

## 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.

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