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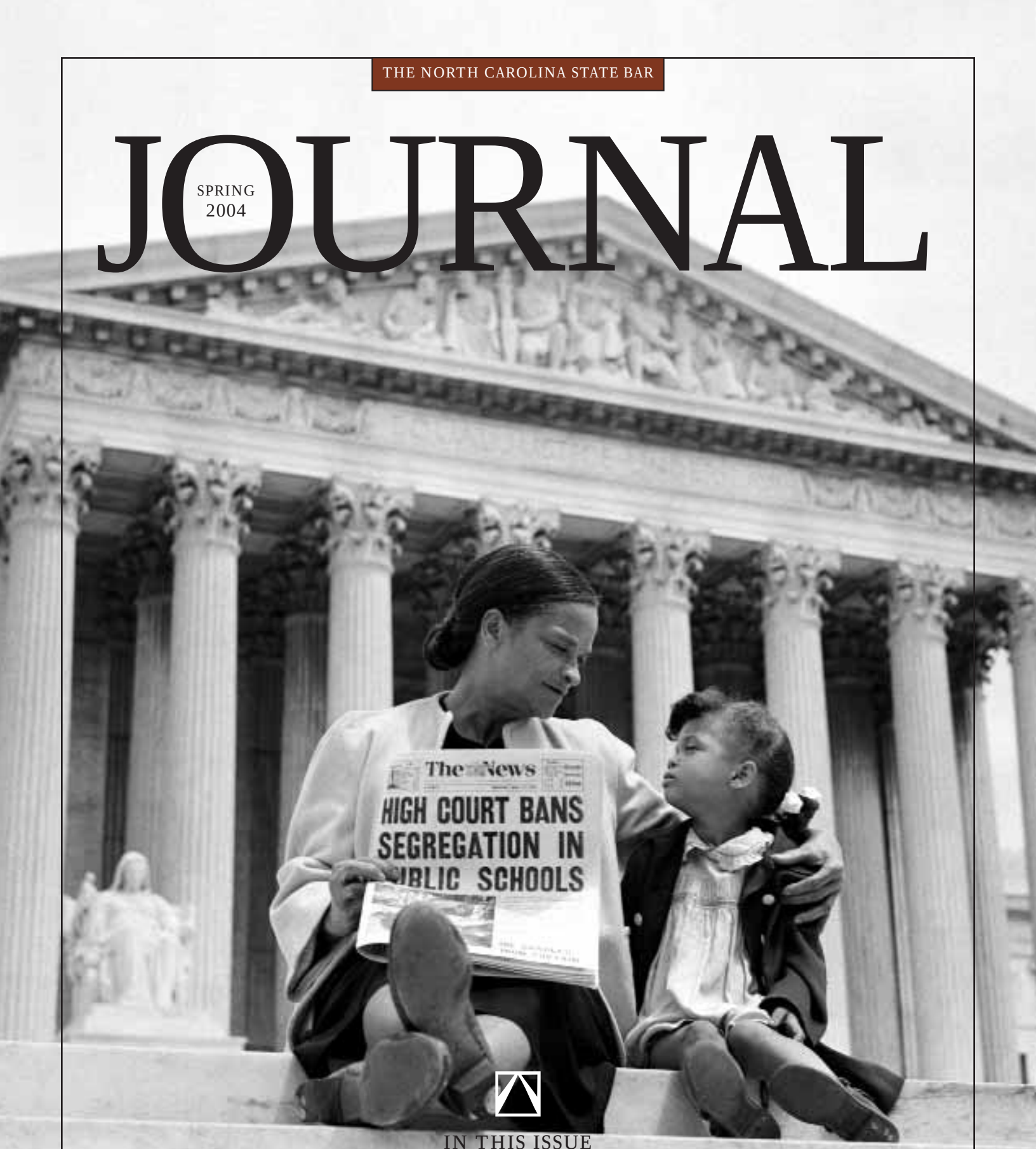

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Ground to Stand On: Charles Hamilton Houston's Legal Foundation for Dr. King[1]

BY JUDGE JAMES A. WYNN JR. AND ELI PAUL MAZUR

Martin Luther King was not a lawyer. But King's debt to the law is no less great. Although King's passionate activism carried the civil rights movement from American streets into America's living room, we must not forget the legal revolution designed by Charles Hamilton Houston which provided the earth for King's vision. Fifty years ago, in 1954, Charles Hamilton Houston's legal campaign to derail *de jure* segregation secured its most famous victory in *Brown v. Board of Education*.[2] One year later, Dr. Martin Luther King joined Rosa Parks in the Montgomery Bus Boycott and became a national figure in the struggle for civil rights. But, as Justice Thurgood Marshall—who argued *Brown* before the Supreme Court—famously said: "We wouldn't have been any place if Charlie hadn't laid the groundwork for it."[3]

So, who was Charles Hamilton Houston? Perhaps the greatest sociological engineer of the twentieth century. What did he engineer? *Brown* itself. *Brown* was neither an ending nor a beginning; rather, *Brown* epitomizes the struggle for civil rights because few souls in America—save those like Charles Houston—could have imagined the Supreme Court's holding 20 years earlier. Indeed, in the years preceding *Brown*, "a large number of social science studies warned," and scientists and laypersons believed, "that African-Americans were permanently and inherently inferior . . . and that their close association with whites could contaminate and weaken the white race."[4] This "wealth of science," viewed in the context of social Darwinism, "created a situation in which strict racial segregation appeared to be socially prudent."[5] The Jim Crow legal regime maintained this "natural order," and African-American transgressions were met with public and private reprisals. From 1896 to 1954, spanning the time from *Plessy* to *Brown*, over 2,000 African-Americans were lynched.[6] *De jure* racism did not end with *Brown*: For example, it was not until 1967, in *Loving v. Virginia*,[7] that the Supreme Court struck down 16 state statutes prohibiting marriage between African-Americans and Caucasians.

But the question is: *How did this country move from lynching blacks to vindicating their rights in courts of law?* Slowly, and with the help of Charles Hamilton Houston.

Biographical Sketch

In 1895, one year before the Supreme Court issued its infamous "separate but equal" ruling in *Plessy v. Ferguson*,[8] Charles Hamilton Houston was born into what UNC Professor Genna Rae McNeil describes as a "jungle of patent racism."[9] At the age of 15, Houston graduated from high school and matriculated to Amherst College. The only African-American in the Amherst class of 1915, Houston was elected to Phi Beta Kappa and was chosen to deliver a commencement address. In 1917, Houston was commissioned as a first lieutenant in the United States Army; a feat which he engineered by forming the Central Committee for Negro College Men which successfully lobbied for the establishment of an African-American officer's training camp.[10] While serving in the army, Houston was almost lynched in France by American soldiers. Thereafter, he helplessly watched as one of his black confederates' was unjustly court marshaled. After this experience, in Houston's own words

> I made up my mind that I would never get caught again without knowing something about my rights; that if luck was with me, and I got through this war, I would study law and use my time fighting for men who could not strike back.[11]

To this end, in 1919 Houston enrolled at Harvard Law School. Despite the clear racial dividing lines at Harvard, Houston became the first African American to serve as an editor on the Harvard Law Review. Houston's academic performance was so strong, and his personality so magnetic, that Dean Roscoe Pound and Professor Felix Frankfurter—a future Supreme Court justice—served as Houston's mentors, recommenders, and advisors throughout his career.[12] After graduating from Harvard Houston applied for a S.J.D. In his application, Houston wrote:

> My reasons for desiring graduate work are both personal and civic . . . a deep desire for further study in the history of the law and comparative jurisprudence . . . [and the belief that] there must be Negro lawyers in every community . . . the great majority [of whom] must come from Negro schools . . . [where] the training will be in the hands of Negro teachers.[13]

November 1939—Chief Council for the National Association for the Advancement of Colored People Charles Hamilton Houston.

Working under the direction of Felix Frankfurter, Houston completed his dissertation and in 1923, Houston became the first African-American in the United States to earn an S.J.D.[14] Thereafter, Houston studied civil law for one more year at the University of Madrid in Spain.

The Man's Work

Now, despite unimpeachable qualifications, Houston could not find gainful employment anywhere in Washington, DC, as an attorney. He was just another Black man without a job. Shortly, however, Roscoe Pound and Felix Frankfurter recommended Houston's appointment as a Professor at Howard Law School.[15] As a teacher, Houston implemented a program of training African-American Lawyers, like Thurgood Marshall, that "[a] lawyer [is] either a social engineer or . . . a parasite on society."[16] For Houston, the fundamental responsibilities of a social engineer included avoiding unnecessary racial antagonism and understanding that the Constitution's structural "inertia against amendment [provided] the lawyer wide room for experimentation."[17] For his accomplishments, Houston was appointed dean of the law school and led Howard's path towards full accreditation.

In 1935, Houston left Howard to serve as special counsel to the National Association for the Advancement of Colored People (NAACP). Houston accepted the position with the NAACP "on

the condition that the program of litigation be conducted as a protracted legal struggle based on . . . cases."[18] Houston opposed an immediate challenge to the "separate but equal doctrine, favoring a more methodical approach at the state and federal levels."[19] He defended his approach on the grounds that it would: (1) "lay the groundwork for the test cases that would ultimately come before the United States Supreme Court"[20] serving as the foundation for overturning *Plessy*, (2) provide the time necessary to engage in broad and wide-ranging educational efforts to change minds in the "court of public opinion," and (3) "allow Houston time to develop competent Black lawyers to 'wage the fight that no white men could be expected to sustain.'"[21]

Why did Houston choose not to wage an immediate and direct attack on "separate but equal"? Well, he knew that the Supreme Court would not strike down forced segregation until forced segregation demanded striking down, literally and practically. The moral argument, the ethical argument, vocalized by Dr. King, had died a slow and painful death in the wake of *Plessy v. Ferguson*.

For instance, in 1899, in the case of *Cumming v. Board of Ed. of Richmond County*,[22] a Georgia school board cut funding to an existing African-American high school and, at the same time, voted "to continue to deny [African-Americans] any admission to" the high school maintained for white children.[23] Petitioners, African-American parents, sought an injunction against tax collection funding the school. The *Cumming's* Court denied this relief because it "would only . . . take from white children educational privileges . . . without giving to colored children additional opportunities for . . . education."[24] Ten years later, in *Berea College v. Kentucky*,[25] a private university was convicted of violating a Kentucky statute making it "unlawful for any . . . corporation . . . to maintain or operate any college . . . where persons of the white and negro races are both received as pupils for instruction."[26] The Supreme Court affirmed the Kentucky Court of Appeals decision which made the boldest endorsements of racial Darwinism to be found in the judicial canon:

> The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other a freeman that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, so far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.[27]

After *Berea College*, states were Constitutionally permitted to require private schools, as well as public schools, to segregate educational resources on the basis of race.

Finally, in 1927, in *Gong Lum v. Rice*, [28] Mr. Gong Lum challenged the Mississippi Superintendents decision "excluding [his daughter, Martha,] from attending [a white] school solely on the ground that she was of Chinese descent . . . ."[29] In his pleading, Mr. Gong noted that: (1) Martha was "not a member of the colored race;" (2) the Mississippi Constitution required the superintendent to establish a public school system for "all children;" and (3) the superintendent violated this Constitutional mandate by refusing to admit Martha to the white high school and/or by failing to maintain a separate school for children of Chinese descent.[30] Relying on *Plessy*, the Supreme Court summarily affirmed the superintendent's decision. Most notably, the *Gong Lum* Court summed up the prior 75 years of segregation jurisprudence by holding that a "Chinese citizen . . . is not denied equal protection of the laws when classed among the colored races and furnished facilities for education *equal* to that offered to call, whether white, brown, yellow, or black."[31] After *Gong Lum*, decided in 1927, the case law was crystal clear; *Plessy v. Ferguson* had reached full maturity.

So, Charles Hamilton Houston realized that the Supreme Court would summarily dismiss any attempt to attack *Plessy* on its four corners or in its entirety. Houston, using the ingenuity of an engineer, decided that the NAACP would target cases in which related issues could be decided destabilizing the very foundations of *Plessy* in a piecemeal fashion. For Houston, only an incremental and deliberate process could generate the long term effects on legal precedent desired. Houston recognized that the "'Law [is] . . . effective . . . always within its limitations," and it would be "too much to expect the court to go against the established and crystallized social customs."[32] Accordingly, Houston focused on areas where segregation was most vulnerable to attack and where segregationists were unlikely to respond with emphatic anger.

For example, Houston chose to focus his efforts first on desegregating graduate and professional schools. By focusing on graduate and professional schools, Houston could achieve his aim of having educated Black lawyers and social scientists to represent Black issues—and achieving small judicial victories laying a precedential groundwork for larger achievements—while at the same time avoiding the raw nerves associated with integrating primary and elementary education. When Houston did shift his focus to elementary education, he started outside of the classroom. Accordingly, by the time *Brown* reached the Supreme Court, the Supreme Court and other federal courts had ruled:

(1) In *Missouri ex rel. Gaines v. Canada*,[33] that state laws requiring African Americans to attend out of state graduate schools—rather than allowing them admission to in-state all-white facilities or building separate graduate schools for African-Americans—were unconstitutional under the equality prong of the separate but equal doctrine;

(2) In *Alston v. School Bd.*,[34] that African American teachers must be paid salaries equal to those of white teachers;

(3) In *Morgan v. Virginia*,[35] that state requirements for segregated seating on interstate buses were unconstitutional;

(4) In *Patton v. Mississippi*,[36] that statu-

tory and administrative strategies employed to exclude African-Americans from criminal juries were unconstitutional;

(5) In *Shelley v. Kraemer*,[37] that the federal Constitution prohibited state courts from enforcing racially restrictive covenants;

(6) In *McLaurin v. Oklahoma State Regents*,[38] that an African American student admitted to a previously segregated graduate school could not be subjected to patterns and practices of segregation interfering with the students meaningful classroom instruction and interaction with peers, such as making a student sit in the classroom doorway.

And (7) in *Sweatt v. Painter*,[39] that a separate law school, hastily established for black students to prevent the admission of black students to the previously all white University of Texas School of Law, could not provide a legal education "equal" to that available to white students.

With this precedent, with this groundwork laid, Thurgood Marshall had the ground to stand on in *Brown*. And, more importantly, Dr. King could take the reins and lead the way to the promised land. And in this effort, Dr. King could employ the assistance of hundreds of Howard educated African-American lawyers. The legacy of Charles Hamilton Houston is legacy by design. He saw a problem, in a vision he saw the solution, and with sweat, tears, and with own life, he made sure the vision was realized.

Martin Luther King was not lawyer. But as I noted, King's debt to the law is no less great. ■

Judge James Wynn is a judge on the North Carolina Court of Appeals. He is chair of the North Carolina Bar Association's Program Committee for the celebration of the 50th Anniversary of Brown v. Board of Education, chair of the ABA's Appellate Judge's Conference, a member of the American Law Institute, and sits on the Executive Committee on the National Conference of Commissioners for Uniform State Laws.

Eli Paul Mazur is a recent graduate of Duke University School of Law. He formerly clerked for Judge Wynn and is currently clerking for the Honorable Graham C. Mullin, Chief Judge of United States District Court, Western District of North Carolina.

Endnotes

1. The substance of this article was presented by Judge Wynn in a speech at the Greensboro Bar Winter Meeting on 15 January 2004.
2. 347 U.S. 483 (1954).
3. Genna R. McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* 3 (1983).
4. Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 35 DUKE L.J. 624, 629-30 (1985).
5. *Id*. at 627.
6. Lynchings: By Year and Race (2003), available at http://www.law.umkc.edu/faculty/projects/ftrials/shipp/lynchingyear.html.
7. 388 U.S. 1 (1967).
8. 163 U.S. 537 (1896).
9. McNeil, *supra* note 2, at xvii.
10. *Id*. at 36-41. *See also* Joyce B. Ross, *E. Spingarn and the Rise of the NAACP 1911-1939* 81-102 (1972) (discussing establishment of officer corps for African-American soldiers).
11. Charles Hamilton Houston, *Saving the World for Democracy*, Pittsburgh Courier (Aug. 24, 1940).
12. McNeil, *supra* note 2, at 52-53.
13. *Id*. at 53.
14. Genna Rae McNeil, *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2167, 2168 (1998).
15. McNeil, *supra* note 2, at 64.
16. McNeil, *supra* note 2, at 84.
17. *Id*. at 86.
18. *Id*. at 134.
19. J. Clay Smith Jr., Book Review, 98 Harv. L. Rev. 482, 488 (1984) (Reviewing McNeil, *supra* note 2).
20. *Id*.
21. *Id*. (citing Richard Kluger, *Simple Justice* 136 (1975)).
22. 175 U.S. 528 (1899).
23. *Id*. at 530-31.
24. *Id*. at 544.
25. 211 U.S. 45 (1908).
26. *Id.* at 59.
27. *Berea College v. Commonwealth*, 94 S.W. 623, 624 (Ky. 1906).
28. 275 U.S. 78 (1927).
29. *Id*. at 79-80.
30. *Id*. at 80-82.
31. *Id*. at 85.
32. McNeil, *supra* note 2, at 134.
33. 305 U.S. 337 (1938).
34. 112 F.2d 992, 996 (4th Cir. 1940).
35. 328 U.S. 373 (1946).
36. 332 U.S. 463 (1947).
37. 334 U.S. 1, 20 (1948)
38. 339 U.S. 637 (1950).
39. 339 U.S. 629 (1950).

Brown v. Board of Education: The State Bar Debates

By Michael Dayton

Mother and Daughter at US Supreme Court

May 1954: Nettie Hunt and her daughter Nickie sit on the steps of the US Supreme Court. Nettie explains to her daughter the meaning of the high court's ruling in the Brown v. Board of Education case that segregation in public schools is unconstitutional.

North Carolina lawyers are familiar with the landmark case of *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), which opened the door to integration of the nation's public schools. What is not widely known is that *Brown* dominated the discussion at the State Bar's annual meetings in 1955 and 1956. Local school boards were seeking legal advice on what the decision meant for them. In response, Bar leaders stepped to the podium and debated how the state, and its school districts, should respond. The speeches those lawyers made have been preserved, word-for-word, in *The North Carolina Bar*, the forerunner of today's *State Bar Journal*.

With the 50th anniversary of *Brown* upon us, it is easy to take for granted that students of all races and colors sit side-by-side in classrooms. The Bar speeches serve as a reminder of how controversial and divisive such a notion seemed in 1954. *Brown* was actually the culmination of two decades of case law that eroded racial barriers at the college and university level. Even so, the decision came "thundering down," as one Bar leader put it, and left the state's legal profession, which itself was divided along racial lines, grappling for direction.

To better understand the arguments put forth 50 years ago, a little background is in order. Segregation of white and African-American schoolchildren had been the law of the land since 1896 under the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896). The *Plessy* decision held that separate facilities for African-Americans and whites were constitutional as long as they were equal. The case served as the legal justification for segregating public schools, restaurants, theaters, and public restrooms. The US Supreme Court turned *Plessy* on its ear in May 1954 when it handed down *Brown* and declared that "separate educational facilities are inherently unequal." The following year, the Supreme Court in *Brown II*, 349 U.S. 294 (1955), ordered the states to integrate their public schools "with all deliberate speed."

Brown did not sit well with the majority of North Carolina citizens. Mindful of that public sentiment, the state's leaders and lawmakers proposed implementation plans—voluntary segregation, for example—that stopped short of complete integration. The General Assembly passed a resolution in April 1955 that stated: "The mixing of the races in the public schools within the state cannot be accomplished and if attempted would alienate public support to such an extent that they could not be operated successfully." Legislators also set up the North Carolina Advisory Committee on Education, popularly known as the "Pearsall Committee" after its chair, lawyer Thomas J. Pearsall, to recommend a course of action. The committee eventually crafted the "Pearsall Plan," which shifted responsibility for desegregation to local school boards and allowed local communities to shut down mixed public schools if conditions became intolerable. The plan also provided that children assigned to an integrated school against their parents' wishes could either transfer to an unmixed school or receive a grant for private schooling. In September 1956, the state's voters, by an overwhelming 4-1 margin, approved the Pearsall Plan as an amendment to the state Constitution. Supporters said the amendment and several related statutes would steer the state along a moderate course until racial tensions subsided. However, some African-American leaders viewed those measures as delaying tactics.

State Bar Meetings

It was against that backdrop that the State Bar scheduled debates on *Brown* at its 22nd and 23rd annual meetings in 1955 and 1956. Bar officials were well aware of the significance of their remarks. Said John H. Hall, the State Bar's President in 1955-1956, "This will no doubt be an eventful year in the Bar's history, and the lawyers throughout the state will, to an unusual degree, be looked to and called for guidance and leadership in solving many of the key problems which are certain to arise. We cannot fail to respond willingly and intelligently, and by so doing increase in stature in the minds of the public." Hall, one of the key speakers at the 1955 meeting, said he nearly declined the invitation, but told his audience, "I said to myself that by so doing I was running away from the most important subject to face our state in this generation."

A pragmatist, Hall predicted North Carolina's public schools would remain segregated by the lawful avoidance of the Supreme Court's decision. He pointed to the General Assembly's April 1955 resolution and concluded integration would fail in the immediate future for lack of funding. "It is my considered opinion," said Hall, "that appropriations cannot be had from our Legislature for any school program bearing a label of integration or desegregation." But Hall said he held "no brief for those few who say we are going to defy the Federal courts and their mandates. Such bold words are poor consolation to a local board of education threatened with a contempt citation."

Hall said North Carolina and other southern states would arrive at a workable solution that stopped short of systemwide integration. "The solution may lie in voluntary segregation, subsidized schools, local option, or some entirely different and as yet unmentioned way," he said.

Hall had served for ten years as a trustee of the State Teachers College in Elizabeth City, an African-American institution. He

The original caption to this photo read: "9/4/1957-Charlotte, NC- Dorothy Geraldine Counts, 15 (L) is followed by a crowd of jeering teenagers as she leaves Harding High School, with her escort, Dr R.A. Hawkins. The crowd of about 100 youths pelted Dorothy and her escort with sticks and stones, after she enrolled at the White High School in Charlotte. An 18 year old white boy and a girl of 15 were arrested for hitting and spitting at the Negro girl when she left the school." Hawkins was the named plaintiff in the 1966 federal case which declared the Pearsall Plan unconstitutional.

questioned what would "become of 9,242 Negro school teachers in the graded schools of the state; are they going to be teaching mixed classes of white and Negro children? … Can you visualize a situation anywhere from Murphy to Manteo where a local school board will employ Negro teachers, knowing in advance that they are to teach white children? As long as human nature is what it is, this will never happen in the foreseeable future in this state. I am not debating what ought to be, I am giving only my candid opinion as to what will be."

W.B. Rodman Jr.

State Attorney General W.B. Rodman Jr., another speaker at the 1955 meeting, criticized the US Supreme Court opinion for its legal reasoning.

"To me one of the disturbing factors of the decision on May 1954, when they said that segregation now became a violation of the Fourteenth Amendment is the manner of its approach," Rodman said. "I personally feel that the best interest of all of our citizens will be served by separation of the races. Perhaps I am wrong about it. Perhaps the Supreme Court of the United States may be right in the conclusion it reaches; but if it is, the appropriate approach to it, it seems to me, was by the process outlined by the Constitution itself—namely, by amendment as provided in the Constitution."

Rodman noted that Chief Justice Warren had called the *Brown* case a "class action" that bound the parties "and everyone who belongs in the class." He questioned the reach of that class action. "I had thought that a class action bound those who were parties and those who might want to come in and make themselves parties to the action," he said. He cited a treatise on federal rules for the proposition that "class action is limited to that extent and that you cannot bind parties so that they are bound by the decree unless they are parties to the action."

Rodman called for patience and tolerance in implementing *Brown* and said separate schooling for whites and African-Americans should continue. "Give to the colored people their schools, give to them the ideal of pride in their race, and continue separation on a voluntary basis," he said. "Let's continue it and call on our courts to recognize the growing feeling that they must live within their own checks and balances and not become arbiters of our lives, economic and social."

Horace E. Stacy

Horace E. Stacy, the State Bar's second vice-president in 1955-1956, also served as attorney for the trustees of the Lumberton City Administration Unit. In that capacity, he had been asked for advice by the local superintendent of schools. Three or four African-Americans planned to apply to white schools, Stacy told the audience. An advocate of voluntary segregation, Stacy said he would advise the school to accept the applicants.

"They will not be there long," he said. "They have just as good schools as we have … and when they get the barrier broken down you say to them: 'Yes, you may come here,' they are not going to attempt integration en masse. Let them break that barrier down and voluntary segregation will work in North Carolina."

Stacy proposed the use of stalling tactics if

outside groups, such as the National Association for the Advancement of Colored People, sought mandatory injunctions to open up white schools. "[W]hen action is brought in federal court and before the injunction comes down, [the trustees] want to know what we are going to do about it," he said. "Well, I told them, 'You can resign…. If you want to pursue the tactics of delay you can just resign and let somebody else take your place, then they will have to start over again.'"

I. Beverly Lake Sr.

I. Beverly Lake Sr., an assistant attorney general who also served as a professor at Wake Forest's law school, spoke against the *Brown* decision at the 1956 meeting. Lake pointed to the language of the Tenth Amendment as his authority for opposing the Supreme Court ruling. That amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Lake argued that the Supreme Court's decision had allowed the federal government to usurp state rights. "I, therefore, consider myself bound by a sacred oath to interpose, to the fullest lawful and practicable extent, whatever professional skill or other resource I may have in opposition to any agency of the Federal Government—executive, legislative, or judicial—when that agency undertakes to invade the powers which the Constitution of the United States reserves to the State of North Carolina," he said.

Lake said intensive integration "whether sudden or gradual, will destroy the value of our public schools as educational institutions." He called for a concerted effort "to show our neighbors, white and Negro, the evil consequences to both races of integration in the schools, so that there will be a massive, passive, law-abiding but adamant resistance to the breakdown of a policy our state has followed so successfully for nearly a century."

He continued, "If, by judicial decree or otherwise, a child of one race is admitted to a school attended by children of the other race, neither our respect for the court or the board rendering the decree, nor our duty as citizens, requires us to accept that situation as desirable or endurable or final. In that event we may properly, and we should, encourage and assist our children and our neighbors in the use of every lawful means to cause that child and its parents to return to the practice North Carolina has found to be best for both races."

William T. Joyner

Also speaking at the October 1956 meeting was Raleigh lawyer William T. Joyner. Although Joyner served as vice-chairman of the Pearsall Committee, he said he was speaking in his capacity as a lawyer. However, he devoted much of his speech to explaining and defending the Pearsall Plan.

Joyner said the immediate integration of schools at the first-grade level was unrealistic because it ignored "the overwhelming and deep sentiment of the people of North Carolina…. The plain fact is that the people of North Carolina will not stand for any substantial racial mixing in the schools throughout the state in the first grade or any other grade."

Joyner noted that some states, including Virginia, South Carolina, Georgia, and Mississippi, were following a path of "massive inflexible resistance." The Pearsall Plan, in contrast, took a moderate course, he said. Underlying the plan was the basic assumption that "when given a choice, free from outside domination, [an African-American student] will choose to associate with members of his own race in the schools. A very keystone to the North Carolina position is that separation of the races in the schools by free and natural choice will be substantially complete."

Welch O. Jordan & Irving E. Carlyle

At the 1955 meeting, Greensboro lawyer Welch O. Jordan said that the elimination of segregation in the state's public schools was inevitable. He stressed that, like it or not, North Carolina lawyers had a professional obligation to follow *Brown*.

"The members of the North Carolina Bar are obligated, not only as citizens, but also by reason of the special duty arising out of the oath which lawyers take upon admission to practice, to obey, without reservation or equivocation, the mandate of the Supreme Court of the United States and that court's direct holding that segregated public schools violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States," Jordan said. "We must seek means of compliance with the law rather than means of resistance or loopholes through which obedience to the law may be avoided."

Jordan concluded: "It is the obligation of every lawyer to exert his or her influence in support of the fundamental constitutional principle that all citizens are equal before the law, and are entitled to genuine equality of treatment in all functions of our government, including the operation of our free public schools. In no other way can we be true to our great heritage."

Winston-Salem lawyer Irving E. Carlyle, speaking at the 1956 meeting, also took issue with legal tactics that sought to delay or block school integration. North Carolina's lawyers needed to take the lead in seeing that integration was implemented, Carlyle said.

"[W]e should remind ourselves now that the penalties we and our children and grandchildren will pay for not obeying the law of the land as laid down in the *Brown* case will be heavier than we now foresee, and one of them could well be isolation from the rest of the free world and the ultimate destruction of democracy," Carlyle said. "The highest part of our calling as lawyers is to lead the people towards respect for law and order. In proportion as we meet that obligation do we lift our profession to higher ground."

Epilogue

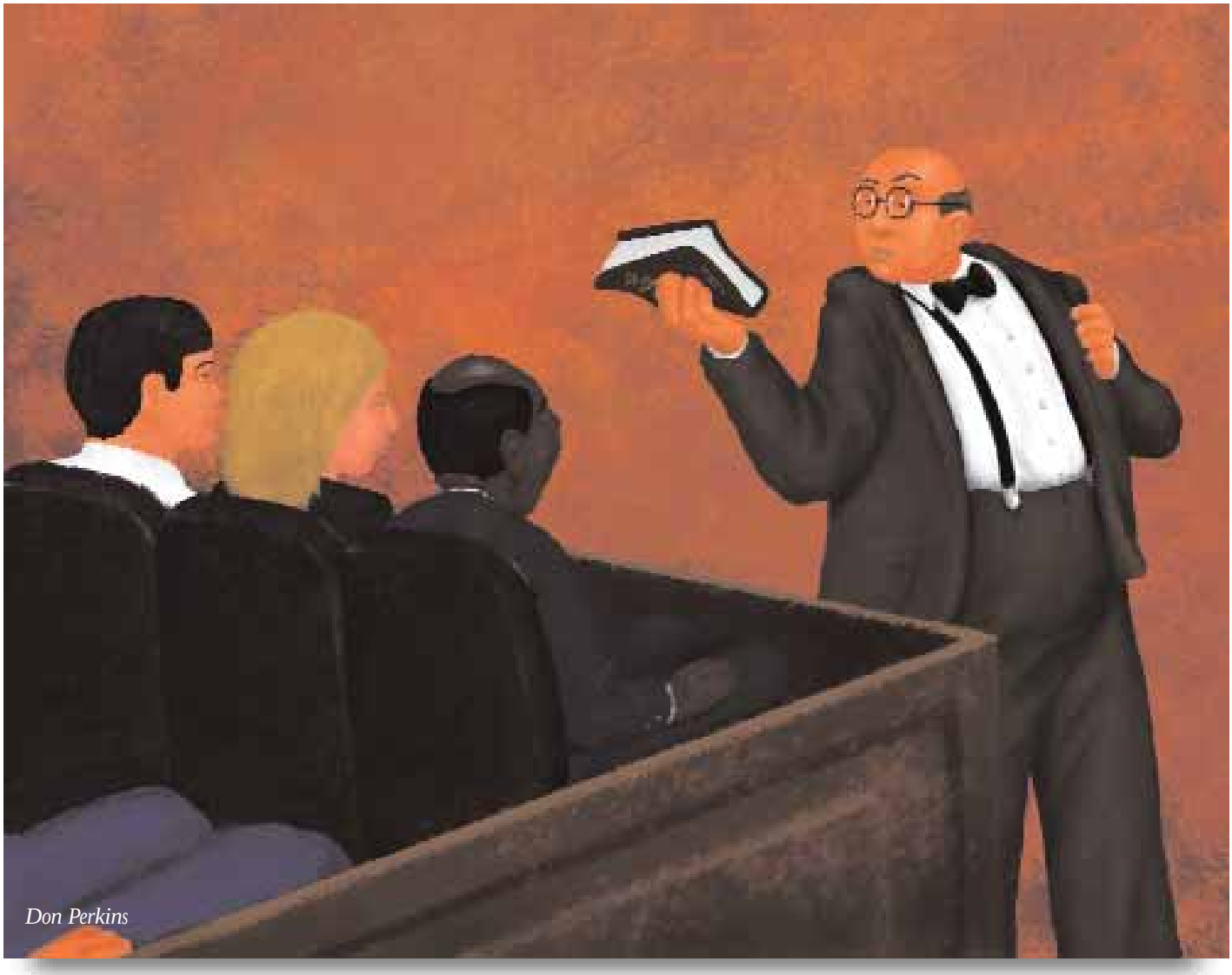
Joyner defended the Pearsall Plan as constitutional during his State Bar speech. However, a three-judge panel from the state's US Western District ruled otherwise in the March 31, 1966, case of *Hawkins v. North Carolina State Board of Education*. The *Hawkins* court also reflected on how far along the integration path the state had moved in ten years.

"We think that the constitutional amendment and statutes (sometimes called the Pearsall Plan), which were passed in response to the Supreme Court's decision in *Brown v. Board of Education*, 349 U.S. 294 (1955), are facially unconstitutional," wrote Judge Spencer Bell in *Hawkins*. "The preambles to these laws expressly state the feeling of the legislature that 'effective operation [of the schools] is impossible [as of 1956] except in conformity with community attitudes.' But community attitudes change, and we have changed in the intervening ten years, and we think the community attitude of North Carolina is very largely in favor of law abidance." ■

Michael Dayton is editor of North Carolina Lawyers Weekly and South Carolina Lawyers Weekly and co-author of a book on the history of Wake County lawyers to be published this spring.

To Cast the First Stone or Turn the Other Cheek: Biblical References in Closing Arguments

By Robert C. Montgomery



Don Perkins

"All Scripture is God-breathed and is useful for teaching, rebuking, correcting, and training in righteousness, so that the man of God may be thoroughly equipped for every good work." II Timothy 3:16-17 (NIV)

"We caution all counsel that they should base their jury arguments solely upon the secular law and the facts. Jury arguments based on any of the religions of the world inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk reversal of otherwise error-free trials." State v. Williams, 350 N.C. 1, 27, 510 S.E.2d 626, 643, cert. denied, 528 U.S. 880, 145 L. Ed. 2d 162, 120 S. Ct. 193 (1999).

North Carolina has not experienced the tumult and turmoil like that caused by a giant piece of granite containing the Ten Commandments placed in the lobby of the Alabama Supreme Court building. While religion may not be displayed quite so prominently in the ceremonial corridors of this state's courts, it nevertheless remains in the courtrooms themselves whether through something as simple as the swearing of witnesses or through something as complex as the religious values and beliefs brought there by jurors.

Although many North Carolinians rely upon religion for guidance in their everyday lives, the question remains whether there is any place for reference to religion in the secular courtrooms of the state. The issue of biblical references in closing arguments in criminal cases increasingly has been the subject of discussion by the North Carolina Supreme Court, and its treatment of the issue may serve as a barometer of religion's role in the secular justice system.

Most of the reported cases in North Carolina dealing with biblical references in closing arguments are capital cases in which the parties have made the references while urging the jury to recommend or reject the death penalty. However, biblical arguments have been utilized in the guilt-innocence phase of many non-capital criminal cases as well.[1]

In *State v. Oliver*, a 1983 case, the prosecutor argued the Bible did not prohibit the death penalty and quoted portions of scripture in support of the argument.[2] In finding no error in the trial, the North Carolina Supreme Court noted that the prosecutor "did not suggest that North Carolina's death penalty was 'divinely' inspired; he simply stated that it was not inconsistent with scriptures of the Bible."[3] The court further suggested there was no problem with the prosecutor's argument because it was made in anticipation of the defendant's argument that the New Testament teaches forgiveness and mercy.[4]

The closing arguments in *Oliver* are typical of arguments that include biblical references. Most present the perceived dichotomy between Old Testament and New Testament teachings concerning the propriety of capital punishment.

Another category of biblical arguments includes those that compare defendants to biblical characters or that include biblical illustrations. The North Carolina Court of Appeals found there was no error when the defendant was linked to Judas Iscariot[5] and when the prosecutor called the defendant a "wolf in sheep's clothing."[6] The North Carolina Supreme Court has approved of the use of a Bible verse to illustrate why evidence of flight is some evidence of guilt.[7]

Since the court's decision in *Oliver* more than 20 years ago, prosecutors and defense attorneys have continued to make biblical references in their closing arguments. During that same period, the North Carolina Supreme Court increasingly has become concerned about the use of matters

outside the law and evidence in closing arguments.[8]

The North Carolina Supreme Court has rarely been as fragmented in recent memory as it was in *State v. Haselden*,[9] a case in which the court considered the propriety of a prosecutor's penalty phase closing argument in which he made biblical references while urging the jury to recommend that the defendant be sentenced to death for first degree murder. In his argument, the prosecutor stated in part as follows:

> . . . As his Honor has instructed you, that side over there gets the last argument. I can't begin to think of what they would argue in this matter. But I suspect that at least one of their arguments is going to be that the death sentence is contrary to the Good Book. It's contrary to our Christian ethics. And then they're probably going to rare back and say, thou shalt not kill. If you're up on the Good Book, what does that mean? That means you and I shalt not kill. It doesn't mean that you shouldn't do it pursuant to the statutes and the law and order. You see, just a few verses below that, right after that thou shalt not kill, just a few verses below it it says, he that smiteth a man so that he die shall surely be put to death. Just a few verses below that. I suggest to you that that is biblical authority for the death sentence. Not a mandate that you do it in any one case, but it is the authority for those of you [who] worry about that.
>
> . . . .
>
> Now, listen to this, ladies and gentlemen of the jury. In the Good Book it says this in Numbers 35. I believe it's starting at verse 6, I mean 16. If he smite him with an instrument of iron so that he die he is a murderer: The murderer shall surely be put to death. If he smite him with throwing a stone wherewith he may die, and he die, he is a murderer: And the murderer shall surely be put to death.
>
> Listen to this ladies and gentlemen of the jury. This is in the Bible, in Numbers, Chapter 36, verse 29. So these things shall be for a statute of judgment.
>
> Ladies and gentlemen of the jury, North Carolina Statute 15A-2000 is a statute of judgment. That is simply that, a statute of judgment. And what does it say in the Bible about a statute of judgment? A statute of judgment unto you throughout your generations and all your dwellings. Whosoever killeth any person, the murderer shall be put to death by the mouth of witnesses. Moreover ye shall take no satisfaction for the life of a murderer which is guilty of death, but he shall surely be put to death. That's the statutes of judgment.
>
> . . . .
>
> You know, I'm going to make one more comment about the Bible. If you ever had any doubt—this is the New Testament, I understand. If you ever had any doubt about capital punishment in the Bible, remember when Jesus was on the cross, beside him on each side, if I recall correctly, is two thieves. He told one of them, he said, you'll be in heaven with me today, some words to that effect. Now, he had the power to take himself away from justice and get down off that cross. He had the power to take those two criminals down and put them on the ground and let them walk away, but he didn't, did he? It's probably why we say, God have mercy on your soul, because he had a soul, or at least that one. But he didn't take justice away from man. He didn't take them down off the cross. That's the strongest argument I can think of. He could've done it right then and there if he had wanted to, but he didn't.[10]

The defendant did not object to any of these portions of the argument.

Three justices wrote that the argument was not so grossly improper as to require *ex mero motu* intervention by the trial court,[11] two others concurred but would have gone further to say that the biblical references were not improper at all,[12] and two others dissented on the ground that the references were so improper that they were prejudicial to the defendant.[13] These plurality, concurring, and dissenting opinions present three differing viewpoints concerning the use of biblical references in closing arguments: (1) that such references are always proper so long as the argument does not ask jurors to render a verdict inconsistent with their oaths; (2) that such references are often improper but rarely are so improper as to affect the jury's decision; and (3) that while there may be a place for biblical references in closing arguments, more often than not they lead to confusion and the possibility that the jury will render a decision based on something other than the secular law. A fourth viewpoint, not represented by the opinions of the court in *Haselden*, is that there is no place for biblical references during closing argument whatsoever.

Not Improper at All

Are biblical references in closing arguments always improper? Or, are these references never improper?

The North Carolina Supreme Court has never addressed biblical arguments in terms of absolutes. Certainly, the court has drawn the line at remarks that state law is divinely inspired or that law officers are ordained by God.[14]

One of the reasons the court has never been absolute in its treatment of biblical arguments is that the court has rarely been faced with squarely addressing the propriety of biblical references. Defendants often do not object to biblical references, and their arguments on appeal therefore raise only the issue of whether the references were so "grossly improper" that the trial court should have intervened *ex mero motu* when it heard the references.[15] Even in a case where the defendant objected, the court addressed only whether a curative instruction given by the trial court was sufficient.[16]

While the court has found that biblical references violate the strict requirement that matters outside the law and evidence not be argued, it has also found biblical arguments "to fall within permissible margins [of closing argument] more often than not."[17] However, the court has recently made it sound as though many biblical arguments are improper, just not so grossly improper as to merit *ex mero motu* intervention.[18]

In *Haselden*, the viewpoint that biblical references are proper was represented by the two concurring justices. Those justices agreed with the principle that the secular law of North Carolina is to be applied in the courtrooms of this state, but they wrote separately to assert the "belief that neither this principle nor any other within our jurisprudence prevents prosecutors from presenting biblical references during clos-

ing argument in capital cases."[19]

The concurring justices first took issue with the idea that the Establishment Clause of the First Amendment to the Constitution of the United States sterilizes public forums by removing all references to religious beliefs.[20] Indeed, the North Carolina Supreme Court has rejected the argument that the use of biblical arguments violates the principles of separation of church and state contained in the First Amendment.[21]

Noting that many jurors in North Carolina have deeply-held Judeo-Christian beliefs that they do not necessarily leave on the courthouse steps, the concurring justices also pointed out that defense attorneys often attempt to tap those beliefs with arguments that the Bible prohibits any killing.[22] So long as prosecutors do not argue the death penalty is divinely mandated for a specific defendant, the justices said, biblical arguments are within the accepted parameters of closing argument and certainly do not fall within the realm of unacceptable hyperbole like comparing a crime to the Columbine High School shooting or Oklahoma City federal building bombing or calling a defendant "lower than the dirt on a snake's belly[.]"[23]

Finally, the concurring justices noted their belief that eliminating biblical arguments "would artificially and selectively eliminate Judeo-Christian precepts of justice from closing arguments, while still permitting arguments arising from other concepts of justice."[24] By doing so, the court would limit prosecutors in their ability to communicate to the jury that the death penalty is sometimes appropriate *and* limit defense attorneys in their ability to persuade a jury to spare the defendant's life.[25]

Some defense attorneys have disagreed intensely with the viewpoint espoused by the concurring justices, believing the use of biblical references in closing argument, in fact, does serve as government endorsement of religion and thereby violates the Establishment Clause of the First Amendment.[26] Some courts have echoed these concerns as well.[27]

There is also some concern that the use of the Bible in the secular courtroom trivializes the Bible, permitting prosecutors and defense attorneys to twist its words however they choose. Indeed, it has been noted that turning the holy into the secular may in fact demean the holy.[28]

The issue of whether biblical references are proper or improper may boil down to whether the Bible is treated as just another text. Until that question is resolved, the prevailing view may remain that although biblical arguments are strongly discouraged they are not so "grossly improper" as to require intervention by the trial court absent an objection.

Not "Grossly Improper"

Cases in which the court has found no gross impropriety in the use of biblical references in closing arguments have focused on three reasons why an argument was not grossly improper: first, the argument was made in anticipation of the defendant's argument that the Bible prohibited capital punishment;[29] second, the prosecutor made it clear that the secular law of the state controlled;[30] and third, the reference was slight or not excessive.[31]

The plurality in *Haselden* represented the viewpoint that a biblical argument, while perhaps improper, is usually not so grossly improper that *ex mero motu* intervention is required when the defendant has made no objection.[32] While cautioning counsel to base their arguments solely upon the secular law and the facts, the plurality concluded:

> [T]he prosecutor argued to the jury that the Bible did not prohibit the death penalty. Contrary to defendant's argument, however, the prosecutor did not suggest that the Bible mandates a death sentence. Indeed, the prosecutor told the jury that the Bible verses he was citing were "not a mandate . . . but [were] the [biblical] authority for those of you [who] worry about that." Additionally, the prosecutor in the present case told the jury that its sentencing decision should be based on the law and the evidence. Finally, the trial court instructed the jury to follow the law as provided to it. Accordingly, we conclude that the prosecutor's use of biblical references was not so grossly improper that the trial court erred by failing to intervene *ex mero motu*.[33]

The plurality's analysis is consistent with the court's prior holdings. Inasmuch as the court had never said a trial court is required to intervene on its own when similar comments were made during closing argument, there was no reason for the trial court in *Haselden* to believe it was required to do so absent an objection.

Further, North Carolina's treatment of biblical arguments is not unusual. Indeed, other jurisdictions have similarly concluded that even improper biblical references are seldom prejudicial depending upon the standard of review applied and the context in which the comments were made.[34]

Usually Improper

The dissenting justices in *Haselden* represent the viewpoint that biblical arguments are usually improper. The dissenters believed that the prosecutor's closing argument urged the jury to recommend a death sentence on an improper basis and that at some point the court has to enforce its admonitions.

The dissenters noted their belief that the biblical arguments in *Haselden* were inconsistent with other portions of the capital trial.[35] The dissenting justices also took the majority to task for the fact that the court has never reversed a conviction because of an argument improperly based on religion.[36] While noting "that professionalism includes the avoidance by practitioners of all known improprieties," the dissent acknowledged that the court could hardly expect advocates to refrain from the behavior when risking nothing more than "a verbal hand slapping" from the court."[37]

Although the dissent believed prosecutors should refrain from biblical arguments because of past warnings from the court, the dissent did not address the defendant's failure to object to the prosecutor's biblical argument. Whether for tactical reasons[38] or because defendants want to make their own biblical arguments, reported cases show that defendants seldom, if ever, object to biblical arguments. If the defendant had objected in *Haselden*, for instance, the trial court could have corrected any impropriety or the issue would have been preserved for appellate review under a less stringent standard than the test for "gross impropriety."[39]

Rejecting a view that religious arguments are never appropriate, the dissenters went on to say there is a place for religious and moral arguments in North Carolina.[40] But the dissenters believed the court should have held "that any argument that essentially asks a jury to base its decision on

moral or religious grounds instead of on the law and the evidence is improper and grounds for reversal,"[41] perhaps showing that the dissenting and plurality justices merely disagreed as to how far the prosecutor went in this particular case.

The two-vote concurrence notwithstanding, the two-vote dissent in *Haselden* could portend the future movement of the court on this issue. However, the fact remains that the trial courts have yet to be given a mandate to intervene *ex mero motu* when defendants do not object and when defendants often make their own biblical arguments.

Always Improper

Although not voting for a total ban on biblical arguments, the dissenters in *Haselden* referred to a total ban in capital litigation in the state courts of Pennsylvania.[42] In *Commonwealth v. Chambers*, the Supreme Court of Pennsylvania reacted to one phrase in the prosecutor's closing argument: "As the Bible says, 'and the murderer shall be put to death.'"[43]

Although the defendant in *Chambers* objected and the trial court gave a curative instruction, the court nevertheless granted the defendant a new sentencing hearing. Noting that it had previously discouraged biblical references while characterizing them as "oratorical flair," the court admonished "all prosecutors that reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action."[44]

The Pennsylvania court's rationale for its decision was clear. It believed "the prosecutor interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference to be drawn therefrom" and "that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance."[45]

The court in *Chambers* notably did not mention the arguments of defense attorneys. Could they still argue that biblical principles prohibit imposition of the death penalty? The court later answered this question and made it clear that defendants in Pennsylvania are prohibited from making "references to the Bible in opposition to imposition of the death penalty."[46]

The *Chambers* opinion likewise did not deal with the notion, accepted in North Carolina, that prosecutors *and* defendants may use the Bible to allay jurors' concerns that following the secular law may somehow violate religious law and their own religious and moral values. Instead, the court in *Chambers* was concerned only with the use of the Bible to suggest that the death penalty is mandated,[47] a line that is drawn in North Carolina.

Conclusion

Regardless of the propriety of biblical arguments in death penalty cases and other cases, the court in *Haselden* has signaled that some of its members are growing tired of the court's unheeded admonitions. At the same time, some members of the court are expressing their opinion that there is nothing wrong with the use of biblical references so long as in the end the jury renders its decision based upon the secular law of the state. The bottom line is that within accepted parameters, as set out by the plurality justices in *Haselden*, biblical arguments in North Carolina do not merit the trial court's intervention absent an objection.

Questions remain, however, concerning future treatment of the issue. Can jurors ever be expected to divest themselves of all their religious values when deciding cases of life and death? Must the courtrooms of this state be sanitized and rendered religion-free zones? These and other questions likely will be answered in the years to come. ■

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Endnotes

1. *See, e.g., State v. Ross*, 100 N.C. App. 207, 395 S.E.2d 148 (1990) (second degree murder), *aff'd*, 329 N.C. 108, 405 S.E.2d 158 (1991); *State v. Hewett*, 93 N.C. App. 1, 376 S.E.2d 467 (1989) (sex offenses); *State v. Rozier*, 69 N.C. App. 38, 316 S.E.2d 893 (controlled substances and weapons offenses), *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984); *State v. Powell*, 55 N.C. App. 328, 285 S.E.2d 284 (1982) (conspiracy).
2. 309 N.C. 326, 359, 307 S.E.2d 304, 326 (1983).
3. *Id.* at 359, 307 S.E.2d at 326.
4. *Id.* at 360, 307 S.E.2d at 326.
5. *State v. Lang*, 46 N.C. App. 138, 146-47, 264 S.E.2d 821, 827, *rev'd on other grounds*, 301 N.C. 508, 272 S.E.2d 123 (1980).
6. *Ross*, 100 N.C. App. at 214, 395 S.E.2d at 152.
7. "'The wicked flee when no man pursueth, but the righteous are bold as a lion.' Proverbs 28, the first verse." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). The court has permitted use of the verse in closing argument. *State v. Call*, 349 N.C. 382, 420-21, 508 S.E.2d 496, 520 (1998).
8. *See, e.g., State v. Rogers*, 355 N.C. 420, 464, 562 S.E.2d 859, 886 (2002) (finding prejudice in closing argument where an expert witness was disparaged); *State v. Jones*, 355 N.C. 117, 126, 558 S.E.2d 97, 103 (2002) (noting "that the issue of improper closing arguments has become a mainstay, if not a troublesome refrain, in cases before this court").
9. 357 N.C. 1, 577 S.E.2d 594, *cert. denied*, ___ U.S. ___, 157 L. Ed. 2d 382, 124 S. Ct. 475 (2003).
10. *Id.* at 21-22, 577 S.E.2d at 607-08.
11. *Id.* at 24, 577 S.E.2d at 609.
12. *Id.* at 35, 577 S.E.2d at 615-16 (Brady, J., concurring).
13. *Id.* at 39-40, 577 S.E.2d at 618 (Edmunds, J., dissenting).
14. *See State v. Brown*, 320 N.C. 179, 206, 358 S.E.2d 1, 19, *cert. denied*, 484 U.S. 970, 98 L. Ed.

2d 406, 108 S. Ct. 467 (1987).

15. Where the defendant does not object to a closing argument, he must show the remarks were so grossly improper that the trial court should have intervened *ex mero motu*. *Call*, 349 N.C. at 419-20, 508 S.E.2d at 519. "The impropriety of the argument must be gross indeed in order for [the Supreme] Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979).

16. *See State v. Swann*, 322 N.C. 666, 679, 370 S.E.2d 533, 540 (1988) (appearing to approve of argument that our secular law is based on God's law but finding there was no prejudice in any event because of the trial court's instruction to disregard the argument).

17. "Neither the 'law' nor the 'facts in evidence' include biblical passages, and, strictly speaking, it is improper for a party either to base or to color his arguments with such extraneous material." *State v. Artis*, 325 N.C. 278, 331, 384 S.E.2d 470, 500 (1989), *vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604, 110 S. Ct. 1466 (1990).

18. *See, e.g., State v. Williams*, 350 N.C. 1, 27, 510 S.E.2d 626, 643 (discouraging arguments that the Bible does not prohibit the death penalty), *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162, 120 S. Ct. 193 (1999); *State v. Barrett*, 343 N.C. 164, 183-84, 469 S.E.2d 888, 899 (finding the defendant not entitled to relief even assuming *arguendo* that argument was improper), *cert. denied*, 519 U.S. 953, 136 L. Ed. 2d 259, 117 S. Ct. 369 (1996); *State v. Bunning*, 338 N.C. 483, 490, 450 S.E.2d 462, 465 (1994) (disapproving of a biblical reference in closing argument but finding it was not so egregious as to require *ex mero motu* intervention).

19. *Id.* at 32, 577 S.E.2d at 613 (Brady, J., concurring).

20. *Id.* at 32, 577 S.E.2d at 613 (Brady, J., concurring).

21. *Williams*, 350 N.C. at 26-27, 510 S.E.2d at 643.

22. *Haselden*, 357 N.C. at 33, 577 S.E.2d at 614 (Brady, J., concurring).

23. *Id.* at 34, 577 S.E.2d at 614-15 (Brady, J., concurring) (quoting *State v. Jones*, 355 N.C. 117, 132, 558 S.E.2d 97, 107 (2002)).

24. *Id.* at 33, 577 S.E.2d at 614 (Brady, J., concurring). Although there are some justifiable concerns about the use of biblical references in closing argument, there is an equally compelling concern that the Bible and other religious works not be selectively excluded from the courtrooms of this state. If an attorney may use something from Shakespeare or other literary work or refer to other opinions outside the record to make a point in closing argument, it would seem that the Bible should be fair game to make a point as well. The North Carolina Supreme Court itself has referenced Shakespeare. *See State v. Barden*, 356 N.C. 316, 365, 572 S.E.2d 108, 139 (2002), *cert. denied*, ___ U.S. ___, 155 L. Ed. 2d 1074, 123 S. Ct. 2087 (2003). A defendant also has been permitted to argue ideas taken from a letter from Reverend Jesse Jackson and to quote from a letter written by Coretta Scott King. *See State v. Braxton*, 352 N.C. 158, 218, 531 S.E.2d 428, 463 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797, 121 S. Ct. 890 (2001).

25. *Id.* at 35, 577 S.E.2d at 615 (Brady, J., concurring).

26. John H. Blume & Sheri Lynn Johnson, *Symposium: Religion's Role in the Administration of the Death Penalty: Don't Take His Eye, Don't Take His Tooth, and Don't Cast the First Stone: Limiting Religious Arguments in Capital Cases*, 9 Wm. & Mary Bill of Rts. J. 61, 86-89 (2000).

27. *See, e.g., State v. Ceballos*, 266 Conn. 364, 390, 832 A.2d 14, 35 (2003) (noting that "religious references during trial are fraught with possible establishment clause complications").

28. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 712 n.19, 79 L. Ed. 2d 604, 635 n.19, 104 S. Ct. 1355, 1379 n.19 (Brennan, J., dissenting) (noting in context of government-sponsored nativity scenes that "[m]any Christian commentators have voiced strong objections to what they consider to be the debasement and trivialization of Christmas through too close a connection with commercial and public celebrations").

29. *See, e.g., State v. Holden*, 346 N.C. 404, 433-34, 488 S.E.2d 514, 530 (1997) (finding no gross impropriety where the prosecutor was anticipating the defendant's argument based on the Bible), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132, 118 S. Ct. 1074 (1998).

30. *See, e.g., State v. Davis*, 353 N.C. 1, 29, 539 S.E.2d 243, 262 (2000) (noting that the prosecutor counseled jurors that they should base their sentencing decision on secular law), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 55, 122 S. Ct. 95 (2001).

31. *See, e.g., State v. Geddie*, 345 N.C. 73, 100-01, 478 S.E.2d 146, 160 (1996) (finding no need for *ex mero motu* intervention because the biblical reference was slight), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43, 118 S. Ct. 86 (1997).

32. *Haselden*, 357 N.C. at 19, 577 S.E.2d at 606 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157, 106 S. Ct. 2464 (1986)). The plurality applied the standard of review for alleged errors to which the defendant did not object at trial: "This court has repeatedly held that arguments to which defendant fails to object at trial 'must be gross indeed in order for this court to hold that a trial judge abused his discretion in not recognizing and correcting ex mero motu an argument which defense counsel apparently did not believe was prejudicial when he heard it.'" The plurality opinion further defined a grossly improper argument as one that "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"

33. *Id.* at 24, 577 S.E.2d at 609.

34. *See, e.g., Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996) (finding that courts have "universally condemned" religious arguments as "confusing, unnecessary, and inflammatory" but nevertheless finding the argument in this case did not render the trial fundamentally unfair); *People v. Sandoval*, 4 Cal. 4th 155, 193-94, 841 P.2d 862, 883-84 (1992) (holding that while neither the State nor the defendant should rely upon religious authority to support or oppose the death penalty, there was no reasonable possibility that the jury would have reached a different result absent the State's argument), *aff'd sub nom. Victor v. Nebraska*, 511 U.S. 1, 127 L. Ed. 2d 583, 114 S. Ct. 1239 (1994).

35. *Haselden*, 357 N.C. at 36, 577 S.E.2d at 616 (Edmunds, J., dissenting).

36. *Id.* at 37, 577 S.E.2d at 616 (Edmunds, J., dissenting).

37. *Id.* at 37, 577 S.E.2d at 617 (Edmunds, J., dissenting). The dissent cited Rogers, 355 N.C. at 464, 562 S.E.2d at 886, a case in which the court held a closing argument that an expert should not be believed because he would give inaccurate or untruthful testimony in exchange for pay was improper but not grossly improper. The court in *Rogers* made sure to warn that its holding "should not be construed as an invitation to trial counsel to try the same thing again." *Id.* at 464, 562 S.E.2d at 886.

38. The court has noted "the reluctance of counsel to interrupt his adversary and object during the course of closing argument for fear of incurring jury disfavor." *Jones*, 355 N.C. at 129, 558 S.E.2d at 105. However, the court has also expressed its awareness that the rule requiring objection ensures that a party not be able to build error into the record by failing to object, *see Oliver*, 309 N.C. at 334, 307 S.E.2d at 311, and that it is the responsibility of a litigant to bring an alleged error to the attention of the trial court to enable the trial court to correct any error during trial and thereby avoid the need for a new trial. *See State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983).

39. For an example of a case in which the trial court denied a defendant's motion in limine to prohibit a prosecutor's biblical argument and the appellate court found prejudicial error as a result, see *Carruthers v. State*, 272 Ga. 306, 310, 528 S.E.2d 217, 222 (2000).

40. *Haselden*, 357 N.C. at 38, 577 S.E.2d at 617 (Edmunds, J., dissenting).

41. *Id.* at 38, 577 S.E.2d at 617 (Edmunds, J., dissenting).

42. *Id.* at 38, 577 S.E.2d at 617 (Edmunds, J., dissenting).

43. 528 Pa. 558, 585, 599 A.2d 630, 643 (1991), *cert. denied*, 504 U.S. 946, 119 L. Ed. 2d 214, 112 S. Ct. 2290 (1992).

44. *Id.* at 586, 599 A.2d at 644.

45. *Id.* at 586, 599 A.2d at 644.

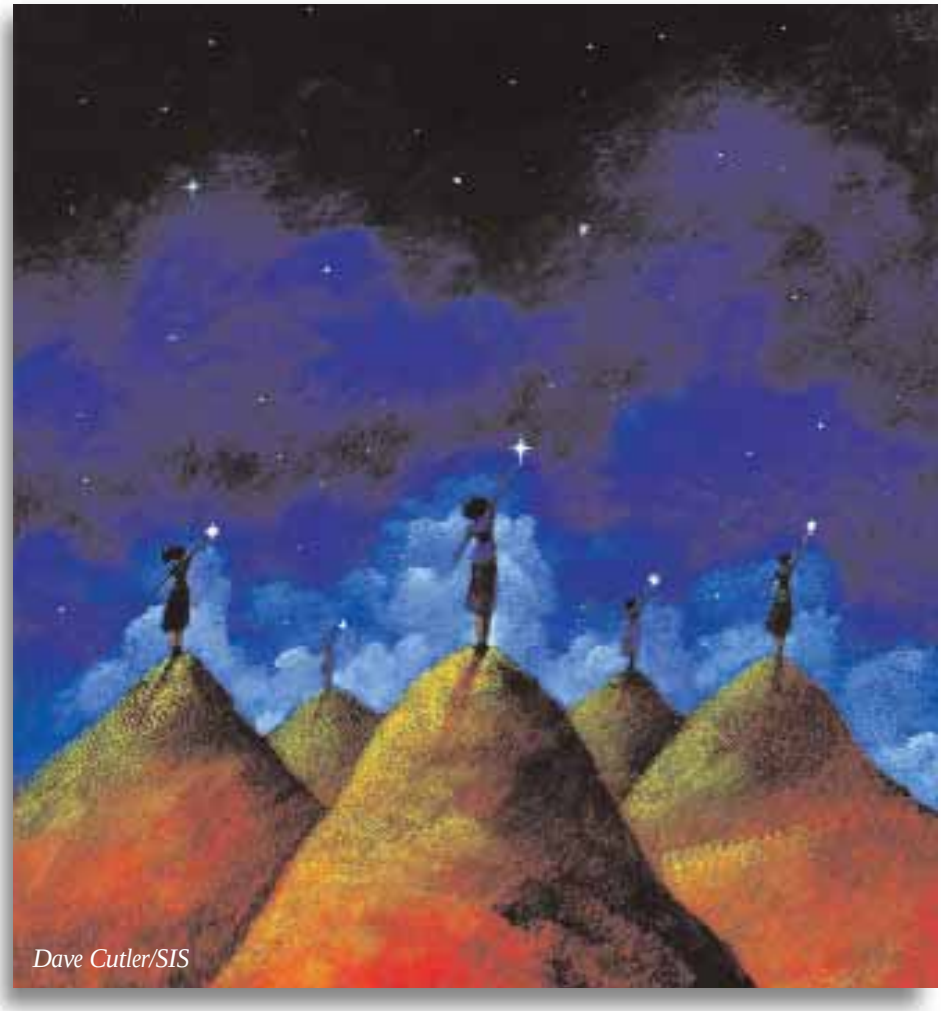
46. *Commonwealth v. Daniels*, 537 Pa. 464, 480, 644 A.2d 1175, 1183 (1994). Some defense attorneys believe defendants should be given more leeway in making biblical arguments because of the constitutional restraints imposed upon the States through the First and Eighth Amendments to the United States Constitution. *See* John H. Blume & Sheri Lynn Johnson, *Symposium: Religion's Role in the Administration of the Death Penalty: Don't Take His Eye, Don't Take His Tooth, and Don't Cast the First Stone: Limiting Religious Arguments in Capital Cases*, 9 Wm. & Mary Bill of Rts. J. 61, 104 (2000).

47. The Supreme Court of Pennsylvania later clarified that biblical references are not always improper so long as they are not used as an independent source of law for the conclusion that the death penalty is an appropriate punishment for a defendant. *See Commonwealth v. Spotz*, 562 Pa. 498, 544-45, 756 A.2d 1139, 1164-65 (2000), *cert. denied*, 532 U.S. 932, 149 L. Ed. 2d 307, 121 S. Ct. 1381 (2001).

Bradwell v. Illinois and the Paramount Destiny of Woman

By Elizabeth G. McCrodden

On April 15, 1873, the United States Supreme Court decided the case of *Bradwell v. Illinois*,[1] holding that the right to practice law in state courts is not a privilege or immunity of a United States citizen within the meaning of the first section of the Fourteenth Amendment to the US Constitution. It upheld the Illinois Supreme Court's determination not to allow Bradwell to practice law in Illinois.



Dave Cutler/SIS

Following one day after the Supreme Court's decision in the *Slaughterhouse Cases*,[2] the majority opinion should have been nothing more than the Court's adherence to precedent. What distinguished *Bradwell* was that the petitioner in the case was a woman, Myra Bradwell, and that three of the justices who had dissented in the *Slaughterhouse Cases* joined in a concurring opinion which represented a judicial repudiation of the nineteenth-century struggle for women's rights.

Myra Bradwell and the Illinois Supreme Court

The quest of Myra Bradwell (1831-94) to become a licensed attorney began in 1852, when she married James Bradwell, a young law student. After her husband passed the bar exams in Illinois and Tennessee, Bradwell determined that she would read law seriously, primarily for the purpose of assisting her husband in his new law practice. Several interruptions, including the births of four children and her volunteer activities during the Civil War, delayed her progress, but in 1869, Bradwell passed the Illinois bar exam.[3] When she applied to the Illinois Supreme Court for a license to practice, she anticipated some resistance and submitted with her application evidence of her successful examination and a brief in which she raised the issue: "The only question involved in this case is—Does being a woman disqualify [me] under the law of Illinois from receiving a license to practice law?"[4]

The first answer the Illinois court rendered was that Bradwell could not practice law because she was a *married* woman and, therefore, suffered from the "disability imposed by your married condition. . . ."[5] The common law principle of coverture was that, upon marriage, a man and woman became one person, and that person was the husband; after marriage, a woman had no legal identity[6] and could not perform a number of legal tasks, including the execution of contracts, which would make it impossible for her to enter into a contract to perform legal services.

Bradwell, however, believing that constitutional amendments and court opinions had weakened the principle of coverture, filed a brief attacking the court's denial of her license. In a written opinion,[7] the Illinois court retreated from its earlier reasoning and held that Bradwell could not practice law because she was a woman. "[T]he sex of the applicant, independent of coverture, is, as our law now stands, a sufficient reason for not granting this license."[8] Foreshadowing the concurring opinion of Justice Bradley at the US Supreme Court and mirroring nineteenth-century beliefs about a woman's role, the Illinois court stated, "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth."[9] Because Justice Bradley's concurrence in *Bradwell* will rely on the separate spheres in which men and women operated, we must examine how those spheres impacted nineteenth-century women.

Nineteenth Century's Separate Spheres

In nineteenth-century America, the roles of men and women were distinct. While society expected men to participate in government and commerce, it also viewed those activities as too competitive for women. The sphere for women was the home and hearth, and around that sphere developed the "cult of true womanhood."[10] There were four attributes ("cardinal virtues") by which a woman's community and her husband were to judge her: piety, purity, submissiveness, and domesticity.[11]

A nineteenth-century woman was to pursue piety, or religion, because it was the source of her strength. Because she carried the moral torch in nineteenth-century America, society frowned upon her having other interests, including intellectual interests, which would distract her from her piety.[12] Hence, a woman's education was primarily religious.

Purity, the second virtue, was the only acceptable condition for a woman who desired respectability and, indeed, a husband. A woman "bestowed her greatest treasure" on her wedding night[13] after which, disabled under the law, she was to submit to her husband's guidance and control. He was to be the doer; she was to be passive. As her protector, he gained control of her property and managed it. Business affairs were beyond her sphere which revolved around husband and children.

The true woman's place, therefore, was in the home, by her own fireside, which meant that domesticity was the highest calling for her. Woman was not to look beyond the home for projects, whether social or moral; she had plenty to do with her own family.[14] As with piety, the virtue of domesticity influenced a woman's education, making acceptable those studies which made her a better wife and mother. Certainly, law was not among those subjects.

Against the backdrop of this nineteenth-century culture there evolved a movement of women who challenged this view of a woman's role. Using their position as moral leaders to get past the hearth and into the public eye, these women initially worked for other causes, including the elimination of prostitution, the abolition of slavery, and temperance. Early on, however, their motives were tinged with self-interest so that, for example, the efforts of the New York Female Moral Reform Society attacked not only prostitution but also the double standard by which society judged the sexual activities of men and women.[15] By the 1840's, the self-interest of these women was open: they were advocating for suffrage, dress reform, property rights, and higher education for themselves.[16] With the 1848 gathering in Seneca Falls, New York, nineteenth-century women launched a political movement dedicated to their own issues. Behind the leadership of Elizabeth Cady Stanton, the women drafted a Declaration of Principles, modeled after the Declaration of Independence, which included demands for equal education, equal employment opportunity, equality before the law, and the vote.[17]

Although Myra Bradwell did not attend the Seneca Falls convention, historians count her among the thousands of women across the country who assumed the responsibility, before and after the Civil War, to advocate for women's rights. Reminiscent of other feminist leaders of the nineteenth century, she possessed the aggressive personality necessary for this advocacy. Her failure to receive a law license from the Illinois Supreme Court provided the first opportunity. As a woman attempting to practice law, Myra Bradwell was to present to the Supreme Court a legal challenge to the old order of the cult of true womanhood. Aware of predictions

that she would "wreck [her] family and break [her] hearthstone to smithereens,"[18] she nevertheless wanted out of the home and into a male profession.[19]

Bradwell v. Illinois

When *Bradwell v. Illinois* came to the Supreme Court in 1873, the court was struggling with its role in American politics. Its recent history included the 1857 *Dred Scott* opinion,[20] after which it fell into "its Civil War impotency,"[21] doing little more than ratifying congressional measures designed to quell the southern rebellion. For political reasons, Congress chose to prey on the court during and after the war, changing the number of justices from nine to ten, then to seven, before restoring it to its current number. Salmon P. Chase, Lincoln's Chief Justice appointee, never possessed the ability to shape the court as had Marshall and Taney, even though his own Republican party dominated the court (six Republicans to three Democrats), and, with the exception of Justice Nathan Clifford, all were there as a result of Lincoln or Grant appointments.

Reconstruction issues confronted the Chase Court. Between 1865 and 1870, the country had ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, and these amendments were to provide the basis for many appeals the court was to consider. Among these appeals was *Bradwell v. Illinois*, the first case to reach the court raising questions about the interpretation of the Fourteenth Amendment.[22]

To appreciate *Bradwell*, one must understand the more famous *Slaughterhouse Cases*. On April 14, 1873, a day before the decision in *Bradwell*, the US Supreme Court issued a sharply divided opinion in which it upheld a Louisiana law requiring that all persons in the business of butchering animals in New Orleans use for that purpose a corporation established by the same law. Opponents of the law eventually argued before the Supreme Court that the law violated the privileges and immunities clause of the Fourteenth Amendment in that it unduly restricted the rights of Louisiana butchers to labor without restraint in a legitimate occupation. In rejecting this argument, Justice Miller, writing for the majority of five justices, narrowly interpreted "privileges or immunities of citizens of the United States" to protect only those rights associated with US citizenship. The protection afforded by the Amendment did not, therefore, apply to the right to labor over which the states had authority.

Dissenting from the case were Justices Bradley, Field, and Hunt as well as Chief Justice Chase. Although there were three separate dissenting opinions, the four justices agreed that the Fourteenth Amendment secured the rights of all Americans, not just African-Americans, and that the right to labor was among the privileges and immunities of citizens of the United States. On this basis, they would have found the Louisiana law unconstitutional.

An understanding of the *Slaughterhouse Cases* is important in assessing the import of *Bradwell*, because it allows a juxtaposition of the views of three of the justices when gender became a variable. The issues presented by the two cases appeared similar; indeed, the attorney representing Bradwell argued *Slaughterhouse*, but had done so on behalf of Louisiana. In arguing *Bradwell*, the attorney, Senator Matthew H. Carpenter, a noted constitutional scholar[23] and an avid advocate of equal rights for women,[24] faced a dilemma: how was he to argue Bradwell's case without implicating the right of women to vote, an implication that would surely lose the case. He resolved the dilemma by specifically arguing that women would not have the right to suffrage until Congress acted, an argument which angered feminists and made them question why Bradwell had chosen him to represent her.

Carpenter's argument, while dwelling on the privileges and immunities clause, sounded nevertheless like equal protection:

> . . . [T]he conclusion is irresistible that the profession of the law, like the clerical profession and that of medicine, is an avocation open to every citizen of the United States. And while the legislature may prescribe qualifications for entering upon this pursuit, it cannot, under the guise of fixing qualifications, exclude a *class of citizens* from admission to the bar. The legislature may say at what age candidates shall be admitted; may elevate or depress the standard of learning required. But a qualification to which a *whole class of citizens* can never attain is not a regulation of admission to the bar, but is, as to such citizens, a prohibition.[25]

Illinois thought little of Bradwell's case, sending no one to argue on its behalf.

In *Bradwell*, as in the *Slaughterhouse Cases*, Justice Samuel F. Miller delivered the majority opinion. Miller, a Republican and a Lincoln appointee, had made it clear in *Slaughterhouse* that he did not want the Supreme Court to be the "perpetual censor" over state legislation regarding the civil rights of its citizens.[26] Relying on precedent, therefore, he quickly disposed of Bradwell's appeal, finding that "the right to control and regulate the granting of license to practice law in the courts of a state is one of those powers which are not transferred for its protection to the federal government, . . ."[27] Joining in Justice Miller's opinion were Justices Nathan Clifford,[28] David Davis,[29] William Strong,[30] and Ward Hunt,[31] all of whom had signed on to the majority opinion in *Slaughterhouse*.

Although three of the remaining four justices had dissented from Miller's interpretation of the privileges and immunities clause in *Slaughterhouse*, they concurred in the opinion Miller wrote in *Bradwell*. They did so, however, on quite distinct grounds which reflected the notion of separate spheres as well as the chasm between nineteenth-century feminist aspirations and reality.

Justice Joseph P. Bradley was a Republican whom President Grant appointed to the bench in 1870. According to historians, he had a phenomenal legal mind which was, nonetheless, beset with blind spots, one of which was *Bradwell*.[32] While studying law, he did extensive work on the common law and its origins,[33] no doubt affecting his "old-fashioned views but deeply felt beliefs"[34] about the place of women. Contrary to what many commentators believe to be a complete contradiction of his position in *Slaughterhouse*,[35] Bradley did try to distinguish his dissent in that case with his concurrence in *Bradwell*. He simply noted that there had never been a privilege held by women as citizens to engage in any and every profession or occupation.[36]

> On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man

"The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."

> is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.[37]

Bradley's concurring opinion signaled the depth of the backlash against nineteenth-century feminism: "The paramount destiny and mission of woman are to fulfill the noble and benign office of wife and mother. This is the law of the Creator."[38] A close study of Bradley's opinion reveals his adherence to the cult of true womanhood. Women were delicate; they were dependent on men whom they needed for protection, and they fulfilled their highest destiny in the domestic sphere. Justices Stephen J. Field[39] and Noah H. Swayne[40] joined Bradley in the concurring opinion.

The lone dissenting voice, although not heard, was that of Chief Justice Salmon P. Chase. Chase, a Republican, had come to the bench after Lincoln's re-election in 1864. Prior to his appointment, he had served as US Senator, governor of Ohio, and, more recently, as Lincoln's wartime Secretary of the Treasury. Contemporaries were aware of Chase's independence and his ambition to govern.[41] Before *Bradwell*, while doing his circuit duties, Chase had decided the Maryland case of *In re Turner*,[42] brought by a black woman claiming to be a victim of involuntary servitude. Chase had ruled for the woman, holding, among other things, that the Thirteenth Amendment established freedom as the constitutional right of *all* persons in the United States.[43] Historians view Chase's opinion in *In re Turner* to signal his view that, under the Constitution,[44] women as well as men stood on equal footing with white men.[45] Chase regretted, according to one biographer, the "omission of a specific gender-neutral provision, especially concerning civil rights, an omission he tried to rectify in *In re Turner* and would fail to remedy in *Bradwell v. Illinois*."[46]

Chase, however, did not commit to paper his views on Myra Bradwell's case or on women and the Fourteenth Amendment. His dissent contained no explanation, because at the time the court considered *Bradwell*, Chase was close to death. He died on May 7, 1873, less than a month after the *Bradwell* decision.

The Aftermath: The Law Regarding Women

The *Bradwell* case came as no surprise. An April 24, 1873, article in *The Nation* reported:

> It is a rather ludicrous illustration of the character of the woman movement that a prominent female agitator should have seized the opportunity to prove the fitness of her sex for professional life, by taking for her first important case one which she must have known the court would decide against her, unless she supposed that they were likely to be influenced by personal solicitation and clamor, or else that they were all gone crazy.[47]

The number of Supreme Court cases that have come after *Bradwell* and that have attempted to interpret the role of women is large, and it is not the purpose of this note to review them all. To the extent that they reflect a continuing societal ambivalence toward the role of women, however, cases spanning the years since *Bradwell* are instructive.[48]

The next and last attempt to use the privileges and immunities clause to advance women's rights occurred when Virginia Minor, president of the Missouri Woman Suffrage Association, and other women attempted to register and vote in states in which their votes were illegal. Efforts by women to gain the vote elicited the same objections as their efforts to practice law. Each activity represented an "assault upon the home" and an invitation to "unsexed" wives.[49] In the 1875 case of *Minor v. Happersett*,[50] the Supreme Court found that there is no express or implied privilege to vote and that there was, therefore, no constitutional violation by those states who did not allow women to vote.

Until 1971, Bradley's view of women dominated most court decisions dealing with women's rights. Those years saw such notable cases as *Muller v. Oregon*[51] which distinguished the Court's earlier foray into substantive due process by *Lochner v. N.Y.*[52] The *Muller* court held that, without violating the Constitution, a state could regulate the hours a woman might work, because the state had a public interest in the physical well-being of those through whom the strength and vigor of the race depended.

Goesaert v. Cleary[53] further highlighted the ambivalence of society toward women's work outside the home. In that 1948 case, a sharply divided Court upheld against a

constitutional challenge a Michigan law forbidding women, other than wives and daughters of the owners, from working in bars. The majority believed that the Michigan law aimed at protecting women from the evils of the bar and could legitimately distinguish between those whose husbands or fathers owned the bar and could, presumably, provide protection and those who had no such protection. Reminiscent of Justice Bradley's opinion in *Bradwell*, Justice Frankfurter, who wrote the majority opinion, argued that "nature made men and women different. . . . The law must accommodate itself to the immutable difference in Nature."[54]

Eventually, however, the Court would apply another clause of the Fourteenth Amendment as a basis for relief for women: the equal protection clause. Carpenter in his *Bradwell* argument had alluded to it, although he apparently did not understand its value if, indeed, it had value in 1873. Almost a century after *Bradwell*, the Court used the equal protection clause in *Reed v. Reed*[55] to strike down an Idaho statute which gave preference to males over females in administrating estates of deceased persons. With this case, the Court began to treat gender as a semi-suspect classification.[56] No doubt pending congressional action on the Equal Rights Amendment influenced the Court's decision to move the law in a new direction.[57]

That there is still ambivalence about what women can and cannot do and what the state can legitimately control is apparent in *Dothard v. Rawlinson*[58] which upheld an Alabama prison regulation forbidding women from working as guards in maximum security prisons for men. The Court reasoned that, although federal law prohibited the use of sex stereotypes in employment standards, woman's ability to maintain order "could be directly reduced by her womanhood."[59] Likewise, in *Rostker v. Goldberg*,[60] decided ten years after *Reed*. The Court held that the Military Selective Service Act did not violate the Fifth Amendment in requiring the registration of males and not females. Since the purpose of the registration was to provide combat troops for which women are deemed unsuitable, the Act was constitutional.[61]

Over 100 years since *Bradwell*, the legal struggle over woman's roles continues. Despite the fact that the struggle has changed immensely since that case, has shifted constitutional grounds and has won the rights of women to enter arenas well beyond the home and hearth, *Dothard* and *Rostker* attest to the fact that the debate over women's rights is far from over. Those who continue to advocate for women's rights use Bradley's concurring opinion in *Bradwell* to serve not only as a reminder of the legal status of women in 1873 but also as a reminder of the power of the Supreme Court to define that status.

The Aftermath - Myra Bradwell

When the Supreme Court decided *Bradwell*, Myra Bradwell's case was moot. The Illinois legislature had already passed a statute allowing women to practice law within the courts of that state. Myra Bradwell, who had founded and edited the highly respected legal periodical, *Chicago Legal News*, had a successful career in publishing and in advocating legal reform.[62] She never again sought a license to practice law. In 1890, when she was in failing health, the Illinois Supreme Court, on its own motion, granted her that license, *nunc pro tunc*, the date of her original application.[63] ■

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Endnotes

1. 16 Wall. 130 (1873).
2. 16 Wall. 36 (1873). *Bradwell* was orally argued before the *Slaughterhouse Cases*, which leads one to question why the Court issued the opinion in *Bradwell* a day later. There is no record of the conference. One scholar has suggested that since these were the first two cases requiring the Court to interpret the Fourteenth Amendment and since Illinois failed to respond to Bradwell's argument, it would not be appropriate as the first case addressing the privileges and immunities clause. Leslie Friedman Goldstein, *The Constitutional Rights of Women*. (Madison, WI.: The University of Wisconsin Press, 1989), 66.
3. Jane M. Friedman, *America's First Woman Lawyer: The Biography of Myra Bradwell* (Buffalo, New York: Prometheus Books, 1993), 18. Bradwell was not the first woman lawyer in the country; Iowa earlier in 1869 had allowed a married woman, Arabella Mansfield, to practice law, but Mansfield, a teacher, never pursued the profession.
4. Friedman, 18, quoting Bradwell's application, reprinted in *Chicago Legal News* [hereinafter CLN] 2 (February 5, 1870): 145, col.1.
5. Friedman, 18, quoting communication from N.L. Freeman, reporter for the Illinois Supreme Court (October 1869), reprinted in *CLN* 2 (February 5, 1870): 145, col.3.
6. Her husband's legal identity "covered" hers; hence, coverture.
7. According to the court, it put its decision in writing "in order that . . . [Bradwell], or some other persons interested, may bring the question before the next legislature." *In re Bradwell*, 55 Ill. 535, 536 (1869).
8. Ibid., 537.
9. Ibid., 539.
10. After reviewing multitudes of nineteenth-century women's magazines, historian Barbara Welter coined the term "cult of true womanhood" to describe society's expectations of women in that century. Barbara Welter, "The Cult of True Womanhood: 1820-1860." *American Quarterly* 18, No. 2 (Summer 1966): pp. 151-74.
11. Ibid, 152.
12. Ibid., 154.
13. Ibid., pp. 154-155.
14. Ibid., 159-63.
15. Carol Smith-Rosenberg, *Disorderly Conduct: Visions of Gender in Victorian America* (New York: Oxford University Press, 1985), 129-31.
16. Catherine Clinton, *The Other Civil War: American Women in the Nineteenth Century* (New York: Hill and Wang, 1984), 72.
17. Clinton, 75.
18. Interview with Myra Bradwell, *Chicago Tribune* (May 12, 1889): 26, col.1-2.
19. A Bradwell biographer contends that Myra Bradwell's aim of assisting her husband in his practice of the law weakened the notion that she was assaulting the cult of true womanhood. Friedman, 38. However, Bradwell's life, especially her reform efforts which sometimes put her in conflict with her husband, is a testament to the contrary.
20. 19 How. 393 (1857)
21. Sidney H. Asch, *The Supreme Court and Its Greatest Justices*. (New York: Arco Publishing Co., Inc., 1971), 59.
22. *Bradwell* was the first case to reach the Court with Fourteenth Amendment questions, but not the first the Court decided. Goldstein, 66. See footnote 2, *supra*.

23. Justice Miller referred to Carpenter as the only person he knew who was a "man of genius." Charles Fairman, *Mr. Justice Miller and the Supreme Court 1862-1890* (Cambridge, Mass.: Harvard University Press, 1939), 116.

24. In 1870, Carpenter pledged to Elizabeth Cady Stanton that he would fight for women's suffrage in the Senate, and in 1874, he represented Susan B. Anthony in her attempt to vacate a fee charged her when she sought to vote in the 1872 presidential elections. Friedman, 22.

25. 16 Wall. 130.

26. Clare Cushman, ed. *The Supreme Court Justices, Illustrated Biographies, 1789-1995*, 2nd ed. (Washington: Congressional Quarterly 1995), 180.

27. 16 Wall. at 138.

28. Nathan Clifford, a Democrat, was the only justice on the Court at the time who was not appointed by either President Lincoln or President Grant. President Buchanan had appointed him in 1857 as a compromise candidate - a northerner with southern sympathies. After the Civil War, he became a strong critic of the federal government and presumably shared Miller's aversion to federal oversight of state legislation. Cushman, 166-70.

29. David Davis, an Illinois Republican, was a longtime friend of President Lincoln who appointed him to the bench in 1862. His opinion in *Ex parte Milligan*, 71 U.S. 2 (1866), was his most notable. His majority opinion held that war did not suspend the Constitution and its rights and that, therefore, when Milligan was tried for treason during the Civil War, he had been entitled to indictment by a grand jury and a public trial by an impartial jury. In 1877, Davis resigned from the Court after the Illinois legislature elected him to the US Senate. Cushman, 181-85.

30. William Strong, a Pennsylvania Democrat who had served on that state's highest court, came to the federal bench through a Grant appointment in 1870. Although colleagues considered him competent, he rarely wrote opinions dealing with constitutional issues. He did pen a constitutional opinion holding that the judicial system could not discriminate against blacks in the selection of a petit jury. Unlike other members of the Court, Strong had no interest in politics. Cushman, 196-200.

31. President Grant appointed Republican Ward Hunt to the Supreme Court in 1872. Although he appeared to support black civil rights, he was not an advocate for women's rights. In 1872, Ward served as the circuit judge who heard the case against suffragist Susan B. Anthony. The state of New York charged her with violating Section 19 of the Enforcement Act of 1870 by "knowingly . . . voting without having the lawful right to vote." [This is the case in which Matthew H. Carpenter represented Anthony.] Ward refused to instruct the jury that, if it found that Anthony believed in good faith that she had the right to vote, it should acquit. He ended up essentially directing the jury to find Anthony guilty. In 1882, circuit court judge C. J. McCrary overturned Anthony's fine of $100. Cushman, 206-210.

32. Fairman, 565.

33. Cushman, 202.

34. Ibid., 204.

35. *See, e.g.*, Cushman, 204.

36. 16 Wall. at 140-41.

37. Ibid., 141.

38. Ibid.

39. In 1863, President Lincoln crossed party lines to appoint to the Court Stephen J. Field, a Democrat. Lincoln apparently was looking for someone more sympathetic to his plans for reconstruction. Field had been Chief Justice of the California Supreme Court. Noted for a hot temper, he was not progressive, consistently opposing an income tax and any form of graduated taxes. Cushman, 186-90. Field led the Court in reading the economic principles of *laissez-faire* into the Constitution, a movement culminating in *Lochner v. New York*, 198 U.S. 45 (1905). Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States*, Stephen Johnson Field, by Loren Beth (New York: Oxford University Press, 1992), 290. Hence one might conclude Field had no difficulty in reading into the Constitution the nineteenth-century "ideal woman." Nevertheless, scholars consider Field a member of one of the strongest "quadrumvirates" ever to sit on the Court, the other members being Bradley, Miller, and John Marshall Harlan. Ibid.

40. President Lincoln's first appointee to the Supreme court was Noah H. Swayne, a Republican from Ohio. Reared by Quaker parents, he opposed slavery and, initially a Democrat, he left that party because of its proslavery position. As a strong ally of business, he offended Justice Miller who referred to him as a mediocre judge. Cushman, 171-75. Scholars appear to agree that Swayne was Lincoln's weakest appointment to the Supreme court. Hall, ed., Noah Haynes Swayne, by Augustus M. Burns III, 851.

41. Kenneth Barnard Umbreit, *Our Eleven Chief Justices: A History of the Supreme Court in Terms of Their Personalities*. (New York: Harper & Brothers Publishers, 1938), 256.

42. 24 Fed. Case 337 (1867).

43. Harold M. Hyman. *The Reconstruction Justice of Salmon P. Chase*. (Lawrence, Kansas: University of Kansas Press, 1997), 129.

44. At the time Chase decided *In re Turner*, the Fourteenth Amendment was not law.

45. Hyman, 130. Hyman notes in his biography that Chase's view of women was more liberal than his time. He believed, for example, that women had the ability to contract as his practice of hiring women clerks during his Treasury years attested.

46. Ibid., 152.

47. Charles Warren, The Supreme Court in *United States History, Vol. 3*, 1856-1918 (Boston: Little, Brown, and Company, 1922), 272, fn.1, quoting *The Nation*, April 24, 1873.

48. Kenneth Karst, a professor of law at UCLA, believes that the role of women in American history is socially constructed around the needs of men and views Supreme Court cases as evidence of that. Kenneth L. Karst, "Woman's Constitution," *Duke Law Journal* (1984): 447, 450. See footnote 61, *infra*.

49. Deborah L. Rhode, *Justice and Gender: Sex Discrimination and the Law.* (Cambridge, Mass.: Harvard University Press, 1989), 20.

50. 21 Wall. 162 (1875).

51. 208 U.S. 412 (1908).

52. 198 U.S. 45 (1905).

53. 335 U.S. 464 (1948).

54. Felix Frankfurter, qtd. In William Chafe, *The American Woman: Her Changing Social, Economic, and Political Roles, 1920-1970*. (Oxford: Oxford University Press, 1972), 125-126.

55. 404 U.S. 71 (1971).

56. Leslie Friedman Goldstein, *The Constitutional Rights of Women*, 2nd ed. (Madison, WI: The University of Wisconsin Press, 1989), 109.

57. Ibid., 112.

58. 433 U.S. 321 (1977).

59. Ibid., 335.

60. 453 U.S. 57 (1981).

61. Karst, footnote 48, *supra*, sees *Rostker* not as a military judgment but as a political decision, pointing out that the President and the Joint Chiefs of Staff wanted to register women as well as men. Congress, responding to public opinion, excluded women from the requirement and, according to Karst, did so as part of a larger political order that "serves to subordinate women to men's uses." Karst, 451.

62. George W. Gale, "Myra Bradwell: The First Woman Lawyer," *American Bar Journal* 39: 1080. Gale, a member of the Illinois bar but not a contemporary of Bradwell, believed that Bradwell's greatest achievements came from her legal reform work. He noted that with a few exceptions all the reforms she advocated, some revolutionary by the standards of her day, became law, 1120-21. She even criticized her own husband who, as a judge, ruled that widows had no inheritance other than what their husbands might leave them. Subsequently, she drafted a statute to change the law, and Gale credited her with persuading the legislature to enact it, 1081.

63. Ibid., 1080.

A History of the North Carolina Association of Women Attorneys

By Anna Stein

The North Carolina Association of Women Attorneys (NCAWA), founded in 1978, celebrates its 25th anniversary this year. It is an opportune time to reflect upon the beginnings of the organization and all that it has accomplished in this period.

Pictured in photo, left to right: Carolyn McAllaster (founding mother), Ellen Gerber, Anne Slifkin (seated, founding mother), and Sharon Thompson (founding mother).

NCAWA was the brainchild of Sharon Thompson, who settled in Durham after attending law school at Antioch in Washington, DC. Thompson commented to her friend Carolyn McAllaster, a 1976 graduate of the University of North Carolina School of Law, how wonderful it would be for North Carolina to have an organization for women attorneys like those she had heard about in other states. This organization, she felt, could promote the rights of women under the law and also support the advancement of women in the profession. Thompson recalls, "There was a real sense of possibilities, of things that could be changed, and certainly an awareness of things that needed to be changed." Thompson and McAllaster joined with McAllaster's UNC law school classmate Anne Slifkin, of Raleigh, and Kathy Schneberk-King, a Durham attorney, to see if they could make this vision a reality.

The women first created a list of the female attorneys in the state to solicit their interest in such an organization. The State Bar does not categorize attorneys by gender, so the group pored over lists of names to determine who might be female. This task presented a bit of a challenge (Leslie? Robin? Beverly?), but was completed with the assistance of Mary Alice Simmons at the State Bar. As it turned out, at that time there were approximately 375 women attorneys in the state. It was a small universe. McAllaster recalls, "The interesting thing is that we knew a huge majority of the people on that list and we probably knew of every woman attorney with more than five years' experience. The vast majority of the women had fewer than five years' experience at that point, because our class was really the first big class of women law students."

From the list of women attorneys contacted, more than 100 showed up for the organizational meeting held on March 11, 1978, at UNC Law School. The meeting was a well-organized all-day affair with

workshops and speakers. Distinguished Durham attorney Kathrine Everett, who was in her mid-eighties at the time, sat in the center of the front row of the welcoming meeting. The third woman admitted to the bar in North Carolina, Everett had fought for suffrage rights earlier in the century and was at that time working for the passage of the Equal Rights Amendment. Her presence was a distinct honor and inspiration to those in attendance.

One of the speakers called in to provide vision for the group was Dr. Pauli Murray, an African-American lawyer and Episcopalian priest who had been raised in Durham. She noted with approval the racial diversity she saw in the crowd and encouraged the group to continue this diversity as it became established. NCAWA has been successful in this regard. McAllaster comments, "From the beginning, this organization was integrated racially, and we had a lot of participation from African-American women as well as white women. It was one of the few groups that you could join where you had that working together of black and white women, and that was really exciting."

At the end of that first meeting, the women voted to form an organization and created a steering committee. Some of the women involved in the creation of the fledgling NCAWA and who are still members of the organization today include Judge Linda McGee, Judge Robin Hudson, Leslie Winner, Lennie Gerber, Carol Spruill, Joyce Davis, Angela Bryant, Joslin Davis, Deborah Greenblatt, and Lark Hayes.

Over the next few months, numerous meetings were devoted to delineating the goals of the new organization and writing the proposed by-laws. Many of those involved in these early gatherings attest to the amazing attention to detail shown. The framers of the by-laws debated every sentence of the document and claim to have had fun in the process. Anne Slifkin says, "I remember going to Lennie Gerber's lake house and lying out on the deck arguing about how to make a viable structure that wasn't hierarchical and that just seemed to take hours, but it was wonderful. You know, if you couldn't take too much more, you just got in the lake!"

Once in place, the organization rapidly set about achieving one of its primary goals: to promote the rights of women under the law. NCAWA's first legislative priority was the passage of the Equal Rights Amendment. In spite of making numerous calls and visits to legislators, participating in marches, and giving speeches in favor of the amendment, NCAWA's effort was in vain.

The group had more success, however, with its next important legislative push. NCAWA members, notably Meyressa Schoonmaker, Gwyn Davis, and Lennie Gerber, worked tirelessly to promote passage of legislation enacting equitable distribution of marital property in 1981. Members helped draft the legislation, lobbied legislators, and gave speeches throughout the state educating women and encouraging them to contact their legislators. Before the passage of equitable distribution, in a divorce, property passed to the spouse

During its 25-year history, NCAWA has lobbied in support of numerous laws to promote the rights and welfare of women and children. ... Since 1993, the organization has hired a lobbyist to help enact its legislative agenda, the first one being Ann Christian and the current being Anne Winner.

in whose name assets were held, almost always the husband. Equitable distribution laws decreed that marital property is to be divided between husband and wife in an equitable manner by a judge at the dissolution of a marriage.

In further protection of the economic interests of women in the state, NCAWA lobbied heavily for a change in the nature of tenancy by the entireties. Before the change, all rents and profits received from property held by a husband and wife as a tenancy by the entirety went to the husband only. In 1982, the General Assembly enacted legislation giving husband and wife "an equal right to the control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety."

During its 25-year history, NCAWA has lobbied in support of numerous laws to promote the rights and welfare of women and children. The organization has from the beginning been a staunch advocate of the right of women to choose abortion; it has also worked in support of legislation to fund prenatal care for poor women. NCAWA has also long been an advocate for victims of domestic violence. It consistently fights to protect money set aside for domestic violence programs and worked for such legal changes as the criminalization of marital rape and the right to proceed *pro se* in seeking domestic violence protective orders. NCAWA has helped to enact legislation to improve the collection of child support and to allow the enforcement of alimony during appeal. It has supported child care reform to give parents a greater voice in regulations and to improve caregiver ratios and rating systems, as well as numerous other initiatives aimed at improving the lives of women and children in this state. Since 1993, the organization has hired a lobbyist to help enact its legislative agenda, the first one being Ann Christian and the current being Anne Winner.

In addition to its mission to promote the rights of women under the law, NCAWA has worked from its inception to help women achieve positions of power in the bar and the judiciary. Of distinct importance to NCAWA has been helping women and people of color get elected to the State Bar Council, which at the formation of NCAWA was all white and male. Bar Councilors are responsible for electing officers of the State Bar, enacting ethical rules governing the profession, and reviewing grievances against attorneys by members of the public. NCAWA worked for many years publicizing among its members the need for women Bar Councilors and encouraging them to become involved in their local bars. The organization also pressed for changes in the way local districts selected Bar Councilors in order to promote diversity.

Finally, in 1986, three women were elected to the State Bar Council: Trish Pegram, Julia Jones, and Kaye Webb. They reported being warmly welcomed to the group. "So many people made a point of saying, 'Glad you're here; it's way past time that women be represented,'" commented Pegram. By 1996, there were seven women State Bar Councilors, and it was during this year that the State Bar passed a ban on sexual relations between attorney and client. Past NCAWA president Harriet Hopkins opined in a 1998 newsletter: "Without the seven women bar councilors in 1996, the ban on sex with clients would never have passed. All can recall the tie vote (with all women voting in favor of the ban), with the tie being broken in favor of the ban by then President Erwin Spainhour. Not only were the votes of those women critical, but also their eloquence during the discussion was imperative."

Perhaps NCAWA's most single-minded pursuit has been to help put women attorneys on the bench. At the time the organization was founded, there were no female superior court judges and only a few female district court judges. The Supreme Court and the court of appeals had one woman judge each: Chief Justice Susie Sharp and Chief Judge Naomi Morris. Jack Cozort, then legal counsel to Governor Hunt and later himself a court of appeals judge, began calling NCAWA for advice when judicial vacancies occurred. The first endorsement of NCAWA was for Karen Galloway for district court in Durham County, and she was appointed in 1979, bringing the number of female district court judges to three.

In 1982, Joyce Davis and Frances Rufty were the first women attorneys appointed to the nominating committee for superior court judgeships. Finally, in 1984, Mary McLaughlin Pope was appointed by Governor Hunt to the superior court bench. Pope was only the third woman in the state to hold a superior court judgeship, following Susie Sharp (1948-1962) and Winifred Wells (1972).

In 1985, Governor Hunt appointed Sarah Parker to the court of appeals, and Governor Martin appointed Rhoda Billings to the Supreme Court, each the second woman to serve on these courts. Billings lost her bid to retain her seat. Sarah Parker won a seat on the Supreme Court in 1992 and has remained the only woman on the state's highest court to this day. Following Sarah Parker on the court of appeals have been nine women judges: Allyson Duncan (appointed by Martin in 1990), Elizabeth McCrodden (appointed by Hunt in 1993), Linda McGee (appointed by Hunt in 1995, elected in 1996), Patricia Timmons-Goodson (appointed by Hunt in 1997, elected in 1998), Robin Hudson (elected in 2000), Loretta Biggs (appointed by Hunt in 2001), Wanda Bryant (appointed by Easley in 2001 and again in 2003), Martha Geer (elected in 2002), and Ann Marie Calabria (elected in 2002). In 2001, Judges McGee, Timmons-Goodson, and Biggs sat on the first all-woman panel of the court of appeals. In 2002, Judges Timmons-

It was hard to find the kind of support NCAWA provided; when the women came together, they could swap stories of being called "honey" in the courtroom or being mistaken for the attorney's secretary instead of the attorney.

Goodson, Biggs, and Bryant sat as the first panel composed of three African-American women. The most recent judicial appointment of a female North Carolinian is that of longtime NCAWA member Allyson Duncan to the Fourth Circuit Court of Appeals by President George W. Bush. Judge Duncan is the first African-American woman to serve on the Fourth Circuit and also the first woman or African-American to serve on the Fourth Circuit from the state of North Carolina.

Throughout its history, NCAWA has worked to make appointments and elections such as those highlighted above happen. The group maintains a list of members interested in appointments and actively encourages its members to seek elected office. Court of appeals Judge Linda McGee, for example, had never really considered a career in the judiciary until fellow NCAWA member Leslie Winner encouraged her to seek appointment by Governor Hunt and vigorously lobbied on her behalf. In 1981, at one of its first annual meetings, NCAWA sponsored a seminar entitled "Making Women Electable," attended by over 200 women lawyers and lay people. In 1984, NCAWA joined with the Office of the Governor to sponsor a Judicial Appointments Conference, with the goal of educating women interested in becoming judges about the appointment process. Most recently, NCAWA's 2003 conference included a panel entitled, "Why You Should Be a Superior Court Judge and How We Can Help You Get There."

Since its inception, NCAWA has nominated women for judicial appointments, and with the establishment of its political action committee in 1986, the group also began making endorsements in judicial elections. The PAC's goal is to promote the election of candidates who have demonstrated their support for the participation of women in the legal profession and who have promoted the rights of women under the law. NCAWA's endorsement, according to court of appeals Judge Robin Hudson, has become "one of the endorsements judicial candidates definitely want." She believes this is because the organization is "perceived as non-partisan and non-biased" and "does one of the most thorough jobs researching candidates of any endorsing group." To wit, the group now receives requests for endorsement even from men running unopposed.

In 1998, reflecting the growing number of women judges in the state, NCAWA established its own Judicial Division. This group, first chaired by Judge Linda McGee, allows women judges from across the state to get to know one another. It also holds Women Judges Forums at all five law schools in North Carolina to encourage young women law students to think about a career in the judiciary. Judge McGee says, "Sharing how we got to be judges might light a spark in people's minds about where they want to go someday."

A further mission of NCAWA is to provide women attorneys with an opportunity to network and socialize. This function was particularly important at the organization's beginning, when many members were the only women attorneys in their communities. It was hard to find the kind of support NCAWA provided; when the women came together, they could swap stories of being called "honey" in the courtroom or being mistaken for the attorney's secretary instead of the attorney.

The organization sponsors an annual conference, with continuing legal education and an awards banquet to present NCAWA's Gwyneth B. Davis Public Service Awards. For many years it has conducted a spring retreat at the beach to allow members to mingle and relax. In the past five years, local chapters have sprouted, with chapters currently established in Wake County, Durham/Orange County, Guilford County, and Asheville. Local chapters have participated in numerous service projects, including clothing drives for battered women shelters and collecting books for women in prison. Women attorneys also find their membership directory helpful for referrals to members in other geographical areas or fields of specialty. Judge Linda McGee comments that she has always reached for her NCAWA directory when asked for referrals, because "I have confidence in the interest and ability of the people on that list. I know that person would take care of the client."

Finally, NCAWA also engages in worthwhile public education work. Since December 2001, NCAWA member Lynne Albert has produced and hosted a television show, "Laying Down the Law," for broadcast on community access stations around the state, in an effort to provide the public with basic information about everyday legal issues. In August, the National Conference of Women's Bar Associations awarded NCAWA its 2003 Public Service Award for sponsoring "Laying Down the Law."

On the occasion of NCAWA's 25th anniversary, three of its founding mothers, Sharon Thompson, Carolyn McAllaster, and Anne Slifkin, are thrilled with the growth of the organization and all the many things it has accomplished. They emphasize that now it is assumed women attorneys "have a place at the table" in a way that was not true before NCAWA was formed. Thompson concludes: "It's amazing to think that we sat around and stuffed envelopes for the first meeting, and the organization still exists and is thriving. I hope that folks do hear what's happened in the last 25 years and appreciate how different things were and appreciate what people who have gone before have done, and I hope that they will carry that forward to help people in the future." ■

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Felling the "Cheek of the Idol": Women, Walter Clark, and the Law

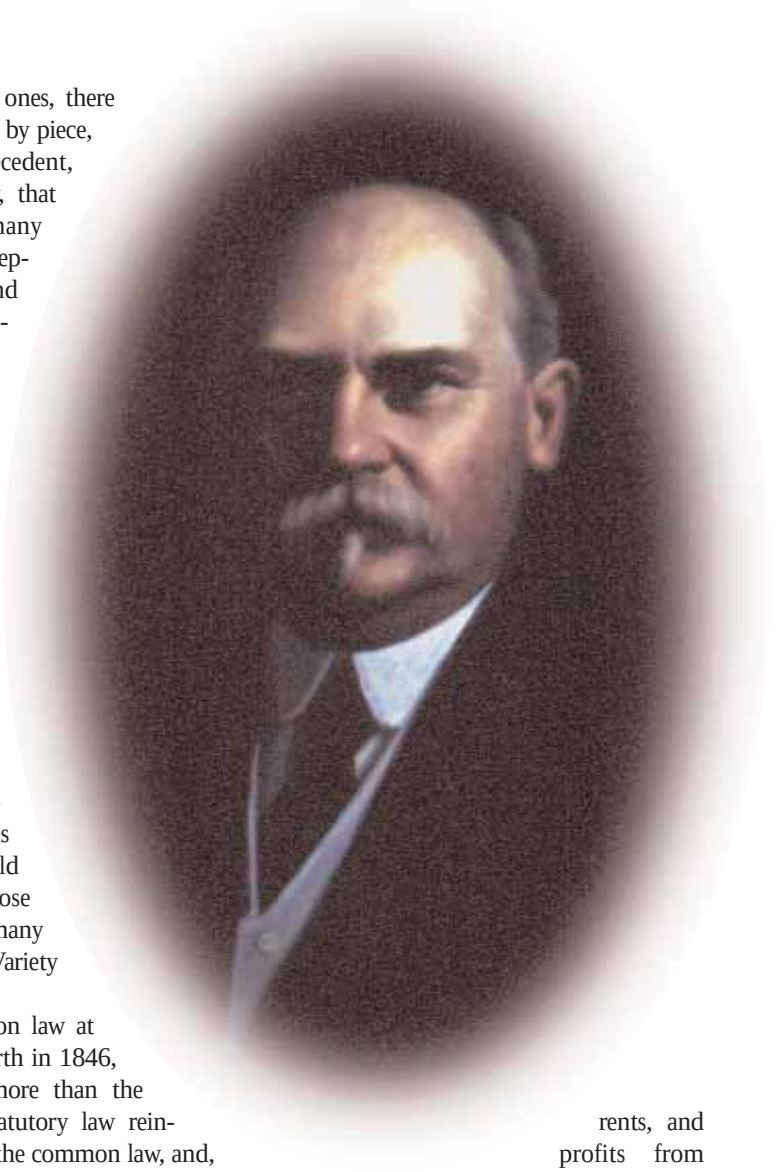
By Elizabeth G. McCrodden

We read in Gibbon that "after the edicts of Theodosius had severely prohibited the sacrifice of the pagans they were still tolerated in the city and temple of Serapis; and this singular indulgence was imprudently ascribed to the superstitious terrors of Christians themselves, as if they feared to abolish those ancient rites which could alone secure the inundations of the Nile, the harvests and the subsistence of Constantinople." But the temple was at last destroyed and the statue of Serapis was involved in ruin. "It was confidently affirmed that if any impious hand should dare to violate the majesty of the god, the heavens and earth would instantly return to their original chaos. An intrepid soldier animated with zeal and armed with a heavy battle-axe, ascended the ladder; and even the Christian multitude expected, with some anxiety, the event of the combat. He aimed a vigorous stroke against the cheek of Serapis; the cheek fell to the ground; the thunder was still silent, and both the heavens and the earth continued to preserve their accustomed order and tranquility. The victorious soldier repeated his blows; the huge idol was overthrown and broken in pieces; and the limbs of Serapis were ignominiously dragged through the streets of Alexandria." The law of the status of woman is the last vestige of slavery. Upon their subjection, it has been thought, rests the basis of society; disturb that, and society crumbles into ruins. By the married woman's property acts the first blow has been struck. The cheek of the idol has fallen to the ground; the thunder is silent, and the earth preserves its accustomed tranquility. The huge idol will sooner or later be broken in pieces.[1]

I. Introduction

Walter McKenzie Clark (1846-1924) served as a justice on the North Carolina Supreme Court from 1889, and as chief justice of the same court from 1902, until his death. Noted for his outspokenness and liberal views, he, more than any other jurist in North Carolina, fought for the liberation of women from the effects of the vestiges of the common law's assumptions regarding woman's capabilities and its pronouncements of her limited rights. The thesis of this paper is that Walter Clark, through his persistent and vigorous attacks, was responsible for felling the "cheek of the idol," expediting the process of extinguishing "preconceived opinions and the dead hand of the past,"[2] the common law as it affected women in North Carolina; but that, contrary to popular opinion during his lifetime and despite his contributions, the "huge idol" of the common law continued to affect women long after Clark's death.

The paper will review the law's treatment of women in North Carolina at the time of Clark's birth and will look briefly at Clark's life and particularly at the women who helped shape it. It will then focus on the justice's views of the common law, finally assessing his impact on North Carolina laws relating to women.



II. The Common Law's Treatment of Women[3]

In an 1897 publication, Walter Clark aptly described the common law which dictated the manner in which women were treated:

> . . . [The origin of the common law] has been fictitiously claimed to be "as undiscoverable as the sources of the Nile." . . . [A]s to the common law we know that its real origin was in the customs of our barbarous and semi-barbarous ancestors added to by the decisions of judges of more recent centuries most of whom were neither wise nor learned beyond their age. One of these, in haste to get to his supper, or half comprehending the cause, or prejudiced, it may be, against a suitor, or possibly boozy (and such have been kenned) has rendered a decision, another judge too indifferent to think for himself or oppressed by the magic of a precedent, has followed, other judges have followed each other in turn and thus many indifferent decisions being interwoven with a greater number of sound ones, there was built up, piece by piece, precedent by precedent, that fabric of law, that patchwork of many hands, that conception of divers and diverse minds, created at different times, that jumble of absurdities, consistent only in inconsistency, which those who throve by exploiting its mysteries were wont to style "the perfection of human reason — the Common Law of England." As a system, it resembles Otway's Old Woman, whose patched gown of many colors bespoke "Variety of wretchedness."[4]

Under the common law at the time of Clark's birth in 1846, women were little more than the property of men. Statutory law reinforced the dictates of the common law, and, until 1868, the North Carolina Constitution was of little assistance.[5] Courts, composed of men, treated women as they did children, servants, and imbeciles, people the courts presumed to have no capacity to think or act rationally. Women could not, of course, vote, nor could they hold public office.

The single woman's fate was better under the law than that of a married woman. She could own and convey property; she could sue and be sued; she could enter into contracts; and she could retain her own earnings. Her employment and educational opportunities, however, were limited, making her, unless she were independently wealthy, better off being married and presumably cared for by a man.

Under the common law, a married woman lost the legal capacity of a man. Once married, she relinquished her personal property, with the exception of her clothes, to her husband. Her intangible property became her husband's once he claimed it. The use, rents, and profits from her real property belonged to her husband, and, when real property was conveyed to husband and wife, they owned it as tenants by the entirety, a concept growing out of the common law's treatment of husband and wife as one, a concept Justice Clark would later attack with a vengeance.

An 1845 North Carolina case explained the policy underlying the woman's legal relinquishment of property:

> The law . . . conveys the marital rights [in the wife's property] to the husband, because it charges him with all the burdens, which are the consideration which he pays for them. . . . Out of that right arises a rule of law, that the husband shall not be cheated, on account of his consideration. . . . They are prospective rights—those that the husband expects to enjoy upon the contemplated marriage . . . .
> A husband, being bound to pay his wife's debts and to maintain her during cover-

In addition to allowing a man to control the property of his wife, the common law also gave the husband the right to control and to punish his wife. . . . "If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."

> ture, and being chargeable by the law with the support of the issue of the marriage, and bound by the ties of natural affection also to make provision for the issue, it is the nature of things, as a matter of common discretion, that a woman's apparent property should enter materially, if not essentially, into his inducement for contracting the marriage, and incurring those onerous obligations.[6]

Marriage, therefore, was a contract the terms of which were dictated by the common law. Reinforced by woman's role as child bearer, those terms formed the basis of an almost unchangeable concept of the man/woman relationship.

A married woman also lost her capacity to enter into contracts. Under the common law, any contract by a married woman was void, and, although states passed constitutional provisions which relaxed this prohibition, such provisions were either carefully crafted or carefully interpreted, to allow the husband to retain ultimate control. For example, North Carolina's Constitution, by an 1868 amendment, allowed a woman to convey her own sole and separate property, but such a conveyance required the written assent of the husband.[7] In addition, until Justice Clark, justices were very reluctant to place a liberal construction on any law granting women rights to which the common law had not subscribed. The 1876 case of *Pippen v. Wesson*,[8] for example, read into the 1868 constitutional amendment the intent "not to enlarge . . . [woman's] special power of contracting into a general power, but to abridge the special power by requiring the husband's consent."[9]

Under the common law principle that all the personal property acquired by a woman during marriage was that of her husband, a married woman's earnings belonged to her husband. Equity would, in certain instances, intervene, as, for example, in the 1843 case of *Kee v. Vasser*,[10] where the husband had acknowledged that the wife's earnings (pin money given to her by him) were her own. A husband's right to his wife's earnings also gave him a legal cause of action when those earnings were impaired by the negligence of a third party. In *Kimberly v. Howland*,[11] a pregnant wife was severely frightened when the negligence of defendant, who was blasting with dynamite, caused a rock to crash through the roof of husband-plaintiff's home as the wife lay in bed. The Court stated, "It seems to be well settled that where the injury to the wife is such that the husband received separate loss or damage, as where he is put to expense, or is deprived of the society or the service of the wife, he is entitled to recover therefor, and he may sue in his own name."[12] Under the common law, the woman would not be allowed to recover for her own injuries caused by the negligence of a third person.[13]

In addition to allowing a man to control the property of his wife, the common law also gave the husband the right to control and to punish his wife. The North Carolina Supreme Court, in the 1874 case of *State v. Oliver*,[14] assumed that the old common law doctrine that allowed a husband to whip his wife, provided he used a switch no thicker than his thumb, had been abandoned. The Court, however, noted that the trial courts of the state would not hear trivial complaints. "If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."[15]

The common law theory that a man could and/or did control his wife was also costly to the man, because he could be held responsible for her acts. In the 1838 case of *Cox v. Hoffman*,[16] the Supreme Court upheld the lower court's jury instructions which allowed the jury to attribute a wife's negligence to the husband. The Court stated that the husband "was liable for the injury done to the property of the plaintiff by the negligence, carelessness, or unskillfulness of his servants in their performance of his business. The wife in the eye of the law is his servant; and the husband would be equally liable to third persons for her negligence and careless acts in doing his business, as he would be for the acts of any other of his servants."[17]

The foregoing paragraphs highlight the law as it pertained when Walter Clark came into the world.

III. The Life of Walter Clark

Walter Clark was born at Prospect Hill Plantation, North Carolina on August 19, 1846, and was the oldest child of David Clark II and Anna Maria Thorne, both prominent families in North Carolina. He spent his boyhood at Ventosa, his family's plantation on the Roanoke River. As a child, Clark was a voracious reader, reputedly completing the Bible by the time he was six-years-old.[18] At the age of eight, he went to Vine Hill Academy, and, in 1857, he transferred to Ridgeway School in Warren County. His teacher there praised his work, writing Clark's father that, "If I had a school of such boys, most of the troublesome part of the business would be avoided."[19]

In the spring of 1859, Clark went to Belmont Select School, located in Granville County and in 1860, against the advice of his Belmont teacher, he entered the Hillsboro Military Academy. When North Carolina voted in 1861 to secede from the union, Colonel Tew, the head of Hillsboro Military Academy, selected Clark to act as drill master for the first set of recruits assembling at the order of North Carolina Governor Ellis. Although Clark's parents were reluctant to have their son in the Confederate Army, young Walter was eager, and his parents consented. Clark was only 14 years old.

Walter Clark served during three different periods of the Civil War. The first period was

from July 1861 to January 1862, when he resigned and re-entered Hillsboro Military Academy. In the summer of 1862, Clark became a first lieutenant in the 35th Regiment and during this period participated in the Battle of Fredericksburg. Although he had a young Negro bodyguard, Clark was not insulated from the hardships of war. When he arrived at the battle in Fredericksburg, Clark sent the bodyguard, with his horses, to the rear, out of danger, and did not see them again for three days. His letters to his mother indicated that he lived for some period without boots and that his "feet would freeze in these low shoes for they keep no more water out than if I had none."[20]

After returning to North Carolina in February 1863, at his mother's urging, Clark again resigned from the Army and almost immediately entered the University of North Carolina in Chapel Hill. The day after his graduation in 1864, he became a major of the 5th Battalion Junior Reserves, and he began his third and final stint in the war. At its close, Clark and his bodyguard returned to Ventosa, only to find the mansion in which he had spent his childhood burned to the ground.

Because his father's health was ruined and also because he was the oldest son, Clark assumed responsibility for rebuilding his family enterprises. Even then, not yet 20 years old, Clark was outspoken, writing articles against slavery and urging fellow southerners to put the war behind them. In August 1866, Clark decided to study law and did so in both New York City and Washington, DC. In January 1867, he was admitted to practice law in Halifax County, and he opened a law office in Scotland Neck. His practice placed him frequently before the North Carolina Supreme Court.

In November 1873, Clark moved to Raleigh, the state capital, where he established a general law practice. In January 1874, he married Susan Washington Graham, daughter of a former governor, United States Senator, and Secretary of the Navy, William A. Graham. He and his wife had eight children.

While he successfully practiced law, Clark also published a number of articles, an activity that he would continue even after assuming the bench. In April 1885, Governor Scales appointed him to the superior court bench, and in November 1889, Governor Fowle appointed him associate justice of the North Carolina Supreme Court. Although his name was mentioned as a possible candidate for vice president of the United States and he once ran for the United States Senate, Clark was to remain on the Supreme Court bench until his death in 1924.

Liberalism marked Clark's tenure on the bench. Using either his opinions and other writings or both, Clark was outspoken in his support for women's issues, including passage of the suffrage amendment and the reversal of common law tenets affecting women. Although it is difficult to establish with certainty what motivated Clark's liberal attitude toward women, it seems safe to postulate that his mother had a good deal to do with it. Her letters to him during his early years admonished him about his religious life and also displayed a remarkable closeness between the two. In 1860, for example, while Clark was at Hillsboro Military Academy, his mother wrote:

> Yesterday was your birthday, did you think of it? it [sic] should have been a day of reflection & of firm resolutions with you to spend the next seven years of your life in establishing firm moral & religious principles & in obtaining an education, that will render you useful in the service of God & your fellowman from now until you are twenty one (if the Good Being should see fit to spare you) will be about the most important era of your life, & will require much watchfulness & prayer, your happiness for life & (probably for eternity) will in a great measure depend on the course you pursue for the next seven years. I put up some fervent petitions in your behalf on yesterday thought of you a great deal, I know that you are exposed to many temptations & that many snares will be laid, to entrap you, but I do trust & pray that you may ever have strength to resist them all, always think of the anxiety & solicitude of the fond ones at home & I am sure it will enable you to take fresh courage in your duty & double your diligence in study, perfectly regardless of the wild and wicked—true courage is to do our duty, even in the presence of those, whom we think will ridicule, I would be perfectly indifferent to ridicule, when in the pursuit of right, & you will never regret it, when you grow older[.] There is one thing I wish to admonish you on & that is the subject of prayer & reading your bible, never neglect getting on your knees, in humble submission to your Maker, before you retire to rest, (never mind who is in the room) & read your bible every day, let others scoff if they will, but never, do you swerve from your duty to your God, remember, to him we owe our all, & on him are dependent for everything - You must try and set a good example for others & not be led off by wild & wicked boys—You know the promises in the bible to those who heed the instructions of their Parents . . . .[21]

That Clark took to heart his mother's admonitions is obvious from several letters, including the following:

> . . . I read three chapters in my Bible every day and five or ten every Sunday like you requested me to do; I go to Sunday School and Church, also I clean my teeth every morning, and everything else you requested me to do . . . .[22]

Clark counted on the advice of his mother and missed it when he had no opportunity to gain it. Once during the war, when colleagues wanted him to become, at age 15, the acting adjutant of his regiment, he wrote that he "had no mother[,] no father to look up to for counsel and as it had [to] be decided then or never . . . . I had to rely on my own judgment for once."[23]

In 1862, upon learning that his younger brother David had died, Clark wrote his mother from Hillsboro Military Academy. The letter displayed Clark's early ability to confide in his mother:

> Your affectionate letter containing such painful tidings reached me late last night. I can not tell you how distressed I was. . . . [N]one but you can imagine how much I feel his loss. I feel like I was alone in the wide wide world. Both of my brothers have gone home to Rest while I alone of the three are left in this world of sin and sorrow. . . . Pray for me, my Mother. Your prayers do me more good than anything else. I feel at times like I knew you were praying for me. I rarely ever express my inner feelings but really for the last two years I have had no peace of mind. I have determined time and again to be a Christian but somehow or other, I always procrastinated. I have tried even, shall I confess it, to persuade myself to be an Infidel, but there was something in that so repugnant so terrible that I shuddered at the idea. . . . Such have been my feelings now for a long time but I can no longer

keep from you the story of my soul's wrestling. . . .[24]

The death of his own daughter some years later prompted another poignant letter demonstrating not only his abiding ability to confide in his mother, but also his sensitivities:

> . . . . I think . . . [the baby] gave me one look of recognition but was too sick to put out her arms to come to me as was her habit. I sat by her bedside during the night and up to the hour she breathed her last. . . . The day had past [*sic*] the hour of twelve and turned to the setting, and with the turning of the tide the bright little spirit floated out on the vast sea of Beyond. When our day was at its noon and brightest, her little eyes opened on a brighter and endless day. Timid and shrinking from new faces, as you know she did, the shining one who came for her must have been attractive beyond loveliness, for she left us without shrinking, not a convulsion, not a throb, told of her going and she went so sweetly that it was hard to tell exactly when the little heart had ceased to beat and the pulse to flicker.
>
> Partly from her name [Anna], partly from her bright, merry, good, loving disposition, and possibly from an instinctive feeling that we were to lose her, she has always been my special pet and companion. For months, I have looked forward to seeing her at noon and night. She learned my steps and always met me as I came to dinner or at night, always with her little smile and accompanied me to the door or gate to bid a reluctant goodbye as I passed back to my daily toil.[25]

In addition to relying on his mother, Clark must have noted her involvement in, and knowledge of, matters beyond the realm normally reserved for women. She corresponded to him about plantation matters, writing of crops that were being planted and assessing the help. They both wrote of political events. His letters to her reflected a respect that certainly he carried into his later years when he was to become involved with the suffrage movement and with his fight against the law's treatment of women.

There are no letters that might reveal how Clark viewed his wife, but the fact that the two of them collaborated in translating the three-volume *Life of Napoleon* by Constant demonstrates not only her abilities but also his respect for those abilities. Moreover, that his writings in opposition to the common law's treatment of women came during his marriage indicates that Susan Clark was a woman who had demonstrated her ability to exercise the rights he so fervently advocated for women.

IV. Clark's War on the Common Law

Walter Clark took issue with the common law's treatment of women in four areas this paper will address: property and contract law, tort law, criminal law, and laws pertaining to women's participation in government. This section of the paper will attempt to outline the basis of his arguments for liberalizing North Carolina laws pertaining to women.

A. Property and Contract Law

The Constitution of 1868, art.X, sec.6 provided:

> The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any way entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, and engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried.

When Walter Clark became an associate justice of the North Carolina Supreme Court, that body of five jurists had never really applied this constitutional provision in the way that it was intended: with the exception of the "assent" provision, to erase the common law's disparate treatment of married women and put them on a par with unmarried women. Part of the problem lay with the North Carolina Code, sec. 1826 which restricted a married woman's rights to make contracts affecting her property, without the written assent of her husband. Moreover, sec. 1256 of the North Carolina Code, in requiring the privy examination of the wife,[26] also acted as a mechanism by which the court could and did circumvent the meaning of the 1868 Constitution.

Clark recognized this problem, addressing it at least as early as 1899, in his dissenting opinion in *Weathers v. Borders*.[27] The result of the majority opinion was that a creditor going against the husband and wife for improvements made on the woman's property had no claim against the wife's real property because the husband had not consented in writing to his wife's oral contract. Clark pointed out the obvious: that constitutional law takes precedent over statutory law and that any statutory restriction of rights granted by the Constitution was not valid. As was typical of many of his opinions, Clark used the opportunity to expand upon the problem with the laws as they related to women:

> The Legislature of 1899 struck "married women" out of the company and category of "infants, idiots, lunatics, and convicts," in which classification they were placed by The Code secs. 148 and 163, but the courts have been still slower than the Legislature in grasping the fact of the emancipation of married women and of their property rights guaranteed them by the Constitution. It is still held as law in North Carolina, strange as it may seem, not only that a married woman cannot alien her property with merely "the written assent of her husband," as the Constitution says, but that her earnings from her own labor belong to her husband.[28]

Later in that same year, 1899, Clark again dissented from an opinion in which the majority of the Court held that a married woman's signing over of a note as security for her husband's loan, without the written assent of her husband, was ineffective to dispose of the property.[29] Clark's dissent rested on his analysis that the law recognized the woman's signing of the note without her husband's assent as an enforceable contract. He wrote that "[c]ommercial paper is sexless. . . ,"[30] finding and challenging two arguments used by the Court in order to "exercise a paternal supervision of the Constitution and construe that it does not mean as to married women what the language unmistakenly and unequivocally says."[31] The first argument Clark challenged was that, since married women cannot convey without the consent of their husbands, to allow them to contract without that consent would be to permit them to do indirectly what they cannot do directly. Clark dismissed this by saying that this was a proper point to have been made at the Constitutional Convention, but that it had been ineffective to change the effect of the 1868 Constitution. The second argument Clark addressed was telling: "that the absolute property rights of a married woman 'as if she remained unmarried' are in conflict

with the common law precedents."[32] Clark noted the obvious: a complete break with the past was precisely why the Convention amended the Constitution,[33] writing somewhat facetiously:

> There are many . . . judicial enunciations recognizing the radical and complete break with the common law as to the status of married women. Whether that law was based upon the conception that a single woman (who had full control of her property) by the fact of marriage gave conclusive proof of imbecility and incompetency, or that only those women who were lacking in discretion married, whatever the basis, the constitutional provision of 1868 swept away the disabilities of married women and guaranteed them the same rights of property "as if remaining unmarried," save that as to conveyances there must be the written assent of the husband.[34]

In a 1901 case, Clark's efforts to move away from common law vestiges in this area of the law seem to have paid off. In *Vann v. Edwards*,[35] the Court upheld the validity of a note, signed by a woman in the presence of her husband, because the Court deemed his presence to indicate his assent. Clark concurred in the result, writing:

> Having left the broad plain highway of the Constitution every step since has taken us further and further into the wilderness. The construction that a married woman's personal earnings are still the property of her husband belongs to the age when she was her husband's chattel. It has no other support. There is no statute to that effect. It is true it was reannounced some fifteen years ago by one of our ablest and most accomplished Judges, who doubtless remembered that he had read it at law school in books hundreds of years old, but who forgot that he had read the decree of equality of woman's property rights in the Constitution of 1868. And so on from step to step we have gone into the wilderness away from the plain guarantee of the Constitution—that a married woman's rights over her property shall remain as if she were single, except that in deeds and mortgages the husband must give his written assent "just as he has like control over his own property save that she must assent to the conveyance of his realty." Instead of holding to this plain, unmistakable provision, we have a multiplicity of judicial interpretations, reservations, restrictions, and conditions, till no one can say absolutely what are the rights of a married woman over her own property, except that they do *not* remain as if she were still single.[36] (Emphasis in the original.)

Ten years later, in the case of *Rea v. Rea*,[37] Chief Justice Clark wrote the majority opinion in a case in which a married woman had signed a certificate transferring stock to her husband who thereafter executed the certificate. After her husband's death, the woman claimed the certificate was a nullity because she had not complied with Revisal, 2107, a revised law pertaining to the privy examination. In his opinion, Clark made clear that, even if the statute applied, it would be invalid because the 1868 Constitution, art.X., sec.6 granted married women the same right to dispose of personalty (as opposed to real property) as if she were a *feme sole*. In perhaps an unjustified statement, Clark proclaimed that *Vann v. Edwards* had overruled the *Walton* case, a fact not borne out by a comparison of the two cases.

Perhaps significant in attaining a majority in the decision was the Martin Act of 1911, an act which seemed to have underlined and extended the 1868 *Const*., art.X, sec.6 proclamation, putting married women on the same footing as single women, except that in conveying real property (not all conveyances), they still had to have the written consent of the husband.

Clark had finally succeeded in winning a majority of the Supreme Court to his interpretation that the constitutional provision giving married women rights, with the exception of conveyances, as though they were single, meant what it said. The vote, however, was 3-2, and Justice Hoke's dissenting opinion demonstrates the paternalistic thoughts of a strong minority:

> . . . I am utterly unable to perceive how a decision setting aside the safeguards provided by this statute, and affording facilities for a married woman to deprive herself of her property, and, in many instances, of a home for herself and children, in favor of an improvident husband, can be properly regarded as an enlightened and progressive policy, or in any way having a tendency to *liberate* married women from the shackles of tyrannous precedent, and, in my opinion, the statute should be upheld in its entirety.[38]

The Clark Court, however, had not had its final say on the privy examination. In *Butler v. Butler*,[39] a majority of the Court, over Clark's dissent, held that the requirement of the privy examination was constitutional. Revisal, sec.2107 had modified the requirement, adding that the justice of the peace examining a married woman had to certify that a conveyance by her to her husband was "not unreasonable or injurious to her," a requirement, as Clark pointed out in his dissent, that was impossible if she were to convey land to her husband as a gift. Clark reasoned in his dissent that, under *Rea*, sec.2107 applied only to contracts and not to conveyances of property; additionally, the interpretation was contrary to the Constitution. Clark continued, noting that North Carolina derived the privy exam from English common law, that England had done away with the requirement 40 years ago, and that "good faith has not been kept with the mothers and wives of North Carolina."[40] He concluded that, "We are governed by preconceived opinions and the dead hand of the past. . . ."[41]

From the brief descriptions of the facts of the cases pertaining to the privy examination as well as the requirement that the husband assent in writing to his wife's conveyances, it should be obvious that, while Justice Clark was arguing for granting to married women the rights of unmarried women, he was also advocating their responsibility in exercising these rights. In *Weathers*, *Walton*, *Vann*, *Rea*, and *Butler*, either the married woman or her heirs were attempting to use her disabilities to their advantage and to avoid responsibility. Clark made clear, in *Warren v. Dail*,[42] that "responsibility is the correlative of freedom and of liberty. Only those are irresponsible who are incompetent for lack of maturity—as minors or 'in chains,' as convicts, idiots, and lunatics."[43]

There was one other area of property law that Clark felt was out of tune with modern thought, and that was the manner in which married couples held property as tenants by the entirety. The rents, uses, and profits derived from property held as tenants by the entirety all accrued to the benefit of the husband. The origin of this doctrine was the subject of intense debate in *Freeman v. Belfer*,[44] a case in which the Court allowed a husband, separated from his wife, the income from property held by them both as tenants by the entirety. Justice Allen wrote the majority

opinion, proclaiming that the idea that marriage made man and woman one came not from the common law, but

> [i]t dates from the Garden of Eden, when it was declared, "They shall be one flesh" (Gen.,2:14), and it has been reaffirmed and preserved in the Gospels and Epistles. "Wherefore they are no more twain, but one flesh" (Matt., 19:5); "They twain shall be one flesh" (Mark, 10:8); "They two shall be one flesh" (Eph., 5:31).[45]

The Chief Justice was not to be outdone. His dissent was sharp, pointing out that the language in Genesis was a statement of Adam, not of God, and arguing that the use of the words *two* and *twain* in biblical verses "show the equality and not the submergence of the wife in the husband as the one being resulting from the union . . . Our property rights are fixed by our Constitution and laws and not by the law of Moses."[46] (In a later address to the law school at the University of North Carolina, Clark went further, pointing out that the statement of Adam "was the utterance ... of the greatest malefactor that this world has known; a man by whom it was declared in the Scriptures that 'death and sin came into the world.'"[47]) Clark concluded his dissent in *Freeman* by referencing the suffrage movement, in which he was so active at the time:

> At a time when women are no longer disposed to submit to enthroned wrong and to suffer in silence as their mothers did; when all five political parties have pledged themselves to confer full suffrage upon them, and in nineteen States women already have the right to vote for President and in twenty other States suffrage in lesser matters, and the President and Cabinet and the political leaders in all parties are pledged to full and equal suffrage; when the irresistible tide of long delayed justice is sweeping over all other countries as well as in ours, it is surely not an auspicious hour by judicial construction to extend in this State the discrimination against women to new fields where it has not heretofore obtained and further restrict the constitutional guarantee of their personal or property rights.[48]

B. Tort Law

Tort law is law which deals with civil wrongs and which provides, generally, for damages to the injured. As noted earlier in this paper, the damages resulting from injuries to a wife belonged to her husband under the common law theory that her earnings were his. Clark argued in his concurring opinion in *Price v. Electric Co.*,[49] that this theory was based upon the common law principle that the slave's earnings belonged to the master, and that, if the slave were injured so that he could not perform his work, the master, not the slave, would be entitled to the damages. Clark's attack on the common law contained a refrain that he used often to emphasize how anachronistic adherence to that law was:

> It is true that under the decisions of the courts made in a ruder age, not based upon any statute, but evolved by the judges out of their own consciousness, and termed by euphemism, "the common law," a married woman could not recover her earnings, nor for damages to her person, nor for her sufferings, physical or mental, and that compensation for all these things belonged to the husband, upon Petruchio's theory that the wife is the chattel or property of the husband. Upon this common law it was held in North Carolina, by *Pearson, C.J.*, in *S. v. Black*, 60 N.C., 263, that it was the "husband's duty to make the wife behave herself" and to thrash her, if necessary to that end, and in *S. v. Rhodes*, 61 N.C., 453 (1868), this Court sustained the charge of the judge below that a man "had the right to whip his wife with a switch no larger than his thumb," . . . But in *S. v. Oliver*, 70 N.C., 61 (in 1874), this Court overruled the numerous decisions to that effect, *Settle, J.*, saying: "The courts have advanced from that barbarism." Thus passed away the vested right of the husband to thrash his wife . . . .
>
> As late as 1886, in *S. v. Edens*, 95 N.C. 693, the Court again held, upon the same "judge-made" law of former times, that a man could "wantonly and maliciously slander" the good name of his wife with impunity, or "assault and beat her" if he inflicted no permanent injury upon her; but . . . this Court reversed that holding in 1908 without any statute, in *S. v. Fulton*, 149 N.C. 485, . . . And thus passed away another vested right, or rather another vested wrong.[50]

The *Price* case allowed the wife to recover for damages due to injuries she received as a result of the defendant's negligence, but only because it read her husband's earlier involvement in the case as a renunciation of his rights in favor of hers. This explains why Clark concurred only in the result.

Clark was not adverse to allowing recovery for a spouse whose mate was injured when the spouse could show personal loss. In the case of *Hipp v. Dupont*,[51] for example, he wrote the majority opinion allowing a married woman to recover damages she incurred as a result of injuries sustained by her husband. In this case, she received damages for expenses she paid, services performed in caring for her husband, loss of support and maintenance, loss of consortium, and her own mental anguish. Clark obviously would have allowed either spouse to recover damages in a situation in which he or she had incurred personal damages, thereby not discriminating against either one.

As one who might commit a tort (and theoretically be a defendant in a civil claim), a woman could take advantage of the common law theory that her husband controlled her and that her actions resulted from his failure to control. The legislature, by the Act of 1871-72, modified the general principle of a husband's liability so that he could be held liable for the wife only as to acts committed while they lived together.[52] Needless to say, Walter Clark felt that there was no basis for this law, especially in twentieth century America. Four years before his death, at the age of 74, he wrote a concurring opinion in *Young v. Newsome*,[53] containing what may have been his most comprehensive attack on the common law:

> The common law was formulated before there was any Parliament, or when they were enacting very few statutes. It was created by judges who were for centuries Catholic priests only, and for centuries more they all were priests or laymen. It is not astonishing that under the influence of priests, who presumably knew little about such matters, it was laid down as a conclusive and irrebuttable presumption of law and fact that the wife acted solely under compulsion of her husband, and therefore that he was liable for her torts.
>
> A great writer, who was far better posted on such matters, in the last century presents that when Mr. Bumble was told that he was responsible for his wife's conduct, and that "indeed he was the more guilty of the two in the eye of the law; for the law supposes that your wife acts under your direction." Mr. Bumble replied, "If the law supposes that, the law is an ass—an

idiot. If that's the eye of the law, the law's a bachelor; and the worst I wish the law is that his eye may be opened by experience." *Oliver Twist*, ch. 51.[54]

Reminiscent of his dissent in *Freeman v. Belfer*, Clark then turned to the religious aspects of the common law.

> Priestly judges seem to have based their whole doctrine of the subjection of woman upon Genesis, ch. 2:23-24: "And the man said, this is now bone of my bone and flesh of my flesh; . . . they twain shall be one flesh." But this was not the declaration of God, but of Adam, and is not a fact, and yet upon that false foundation was built the theory of the common law that has persisted in the minds of some down to the present day, much to the detriment of women whose legal rights have been far inferior to those of women in other civilized counties, and even to those living in semi-civilized countries under the domination of the Koran.[55]

Despite his rhetoric, Clark was compelled to concur in the result of the case, holding a husband liable for the slander committed by the wife, because the General Assembly had, by enacting a statute,[56] given credence to the common law.

C. Criminal Law

Under the common law, there were parallels between the criminal law, as it related to married women who might commit a criminal offense, and tort law, *i.e.*, husbands were presumed to control their wives and were responsible civilly or criminally if they did not. In a 1914 case, *State v. Seahorn*,[57] Chief Justice Clark, concurring in an opinion involving both husband and wife, found an irrebuttable presumption of compulsion out of keeping with twentieth century notions. "The contention that a wife has no more intelligence or responsibility than a child is now out of date."[58] Clark concurred because he felt there might have been evidence that the wife had acted upon compulsion by her husband, but he made it clear that he thought the presumption of compulsion should be, at best, one which the husband might rebut.

D. Women's Suffrage

Walter Clark became North Carolina's most distinguished advocate for women's suffrage, corresponding and strategizing for passage of the 19th amendment with women both inside and outside the state. In 1911, he delivered the first prepared speech supporting women's suffrage by any leader in the state.[59] That same year, however, in his unsuccessful campaign for the United States Senate, he failed to include suffrage in his platform.[60] Anna Howard Shaw, president of the National American Woman Suffrage Association, wrote Clark complaining of other parts of his platform, specifically arguing against giving Confederate soldiers pensions until women received the vote. She called Clark's attention to an item in his platform that showed "how easily men fall into the attitude of utter forgetfulness of women:"[61]

> In your third and fourth clauses you speak of submitting questions to the people, and, of course, even though you may be a suffragist, you do not intend by that to submit the questions to the people at all but simply to men people. Now it is rather humiliating to be forgotten, but to be forgotten so badly by those who do not realize they have forgotten anything, is humiliation unspeakable. And that is just the position in which women of this country are placed, even by very excellent men like yourself. I never fail to protest against this statement and insist you do not mean the people and that if you mean the electors you should say so, but if you mean the people—the women people as well as the men people—then the term may be properly used."[62]

Despite this gentle chiding by Shaw, Clark's sensitivity to women's issues cannot be doubted.[63] His papers reveal letters from Carrie Chapman Catt,[64] Helen H. Gardner, suffrage leader and first woman member of the United States Civil Service Commission,[65] Maude Waddell, a prominent leader in North Carolina's suffrage movement,[66] Martha Haywood, president of the Equal Suffrage League of Raleigh,[67] Ida Porter-Boyer, a Louisiana leader in women's suffrage,[68] and others, all praising his efforts on behalf of women.

Letters from him to some of these same women leaders acknowledge difficulty in the "ultraconservatism in the South."[69] Clark proposed to Carrie Chapman Catt the strategy of working for women's vote only in the primary. Responding to what must have been opposition to allowing the vote for Negro women, Clark argued that, since Negroes, who were mainly Republicans, would not vote in the Democratic primary and since the Democratic party controlled North Carolina, allowing women the vote in the primary would give white women, but not black women, an effective voice.[70]

Clark's letter to Catt was not his only reference to the race issue in the suffrage movement in North Carolina. In a letter to Lee S. Overman, United States Senator from North Carolina, Clark contended that, since there were so many white women ("53,000 more white women in this State than all the negro men and negro women put together"[71]) the votes of white women, presumably Democrats, would more than offset the Republican votes cast by the Negro voters.[72]

As noted in an earlier discussion of the *Freeman v. Belfer* case, Clark was not hesitant about drawing the suffrage question into other issues involving women. Additional cases gave him opportunities to state his views on women's other roles in government. In the case of *State ex rel. Bickett v. Knight*,[73] for example, the attorney general of North Carolina (Bickett) brought an action to determine whether a woman could hold the position of notary public in North Carolina. In enacting ch. 12 of the Public Laws of 1915, the legislature had permitted the governor "to appoint women as well as men to be notaries public, and this position shall be deemed a place of trust and profit, and not an office."[74] The majority opinion reasoned that (1) women may not vote; (2) only voters may hold office; (3) notary public is an office; and (4) women, therefore, may not be notaries public. Chief Justice Clark dissented, contending that, since the Constitution did not define *office*, the legislation could properly define a notary public as not being an office.

(In a concurring opinion in a later case, *Allen v. Roanoke R.R. and Lumber Co.*,[75] Clark apparently took great delight in chiding the majority about their assumption that the answer filed in the case, notarized by a woman, and the deed involved in the case, also notarized by a woman, were valid. He noted that, if either had been defective under the ruling in the *Knight* case, the majority's opinion would not have been necessary.)

Walter Clark's Impact on Laws Affecting Women

In 1911, when the Supreme Court filed *Rea v. Rea*, an opinion written by Clark, the *News & Observer* proclaimed, "Married Women are Emancipated."[76] According to

[Clark's] willingness to criticize reliance on biblical references, the heart of many ideas pertaining to women, their capabilities, and their role, attests to his courage in the early years of this century when irreverence, or perceived irreverence, could have cost him his judicial seat.

Josephus Daniels, "The decision gave women absolute control over their property as before marriage...."[77] Unfortunately, this overstated the case for Clark's impact on laws affecting women. In property law, alone, the area of law affected by *Rea*, Clark's own court in the *Butler* case, found the privy examination constitutional. It would not be until 1977 that the General Assembly repealed the law requiring a privy examination of married women wishing to give land to their husbands.[78] In addition, the 1868 Constitution, art.X, sec.6 still required the husband's written assent whenever the wife wanted to convey property. In 1965, by virtue of a constitutional amendment[79] and the repeal of several statutes,[80] married women no longer had to obtain the written assent of their husbands in order to convey property.

As to the income, use, and profits derived from land held by husband and wife as tenants by the entirety, the husband retained the rights until 1983, when a new law, applying to property acquired on or after 1 January 1983, provided that the husband and wife have "an equal right to the control, use, possession, rents, income, and profits of [such] real property . . . ."[81] The legislature later eliminated the limitation of applicability to property acquired on or after 1 January 1983, so that women would have equal rights regardless of the date of acquisition.[82]

The Martin Act of 1911 entirely changed the law regarding women's rights to contract and, even though there is no direct link between Justice Clark and this act, one might assume that his persistent rhetoric extolling the rights of women and the need to remove laws from the blight of the English common law assisted in that endeavor. Moreover, among his papers is a notable 1910 letter from Joseph A. Brown, a member of the legislature from Columbus County, seeking Clark's assistance in writing legislation that would allow North Carolina's laws pertaining to women to conform to the laws of other states.[83] This letter reflects the esteem with which Clark was held and signifies his participation in drafting statutes to conform to his ideas about what the law should be.[84] Notably, however, the legislature did not act until 1945 to eliminate the requirement of a privy examination for the wife entering into a contract.[85]

In the areas of tort and criminal law, the North Carolina legislature acted more quickly. Just one year after Clark's dissent in *Young v. Newsome*, the General Assembly amended N.C. Gen. Stat. Sec. 52-15 to read that "[n]o husband shall be liable for damages accruing from any tort committed by his wife, or for any costs or fines incurred in any criminal proceeding against her."[86]

Finally, despite Clark's optimism regarding suffrage,[87] North Carolina did not ratify the 19th Amendment to the United States Constitution until 1971, at which time ratification was symbolic only. His efforts to persuade at least one of North Carolina's United States Senators (Overman) to support the amendment failed.

Minimizing Clark's effectiveness, however, should not serve to detract from his efforts for women. At a time when women needed the support of strong and respected voices, they were able to hear Walter Clark's intoning against the evils of the common law's treatment of women. His willingness to criticize reliance on biblical references, the heart of many ideas pertaining to women, their capabilities, and their role, attests to his courage in the early years of this century when irreverence, or perceived irreverence, could have cost him his judicial seat.

Moreover, the years since Clark's death have failed to produce a Supreme Court justice who would champion the cause of women as Clark did. Perhaps the most popular, Sam J. Ervin Jr., mirrored, in his opposition to the Equal Rights Amendment, what Clark had warned against in his fight for women's suffrage: southern men's attempts to "put women on a pedestal,"[88] and thereby defeat their rights. Even the first woman justice, Susie Sharpe, failed women when she declared her own personal opposition to the Equal Rights Amendment.

In 1919, when Clark was playing a major role in the North Carolina battle for women's suffrage, he wrote his cousin, Julia Dameron, urging her to reveal Senator Overman's opposition to the "just principle of equal pay for equal services."[89] He ended his letter by emphasizing the following admonition: "Injustice always relies upon the timidity of those . . . [it] treat[s] unjustly." Walter Clark dedicated a significant portion of his life boldly fighting the law's disparate, patriarchal, and unjust treatment of women. He "ascended the ladder" and "aimed a vigorous stroke" at the "cheek of the idol," the common law, and although much of the ideology undergirding the huge idol remains, Clark's life symbolizes the strategy necessary to destroy it: "Boldness - Boldness - and more boldness."[90] ■

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Endnotes

1. 6 American Law Review 72 (1871), quoted with approval in *Weathers v. Borders*, 124 N.C. 610, at 617-18 (1899)(Justice Clark, dissenting). This paper contains some rather long quotes. Justice Clark, however, was painstaking in his development and use of metaphors, and it may fairly be said that he was not exactly succinct. The inclusion of these lengthy quotes reflects the writer's judgment that they demonstrate not only Clark's intensity but also his intelligent reflection on the issues addressed.
2. *Butler v. Butler*, 169 N.C. 584, at 601 (1915)(Chief Justice Clark, dissenting).
3. Portions of this section of the paper are derived from Part I of "Feminist Legal Issues and the Courts," written by the author in January 1992. Modifications make the material pertinent to the

thesis of this paper.

4. Walter Clark, "The Progress of the Law," *The American Law Journal*, Vol. 31, p. 410, at 410-11 (1897).

5. In 1868, North Carolina amended its Constitution to allow married women more rights pertaining to their ability to convey property. 1868 Const., art.X, sec.6. As will be seen later in the paper, Clark spent much judicial time trying to persuade his colleagues to enforce the Constitution as written.

6. Quoted without citation in Coates, Albert, *By Her Own Bootstraps* (Albert Coates: 1975), p.9.

7. 1868 *Const*., art.X, sec.6.

8. 74 N.C. 437 (1876).

9. *Pippen*, 74 N.C. at 446.

10. 37 N.C. 553 (1843).

11. 143 N.C. 399 (1906).

12. *Kimberly* 143 N.C. at 405. Clark, at this time chief justice, joined the majority in this opinion. His majority opinion in the case of *Hipp v. Dupont*, discussed in section IV,B. of this paper, reveals that Clark believed that each spouse had a right to recover personal damages that might arise from the injury of his/her spouse.

13. Cf., *Price v. Electric Co.*, 160 N.C. 450 (1912)(Supreme Court upheld a wife's claim for damages for her own injuries, but only after noting that the husband had given her the right to sue. Chief Justice Clark's concurring opinion will be discussed later in the paper.)

14. 70 N.C. 60 (1874).

15. *Oliver*, 70 N.C. at 61-62. The courts' self-imposed oblivion to domestic conflict has persisted until present times. The Domestic Violence Act, Ch. 50B of the North Carolina General Statutes was enacted in 1979. Session Laws 1993, c. 274, s.1, effective July 5, 1993, abolished spousal defense in cases of rape. *See* N.C.G.S. Sec. 14-27.8.

16. 20 N.C. 319 (1838).

17. *Cox*, 20 N.C. at 320.

18. Aubrey Lee Brooks and Hugh Talmage Lefler, eds., *The Papers of Walter Clark*, Vol.I (Chapel Hill: The University of North Carolina Press, 1948), p.3 (hereafter referred to as Brooks & Lefler, Vol.I).

19. William K. Bass, "School Report of Walter Clark, 1857," 14 December 1857, Brooks and Lefler, p.6.

20. Walter Clark, letter to his mother, 30 January 1863, Brooks and Lefler, Vol.I, p.102.

21. Anna Thorne Clark, letter to Walter Clark, 20 August 1860, Brooks and Lefler, pp.29-30.

22. Walter Clark, letter to his mother, 12 August 1858, Brooks and Lefler, pp.8-9.

23. Walter Clark, letter to his mother, 26 November 1861, Brooks and Lefler, p.61.

24. Walter Clark, letter to his mother, 28 June 1862, Brooks and Lefler, pp. 72-73.

25. Walter Clark, letter to his mother, 24 July 1884, Brooks and Lefler, pp.219-220.

26. This was the private examination required of a married woman by a clerk of court for the purpose of ascertaining whether she was entering into a contract freely or under the influence or coercion of her husband.

27. 124 N.C. 610 (1899).

28. *Weathers*, 124 N.C. at 617. At this point in his opinion, Clark inserted the quote from his 6 American Law Review article, found on page 1 of this paper. Clark often repeated material used in prior opinions or articles.

29. *Walton v. Bristol*, 125 N.C. 419 (1899).

30. *Walton*, 125 N.C. at 431.

31. *Walton*, 125 N.C. at 427.

32. *Walton*, 125 N.C. at 428.

33. *Walton*, 125 N.C. 428.

34. *Walton*, 125 N.C. at 428-29.

35. 128 N.C. 425 (1901).

36. *Vann*, 128 N.C. at 430.

37. 156 N.C. 529 (1911).

38. *Rea*, 156 N.C. at 536-37.

39. 169 N.C. 584 (1915).

40. *Butler*, 169 N.C. at 601.

41. *Butler*, 169 N.C. 601.

42. 170 N.C. 406 (1915).

43. *Warren*, 170 N.C. at 413-14.

44. 173 N.C. 581 (1917).

45. *Freeman*, 173 N.C. at 582.

46. *Freeman*, 173 N.C. at 588.

47. Walter Clark, "Address on the Common Law Before the University of North Carolina Law School," 58 *American Law Review* 450, 460 (1924).

48. *Freeman*, 173 N.C. at 589-90.

49. 160 N.C. 450 (1912).

50. *Price*, 160 N.C. at 455.

51. 182 N.C. 9 (1921).

52. N.C.Gen.Stat. Sec.52-15 (1871).

53. 180 N.C. 315 (1920).

54. *Young*, 180 N.C. at 316.

55. *Young*, 180 N.C. at 317.

56. C.S. 2518 (1872).

57. 166 N.C. 373 (1914).

58. *Seahorn*, 166 N.C. at 378.

59. Aubrey Lee Brooks and Hugh Talmage Lefler, eds., *The Papers of Walter Clark*, Vol II (Chapel Hill: The University of North Carolina Press: 1950), p.54 (hereafter referred to as Brooks & Lefler, Vol.II).

60. Brooks & Lefler, Vol.II, insert between pp.152-53.

61. Anna Howard Shaw, letter to Walter Clark, 28 November 1911, Brooks & Lefler, Vol.II, pp.138-139.

62. Shaw letter, Brooks & Lefler, Vol.II, p.139.

63. Aubrey Brooks, who wrote Clark's biography, related an incident, described by Associate Justice Seawell, that displayed the depth of Clark's feelings about the 19th Amendment. When Carrie Chapman Catt was delivering an "able and eloquent appeal to the men of [the] North Carolina [legislature] to make their women free, tears ran down the cheeks of the Chief Justice," who was presiding. Aubrey Lee Brooks, *Walter Clark: Fighting Judge* (Chapel Hill: The University of North Carolina Press, 1944), p.170 (hereafter referred to as Brooks).

64. Carrie Chapman Catt, letter to Walter Clark, 20 August 1917, Brooks & Lefler, Vol.II, pp.354-55.

65. Helen H. Gardner, letter to Walter Clark, 23 February 1914, Brooks & Lefler, Vol.II, p.239.

66. Maude Waddell, letter to Walter Clark, 14 September 1914, Brooks & Lefler, Vol.II, p.257.

67. Martha Haywood, letter to Walter Clark, 28 July 1916, Brooks & Lefler, Vol.II, p.308.

68. Ida Porter-Boyer, letter to Walter Clark, 20 November 1916, Brooks & Lefler, Vol.II, p.322.

69. Walter Clark, letter to Carrie Chapman Catt, 11 December 1916, Brooks & Lefler, Vol.II, p.324.

70. Walter Clark, letter to Carrie Chapman Catt, 28 February 1917, Brooks & Lefler, Vol.II, p.340.

71. Walter Clark, letter to Lee S. Overman, 13 January 1919, Brooks & Lefler, Vol.II, p. 388.

72. Clark letter to Overman, Brooks & Lefler, Vol.II, p.388. Clark's references to race appear to be confined to his strategy for passing the 19th Amendment; whether he himself harbored racism is unclear. None of the material reviewed for this paper would indicate that he did, although one might suspect at least some paternalistic leanings at this point in our history.

73. 169 N.C. 333 (1915).

74. Ch. 12, Public Laws of 1915.

75. 171 N.C. 339 (1916).

76. Brooks, p.161.

77. Brooks & Lefler, Vol.II, p.54.

78. N.C. Sess. Laws 1977, c.375,s.1, effective January 1, 1978.

79. *Const*., art.X, sec.6, amended on 14 January 1964 by a vote of the people, effective January 1, 1965.

80. Notably, N.C.Gen.Stat. Secs. 52-1, 52-2, and 52-4 (1953).

81. N.C.Gen.Stat. Sec.39-13.6(1982).

82. N.C. Sess. Laws 1983, c.449, sec.1.

83. Joseph A. Brown, letter to Walter Clark, 26 November 1910, Brooks & Lefler, Vol.II, p.109.

84. It should be noted that a judge's involvement in drafting legislation that might someday come before him for interpretation is not permissible under the current *Code of Judicial Conduct*. What Justice Clark did, however, was fairly standard for his day.

85. N.C.C.S. 2507, c.73, s.16 (1945).

86. N.C.Gen. Stat. Sec. 52-15, amended by ch.102, Public Laws, 1921.

87. In a 1920 letter to Carrie Chapman Catt, for example, Clark wrote of Senator Overman's failure to endorse the amendment at the State Democratic Convention. Clark noted, however, that the Convention voted overwhelmingly for suffrage, adding "Without the Resolution, ratification in July was probable but not certain. This, I think settles the matter. . . ." Walter Clark, letter to Carrie Chapman Catt, 9 April 1920, Brooks & Lefler, Vol.II, p.409.

88. Walter Clark, letter to Kate M. Gordon (President of Louisiana State Suffrage Association), 29 July 1913, Brooks & Lefler, Vol.II, p.208. Clark's letter characterized the southern man's opposition: "Southern men as a rule do not know how to oppose anything that women demand. Hence those who oppose suffrage try to do so by flattering the women, 'putting them on pedestals,' saying the women do not want it, and taking any other position other than meeting the issue squarely on its merits."

89. Walter Clark, letter to Julia Dameron, 27 February 1919, Brooks & Lefler, Vol.II, pp.393-94.

90. Clark quoted this in his letter to Julia Dameron, writing that this was the one phrase by which Danton "rolled back the tide of the invasion of France." Clark letter to Dameron, Brooks & Lefler, Vol.II, p.393.

An Interview with Judge Marcia H. Morey

By Thomas L. Fowler

In December of 2003, Tom Fowler talked with District Court Judge Marcia Morey at her office on the sixth floor of the Durham County Courthouse in downtown Durham. Judge Morey grew up in Decatur, Illinois, was co-captain of the 1976 US Olympic Swim Team, and graduated from Northwestern School of Law in 1982. Judge Morey has served on the district court bench since 1999. The following are excerpts from this conversation.

Fowler: Tell me about growing up in Decatur, Illinois.

Judge Morey: I was the fourth generation of my family to grow up in Decatur. My father was a lawyer, as was his father. But my mother had the hardest job, being my mother. I was the youngest of three sisters and thus was the brunt of many jokes—but I endured. I was compared to my sisters a lot. They were both very studious and well-disciplined. I had a lot more energy and kind of a wild streak.

Fowler: But you were the baby and so had few responsibilities.

Judge Morey: You could say that. [laughs] Except for living up to my childhood reputation for being a little outrageous. My parents finally realized the best way to

handle me was to put me in the swimming pool where I wouldn't be able to talk much and they would know where to find me. I started swimming when I was six, and spent much of the next 14 years partially submerged.

Fowler: Does the name Kornelia Ender ring a bell?

Judge Morey: It sure does. In the 1970's she was the star of the East German swim team and shattered numerous world records. I swam against her in some relays, always coming in behind her. She had amazing success very early which gave rise to questions of steroid use by the East Germans. Also on that team was a person named Renate Vogel, who was their breaststroker—which was my stroke. Renate set several world records in the 1970's—at the same time Kornelia Ender was setting world records in the freestyle.

Fowler: So where were you and what were you doing in July of 1976?

Judge Morey: I was on the US Olympic team preparing to swim in the Montreal Olympics. Actually preparing to get soundly beaten by Renate Vogel and the East German swim team.

Fowler: Hasn't it been established that the East German women who beat the American women swimmers in '76 had all been using banned substances that should have disqualified them from competing in the Olympics[1]—so that you, Shirley Babashoff, and your teammates should have won the medals and the glory in '76?[2]

Judge Morey: Yes. After the Olympics, it was proven that the East Germans had been using steroids—but they paid a great price for that glory. One example is Renate Vogel, with whom I became good friends. After the Olympics, Renate defected to West Germany by hiding underneath a truck and clinging to the truck's axle for three hours until she crossed the border to freedom in West Germany. She defected because she was in dire need of medical assistance. Her health problems were traced back to years of government-administered anabolic steroids. When Renate was five years old, she was taken from her family to be trained to become an Olympic athlete. She grew up at the government's training facilities where East Germany prepared—and manufactured—the world's best athletes. But the steroid use resulted in her very early, tragic death—the price of glory for Renate. It was very sad. So I have no regrets about not winning a gold medal and losing in a fair manner.

Fowler: Well, the regrets would be that it shouldn't have happened in the first place, and if it hadn't happened the American team would have won.

Judge Morey: Right. The athletes were pawns in the East German system. But even back then, when the rumors of their drug use were rampant, we felt that we did our best, swam our hardest, and had very disappointing defeats—but the defeat I experienced at the Olympics helped make me prioritize what is truly important in life. Gold medals and fleeting fame are not what lasts. Too much success at an early age sometimes leads to problems later in life.

Fowler: Have you kept in touch with Babashoff and your other teammates?

Judge Morey: There have been some reunions over the years. Shirley Babashoff became a postal worker in Southern California. Several Olympic swimmers had problems adjusting to their lives after athletics.

Fowler: So after the Olympics you stopped swimming?

Judge Morey: Yes, I did. It was a difficult adjustment. After 14 years of competing, all through my school and college years, I didn't know who I was except as an athlete. You work your whole life dreaming to be an Olympian, representing your country, getting a gold medal, watching the American flag go up the pole, and thinking that that is what will make everyone happy. And then in one race it is all over. So it was a big adjustment not to be in the limelight, not to train five hours every day, and not have any specific goals. Finding a new direction was my biggest challenge. Immediately after the 1976 Olympics, I went from 160 pounds to about 100 pounds, and became anorexic. I struggled with that for the next ten years.

Fowler: Did you think about competing in the next Olympics—1980 in Moscow?

Judge Morey: No, I was totally burned out. I was 20 years old—one of the older swimmers—and I was ready to start living life, ready to start learning what it takes to be a good human being.

Fowler: Why did your thoughts turn to law school after the Olympics?

Judge Morey: Both my father and grandfather were lawyers so it may have been in my blood. I think I rebelled against it for awhile after college. I didn't think it looked like much fun watching my father come home every night with stacks of papers. He practiced business/banking law. But my father did influence me. He was the first to tell me that there are so many different avenues that law school can open up—that even if you never practice law, the law school education is priceless.

Fowler: When you were in law school, what kind of law career did you envision?

Judge Morey: Survival [both laugh].

Fowler: Well, you didn't think you would be a prosecutor did you?

Judge Morey: No. Not at all. I did find law school fascinating because life is learning rights and responsibilities. Social issues inspired me. Constitutional law, criminal law, social justice energized me. After law school I did return home and asked my father for a job. He said, "No, I don't believe in nepotism." Actually, he was wise and knew I wouldn't be happy practicing business law. Instead I got a job with the NCAA in Kansas City, as an investigator. I traveled throughout the country investigating cases of cheating in college athletics. After that I worked as a television and print journalist in Decatur.

Fowler: I first met you in the mid-1980's, when I was representing juveniles facing delinquency charges and you were the juvenile court prosecutor—and I must tell you that you were the best prosecutor I ever worked with. You were straightforward, prepared, calm, and reasonable. How was it that you came to be a prosecutor?

Judge Morey: I moved down to Durham in 1987 and sent out dozens of resumes. Ron Stephens, the district attorney in Durham at the time, offered me a job. I will always be grateful to Ron for opening the door for me. In many district attorney's offices, the newest prosecutors are often sent down to juvenile court to get broken in—usually it's a short stint before they find their stride and graduate to traffic court. Evidently I never got this promotion—but maybe it was because I loved juvenile court.

Fowler: Why did you like juvenile court?

Judge Morey: The longer I was in juvenile court the more I understood and appreciated the challenges faced by children without supportive families—who may grow up sleeping under beds hearing gunshots outside at night or who may be victims of fetal alcohol syndrome and who never know the

The longer I was in juvenile court the more I understood and appreciated the challenges faced by children without supportive families—who may grow up sleeping under beds hearing gunshots outside at night or who may be victims of fetal alcohol syndrome and who never know the difference between right and wrong.

difference between right and wrong. These are kids who, from their first day on earth, never had a fair chance. And as a prosecutor, I had the ability to do the right thing. I had the ability to really stress rehabilitation. I learned to understand that most juveniles who wound up in court weren't bad kids choosing a bad life. They simply had no options. So juvenile court can be a positive, constructive court—we could give kids another chance. Juvenile court became my niche and my passion.

Fowler: It did become your niche. You were involved with the task force that produced a major rewrite of the juvenile code in 1998, called the Juvenile Justice Reform Act. Did you accomplish everything that you hoped for in this new legislation?

Judge Morey: We did except for the funding. At a time when most states were becoming more punitive towards juveniles, North Carolina kept a good balance of rehabilitation and accountability. I attribute a lot of that to Governor Hunt. He was very devoted to doing the right thing. Although his initial reaction was "let's get the punks off the streets," he then took the time to go into the courtrooms, to go to the training schools, to really see things through the eyes of these kids. As a result, the commission went beyond simply reacting to the juvenile crime headlines. The new Juvenile Code was tempered and well-balanced. We did accomplish what we wanted in the re-write. But what we didn't accomplish was getting adequate funding.

Fowler: Interesting, because at the time the governor said this overhaul of the state's juvenile justice system had been accomplished through "tougher punishment and increased prevention efforts." But some have always thought the problem with juvenile justice has been the limited dispositional alternatives available for addressing the problems of delinquent kids—that is, insufficient funding to create or make available these dispositional alternatives.

Judge Morey: And I agree. We were only funded 18.5 million out of a 42 million dollar need. So there are still big challenges ahead.

Fowler: Recently you have been critical of the State spending millions of dollars to build new training schools[3] instead of putting this money into creating more and better educational and treatment or therapy programs for juvenile offenders. What specific programs do you think are needed?

Judge Morey: Well, we know what doesn't work. It doesn't work to warehouse kids in big structures. They need smaller environments. They need counseling and rehabilitation. Eighty-nine percent of all our kids, in what were once called training schools and are now called youth development academies, have a diagnosed mental illness. This finding is horrific. Sixty percent are functionally illiterate. If we send these kids back to a family that is still broken, we send them back to the same environment that caused their problems in the first place. We do need smaller facilities that are in close proximity to families so they can be involved in rehabilitation. To rebuild three decaying training schools, with 300 bed institutions, makes no sense. It's a waste of money. We have to give these kids what they've never had, and that's personal attention and more effort toward reaching their hearts, minds, and intellect—and their potential.

Fowler: So how do you like being a judge?

Judge Morey: I am thrilled to be on the district court bench. I love the work and the people I work with. I do get frustrated that we never seem to have enough time to adequately address all the problems we face on the bench. And with each week a rotation from criminal court to juvenile court to family court—it's diverse and always a challenge.

Fowler: Durham is one of several districts in the state that has a family court.[4] How is family court different from what existed before?

Judge Morey: The benefits of family court are tremendous. The case managers do an excellent job making sure that cases are on track, and that if issues are left open they will be brought back before the court so they can be resolved. The same judge will hear the family issues, whether it is domestic violence, a child support hearing, a custody hearing, or equitable distribution. I think the consistency of assigning one judge to one family is very helpful. The administration of family court and its case management system has also helped to keep these cases on track and moving forward. I think we are serving the citizens a lot better.

Fowler: Under the old system a judge considering a juvenile's delinquency case would not know (at least in theory) anything about the youth's family until after adjudication, but under this system the judge might know everything about the family at the adjudication stage. Can, or does, this interfere with the judge's objectivity or the juvenile's right to a truly adversary proceeding?

Judge Morey: Not that many cases overlap between delinquency and the family court setting. But, Tom, every time we walk into the courtroom, we take off any preconceived ideas or established issues about that case and that family, and we apply the standards that have to be applied to that case. So if we know kids in delinquency court have deadbeat parents and no one is watching over the child, is that going to taint our view of the child? No. And, of course, the attorneys have to do their job to make sure the proper burden of proof—beyond a reasonable doubt—is applied at the adjudication stage of delinquency proceedings.

Fowler: You have been outspoken about the gang problem in Durham. But one of your colleagues on the bench has pointed out that being a member of a gang is not a crime in and of itself. Could you describe

why gangs present a different kind of problem for communities, and how the community, law enforcement and the courts can or should properly respond?

Judge Morey: Well, I agree that being a member of a gang is not a crime. But being a member of a gang, particularly in a county like Durham, does put that juvenile at risk and it is a very serious problem. If a juvenile is adjudicated delinquent for say an armed robbery or a felonious assault and evidence shows that the crime was done as a part of a gang activity, much harsher consequences will result. In the past there has been denial that gangs existed or were a major problem. When I was a prosecutor I saw the existence of gangs in middle schools—it wasn't the Crips and the Bloods, but you could tell. And is the gang a substitute for the family? Yes. For kids without strong family ties. Everyone wants a tie somewhere and kids are no exception. In fact, they want it more than anyone. The most difficult challenge is to try to help a family before a juvenile is charged with a crime. Mothers come into court, tell me they are scared and have no idea what to do. They know their child is in trouble. Durham has a youth treatment court, for substance abuse. Twenty out of the 24 kids involved are gang affiliated. I impose curfews. I order them not to associate with gang members, not to wear gang colors. We do whatever we can do to try to help these kids get away from these gangs. Most of the youth want to be away from the gang. This is the most challenging issue right now. We have to support families more, and students suspended from the schools have to have alternative educational opportunities.

Fowler: A recently published study and report[5] evaluated the quality of the legal representation generally provided in delinquency proceedings in North Carolina. The report was fairly critical of the performance of private counsel appointed to represent juveniles in these proceedings.[6] Durham has a public defender providing these services and so may be an exception, but what is your opinion of the quality of the legal representation generally provided in delinquency proceedings statewide?

Judge Morey: One of the benefits I had working on the Juvenile Justice Reform, was that I got to travel across the State observing many juvenile courts. One of the most amazing things I observed was how different every district was. In some districts, including Durham, the defense attorneys were actively involved with the families and made sure all treatment options were explored and the system was accountable. These juvenile attorneys went far beyond courtroom litigation skills. Yet in other counties, defense attorneys would walk out when it was time for disposition—because they thought, well, it's just social services anyway and it doesn't matter. So it's hard to give a blanket response. I think the Bar Association's study was very informative and more needs to be done to improve representation of juveniles.

Fowler: The report specifically discusses the confusion about the proper role of the attorney in these cases—let me quote: "To insure due process in delinquency proceedings, it is important for defense counsel to understand her role as an 'expressed interest' attorney advocating for the rights of the client, not a 'best interest' attorney advocating for what she believes is best for her client. Appointed counsel frequently expressed their belief, however, that the problems of juvenile court rested with the parents and children, citing a lack of discipline and responsibility as the main reasons for juveniles being in court and the major obstacle to effective representation." What is the proper role of defense counsel, and is a rights-based, adversary approach in the best interests of either the juvenile or the community?

Judge Morey: That is one of the toughest issues for juvenile defense attorneys—knowing that on a technicality or point of law they may prevail at adjudication, yet also they are aware of a severe drug problem, neglect or abuse in the family, the need for remedial education, or help with an unwanted gang-affiliation. It's a very tough job.

Fowler: A recent newspaper article reported about an ongoing race for a judgeship on the North Carolina Court of Appeals. It stated that the challenger had made "blistering attacks" on the incumbent judge for her concurrence in three specific court of appeals opinions of which the challenger was critical of the decision reached by the court. The article noted that this approach might signal the end of our state's tradition of cordial judicial campaigns. For a state that has chosen to elect its judges, is this a bad thing?

Judge Morey: I am disturbed at the recent changes in the Code of Judicial Conduct. The changes were not presented to judges at the district or superior court level for comment or input. The new revisions which allow judges to speak out on political issues, appear in political campaigns, and directly solicit campaign contributions, is appalling. That is why I drafted a resolution that the district court judges approved opposing the amendments to the Code. The court of appeals race you mentioned and the issues raised are an indirect outcome of the relaxed rules in the Code of Conduct. I think in the long run, it will be a disservice to judicial candidates and the public. I fear that appellate judges may hesitate to write forceful, necessary opinions because they will be targets for attack from opponents who take case rulings out of context, turning them into political issues.

Fowler: But how are voters supposed to distinguish between judicial candidates, and make an educated choice to vote for one judicial candidate as opposed to another?

Judge Morey: Perhaps we need a citizen Court Watch approach that tracks what happens in courtrooms. I don't mean actual case decisions, but the professional judicial demeanor. Are judges punctual in court? Are they fair, impartial, and respectful to litigants and lawyers? And how often a judge has been overturned on appeal. Now I am more troubled that the new relaxed Code of Conduct may lead some judges to think, it's time to recess court and meet with some attorneys in the back hall with, "Hey, I need a little campaign contribution, and I'd really appreciate you giving me a few hundred dollars." That is redolent of the appearance of impropriety. Even if it's to lawyers a judge has known for 15 years, I wouldn't do it inside or outside a courthouse. For this to now be permissible sends the wrong message to the public. It may be a fine line between a judicial campaign asking for contributions and a judge asking—but that fine line is a very important line. Judges should not act like other politicians. If judges can now speak at political fundraisers or endorse candidates, we are going to see huge increases in demands for recusals.

Don't forget the overwhelming majority of our citizens want to elect judges. I agree with that. And if the criticism is that voters blindly elect judges, then the answer is to better educate the voters about their judges and courts. But to do away with judicial elections and adopt an appointment system is even more prone to political favoritism.

I've seen at least 50 kids under the age of 16 killed since I've been at the Durham courthouse as both a prosecutor and judge—and every one had a face, a family, and a story. They aren't statistics. And there will be a lot more unless we all take a personal responsibility to help these kids because their lives have not been as lucky as some of ours have been. . .

Earlier you asked how I liked being a judge—and I do love it—but it is isolating. Several close friends of mine have been lawyers, but since taking the bench, I have reduced or eliminated social contacts with them. And I hate that because I miss those friendships. But I am uncomfortable going out in public and eating dinner with lawyers when people who may appear before me could watch me schmooze with an opposing attorney. Not that I am doing anything wrong, but it is the appearance, from that person's point of view, not mine. I'm very conscious of what is perceived by people. And I would never discuss a case with a lawyer during a social engagement—but part of taking the job seriously has made it difficult and isolating and required letting go of good friendships. But, as I see it, that's the price to pay to be a good judge.

Fowler: Judge Morey, are you still a swimmer or have you found better ways to relax in your spare time?

Judge Morey: [Laughs] I don't relax much. [Both laugh] I do still swim but I run more now. I run every day, three or four miles. And I do kayaking. I realize now it's so nice during workouts to hear things other than water swirling about your ears—and see things other than the black lane line at the bottom of the swimming pool.

Fowler: What was the last book you read, the last CD you bought, and the menu of the last gourmet meal you cooked?

Judge Morey: *My Losing Season* by Pat Conroy, was the last book. The last CD was Eva Cassidy's *Songbird*. And the last gourmet meal was a double-cheese and pepperoni pizza I ordered from Dominos.

Fowler: Well, okay. Have you ever wondered how your life would have been different if you hadn't been kicked out of ballet class when you were 11?

Judge Morey: [Laughs] No. I had no future there. I was kicked out because I had taken scissors to the leotards and cut them up so I wouldn't have to go. My mother made me pin it together with 50 safety pins, and ... well ... [unintelligible]. I hated ballet.

Fowler: Judge Morey, you've seen a lot of troubled kids come before you in the courtroom—some you may have seen only once or twice, and some you may have seen far too many times. In light of your experience, what's the best thing we can do to help kids these days—both the kids in our own families and those in our communities?

Judge Morey: Take a personal interest in them. Make sure they understand their responsibilities. I love to volunteer in teen court, truancy court—the one on one with kids outside of the traditional court setting. Every child needs a mentor. Every child needs someone that they know thinks about them, is concerned about them, and wants the best for them. I've seen at least 50 kids under the age of 16 killed since I've been at the Durham courthouse as both a prosecutor and judge—and every one had a face, a family, and a story. They aren't statistics. And there will be a lot more unless we all take a personal responsibility to help these kids, because their lives have not been as lucky as some of ours have been—being financially secure, being able to go to college, celebrate holidays with family members. The things we may take for granted, some of these families could never imagine.

Fowler: Thanks very much for talking with me this afternoon, Judge Morey.

Judge Morey: You're welcome. It has been my pleasure. ■

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Endnotes

1. In the 1976 Montreal Olympics, East Germany's women's swimming team dominated, capturing 11 of the 13 events. East German Kornelia Ender won four gold medals, while the USA's best swimmer, Shirley Babashoff, had four second place finishes, each behind a world record performance by an East German swimmer. Decades later, reports appeared to document that the East German women's team made regular and substantial use of illegal performance-enhancing steroids in preparation for the 1976 Games.
2. One commentator has stated: "Had it not been for the drugs regime of East Germany, Babashoff may have been considered one of the greatest swimmers in history."
3. According to newspaper reports, North Carolina currently operates five youth prisons, which house roughly 540 children ages 11 to 17. The State is considering proposals to build either three large juvenile facilities or eight to ten smaller facilities to replace deteriorating juvenile prisons that a state audit found to be unsafe.
4. In 1999, the North Carolina General Assembly allocated the Administrative Office of the Courts money to begin three pilot programs across the state. The idea was to bring the offices that serve family matters together and thus decrease the burden put on a family having to appear in court. In the past, family members had to appear before one judge for domestic violence issues, then another judge for child custody hearings, and the Department of Juvenile Justice for others. Today, the family court concept brings them all together and one judge can deal with the family on all issues. *See generally* Cheryl Howell, *North Carolina's Experiment with Family Court*, North Carolina State Bar Journal, Fall 2001, pp. 14-19.
5. *North Carolina: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, by the American Bar Association Juvenile Justice Center and the Southern Juvenile Defender Center, in collaboration with the National Juvenile Defender Center and the North Carolina Office of Indigent Defense Services (October 2003).
6. The report sets out the following problem areas: unequal representation, lack of investigative services and access to materials, lack of client contact, lack of motions practice, lack of detention advocacy, lack of advocacy at adjudication, lack of disposition advocacy, few notices of appeal entered, lack of post-dispositional advocacy, lack of training and standards, lack of collateral representation, clients with limited English proficiency, clients with mental health issues, disproportionately minority representation, school referrals, confusion about role of counsel, inadequate system resources, and parental/family participation.

Death and the Privilege

By Kenneth S. Broun

The facts of the Eric Miller investigation read like a *Law and Order* script, or perhaps something from *The Practice* only they are somewhat more strange. But this really happened. The North Carolina Supreme Court opinion deciding the case[1] is significant not only under its own bizarre facts but, unless limited to its facts, may have ramifications with regard to the application of the attorney-client privilege that extend beyond the relatively rare situation where the client has died.

In November 2000, Eric Miller, a postdoctoral research scientist working in the Research Triangle Park, was hospitalized with symptoms later determined to be consistent with arsenic poisoning. The evening before, he had been at a bowling party with some coworkers of his wife, Ann Rene. While at the bowling alley, Miller partially consumed a cup of beer given to him by Ann Rene Miller's coworker, Derril H. Willard. Miller commented to those present that the beer had a bad or "funny" taste.

Miller spent eight days at Rex and North Carolina Memorial and was then discharged in the care of his wife and parents. During the next week, he seemed to regain strength, but on December 1 he became violently ill and was again hospitalized. He died on December 2, 2000. The cause of death was arsenic poisoning. At the direction of his wife, Miller's body was cremated shortly after the autopsy.

Law enforcement officials investigating the death discovered 576 minutes of conversations between Ann Rene Miller and Derril Willard, conversations that increased in frequency and duration immediately before and after the bowling party. E-mail messages between the two were found on her computer. An interview with Willard's wife, Yvette, disclosed that Willard had acknowledged a romantic involvement with Ann Rene Miller. Although the police interviewed all of the other persons present at the bowling party, Willard refused to be interviewed by them.

Shortly after Miller's death, Willard sought legal counsel from criminal defense attorney Richard T. Gammon. Willard told his wife that Gammon had advised him that he could be charged with Miller's attempted murder. Willard committed suicide a few days later. He left a will naming his wife as his executrix.

Sometime in the next several months, Willard's estate was closed. However, in February 2002, Yvette Willard reopened the estate "to handle legal matters." Two days later, the State filed a "Petition in the Nature of a Special Proceeding" in the superior court of Wake County seeking disclosure of communications between Gammon and Willard. The petition was accompanied by an affidavit of Yvette Willard purporting to waive Willard's attorney-client privilege with regard to his conversations with Gammon. A week later, a release was executed on behalf of the estate of Eric Miller, releasing the Willard estate from any liability it might have for Miller's death.

After a hearing, the Hon. Donald W. Stephens, the Wake County senior resident superior court judge, entered an order requiring Gammon to provide the court with a sealed affidavit containing any information that he had received relevant to the investigation of Miller's death. The order stated that the court would conduct an *in camera* review of the information to "determine if the interest of justice required disclosure of the information to the State." Gammon appealed and, by joint petition for discretionary review, the matter came to the North Carolina Supreme Court.

Before discussing the court's decision in *Miller*, it is useful to outline some relevant dimensions of the attorney-client privilege in North Carolina and elsewhere. Unlike many privileges recognized in this state, the attorney-client privilege is a common law rather than a statutory privilege. Furthermore, unlike most of the statutory privileges,[2] the attorney-client privilege is absolute[3] rather than subject to abrogation in the discretion of a trial court judge. It is certainly the oldest and most venerated of all of the rules of law protecting communications from compulsory disclosure in the courtroom.[4] The North Carolina courts have recognized a five-part test to determine whether the attorney-client privilege applies to a communication: (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and (5) the client has not waived the privilege.[5]

Until the Miller case, the only North

Carolina case discussing the application of the privilege to communications by a client who is now deceased was *In re Kemp*.[6] *Kemp* involved a will contest between the beneficiary named in the will, a local hospital, and members of the deceased's family. The attorney for the deceased was permitted to testify that she was of sound mind and to recount communications made to him by the deceased while she was his client. The court held that the attorney's testimony with regard to his client's mental condition did not involve communications between attorney and client and was therefore not covered by the privilege. But the court went beyond that limited holding, recognizing that the attorney had in fact testified to communications with his client. Despite the fact that the testimony involved communications, the court found no contravention of the privilege. It noted that the "rule of privilege does not apply in litigation after the client's death, between the parties, all of whom claim under the client; and so, where the controversy is to determine who will take by succession the property of a deceased person and both parties claim under him, neither can set up a claim of privilege against the other as regards the communication of the deceased with his attorney."[7] The court's holding in *Kemp* is consistent with many cases throughout the nation.[8]

Other jurisdictions have dealt with the issue of the survival of the privilege after the death of the client in other than will contest cases. Most significantly, in 1998 the Supreme Court of the United States dealt with the issue in a case bearing some similarity to the facts of *Miller*. In *Swidler & Berlin v. United States*,[9] the Court dealt with an incident arising out of the Clinton White House travel office affair. During the investigation of the dismissal of White House travel office employees, Deputy White House Counsel Vincent Foster met with an attorney. Nine days later, Foster committed suicide. The independent counsel issued subpoenas for the attorney's notes of his conference with Foster. The attorney resisted and the district court quashed the subpoena. The court of appeals reversed, holding that, where the privilege is applied posthumously, a balancing test should apply. The Supreme Court reinstated the district court decision, finding that the privilege survives the death of the client in its absolute form. The Court stressed the value of the privilege in encouraging a free flow of information between lawyer and client. As quoted in the *Miller* case,[10] the Supreme Court stated:

> Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.[11]

The Court went on expressly to reject the application of a balancing test, even in posthumous application of the privilege, because of the introduction of uncertainty that such a test would bring to the privilege.

Other jurisdictions hold that the privilege survives the death of the client,[12] although some cases expressly recognize that a personal representative of the deceased, such as an executor, may waive the privilege.[13] Several states explicitly provide by statute or rule that the personal representative of the deceased may claim the privilege, thus seemingly recognizing a right to waive as well.[14]

There is no doubt that the privilege has been absolute in North Carolina in the sense that the courts will not balance the need for the evidence at trial against the protection of communications.[15] Yet, if the client is still alive, the privilege may not always exist. It can be waived by the client,[16] sometimes impliedly or inadvertently.[17] Perhaps the most significant distinction then between a privilege held by a living client and one applied to an individual now deceased, with no power in a personal representative to waive, is that in the latter case the privilege certainly lasts forever.

The Supreme Court thus faced a number of significant issues in deciding the *Miller* case, not the least of which was the possibility that by recognizing the posthumous application, it was forever preventing the disclosure of information. The Court's opinion in *Miller* left open the possibility of eternal secrecy, but may have succeeded in watering down the privilege so as to make it meaningless in some instances even before the death of the client.

The Court's opinion is thorough and scholarly and begins on solid grounds. It first upheld the propriety of a special proceeding to consider the privilege question in this case. Although it acknowledged that the proceeding in this case was not initiated in strict accord with statutory procedures, the court had the inherent power to act "to accommodate exigent circumstances where required in the interest of justice."[18]

The opinion then held that the privilege survives the death of the client, citing decisions in other jurisdictions as well as *In re Kemp*, where the Court, in creating a testamentary exception, presumed that the attorney-client privilege extends after a client's death.[19] The Court then analyzed the powers of an executrix under the North Carolina statutes to waive the privilege under the circumstances of the case. The Court found that, where "no claim has been inferred, threatened, or made by or against Mr. Willard's estate," the statutes give no power to his executrix to waive the privilege. The Court found G.S. §32-27(23), empowering the executor to "compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate," inapplicable. Similarly, the Court found no power to waive under G.S. §28A-13-3(a)(15), conferring the power to "compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate," where there was no pending claim against the estate. Yvette Willard's affidavit purporting to waive the privilege was ineffective.[20]

In reaching its conclusion with regard to the inability of the executrix to waive the privilege, the Court ignored an earlier North Carolina decision, *Hayes v. Ricard*,[21] that had assumed both that the privilege survived the death of the client and that a personal representative had the power to waive the privilege. In *Hayes*, the beneficiaries of an estate sued to quiet title to land. At issue was an unrecorded quit-claim deed to the deceased's alleged mistress. The plaintiffs called the deceased's attorney, who was also one of the executors of his estate, as a witness at the trial and asked him about the transaction. The Court held that the defendant should have been permitted to cross-examine the attorney with regard to communications with the deceased. Plaintiffs had "waived their right to keep their communication privileged" by calling the attorney/executor to the witness stand. Although there are obvious distinctions between the *Hayes* and *Miller* cases, the Court's failure even to cite *Hayes* is puzzling.

The Court then rejected the State's asser-

tion of a balancing test. The State's balancing test had been accepted by the trial court judge, who ruled that the "State's and the public's interest in determining the identity of the person or persons responsible for the death of Eric Miller outweigh the public interest in protecting . . . the attorney-client privilege." Such a balancing test had been applied in at least one decision from another state, *Cohen v. Jenkintown Cab Co*,[22] where the court concluded that the "interests of justice" required disclosure of a deceased client's communications with his attorney.

In rejecting a balancing approach, the Court relied, among other things, on the clear rejection of such an approach by the United States Supreme Court in *Swidler & Berlin*.[23] In addition, the Court noted that the General Assembly has created qualified privileges, such as those governing communications between physician and patient, where a trial court judge is given the power to require disclosure if "necessary to a proper administration of justice."[24] Unlike such statutory privileges, the attorney-client privilege is common law based and has never been held to be subject to balancing.[25]

After rejecting waiver and balancing, the Court continued its analysis of the privilege, at first describing the privilege and its operation in ways that are totally consistent with both North Carolina cases and cases from other jurisdictions. It observed that not all communications between an attorney and client are privileged. For example, a lawyer's testimony with regard to whether he had communicated to his client by letter is not privileged.[26] Statements made in the presence of third persons are similarly not protected by the privilege.[27] Statements made in aid of illegal or fraudulent activity are also not privileged.[28] The Court recognized that a trial court may conduct a preliminary inquiry, including an *in camera* review of the allegedly privileged matter, in order to determine the applicability of the privilege.[29] Based on this analysis, the Court found no error in the trial court's decision to conduct an *in camera* review of the communications between Derril Willard and his attorney, Richard Gammon.

The Court then turned to an application of these principles to the facts in the *Miller* case. Again, in the first part of this analysis, the Court's opinion is scholarly, thorough, and in accord with precedent, both state and national. The Court emphasized that "only those communications which are between the attorney and the client and which are part of the client's actual purpose for the legal consultation are privileged."[30] The Court noted that the communications must pertain to the client's legal rights or interests, not the legal rights or interests of some other person. Such an observation is unquestionably consistent with existing authority, including language in the North Carolina cases that "the communication relates to a matter about which the attorney is being professionally consulted."[31] Thus, if Derril Willard was inquiring with regard to his own legal rights, the communications may be privileged. Unless he was her agent, an inquiry with regard to Ann Rene Miller's legal rights would not be privileged.[32] Similarly, statements made for the purposes of concealing a third-person's crime, *e.g.*, hypothetically, Ann Rene Miller's guilt, would not be privileged both because they did not pertain to the client's legal interests and because such an inquiry would likely be considered in furtherance of a crime. However, the Court observed, again consistent with existing law, that any statement made by Mr. Willard that also implicated him in the crime would be covered by the privilege.[33]

So far, so good. But it is at this point in the opinion that the Court departed from existing authority and ventured into a theory the application of which may adversely affect the policy behind the privilege in cases other than those involving the death of the client. The Court stated that a trial court should apply the maxim *cessante ratione legis, cessat ipsa lex*: when the underlying justification for the rule of law is not furthered by its continued application, the rule or privilege should cease to apply.

Citing *Swidler & Berlin*, the Court focused on three possible consequences in the event of disclosure of privileged matter: (1) that disclosure might subject the client to criminal liability; (2) that disclosure might subject the client, or the client's estate, to civil liability; and (3) that disclosure might harm the client's loved ones or his reputation. The Court then stated:

> In the instant case, the trial court should consider whether these possible consequences would apply to, or would have any negative or harmful effect on, Mr. Willard's rights and interests if the State was permitted to obtain the information communicated between Mr. Willard and respondent. In the event that the trial court, upon *in camera* review, should conclude that any of these consequences will apply to any portion of the communications, they should remain undisclosed. If, on the other hand, the trial court should determine that the communications asserted to be privileged would have no negative impact on Mr. Willard's interests, the purpose for the privilege no longer exists. When application of the privilege will no longer safeguard the client's interests, no reason exists in support of perpetual nondisclosure.[34]

The Court took pains throughout much of its opinion to stay within the common law boundaries of the privilege and to give the privilege the policy deference that it recognized as its due. Nevertheless, in the end, its direction to the trial court to inquire into the consequences to the client is contrary to the rule's underlying rationale. Inquiring as to an individual's criminal liability is certainly appropriate in the case of the privilege against self-incrimination.[35] But, as the Court itself recognized in *Miller*, the rationale for the attorney-client privilege is to create a free-flow of information between attorney and client—not to protect the client from adverse consequences.[36] Given that rationale, the question should be whether, *at the time of the communication*, the client was seeking legal advice. In the application of the privilege, it has never mattered and should not matter that the client is no longer personally subject to harm at the time disclosure is sought.

Assume, for example, that a client has consulted a lawyer with regard to a civil liability, a contract or tort claim in which the client is one of several people who may be liable based upon the same activity. Assume further that the client later settles his dispute, but that the dispute involving others continues. The client's lawyer is called as a witness at the trial of these other claims. Is there any question that, if claimed by the client or by the lawyer on the client's behalf, the privilege would still attach to such communications? At least until the *Miller* case, there was no doubt that the privilege could still be asserted. The question has not arisen often in the courts, probably because the answer has been obvious. One case may serve as an example. In *State v. Hamrick*,[37] a co-conspirator testified for the State against the defendant. The Court held that the State's objection to questions concerning the witness's communication with his attorney had been properly sustained. There was no inquiry as to whether the co-conspira-

tor was still subject to criminal punishment.

The Court stated that the *Miller* case was "rare," commenting that the "trial courts should carefully analyze each individual factual situation on a case-by-case basis when determining whether to permit disclosure of information asserted to be privileged." The Court further acknowledged that the *Miller* case presents unique circumstances for the application of this analysis and that it is in "no way sanctioning or suggesting any general application of special proceedings or grand jury investigations by prosecutors in the nature of fishing expeditions or otherwise which would tend to diminish in any way the great value to the public of the attorney-client privilege by its proper application through the judicial process."[38] Thus, arguably at least, the Court intended to limit its inquiry as to consequences to the client to instances in which the client has died. However, because of the Court's insistence on looking to the consequences of divulging communications to the client, it may be difficult to limit the impact of its opinion.

Based on the Court's decision, the trial judge ordered Richard Gammon to submit an affidavit setting forth what Derril Willard told him. The judge reviewed that affidavit and ordered at least some disclosures.[39] The trial judge's ruling is now on appeal.[40] It seems hard to believe that, even under the parameters set out by the Supreme Court, disclosure is appropriate. It has previously been disclosed that Willard told his wife that he might be prosecuted for attempted murder. Presumably, this advice would have been given to him only if he was concerned about his own legal rights and liabilities, not simply those of Ann Rene Miller. If that is the case, assuming that Willard confessed to some involvement in Miller's poisoning, how could that not affect Willard's reputation?

Although it is hard to predict the ultimate outcome of this bizarre situation, one can only wonder whether the Court's decision has caused us to ask the right questions. Surely it is correct to ask whether Derril Willard was seeking legal advice for himself, rather than for Ann Rene Miller. But the question of the consequences to Mr. Willard and his estate ought to be irrelevant to the policy reasons for applying or not applying the privilege.

There are good policy reasons for providing that the privilege protecting confidential communications to attorneys ought not to last in perpetuity. Yet a majority of the United States Supreme Court seemed untroubled by such a result, holding in *Swidler v. Berlin* that the privilege survived the death of the client, with no possibility of balancing and no express provision for waiver, even by dicta. One problematic consequence of such a holding—the specter of a confession of a now deceased client to his lawyer preventing the exoneration of an innocent person—can be dealt with by recognizing the constitutional implications of the exclusion of such evidence. Indeed, the majority opinion in *Swidler & Berlin* responded to the dissent's concerns in this regard by stating:

> Petitioners, while opposing wholesale abrogation of the privilege in criminal cases, concede that exceptional circumstance implicating a criminal defendant's constitutional rights might warrant breaching the privilege. We do not, however, need to reach this issue, since such exceptional circumstances clearly are not presented here.[41]

But even beyond the exonerating confession situation, communications by deceased clients should be viewed on a level as close as possible to those of living clients. Living clients may waive the privileges for a variety of reasons, ranging from moral imperative to financial gain. Under the absolute privilege presumably set up in *Swidler & Berlin*, and even under the privilege as described in *Miller*, there is no such waiver possible, no matter what a living client might have wanted to do.

The *Miller* decision would have been a stronger, more justified decision on policy grounds if it had recognized the survival of the privilege but had provided that it could be waived by the client's personal representative. As noted above, many states have accomplished that result by rule or statute. Also, as noted above, North Carolina had assumed that result in the 1956 decision in *Hayes v. Ricard*.[42] It is hard to be too critical of the Court's statutory analysis. The statutes do not expressly give the personal representative the right to waive the privilege in the absence of a viable claim against the estate. However, it would not have been difficult to imply such a right from the broad language of the statutes dealing with the claims in favor of or against the estate. Indeed, the Court would only have had to look to the *Hayes* case to excuse a liberal reading of the language.

Under the facts of the *Miller* case, Richard Gammon might well have argued that the executrix had a conflict of interest. She was, probably with justification, angry at her husband for his affair, even if he had played no role in the murder. However, the answer to that conflict of interest would be to remove the widow from the position of executrix. The power to do that already exists. G.S. 28A-9-1(a)(4) permits removal of a personal representative if the representative "has a private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration."[43] The discretion to remove is lodged, initially in the clerk of the superior court on the clerk's own motion or upon a verified complaint made by any person interested in the estate,[44] but is reviewable by a superior court judge.[45]

A case from Massachusetts, a state in which waiver by the personal representative is permitted, *District Attorney for the Norfolk District v. Magraw*,[46] is an example of removal of an executor for conflict of interest in order to avoid a conflict. In *Magraw*, the court held that the deceased's husband could be removed from his position as executor in order to avoid his assertion of the privilege on behalf of his deceased wife where he was the prime suspect in her murder. Although the facts of *Magraw* are very different from *Miller*, the principle of removal for conflict of interest is the same.

One way out of the dilemma presented by the *Miller* facts would be for the legislature

specifically to give the deceased's personal representative the right to claim or waive the privilege. This would remove the specter of a privilege in perpetuity and the loss of information that the deceased might ultimately have wanted disclosed. Such a statutory amendment could also contain a provision that would explicitly provide for removal of the representative in conflict of interest cases, thus removing any doubt based upon current legislation. It could also preserve for the client the right to deny his or her representative the right to waive the privilege, thus putting the client in control of the privilege's exercise just as if he or she were alive.

The enactment of a statute giving a personal representative the right to assert the privilege would not necessarily eliminate the problem caused by the Supreme Court's use of the *cessante ratione legis*, *cessat ipsa lex* doctrine to consider the current impact of the privilege on the estate or reputation of the deceased. Thus, it is still possible that an executor would elect to assert the privilege, and the Court would find, under *Miller*, that its assertion was precluded because of the absence of any impact on the deceased's estate or reputation. Such a result could also be corrected by statute. But even if it is not, the opportunity for this unwarranted result would be limited. The policy of the privilege would largely be preserved, as would the justice system's need for information in the vast majority of cases. ■

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Endnotes

1. *In re Miller*, 357 N.C. 316, 584 S..E..2d 772 (2003).
2. N.C.G.S. §8-53 to 8-53.13.
3. *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976).
4. WIGMORE ON EVIDENCE §2290 (McNaughton rev. 1961).
5. *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). *See also State v. McIntosh*, 336 N.C. 517, 523-24, 444 S.E.2d 438, 442 (1994); KENNETH S. BROUN, 1 BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE, §129 (5th Ed. 1998).
6. 236 N.C. 680, 73 S.E.2d 906 (1953). *See also Hayes v. Ricard*, 244 N.C. 313, 93 S.E.2d 540 (1956), where the Court assumed that the privilege survived the death of the client. See discussion in text accompanying note 21, *infra*.
7. *In re Kemp*, *supra* note 6, 236 N.C. at 684, 73 S.E.2d at 910 (citing 70 C.J. Witnesses, §567 and Wigmore on Evidence (2d Ed.) ' 2329).
8. JOHN W. STRONG, 1 MCCORMICK ON EVIDENCE, §94 (5th ed. 1999).
9. 524 U.S. 399 (1998).
10. *In re Miller*, 357 N.C. at 331, 584 S.E.2d at 784.
11. 524 U.S. at 407.
12. *See, e.g., Wesp v. Everson*, 33 P.3d 191 (Colo. 2001) (civil suit by daughter against estate of mother and step-father; testamentary exception did not apply where not a will contest); *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264 (Mo. App. 1976) (quantum meruit suit against estate); *Taylor v. Sheldon*, 173 N.E.2d 892 (Ohio 1961) (attorney's observations with regard to competency of client); *Curato v. Brain*, 715 A.2d 631 (R.I. 1998) (action by daughter against father's estate; testamentary exception did not apply where not a will contest). *But see, Cohen v. Jenkintown Cab. Co.*, 357 A.2d 689 (Pa. Super.1976) (balancing test used to determine applicability of privilege after death of the client)
13. *See District Attorney for Norfolk Dist. v. Magraw*, 628 N.E.2d 24 (Mass. 1994) (executor could waive privilege but court allows motion by prosecutor to remove executor where he was a suspect in the deceased's murder); *Martin v. Shaen*, 156 P.2d 681 (Wash. 1945) (executor waived privilege by testifying to communications with deceased).
14. Ala. R. Evid. 502(c) (2003); Alaska R. Evid. 503(c) (2003); Ark. Code Ann. §16-41-101, Rule 502 (c) (2003); Cal. Evid. Code §953(c) (2003); Del. R. Evid. 502(c) (2003); Fla. Stat. Ann. §90.502(3)(c) (2003); Haw. Rev. Stat. Ann. §503(c) (2003); Idaho R. Evid. 502(c) (2003); Kan. Stat. Ann. §60-426(a) (2002); Ky. R. Evid. 503(c) (2003); Me. R. Evid. 502(c) (2003); Miss. R. Evid. 502(c) (2003); Neb. Rev. Stat. §27-503(3) (2003); Nev. Rev. Stat. 49.105(1) (2003); N.H. R. Evid. 502(c) (2003); N.J. Stat. Ann. §2A:84A-20(1) (2003); N.M. R. Evid. 11-503(C) (2003); N.D. R. Evid. 502((c) (2003); Okla Stat. tit. 12 §2502(C)(2003); Or. Rev. Stat. §40.225, R. 503((3)(2003); S.D. Codified laws §19-13-4, R. 502(c) (2003); Tex. R. Evid. 503(c) (2003); Utah R. Evid. 504(c) (2002); Vt. R. Evid. 502(c) (2003); Wis. Stat. Ann. §905.03(3) (2003). Cases from these states reaching the issue hold that the power to claim the privilege is the power to waive it. *See In the Matter of the Estate of Curtis*, 394 P.2d 59 (Kan. 1964); *Scott v. Grinnell*, 161 A.2d 179 (N.H. 1960).
15. *See Willis v. Duke Power Co.* 291 N.C. 19, 229 S.E.2d 191 (1976). The Court, in *Miller*, expressly rejects a balancing test for the application of the privilege. *See* text accompanying notes 22-23, *infra*.
16 . *State v. McIntosh*, 336 N.C. 517, 444 S.E.2d 438 (1994); *State v. Murvin*, 304 N.C. 523, 284 S.E.2d 289 (1981).
17. *See, e.g., State v. Bronson*, 333 N.C. 67, 76. 423 S.E.2d 772, 777 (1992) (defendant waived privilege when he failed to object to prosecutor's questions about conversations with his attorney).
18. *In re Miller*, 357 N.C. at 322, 584 S.E.2d at 778.
19. *In re Miller*, 357 N.C. at 323, 584 S.E.2d at 779. *See* text accompanying note 6, *supra*.
20. *In re Miller*, 357 N.C. at 324-27, 584 S.E.2d at 779-782.
21. 244 N.C. 313, 93 S.E.2d 540 (1956).
22. 357 A.2d 689 (Pa. Super. 1976).
23. *Supra*, note 9. *See also, In re John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990).
24. N.C.G.S. §8-53.
25. *See In re Miller*, 357 N.C. at 327-33, 584 S.E.2d 782-85. The Court specifically notes:

    The attorney-client privilege is unique among all privilege communications. In practice, communications between attorney and client can encompass *all* subjects which may be discussed in any other privileged relationship and indeed all subjects within the human experience. As such, it is the privilege most beneficial to the public, both in facilitating competent legal advice and ultimately in furthering the ends of justice. We therefore conclude that the balancing test as proposed by the State is not appropriate and should not be applied under the circumstances of the instant case. (Emphasis by the Court).
26. *State v. Tate*, 294 N.C. 189, 239 S.E.2d 821(1978).
27. *State v. Murvin*, 304 N.C. 523, 284 S.E.2d 289 (1981).
28. *E.g., Hughes v. Boone*, 102 N.C. 137, 9 S.E. 289 (1889). *See also* BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE, *supra* note 5, §129 at 427 (5th ed. 1998).
29. *Hughes v. Boone*, 102 N.C. 137, 9 S.E. 289 (1889). *See also United States v. Zolin*, 491 U.S. 554 (1989) (court may conduct an in camera review of allegedly privileged material where there is a factual basis adequate to support a good faith belief by a reasonable person that such an inspection may reveal evidence to establish the claim that the crime-fraud exception applies).
30. *In re Miller*, 357 N.C. at 337, 584 S.E.2d at 788.
31. *State v. McIntosh*, 336 N.C. 517, 523-24, 444 S.E.2d 438, 442 (1994).
32. The Court relies upon *State v. Murvin*, 304 N.C. 523, 284 S.E.2d 289 (1981) where the client's statements related to the guilt of a third party, rather than the matter about which she had consulted her attorney. The client's statements were therefore not privileged. As to the privilege attaching to statements made by an agent, see *State v. Van Landingham*, 283 N.C. 589, 197 S.E.2d 539 (1981). See also MCCORMICK ON EVIDENCE, *supra* note 4, at §91.
33. *In re Miller*, 357 N.C. at 340, 584 S.E.2d at 789.
34. *In re Miller*, 357 N.C. at 342, 584 S.E.2d at 790.
35. *See* MCCORMICK ON EVIDENCE, *supra* note 4, at §123.
36. *In re Miller*, 357 N.C. at 329, 584 S.E.2d at 782. "The rationale for having the attorney-client priivlege is based upon the belief that only 'full and frank' communications between attorney and client allow the attorney to provide the best counsel to this client." *See also* WIGMORE ON EVIDENCE, *supra* note 4, at §2291.
37. 26 N.C. App. 518, 216 S.E.2d 391 (1975).
38. *In re Miller*, 357 N.C. at 342, 584 S.E.2d 791.
39. Andrea Wigel, Judge: Tell Dead Client's Secrets, *News & Observer* (Raleigh, NC), October 3, 2003, at A1.
40. Gammon Appeal Ruling in Arsenic Poisoning Case, at www.nbc17.com/news/2531221/detail.html (Last updated Oct. 2, 2003).
41. 524 U.S. at 408, note 3. *See also Chambers v. Mississippi*, 410 U.S. 284 (1973) (defendant's right to introduce evidence under the Sixth Amendment).
42. *See* note 21 and accompanying text.
43. *See also* Wiggins & Braun, Wills and Administration of Estates in North Carolina. §234 (3d Ed. 1993).
44. G.S. §28A-9-1.
45. G.S. §28A-9-4.
46. 628 N.E.2d 24 (Mass. 1994).