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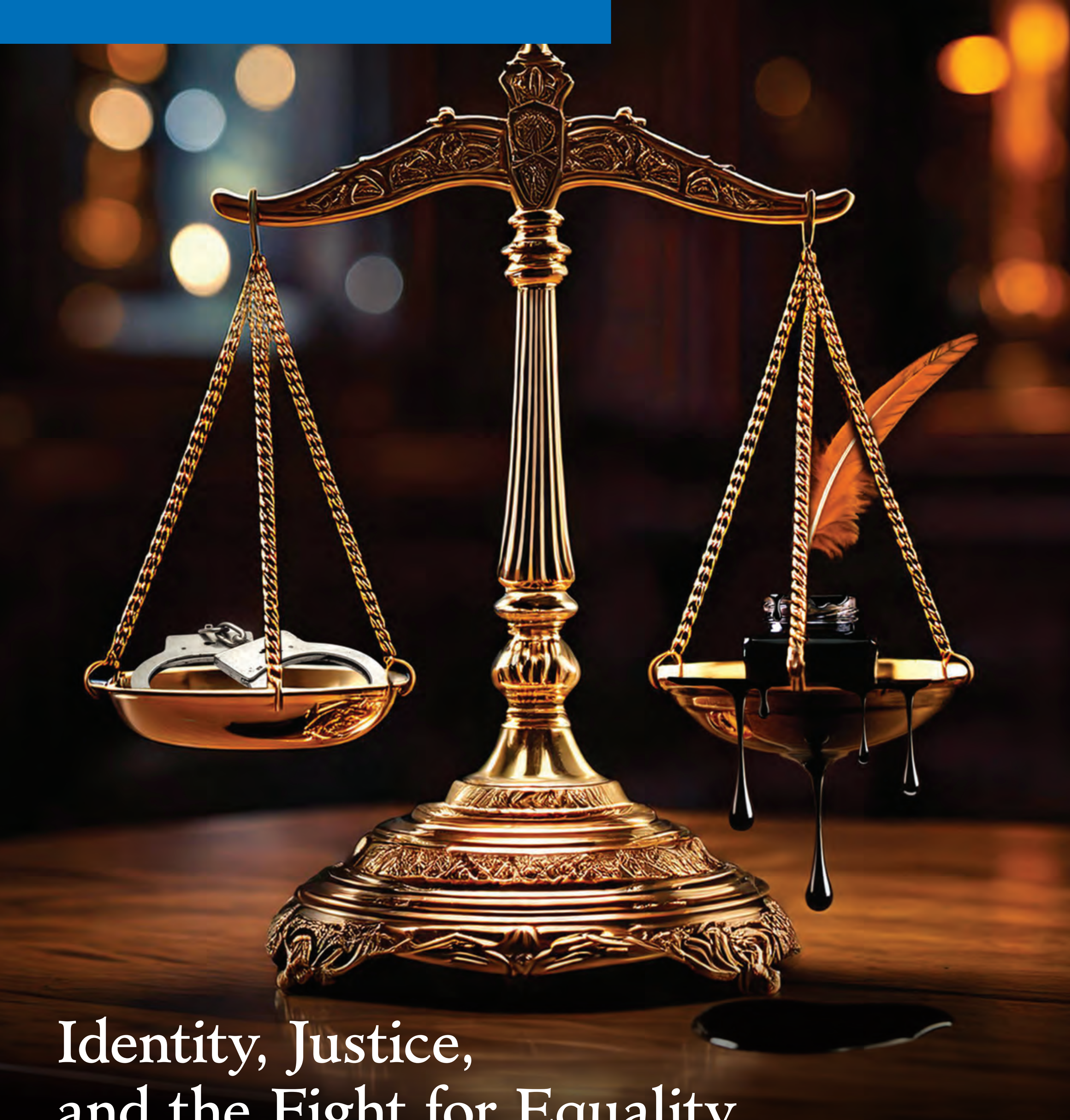

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Writing that Strikes the Reader: What "Is" "It"?

By Christian Ketter

I teach my law students that effective writing should be clear enough to be understood on the first read. After all, you may not get a second read. In every issue, I will offer you something that may help your legal writing. In return, you may find yourself contributing something truly unique to the *DCBA Brief*.

Chief Justice **John G. Roberts** has remarked that, for lawyers, whether it's a contract or a statute or the U.S. Constitution, "language is the central tool of our trade."[1] But language has its limits. (So do the pages allowed in a brief.) No matter how precise we aim to be, we can never fully capture the world itself—the world that exists beyond language.

Sometimes there is a profound vagueness in particularity—or perhaps a profound particularity in vagueness. "I know it when I see it"[2] and "It depends on what the meaning of the word 'is' is"[3] are famous legal expressions. Those phrases stick with us because they capture an elusive truth in a memorable way.[4] These expressions are effective because—despite their apparent vagueness—they convey deep insights in a particular way. And without saying much, they say a lot. They are examples of how a seemingly ambiguous statement can be both specific and expansive, much like other timeless quotes from history.

Consider these classic phrases: **Siddhartha Gautama**'s "What we think we become," **Socrates**'s "The unexamined life is not worth living," **Shakespeare**'s "To be or not to be, that is the question," **Chief Justice Marshall**'s "We must never forget that it is a constitution we are expounding,"[5] **Lord Acton**'s "Power tends to corrupt, and absolute power corrupts absolutely," **Yeats**'s "Do not wait to strike till the iron is hot, but make it hot by striking," **President Franklin Roosevelt**'s "The only thing we have to fear is fear itself," **Dr. King**'s "Injustice anywhere is a threat to justice everywhere," **President Kennedy**'s "Ask not what your country can do for you—ask what you can do for your country," and **Vince Lombardi**'s "The measure of who we are is what we do with what we have."

These sentences are not long or complex. They are short and thought-provoking. They capture attention and provoke reflection with minimal verbiage. In writing for the practice of law, this approach is particularly valuable. It can be characterized as *getting to the clearest point in as few pages as possible.* And sometimes, the writing needs to be no more particular than it already is—provided that it is clear to the reader. A well-guided reader can often draw necessary conclusions that would otherwise take pages to articulate.

The ability to strike a reader is a profound tool. Done well, it's not accidental.[6] For instance, six words in a concise 14-page unanimous opinion eviscerated *Plessy v Ferguson*;

DCBA Brief Editor-in-Chief, Christian Ketter, is an adjunct professor of law at University of Illinois at Chicago and an attorney with Peterson, Johnson & Murray. Ketter is a former prosecutor and judicial intern to the Honorable Judge William J. Bauer on the U.S. Court of Appeals for the Seventh Circuit. He is the former DCBA Appellate Law Section Chair and serves on the Seventh Circuit Bar Association's Diversity, Equity & Inclusion Committee, the ISBA Local Government and Federal Litigation Section Councils, and as DCBA's Associate-General Counsel.

1. Robert S. Anderson, *U.S. Supreme Court Interviews on Effective Legal Writing – Part I*, The Colorado Lawyer, June 2008, at 61.
2. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J.)
3. United States. Congress. House. Committee on the Judiciary, Henry J. Hyde, Impeachment of William Jefferson Clinton, President of the United States 73 (1998).
4. Whether those respective memorable expressions actually identified obscenity or answered the oathbound question may likewise be elusive.
5. *McCulloch v. State of Maryland*, 17 U.S. 316 (1819).
6. *See* Indiana University Newsletter, *The Mechanics Of Retail Advertising*, Vol. 13, Iss. 4, at 28 (1925) (noting "[g]ood headlines average from four to seven words" and "serve as attention attractors, first getting the reader's attention and then leading him to the body of the advertisement.").

"Separate educational facilities are inherently unequal."[7] But sometimes it's tucked away in a critical footnote waiting to be built upon.[8] Other times, it's a specific word choice.[9] Indeed, these are our legal tools. And particularity is important because it remains a lawyer's "province and duty . . . to say what the law is."[10]

If your writing leaves a jurist turning your words over in her mind after reading them once, you've made a significant impact. Just make sure that the one read that you get is the one that you want.

We extend a warm welcome to one of my former law students at the University of Illinois at Chicago School of Law, **Ryan Price,** who has joined the editorial board's legal writing mentorship program. His talent and dedication are a great addition. The *DCBA Brief* is proud to be proud to support the development of the next generation of lawyers. Welcome aboard! ☐

7. *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 495 (1954).
8. *See U.S. v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4 (1938) ("whether prejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry").
9. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("Specific guarantees in the Bill of Rights have *penumbras*, formed by emanations from those guarantees that help give them life and substance.") (emphasis added).
10. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (Marshall, C.J.).

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126 South County Farm Road
Wheaton Illinois 60187
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Errata Statement

DCBA Brief September/October 2024

In *DCBA Brief* Volume 37, Issue 2, the Table of Contents on pp. 1 and 45 misstated the author of the 2024 Liberty Bell Award Recipient Reaches "Pinnacle of Career." The correct author is John J. Pcolinski, Jr.

The editors deeply regret the error.

Articles & Perspectives

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Article Editors

Christopher R. Gorman

Christopher R. Gorman is a partner at Robbins Schwartz focusing on commercial, construction, and real estate law in the public sector. He has extensive experience in labor and employment law and advises clients on board governance and compliance. Chris previously served as in-house counsel for a nonprofit, a charter school management firm, and a state regulatory agency.

Tyler Michals

Tyler Michals is an assistant corporation counsel in the Federal Civil Rights Litigation Division of the City of Chicago's Law Department. He previously worked as an assistant state's attorney in the Cook County State's Attorney's Office. He is a graduate of Michigan State University College of Law where he graduated cum laude.

Does the Second Amendment Protect a Felon's Right to Possess Firearms?

By Paul Piro

Under both Illinois and federal law, felons are prohibited from possessing firearms.[1] Indeed, having a felony conviction is, practically speaking, a lifetime ban on an individual's right to possess a firearm. For convicted felons, however, the U.S. Supreme Court's decision in *Bruen* offers a potential avenue for regaining their right to bear arms.[2]

Bruen is the most significant case regarding firearms in at least the last decade. At issue in *Bruen* was New York's "proper-cause" standard for obtaining a concealed carry license ("CCL"). Before *Bruen*, New York's proper-cause standard required that the applicant for a CCL "demonstrate a special need for self-protection distinguishable from that of the general community."[3] The two CCL applicants in *Bruen*, Brandon Koch and Robert Nash, had been denied concealed carry licenses based on the proper cause standard.[4]

In *Bruen*, the Supreme Court created a new framework for Second Amendment challenges. It established a two-step test. The first step is that the petitioner or defendant, depending on the nature of the litigation, must show that his or her conduct falls within the scope of the Second Amendment.[5] If the conduct of the individual bringing the Second Amendment challenge falls within the scope of the Second Amendment, then the burden shifts to the government to show that the challenged law "is consistent with this Nation's historical tradition of firearm regulation."[6]

1. *See, e.g.,* 18 U.S.C. 922(g)(1); 720 ILCS 5/24-1.1(e).
2. *New York Rifle & Pistol Assn. v. Bruen,* 597 U.S. 1 (2022).
3. *Id.*
4. *Id.*
5. *Id.* at 3-4
6. *Id.* at 4.

The Court ruled in *Bruen* that the applicants' conduct—seeking a concealed carry license—fell within the scope of the Second Amendment.[7] Moving to the second step, the Court ruled that the government failed to meet its burden "to identify an American tradition justifying New York's proper-cause requirement."[8] Therefore, the Court held that New York's proper-cause requirement violated the Second Amendment.[9]

In the wake of *Bruen,* the U.S. Supreme Court has sought to clarify its Second Amendment jurisprudence. For instance, in *United States v. Rahimi*, the Supreme Court held that the federal statute prohibiting individuals with a domestic violence restraining order against them from possessing firearms was constitutional.[10] The Court held that "[W]hen an individual has been found by a court to pose a credible threat to the physical safety of another, that individual may be temporarily disarmed consistent with the Second Amendment."[11]

There are significant differences between the facts in *Rahimi* and those cases involving felons in possession of a firearm. The most significant distinguishing fact is that *Rahimi* did not address the issue of whether felons may possess firearms. Another significant fact is that the Court specified that the disarmament in *Rahimi* was "temporary."[12]

Objectively, Rahimi was not the most sympathetic candidate to have his Second Amendment rights restored. On at least two prior occasions, Rahimi had threatened a woman with a firearm.[13] He had also previously violated an order of protection that one of those women had against him.[14] Furthermore, on multiple prior occasions, he discharged his firearm in the direction of an individual and/or recklessly into the air.[15] For the foregoing reasons, *Rahimi* stands mainly for the proposition that an *actively* dangerous individual may temporarily lose his Second Amendment privileges. But the decision says little about a petitioner who is disarmed merely due to having a felony conviction in his or her background.

Other cases have addressed the question of a felon's right to possess firearms directly. In *Range v. Attorney General United States of America*, a Third Circuit case, the petitioner filed a declaratory action against the federal government arguing that his Second Amendment rights were violated because he was prohibited from obtaining a firearm despite having only a non-violent felony conviction in his background.[16] In 1995, Range had been convicted in Pennsylvania for making a false statement to obtain food stamp assistance which, under Pennsylvania law, was considered a misdemeanor punishable by up to five years of imprisonment.[17] He was sentenced to three years of probation.[18] Still, since the offense was punishable by at least one year of imprisonment, it was considered a felony conviction under the federal firearms statute despite its classification as a misdemeanor in Pennsylvania.

About the Author

Paul Piro is an attorney at McDermott Law Group, LLC, a law firm nationally recognized by the Second Amendment community for consistently obtaining not guilty verdicts involving self-defense shootings.

7. *Id.* at 3-4
8. *Id.* at 4.
9. *Id.* at 7
10. *United States v. Rahimi*, 144 S. Ct. 1889 (2024)
11. *Id.* at 1891.
12. *Id.*
13. *Id.* at 1894-5.
14. *Id.* at 1895.
15. *Id.*
16. *Range v. Attorney General United States of America*, 69 F.4th 96 (3rd Cir. 2023)
17. *Id.*
18. *Id.* at 98.

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As a preliminary matter, the Third Circuit found that Range was part of "the people" who are protected under the Second Amendment and that his conduct fell within the Amendment's scope.[19] The court held that the federal statute prohibiting felons from possessing firearms was unconstitutional as applied to him due to the non-violent nature of his past conviction.[20] As opposed to a facial challenge, an as-applied challenge—like the one in *Range*—does not invalidate an entire statute. Rather, the statute was only held to be invalid as applied to Range, since he was a party to the lawsuit. Regardless, the judgment in *Range* has been subsequently vacated, and the case remanded back to the Third Circuit for further consideration in light of the *Rahimi* decision.

In *United States v. Prince*, the federal statute prohibiting felons from having firearms was declared both facially unconstitutional and as-applied in the Northern District of Illinois.[21] The facts in *Prince* are straightforward: Prince allegedly approached three individuals on a CTA train, brandished a firearm, and robbed the victims at gunpoint.[22] During the ensuing prosecution, Prince filed a motion to dismiss the indictment, arguing that the statute was unconstitutional.[23]

The district court concluded that the federal statute prohibiting felons from possessing firearms "imposes a far greater burden on the right to keep and bear arms than the historical categorical exclusions from the people's Second Amendment right."[24] In its briefs, the government had relied on 17th-century historical precedents to justify the law, such as the English government disarming nonconformist Protestants and Catholics who refused to renounce their faith.[25] Other examples cited by the government included American colonies that disarmed Catholics, Native Americans, and enslaved people.[26] Similarly, loyalty oath requirements allowed states to disarm people who failed to take an oath throughout Colonial America and the Revolutionary War.[27] Given *Bruen*'s historical analog requirement, the government has frequently been placed in the awkward position of relying on historical regulations that were created to disarm a particular group of persons, which in turn often relied on racist or bigoted assumptions. At any rate, the court found that none of the historical analogs cited by the government directly related to whether felons could possess weapons.

In *United States v. Neal*, another Northern District of Illinois case, five defendants were separately charged in federal court with the offense of unlawful possession of a firearm by a felon.[28] The district court held that the statute was facially unconstitutional.[29] In support of its position that the provision was constitutional, the government provided three historical examples that were made during state ratifying conventions during America's founding. The first was the Pennsylvania Antifederalists' proposal for a constitutional amendment, which stated that "No law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals."[30] The second

19. *Id.* at 102-103.
20. *Id.* at 106.
21. *United States v. Prince*, 700 F.Supp.3d 663, 675-6 (N.D. Ill. 2023).
22. *Id.* at 664.
23. *Id.*
24. *Id.* at 673.
25. *Id.* at 670.
26. *Id.* at 671.
27. *Id.* at 671.
28. *United States v. Neal,* 2024 WL 833607 (N.D. Ill. 2024).
29. *Id.* at 13.
30. *Id.* at 10.

example came from the Massachusetts ratifying convention, where Samuel Adams proposed that the "Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms."[31] The third proposal came from New Hampshire and stated that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."[32] None of these proposals became law, however, and only New Hampshire's proposed amendment received even majority support.[33]

The government further argued that capital punishment and estate forfeiture were common punishments for felonies in the 18th century.[34] The district court rejected this reasoning since not all felons were permanently disarmed and stripped of their estates.[35] Some felons were able to regain their firearm privileges after they served their punishments.[36] The court concluded that "the prevalence of capital punishment and estate forfeiture at the founding, taken alone or together with the rejected proposals at the ratifying conventions, does not provide the required historical tradition to support § 922(g)(1)."[37]

In *United States v. Griffin,* yet another Northern District of Illinois case, the defendant had multiple prior felony convictions, including for robbery, criminal trespass, and possession of controlled substances.[38] In *Griffin*, the government argued that the federal statute preventing felons from possessing firearms addressed a "general societal problem that has persisted since the 18th century" because it is consistent with laws prohibiting untrustworthy individuals from possessing firearms.[39] As in *Neal*, the government relied on the Pennsylvania and Massachusetts proposals at the state ratifying conventions.[40] Similarly, the government again relied on English historical laws disarming religious minorities and laws authorizing capital punishment and estate forfeiture for felony convictions.[41] The government also cited historical laws disarming Native Americans and Black people.[42]

In *Griffin*, the district court agreed with the government that the British loyalist laws were sufficient to support enforcement of the federal ban on felons possessing firearms.[43] The court ruled, however, that individualized assessments between violent and non-violent felons for purposes of possessing firearms were supported by America's historical tradition.[44] Indeed, the court explained that there was an exception to British loyalist dispossession laws.[45] For instance, a former British loyalist could sign a loyalty oath, which would allow the person to possess firearms.[46] The court indicated that this exception required an

31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 11.
35. *Id.*
36. *Id.*
37. *Id.*
38. *United States v. Griffin*, 704 F.Supp. 3d 851, 863 (N.D. Ill. 2023).
39. *Id.* at 857.
40. *Id.* at 858.
41. *Id.* at 858 and 861.
42. *Id.* at 859.
43. *Id.* at 861.
44. *Id.* at 862
45. *Id.*
46. *Id.*

“Given *Bruen’s* historical analog requirement, the government has frequently been placed in the awkward position of relying on historical regulations that were created to disarm a particular group of persons, which in turn often relied on racist or bigoted assumptions.

individualized assessment to determine whether they were “so untrustworthy or dangerous” that they should be prohibited from possessing firearms.[47] The court used similar reasoning in assessing *Griffin*’s as-applied challenge.

The court noted that Griffin had been convicted of robbery, which the Seventh Circuit has held is a violent felony under Illinois law.[48] On the other hand, the court gave significant weight to the fact that Griffin had “never been convicted of a crime involving the use of a weapon” and noted that he was not arrested during the commission of a violent offense in the case before the court.[49] The court pointed out that Griffin had been arrested for smoking cannabis in his illegally parked car while possessing a firearm.[50] The court concluded that his conduct, therefore, did not “demonstrate a risk of violence.”[51] Thus, the court held that the statute was unconstitutional as applied to Griffin.[52]

Both state and federal courts will be sorting through the fallout from *Bruen*’s historical analog test for the foreseeable future. As courts throughout the nation reassess Second Amendment rights in light of *Bruen*, recent decisions give credence to the possibility that felons could someday see their right to bear arms restored. Given the present uncertainty in the law, it’s an issue that is likely to land at the U.S. Supreme Court sooner than later. ☐

47. *Id.*
48. *Id.* at 863.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

Illinois Felon Dispossession Statutes Under Attack in the Aftermath of *New York State Rifle & Pistol Association, Inc. v. Bruen*: Who Will Get Bragging Rights?

By Emmet C. Fairfield and Stefania Neri

In 2022, the Supreme Court of the United States changed the calculus for assessing the constitutionality of firearm regulations. Since then, Illinois statutes prohibiting felons from possessing firearms have come under attack. The Illinois Appellate Court has universally rejected constitutional challenges to the statutes. However, the appellate court has split on the appropriate analysis to be used to conclude that felon-dispossession statutes are constitutional. This article discusses the relevant U.S. Supreme Court precedent and highlights the differing approaches of the Illinois appellate court, as well as the strengths and weaknesses of those approaches.

Heller and *McDonald*

In *District of Columbia v. Heller*, the U.S. Supreme Court analyzed the meaning of the Second Amendment to the U.S. Constitution.[1] At issue was a District of Columbia police officer's challenge to a law that banned the possession of a handgun in the home.[2] The Court struck down the law, concluding the Second Amendment guaranteed an individual right—not tied to militia or military service—to possess and carry weapons in case of confrontation.[3] However, the majority cautioned the Second Amendment right is "not unlimited."[4] Thus, the Court stated, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."[5]

Two years later, in *McDonald v. City of Chicago*, the U.S. Supreme Court considered a challenge to Chicago's ordinance banning individuals from possessing handguns inside the home.[6] The Court struck down the law on the same basis as *Heller*. But the majority opinion went further, finding the second amendment applied to state and local governments via the Fourteenth Amendment.[7] This determination had a nationwide impact—an individual's right to bear arms is fundamental and applies equally to the federal, state, and local governments. Conspicuously, the Court reaffirmed *Heller*'s proclamation that not all laws regulating firearm possession are vulnerable, including those which prohibit the possession of firearms by felons.[8] Justice Stephen Breyer's dissent emphasized that legislatures are better equipped than courts to make determinations on state gun laws.[9]

Bruen and the "Two Step" Analysis under *Heller* and *McDonald*

After *Heller*, every federal appellate circuit developed a two-step framework for reviewing Second Amendment challenges that combined analyzing the nation's historical tradition of firearm regulation with means-end scrutiny.[10]

In *Bruen*, the Court rejected that framework and instead focused on the Second Amendment's text and the nation's

1. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
2. *Id.* at 574-75.
3. *Id.* at 576-600.
4. *Id.* at 626.
5. *Id.*
6. *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).
7. *Id.* at 791.
8. *Id.* at 786.
9. *Id.* at 922.
10. *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 17 (2022).

historical tradition of firearm regulation.[11] At issue in *Bruen* was a law that required individuals who want to conceal carry a firearm outside their home to obtain an unrestricted license, for which they had to show "proper cause," that is, "demonstrate a special need for self-protection distinguishable from that of the general community."[12] The Court struck down the law because "[it prevented] law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms."[13] Importantly, among the Court's majority and concurring opinions, the term "law-abiding citizens" (or some variation of the term) was used 18 times. In his concurring opinion, Justice Brett Kavanagh quoted *Heller*'s proclamation that nothing in the Court's opinion should be read to cast doubt on the longstanding practice of prohibiting felons from possessing firearms.[14]

Consistent with the majority and concurring opinions, *Bruen* set out a new two-part framework for assessing a firearm regulation's constitutionality:

> "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command."[15]

If an individual's conduct falls equally within the scope of conduct protected by the Second Amendment's plain text, the government need only point to historical precedent from before, during, and after the founding of the United States that

About the Authors

Emmet C. Fairfield, a 2013 NIU law graduate, is a law clerk to Justice Linda Davenport and former clerk to Justices Ann Jorgensen and Lisa Holder White, appellate court staff attorney, and associate attorney at Broida and Nichele, Ltd. He lives in Geneva with his wife and two daughters.

Stefania (Triolo) Neri is a third-year law student at Northern Illinois University College of Law. She is a law clerk at Peterson, Johnson & Murray, LLC. She lives in Addison with her husband.

11. *Id.*
12. *Id.* at 12.
13. *Id.* at 71.
14. *Id.* at 81 (Kavanagh, J., concurring, joined by Roberts, C.J.).
15. (Internal quotation marks omitted.) *Id.* at 24.

evinces a comparable tradition of regulation to bear their burden.[16] (The Court emphasized that the most relevant time period is that surrounding the Second Amendment's enactment, in 1791.) There need not be a historical "twin"; rather, the government may justify the regulation with a historical analog that is relevantly similar.[17] This inquiry, according to the Court, turns on whether the "modern and historical regulations impose a comparable burden on the right of armed self-defense and . . . whether that burden is comparably justified."[18]

Bruen's Aftermath in Illinois

After *Bruen*, federal and state statutes regulating firearm possession have faced an onslaught of constitutional challenges. In Illinois courts, persons have challenged various state statutes regulating firearms, including those that criminalize possession by felons,[19] open carriage,[20] and the sale or possession of certain firearm types.[21] The focus of this article is Illinois statutes that make it illegal for a felon to possess a firearm.

Illinois's Felon Dispossession Statutes

Illinois has two statutes that criminalize firearm possession by felons. Section 24-1.1(a) of the Criminal Code of 2012 (Code) defines the offense of unlawful use or possession of a weapon by a felon (UUWF). This section makes it illegal for an individual who has been convicted of a felony under the law of any jurisdiction to possess a firearm or firearm ammunition.[22] Section 24-1.1, however, does not act as a permanent bar. A felon can seek relief from the Director of the Illinois State Police under section 10 of the Firearm Owners Identification Card Act.[23]

Section 24-1.7 of the Code criminalizes being "an armed habitual criminal," which is defined as someone who possesses a firearm after having been convicted two or more times of any combination of certain enumerated offenses.[24] A violation of section 24-1.7 is punished more strictly than a violation of section 24-1.1.[25]

Three Approaches in the Appellate Court

Bruen opened the floodgates to violent and nonviolent felons challenging their convictions under the felon-dispossession statutes.[26] Since 2023, the appellate court has decided dozens of constitutional challenges to such convictions. While no such challenge has been successful, the appellate court has taken three paths to that conclusion.

The Majority View: Non-Law-Abiding Citizens are Not Protected by the Second Amendment

A majority of the appellate panels have avoided a historical analysis, instead ending at *Bruen*'s first step by concluding that felons are not part of "the People" to whom the Second Amendment refers.[27] The First District reported the earliest decision to do so, *People v. Baker.*[28] In *Baker*, the defendant, relying on *Bruen*, raised an as-applied challenge to his UUWF conviction under the Second Amendment.[29] According to the court, "[T]he problem with defendant's

16. *Id.* at 27.
17. *Id.* at 28-30.
18. *Id.* at 29.
19. *E.g., People v. Brooks*, 2023 IL App (1st) 200435 (challenge to a felon-dispossession statute).
20. *Sinnissippi Rod & Gun Club, Inc. v. Raoul*, 2024 IL App (3d) 210073 (challenge to the law banning open carry).
21. *People v. Smith*, 2024 IL App (1st) 221455 (challenge to statute banning the sale, manufacture, purchase, possession, and carriage of short-barreled firearms); *Wilson v. Kelly*, 2024 IL App (5th) 230382-U (challenge to statue banning manufacture, sale, or delivery of less-costly firearms made of alloys).
22. 720 ILCS 5/24-1.1(a) (West 2022). A first violation of this section is a Class 3 felony but is punishable by 2 to 10 years' imprisonment, as opposed to 2- to 5-year range generally applicable to Class 3 felonies. Compare *id.* § 24-1.1(e) with 730 ILCS 5/5-4.5-40 (West 2022).
23. 720 ILCS 5/24-1.1(a) (West 2022); 430 ILCS 65/10 (West 2022).
24. 720 ILCS 5/24-1.7(a) (West 2022). Those offenses include forcible felonies as defined by section 2-8 of the Code, other felonies involving the use of weapons, and drug offenses that are punishable as Class 3 or higher felonies.
25. *Id.* § 24-1.7(b) (a violation is a Class X felony); see 730 ILCS 5/5-4.5-25 (Class X felonies are punishable by 6 to 30 years' imprisonment and are nonprobationable).
26. See, *e.g., People v. Baker*, 2023 IL App (1st) 220328; *People v. Morales*, 2024 IL App (3d) 230433-U.
27. See, e.g., *People v. Martinez*, 2024 IL App (2d) 230305-U, ¶ 27.
28. *Baker*, 2023 IL App (1st) 220328 (heard by the Sixth Division).
29. *Id.* ¶¶ 33-35, 37.

> **"A majority of the appellate panels have avoided a historical analysis, instead ending at Bruen's first step by concluding that felons are not part of "the People" to whom the second amendment refers.**

argument [was] that *Bruen* just does not apply to him."[30] The court emphasized that *Bruen* had limited its holding to "law-abiding citizens," and thus, its new analytical framework applied only to laws regulating possession by such citizens.[31] Further, the justices in the majority in *Bruen* had repeated the phrase "law-abiding" 18 times.[32] In Justice Kavanaugh's concurrence, joined by Chief Justice Roberts, he quoted directly from the opinion in *Heller,* explaining that the Court's decision in that case "should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." [33] The court concluded, "[b]ased on the plain, clear, and repeated language of the justices in the majority, the defendant is simply outside the box drawn by *Bruen*."[34]

The Fourth District followed suit. In *People v. Boyce*, the defendant raised a facial challenge to the UUWF statute.[35] In its discussion of the Second Amendment claim, the court adopted *Baker*'s reasoning in finding *Bruen* did not apply to the defendant.[36] In doing so, the court rejected the defendant's suggestion that analyzing the question in such a manner places too much weight on the *Bruen* Court's use of the phrase "law-abiding."[37] Rather, the Court's use of the phrase in *Bruen* "support[ed] the validity of [the] dictum in *Heller*."[38]

The vast majority of appellate decisions have similarly analyzed these challenges.[39]

30. *Id.* ¶ 37.
31. *Id.*
32. *Id.*
33. *Id.* (quoting *Bruen*, 597 U.S. at 81 (Kavanaugh, J., concurring, joined by Robert, C.J.) (quoting *Heller*, 554 U.S. at 626-27)).
34. *Id.*
35. *People v. Boyce*, 2023 IL App (4th) 221113-U, ¶ 3. The authors note *Boyce* is a nonprecedential Rule 23 order, but the Fourth District has since published two opinions following the analysis of *Boyce. See People v. Burns*, 2024 IL App (4th) 230428; *People v. Gardner*, 2024 IL App (4th) 230443.
36. *Id.* ¶¶ 14-16.
37. *Id.* ¶ 15.
38. *Id.*
39. *People v. Robinson*, 2023 IL App (1st) 220959-U (heard by the First Division); *People v. Muhammad*, 2023 IL App (1st) 230121-U (heard by the Second Division); *People v. Mobley*, 2023 IL App (1st) 221264 (heard by the Sixth Division); *People v. Langston*, 2023 IL App (4th) 230162-U; *People v. Leonard*, 2024 IL App (4th) 230413-U; *People v. Echols*, 2024 IL App (2d) 220281-U; *People v. Gross*, 2024 IL App (2d) 230017-U; *Burns*, 2024 IL App (4th) 230428; *People v. Box*, 2024 IL App (4th) 230649-U; *People v. Kelley*, 2024 IL App (1st) 230569 (heard by the Third Division); *People v. Wright*, 2024 IL App (1st) 230428-U (heard by the First Division); *People v. Carldwell*, 2024 IL App (1st) 230968-U (heard by the First Division); *People v. Davidson*, 2024 IL App (4th) 230398-U; *People v. Gilbert*, 2024 IL App (4th) 231164-U; *Gardner*, 2024 IL App (4th) 230443; *People v. McNeal*, 2024 IL App (1st) 231051-U (heard by the First Division); *People v. Thomas*, 2024 IL App (4th) 240315-U; *People v. Whitehead*, 2024 IL App (1st) 231008-U (heard by the Second Division); *People v. Martinez*, 2024 IL App (2d) 230305-U; *People v. Avery*, 2024 IL App (1st) 230606-U (heard by the Fifth Division).

The Minority View: History Justifies Disarming Felons
Some panels have disagreed with the majority view. The first such decision was *People v. Brooks*, decided by the First Division of the First District.[40] In *Brooks*, the defendant asserted the AHC statute violated the Second Amendment as applied to him, where his AHC conviction was predicated on two nonviolent felony convictions.[41] At *Bruen*'s first step, the State argued the Second Amendment's text did not cover the conduct at issue because the defendant possessed the firearm in connection with the sale or use of drugs.[42] The court rejected this argument, finding the relevant conduct, based on the AHC statute's text, was the defendant's mere *possession* of a firearm.[43] Thus, the court explained, answering whether the defendant's conduct fell under the Second Amendment's "keep and bear" language, understood as possession, was a simple "yes."[44] In addition, the court rejected the State's argument that the Second Amendment did not protect the defendant because, as a convicted felon, he was not a law-abiding citizen.[45] The court found the State's argument "incorrectly conflate[d] *Bruen*'s first step with its second," because *Bruen*'s first step "does not contemplate the actor or the subject."[46] The court explained the defendant's status as a felon is relevant at *Bruen*'s second step, not its first.[47]

Thus, the court engaged in historical analysis, finding there existed relevantly similar historical justifications for felon disposition statutes.[48] Specifically, the court pointed to colonial laws that disarmed Native Americans and other minority groups like Catholics in Maryland and Pennsylvania, which were based on the thought that "they could not be trusted to obey the law."[49] Additionally, the court found support in founding-era criminal punishments, under which legislatures prescribed death and forfeiture of a person's entire estate for violent and even nonviolent offenses.[50] The court wrote, "As this survey reflects, there is a historical tradition of legislatures exercising their discretion to impose status-based restrictions disarming entire categories of persons who, based on their past conduct, were presumed unwilling to obey the law."[51] Further, the court found its conclusion was bolstered by *Heller* and *Bruen*, which emphasized that the persons involved there were law-abiding citizens.[52]

The Third District followed suit in *People v. Travis*.[53] In *Travis*, the court rejected the defendant's facial and as-applied challenges to both the UUWF and AHC statutes. The court noted the split between *Baker* and *Brooks* and adopted the reasoning of *Brooks*.[54] Turning to *Bruen*'s second step, the court—like the court in *Brooks*—determined the United States nation had a historical tradition of regulating firearm possession by those viewed as dangerous or unwilling to obey the law.[55] Some other decisions have ascribed to *Brooks*, but it is decidedly the minority view.[56]

A Third (Now-Extinct) Approach
In its first decision on the subject, the Second District took a third approach to these challenges.[57] In *Smith*, the defendant raised an as-applied challenge to the AHC statute. At *Bruen*'s first step, the court noted *Baker* and its holding that *Bruen* "just does not apply to [felons]."[58] However, the court did not commit to *Baker*'s reasoning.[59] Instead, the court assumed the defendant's conduct was covered by the Second

40. *People v. Brooks*, 2023 IL App (1st) 200435 (heard by the First Division).
41. *Id.* ¶ 55.
42. *Id.* ¶ 84.
43. *Id.* ¶¶ 85-86.
44. *Id.* ¶ 86.
45. *Id.* ¶¶ 88-89.
46. *Id.* ¶ 89.
47. *Id.*
48. *Id.* ¶¶ 90-105.
49. *Id.* ¶ 94.
50. *Id.* ¶ 96.
51. (Internal quotation marks omitted.) *Id.* ¶ 97.
52. *Id.* ¶ 99.
53. *People v. Travis*, 2024 IL App (3d) 230113.
54. *Id.* ¶ 26.
55. *Id.* ¶¶ 27-33.
56. *People v. Sherrod*, 2024 IL App (3d) 230275-U; *People v. Linzy*, 2024 IL App (1st) 221921-U (heard by the Third Division); *People v. Morales*, 2024 IL App (3d) 230433-U; *People v. Miller*, 2024 IL App (3d) 230377-U; see also *Kelley*, 2024 IL App (1st) 230569, ¶ 34 (Reyes, J., specially concurring) (finding the *Baker* approach "concern[ing]" and not necessarily faithful to *Bruen*).
57. *People v. Smith*, 2023 IL App (2d) 220340-U.
58. *Id.* ¶ 56 (quoting *Baker*, 2023 IL App (1st) 220328, ¶ 37).
59. *Id.* ¶¶ 56-57 (In these paragraphs, the court uses noncommittal language, such as, "It is here that, if we follow [*Baker*], defendant's constitutional claim fails"; "Accordingly, *** *Bruen* may reflect that 'the people' referred to in the second amendment are 'law-abiding citizens"; and "*If so,* *** [defendant] is not a 'law-abiding' citizen afforded the same second amendment protections enjoyed by 'the people' referenced in the second amendment." (Emphases added.)).

Amendment's text and moved to *Bruen*'s second step.[60] At *Bruen*'s second step, the court preliminarily found the nonviolent nature of the defendant's qualifying convictions was irrelevant, as the Supreme Court had not qualified its use of the term "felons" in *Heller* and *McDonald*.[61] The court then set forth a truncated historical analysis, stating its agreement with federal and state decisions that had found "the country's historical tradition of firearm regulation included excluding felons from possessing firearms."[62]

Though not every one of its justices has weighed in, the Second District has since more clearly committed to the majority view, that is, a *Baker*-and-*Boyce*-type analysis.[63] Nevertheless, the court in each of those cases hedged, noting their agreement with the historical analysis of *Baker*, *Travis*, and several federal decisions.[64]

Which Approach is Soundest?

Each of the *Bruen* challenges to Illinois felon-dispossession statutes has reached the same fate in the appellate court: the statutes do not violate the Second Amendment. And while what matters most is that conclusion, the appellate court has dealt with these challenges in different ways. This begs the question of which approach is the soundest.

The majority approach to this question has appeal. First, it is a clean, simple way to reject these challenges. It does not require an acute understanding of the nation's historical tradition of firearm regulation. Moreover, this approach is backed by the Supreme Court's own words. However, the majority approach can be fairly criticized. First, as the court in *Brooks* explained, the approach may conflate *Bruen*'s first and second steps.[65] *Bruen*'s first step is concerned with conduct. In all of these cases, the defendant is charged with a possessory offense, and at its core, the Second Amendment protects firearm possession. In addition, the majority approach rests largely on *dicta*.

At face value, *Brooks* and *Travis* appear to be more faithful to *Bruen*, in that they do not bypass the text-and-history test set forth by the Court.[66] And their approach does not attempt to define the precise meaning and scope of "law-abiding."[67] But *Brooks* and *Travis* cannot avoid criticism, either. First, they are true outliers, and the weight of authority in Illinois suggests they got it wrong. Second, *Brooks* and *Travis* may not give enough weight to the Supreme Court's *dicta* in *Heller*, *McDonald*, and *Bruen*.[68] The Illinois Supreme Court has written that judicial *dicta* "is entitled to much weight, and should be followed unless found to be erroneous," and "[e]ven *obiter dictum* from a court of last resort can be tantamount to a decision and therefore binding."[69] Moreover, as one panel has recognized, *Brooks*'s textual analysis may be flawed in that the conduct at issue in these cases is not merely firearm possession, it is firearm possession *by a felon*.[70]

Conclusion

Bruen has burdened the Illinois appellate court with challenges to several state statutes regulating firearms. The Illinois Supreme Court has received petitions for leave to appeal in most if not all of the cases challenging the felon-dispossession statutes, but it has yet to grant one.[71] Of course, the analytical paths discussed in this article will not matter if the supreme court upholds felon-dispossession statutes, regardless of the path taken. But it will provide one side of the debate with bragging rights, and who does not want those? ☐

60. *Id.* ¶ 58.
61. *Id.* ¶ 59.
62. *Id.* (citing *Awkerman v. Illinois State Police*, 2023 IL App (2d) 220434, ¶ 52; *United States v. Jackson*, 69 F. 4th 495 (8th Cir. 2023); *United States v. Rahimi*, 61 F. 4th 443 (5th Cir. 2023); *Brooks*, 2023 IL App (1st) 200435).
63. *Echols*, 2024 IL App (2d) 220281-U; *Gross*, 2024 IL App (2d) 230017-U; *Martinez*, 2024 IL App (2d) 230305-U. The authors note the justice who authored *Smith* and one of her concurring justices later concurred in orders which followed *Baker*. In each of those cases, the court hedged and stated the laws had also been upheld at *Bruen*'s second step.
64. *Echols*, 2024 IL App (2d) 220281-U, ¶¶ 152-158; *Gross*, 2024 IL App (2d) 230017-U, ¶¶ 23-29; *Martinez*, 2024 IL App (2d) 230305-U, ¶¶ 27-49.
65. *Brooks*, 2023 IL App (1st) 200435, ¶ 89.
66. *Kelley*, 2024 IL App (1st) 230569, ¶ 34 (Reyes, J., specially concurring).
67. *Id.*
68. *See, e.g., People v. Aguilar*, 408 Ill. App. 3d 136,152 (Neville, J., dissenting) ("The majority here gives short shrift to the *Heller* Court's analysis, treating all but its final holding, concerning a statute that banned handgun possession in the home, as *dicta*. But, as our supreme court [has] explained ***, judicial *dicta* should usually carry dispositive weight in an inferior court.").
69. *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993); see also *People v. Williams*, 204 Ill. 2d 191, 206-07 (2003).
70. *Muhammad*, 2023 IL App (1st) 230121-U, ¶ 22; 720 ILCS 5/24-1.1(a) (proscribing possession of a firearm or firearm ammunition by someone who has been convicted of a felony); *Id.* § 24-1.7(a) (proscribing firearm possession by someone who has two or more qualifying felony convictions).
71. The authors caution that this article was completed before the supreme court announced its petition for leave to appeal dispositions for its September term.

March on the Courtroom Part II: The Question of Identity and Its Influence on African American Lawyers

By Kevin Perteet Boens

See *DCBA Brief* September/October issue for March on the Courtroom Part I: Background on African American Lawyers and the Question of Identity.

Although Part I of this series[1] discussed a few accounts of trailblazers in the fight for equality in the courtroom, there is an inherent theme that arises from each of their stories. There is a need to analyze the question of identity, asking ourselves: Who were you raised to be? What were you raised to believe? How have you learned to think? How would that perception aid your efforts while interpreting the law? With Congress abolishing slavery in 1865, the social climate by the early 1890s had still not adjusted to the notion that all people, regardless of race, were supposed to be made equal, thus creating an economic divide.

Due to this, many African Americans were born into families who by today's terms would be considered poor or lower working class. Where, if a family had more than one child, there was a significant notion that they would struggle to provide for the basic needs of the entire household. However, African Americans during this period were determined to gain a living. They would work at jobs where they endured slanderous remarks, where they were treated worse than their counterparts, even being paid less, but a common consensus amongst black families was their hope for their youth.

Many African Americans dealt with the pushback to their integration into the workforce, education system, and voting rights. Jim Crow laws and systematic segregation were at the forefront of African American reality. While trying to bridge the gap in the literacy epidemic amongst African Americans, there was open hatred from their Caucasian counterparts who believed African Americans were taking their cities, properties, and land—so much so, that many cities in the Midwest and South, to keep African Americans from getting jobs or being able to

1. Kevin Perteet Boens, March on the Courtroom Part I: Background on African American Lawyers and the Question of Identity, 37 DCBABR, 30 (2024)

send their children to school with other Caucasian kids, actively participated in drives.[2] These drives were enforced amongst many communities as informal "Sundown town laws," which meant that African Americans could not be caught in town after dark or else they would risk lynching, rape, etc.

This proved more disparaging for African Americans because during this time the only jobs that their education, or lack thereof, allowed them to have were sharecropping, bar stewards, housemaids, or other remedial work positions that required little academics. These positions were often not morning positions and business owners or patrons frequently held up the workers long after the sun had set.[3] These conditions did not give African Americans many options to integrate into society as equal to Caucasian men and were much harder for African American women than African American men. However, being that many of the African Americans at this time were not far removed from slavery, they held a strong sense of community and what they could do amongst themselves to make their situations bearable.

African American communities had to create a parallel country within the United States to draw African Americans inward and create communities that existed outside but alongside the Caucasian community. W. E. B. Du Bois called the creation of these parallel communities "living behind the veil."[4] In these towns, African Americans began to mimic Caucasian societies and started their churches, social clubs, and fraternal organizations.[5] Though ostracized for their skin color, African Americans started to believe that they would have to help themselves before the law would stand by their side again.

In 1896, the National Association of Colored Women (NACW) with its founding members: Ida B. Wells, Harriet Tubman, and May Murray Washington (Booker T. Washington's wife) presented its motto "Lifting as we climb" as a declaration of their belief in the African American woman's ability to effect change in their communities.[6] This 300-member organization would raise funds and sponsor kindergartens, vocational schools, summer camps, and homes for the elderly. After a decade, they were sponsoring cultural events, including poetry readings, and campaigned for the right of black men and women to vote. The organization even supported the women's suffrage movement two years before the General Federation of Women's Clubs, an organization for white women.

Although there were many efforts by African American communities to provide themselves with equal opportunity, they still vastly lacked resources and support. Though being successful in securing spaces to cultivate learning and work, there were few African Americans qualified to teach. Seeing the struggle of the African American community, W. E. B. Du Bois wrote, "Theoretically, the Negro needs neither segregated schools nor mixed schools. What he needs is Education." He concluded, however, that "either he will have separate schools, or he will not be educated."[7]

The Role of Religion on Identity

During the 1890s, many African American families got their sense of identity from their prospective religions. Long-standing as a tool for African Americans, religion was used as a tool to mold behaviors and to determine right or wrong. The teachings of religion in the African American community fostered bonds amongst which many groups began to create their own smaller communities. Though the base was Christianity, many of these groups had varying levels of belief. This divergence of a centralized religion was one of the steppingstones on which African Americans took to find their footing in the evolving social economic climate.

At this time, many activists practiced varying religions. This aspect of a separation of beliefs caused many groups to see

2. Charles Ogletree, Jr., All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education, 66 Mont. L. Rev. (2005).
3. Anthony Appiah and Henry Louis, Africana: The Encyclopedia of the African and African American Experience, Oxford University Press (2005).
4. Ogletree, *supra* note 1, at 67.
5. *Id.* at 68.
6. *Id.* at 69.
7. Herbert Aptheker and W.E.B. Du Bois, The Correspondence of W. E. B. Du Bois, (1976), https://www.jstor.org/Stable/367788.

About the Author

Kevin Boens III is a 3L at Northern Illinois University College of Law. He is Chicago born and raised and has wanted to be a lawyer since he was four years old. He is now at the threshold of that goal and looks forward to being a licensed attorney shortly. His current focus is corporate law, but he is always interested in pursuing the questions that can't be answered binomially.

change, laws, and justice in different ways, but ultimately these groups were fighting for the same cause. Activist Loren Miller attributes his early beliefs to his religion and upbringing.[8] Growing up on an Indian reservation, there was a strong sense of community and interdependence to achieve the goals that benefitted everyone.[9] However, when of age, Miller did not see the United States fostering religion in that it separated church and state and thus the cultural norms to which he had grown accustomed were no longer prevalent.[10] He realized quickly that there was no uniformity and that his neighbor was not his friend just for the sake of proximity and because neighborliness was a custom.

This was the fostering ground for Miller's communist views.[11] Being that he had seen a community that did not operate based on what a person looked like but on what they could contribute.[12] Miller detested the U.S. and believed communism, alongside a unified belief system, would unite the U.S.[13] Though this view changed as Miller got involved in the civil rights fight, it must be noted that his thoughts stemmed from the fact (1) there was no sense of community working towards a goal and (2) there was no belief system in which to guide the behaviors of individuals.[14] Considering these factors, it is paramount to see that the congregation of civil rights created an identity working towards enforcement of the law so that African Americans received equal treatment in and outside the courtroom.

Although religion was prominent in the African American community, some individuals did not take to the spiritual upbringing as much as others, such as Thurgood Marshall. Though for most of his life, he was known to follow the teaching of Episcopalians, Marshall says that religion played an ounce in who he was because his mother made sure that he had a thorough knowledge of their religion, but he was raised to be a thinker and always challenged to go beyond the surface level of thought. Marshall, being raised with a mother who was a teacher and father who was a rail porter and steward at an all-white country club, said there was never a moment that lacked information.[15]

Marshall recalled the many nights sitting and debating politics, news, or even the decisions of cases in which he and his father would watch at the courthouse. He recalled they would go on for hours about the world's events, and his father would never let him make a statement without shooting it down or arguing about it until neither of them could go any longer. The discussion of politics was also a very prevalent marquee of the African American community. They would gather at bars or public spaces, where they were allowed and listen to the radio and discuss thoughts on world events, sports, and the changing political climate. Another prevalent source of information that African Americans believed they needed was the newspaper. [16]

Between the 1915 and 1920s, more African Americans placed value on literacy and having a general education. During this social economics era, many African Americans were starting to push the envelope when it came to rights, culture, and representation. A large part of that was due to the "new age negro movement" which was held in response to the NAACP starting to make headway in its social reforms after its creation in 1909.[17] The newspaper was the way that African Americans were made aware of the rights and liberties that they were deprived of. A section of the newspaper was dedicated to scholars of the African American community explaining in "layman's terms" what the laws were and how they were supposed to be enacted upon the people.[18] Though this method did not have the effect that was perceived to have. The African American

8. Kenneth W. Mack, Representing the Race: The Creation of the Civil Rights Lawyer, Harvard University Press, (2014) at 33:26, audiobooks.com.
9. *Id.* at 34:47.
10. *Id.* at 37:14.
11. *Id.* at 35:13.
12. *Id.* at 36:40.
13. *Id.*
14. *Id.* at 37:00.

15. Juan Williams, Thurgood Marshall: American Revolutionary, Crown, (2000).
16. *Id.* at 23.
17. Ogletree, *supra* note 1, at 82.
18. *Id.* at 82.

“With many battles being forged and won before, Marshall was intending to make a big move to solidify the rights and privileges of all Americans regardless of skin color.

community grew resentful and angered when faced with the truth of the land. It was stated that “ignorance of what was against us, had its type of liberating effect, but to understand the distance between man based on the color of his skin brings daunting and disparaging thoughts for advancement and change.[19]

Du Bois noted that his attempt in conjunction with this editorial was to continue empowering and pushing African Americans forward and bridging the literacy gap between the two estranged cultures.[20] The articles in The Crisis, which Du Bois produced, were “descended from Frederick Douglass's North Star, William Garrison's Liberator, and Samuel Eli Cornish and John Russwurm's Freedom Journal, the first newspaper in North America published by an African American.”[21] Although the initial perception did not serve the intended purpose, the African American press grew wildly in the proceeding years before and after the Civil War. Alongside the radio, it became the hub of information for the growing African American communities.

Looking back to Thurgood's youth, he recalled the conversations of politics that the men would have in the shop in which he worked in his young teen years. He said their points of view were always different and distinct from his own, but he dared not say anything, however, he would have riveting discussions with his father about the same subjects.[22] This was the birth of his fascination with being able to affect the law because he believed “the ability to shape the perspective of one's thoughts, was the power needed to make people equal.”[23]

Beginnings of the Battle for Equality in the Courtroom

Though there was a bunch of social change going on within the African American communities themselves, there was still the overarching stigma of segregation that burdened African

19. Charlotte O'Kelly, Black Newspapers and the Black Protest Movement: Their Historical Relationship, 1827-1945, Phylon , vol. 43, no. 1, 1982, p. 1, https://doi.org/10.2307/274595.
20. Ogletree, *supra* note 1, at 84.
21. Ogletree, *supra* note 1, at 85.
22. Williams, *supra* note 13, at 34.
23. Mack, *supra* note 7, at 03:01:34.

Americans. In a social climate where they were seen as separate but equal, if change was to happen, it would have to come from laws being made to prohibit blatant discrimination against a race of people. During this time, however, many African Americans believed the fight too large for individuals to take on and knew that if change was to happen the very government that allowed state-issued oppressions would have to enact laws to get rid of them. This was the task in which the NAACP sought to fight by using the existing laws to manipulate change.

In the 1930s, the NAACP took up the battle for equality in the courtroom. They hired Nathan Margold to create a plan for systematically undermining segregation. He decided it would be prevalent to attack the school systems first.[24] However, Charles Houston, thought this undertaking had to be done "incrementally, step by step, to show there was widespread inequality through a series of legal decrees to build the groundwork leading to the fight against segregation in schools."[25] Houston planned to show that the "separate but equal" framework which was outlined in *Plessy v. Ferguson* was not being upheld in the Southern states.

Houston and Marshall, using a report commissioned by the Garland Fund, traveled to the South and conducted investigations on the living conditions of African Americans and studied the education systems.[26] After the investigation, the duo started a series of litigation starting with *Murray v. Pearson*[27] where a "legal order stipulating that a black person was entitled to admission to the University of Maryland Law School because he couldn't otherwise get an equal legal education in the state, and it wasn't feasible to create a whole new law school for blacks."[28]

It was acknowledged that this was the first on their journey because it was the university where Thurgood himself got denied access based solely on the color of his skin. Thurgood remarks that decision as "The start of the new age . . . being that just 4 years prior they didn't even look me in my eye to deny me."[29]

The next case they took on was *Gaines v. Canada,*[30] where the U.S. Supreme Court ordered the University of Missouri to admit African American students or to create a university for black students. Houston was enacting his plan to use benchmark cases to show that southern schools were not creating or providing equal opportunities for African Americans.

Furthermore, there was a notion that not only were the universities not admitting these students, but the southern schools were depriving African Americans of resources in education and other fields. Thus, the range of Huston's suits broadened into the electoral system, the criminal justice system, housing, and employment. Another of Houston's concerns was for the equality of African Americans in the workforce, due to labor unions refusing to represent African Americans. In *Steele v. Louisville & Nashville Railroad Co.,* [31] the Supreme Court held it was unlawful for a union to refuse to represent black workers; unions had a duty to represent all workers.

Houston, for the next decade, with the help of other black attorneys took on many other cases in which to fight the principle of segregation. He was determined to show that by the government's law, their" sinister child would fall before their feet."[32] It was this conquest that Thurgood Marshall saw and learned to use the system that was already in place, to create a reality that matched the words that the system was supposed to implore.

It was the conglomeration of all these events which fueled the fire for a major change. The nation was shifting, and African Americans and Caucasian Americans were at a turning point. With many battles being forged and won before, Marshall intended to make a big move to solidify the rights and privileges of all Americans regardless of skin color. In continuing his mentor's quest for justice and equality for African Americans in education, Thurgood Marshall inherited Houston's conquest and task that the NAACP was trying to carry out. Marshall knew that he had to attack on multiple fronts, considering all the recent headway being made with the smaller suits and

24. Harvard, and Law Today, *Tomiko Brown-Nagin on the Civil Rights Lawyer Who Paved the Path.* Harvard Law School, May 17, 2018, hls.harvard.edu/today/tomiko-brown-nagin-civil-rights-lawyer-paved-path/.
25. *Id.*
26. *Id.*
27. *Pearson v. Murray*, 169 Md. 478 (1936).
28. Harvard, and Law Today, *supra* note 22.
29. Williams, *supra* note 13, at 58.
30. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).
31. *Steele v. Louisville & N. R. Co.,* 323 U.S. 192 (1944).
32. Rawn James, Root and Branch, Bloomsbury Publishing USA (2010) at 01:05:02.

Supreme Court rulings forcing southern schools to admit African American students or create schools or programs in which they could attend under the merit of the school. Marshall and the NAACP knew that they may have been able to change schools, but there was a bigger issue that plagued the African American community.

Though there was a subtle push for equality after *Plessy v. Furgeson*, Marshall took on the Supreme Court once again after the University of Texas Law School, instead of admitting African Americans to their institution, created a new institution called Texas State University for Negroes, which was a three-room institution in the basement of the state capitol building. Marshall's plight with this "nominal expression of equality, is that the university only had one enrolled student in the law program, on top of replacing the high school for black students with dilapidated barracks that had just housed German soldiers."[33] With these two instances being prevalent in the news at the time, Marshall got involved and wrote a letter to the media company and once again petitioned the Supreme Court to enforce their laws. After two cases: *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents for Higher Education*, Marshall had set the stage to show that Separate could never be Equal.[34]

The Five Pivotal Court Cases on Segregation

Many attribute *Brown v. Board of Education* in 1954 to be the pivotal case that ended the legality of segregation in schools in America. However, *Brown v. Board* was but one of five cases in which the Supreme Court considered before rendering judgment on segregation. The first of the five was *Belton v. Gebhart* (*Bulah v. Gebhart*)[35] where African American parents petitioned the Delaware Department of Public Instruction for transportation by school bus for their children. They made note that the buses passed their homes twice a day and did not stop to pick up their kids. The case was heard before the Delaware Court of Chancery, rather than the U.S. District Court. The chancellor ruled that the plaintiffs were being denied equal protection of the law and ordered the children to be immediately admitted to the white school. However, the board of education appealed the decision, making the Delaware case the only case of the five that achieved relief for the plaintiffs at the state level.

The second of the five cases was *Brown v. Board of Education*,[36] where African American families in Topeka, Kansas were denied admission into white schools. The parents filed suit against the Topeka Board of Education since the denial forced the children into designated schools for African Americans, which were often miles away from their homes. The U.S. District Court ruled against the plaintiffs but placed in the record its acceptance of the psychological evidence that African American children were adversely affected by segregation. This decision was later overturned by the U.S. Supreme Court and those findings were quoted in its 1954 opinion.

The third of the five cases was *Bolling v. Sharpe*,[37] where Gardner Bishop and the Consolidated Parents Group, Inc. attempted to get African American students admitted to the newly completed John Philip Sousa Junior High School, but all were denied based on their skin color. The case was decided by the U.S. District Court, which dismissed the case based on a recent ruling by the Court of Appeals in *Carr v. Corning* that held "segregated schools were constitutional in the District of Columbia."[38]

The fourth of the five cases was *Briggs v. Elliott*,[39] where parents filed suit against R.W. Elliott, in his capacity as the president of the school board for Clarendon County, South Carolina. The suit arose because parents asked for the county to provide school buses for the black students as they did for whites, but the requests were ignored numerous times. This led the parents to sue the school board challenging segregation itself. This case was brought before a three-judge panel at the U.S. District Court. Where after being presented with substantial psychological evidence and expert testimony on African American school conditions, in a 2-1 vote, they denied the plaintiffs' request to abolish school segregation. However, they ordered

33. Sherrilyn Ifill, *How Thurgood Marshall Paved the Road to "Brown v. Board of Education,* Smithsonian Magazine, Mar. 10, 2021, www.smithsonianmag.com/history/how-thurgood-marshall-paved-road-brown-v-board-education-180977197/.
34. Tarlton Law Library, *The Papers of Justice Tom C. Clark: Sweatt v. Painter*, Utexas.edu, 2016, tarlton.law.utexas.edu/clark/sweatt-v-painter.
35. *Gebhart v. Belton*, 91 A.2d 137 (1952).
36. *Brown v. Board of Educ.,* 98 F. Supp. 797 (1951).
37. *Bolling v. Sharpe*, 347 U.S. 497 (1952).
38. *Carr v. Corning*, 182 F.2d 14 (1950).
39. *Briggs v. Elliott*, 132 F. Supp. 776 (1955).

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the school board to begin equalization of the schools. Judge Julius Waring delivered his dissenting opinion where he adamantly opposed segregation in public education.

The fifth of the five cases was *Davis v. County School Board*,[40] where African American students from Moton High School participated in a two-week protest. The strike's purpose was to bring notice to the school's deplorable conditions and how they were averse to their equal educational opportunities. The school had no gym, cafeteria, infirmary, or teachers' restrooms, and the overflow of students was housed in an old school bus and three buildings covered in tar paper. Many parents petitioned the school board for improvements to no avail. This case was brought before a three-judge panel at the U.S. District Court, which unanimously rejected the students' request stating, "[w]e have found no hurt or harm to either race." The court ordered the school board to proceed with plans to equalize the African American students' schools. This ruling was later overturned by the Supreme Court, which ordered that the schools be desegregated. This was not perceived well by Caucasian Virginians, so much so that the board of supervisors for Prince Edward County refused to fund the County School Board from 1959-1964, effectively closing the public schools rather than integrating them.

It was these five cases that were before the Supreme Court when deciding the fate of their previous "separate but equal ruling." Marshall, knowing the holdings of these districts and appeal cases seeking certiorari before the Supreme Court, decided to take a page from his mentor's book. Marshall anticipated the odds being against him in the Supreme Court overturning *Plessy v. Furgerson*, so he found it important to "work" his opposing council before they went before the Justices.[41] Despite the displeasure of his legal team, the advice of other NAACP members, and the social norm at the time, Marshall invited John W. Davis, an avid segregationist, to lunch where Marshall got to see Davis's perception and show Davis his own.[42]

During this meeting, Marshall asked Davis about his life, ambitions, and why he became a lawyer in the first place. He made sure if ever the case came up, he would change the subject and ask Davis more personal questions or interject with stories of his own. By the time lunch was finished, the conversation had been 3.5 hours and Marshall said he had accomplished his goal even if he had lost the case.[43] By doing this, Marshall was using his position as a lawyer to force Davis to interact with him as a man on equal footing, something which Davis would have never done. In Davis's biography, it was stated after the case that Davis had no clue why Marshall asked him to lunch, but he went because he thought Marshall would use it in arguments that we aren't equal if counsels can't even share a meal.[44]

Marshall, upon an interview after winning the decision stated, "The perception of man is the key to change. If you can change a man's perspective, you can create a new reality for him."[45] Kenneth Mack notes that Marshall "learning how to interact with white people in his early cases, is a thing that black people didn't get to do, and how to do it in a place that was special in an era of segregation, the courtroom."[46] Though many of the accounts are shown, there is a consensus that identity plays a huge role in what it means to be a lawyer, and what it means to be a human. A person, no matter if they are black, white, or orange, is a culmination of their upbringing and the power to shape one's identity through their perspective is a powerful tool. ☐

40. *Davis v. County Sch. Bd.,* 103 F. Supp. 337 (1952).

41. Mack, *supra* note 7, at 3:10:54.
42. *Id.* at 03:11:20.
43. *Id.* at 03:13:22.
44. William Henry Harbaugh, Lawyer's Lawyer; the Life of John W. Davis, Oxford University Press (1973).
45. Williams, *supra* note 13, at 45.
46. Mack, *supra* note 7.

After More Than a Century, the Time for the Equal Rights Amendment is Now

By Maxwell Sharkey

The long-delayed Equal Rights Amendment (ERA) to the United States Constitution, which has been more than a century in the making, is needed now more than ever to protect transgender youths. In 2023 alone, over five hundred anti-transgender bills were introduced in state legislatures across the country, many of which jeopardize the gains advocates of transgender rights have made in the half-century since the ERA received congressional approval—even though final ratification of the ERA could secure those gains through the heightened scrutiny that should be applied to laws and regulations aimed at sex- and gender-based classifications.[1]

As the country has moved slowly closer to ratification and adoption of the ERA in recent years, courts continue to struggle with the judicial doctrines applicable to the standard of review applied in gender and sex discrimination cases—something that the ERA could directly address by making sex- and gender-based classification subject to the "strict scrutiny applied to other historically disadvantaged classes such as race as the ERA's advocates suggest.[2] However, without the adoption of the ERA, those laws and regulations remain subject to intermediate scrutiny as a "quasi-suspect" class.

This article will be in two parts, with the first focusing on the history and development of the ERA and standards of review applied to cases involving sex and gender discrimination, including recent approaches taken by the Supreme Court of the United States. The second part, which will appear in an upcoming issue of the *DCBA Brief,* will focus on what defines a suspect class and why before offering a perspective on why the quasi-suspect treatment that has been applied is no longer a workable framework. In particular, the ensuing article will focus on issues involving the regulation of bathroom access and the decision in *Grimm v. Gloucester County School Board*.[3]

Background of the ERA and Recent Developments Relating to Ratification

The ERA is a proposed amendment to the U.S. Constitution rooted in the first women's rights convention, commonly known as the Seneca Falls Convention, held in 1848. By 1923, three years after women gained the right to vote as a result of ideas first advocated in 1848, the momentum toward women's rights resulted in the introduction of the ERA in Congress to ensure not only the right to vote but equality of the law. Despite the gains of the movement by that time, the ERA was perpetually voted down until the women's rights movement of the 1960s and 1970s.[4]

Congress eventually approved the text of the ERA in 1972, finding that:

1. Christy Mallory & Elana Redfield, *The Impact of 2023 Legislation on Transgender Youth,* Williams Inst. UCLA School of Law, 2023, https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Legislation-Summary-Oct-2023.pdf.
2. The ERA Project, *Why do we need the ERA? New Decision from the 6th Circuit Answers the Question,* Columbia Law School, June 1, 2021, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://gender-sexuality.law.columbia.edu/sites/default/files/content/ERA%20Brief%20Vitolo%20v%20Guzman.pdf.
3. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).
4. Jane Mansbridge, *3 Things You Should Know About the History of the Equal Rights Amendment,* Harvard Kennedy School, Nov. 26, 2019, https://www.youtube.com/watch?v=82WoxehH980&t=156s.

> "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[5]

In two simple sentences, the history of discrimination based on sex would have been vastly judicially different. Yet only thirty of the necessary thirty-eight states ratified the ERA by 1973.[6] As the ERA neared ratification, strong opposition emerged from conservative activist Phillis Schlafly in the form of the STOP ERA campaign and her pronounced "parade of horribles." Among the "horrendous" things that Schlafly warned of were gender-neutral bathrooms, same-sex marriage, and women serving in military combat.[7] Despite the Republican Party's initial support for the ERA, the "STOP ERA" campaign successfully stalled the amendment for the next four decades.

The ERA resurfaced again in 2017 when Nevada became the 36th state to ratify the amendment. In 2018, Illinois became the 37th state to ratify. Finally, Virginia became the 38th state in 2020, arguably giving the ERA the votes necessary to be ratified.[8] However, the original congressional approval of ratification of the ERA expired in 1979. The deadline was extended to 1982, and it has been long contended that Congress can extend the deadline or suspend the deadline altogether, although there is no precedent for such congressional action or interpretation. This issue, which has yet to be resolved, is viewed more as a political issue than one requiring judicial intervention.[9] To complicate the status of ERA's ratification adoption, five states have rescinded their ratification despite challenges that Article V of the U.S. Constitution which gives the states the power to ratify a proposed amendment but does not speak to a power to rescind that ratification.[10]

Ultimately, the Supreme Court has deferred to the legislative branch in deciding what it considers a "political issue," leaving Congress to decide whether ratification of the ERA is valid or not. Ideally, with so many potentially discriminatory laws being introduced against transgender individuals, Congress must act sooner rather than later. Certainly, recent opinions from the Court would seem to support the position that discrimination based on sex is not only discrimination based on a suspect class but extends to discrimination against individuals based on their sexual orientation and gender identity.[11] However, as recent years have seen an increasing number of laws and regulations impacting the rights of individuals based on their sexual orientation and gender identity, including the use of public school restrooms and locker rooms, it is unclear whether courts

About the Author

Max Sharkey is a family law attorney with Kuffel Law. He graduated cum laude from NIU Law School in addition to receiving a Graduate Certificate in Women, Gender, and the Law. He is an Edward Diedrich Award winner. Max enjoys writing about the intersectionality of LGBTQ+ studies and the law.

5. Wilfred U. Codrington III and Alex Cohen, *The Equal Rights Amendment Explained*, Brennan Center for Justice, Jan. 23, 2020, https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained (last visited Aug. 8, 2024).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. Kathryn Colohan, et. al, *Ratification Info State by State.* Alice Paul Institute, 2018, https://www.equalrightsamendment.org/era-ratification-map (last visited Aug. 8, 2024).
11. *See e.g.* Bostock v. Clayton County, 590 U.S. 644 (2020) (Title VII of the Civil Rights Act of 1964 protects employees against discrimination because of sexuality or gender identity)

will adopt the more inclusive approach of the ERA by defining sex and gender as suspect classes under existing jurisprudence without the adoption and ratification ERA, although the author believes they should.

Today, without the ERA and absent clear direction from the Court, "sex" or "gender" remain quasi-suspect classes for purposes of reviewing discrimination claims. As a result, laws and regulations giving rise to such claims are reviewed with "intermediate scrutiny," meaning that the law or regulation must further an important government interest by means that are substantially related to that interest. In effect, government entities are required to shoulder a far lighter burden than what would otherwise apply to laws and regulations impacting suspect classes, which require government entities to prove that the challenged law or regulation has a compelling interest and is narrowly tailored to meet that interest.[12]

History of Sex and Gender as a Quasi-Suspect Classes

Even as the ERA was initially awaiting ratification, the Supreme Court first meaningfully considered whether sex-based classifications would violate the Equal Protection Clause in the 1971 case of *Reed v. Reed*.[13] In *Reed*, a mother of a deceased child challenged Idaho law that gave preference in decision-making with respect to the administration of the child's estate.[14] Importantly, the Court recognized gender as a class subject to differing treatment, holding: "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. . . [T]he choice in this context may not lawfully be mandated solely on the basis of sex."[15] This is the first time the phrase "on the basis of sex," most notably linked to the late Justice Ruth Bader Ginsburg, was used by the Court. Despite the later importance of such turn of phrase, the Court did not take a stance in *Reed* on the proper level of scrutiny that should apply to sex discrimination.

The Court first took a stance about what standard should apply to sex discrimination prior to *Craig*, in a case involving the government's different treatment of female versus male members of the military seeking insurance coverage for their spouses, *Frontiero v. Richardson*.[16] Although a plurality of justices in *Frontiero* held the military's benefits policy was unconstitutional, a majority could not agree that sex-based classifications should be subjected to strict scrutiny judicial review.[17] Four justices found that the plaintiff's lawyer, Ruth Bader Ginsburg, had made the compelling argument that sex discrimination classifications should be put to the highest standard, which is strict scrutiny not intermediate or rational basis.[18]

After the *Frontiero* case, the Court in *Craig v. Boren* finally articulated a new standard applicable when a plaintiff complains of sex-based discrimination. *Craig* involved a challenge to an Oklahoma statute that used age and sex to restrict the ability to buy beer. The Court would end up stating that gender classifications require the government to show its law or regulation achieves an important goal and that it is substantially related to achieving that goal. Notably, author Lenora Lapidus explained the reason the Court in *Craig* did not make sex a suspect class is because the ERA had nearly enough support to be ratified at the time and the Court did not want to take a position on the political issue.[19] However, following the

12. *Craig v. Boren*, 429 U.S. 190 (1976).
13. It is important to note that sex and gender are two distinct concepts. Sex referring to a person's biology and gender being an internal view of self. However, for the purposes of this paper since the court references it as sex-discrimination that will be the phrase used, although gender discrimination may be more appropriate in the discussion of transgender individuals.
14. *Id.* at 72.
15. *Id.* at 77.
16. *Frontiero v. Richardson,* 411 U.S. 677 (1973).
17. *Id.* at 691.
18. Lenora Lapidus, *Ruth Bader Ginsburg and the Development of Gender Equality Jurisprudence under the Fourteenth Amendment*, N.Y.U Review of Law & Social Change, Equal Rights Amendment Convening: Vol. 43 (available at https://socialchangenyu.com/wp-content/uploads/2019/06/Lenora-Lapidus_RLSC-The-Harbinger_43.2-1.pdf.
19. *Id.*

“Ultimately, the Supreme Court has deferred to the legislative branch in deciding what it considers a “political issue,” leaving Congress to decide whether ratification of the ERA is valid.

STOP ERA movement, it became clear that this new standard solidified sex or gender as a *quasi-suspect* class, meaning laws based on sex or gender were deserving of more exacting judicial review than the rational basis test but not the heightened bar of strict scrutiny.[20]

Prior to *Craig*, the Court had generally articulated two levels of judicial review for constitutionally suspect laws and regulations—the rational basis test and strict scrutiny. The rational basis test is traced back to the 1876 case of *Munn v. Illinois,* where a Chicago public warehouse was accused of charging excessive rates for the storage and transportation of grain under Illinois law.[21] The Court in *Munn* established the foundation of the rational basis test in denying the warehouse's argument that the excessive rate law constituted a deprivation of property under the Fourteenth Amendment's due process clause, holding that a state must only show circumstances that justify enacting a challenged statute to withstand constitutional scrutiny.[22]

The Court's approach in *Munn* developed over time, leading to the Court's decision in *U.S. v. Carolene Products Company*, in which a milk producer challenged Congress's efforts to ban the interstate shipment of “filled milk” as a violation of its Fifth Amendment due process rights. [23] As in *Munn*, the Court in *Carolene Products* determined that Congress had a rational basis for its regulation of interstate commerce, supported by evidence presented at congressional hearings. [24] In doing so, by footnote, the Court's majority also recognized that legislation restricting some constitutional rights may be subject to more exacting judicial scrutiny than the rational basis test.[25]

20. *Craig v. Boren*, 429 U.S. 190, 218 (1976).
21. *Munn v. Illinois*, 94 U.S. 113 (1876).
22. *Id.* at 132.
23. 304 U.S. 144 (1938)
24. *U.S. v. Carolene Products Company*, 304 U.S. 144 (1938)
25. *Id*, 304 U.S. at n. 4

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At the time the Court was addressing the issues of discrimination like those that arose in *Craig,* the Court continued to apply the rational basis test as it had developed since *Munn*, finding in a case decided in the same year as *Craig* that "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."[26]

However, by the time of deciding *Craig*, the Court had also further clarified the circumstances that would result in more exacting judicial review of laws affecting certain fundamental constitutional rights under the standard that had become known as "strict scrutiny." The Court first applied the strict scrutiny standard, used today, in *Korematsu v. United States* where a Japanese American citizen challenged an executive order that forbade all persons of Japanese ancestry from being in a designated military area.[27] The Court held that because there was a state of "emergency and peril" the government had met the rigid standard to infringe on Korematsu's fundamental rights.[28] To satisfy strict scrutiny, the Court has held that "classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[29]

When sex discrimination cases emerged around the time of *Craig*, the Court created a third standard known as intermediate scrutiny given the extremes between the rational basis test and strict scrutiny.

Conclusion

Given the delay in ratification of the ERA and the introduction of intermediate scrutiny, what has the classification of sex and gender meant for judicial review of potentially discriminatory legislation since?[30] Unfortunately, the Court has not set out a definitive criterion for a quasi-suspect class as it has a suspect class. Nor has it explained why sex and gender should not be subject to heightened scrutiny, even as it has more frequently dealt with matters related to sex and gender, and all the many "classifications" that can be made within such classes.

The next article will address where prevailing standards of judicial review have left us as concepts of gender and sex have evolved since *Frontiero* and *Craig.* In particular, it will review recent cases that suggest that the inevitable conflict between the existing treatment of sex and gender will become increasingly complicated as cultural norms develop while courts, the Constitutions, and other institutions try to catch up after nearly a century of being behind, all of which could be avoided by ratification and adoption of the ERA. ☐

26. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).
27. *Korematsu v. United States,* 323 U.S. 214 (1944).
28. *Id.* at 220.
29. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).
30. Rachel Moran, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 Yale L.J. 912, 916-918 (1981).

Good Exposure: Putting More Thought Into Your Professional Image

By Tyler Michals

With thirty years of experience in the photography industry, Rob Wehmeier knows a thing or two about what a picture is worth. It's been part of a lifelong passion for Rob, who came to appreciate the intricacies of photography at an early age. His brother attended Columbia College to earn a degree in photography, and Rob's father had constructed a dark room for developing photographs in the basement of the family home.

Yet, turning his hobby into a career was not a foregone conclusion. Indeed, while pursuing an undergraduate degree at Valparaiso University, Rob took a photography course as an aside merely because he thought it would be interesting. This choice would prove fortuitous, as his professor quickly noticed Rob's keen eye, and inquired whether Rob had thought of making photography a career.

This nudge set Rob on a professional journey that would take several twists and turns, professionally and personally. After graduating with an individualized degree in photography in 1988, Rob moved to Chicago, where he met his wife, Elise. (For someone steeped in visual photography, it might be ironic that they met as part of a blind date!) The pair left Chicago for the suburbs in 1995, and in 1998 welcomed their first of three children.

The birth of their first child had a profound impact not only on the family but on Rob's career. Early in his career, Rob worked in commercial photography, and abided by a strict rule: "No babies, no weddings." But the proud father couldn't resist taking pictures of his newborn, which helped him warm to the idea of taking portrait photos for families.

Along with his wife, Elise, Rob owns and operates Wehmeier Portraits, which provides a wide variety of photography services to businesses and individuals. Specifically, Rob works with businesses for marketing purposes, editorial work for magazines, portrait work for families and individuals, as well as industrial and stock photography for clients.

A sizeable portion of Rob's business portfolio involves working with law firms that are seeking high-quality portraits of the firm's attorneys. This is done mainly for marketing reasons. Putting a professionally photographed face on the firm's website can yield

tangible benefits. When choosing an attorney, Rob says, potential clients are not just hiring a firm—they're hiring a person.

Rob estimates that more than half of people nowadays decide on which service provider to choose based on web searches, meaning that a successful online presence is crucial for any law firm. This is backed up by available studies, which show that a majority of those seeking legal representation conduct online reviews beforehand.[1] As such, your website has become the virtual "front door" to your business, Rob says. Prospective clients are looking for imagery. They're much more likely to read the words on your page if those words are connected to a professionally photographed face.

Over the years, Rob has observed changes in the way law firms choose to have their attorneys photographed. The legal profession is less stuffy now than in former days. Today, firms do not necessarily abide by old-school notions of what a lawyer "should" look like. Firms are not universally striving for a Rolodex of attorneys clad in identical black suits and ties. Instead, firms are adapting to changing preferences, as they seek to attract top talent.

This, of course, will vary from law firm to law firm. Some firms are opting for more relaxed looks. Rob recommends that firms look online for inspiration in determining what sort of message the firm is trying to convey to the public. Is the firm seeking to present itself as formal, or more casual? Such a decision doesn't just impact who might retain the firm, but who might be interested in joining the firm as an employee. Thus, a firm's decision on how it styles its portraits will not only reflect but can also influence office culture.

A nicely tailored suit may be impressive, but according to Rob, "it doesn't say everything." Instead, firms need to shift their mindset from "How do I look?" to "How do I want to communicate with my ideal client?" A solemn, serious expression may attract one type of client, while a wide smile or cheery grin will attract another. That isn't to say that one tack is better than the other, but only that firms should take such considerations into account.

It isn't just law firms that can benefit. New lawyers, especially, need to consider investing in high-quality portraits that can be used for online profiles, particularly LinkedIn. When seeking

1. Casey Meraz, *How many people read reviews prior to contacting an attorney?*, Juris Digital (Jun. 8, 2023), https://jurisdigital.com/research/how-many-people-read-reviews-prior-to-contacting-an-attorney/

About the Author

Tyler Michals is an assistant corporation counsel in the Federal Civil Rights Litigation Division of the City of Chicago's Law Department. He previously worked as an assistant state's attorney in the Cook County State's Attorney's Office. He is a graduate of Michigan State University College of Law where he graduated cum laude.

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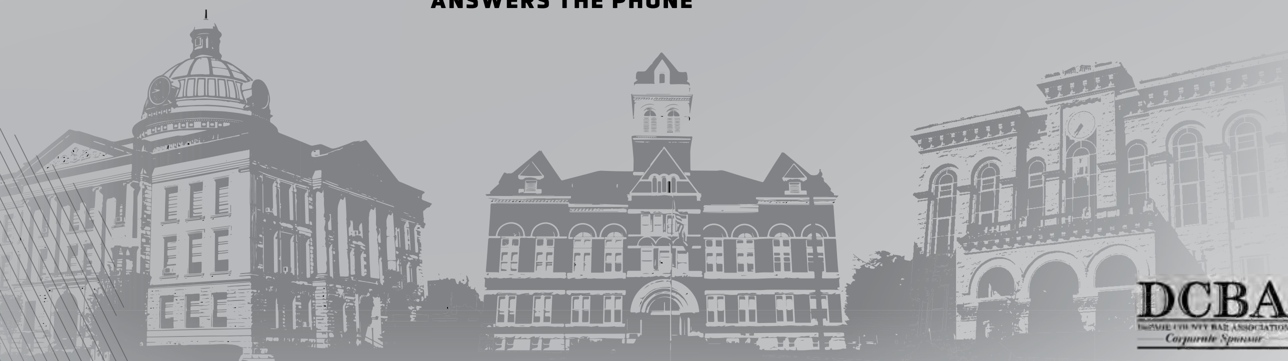

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> **“Firms need to shift their mindset from “How do I look?” to “How do I want to communicate with my ideal client?”**

legal representation, clients often prioritize experience over youthful charm. This makes it important for those fresh out of law school to ensure that their LinkedIn picture is more recent than their high-school yearbook photo.

Even for more seasoned attorneys, having a recent photograph is important. Clients want to know that what they see is what they get. It’s part of building trust within the attorney-client relationship. At an initial meeting, clients don’t want to be surprised to find that the clean-shaven lawyer from the website sports a floor-length beard while in court.

Like the legal profession, portrait photography is also working out how to coexist with emerging technologies.[2] In particular, the rise of artificial intelligence (“AI”) poses unique challenges to the photography business. Rob, however, isn’t worried so much about the risks of AI. Technology is always advancing, he avers, and it is best to work with those advances rather than try to stave off the inevitable.

Still, authenticity remains key, Rob says. Certain things in life require a personal touch. Together, the photographer and the subject can work to craft the ideal image that is then conveyed to the customer or client. In the long run, a high-quality portrait can help to place you, or your law firm, in the best possible light. ☐

2. Sara Merken, ABA taps prominent lawyers to tackle AI risks, opportunities, Reuters (Aug. 28, 2023), https://www.reuters.com/legal/transactional/aba-taps-prominent-lawyers-tackle-ai-risks-opportunities-2023-08-28/; Amanda Hetler, Pros and cons of AI-generated content, TechTarget (Jul. 08, 2024), https://www.techtarget.com/whatis/feature/Pros-and-cons-of-AI-generated-content

Law Update

By Editors Rachel Legorreta and Allison Trendle

Defamatory Letters Published in Illinois Trigger Personal Jurisdiction for Defamation Claim
Brody v. Hoch, 2024 IL App (1st) 231524

In *Brody*, the plaintiff, a Tennessee resident, brought a defamation per se action against two residents of California. The plaintiff alleged that the defendants sent defamatory letters about him to the CEO and current and former partners of his employer, an Illinois financial firm. The letters claimed that the plaintiff, a senior executive, was engaged in money laundering, wire fraud, unlicensed money transmitting, embezzlement, and tax evasion. The defendants moved to dismiss the case for lack of personal jurisdiction, arguing that as nonresidents of Illinois, they did not have minimum contacts with Illinois. The trial court granted the defendant's motion to dismiss, concluding that "the most important question for jurisdictional purposes is where the person or entity who is targeted is based." Because the plaintiff is a Tennessee resident and not an Illinois resident, the trial court stated that "it is not reasonable for Illinois to assert specific jurisdiction over [d]efendants where neither Illinois nor the [p]laintiff has a compelling interest in litigating this case in the state of Illinois and [d]efendan[s] [have] not had sufficient minimum contacts with this state."

On appeal, the appellate court applied the Illinois long-arm statute and found that the defendants submitted themselves to Illinois' jurisdiction when they published the defamation to the plaintiff's employers in Illinois. The court further found that the plaintiff's complaint sufficiently alleged that the defendants purposefully directed their activities toward Illinois when they intentionally sent five defamatory letters about the plaintiff to his employers located in Illinois.

Google Images of a Sidewalk Defect Can Establish Constructive Notice
Heath v. City of Naperville, 2024 IL App (3d) 230663

In *Heath*, the plaintiffs sued the City of Naperville and a homeowner when one of the plaintiffs tripped and fell on an uneven sidewalk in front of the homeowner's home. The plaintiffs alleged the City violated its duty to maintain the sidewalk in a reasonably safe condition by (1) failing to properly maintain the sidewalk so that it became loose, uneven, and broken; (2) failing to mark or warn of the loose, uneven, and broken sidewalk; and (3) failing to have a proper inspection system to notify the City its property was in an unreasonably unsafe condition. In response, the City asserted it was immune from suit under section 3-102(b) of the Local Governmental and Governmental Employees Tort Immunity Act.

During discovery, the City identified that it does not have a "systematic" sidewalk and replacement program, but rather has a program that is driven by requests and complaints from the public. In addition to this program, the City operates road resurfacing programs and tree-trimming and leaf-pick-up programs, in which City inspectors are in the area of city sidewalks and can, and sometimes do, inspect sidewalks for needed repairs.

The plaintiffs both testified that based on Google Maps, the sidewalk defect would have been present for at least two years. Additionally, one of the plaintiffs testified that the defect would have been "blatantly apparent" to the homeowners any time one of them mowed the lawn or shoveled snow off the sidewalk. He further testified that the City made other corrections on

parts of the sidewalk near the area of the fall, which meant the City "would have had to have been in the area in order to make those corrections."

A City inspector testified that he inspected the sidewalk a year after the fall and observed the defect. The City inspector believed the defect was caused by the roots of an adjacent parkway tree. The inspector did not measure the defect at the time of his initial inspection, but returned later, and measured the defect at more than 2 inches, but less than 2 ½ inches.

Following discovery, the City moved for summary judgment, asserting that the plaintiffs had not provided any evidence that the City had actual or constructive notice of the sidewalk defect, and it did not discover the unsafe condition, despite having maintained and operated with due care a reasonably adequate inspection system. The trial court granted the city's motion and concluded that there was no evidence that the City had actual notice and there was no triable question on the issue of constructive notice.

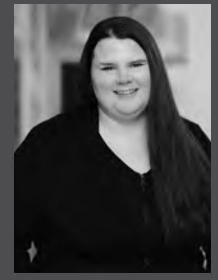
On appeal, the appellate court overturned the trial court. The appellate court first considered the issue of actual notice. The appellate court rejected the plaintiffs' position that the City must have seen the defect any time they were in the area. While the defect being more than two inches supported the plaintiffs' argument, the appellate court found that the City's ordinance does not require all employees or contractors to be trained to recognize unreasonably dangerous conditions on public sidewalks. The appellate court then considered the circumstantial evidence which plaintiffs asserted created actual notice. The appellate court found that this evidence establishes nothing more than a possibility that a City employee or contractor may have seen the defect.

The appellate court then considered the issue of constructive notice. The court found that there is a question of constructive notice based on Google Map images, which showed the defect was present in September 2012, more than seven years before the plaintiff tripped on it. A Google image from 2018 showed that the defect had grown about an inch in the six intervening years. Next, the appellate court considered whether the defect was conspicuous. The court found that the record contained evidence from which a factfinder could conclude the defect was sufficiently conspicuous to charge the City with constructive notice, based on the two inch variance and that it could be seen from a vehicle passing on the street taking images of the area.

Next, the appellate court considered the City's contention that it lacked constructive notice because it maintained a reasonably adequate inspection system. The court noted that the Tort Immunity Act places the burden of proof as to the reasonableness of an inspection system on a governmental entity. The court found that the record presents a triable question as to whether the City's inspection system was reasonably adequate under the circumstances based on the City's engineer who stated that the sidewalk repair and replacement system is "not systematic." In reversing the trial court's judgment, the appellate court emphasized that that the question of whether a municipality maintains and operates a reasonably adequate inspection system is generally a question of fact.

About the Editors

Rachel Legorreta is an associate with the law firm of John J. Malm & Associates, P.C., where she focuses her practice on personal injury litigation. She graduated magna cum laude from Northern Illinois University College of Law and is a current member of the *DCBA Brief* Editorial Board.



Allison Trendle is currently an associate attorney at Giannola Legal in Lemont, IL. Allison graduated with bachelor's degrees in Psychology and Criminal Justice from Lewis University in 2018 and from UIC John Marshall Law School in 2021.

Defendant Has Burden to Show Unlikely Recurrence of Discriminatory Conduct
EEOC v. Wal-Mart Stores East, L.P., Nos. 22-3202 & 23-1021

In *EEOC v. Wal-Mart Stores East, L.P.*, the Equal Employment Opportunity Commission filed a lawsuit on behalf of a former employee of Wal-Mart. The former employee, an individual with Down syndrome, worked for Walmart for over 15 years, with a set routine of working a 12 to 4 p.m. shift, four days a week, excluding Thursdays and the weekend. Her schedule was based on her inability to drive, her need to rely on public transportation, and her inability to stand longer than four hours. In order to accommodate her needs, Walmart's store manager made manual adjustments to the schedule. In 2014, Walmart issued a directive that managers were no longer able to make adjustments to work schedules, unless there was a business justification for doing so. As a result, the employee was forced to accept a 1 p.m. to 5:30 p.m. schedule.

The Walmart employee had difficulty adjusting to her new schedule and often would leave early and miss her bus to get home. Her sister advised Walmart's manager that she couldn't physically handle working that late because of her Down syndrome and requested that her schedule be changed back to 12 to 4 p.m. to restore order. Walmart kept the employee on that schedule and eventually discharged her based on her attendance infractions. After her termination, her sister met with Walmart's managers and invoked her right to accommodation under the ADA and asked that her sister be given her job back with her old work schedule. The family then contacted the EEOC, which filed suit against Walmart for failure to accommodate the employee's disability by not modifying her work schedule. After a four-day trial, the jury found in the EEOC's favor, awarding the employee $150,000 in compensatory damages and $125 million in punitive damages. The trial court reduced the punitive damages to $150,000 to bring the total award in line with the ADA's damages cap of $300,000. The court additionally awarded equitable relief in backpay, prejudgment interest, and an additional sum for tax consequences.

After the trial, the EEOC filed a motion asking that the court order Walmart to reinstate their former employee to her position and requested a variety of other injunctive measures bearing on Walmart's disability-related policies. The court agreed to order the former employee reinstated, but declined to order the additional forms of injunctive relief the EEOC requested, which were aimed at preventing a reoccurrence of what happened. The court indicated that the injunctive relief was for the most part that Walmart obeys the law. The court thought the evidence did not show that Walmart was likely to repeat its illegal conduct.

On appeal, the court found that EEOC's injunctive reliefs were reasonable. The court pointed to Walmart's shortcomings in its failure to treat its former employee's request for an accommodation that the ADA, case law, and Walmart's own policies required, and the impression given to Walmart managers that long-term schedule modifications could not be granted, which arguably was consistent with the company-wide directive. The court also found that the trial court did not take into account the totality of why Walmart denied an accommodation—specifically, the company's unwillingness to entertain the possibility of a long-term schedule accommodation. The court noted that the shortcomings in response to the request for an accommodation raise the possibility that this may be more than an isolated incident.

Odor of Burning Cannabis Alone Insufficient to Establish Probable Cause
People v. Redmond, 2014 IL129201

In *People v. Redmond*, the defendant, Ryan Redmond, was charged with unlawful possession of cannabis and unlawful possession of cannabis by a driver. An Illinois State Police officer stopped the defendant for speeding and having an improperly secured license plate. During the stop, the officer searched the vehicle and discovered a plastic bag containing one gram of cannabis in the car's center console.

The defendant filed a motion to suppress the cannabis found in his car. At the hearing on his motion, the officer testified that he "smelled the odor of burnt cannabis" in the vehicle as he approached the vehicle, and the defendant rolled the passenger window down. When asked by the officer, the defendant denied smoking cannabis in the vehicle. The officer further testified that he did not see cannabis in plain view, could not

see anything lit or currently emitting the odor of cannabis, and did not smell burnt cannabis on the defendant's person when he asked him to step out of the vehicle. Further, the officer testified that he did not detect any signs of impairment of the defendant. Despite this, the officer proceeded to search the vehicle. The officer testified that he did so due to the odor of cannabis, the defendant's "evasive answers" about where he resided, the defendant being stopped on a "known drug corridor," and the defendant traveling between cities that the officer considered "hubs of criminal activity." During the search, the officer found the bag of cannabis.

The circuit court granted the defendant's motion to suppress because the officer did not have probable cause to conduct the warrantless search of the defendant's vehicle. The appellate court affirmed the trial court's decision based on the lack of evidence supporting a finding of probable cause to conduct the warrantless search. The State then appealed to the Illinois Supreme Court.

The Illinois Supreme Court reviewed the sole issue of whether the officer had probable cause to conduct the warrantless search of the defendant's vehicle. The court affirmed the lower courts' rulings.

The court analyzed the evolution of cannabis laws in Illinois from pre-1971 to its legalization in 2020. In 1985, when possession of cannabis was still illegal in Illinois, the court held in *People v. Stout*, 106 Ill. 2d 77 (1985) that the smell of burnt cannabis inside of a vehicle by itself was sufficient to establish probable cause to conduct a warrantless search of the vehicle. However, with the legalization of cannabis in 2020, the court saw a need to move away from *Stout* and held that, because of the legalization of marijuana, the smell of burning cannabis in a vehicle alone is insufficient to establish probable cause to conduct a warrantless search of the vehicle.

On appeal, the State seemingly conceded that the smell of burnt cannabis alone did not establish probable cause but argued that particular issue was not before the court because the officer had additional evidence upon which he could have established probable cause. The State argued that the totality of the circumstances supported the officer's belief that the defendant smoked cannabis in his vehicle. Namely, the State argued that the strong odor of cannabis, the location of the stop on the highway, the defendant's failure to produce his license and registration, and the defendant's allegedly evasive answers established probable cause. The court was unpersuaded by the State's arguments and stated that, while the officer may have had reasonable suspicion to investigate, his investigation should have ended prior to the vehicle search when he failed to uncover any additional evidence to establish probable cause. As such, the search was unreasonable because the only evidence the officer had to conduct the search was the smell of cannabis.

Statutory Best Interest Factors Insufficient to Justify Relocation Ruling

In re Marriage of Gualandi, 2024 Il App (5th) 240238

In *Gualandi*, the parties filed cross-petitions to modify parenting time, each seeking majority parenting time with the parties' two minor children. The mother also sought the relocation of the children from Illinois to Indiana. The parties had two minor children of whom the father had the majority of parenting time. The father's petition alleged that the mother failed to exercise her court ordered parenting time, lived in an "unstable environment," and relocated on multiple occasions without notifying the father or filing the proper pleadings with the circuit court. The mother sought sole decision-making responsibilities and the circuit court restricted the father's parenting time in her petition and alleged that the father kept the children in a filthy house and, as a result, the children suffered a multitude of health issues related to the state of the father's house. The mother further alleged that the father engaged in a series of other behaviors that interfered with her relationship with the children, including listening in on phone calls between the children and mother, encouraging the children to misbehave at the mother's house, and encouraging the children keep certain incidents that occurred at the father's house a secret from the mother.

At the hearing on the cross-petitions to modify parenting time, the court appointed Guardian ad Litem testified extensively regarding the filthy condition of the father's house and the children's poor hygiene. The Guardian ad Litem also testified to

the children's preference to stay with the father. During his testimony, the Guardian ad Litem acknowledged that he only visited the father's residence, not the mother's residence and that he did not have any knowledge of an order of protection possibly entered between the mother and her boyfriend. He additionally acknowledged that he had not spoken with the children's teachers or reviewed their medical records, despite allegations raised regarding the children's education and health. At the end of his testimony, the Guardian ad Litem recommended that the children remain with the father.

The father testified that the mother had moved numerous times without informing the father and had relocated to Indiana without discussing it with the father. The father further testified that he had cleaned up after the Guardian ad Litem had visited his house and that the mother never attempted to remove the children despite knowing the condition of his residence. Further, the father stated that he had contacted someone from the children's aftercare program to help with hygiene.

The mother and mother's boyfriend testified that the father's house was filthy, the children were frequently dirty, one of the children had lice on multiple occasions, and both children had health problems that the father did not adequately address.

After listening to the testimony of other witnesses, the Guardian ad Litem testified a second time and changed his recommendation in favor of the children relocating to Indiana to reside with the mother. The circuit court granted the mother's Petition to Modify and request to relocate and entered an "Agreed Parenting Plan and Judgment" drafted by the mother's attorney that the circuit court edited slightly. In its ruling, the circuit court explained that it considered the best interest factors in 750 ILCS 5/602.7 in granting the mother's motion to modify and, by granting her motion with the knowledge she lived in Indiana, the circuit court found that it was "appropriate for the children to be able to relocate to the state of Indiana."

Father appealed the circuit court's decision. On appeal, the court vacated and remanded the circuit court's decision.

The father first argued that the circuit court erred in entering an "Agreed Parenting Plan and Judgment," drafted primarily by the mother's attorney, that had not been agreed to by the father. The Fifth District agreed with the father and stated that, due to the contested nature of the issues in the parenting plan, the circuit court needed to have included in the parenting plan its findings that a substantial change in circumstances occurred and its determination of the best interests of the children.

Next, the Appellate Court found that the circuit court failed to consider the statutory factors for relocation under 750 ILCS 5/609.2(g), including the mother's reasons for relocating, her history of failing to exercise parenting time, her relationship with her children, the educational opportunities available to the children, and the impact of the relocation on the children.

The Appellate Court also found that the Guardian ad Litem failed to adequately investigate certain issues under 750 ILCS 5/607.2, including allegations of the mother's drug use and mental health problems, her fights with her boyfriend, the living conditions of the mother's residence, and any DCFS investigations. The court stated that the Guardian ad Litem "should have taken reasonable steps" to investigate all issues relating to the children per his statutory duty under 750 ILCS 5/506 and that the Guardian ad Litem failed to do so. The court went so far as to suggest that on remand, the circuit court appoint a new Guardian ad Litem or, if the circuit court kept the current Guardian ad Litem, he update his report after conducting a complete investigation of the facts.

The court ultimately vacated and remanded the matter to the circuit court with direction to conduct a temporary custody hearing "as emergently as possible" and consider the proper statutory factors for a modification of parenting time and relocation.

Conviction of Minor's Uncle Under Criminal Sexual Abuse Statute Did Not Violate Equal Protection Clause
In re M.G., 2024 IL App (1st) 232106

In *In re M.G.*, the circuit court found M.G., a minor, guilty of aggravated criminal sexual abuse of a minor for abusing his 10-year-old niece, S.G.

At trial, the State presented witness testimony from M.G.'s two minor nieces, S.G. and F.G., who the State alleged he had sexually abused over the course of approximately 15 months. S.G. testified that M.G. repeatedly abused her at night in their shared bedroom and detailed the abuse to the circuit court. F.G. testified similarly to being abused by M.G. on one occasion. Both F.G. and S.G. identified M.G. as their abuser.

After the State rested, M.G. moved for a directed verdict. When the circuit court denied M.G.'s motion, M.G. rested without presenting any evidence. The circuit court found S.G.'s testimony to be credible and found M.G. guilty of criminal sexual assault and aggravated criminal sexual abuse. As to F.G., the circuit court found that the State failed to meet its burden. M.G. filed a motion to reconsider and argued that the State failed to meet its burden for both criminal sexual assault and criminal sexual abuse. After hearing on M.G.'s motion, the circuit court found M.G. not guilty of the criminal sexual assault but guilty of aggravated criminal sexual abuse. In sustaining its prior ruling, the court stated again that it found S.G. to be a credible witness.

On appeal, M.G. raised two issues. First, that the State presented insufficient evidence to convict him of aggravated criminal sexual abuse. Second, that the statute he was convicted of violating violated his constitutional rights under the equal protection clause.

With regards to M.G.'s sufficiency of the evidence argument, M.G. argued that the State had not proven that he acted for the purpose of his or S.G.'s sexual gratification or arousal. The court was unpersuaded by M.G.'s arguments and found that the State had ample evidence to convict M.G. of aggravated criminal sexual abuse. It stated that the nature and circumstances surrounding M.G.'s behavior "provide[d] strong circumstantial evidence of intent." M.G. was 15 to 16 years old when he abused S.G., waited until her mother left and the rest of the family went to sleep to act, and repeatedly touched S.G. inappropriately, and the court held that this evidence was sufficient to convict M.G.

With regards to M.G.'s equal protection claim, M.G. was found guilty of aggravated criminal sexual abuse under 720 ILCS 5/11-1.60(b) as a family member of S.G, namely her uncle. M.G. argued that if he had been S.G.'s brother or cousin, he would not have been considered a family member under the aggravated criminal sexual abuse statute. Instead, he would have been found guilty of criminal sexual abuse under 720 ILCS 5/11-1.50(b). M.G. argued that because the aggravated criminal sexual abuse statute treated him, an uncle only 5 years older than his victim, differently than similarly situated individual, namely an older brother or cousin, the statute, as applied, violated his rights under the equal protection clause.

The court denied M.G.'s claims and found that M.G. failed to meet his burden of establishing a constitutional violation. In its discussion of M.G.'s constitutional claim, the court discussed the definition of family member under section 11-0.1 of the Code as "parent, grandparent, child, aunt, uncle, great-aunt, or great-uncle." Further, the Code states that a family member could also mean, "if the victim is a child under 18 years of age, an accused who has resided in the household with the child continuously for at least 6 months." The court found that the Code did not exclude brother or cousin from its definition as M.G. claimed, but included it in the second part of its definition as a family member who has resided in the same house as the child for 6 months, such as a brother or a cousin. Further, in considering the context of section 11-0.1, the court found that the aggravated criminal sexual abuse statute clearly included "individuals with a familial relationship of trust to the minor victim." ☐

Third District Local Rules Amendments

The justices of the Illinois Appellate Court have approved amendments to their local rules, effective September 24, 2024. The court has amended Local Rule 104(c), governing the electronic filing of briefs and appendices, and Local Rule 106(c), governing the length of oral arguments. The court also adopted a new rule, Local Rule 110, governing the payment of docketing fees in appeals taken under Illinois Supreme Court Rule 604(h) (pretrial release proceeding). The full set of the Third District's local rules can be accessed on the Illinois Courts website. Additions are indicated by underlined text; deletions are indicated by ~~strikethrough text.~~

Amendment to Local Rule 104(c):
"When an appendix to a brief exceeds 20 pages, the appendix shall be filed separately from the brief. Where electronic filing is applicable, the appendix and brief shall be filed as lead documents in ~~separate electronic envelopes.~~

Amendment to Local Rule 106(c):
"Any proposed deviation in length from the above subsections, or division of time amongst co-counsel, shall be requested via written motion. The motion shall include a specific proposal and be filed at least 7 days before ~~at least one business day prior to the~~ oral argument.

New Local Rule 110 – Docketing Fee in Interlocutory Criminal Pretrial Appeals:
"In appeals filed under Supreme Court Rule 604(h), within 14 days after the filing of the notice of appeal, the party filing the notice of appeal shall remit to the Clerk of the reviewing court the filing fee set forth in Supreme Court Rule 313, except when excused by law. Pursuant to Supreme Court Rules 604(h) and 606(g), no docketing statement shall be required." ☐

Welcome

Welcome to the new DCBA members.

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Students:
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Book Review

Kennedy's Avenger

By Tyler Michals

This November marks 61 years since John F. Kennedy was assassinated in Dallas, Texas. The legacy of that seminal event continues to inspire lively debate, and not a few conspiracy theories. The mysterious background of Kennedy's assassin, Lee Harvey Oswald, has fueled much of the speculation. Post-World War II, Oswald, a former U.S. marine disillusioned with the United States, had traveled to the Soviet Union where he met his wife. He then returned home to the U.S. where he became involved in various political activities, including picketing in support of communist Cuba.

History might have learned more about this enigmatic figure and his motivations, except that Oswald, too, was assassinated in Dallas in November 1963—just a few days after killing JFK. For the most part, history has been less focused on Jack Ruby, who assassinated Oswald in broad daylight outside the Dallas police station. In *Kennedy's Avenger*, the authorial duo of Daniel Abrams and David Fisher seek to shed light on the mystery by examining the evidence as it was revealed through the crucible of Ruby's 1964 criminal trial.[1]

Jack Ruby, aka Jack Rubenstein, was born in Chicago, Illinois in 1911. His upbringing was tumultuous, with an alcoholic father, and a well-meaning, but troubled mother who would intermittently spend time in mental institutions. Ruby was close with his siblings, including a younger brother who also struggled with mental illness.

In the 1950s, Ruby moved to Dallas, Texas. There, he would own and operate various nightclubs, where he would occasionally serve as the bouncer. In this role, he became acquainted with a great many people, including many Dallas police officers.

Following the assassination of JFK, Oswald was quickly arrested and charged with murdering the president. Two days later, after entering a plea of not guilty, Oswald was transferred from the Dallas police station to the local jail. While being walked in handcuffs to an awaiting squad car, with Dallas police detectives on either side of him, Ruby walked right up to Oswald and shot him once in the abdomen with a handgun. Oswald died almost instantly.

After shooting Oswald, Ruby was immediately arrested and charged with murder. For his defense attorney, Ruby hired Mel Belli, one of the most famous lawyers in the country at the time. Belli would bring on two Texans to his defense team, Joe Tonahill and Phil Burleson. The trial had to be shifted into a larger courtroom within the Dallas courthouse to accommodate the throngs of reporters from all over the world who were in attendance.

Contentious pre-trial issues significantly delayed the trial's commencement. Were photographers and videographers

1. Dan Abrams and David Fisher, Kennedy's Avenger: Assassination, Conspiracy, and the Forgotten Trial of Jack Ruby, 2021, 400p., Hanover Square,

allowed in the courtroom? No, according to Judge Joe Brown. Should the video be allowed in as evidence? After all, the murder had been shown on live TV. But the video, which we take for granted today as often the strongest evidence in a given case, was still new in 1964. Ultimately, the court allowed a video recording to be admitted.

How was the jury pool to be selected? Surely everyone in Dallas was already aware of the incident. Indeed, one of the prospective jurors during *voir dire* was struck for cause because she claimed to have not heard any gossip about the murder of Oswald—something that both the prosecution and defense recognized to be an obvious lie.

Should the trial even take place in Dallas? There was a worry that the city of Dallas itself was on trial. After the murders of Kennedy and Oswald occurred just days apart, newspapers began referring to Dallas as the "city of assassins." In fact, much of the trial would seemingly focus on the impact of the jury's verdict on the city's reputation.

A jury was ultimately empaneled, and the trial began in Dallas. The prosecution's case was straightforward. Various Dallas police officers and detectives testified that Jack Ruby approached Oswald and shot him—a fact that had been captured on video and was therefore undisputed.

Much of the prosecution's case was devoted to proving that Ruby had acted with "malice," an essential element of the crime. Officers and detectives testified that Ruby had made statements, although there was little consistency as to what exactly was said, or whether Ruby was the one who said it. Most damningly, the statement attributed to Ruby in the aftermath of the shooting was some variant of, "I hope the son of a bitch dies." At the police station afterward, Ruby allegedly stated that he meant to shoot Oswald three times.

On the merits, there were a few strategic options available to the defense. The first, and perhaps easiest course would have been to argue that Ruby had no "malice" when he killed Oswald but rather committed a crime of passion upon seeing the man who assassinated a beloved American president. At the time, the range of penalties for murder without malice was as low as two years in jail—and the death penalty would not have been possible.

Instead, Ruby's attorneys put forth the defense of temporary insanity, a convo-

About the Author

Tyler Michals is an assistant corporation counsel in the Federal Civil Rights Litigation Division of the City of Chicago's Law Department. He previously worked as an assistant state's attorney in the Cook County State's Attorney's Office. He is a graduate of Michigan State University College of Law where he graduated cum laude.

luted argument that posited, in essence, that Ruby killed Oswald while in a "fugue" state as a result of psychomotor epilepsy. According to the defense, Ruby had developed the condition as a result of numerous fights while serving as the bouncer at his night clubs, as well as during his rough upbringing in Chicago, where he was good friends with Barney Ross (later a welterweight world boxing champion).

The defense's case was complex, and its witnesses can be divided into three categories. The first slate of witnesses established that Ruby did not have a premeditated plan. Instead, Ruby had been at a Western Union near the police station wiring money to a downtrodden employee who was in desperate need of cash. Indeed, based on a time-stamped Western Union receipt, it appeared that Ruby had been near the Dallas police station by pure happenstance. Further, Ruby, who loved his twelve dogs to the point of referring to one of them as "his wife," and the rest as his children, had left one of his dogs in his locked car—evidence that suggested he did not intend to be subsequently arrested. Further, his housekeeper testified that Ruby asked her to come by his home that afternoon, a fact that, again, suggested he did not intend to spend that afternoon in jail.

The second set of witnesses was used to establish that Jack Ruby was an odd-ball, or as Belli referred to his client during closing arguments: The "village idiot . . . the hunchback of Notre Dame." Witness after witness testified that Ruby was unusually passionate. He was prone to fits of rage and emotion—perfectly rational in one moment, while sobbing unconsolably in the next.

Importantly, he would occasionally blackout during fits of violence. One of his employees testified to seeing him severely beating an unruly patron at his club. Upon seeing his employee standing nearby in shocked horror, Ruby looked down at his victim and asked innocently, "Did I do this?" Even his sister testified that he had gotten physical with her to the point of throwing her down the stairs, an incident he did not appear to remember after the fact.

Ultimately, Ruby's defense hinged on the final set of witnesses. Belli called numerous experts in the fields of medicine, psychology, psychiatry, and most importantly, psychomotor epilepsy. These experts testified that, based on brain readings, Ruby suffered from psychomotor epilepsy. Crucially, some of these experts testified that they had formed the conclusion that Ruby was not able to determine right from wrong (the legal test for insanity) while suffering such a seizure.

The prosecution called its own experts in what got bogged down in an exceedingly complicated battle of experts. After so long in the jury box, there's little doubt that the jurors' eyes glazed over as expert upon expert disputed the findings of the other. Unfortunately, the reader, too, is brought along on this overly-technical battle as the authors painstakingly account for each individual expert's testimony. The case went from prosecution, to defense, to rebuttal, to surrebuttal, on and on several times back and forth until both sides had finally exhausted themselves.

In all, the trial lasted three weeks, and more than 60 witnesses testified. The jury had been sequestered for even longer than that. There were no alternate jurors, and there was legitimate concern that the jury could not be held together any further—that they could soon rebel, wasting weeks of work in the process. That fear was the reason that, in a desperate bid to finish the trial, closing arguments began on a Friday evening, and ended around 1 a.m. on Saturday morning.

Just two hours and nineteen minutes after beginning deliberations, the jury returned a verdict declaring Ruby guilty of murder with malice, and sentenced him to death. Belli could not resist one final outburst, admonishing the jurors on their way out that they had "blood on their hands." Afterwards, Belli refused to shake the hand of Judge Brown, who had presided over the trial.

The trial had been unusually hostile. Petty barbs were thrown about

casually, and Judge Brown seemingly had little interest in bringing the sides into order. In closing arguments, Tonahill told the jury that one of the prosecutors had laid his "tarantula eyes" on a witness. Afterwards, Henry Wade,[2] the chief prosecutor, called one of the defense attorneys, "Ungentlemanly, and un-Texan," the ultimate insult to wield towards a fellow Lone Star State citizen.

Nonetheless, the groundwork had been laid for a viable appeal. Belli would not be a part of it, however—the Ruby family fired him. The appellate process was long and tedious. It was held up by several hearings to determine Ruby's sanity. Ultimately, in 1966, a unanimous Texas appellate court ruled that Ruby was entitled to a new trial. The principal reasons were that the venue should have been transferred somewhere other than Dallas, and also that certain post-arrest statements made by Ruby should not have been admitted into evidence.

Overall, *Kennedy's Avenger* is much more than merely an annotated transcript of the proceedings. The authors synthesize the proceedings in a way that is readable as a compelling narrative without dumbing-down the source material so as to condescend to a mass-market audience.

Although Ruby is nominally the main character—"Kennedy's Avenger"—the only glimpses into his background stem from what was revealed at trial. This paints a somewhat cramped view of the man through the lens of what his defense team was attempting to portray him as: A mentally-ill outcast who was prone to blacking out during fits of rage.

The biggest indication that Jack Ruby was a living breathing person, rather than the defense or prosecution's caricature, was the seemingly innocuous testimony of his longtime ex-girlfriend. Though called by the defense, she testified that Ruby was not mentally ill. As was the case throughout the trial, Ruby showed no emotion during her testimony. But cameras followed his former girlfriend after she left the courtroom, where she broke down and sobbed.

One of the great aspects of legal trials is that only relevant, competent evidence is admissible. For that reason, trials are not fertile grounds for conspiracy theorizing. Still, the authors cannot avoid mentioning modern conspiracy theories any more than the lawyers in that Dallas courtroom could in 1964. Some of the allusions to a possible conspiracy were inherent in the crime.

How *did* Jack Ruby manage to walk into the Dallas police station with a handgun, right up to the world's most famous criminal, and fire a bullet into his stomach? Was Ruby in cahoots with Dallas police officers, some of whom had frequented his nightclubs? Did Ruby know Oswald?

At least one person had allegedly seen Oswald at Ruby's nightclub the week before the murder—although that person was shot in the head just days after Oswald was killed. The wife of the man who shot *him* was a dancer at Ruby's nightclub. *She* would later hang herself while in the Dallas jail awaiting charges on another crime. For his part, Ruby's trip to communist Cuba just a few months before the murder thickened the plot further…

Alas, we may never know what exactly happened. Suffice it to say that whether you believe Jack Kennedy was assassinated as part of a grand conspiracy, or that Oswald was merely a lone wolf, there are enough unknowns to give your opinion plausibility. But as Ruby's lawyer put it in closing arguments, if there was something deeper at work, "it would be the greatest conspiracy in the history of the world."

In the wake of his successful appeal, prosecutors insisted that Ruby would be retried, but that opportunity never came. In 1967, Ruby was admitted to Parkland Hospital—the same hospital where both Oswald and JFK had died—where he was diagnosed with untreatable cancer. Weeks later he succumbed to his disease. This caused the only attorney who had participated in Ruby's defense from trial through appeal, Phil Burleson, to remark that, as a legal matter, "Jack Ruby died an innocent man." ☐

2. Later the nominal defendant in another famous case, *Roe v. Wade*, 410 U.S. 113 (1973)

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DCBA Leaders Visits Assistant Dean Greg Anderson's 1L Course

Assistant Dean Greg Anderson, Marissa Spencer, Oran Cart, Karen Mills, Chief Judge Bonnie Wheaton, Patrick Collins

On September 12, 2024, the DCBA presented to the 1L class at NIU on the benefits of being a member of a bar association during and after law school. In attendance was the entire 1L class for NIU of approximately 115 students and a panel of DCBA members including Chief Judge Bonnie Wheaton, Karen Mills, Patrick Collins, Marissa Spencer, Oran Cart and Assistant Dean Greg Anderson as the moderator. All NIU law students were invited to the reception that followed. The DCBA intends to offer similar programs to those of other law schools in the area. If you would like to volunteer for such a program or be included when said opportunity should arise, please contact Debra Kennedy at dkennedy@dcba.org or 630-653-7779. ☐

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2024 Annual Report

This year, I am honored to serve as the DuPage Bar Foundation's President. I have proudly served on the board since 2020, and each year I am more impressed by the generosity of our community. On behalf of our board, I thank everyone who has donated, attended one of our events, or taken a chance on one of our bar foundation raffles. For 27 years, the DBF has been a 501(c)(3) organization dedicated to supporting justice in our DuPage community. With your support, we will continue our mission of giving back to the legal community with grants and scholarships.

I have served on the scholarship committee every year while on the board. The law students who apply are inspiring. Each year, we have a variety of candidates from many diverse backgrounds, all of whom share one thing in common—they demonstrate a commitment to not only zealously contribute to the legal community as a whole, but specifically to our community in DuPage. I hope you will encourage any law students you know to apply next year.

In addition to our annual scholarships awarded each spring, the foundation is proud to award grants each year to local organizations such as Family Shelter Services, NAMI of DuPage, and CASA of DuPage.

Finally, it is the foundation's privilege to participate in the preservation of our legal history. This past August, we celebrated the ribbon cutting of the restored "Reflections on 201 Reber Street" by Mark Ialongo, made possible through the gift of a generous anonymous donor. The photographs are on display in the third-floor hallway of the DuPage Judicial Center.

Thank you to all the members of the DuPage Foundation Board, past president Stacey Lynch, DCBA Executive Director Robert Rupp, and DCBA Assistant Executive Director Debra Kennedy for all their hard work. Without them and your support, these projects would not be possible. Serving on the DBF Board has been a tremendous privilege, and I am excited for the coming year. I hope to see you all at our next event!

Jessica Wollwage-Rymut
A. Traub & Associates
DBF President 2024-2025

Mission Statement

To support justice in our DuPage community by maintaining the integrity of the legal profession, contributing to the education of future lawyers, and improving the facilitation of justice through charitable acts.

History

DuPage Bar Foundation was established in 1997 as the charitable 501(c)(3) arm of the DuPage County Bar Association. The DBF is governed by a board of directors of up to nineteen distinguished DCBA members.

Purpose

- To foster and maintain the honor and integrity of the profession of law;
- To improve and facilitate the administration of justice;
- To promote the study of law;
- To acquire, preserve and exhibit rare books and documents, subjects of art and items of historical interest having legal significance; and
- To assist deserving members of the DuPage County Bar Association and their dependents who are ill, incapacitated or superannuated.

$17,000 awarded in scholarships in 2024

Better law students make better lawyers. Three ways you can help:

Contribute Now

Contribute charitable tax-deductible funds to one of several existing law school DBF scholarships.

OR

Host a Scholarship

Sponsor your own charitable scholarship in your law firms name. Let the DBF administer and handle all the “red tape.”

OR

Leave a Legacy

Give through your personal estate, will or make a memorial gift in a loved one’s name.

William J. Bauer Scholarship - Winners of this scholarship embody the qualities of the Hon. William. J. Bauer, Judge of the United States Court of Appeals for the Seventh Circuit. These qualities include unquestioned integrity; a passion for finding legal solutions to human problems that are fair and just; and a profound understanding of the need for professional civility.

2024 Bauer Scholar: Alexis Beck, Chicago Kent

DBF Ambassador Scholarship - Winners must show a financial need, demonstrate academic achievement, have a connection to DuPage County and have completed one full semester of law school.

2024 Ambassador Scholars: Briget Curtis, University of Chicago, Abinaya Wiggins, Chicago Kent and Whitney Wright, Northern Illinois University

Lemmen Memorial Scholarship - The Elsie Lemmen Memorial Scholarship recognizes a law student who demonstrates pro bono and public service experience or a desire to offer legal aid to the needy as an attorney or volunteer.

2024 Lemmen Scholar: Ellie Braida, Chicago Kent

Kasey Wheeler Memorial Scholarship - The Kasey Wheeler Memorial Scholarship remembers Kasey’s spirit and drive by awarding the efforts of an individual attending law school while holding full-time employment.

2024 Wheeler Scholar: Mitrese Smith, UIC / John Marshall

$16,850 was awarded to local non-profits through DBF grants

2023/2024 Program Highlights

2023 Holiday Fund — Our signature Holiday Breakfast returned to the Attorney Resource Center for a morning of fun and fundraising. Donations to the holiday fund totaled $14,500 and hundreds of toys were collected for the Lawyers Lending a Hand Toy Drive.

DCBA/DBF Memorial Program — A ceremony recognizing DCBA members who died in 2022 and 2023 was held on March 8, 2024. Families and members of the legal community recognized these great men and women by placing name plates on the DBF sponsored Hon. Carl Henninger Memorial Plaque located on the third floor of the courthouse.

2023 Golf Outing Raffle — Through the extreme generosity of DBF Board Members, several prize packages were offered in a raffle and two rare bourbons were auctioned raising over $4,000 for the scholarship program.

Memories of Reber Street — Through the extreme generosity of an anonymous donor, the DBF Funded the digital remastering and enlargement of photos taken of the Reber Street Courthouse for display on the 3rd floor of the DuPage Judicial Center.

DCBA Member Contributions — We raised over $15,000 through DCBA member contributions. Each member is asked to donate $10 during their renewal. Thank you to all our generous members donating through DCBA's membership renewal process,

How we manage the funds entrusted to us

Assets as of 6/31/2024:

Cash	$ 18,102.23
Investments	$144,286.77
Total	**$162,389.00**

Liabilities & Equity as of 6/30/2024:

Liabilities	$0
Retained Earnings	$161,417.13
Net Income	$971.87
Total	**$162,389.00**

2023-2024 Revenue:

Fundraising	$ 22,085.00
Member Contributions	$ 1 5,350.00
Hosted Scholarship	$ 2,500.00
Return on Investments	$ 14,447.00
Total	**$**54,382.00

2023-2024 Expenses:

Fundraisers	$4,838.00
Community Grants	$16,850.00
Arts Project	$ 8,626.00
Scholarships	$17,000.00
Meetings & Events	$1,867.00
Marketing	$350.00
Administration	$3,879.00
Total	**$53,410.00**

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Thank you!

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September 2024 Unwind

DCBA & KCBA Family Law Sections at Prairie Landing in West Chicago

The judges of the 16th Circuit Family Division and the 18th Circuit Domestic Relations Division joined DCBA and KCBA Family Law Section members at Prairie Landing for a special reception on September 19, 2024. ☐

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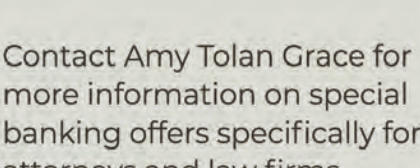

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