessity, expand beyond the central city, aided and abetted by the automobile and the construction of traffic corridors known as freeways. Sociologists and historians, I am sure, will have much to say in the future as they record this significant change in America’s lifestyle. An unfortunate by-product of this development,

however, has been the polarization that has taken place as a result.”

In that same speech and in others, my dad defended Milwaukee. “I, for one,” he wrote, “do not believe our long-established cities are ready to check in at the mortuary. They’re going to be around for a long, long time and play a key role in the society in which we live and in which our children and grandchildren will live.”

He also offered a staunch defense of MPS’s performance: “In my humble opinion and based on comparison with other urban school systems, Milwaukee’s public schools have more going for them than any other major school system in the country.”

The challenges facing Milwaukee’s public schools were of their time, but also, in some ways, *timeless*. In reading the speeches, I was struck by how issues facing MPS in the late 1960s and early 1970s still confront the district today. In this address to the Council of Chief State School Officers on November 14, 1967, my dad talked of the district’s dire financial situation:

“Our urban school system and our municipal government are both beseeching the state of Wisconsin for necessary financial assistance. We are desperate. Even though the schools have the backing of our State Department of Public Instruction, we are not making satisfactory progress in our quest for more funds. It is no secret that we are threatened with a teacher walkout in the near future; we have large numbers of disadvantaged, disruptive, and handicapped children who are not receiving required services and programs; we must continue our long-term construction program. So, I ask you, where do we turn? If the state does not invest a greater amount of its monies in our local school district, who will?”

In an address on June 19, 1969, to the American Institute of Architects, my father warned of a citizen revolt against the high cost of taxation.

“It is news to none of us that in Milwaukee, particularly, the property tax has reached the breaking point. The citizens of this city support their schools financially to the same degree that any other school district does. However, in addition to the school tax, there is what I call the municipal overburden, and this, coupled with the school tax, makes the burden almost unbearable.”

**“So, I ask you, where do we turn? If the state does not invest a greater amount of its monies in our local school district, who will?”**





In that same 1969 speech, my dad also talked about an emerging problem that vexes MPS even today: student turnover and mobility. A recent series by *Milwaukee Journal Sentinel* education reporter Erin Richards examined how high levels of student mobility stall academic achievement. These were my father's words, 50 years ago:

"Many of our Milwaukee schools have a 20 percent mobility factor. The situation becomes alarming when the mobility factor reaches 50 percent or more. What does that 50 percent mean? Simply this: For every class of 30 pupils that begins the school year in September, 15 of those 30 pupils will have left the school before the following June and have been replaced by 15 new pupils. In the most recent year for which statistics are available, 26 of our Milwaukee schools were over the 50 percent mark. Several schools reached the 75 percent mark—a 75 percent turnover of students in one year.

"What happens to the educational progress in a classroom with such comings and goings? What happens to the educational progress of a child who attends three or four schools in the course of one year? What about the child who stays in that room all year and doesn't move, but instead witnesses a constant parade

of classmates and a continual adjustment of the class program to meet the needs of the changing student population?"

As I reviewed the hundreds of pages of speeches and addresses from the seven-year period, I found only a few mentions of the subject that would generate debate for years to come: desegregation, or whether Milwaukee's schools could be successfully integrated. Filed before my father arrived in Milwaukee, the desegregation lawsuit had still not been decided by the time he left.

My dad's most exhaustive comments on the integration issue came in one of his final speeches, delivered March 29, 1974. It was an address in Milwaukee to the Citizens' Governmental Research Bureau (now the Wisconsin Policy Forum).

In that speech, my father said that "until the integration issue can be successfully resolved, urban schools will continue to suffer." And he raised issues that no doubt were controversial then *and* still are today. Could "cynicism" about the possibilities of integration—on the part of both whites and blacks—be overcome? Would a new generation of black leaders, who wanted their own good neighborhood schools, see integration efforts as a means to diminish their hard-earned power base? Would communities continue to find ways to

frustrate integration efforts, despite the *Brown v. Board of Education* Supreme Court ruling?

Here are some of his words:

"I opened this discussion on school integration by indicating that this issue is an unresolved cancer eating at the quality of urban schooling. It would appear that the major initial step in resolving this issue will have to be taken by the courts. Once the legal direction has been established, then is the appropriate time for debate on ways in which the integration can occur.

"Of course, the resolution of issues does not always follow a logical course. I guess it was inevitable that there should be debate in this city and other cities with regard to resolving racial imbalance before a legal direction had been clearly established. As you know, there has been debate before the Milwaukee Board of School Directors involving a number of plans with racial-balance elements. The racial-balance question deserves free and open debate. However, I cannot help but feel that, unfortunately, this free and open debate contributes to increased white flight. Of course, I have no direct cause-and-effect relationship data to give you; however, I would conjecture that the very discussion of the integration issue increases white flight. Our data would substantiate that we are losing white students, while the black population is stabilizing in number.

"We as a city and a society ought to be mature enough to discuss controversial issues without its resulting in fear and flight. In that spirit, I would like to speak in a planning sense regarding the potential ways in which we might provide racial balance in our schools. . . .

"[T]o be effective, it would seem that integration could not be accomplished on a piecemeal basis. . . . For a few moments, then, let me talk about the metropolitan alternative. Demographic predictions on the state of future urban America are rather transparent, given no changes in our current approaches. High and middle socioeconomic whites will continue to flee the cities. Cities will become increasingly the residence of the socioeconomic poor. If this pattern of

apartheid is not to occur, there must be some identification of structures to change these predictions. . . .

. . . .

"The separation of the city from its suburban units is an historical contrivance that has no logic in response to our current needs. I do not feel I have to go into great detail to demonstrate the inextricable interdependency of city and suburban life. There really is no 'inner city'; there are merely differentiated economic areas within a metropolis. . . .

. . . .

"Some education planners have argued that future urban schooling in this country would hold promise if built upon a metropolitan concept. Within this metropolitan area there would remain substructures in response to the power relationships within the metropolis. In turn, these enclaves would have representation on a larger metropolitan board that could treat the overall problems of the area. . . . The integration plans for a metropolitan area should respect the power relationship in these substructural areas in a way that allows communities to share school experiences from a position of integrity.

"In other words, communities do not have to be shattered in a random, linear programming approach to distributing children for integration purposes. Instead, established communities can share learning experiences in ways that accomplish the integration goal but at the same time retain the sense of community that integration critics so aggressively support."

Now, nearly 45 years later, I ask my dad if he could give me an example of what he was discussing then. He says he meant that schools from different parts of the city and metro area could be paired for shared learning experiences. For example, an orchestra from one high school might perform with the choir of another with a different racial makeup. Newly created advisory councils, featuring schools from the inner and outer city, would work together on long-range planning.

By the end of his tenure in Milwaukee, my dad had come to believe that issues such as racial integration and school financing could not be

**"The separation of the city from its suburban units is an historical contrivance that has no logic in response to our current needs."**

solved without a metropolitan school district that oversaw both the city and its suburbs. The effort to integrate Milwaukee's public schools would unfold much differently, as detailed in Alan Borsuk's article in this magazine (beginning on page 40).

During our conversation in California, my dad looks back to a moment from his tenure in Milwaukee that lingers, these many years later. It's a story he's told me before. In his final months on the job, he testified before Judge John W. Reynolds at the desegregation trial.

"I believe in societal integration," my dad recalls telling the judge. "It is a must in a shrinking world, and it is morally right."

The question was how to achieve it. "I had not recommended abandoning the neighborhood school policy," his recollection continued. "I thought it would only be a short-term, piecemeal measure, not necessarily best for long-range goals [including integration], since a flight to the suburbs would result."

But it's what happened during a break in his testimony that my dad still thinks about today. Reynolds asked him a question.

"He put his hand up to his mouth and leaned down and said, 'Doc, what are we going to do with this situation?'"

My dad—who was soon to leave Milwaukee—says today he regrets not having given Reynolds an answer.

"You look back," my dad said. "He was asking for my input."

As he tells this story, there is a sadness in my father's eyes. He says he believes that the subsequent city busing program ultimately ended up hurting neighborhoods across the city. Black and white. Years later, Milwaukee schools were still segregated. Re-segregated.

Ironically, my dad came to Milwaukee from Delaware, where he served as state schools superintendent, and where he desegregated the state's separate and unequal schools. His work in Delaware was not without controversy. One of our family's not-so-fond memories of my dad's tenure was the time someone tried to ignite a tinderbox left on our doorstep. But in many respects, my dad says integrating schools in Milwaukee—a city that at the time had strong ethnic enclaves and only a recent infusion of black residents—was more challenging than it was in a state with a long history of slavery and segregated schools. Because



of the tensions that existed in the city at the time, my dad believes change in Milwaukee had to be more incremental, "digestible," as he calls it.

On March 30, 1974, my dad submitted his letter of resignation to the Milwaukee school board. He was ready to take on a new challenge: dean of the School of Education at Indiana University.

"It has been a privilege to serve as Milwaukee superintendent of schools during a unique and challenging time in its history," my dad wrote. "What historians will undoubtedly someday describe as cataclysmic events occurring since 1967 have had a profound impact upon our youth and our schools. However my stewardship during these times is ultimately judged, I will remain grateful for the personal and professional opportunity."

The letter speaks optimistically of the district's future, and the many files and folders from my dad's seven years in Milwaukee recount a number of successes. After 15 years of decline, math and reading scores rose during his final year as superintendent. When my dad arrived in Milwaukee, there was one African-American school administrator in the district. By the time he left, the district employed nearly 100. A \$60 million bonding referendum was approved, leading to construction of three new high school buildings. There was a new emphasis on community involvement in decision making.

But, as my father conceded then and today, some unfinished business remained.

Among the many documents my dad has kept is a newspaper story from June 2, 1974. It's what might be called an exit interview. In that interview, my father talked of successes and frustrations. He told *Milwaukee Journal* education reporter David Bednarek:

"This is a school system that has been wrestling with its problems, a school system that has evolved change without revolution. . . .

"In Milwaukee, we have unique aspirations and we have something going. In light of the need, though, we didn't do half as much as we should have."

On July 1, 1974, my dad began his new job as dean of the Indiana University School of Education. His days in Milwaukee were over, but nearly a half century later, memories of what happened during that turbulent period are never too far away. ■



Jim Doyle

## Evaluating the Great Lakes Compact After a Decade

Marquette Law School's Water Law and Policy Initiative, directed by Professor David Striffling, presented a half-day conference—"Evaluating the Great Lakes Compact on Its Tenth Anniversary"—in the Lubar Center of Eckstein Hall on October 2, 2018. Experts discussed the landmark agreement that first gained the approval of the governors of the eight Great Lakes states and that Congress then enacted into federal law in 2008. Among other things, the Great Lakes Compact governs diverting water for use outside of the Great Lakes basin. Diversion has received considerable attention in southeastern Wisconsin: In particular, Waukesha, which is just outside of the basin boundary, recently sought to use water from Lake Michigan for its municipal supply after its well water was found to contain high levels of radium. Waukesha's application became the first major legal test of the compact. Jim Doyle, governor of Wisconsin from 2003 to 2011, played a critical role in the negotiations leading to the compact and gave opening remarks at the Law School's conference this past fall. This is an excerpted and edited version of his remarks.

Thank you, Dean Kearney, for the kind introduction. I want to compliment you and Marquette and the Lubar Center—Mike Gousha, the whole team. I have watched this public policy emphasis develop over the years, and it really has become a center for important discussions in the state of Wisconsin and this region and this country. I thank you for that. It was visionary, and it has really been important to the whole state.

I am very pleased to be here on the tenth anniversary of a hallmark moment in the history of the Great Lakes, when President George W. Bush signed the Great Lakes Compact. I am often asked: "Is it successful or not?" And I will say to you that the test is really still to come—when the demands for water grow and grow and grow around the United States, around the world, and the eyes of



Professor David Striffling and Governor Jim Doyle

those who want water become focused on this amazing resource.

It was only back in the 1980s that a Wisconsin governor, Lee S. Dreyfus, compared water with oil. This was around the time when OPEC was at its peak and we had oil shortages; somewhat jokingly he said, in essence, "Water will be the oil of the future, and we ought to think about how we might sell the water of the Great Lakes." We now sort of take it for granted that this is something that we would protect. But as you look at how that idea developed and where the compact came from, it came from a real fear that, I think, is still legitimate and will be out there in decades to come. That is, it involves people looking to do to these lakes what was done in central Asia to the Aral Sea and in other places around the world.

The compact was a significant accomplishment. It really has two main parts that, from my perspective, were critical. One that continues to receive a lot of attention concerns diversion of water. Yet perhaps even more important is the fact that the compact constitutes a framework for the joint management of these lakes. Instead of the Wisconsin DNR and the Michigan DNR and Ohio going their own ways in trying to figure out what to do, the Great Lakes Compact is the framework by which data are collected and the science behind Great Lakes preservation is done—in

cooperation among all of those states and the federal government. That is an incredibly important part of what this was about, and I would assume that, as you talk today, part of the discussion will be on how effective that part of the compact has been. To my mind, that's an area that we have not adequately picked up on.

Let me focus a bit on the history of the compact. My world was political at the time. I saw a lot of wonderful people—some of whom are here in the room today—really working hard at the basic science of this and the basic technical work that had to be done to put the compact together. At the same time, some major political forces were at work. Only when those forces came together in a unique kind of way were we in a position to get this passed through eight states and the Congress of the United States.

There had been a lot of talk in the big picture about the potential threat of

people taking water from the Great Lakes. All of the Great Lakes states understood the importance, but maybe especially Wisconsin. I might argue that, since the Upper Peninsula really should be part of Wisconsin, we have more Great Lakes frontage than anyone else—but, ceding that to Michigan, we're at least number two in the amount of actual Great Lakes exposure. And in Wisconsin, our history, our culture, our economy, where we have come from—all this is tied up in the Great Lakes.

I've always loved the picture of the planet from outer space: Wisconsin is one of the states of which you can actually say, "There it is." That's because of water—because of Lake Superior on the north and Lake Michigan on the east and the Mississippi River on the west. That Illinois border is not from nature, but the others are.

So, generally speaking, Wisconsin is defined by the Great Lakes. It is where our

economy grew in the nineteenth century, where the great cities grew, Milwaukee in particular. But—and here is where the politics come in—when Wisconsin was laying out its political boundaries, nobody was thinking about where the mini-Continental Divide was. Nobody was thinking that the boundary of the Great Lakes Basin was only some 6 or 7 miles west of the shores of Lake Michigan. Those communities that were within 25 miles or so of Lake Michigan all saw themselves as Great Lakes communities. When people were thinking where the county should go and where political boundaries should go and where cities should be located, it wasn't, to my knowledge, in anybody's thinking to say, "You know, we want to have a city in New Berlin, but put only a little bit of it into the Great Lakes basin, and everyone in the rest of the city can look to the Mississippi River and the West for their water."

At the time, we were facing the practical reality of how to get a Great Lakes Compact passed in a political structure in which there was, quite legitimately, a lot of concern about how all this would work. That was one really significant problem that we had and continue to have. And when you talk about the issue of diversion in southeast Wisconsin, that's not because people are more cantankerous in southeast Wisconsin. It's because there are communities that have long seen themselves as Great Lakes communities but may be a mile or two or three to the west of the Great Lakes Basin. That's the geography of this.

I've heard some talk that this issue wasn't so much about partisan politics but rather about where that divide happened to come through. It had to be worked out in a way that, even though it wasn't going to make everybody happy, provided political solutions. The main one is that any water coming out in the so-called straddling communities has to go back in—has to be treated and go back in.

The second big challenge was one that continues to plague our politics today. I'm going to be a little partisan



here, so I apologize to my Republican friends out there. At the time, the Great Lakes Compact was seen by many of the Republican legislators in Wisconsin as sort of do-gooder, liberal, green, Democratic policy. And with a Democratic governor pushing it as hard as I was pushing it, that reaction was just something kind of instinctive: “This is too much regulation, this is too much government interference, the market will take care of it”—you can hear all of the arguments. And then there was a very practical Republican opposition to it, which was that the Republicans largely represented the communities that needed to deal with the straddling-community issue. If I represented Waukesha County, Democrat or Republican, I’d better be trying to make sure that I don’t have radium in the water and that I have a source of water and that I’m working on those kinds of issues. There also were the usual kinds of issues as well—environmentalists demanding everything to be 100 percent correct, some businesspeople saying this is going to be terrible for our business, with our trying to get them somewhere together. I am really amazed at the number of great people—of both parties, of business, among environmentalists—who actually understood in the end what the practicalities of this were and how much they had to get down and work together. And that is what resulted ultimately in a decision being made in favor of the Great Lakes Compact in Wisconsin.

Wisconsin’s approval of this compact was absolutely critical. We had been a key state. Our negotiators were at the center. A lot of very difficult negotiation had to be done in order to get eight different states together. We were really tied up in this. I was fighting this for several years before we ultimately passed it. I would say two big things led to its passage.

One was that the Waukesha people understood in the end—it took a couple of years for this to happen, but they understood in the end—that the DNR was not going to let them off the hook on the radium in the water, that as a

## “Wisconsin’s approval of this compact was absolutely critical. We had been a key state. Our negotiators were at the center.”

Jim Doyle

practical matter they needed to deal with their water source, and that the Great Lakes were the only place in realistic terms to which they could turn. Further, they understood that the largely unstructured process existing before the compact—the one by which you just put out a request and if any governor said “No,” it was over—wasn’t going to work for them.

In the end, they understood that only through an organized process like the Great Lakes Compact could they legitimately, at some point, get approval from the other governors of the Great Lakes states in order to get the diversion. When Waukesha recognized that this was the way they had to go, at that point, the Republican opposition in the state became very different. Approval sort of started to happen at that point. So that change was very important.

Then, in addition, a number of other states started passing this. One of the good things about this was that we had been talking to Republican legislators for two years—not in a big, antagonistic kind of way, but just continuing to talk, to inform them of what was going on, to try to include them in everything that was happening. Patience like that sometimes pays off in the end. When the moment came that the Republicans were moving to the other side, we weren’t starting from scratch. We had a number of good, Republican legislators who had been basically sort of understanding this and getting behind this for a long time—and so who were ready to go. And when Wisconsin went, Ohio had to go. And when Wisconsin and Ohio were there . . . then it all happened.

I still believe that these matters will be a big issue—10, 20, 25 years from now—

and that’s why I think that the real success of the compact has yet to be tested. What will really test this at some point is when there is a huge water shortage in the country and people go to Congress and say, “You have to get rid of this compact in order for us to have the water.”

Here are the challenges that I see ahead. One is that there has been a real change since 2010—and certainly during the last couple of years—in the politics of how people see regulation versus government involvement. There’s just no doubt that that is the truth of the situation. Anybody can look at it, I can be critical of it, other people can applaud it, but we have moved into an era in which nonregulation and criticism of what some call over-involvement by government have been a winning political message in election after election. I think that this has seriously slowed us down in Wisconsin and in the other Great Lakes states in taking care of what is a critical part of this: How do we get the states to work together?

There’s a lot of good work being done, I know. Is it at the level or the intensity that I would like it? Probably not so much. But there is a lot of work that continues to be done, and it is the framework that we have.

When I look back at it, the compact has sort of taken the impetus out of “save the Great Lakes” political fervor. I don’t follow them all, but I have not seen elections in Wisconsin or in other states bring this issue to the fore for many years. I think it has receded some in the public mind. I think it’s critical to test candidates on how committed they are to this compact and to this process and, more importantly, what kind of resources they are willing to put into the effort to make sure that this happens. ■

Joseph D. Kearney

## Bev Franklin Day

On December 14, 2018, Beverly Franklin retired after 40 years of service to Marquette University Law School. Bev—as she prefers to be called—was a longtime administrative assistant to faculty in room 109 of Sensenbrenner Hall. This was the door closest to the Law School’s entrance on Wisconsin Avenue. Upon the move to Eckstein Hall, in 2010, her role as greeter and gatekeeper was formalized: Bev became the primary person at the Welcome Desk, by which all entering and leaving the Law School must pass. She was, in short, central to the community of the Law School. Here is an excerpt from Dean Joseph D. Kearney’s remarks at the Law School’s annual Christmas luncheon—Bev’s last day of work.

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Mostly I want to talk about Bev Franklin. It is Bev Franklin Day, after all. That is the least that we can do after her 40 years or so of service to the Law School. Just to give you a sense of how long this has been, Bev has been with us even longer than Bonnie Thomson. And I say that not in any way to pick on Bonnie, but, rather, because Bonnie typically says that she has been here “longer than Methuselah was old,” or “since the flood,” or something like that.

It’s actually a good thing that Bev has been here longer than Bonnie. Here’s what Bonnie told me last week: “Bev was the first person from the Law School whom I encountered on January 2, 1985—she smiled and put out her hand to help me over a snowbank on 11th Street. That gesture pretty much sums up Bev’s approach to people throughout her tenure.” That is succinctly and well said.



Paul Anderson sent me a note also recalling Bev in Sensenbrenner Hall: “In the old building,” Paul said, “there was a day each week when Bev would make bacon (I believe it was Thursdays). Entering off Wisconsin Avenue, I could smell it from the front door all the way to my office next door. It became a tradition for her to share some with me.” That was part of a food theme in the comments that people sent me: Deborah Darin’s comment to me simply was, “The cakes. The lemon cake.” To that she added only the parenthetical, “Sighing.”

There were some other themes in a few of the comments that I received. One had something to do with Bev’s flirting with people, but I thought it imprudent to explore that, even if it was all G-rated (as it was). Another—to which Melissa Greipp and Bruce Boyden both attested—touched upon Bev’s reception of people’s families. Whether it was hugs for Olivia or help with a bottle for

Ollie, and whether it was Eckstein Hall or Sensenbrenner Hall, their comments reflected Bev’s genuine care and warmth for their children.

The prevailing theme was the way Bev helped build up our community, whether by welcoming people or otherwise. Mike McChrystal was the person responsible for the idea that we formalize Bev’s community-building role by asking her to lead the Welcome Desk when we moved to Eckstein Hall. His comment in recalling that last week was this: “I remember a greeter at the front door of a Ritz-Carlton hotel where I once stayed who warmly engaged each arriving guest and made you feel that your arrival brightened his day. When we were considering the role of the Welcome Desk and the person at it, I wondered who in the Law School could do what that greeter did. Bev was the obvious choice.”

That is all true, but Mike tells us only half the story—or just a bit more than

half. He *also* told me at the time—this would have been 2009 or 2010—that we needed someone at the Welcome Desk who, where appropriate, would take no guff. Bev, I trust that it's not a surprise to you that you scored very high on that measure as well.

So well it should be Bev Franklin Day at the Law School. Some of you may think that to declare this to be the case is to exceed my authority as dean. Perhaps I should have put the matter forward for some sort of community resolution. And if necessary, I'm sure that I could do so here, by unanimous consent or acclamation, as is said. Yet I think that to be unnecessary.

For we have here a proclamation from the Wisconsin Supreme Court—specifically, signed by Chief Justice Patience Roggensack—noting Bev's "leadership, faithful service, and excellence" on behalf of the Law School. The chief justice notes everything from Bev's attention for students and guests to her ensuring that no one's car—and I mean no one's—was permitted to block the road outside the building. It is a generous citation, commending and congratulating Bev.

Now we at the Law School are part of the legal profession, so I think this to be pretty good authority. At the same time, some may think, "Well, that's the court system. Judges are not supposed to make laws, only interpret them—you know, the whole baseball-umpire thing." Anticipating that objection, we also have here a proclamation from Mayor Tom Barrett, on behalf of the City of Milwaukee.

The mayor's proclamation is warm and expansive. It is the conclusion upon which I wish to focus here: He concludes by declaring today to be "Bev Franklin Day" in the City of Milwaukee. Quite what the rights and prerogatives appurtenant to this proclamation are, I'm not sure. But whatever they are, they extend to the rest of Milwaukee County, as we have a similar proclamation from Chris Abele, the Milwaukee County

executive. So if you're inclined to go crazy, Bev, let it be today, and know that you'll be in as good shape in, say, Wauwatosa or Franklin as you will be, at home, in Milwaukee. And if you get into big trouble, know that you have the Wisconsin Supreme Court in your back pocket.

And, more than anything, know that, while these tickets apparently are good for this day only, you'll always be part of us at Marquette Law School. In that regard, this package, also, is for you. I don't think that it is spoiling any surprise to say that in it are some photos capturing just some aspects of your time here.

For my final words on this matter, I'm going to defer to our students—or former students, which is to say Marquette lawyers. Many of us, including Steve Nelson (who sent me the link), will remember that when Judge Derek Mosley received the Howard B. Eisenberg Service Award from us a few years ago, he asked two people to be there that evening. One was Robin Cork, who (happily) has not yet retired from our library. The other, of course, was Bev Franklin. He described her importance to him during law school in part by saying, "Not a day went by when I did not go and talk to Bev."

More recently (just last night in fact), another former student, who is here today, described for us Bev's importance to her: This was Phoebe Williams, whom

## EXECUTIVE PROCLAMATION

*WHEREAS*, Bev Franklin has dedicated her life in service to Marquette University for nearly forty years and specifically to improve the lives of the Marquette Law School's faculty, staff, and students since 1985; and

*WHEREAS*, Franklin has been a positive force for good in Sensenbrenner Hall supporting nine full-time faculty with their research and classes for more than 29 years; and

*WHEREAS*, Franklin has served as the public face of the Marquette Law School by welcoming close to 2,000 students and more than 27,000 *On the Issues with Mike Gousha* guests, to Ray & Kay Eckstein Hall since 2010; and

*WHEREAS*, she warmly greets guests with her big smile and a unique ability to call everyone "sweetie"—from a first-time guest to the University Provost; and

*WHEREAS*, Franklin is known by her friends and colleagues for her tasty and scrumptious baked cakes and cupcakes which she graciously shared; now, therefore

I, *CHRIS ABELE*, County Executive of Milwaukee County, do hereby congratulate,

*Bev Franklin*

On her retirement from the Marquette University Law School on December 14, 2018.



*Chris Abele*  
Milwaukee County Executive

Bev Franklin Day Proclamation

we may think of as a faculty member but who, of course, once walked the halls of Sensenbrenner as a student. Here's what Phoebe told her (in part):

"Bev, as a law student at Marquette from 1978 to 1981, I was nurtured by your warm and friendly presence. As a faculty member since 1985, I knew I could count on you to support my work at the Law School. I have benefited immensely from our conversations and friendship. Yet, I have always admired your professionalism. I knew that even though you liked me a lot, I still had to follow the rules."

I cannot improve upon those words—whether those of the chief justice, the mayor, Phoebe, or anyone else. We love you, Bev. ■

**"When we were considering the role of the Welcome Desk and the person at it, I wondered who in the Law School could do what that greeter did. Bev was the obvious choice."**

Mike McChrystal

# CLASS NOTES



Patrick O. Dunphy



Maxine A. White



Jeffrey A. Pitman



Kevin M. Long



Rachel Monaco-Wilcox



Laura M. Lyons

**68 Frank J. Daily** has been reappointed by the Wisconsin Supreme Court to the Wisconsin Judicial Commission.

**76 Patrick O. Dunphy** lectured at Hastings Law School and Stanford Law School on gun litigation and the role of tort law in fostering social change. He is co-founder of Cannon & Dunphy, with offices in Milwaukee and Brookfield, Wis.

**81 Jose A. Olivieri** has been named co-managing partner of the Milwaukee office of Michael Best & Friedrich. He previously served as chair of the firm's labor and employment practice group and led the establishment of its immigration law practice.

**83 Mark V. Afable** has been appointed by Wisconsin Governor Tony Evers as the state's commissioner of insurance. He previously was chief legal officer at American Family Insurance.

**Jeffrey L. Hesson** has joined von Briesen & Roper in its office in Neenah, Wis.

**84 Tracey L. Klein** has become a shareholder in the national law firm of Polsinelli, practicing in its Chicago office.

**85 Maxine A. White**, chief judge of the Milwaukee County Circuit Court, received the Jurist of the Year Award from the Wisconsin Chapter of the Justinian Society of Lawyers and the Milwaukee County Sheriff's Commitment to Excellence Award in fall 2018.

**88 Lynne M. Halbrooks** has joined Caliburn International, based in Reston, Va., as deputy general counsel and chief compliance officer.

**90 Jeffrey A. Pitman**, of Pitman, Kalkhoff, Sicula & Dentice, was elected to the American Board of Trial Advocates. In January 2019, he obtained a plaintiffs' verdict for \$11 million in a nursing-home wrongful-death case in Albuquerque, N.M.

**91 Daniel J. Gabler** was appointed by Governor Scott Walker as a Milwaukee County Circuit Court judge.

**92 Kevin M. Long** was named one of two Milwaukee office managing partners for Quarles & Brady.

**94 Mary S. Gerbig** received the 2018 George Tipler Award from the Wisconsin School Attorneys Association. Practicing from the firm's Green Bay office, she is chair of the school and higher education team at Davis | Kuelthau.

**97 Stacy L. Alvarez** joined Westbury Bank, which serves southeastern Wisconsin, as vice president – commercial relationship manager.

**99 Jon E. Fredrickson** was appointed by Governor Scott Walker as a circuit judge in Racine County, Wis. Fredrickson was previously a shareholder at Kravit Hovel & Krawczyk.

**00 Katherine Maloney Perhach** was appointed by the U.S. Court of Appeals for the Seventh Circuit to a 14-year term as bankruptcy judge for the U.S. District Court for the Eastern District of Wisconsin.

**Rebecca Cameron Valcq** was appointed chair of the Public Service Commission by Wisconsin Governor Tony Evers. She previously was a partner at Quarles & Brady in its Milwaukee office.

**01 Julie M. DuQuaine** joined the district attorney's office in Outagamie County, Wis.

**03 Tara R. Devine**, a partner at Salvi, Schostok & Pritchard in the firm's Lake County office, received a 2018 Trial Lawyer Excellence Award from the *Jury Verdict Reporter* for being part of a trial team that obtained the highest reported Illinois verdict for personal injury (compensatory damages).

**04 Aaron C. Bitter** was named program manager for the Association of Persons Affected by Addiction (APAA), a recovery community organization based in Dallas, Texas.

**Maria L. Kreiter**, a Godfrey & Kahn litigation shareholder, was appointed board president for the Coalition for Children, Youth & Families, based in Milwaukee.

**Rachel K. Monaco-Wilcox**, of LOTUS Legal Clinic, received a Philanthropists in Our Community Award from the Women's Fund of Greater Milwaukee.

Employment data for recent classes can be found at [law.marquette.edu/career-planning/welcome](http://law.marquette.edu/career-planning/welcome).



Katya L. Zelenovskiy



Bryant E. Ferguson



Jaclyn C. Kallie



Max T. Stephenson



Makda Fessahaye



Matthew J. Ackmann

**05** **Laura M. Lyons** has joined Dean Health Plan as a staff attorney. She is also serving a one-year term as the president of the Wisconsin Association of Worker's Compensation Attorneys.

**06** **David N. Farwell** has been named assistant corporation counsel for Milwaukee County.

**08** **Kail J. Decker** has been appointed city attorney of West Allis, Wis.

**Katya L. Zelenovskiy** was named one of two Milwaukee office managing partners for Quarles & Brady.

**09** **Megan E. Troy** was promoted to partner at Seyfarth Shaw, based in Chicago.

**10** **Bryant E. Ferguson** was named a shareholder at Reinhart Boerner Van Deuren in Milwaukee, practicing in employee benefits.

**Jessica B. Prochaska** has become a shareholder at Burg Simpson Eldredge Hersh Jardine in Englewood, Colo.

**12** **Jaclyn C. Kallie** joined the civil litigation team at Gimbel, Reilly, Guerin & Brown, Milwaukee.

**Steffanie A. Walczak** was promoted to shareholder at Petit & Dommershausen, Menasha, Wis., where she is in the firm's family law practice.

**13** **Heidi M. Gabriel** has joined the corporate law practice of Reinhart Boerner Van Deuren, serving the Milwaukee and Madison offices. She is a certified public accountant.

**Derek A. Hawkins** has joined the Harley-Davidson Motor Company as trademark corporate counsel.

**Max T. Stephenson**, of Gimbel, Reilly, Guerin & Brown, is president of the Milwaukee Young Lawyers Association's board of directors.

**14** **Stephanie N. Galvin** was promoted to associate general counsel with the Miami Marlins Baseball Club.

**Kristen D. Hardy** is the 2018–2019 president of the Wisconsin Association of African-American Lawyers, and **Makda Fessahaye** is president-elect. The organization is dedicated to diversifying the legal community through educational programming, community advocacy, and providing scholarships. Hardy is compliance counsel at Rockwell Automation, Inc., and Fessahaye is administrator of the Division of Adult Institutions for the Wisconsin Department of Corrections.

**15** **Laura L. Ferrari** has joined Reinhart Boerner Van Deuren in its labor and employment practice in Milwaukee.

**16** **Matthew J. Ackmann** joined the trusts and estates group of Reinhart Boerner Van Deuren, practicing in the firm's office in Waukesha, Wis.

**Elizabeth L. Ehrmann** has been named athletics compliance specialist at Cleveland State University.

**17** **Michael R. Laing** and his wife, Lizzie, welcomed a baby girl, Eloise Alexandra, on December 30, 2018.

### SHARE SUGGESTIONS FOR CLASS NOTES WITH CHRISTINE.WV@MARQUETTE.EDU.

We are especially interested in accomplishments that do not recur annually. Personal matters such as weddings and birth or adoption announcements are welcome. We update postings of class notes weekly at [law.marquette.edu](http://law.marquette.edu).



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**For the home teams.** In Milwaukee, that means Marquette, and also the Packers and the Bucks—and, especially, the Milwaukee Brewers (2018 attendance: 2,850,875). Last October, when the team came within one victory of the World Series, we were right there with just about everybody else in metro Milwaukee. “Go Brewers!” said our banner, in large letters on the southeast face of Eckstein Hall, to the 300,000 people daily passing through the Marquette Interchange.

To be sure, there are Angels, Astros, White Sox, and even Cubs fans among us at Marquette Law School. Yet if it can be “next year” for those teams in recent seasons, why not the Brewers? So, with the new season underway, buy us some peanuts and Cracker Jack—and take us out to the ballgame.



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