



Alumni - Hello Again

The *Barrister* members hope you enjoyed the last edition - and enjoy this one, too! This edition has many topical issues written by faculty and students. We again ask alumni to consider submitting articles for publication or 'republishing.'

Unfortunately, your Alumni Board of Directors voted not to allow *The Barrister* to 'piggy-back' with routine alumni mailings - even though there would be no additional costs incurred by the alumni association. As such, *The Barrister* had to obtain its own bulk rate permit and then pay the postage to send each alumni their copy.

So we ask that you seriously consider an ad in *The Barrister* and/or make a tax-deductible donation to the non-profit *The Barrister*. Our address is:

The Barrister - Editor
c/o NCCU - School of Law
1801 Fayetteville Street
Durham, NC 27707

Celebration of a Pioneer

Last November the Student Bar Association held a celebration for Dean Emeritus Daniel G. Sampson. Members of the administration, faculty, student body --both present and former, and friends paid tribute to this uniquely gifted legal scholar, law administrator, professor, and human being. A complete accounting of The Celebration has been included in this edition of *The Barrister*.

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Statutory Interpretations

The Law School Administration was non-responsive to the ABA article in the last edition of *The Barrister* and students sent a petition for the ABA to look into the school's apparent violation of ABA Standards. For an update - see pg. 9.

TRIBUTE TO GREATNESS: THURGOOD MARSHALL

1908-1993

The October 1992 Fordham Law Review¹ was a composite of the original tribute to Justice Thurgood Marshall, sponsored by Fordham Law School and the Stein Institute of Law and Ethics, in March 1992. The March 1992 program was titled "Brown v. Board of Education and its Legacy" and had a host of acclaimed jurists, scholars, and civil rights litigators, who made oral presentations citing the depth and breadth of Brown.²

*Those March 1992 presentations were revamped for the Fordham October 1992 publication and now *The Barrister* is providing a brief overview from that publication. Hopefully, *The Barrister's* offering will not only underscore the greatness of the man - but also "wet your appetite" and move you to peruse the complete series offered in the October 1992 publication.³*

THURGOOD MARSHALL
1908-1993



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CHANCELLOR CHAMBERS: UPDATE

Unfortunately, we, the law students of North Carolina Central University, have to say "welcome aboard" to Chancellor Chambers in this publication, rather than in person. Although numerous attempts were made to have Chancellor Chambers respond to a rather brief questionnaire sent at his request, and repeated attempts to schedule a meeting to discuss law students' concerns, Chancellor Chambers' busy schedule has prevented any dialogue. Another attempt to meet has been scheduled for early March (after this edition went 'to press').

Even though students have not 'seen' the Chancellor at the Law School, his presence is being felt. As many of you know, by way of reading the Law School Weekly, the Chancellor has appointed a 'blue-ribbon' advisory committee to review "the overall reaction of the Law School." In an attempt to determine the scope of the committee; when and if the committee will meet with students; why there aren't 'recent' alumni on the committee; why there are no 3Ls on the committee - we met with the chairperson - Professor Daye of the UNC-CH School of Law. The following paraphrases the issues discussed at that meeting:

Q: What is the scope of the Committee?

A: We have been asked by Chancellor Chambers to advise him about certain law aspects - such as; the administration; faculty; curriculum; school's mission. Further, the goal of the Committee is to be in a position to determine facts and present salient information and data which will enable the Chancellor to effect the initiatives he wished to employ at the School of Law.

Q: Will students be able to meet with the Committee?

A: Yes - I just spoke to the Dean today and she will have sign-up sheets posted for law students. Further, the Committee will not be looking at areas that are within the jurisdiction of the faculty of administration - namely, we will not attempt to ascertain whether or not the C-rule is 'valid'; we will not deal with whether having a required attendance policy is 'proper' - because we are not in a position to evaluate the information and data after a one-day visit. Again, the scope of our mission is to provide data and information to the Chancellor; we are not evaluating the data.

Q: Does that mean the Committee would not pass on information about student concerns regarding these matters:

A: No - if we had numerous complaints about any one area then we would pass that data along to the Chancellor. More importantly, the Chancellor is looking for things that will assist him in getting more State and Federal funds. So, for example, if students report that having to work 10-20 hours a week meant they were unable to effectively do their course work - that would be helpful to the Chancellor. Again, that is not to say the Committee or the Chancellor will ignore complaints. So, I hope to see you, and the editor of the Law Journal, SBA representatives, members of other NCCU law school organizations, any student who signs up to meet with us, faculty and administration on March 5, 1993.

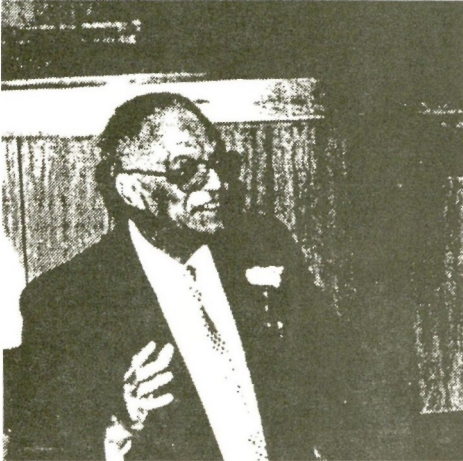
By: WJO

(Editor's Note: On March 2, Chancellor Chambers met with *The Barrister* reporter L. Wells and this editor. - Too late for this edition.)

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CELEBRATION OF A PIONEER

Honorable, dedicated, knowledgeable, philosophical, poetic and learned are only a few of the adjectives which are used to describe our own Dean and Professor Emeritus Daniel G. Sampson. Because Dean Sampson has exhibited the highest degree of dedication and concern for the students, the Student Bar Association sponsored an appreciation *celebration*; not only to show our



Dean Sampson honored at S.B.A. celebration during Homecoming 1992.

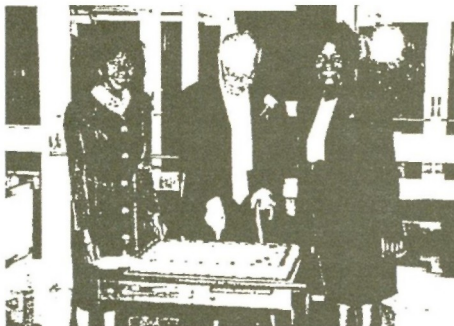
appreciation and express our affection for Dean Sampson, but also to give all students a sense of this fine human being.

The appreciation *celebration* was held the evening of November 5, 1992 at the law school. Students and faculty were instrumental in making the *celebration* a great success. The master of ceremonies was 2L vice president Doug Simon. Vershenia Ballance, 1L class president, presented the welcome. Dean Mary Wright read Dean Sampson's biographical sketch. Christa Tidwell, 3L president, introduced the guest speakers. On the roster of speakers were past and present students as well as friends of Dean Sampson: Attorney Victor Boone, Executive Director of East Central Community Legal Services; Mrs. LeMarquis DeJarmon, wife of the late law school Dean LeMarquis DeJarmon and past president of the National Barrister's Wives; Attorney Allyson Duncan, North Carolina Utilities Commissioner; Charles Hines, 3L; and William Olynick, 3L. Jerry Smith, 3L, rendered musical selections before and after the program. Stephanie Hand, 3L, serenaded Dean Sampson with an appropriate song entitled, "You are My Hero". As a memento of the celebration, the Student Bar Association and Phi Alpha Delta law fraternity presented Dean Sampson with plaques for outstanding service to the law school. This wonderful occasion was brought to a close with a reception

in the law school lobby. Stephanie Hand and Lalita Wells (both 3Ls) catered the reception.

During the ceremony, it was noted that Dean Sampson became a member of our law school family in 1950. He served as Dean from 1965 until 1969. Under his administration, the law school's first legal fraternity was started (Phi Alpha Delta); the JD degree replaced the LLB; the *Law Journal* was started; and *The Barrister* was started.¹ In 1969, Dean Sampson was appointed legal assistant to Dr. A.N. Whiting, the fourth president of North Carolina Central University.²

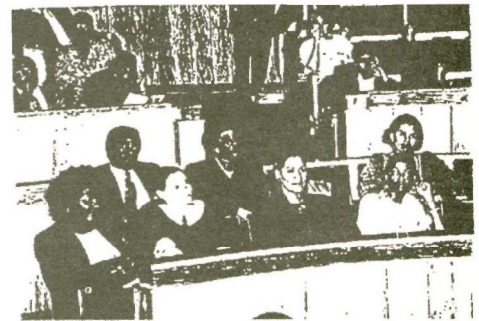
Speakers also noted their personal and close relationships with Dean Sampson. One spoke of a Central law student who was not able to return for academic reasons and that Dean Sampson "vouched" for the student — thereby providing the caliber of recommendation necessary for the student to be able to enter another law school. Another speaker spoke of Dean Sampson's unending and continued assistance; he had worked with her each and every day of the summer for countless hours, so that she would be better equipped to pass the bar exam. Yet another spoke about his seemingly, unending wealth of knowledge — not just legal knowledge, but knowledge about life and his capacity to share his vast wealth of that knowledge, without superimposing his own beliefs and ideas as *fact*. Occasionally, he would share his concerns and questions with the understanding it was pure *dicta*. A former student told a story that underscores the strength and humor of this gentle person. During a criminal law class, Dean Sampson was questioning this



S.B.A. V.P. & Pres. Tonya Roberts & Teresa Walker "join in" celebration.

person about the facts of a particular case. Describing the facts, this person remarked that it appeared the defendant might have robbed the plaintiff's house; asked again, the person repeated his remarks, whereupon Dean Sampson, chuckling and without any attempt to belittle the person, said: "you cannot rob a house - burglarize perhaps, but not rob." Another speaker reminded

the audience that all students and faculty as well, should take advantage of this uniquely gifted and inspired person. She reminded us that Dean Sampson has taught virtually all the courses at Central's law school - from agency to torts (and everything in between - except Tax - it was offered that to teach tax you need someone unique and Professor Sampson suggested he was not THAT unique). During a moment reserved for reflections from the audience, Professor T.M. Ringer added a bit of humor to the *celebration*. In his cross examination persona, Professor Ringer relentlessly questioned Dean Sampson about his days as an undergraduate at Morehouse College. Dean Ringer inquired into the occasion where



Friends, colleagues, and students listening to the tributes to Dean Emeritus Sampson.

Dean Sampson was given to keep an eye on his roommate's girlfriend. Dean Sampson kept a very good eye on his roommates' girl - they fell in love and he later married his roommate's ex-girlfriend. From that union three children were born. Two of their children are practicing lawyers and one is a practicing doctor.

Many students are not aware that in 1965 Governor Dan Moore tried to close the law school believing it was not cost effective. It was Dean Sampson who developed "The Sampson Paper" which documented the detrimental impact the closing of the law school would have on the surrounding community. Dean Sampson's position was finally accepted and the law school survived Governor Moore's attack.³ For the last forty-two years, Dean Sampson has been instrumental in shaping the Central law student into the best lawyer she or he can become. Dean Sampson has had an impact upon more African-American attorneys in the Southeast than any other professor.⁴ He is everything a law professor should be to any aspiring lawyer. He is always concerned about students' understanding of the law. He is always patient, and he always expresses his passion for fairness in the law.

Students are encouraged to take the courses he

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Celebration Of A Pioneer

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teaches (debtor/creditor and advance torts). My experience as a law student has been deeply enhanced by having had Dean Sampson as a teacher, as a guide. I would suggest that each and every student consider taking a course with this truly remarkable person.

By: Tonja Roberts

ENDNOTES

1. North Carolina Central University School of Law, *Biographical Sketch of Dean and Professor Emeritus Daniel G. Sampson*.
2. *Id.*
3. *Id.*
4. "Moving to New Horizons", volume 3, August 1984.

Journey With A "Guide"

This is an edited offering of a recently published article from a former "The Barrister" publication, to give you a further sense of this dynamic individual.

After I had arranged my structural scheme and was capable of discarding many data that were superfluous to my initial effort of uncovering the cogency of his teachings, it became clear to me that they had an internal cohesion, a logical sequence that enabled me to view the entire phenomenon in a light that dispelled the sense of bizarreness which has the mark of all I had experienced. It was obvious to me then that my apprenticeship had been only the beginning of a very long road. And the strenuous experiences I had undergone, which were so overwhelming to me, were but a small fragment of a system of logical thought from which Don Juan drew meaningful inferences for his day-to-day life, a vastly complex system of beliefs in which injury was an experience leading to exultation.¹

How exhilarating it would be to have a professor who not only thoroughly analyzes questions and discussed the law, but one who truly enjoyed "guiding" students through the many quagmires encountered while seeking legal knowledge.... Perhaps we have such a person, such a "guide." Such a "guide" would have us journey through, and then beyond the texts, hornbooks, restatements, and treatises, all of which are known

virtually verbatim by the "guide." He would be able to summarize a questionable statute or court decision by simply noting that, *there is a point beyond which even justice becomes unjust*.²... Perhaps we have such a person, such a guide.

Visitors to our university, strolling in our hallways might happen to overhear dialogue or interchange between student and such a person, such a "guide." The visitors might look quizzically towards the classroom, and momentarily pause to reassure themselves that they are in the right building - for they might have just heard the "guide" saying in a whisper, to a hushed audience of students straining to hear his every word, after not having been able to answer, to his own satisfaction, a query pertaining to a precept of law:

*Flower in the crannied wall,
I pluck you out of the crannies;-
I hold you here, root and all, in my hand,
Little flower - but if I could understand
What you are, root and all, and all in all,
I should know what God and man is.³*

The "guide" would explain that no one knows everything about any one thing and when man ascertains all knowledge about any one thing, then man has become one with his or her God...Perhaps we have such a person, such a "guide." Another visitor, at another time, may have heard the "guide," after asking for volunteers to "assist" him in attempting to unlock the mysteries of a particularly difficult, seemingly unfathomable statute, and getting no response simply say, *A man should never be shamed to own he has been in the wrong, which is but say, in other words, that he is wiser today than he was yesterday*.⁴... Perhaps we have such a person, such a "guide."

If we did have such a person, such a "guide." He would have been considered by many to have been the Promethean spark, the keystone for North Carolina Central University School of Law with his vigorous defense, in 1965, against Governor Moore's proposal to close the law school. His research would have led the "Paper" which assisted in the defeat of Governor Moore's desire to close the law school because the school was supposedly not cost effective. One would only obtain but a glimmer of this "guide's" mindset, by reviewing but a portion of his 1965 prophetic statement:

More and more law schools are limiting their enrollment to the top five or ten percent of college graduating classes. Consequently, the student graduating in the lower, upper, or middle part of his class from any college is finding his source of obtaining a legal education diminishing. Because of this

factor, North Carolina College Law School is in a unique position of performing an invaluable service to worthy and deserving students as well as contributing to the general welfare of the State.

Dean Emeritus Daniel Sampson has been our guide. He obtained his B.S. and M.A. degrees before serving in the Army during World War II. He then obtained his L.L.B. and L.L.M. at Boston College and joined the faculty in 1950, at what is now known as North Carolina Central University School of Law; and he has been with us ever since. He would become the Dean of this Law School from 1965 to 1969 and be largely responsible for admitting native American and white students, thereby integrating the student body. He was instrumental in getting the degree classification, bestowed upon law school graduates, changed from L.L.B. to a J.D.⁵ In 1969, he was asked to serve as the Legal Advisor to the University President and also served on numerous committees and became Chairman of the Law Dean Search Committee in 1980.

This man, this "guide" is not one to rest on his many laurels. Since retiring in 1984, he has been an adjunct professor and the "guide" for Advanced Torts and Debtor/Creditor law. He was a member of the 1985 Law Dean Search Committee.⁶

Our "guide" is a man who was described in 1971 as a person who never had students who were uncomfortable in his presence and, *his understanding of students' problems forges a strong link which is inseparable*.⁷

Nothing has changed. Our "guide" continues to agonize whenever a student has a poor performance, thinking that he somehow failed in his responsibilities as "guide," rather than placing the blame upon the student for not being prepared. Our "guide" will not allow a student the false luxury of suggesting any outcome, in the law, is certain. He would be inclined to say, *Certainly generally is illusion, and repose is not the destiny of man*.⁸

Try not to pass up the "journey," the inquiry, the experience, which could lead to exhilaration, with this wise and uniquely qualified "guide." You will sense his wisdom, you will feel it and turn your mind towards it, just as you would turn your face towards an early summer sun. You will enjoy the self-depriving humor and come to "know" the clarity and the wisdom which emanates from this "guide." *The most manifest sign of wisdom is a continued cheerfulness: her state is like that of things in the regions, above the moon, always clear and serene*.⁹ Bask in this "guide's" good humor and serenity. Tennyson said, *Knowledge comes but wisdom lingers*.¹⁰ The hope is that this wise "guide"

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Journey With A "Guide"

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lingers with us for many a year, and "guides" many a student through some of the seemingly overwhelming, complex legal disciplines, allowing them to see how the strenuous mental experiences of trying to understand cases, reveling in the poetic beauty of the writings of Cardoza, Hand, et al., will build a system of logical thoughts.

Then perhaps, more of us would be in a position to say, *thou wert my guide, philosopher, and friend*.¹¹

By: A grateful traveler: WJO

ENDNOTES

¹ Carlos Castaneda, *The teachings of Don Juan: A yohui way of knowledge*, 254, 255

(Ballantine Books 1971) (1968).

² Sophocles: *Electra*

³ Alfred Lord Tennyson, *Flower in the Crannied Wall, in Idylls of the King and a Selection of Poems*, 317 (Signet Classic 1961) (1830)

⁴ Jonathan Swift: *Thoughts on Various Subjects*.

⁵ The J.D. degree carries with it the distinction of being a Doctorate degree.

The L.L.B. is not as prestigious as the J.D. degree.

⁶ North Carolina University School of Law, *Biographical sketch of Dean and Professor Emeritus*.

⁷ Anne Duncan, quoted in *Id*.

⁸ Oliver Wendell Holmes, Jr., *The Path of the Law*.

⁹ Montaigne: *Essays* Lxxv.

¹⁰ Alfred Lord Tennyson: *Locksley Hall*.

¹¹ Alexander Pope: *An Essay on Man; in Epistle IV*.

Tribute To Greatness: Thurgood Marshall

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The October 1992 issue of the Fordham Law Review presented Fordham Law School's tribute to one of the giants of American Law and American history on the occasion of his retirement from the Supreme Court. William M. Treanor, Associate Professor of Law at Fordham Law School noted:

Justice Thurgood Marshall is, I believe, the single most important lawyer of this century, both for his contribution as an advocate and for his contribution as a jurist . . . The United States today is a remarkably different place than it was in 1933 when he began practice, and ours is far more just society.

Justice Thurgood Marshall made history

*repeatedly - as Chief Counsel of the NAACP Legal Defense Fund, as Judge of the United States Supreme Court of Appeals for the Second Circuit, as Solicitor General, and, of course, as Supreme Court Justice. But perhaps his most important contribution was his victory in the case of Brown v. Board of Education.*⁴

Brown was the capstone of Justice Marshall's campaign at the NAACP Legal Defense Fund to combat and eradicate state-sponsored segregation. There were, of course, two Supreme Court decisions in *Brown*. In the first decision, in 1954, Chief Justice Warren, on behalf of a unanimous Court, rules that "(s)eparate educational facilities are inherently unequal."⁵ The following year, in *Brown II*, the Court rejected Marshall's request to fix a date for the end to segregation,⁶ it unanimously directed the district courts to admit (the parties) to public schools on a racially nondiscriminatory basis with all deliberate speed.⁷

Together, the decision in *Brown* were, at the same time, both revolutionary and conservative. They were revolutionary because they dramatically changed the law and the life of the people in this country; yet, they were conservative because that change was effected by the actions of lawfully constituted authority.

Perhaps the most famous critique of the jurisprudence of *Brown* is Professor Herbert Wechsler's 1959 essay *Toward Neutral Principles of Law*, in which he contended that the decision was unprincipled and contrary to basic tenets of constitutional government.⁸ More recently, Professor Charles Lawrence and others have said that the Court in *Brown I* missed the real wrong. By focusing on the psychological harms of segregation, the Court missed the fact that the real harm of segregation is that it stigmatizes and subordinates African-Americans. It has additionally been argued that because the court got the 'right' wrong in *Brown I*, the Supreme Court in the 1970s and 1980s was able to retreat from its commitment to civil rights.

Just as the right has been attacked, so has the remedy. The limited remedy of *Brown II* - and in particular the "all deliberate speed" formulation - did not promptly vindicate the rights of African-Americans. In fact, ten years after *Brown*, only two percent of Black children in the South attended desegregated schools.¹⁰

These two themes, the transformation that *Brown* created and the limits of that transformation, are the focus of the first portion of the tribute, "Brown and the Transformation of the Constitution."

The first contribution was from one of the legends of the civil rights movement, Judge Constance Baker Motley. Judge Motley participated in all of the major education cases during her

two decades with the Legal Defense Fund, including both *Brown* and *Brown II*, in which she was one of the attorneys who wrote the briefs that the Legal Defense Fund submitted to the Supreme Court. Judge Motley places *Brown* in the context of the earliest civil rights cases that eroded the force of *Plessy v. Ferguson*,¹¹ and assess the impact of the *Brown* decision. The second speaker, Professor Mark Tushnet, speaking from the vantage point of historian and legal scholar, probed the gap between *Brown I*'s right and *Brown II*'s remedy, and concluded that the "all deliberate speed" formulation ultimately, and ironically, contributed to the rise of judicial activism and modern public law litigation. Then Judge Louis Pollak spoke. He is a long-time advisor to the NAACP Legal Defense Fund, one of the attorneys who wrote the brief in *Brown II*, and author of the article, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*.¹² Although then-Professor Pollak disagreed with the Court's reasoning, that article provided one of the most important defenses of the constitutional legitimacy of the holding in *Brown*. Judge Pollak discussed the generative power of *Brown*'s commitment to the principle of equality, a power that he sees manifested in the Supreme Court's jurisprudence of the next quarter-century.

The second portion of "Civil Rights in Education after *Brown*," focused on a specific aspect of *Brown*'s legacy: the on-going campaign to end school segregation. Four attorneys who played an important and distinguished role in litigating post-*Brown* civil rights cases will focus on one or two of the education cases on which they worked and the lessons that can be drawn from those experiences.

The cases are for the most part, a second generation of segregation cases - second generation not merely in terms of chronology, but also second generation in terms of the type of case. The focus is no longer primarily, as it was in the years immediately following *Brown*, on the South, although it remains in the South as well. These are cases in which educational segregation is inextricably linked to segregation in housing, and in which segregation in housing is a product of White flight as much as it is a product of segregation within the town or the city.

The problems posed by these cases are more complex, but the underlying issues remain largely the same as they were in *Brown*. What is the nature of the constitutional rights involved? What kind of remedy is appropriate for those rights? What is the relationship between the rights articulated by courts and the remedies that they require to be followed? What is the relation between judicial enunciation of rights and remedies and popular support for civil rights? To these questions, however, a new one is added: Does the more complex nature of the

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Tribute To Greatness: Thurgood Marshall

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segregation involved necessitate a different kind of remedy?

Mr. Conrad Harper, a member of the NAACP Legal Defense and Educational Fund's staff from 1965 to 1970, discussed *Harkless v. Sweeny Independent School District*,¹³ a case which played an important role in the eventually successful challenge to *Monroe v. Pape's*¹⁴ bar to civil rights suits against municipalities. Mr. Harper argued that the case illustrates how the Legal Defense Fund successfully combated hostile precedent. Professor Drew Days, a former Assistant Attorney General for Civil Rights and First Assistant Counsel for the NAACP Legal Defense Fund, offered the Hillsborough County, Florida school desegregation case¹⁵ as an example of how integration can be successfully achieved. In a dramatically different tone, Judge Nathaniel Jones, NAACP General Counsel for a decade, discussed *Milliken v. Bradley*.¹⁶ *Milliken* was the critical case in the attempt to apply the principles enunciated in *Brown* to Northern schools, and, Judge Jones eloquently declares, the Supreme Court's decision in *Milliken I* was a "watershed" event in the retreat from the Court's commitment to racial equality. The final speaker was Professor Theodore Shaw. Professor Shaw was a trial attorney in the Civil Rights Division of the Department of Justice, Assistant Counsel and Director of the Education Docket for the NAACP's Legal Defense Fund, and Western Regional Counsel for the Legal Defense Fund. He discussed *Missouri v. Jenkins*¹⁷ and *Dowell v. Board of Education*.¹⁸ Professor Shaw used these cases as evidence of the complexity of the school desegregation issue, of the difficulties that those who hope to carry on in the tradition of Justice Marshall must confront, and of the importance of carrying on that tradition.

The closing remarks came from the program's moderator, Mr. Paul Dimond, a distinguished scholar and former Director of the National Lawyer's Committee for Civil Rights under Law. Mr. Dimond suggested that an "anti-caste" principle informs the Supreme Court's decision in *Brown* and argues for its revival. Returning to the theme of the difference between the right and the remedy in *Brown*, Mr. Dimond defended the appropriateness of separating right and remedy. He argued that the combination of the enunciation of broad constitutional principles and the use of constrained judicial remedies acknowledges limitations on judicial power while permitting coalition building.



Taken all together, the speakers, illustrate the many dimensions of *Brown's* legacy. The panelists' comments demonstrate that the promise of *Brown* remains and may well long remain unfulfilled. But the weight of their remarks is to mark and celebrate a triumph. The comments show the way in which the decision's support for the principle of racial equality empowered the civil rights movement and shaped subsequent constitutional and legal developments on a host of fronts, and they show how *Brown* set an aspirational standard against which subsequent developments would be tested.

The remarks of the speakers also underscored the incomparable significance of the career of Justice Thurgood Marshall. The speakers discussed Justice Marshall in many different contexts. They spoke of him as a colleague, as a Supreme Court Justice, as a hero. Regardless of how they know him, the common thread is that he touched their lives. Although in different ways, each of the speakers has been a fighter for the cause of racial justice and equality. In that struggle, each of the panelists was clearly inspired and challenged by Thurgood Marshall. It is this ability to challenge and inspire countless men and women - just as much as it is his role in personally shaping the law - that constitutes Thurgood Marshall's legacy.

Closing Remarks: Paul Dimond

As I was intimately involved in trying all aspects of *Milliken*, I would like to begin by sharing my seasoned observations about that case. First, in considering the meaning of *Milliken*, it seems to me that the public message of *Milliken I* and *Milliken II*,

in combination, is that racial segregation in metropolitan America is innocent once you get beyond the inner-city boundary: it's no one's fault and it's no one's responsibility. At the same time, the Burger Court bent over backwards to permit an order against a state authority to infuse funds into an inner-city school district proven guilty of de jure segregation. In its own way, *Milliken* can best be understood as a "separate but equal" result for our times.

Second I want you to think with me about the choices made in the process of this major constitutional litigation. In *Milliken*, we had fifty-seven trial days to make our case in the trial court. At the start of the trial, District Judge Stephen Roth, an immigrant from Hungary said, "I made it, and I don't understand why Blacks cannot." He invited us out of his courtroom, literally, twice in preliminary motions. Yet, like the justice of the peace that he was, Judge Roth agreed to sit there and hear all the evidence. By the end of that fifty-seven days, he was convinced that the State of Michigan was an integral part of a system of racial ghettoization in which there was an expanding core of Black families in Black neighborhoods always confined within a line separate and distinct from a receding ring of White schools and White neighborhoods.

When it got near the end of the trial, in what has been described as thinking about remedy while hearing the evidence of violation, I recall Judge Roth said, "My God, if I'm going to limit remedy to the boundary of the school district of the City of Detroit, I'll merely be imposing - and giving my imprimatur to - the latest line of containment of segregation."

As it came about, when the case hit the Supreme Court, the remedy that Judge Roth then contemplated, which involved some fifty-four school districts, had been vacated by the court of appeals on procedural grounds. As a result, the only issue before the Supreme Court was whether or not Judge Roth's conception of violation was accurate, whether or not even one single Black child would be able to cross that latest line of racial containment.

Courts make choices when they hear cases. In *Milliken I*, the majority chose to ignore their opportunity. Instead, the Burger Court's majority opinion proceeds with a recitation of how the district judge was a radical who unilaterally reached out to rope in all of the suburbs through massive cross-district busing, because he did not happen to like the racial composition of majority-Black schools. The majority opinion has no conception of the Court's

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Closing Remarks

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opportunity to issue a *Brown I* violation ruling for our time by deferring the consideration of remedy for another day. The opportunity was before the Burger Court to find a violation which would have required no remedy at that point in time, which could have permitted a remand for exactly the type of transformative political, judicial, and social result that followed from *Brown II*. Instead, because the Court was so concerned about, let's say, the political ramifications of what it was doing - and I will add, at least in part because it was so focused on remedial considerations - it never even thought about grasping this opportunity.

Finally, let me share one final irony in *Milliken*. Timing, as some say, is everything. Justice Harry Blackmun was the swing vote in the 5-4 majority in *Milliken II*. Three years later, four years later, and five years later, he was the seeing vote that provided the victories for the plaintiffs, not only in the central school district cases from Dayton and Columbus, but also a statewide, cross-district, metropolitan case from Wilmington, Delaware.

Think about Supreme Court Justices. Theirs is not the single case that tests whatever their ideology or judicial philosophy may be against the weight of evidence; rather, it is the series of cases that come before the Justices over a course of years. I ask the question, then, if *Milliken* had only come three years later, where would the law and the national conscience of the country be today with respect to the issues of racial discrimination?

I would like to turn, from such speculation about the past, in order to think about the future of judicial review in race cases. Think, for a moment, about the possibilities for change if we focus more of our energy, more of our evidence, more of our political debate, and more of our legal argument on the actual violation. Consider the possibilities if we infuse our proof of violation with a greater reach and worry less about the extent of court-ordered remedy. Could this provide a way to continue the debate, as Ted Shaw called it, in order to assure a more open judicial process?

Do not despair about the potential for such transformation simply because of the narrowing of the Burger and Rehnquist Courts. After all, in a tribute to Justice Marshall, I think it is appropriate to note that our situation today is far less bleak than was his. Today, there are no laws on the books that exclude anybody by race from jobs, from public accommodations, from public facilities, from public schools, from conveyances, from owning property. There are no signs on drinking fountains or bathrooms saying "Whites only."...

So, rather than further bemoaning the narrowing of civil rights under the Rehnquist and Burger Courts, I ask you to look forward with me. Let us

ask whether we can change the terms of the debate about discrimination as it may still exist in the country.

I do not want to suggest a grand political, or even litigation, strategy in order to give greater public meaning today to Justice Marshall's great victory in *Brown*. Allow me, instead to suggest a narrower principle. It has three elements:

First, the legal basis for the claim of discrimination must be broad enough to include all racial, ethnic, and gender groups.

We can see the future of the country in the three fastest growing states - Florida, Texas, and California. By the year 2000, the majority of the children in those states are going to be minorities, and the largest minority in each of those states is going to be Hispanic, not African-American.

Second, the legal basis for the claim of discrimination must be deep enough to admit all manner of proof of wrongdoing. It is essential that there be room for evidence of a dominant majority, singling out and marking by caste, a particular minority group for abuse, neglect, or disregard, whether in single acts - no matter how isolated - or in complex patterns - no matter how interwoven. A no-fault theory of discrimination has no moral claim on the conscience of any court or on the country.

Third, the basis for the discrimination claim must be restrained enough to recognize that the first obligation is to plumb the full extent and depth of any such caste wrong, not to evaluate the extent and limits for the courts' remedial powers. (*emphasis added*)

We should concede that the more massive and entrenched the wrong of discrimination, the more important it is for the courts to declare the full extent of that wrong. The courts must also permit the ultimate remedy to be worked out in a political process in which those who are grieved will at least have a continuing claim that the declared wrong cannot be remedied in the courts alone.

By now, we should all be mature enough to understand the limits of courts in exercising their counter majoritarian powers and their function of judicial review. I suggest that we ought to think about doing so with respect to remedy - much as the Warren Court did in *Brown II*.

This restrained approach to court-ordered remedies in cases of entrenched discrimination will have one additional benefit. It will encourage the building of political coalitions and affirmative remedies that are sufficiently inclusive as to make irrelevant remedial classification along the lines of the original discrimination.

With respect to remedy, I also think we need to recognize that in a free society empowering real personal choices for individuals is not necessarily inconsistent with remedying even the most entrenched discrimination against minority groups.

In sum, I ask that you consider whether we should seek a rebirth of what I have dubbed elsewhere the "anti-caste principle." I believe this principle undergirds the Fourteenth Amendment as originally interpreted in *Strauder v. West Virginia* and explains and informs *Brown*. The alternative it seems to me is to continue with a suspect classification analysis, some kind of modified tow-tier approach, in which the only judicially cognizable claims of wrongdoing will be those rare aberrant acts today when somebody makes a mistake and speaks explicitly of race. In fact, the primary cases that will be challenged under this wooden approach to judicial review of racial discrimination will be those in which the majority, for whatever reason, decides that it wishes to try to provide affirmative relief to minorities.

What is the risk of trying the anti-caste principle? Isn't the risk the same as it was in 1896 at the time of the *Plessy v. Ferguson* decision? Couldn't the Rehnquist Court say "There is no longer any caste discrimination in America based on today's facts? Yet, let us consider what is different about today from 1896. We have the right of free speech guaranteed, and we have the right for all to vote guaranteed. If such an awful judgment emerged from the Rehnquist Court, we would at least have the opportunity to continue the debate in the political arena on terms that involve fundamental right and wrong.

I would like to leave you with this last thought. I submit that the anti-caste principle can empower us to debate, both in the Court and across the country, in this decade and into the next century, whether the second Reconstruction *should* continue. Keeping this dialogue with conscience open is a far worthier legacy of *Brown* and Justice Marshall than allowing a conservative Rehnquist Court to slowly but surely shut the door of the Court, and with it the conscience of the country, to virtually all claims of wrongful discrimination.**

**Several months after the tribute to Justice Marshall, the Supreme Court issued its ruling in the higher education case arising in Mississippi, *United States v. Fordice*, 112 S Ct. 2727 (1992). Although one ruling in a particular case is not dispositive, I am encouraged that a clear majority on the Rehnquist Court found a continuing violation in the dual system of higher education and remanded *without* specific instructions as to remedy so that the parties - within the political process - would confront the unremedied wrong. That this case arose in the context of voluntary choices in higher education (rather than the conditions of mandatory assignments in elementary and secondary schooling), may well have the Court to examine the extent of the wrong and to accept the limits for court-ordered remedies more fully. See generally *Anti-Caste*

(Continued on page 7)

Closing Remarks

(Continued from page 6)

Principle, *supra* note 7, at 45-50.

It would appear that Justice Thurgood Marshall lives on not only in our hearts, but also lives on in The Court.

Edited by W.J.O.

The Barrister would like to thank the Fordham Law Review for authorization to publish the edited version of the Symposium, *Brown v. Board of Education and its Legacy: A Tribute to Justice Thurgood Marshall*; and Fordham Law Professor William M. Treanor.

ENDNOTES

- ¹ Treanor, *Brown v. Board of Education and Its Legacy: A Tribute to Justice Thurgood Marshall*, 111 Ford. L. Rev. 1-104 (1992).
- ² 349 U.S. 294 (1955) (*Brown II*); 347 U.S. 483 (1954) (*Brown I*).
- ³ See note 1 *supra*.
- ⁴ *Brown I*, 347 U.S. at 495.
- ⁵ See note 2 *supra*.
- ⁶ See Richard Kluger, *Simple Justice* 941 (1975).
- ⁷ *Brown II*, 349 U.S. at 301.
- ⁸ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 31-35 (1959).
- ⁹ See Charles Lawrence, "One More River to Cross"-Recognizing the Real Injury in *Brown*: A Prerequisite to Shaping New Remedies, in *Shades of Brown: New Perspectives on School Desegregation* 49 (Derrick A. Bell ed., 1980).
- ¹⁰ See Cass R. Sunstein, *Constitutional Politics and the Conservative Court*, Am. Prospect, Apr. 1990, at 51, 59.
- ¹¹ 163 U.S. 537 (1896), overruled by *Brown v. Board of Educ.* 347 U.S. 483 (1954).
- ¹² 108 U.P.L. Rev. 1 (1959).
- ¹³ 427 F.2d 319 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971).
- ¹⁴ 365 U.S. 167 (1961), overruled by *Monell v. Department of Social Servs.* 436 U.S. 658 (1978), and overruled by *Ingraham v. Wright*, 430 U.S. 651 (1977).
- ¹⁵ See *Mannings v. Board of Pub. Instruction*, 306 F. Supp. 497 (M.D. Fla. 1969), rev'd, 427 F.2d 874 (5th Cir. 1970).
- ¹⁶ 433 U.S. 267 (1977) (*Milliken II*); 418 U.S. 717 (1974) (*Milliken I*).
- ¹⁷ 495 U.S. 33 (1990).
- ¹⁸ 396 U.S. 269 (1969).

CHILDREN'S ISSUES: TERMINATION OF PARENTAL RIGHTS AND ABUSE AND NEGLECT

The Parental Right to Attend Hearings was recently decided via *In re Quevedo*, 419 S.E.2d 158 (N.C. Ct. App. 1992). Trial court's refusal to provide for the transportation of an incarcerated father to his termination of parental rights hearing did not violate the father's due process rights.

A petition was filed in North Carolina to terminate the parental rights of a father who was incarcerated in Massachusetts. Prior to trial, the father's court-appointed lawyer motioned to have the father transported from prison to attend the hearing or to postpone the hearing until the father could attend. The trial court denied this motion. The attorney then moved for funds to transport the father from prison in order to take his deposition. This motion was also denied. However, the father was permitted to submit affidavits at the hearing. The hearing was held without the father present (his attorney attended). His parental rights were terminated and he appealed, claiming his due process rights had been violated.

The Court of Appeals of North Carolina affirmed, finding no due process violation. The court recognized a parent's due process right to be present at a termination of parental rights proceeding was not absolute. To determine whether the father was entitled to be transported to the hearing, the court referred to the factors set forth by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976): (1) the private interests affected, (2) the risk of error created by the procedure, and (3) the government's interest in using the procedure.

The court found the father's interest in his child would be affected by the proceeding, and recognized that interest as extremely important. It also found the state's interests in the child's welfare, reducing costs, and the security of prisoners were significant, and out-weighed the father's interest. Finally, it determined the risk of error in conducting the termination hearing without the father present was slight. Although the father was not able to present evidence in person and help his attorney with cross-examination, he was allowed to submit an affidavit. This affidavit explained why he had not seen his daughters and described his attempts to contact them. In light of this affidavit and his attorney's ability to conduct cross-examination, the court concluded the result of the hearing would not have been different if the father had been present. Thus, his due process rights had not been violated.

The court made a final observation that the father's rights would have been better protected if he had been transported to North Carolina and deposed. According to the court, "when an incarcerated parent is denied transportation to the hearing in contested termination cases, the better practice is for the court, when so moved, to provide the funds necessary for the deposing of the incarcerated parent."

Abuse, Neglect and Hearsay

The issue of the Reliability of Children's Hearsay was discussed in *State v. Edwards*, 485 N.W.2d 911 (Minn.

1992). Child's hearsay statement should not have been excluded under the catch-all exception based on the trial court's finding that the child was incompetent to testify at trial.

Defendant was charged with sexually abusing his wife's seven-year-old granddaughter. At a pretrial hearing, the trial court determined the child was not competent to testify at trial. On this basis, the trial court denied the state's motion to admit certain out-of-court statements made by the child. The court of appeals ultimately affirmed the trial court's decision that the child's statements were not admissible under the excited utterance and "catch-all" exceptions.

The Supreme Court of Minnesota reversed. Three out-of-court statements by the child were at issue: one made to the 911 operator immediately following the incident, another made to a police officer who responded to the call minutes after the incident, and a third made to a different officer at the hospital approximately one hour after the incident. At the outset, the court held that the first two statements were admissible under the excited utterance exception.

The court then turned to the child's third hearsay statement, made to the officer at the hospital. The court assumed this statement did not qualify as an excited utterance, but found it was admissible under the catch-all exception. The United States Supreme Court in *Idaho v. Wright*, 497 U.S. 805 (1990), required that, to satisfy the confrontation clause, an out-of-court statement may not be admitted under the catch-all (or residual) exception unless it possess "particular guarantees of trustworthiness." These guarantees must be determined from the totality of the circumstances surrounding the making of the statement. Looking at these circumstances, the court noted the child appeared to be frightened when she made the statement and had no apparent motive to lie. The statement itself was not the type a child would be expected to fabricate. In addition, the officer did not have a preconceived idea of what the child would say. Finally, the child's statements were internally consistent during the interview and had "an immediately apparent 'ring of credibility.'"

An out-of-court statement should not be considered per se unreliable if made by an incompetent witness. The court found the child's incompetency reflected on her ability to testify in court rather than on her ability to perceive the incident and accurately relate it. Since the circumstances surrounding the child's making of the statement indicated the statement was reliable, the statement should have been admitted under the catch-all exception.

Edited by W.J.O.

The Barrister would like to thank *The ABA Juvenile and Child Law Reporter* for the permission to print these edited versions of the articles which were published in the January 1993 edition.



Light On The Rape HALLway: North Carolina Sheds Some Light on the Admissibility of Evidence of Post-Traumatic Stress Disorder

Over the past several years our courts have become more sensitive to the long-term effects suffered by victims of rape. These effects are known as post-traumatic stress disorder or PTSD.¹ Symptoms of PTSD include feelings of anxiety, frustration, depression, hyper-vigilance, hyper-awareness, alarm, and endangerment; - rape victims can also experience a general fear of men. In addition, an accompanying conversion reaction may result where the victim suffers from a neurologically inexplicable paralysis caused by the psychological trauma of the rape.

While the effects of PTSD and conversion are well documented. American courts have struggled in determining when this evidence may be admitted in a criminal trial. The North Carolina Supreme Court recently decided this issue in *State v. Hall*.² In Hall, the court limited the use of PTSD and conversion evidence. This [edited] article will discuss the soundness of such limitations and the practical difficulties that juries will undoubtedly face in trying to follow a judge's instruction as to the limited admissibility of evidence of PTSD and conversion.

In February of 1988, Donney Ray Hall was indicted for second degree rape and second degree sexual activity by a substitute parent. At trial, the fifteen-year old stepdaughter of the defendant referred to as M.M., testified that after midnight on February 14, 1988, the defendant entered her room and had intercourse with her. The State offered no physical evidence that a rape had occurred. The state did present evidence that M.M. had suffered PTSD and conversion by way of the testimony of three health care professionals, two doctors and a clinical social worker, who had cared for M.M. in the months after the alleged rape. The basis of their collective testimony was that M.M. "fit the 'profile' of sexually abused children, that she suffered a neurologically inexplicable paralysis known as 'conversion reaction,' which is caused by severe psychological trauma, anxiety, or depression; and that she was suffering from post-traumatic stress disorder, which involves psychological responses to certain emotionally traumatic events".⁴

The defendant objected to the testimony by the health care professionals, but all objections were denied. The trial court admitted the

testimonies, but did not give any limiting instructions to the jury as to the use of the PTSD and conversion evidence. As such, the jury found the defendant guilty of second degree rape and sexual activity by a substitute parent. The defendant then appealed to the North Carolina Court of Appeals.

The appeals court upheld the conviction. On the issue of the admissibility of the PTSD conversion evidence, the court held that the evidence was admissible because the testimony would help the jury determine if M.M. had been raped. In addition, the court held that the evidence of PTSD and conversion would help the jury understand the behavior of sexually abused children and aid in assessing the credibility of the victim as a witness.⁵ The defendant appealed to the North Carolina Supreme Court.

On discretionary review, the North Carolina Supreme Court, in a four to three decision, overturned the conviction. Since this was a case of first impression for the supreme court, the court relied on case law from outside jurisdictions, specifically California and New York, in determining the admissibility of PTSD and conversion evidence. In the opinion written by Chief Justice Exum, the court held that evidence of PTSD and conversion was properly admissible if relevant, but the evidence could not be admitted for the purpose of proving that the rape actually occurred.⁶

The court cited two reasons for limiting the admissibility of PTSD and conversion evidence: "first, psychiatric procedures in developing the diagnosis are designed for therapeutic purposes and are not reliable as fact finding tools to determine whether a rape has in fact occurred" "...second, the potential for prejudice looms large because the jury may accord too much weight to expert opinions stating medical conclusions which were drawn from diagnostic methods having limited merit as fact finding devices."

The court was concerned that a number of different traumatic events, in addition to rape, could create symptoms of PTSD or conversion. The court did explain, however, that evidence of PTSD and conversion could be admitted for corroborative purposes such as explaining the complainant's post-assault behavior or aiding in the complainant's credibility as a witness. The court explained that the purpose for which

PTSD and conversion evidence is offered will determine the evidence's admissibility.

The court held that because the state presented no physical evidence of rape or sexual abuse, the trial judge erred in failing to give a limiting instruction to the jury on the admissibility of the PTSD and conversion evidence. The court held that the defendant had shown, as required by North Carolina General Statutes, that there was a reasonable probability that the defendant would have been acquitted absent the PTSD and conversion evidence. Therefore, the court remanded the case for retrial.

Justice Wichard dissented on the ground that the majority's decision concerned the "weight or credibility of the evidence, and not its admissibility." Justice's Webb and Mitchell joined in the dissent.⁹

PRIOR LAW AND PRACTICE

The North Carolina Supreme Court had several opportunities, prior to Hall, to rule on the admissibility of PTSD evidence. One of the first instances was in *State v. Clemmons*.¹⁰ In *Clemmons*, the court refused to overturn the defendant's conviction of rape. Despite conceding that the trial court made an improper ruling in admitting evidence of the defendant's prior sexual misconduct towards a female, the court held that there was overwhelming evidence against the defendant. Particularly, the court stressed the evidence of "severe (PTSD) for a lengthy period immediately following the incident."¹¹ This dicta indicated the court's willingness to allow PTSD evidence in a rape trial through the court did not specifically rule on PTSD evidence.

In *State v. Stafford*, a rape trial, a doctor testified about the symptoms of PTSD present in the victim. The court held that the doctor's testimony regarding PTSD was hearsay and not within the North Carolina Rule 803 (4) exception. The court held that the statements made, by the victim, to the doctor were in preparation for trial and were not made for medical purposes. The court stated, however, "We neither reach nor decide the question of whether in a proper case expert testimony concerning (PTSD) will be admitted in the trial courts of this state."¹³

In *Godwin*,¹⁴ a sexual offense and attempted rape case, the court found that the state had not properly laid the foundation to qualify the clinical social worker witness as an expert on PTSD.

The court found that the admission of the witness' testimony was improper and ordered a new trial; but the court refused to decide whether PTSD evidence was admissible in North Carolina.

Evidence of PTSD, has been considered in a number of other jurisdictions. In *People v. Taylor*¹⁵, New York's highest court, after it undertook an exhaustive review of almost every jurisdiction that has ruled on PTSD evidence, held that whether PTSD evidence will be admissible depends on the purpose for which it is being offered. In *Taylor* the court noted that many jurisdictions allow the introduction of PTSD into evidence, but that there was "no uniform approach to the admission of evidence of (PTSD)..."¹⁶

The *Taylor* court also noted that, in California, evidence of PTSD was not admissible to prove that the rape actually occurred. However, California, along with Kansas, West Virginia, Maryland, Arizona, Montana, and Iowa, have allowed PTSD evidence where the issue is whether or not sex was consensual. Colorado, Indiana, Oregon, Hawaii, New Hampshire, Delaware, Connecticut, and Vermont, have also admitted PTSD evidence as a defense, "to explain behavior exhibited by the complainant that might be viewed as inconsistent with a claim of rape."¹⁷ Only Missouri, Washington, and Pennsylvania, have specifically refused to allow expert testimony of PTSD.

ANALYSIS

Courts will always attempt to protect the Judicial process and insure that defendants have a fair trial - furthermore, judges must defer to the expertise of medical personnel in determining the validity of new diagnoses. The North Carolina Supreme Court waited six years to make a specific ruling on the admissibility of PTSD and conversion of evidence - from *State v. Clemmons*,¹⁸ in 1986, to *Hall* in 1992. While properly considering precedent in other jurisdictions and the recognition of PTSD as a diagnosed disorder, the North Carolina supreme court has made a necessary and cautious attempt to deal with one of the latest medical diagnoses.

In *Hall*, the court recognized "the inherent prejudicial dangers of a per se admissibility of PTSD testimony." By emphasizing the purely therapeutic role of physicians and social workers, the court distinguished why the testimony of PTSD and conversion can not be accepted as a true fact-finding tool. Furthermore, by recog-

UPDATE: THE ABC'S OF THE ABA: STATUTORY INTERPRETATION - WHY A REQUIRED COURSE?

In the previous edition of *The Barrister* it was reported that it appeared North Carolina Central university's School of Law has, and continues to, require all third year students to take Statutory Interpretation in direct violation of the American Bar Association's...Council of the Section of the Section of Legal Education and the Accreditation Committee Standards 301 and 302.

In summary, Standards 301 and 302 denote that a law school may offer a course for improving student performance for bar examinations. However, law schools may NOT offer such a course for academic credit OR AS A CONDITION TO GRADUATION. The case was made that the course called Statutory Interpretation was at best, a mini review of those courses tested on the North Carolina bar exam which were NOT required courses.

It was suggested that the administration and the SBA look into the matter before the ABA brought the matter to the attention of the law school.

Since the publication of that article the following has transpired:

- The SBA contacted the administration of the law school and was told that because the matter was not addressed before publication it would not be discussed with *The Barrister* staff. Moreover, the administrator indicated it would not discuss or put the matter on the agenda of any faculty meeting. This of course suggests that the administration is content to deal with form rather than substance.

- Apparently the faculty did have the common sense and decency to discuss the matter at a faculty meeting. However, the administration's position showed the usual inflexibility. The administration again refused to "look into" the matter and basically said- if an when the ABA comes here and tells us to change - then we'll change. Unfortunately for all students, the administration opts, once again, to "circle the wagons."

- Now for the good news. Student & faculty response to the article was quite favorable. Moreover, it was then suggested that because of the administration's 'nonresponse,' that a

petition be drafted and submitted to the ABA Accreditation Committee asking for an investigation of the matter. The petition was drafted, last semester, during the last day of class but we obtained a sufficient number of 'signatures' even though the majority of students did not get to see or sign the petition.

- The petition was sent to the ABA and a recent telephone call determined that the petition was inadvertently placed in a file without any further follow-up. The ABA attorney indicated that the matter would be addressed post-haste and that *The Barrister* would be given a status report in the near future.

- If the ABA determines that the petition constitutes valid facts, with regard to the Standards, the ABA will then send a copy of the petition to the Dean of the Law School and request that the Dean respond to the allegations in the petition and to provide any additional information required by the ABA. Further, upon receipt of the response of the Dean of the Law School, the ABA will either:

- a) Dismiss the complaint if the ABA determines that the petition and the Dean's response considered together do not support a claim that the school is in non-compliance with the Standards.

- b) Place the petition on the agenda for the next site evaluation of the Law School if the ABA determines that the complaint and the Dean's response considered together indicate conditions or practices that raise a question concerning the school's compliance with the Standards.

- *The Barrister* will also attempt to have an editor and/or writer meet with Chancellor Chambers and ask for his assistance in this matter.

Needless to say, the ABA's investigation will not likely impact or assist the present 3L class. However, the future 3L's can and should benefit from our willingness and ability to question and challenge perceived inequities and injustices. Isn't that why some of us are here?!?

By: Bill Olynick

404 (b) OR NOT 404 (b): IS THE QUESTION - WHEN CHARACTER IS NOT CHARACTER

Professor Thomas M. Ringer, Jr. - North Carolina Central University School of Law

Rule 404(b) of the North Carolina Rules of Evidence is generally known as the "other purposes" clause or the "other wrongs, crimes or acts" clause. It reads as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

A clear understanding of Rule 404(b) requires an examination of related rules that address the admissibility of character evidence, such as 405(b) and 404(a). According to *Brandis On North Carolina Evidence*, [c]haracter comprises the actual qualities and characteristics of an individual, the peculiar qualities impressed by nature and habit on the person, which distinguish him from others (Page 454).

As a general rule, character evidence is not admissible in either criminal cases or civil cases unless: character is an ultimate issue in the case; or an accused in a criminal case "opens the door" to her pertinent character traits; or the defendant in a criminal case "opens the door" to the character of the victim of the alleged crime, or character evidence is involved in impeaching a witness in either a criminal prosecution or a civil action.

The "other purposes" clause of Rule 404(b) provides that other wrongs, crimes or acts of an individual may be admitted for any relevant purpose except to prove that the individual acted in conformity with his character at the time in question. Therefore, Rule 404(b) does not constitute an exception to the propensity rule. Evidence of an individual's wrongs, crimes or acts pursuant to Rule 404(b) are not admitted as character evidence, *per se*. Rather, evidence of an individual's wrongs, crimes or acts are admitted for some purpose other than to prove the character traits of the individual.

In practice, Rule 404(b) is a prosecutor's rule that permits the State to circumvent the Propensity Rule by introducing past wrongs, crimes and acts of the defendant disguised as "other purposes" evidence. More than ninety percent of the reported North Carolina cases that address Rule 404(b) involve offers of proof by the prosecution of "other purposes" evidence relating to the collateral wrongs, crimes and acts of defendants in criminal cases.

At least one North Carolina appellate court decision has stated that Rule 404(b) is applicable only to parties in civil cases and usually to defendants in criminal cases. *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986). However, the language of the rule does not limit its application to the admission of collateral wrongs of parties. Yet, the North Carolina supreme court recently rejected a defendant's contention that Rule 404(b) could be used to prove the collateral acts of another individual as circumstantial evidence that the other individual and not the defendant committed the crime in question. *State v. Richardson*, 328 N.C. 505, 402 S.E.2d 401 (1991). In a similar case, the North Carolina court of appeals held that a defendant who was arrested, after a bag of cocaine was found under the seat of the truck that he was driving, was not entitled to offer into evidence the criminal record of the owner of the truck for the purpose of showing that the owner of the truck had probably acted in conformity with a previous conviction by placing cocaine under the seat. The court held that the offer of proof was too speculative. *State v. Chandler*, N.C. App. 706, 398 S.E.2d 337 (1990).

A discussion of Rule 404(b) is particularly timely and topical in light of a trilogy of recent North Carolina supreme court decisions that have addressed the admissibility of "other purposes" evidence pursuant to Rule 404(b). In *State v. Agee*, the court upheld the admission of evidence relating to a prior offense even though the defendant had been acquitted of the prior offense. The court relied upon the "chain of circumstances" or *res gestae* doctrine to support the admission of the prior offense evidence. *State v. Agee*, 391 S.E.2d 171 (1990).

In *State v. Stager*, the court upheld the murder conviction of the defendant-wife for the murder by firearm of her second husband. During the trial of that case, the prosecution was allowed to offer evidence surrounding the death by firearm of defendant-wife's first husband. The court upheld the admission of this "other purposes" evidence even though the defendant-wife was never charged with or tried for the murder of her first husband and even though the death of the first husband occurred approximately ten years prior to the death of defendant's second husband. *State v. Stager*, 406 S.E.2d 876 (1991).

The third and most intriguing of the cases was *State v. Scott*. The court reversed the kidnapping

and rape convictions of the defendant on the basis that the trial court had improperly admitted testimony concerning a prior rape that had allegedly occurred two years earlier but which had resulted in defendant's acquittal. The court held that the prejudicial effect of admitting a prior offense for which the defendant had been acquitted would clearly outweigh its probative value pursuant to a Rule 403 analysis. *State v. Scott*, 413 S.E.2d 787 (1992).

In sum, these decisions raise numerous issues relating to the proper interpretation of Rule 404(b). In *Agee* and *Stager*, the court followed a traditional approach in admitting "other purposes" evidence pursuant to Rules 404(b), 401 and 403. The more recent *Scott* decision, however, signifies a marked departure from established precedent and represents an apparent change in the court's analytical approach and judicial attitude regarding the admissibility of collateral wrongs, crimes or acts. The majority opinion in *Scott*, authored by Chief Justice Exum, cited favorably the dissenting opinion of Justice Brennan in *Dowling v. United States*, rather than the majority opinion of Justice White, which stated that evidence of a prior alleged offense for which the defendant had been acquitted was not admissible.

It is worth noting that North Carolina Evidence Rule 404(b) is modeled after and tracks the language of Federal Rule of Evidence 404(b), with two exceptions. The main difference being that the Federal 404(b) rule includes a 1991 amendment, which was revised by deleting the period at the end of the second sentence, and adding the following notice provision:

provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." [FRE 404(b) as amended effective December 1, 1991.]

Hopefully, the North Carolina General Assembly will act promptly to add this notice provision to Rule 404(b) of the North Carolina Rules of Evidence. In the meantime, counsel for defendants in criminal cases should continue to elicit this information through discovery and to suppress impermissible

THE CASE FOR SUBMITTING WRITTEN INSTRUCTIONS TO THE JURY

G. Nicholas Herman - Adjunct faculty member at NCCU

Over two-hundred years ago, Sir William Blackstone wrote that trial by jury is the "grand bulwark of [our] liberties."¹ Yet, in the words of one trial judge, it is now commonly observed: "[w]hen I read instructions to the jury, I hope that I will see a light go on in the jurors' eyes, but I never do."² This careful assessment has led a number of states to require that, along with oral instructions, the jury be given written instructions to take to the jury room. If our jury system is truly to remain the bulwark of our liberties, North Carolina should do the same.

THE PROBLEM OF COMPREHENSION

The irony of the current North Carolina practice of oral instructions to the jury, is that numerous studies have shown that jurors have great difficulty understanding purely oral instructions. For example, in the early 1970s a major study showed that 86% of jurors in criminal cases misunderstood the standard of proof to convict, and less than 50% in civil cases understood the meaning of "probable cause."³ Later studies revealed an equally dismal portrait. Studies conducted in the mid 1970s showed that nearly 50% of jurors believed that "preponderance of the evidence" meant "a slow and careful pondering of the evidence," and more than 25% misunderstood definitions for "burden of proof," "impeach," "admissible evidence," and "inference."⁴

Still later, in the 1980s even more sophisticated studies quantified the limited ability of juries to understand oral instructions. For example, one leading study of Texas jurors showed that only 19% understood the definition of "negligence," 15% understood "probable cause," 17% understood "presumption of innocence," and 19% understood instructions on "accomplice testimony."⁵

In sum, as bluntly put by one recent commentator: "[a]ll of the empirical studies show juror comprehension of [oral] pattern instructions to be so low as to be dysfunctional."⁶ In contrast, a number of these same studies have shown that when jurors are provided written instructions, their deliberations are more efficient; they are guided by a greater understanding of the law; and they have greater confidence in the correctness of their verdict.⁷ Thus, it is not surprising that the most frequent criticism of the jury-instruction process from jurors themselves is that the instructions are not provided to them in writing.⁸

NORTH CAROLINA PRACTICE

Presently, the North Carolina General Statutes neither require nor expressly prohibit submitting written instructions to the jury. However, in *State v. Frank* and *State v. Pearce*,⁹ the Supreme Court approved without requiring the practice of submitting to the jury written instructions on the elements

of offenses charged in a criminal case. Notwithstanding these decisions, under current North Carolina practice written instructions are rarely - if ever - submitted to the jury in criminal or civil cases.

This has not always been the practice. Beginning in 1885, G.S. 1-182 provided that if any party to an action requested that the trial judge put his instructions in writing, "he must, at the request of either party to the action, allow the jury to take his instructions with them on their retirement. . . ." The failure to strictly comply with this statute in civil or criminal cases required a new trial.¹⁰ In 1967, the statute was revised to apply to criminal cases only.¹¹ Then, inexplicably, in 1977 the statute was repealed altogether.¹²

In its place, the legislature enacted Rule 51 of the N.C. Rules of Civil Procedure, and G.S. 15A-1231 applicable to criminal cases. These statutes prohibit the trial judge from giving opinions on the facts of a case or the jury's verdict and spell out the responsibilities of trial counsel in requesting specific instructions from the court. Nothing is said about submitting written instructions to the jury.

PRACTICE IN OTHER JURISDICTIONS

As a response to the problem of jury comprehension, approximately twenty state have, at one time or another, permitted the submission written instructions in civil cases;¹³ and almost thirty have permitted the practice in criminal cases.¹⁴ In as many as twenty states the legislatures and courts are now silent on the subject and approximately four states have prohibited the practice outright in certain cases.¹⁵

Of those states that allow the submission of written instructions, some - as in federal practice - leave the matter solely to the discretion of the trial judge,¹⁶ while others require the practice upon request of a party or the jury itself.¹⁷ At least six states make the practice mandatory.¹⁸

When the submission of written instructions is permitted, the trial judge is still required to first charge the jury orally. The written instructions must then consist of the complete final oral charge given by the trial judge. In addition, a number of cases have held that the instructions submitted should not be tainted by underlinings, interlineations, nota-



G. Nicholas Herman is a partner in the Chapel Hill firm of Bernholz & Herman. He has a broad civil and criminal trial practice. He is also an adjunct faculty member at NCCU Law School and UNC-CH Law School, variously teaching trial practice, appellate advocacy, evidence, legal methods, research & writing, and senior writing.

tions, crossed-out portions of the text, or incomplete erasures.¹⁹

ADVANTAGES AND DANGERS

The most obvious advantage of written instructions is that they markedly enhance the jury's comprehension of the applicable law. Also, they permit juries to be more efficient and focused in their deliberations by eliminating excessive debates about what the trial judge charged orally.²⁰ In light of these advantages, and because of the critical importance that juries follow the law as instructed by the court, it may seem curious that the practice of submitting written instructions has not been readily adopted in all jurisdictions.

Some courts and commentators have suggested certain dangers and practical problems in providing written instructions to the jury.²¹ The most common of these are: (1) that the jury may misinterpret the instructions and debate the law; (2) that the jury may give undue emphasis to the written instructions and de-emphasize the fact-finding function; and (3) that the courts have limited time and resources to make written instructions available to the jury.²² However, there are sound reasons why these reservations are unfounded. First, the suggestion that the jury might misinterpret the written instructions is fundamentally belied by their very purpose. The jury's ability to read the instructions militates against misinterpretation rather than fostering it. Cautionary instructions should be given to the jury that the written materials are submitted to assist them in refreshing their recollection of the trial judge's oral charge. Also, it should be emphasized that the jury should always request an explanation or clarification of the law directly from the court. Therefore, any risk of misinterpretation or debate about the law would be no greater than if the jury was only charged orally.²³

Second, the danger that the jury might overemphasize the written instructions and subordinate deliberations about the evidence may also be overcome by appropriate cautionary instructions.²⁴ One study found that juries given written instructions actually "concentrated more on the relevant facts."²⁵ In addition, if the written

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instructions embody the trial judge's complete oral charge, any risk that the jury might give undue emphasis to any portion of the instructions would again be no greater than if no written instructions were provided at all.

Finally, the notion that courts have limited time and resources to make written instructions available to the jury is simply outdated by today's trial procedure and word-processor technology. Under current North Carolina procedure, as in most states, a conference on instructions must be held between the trial judge and counsel in advance of delivering final instructions to the jury.²⁶ During such a conference, the trial judge could easily delegate the responsibility for typing and duplicating his final instructions to one of the parties for the jury. Any minor delay occasioned by that process would be far outweighed by the benefits of providing written instructions.

In summary, the advantages of submitting written instructions to the jury greatly outweigh any perceived dangers or practical difficulties. Accordingly, the overwhelming authorities that have examined the subject have strongly advocated sending written instructions to the jury room.²⁷

ADOPTING A NEW RULE

The North Carolina General Rules of Practice for the superior and district courts, which include rules related to jury instructions,²⁸ are promulgated by the supreme court which is "authorized to prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with acts of the general assembly."²⁹ Because there are no North Carolina statutory provisions that expressly prohibit submitting written instructions to the jury,³⁰ any rule authorizing this practice could be promulgated by the supreme court alone.

In adopting a rule that would authorize submitting written instructions to the jury, the following procedures would be desirable:

- (1) The rule should require the submission of written instructions in civil and criminal cases upon motion of any party at the jury conference,³¹ or upon the trial judge's own initiative.
- (2) The written instructions should embody the final, verbatim oral charge given by the trial judge to the jury, and made a part of the record.
- (3) The responsibility for typing and duplicating the written instructions should rest with the party requesting the submission or, in the event both parties make the request, upon the party with the burden of proof.

(4) When the jury retires for deliberations, a copy of the written instructions should be provided to each juror so that each has equal access to the instructions during deliberations.³²

(5) The written instructions should not contain underscoring, interlineations, notations, crossed-out portions of the text, or incomplete erasures.³³

(6) The written instructions (and the oral charge) should contain cautionary instructions to the effect that the written materials are solely given as an aid to the jury's comprehension of the oral charge, and that the jury should always directly consult the court for any explanation or clarification about the instructions.³⁴

CONCLUSION

Most judges and trial lawyers would agree that jurors are generally conscientious and discharge their duty with a genuine sense of responsibility. This salutary observation, however, cannot overcome the limitations that hour-long oral instructions place upon the jury's ability to understand the applicable law. To suppose that our current jury-instruction practice is adequate to the jury's task is simply belied by common sense as well as empirical research. Thus, North Carolina's supreme court should adopt a new rule authorizing the submission of written instructions to the jury. Doing so would go a long way in relieving the jury from having to go, as Judge Learned Hand put it, "rummaging through a wilderness of verbage."³⁵

Edited by W.J.O.

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ENDNOTES

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- 8 Cramer, *Effective Instructions: Put Them in Writing*, 8 Univ. of Bridgeport L. Rev. 335, 337-339 (1987).
- 9 284 N.C. 137, 200 S.E.2d 169 (1973) & 296 N.C. 381, 250 S.E.2d 640 (1979).
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- 12 1977, c. 776.
- 13 Annot., *Propriety and Prejudicial Effect of Sending Written Instructions With Retiring Jury in Civil Case*, 91 ALR3d 336, 344-45 (1979).
- 14 Note, *The Submission of Written Instructions and Statutory Language to New York Criminal Juries*, 56 Brooklyn L. Rev. 1353, 1362 (1991).
- 15 *Id.*
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- 17 Brooklyn L. Rev., *supra* note 14 at 1362-63 n. 36.
- 18 See *Manor v. Raskin*, 113 Ariz. 3, 545 P.2d 927 (1976); *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1, *cert. denied*, 431 U.S. 933 (1976); *People v. Allen*, 109 Ill.2d 177, 486 N.E.2d 873 (1985); *State v. Jackson*, 397 N.W.2d 512 (Iowa 1976); *Kansas City v. Martin*, 369 S.W.2d 602 (Mo. Ct. App. 1963).
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- 22 *Id.*
- 23 See *Id.* at 1375 n. 106.
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- 25 Forston, *supra* note 7 at 610.
- 26 N.C. General Rules of Practice for the Superior and District Courts, Rule 21; N.C. Gen. Stat. 15A-1231.
- 27 See, e.g., Steele & Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. Law Rev. 77, 109 (1988); Hastie, Penrod & Pennington, *Inside the Jury*, at 231 (1983); Cramer, *Effective Instructions: Put Them in Writing*, 8 University of Bridgeport Law Rev. 335-340 (1987); Sand, *Experiments in the Second Circuit With Techniques for Aiding Juror Comprehension*, 8 University of Bridgeport Law Rev. 330-332 (1987); Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 Cal. L. Rev. 731, 756-757 (1981); Note, *The Submission of Written Instructions* (continued on page 13)

- and Statutory Language to New York Criminal Juries. 56 Brooklyn L. Rev. 1353 (1991).
- 28 See Rule 21, N.C. Gen. R., of P. for the Sup. & Dist. Cts.
- 29 N.C. Gen. Stat. § 7A-34
- 30 See N.C. Gen. Stat. § 1A-1, Rule 51; 15A-1231; and 1-181.
- 31 See supra note 33, and N.C. Gen. Stat. 15A-1231.
- 32 See Forston, supra note 7 at 620; see also 56 Brooklyn L. Rev. 1353, supra note 15 at 1381.
- 33 See supra note 23.
- 34 See supra notes 28-29.
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nizing that a lay jury is highly likely to be persuaded by expert testimony of PTSD or conversion, the court protects the essential function of the jury; the jury, not the expert, is the finder of facts.

The Hall court followed established evidentiary rules for example Rule 403, by demonstrating how PTSD and conversion evidence can create a "danger" of unfair prejudice" to the defendant. In deciding, therefore, to disallow PTSD and conversion evidence for the purpose of proving an actual rape, the Hall court ensures that the guilt or innocence of a defendant will be determined by an unprejudiced jury.

Yet, in not creating a per se ban on the admissibility of PTSD and conversion evidence, the Hall court demonstrated the use of flexible rules that a court should employ in order to cope with the ever-

improving world of science. The court recognized that the reason for allowing expert testimony under North Carolina Rule 702 is that neither a lay jury nor a judge can "know" all relevant information that may assist the trier-of-fact to reach an informed decision. Furthermore, the court recognized that in certain circumstances near perfect psychological evidence may be as valuable, if not more valuable, than actual physical evidence. For example, in a rape trial, where the defendant is claiming consent by the victim, symptoms of PTSD can aid the jury. As one commentator has stated on the relevance of rape trauma syndrome (RTS), a form of PTSD:

[T]hat definition makes psychological "bruises" as a relevant as physical bruises in a consent-rape trial. Both certainly may result from many causes. Neither the physician who testifies that a woman has physical bruises nor a psychologist who testifies that a woman suffers from RTS can state unequivocally that the condition was caused by a specific incident of non-consensual intercourse, yet the evidence of a victim's physical injuries is deemed clearly relevant in a rape case and admissibility of this is beyond doubt.¹⁹

Therefore, the Hall court had two very good reasons to follow the lead of New York's highest court, by allowing the limited admissibility of PTSD and conversion evidence. First, by creating the rule that the purpose the evidence is being offered for will determine its admissibility, the North Carolina Supreme Court has given trial judges the flexibility to deal with innovative and unreviewed uses of PTSD. Second, the supreme court has recognized that evidence of PTSD is a valuable tool for prosecutors to bolster the credibility of a victim in a society that at times, wants to put the rape victim on trial and not the defendant.

The dissent in Hall failed to provide the logical analysis provided by the majority. More specifically, the dissent provided no viable reasons why potentially potent PTSD evidence did not or would not create unfair prejudice in minds of the jurors. Furthermore, by declaring that the real issue should be the credibility and not the

admissibility of PTSD evidence, the dissent failed to recognize inherent danger of putting the rape victim on trial rather than the defendant.

Most jurisdictions, including North Carolina, have enacted rape-shield statutes to specifically avoid the focus of the trial from failing on the victim's previous sexual conduct and to prohibit the defense from probing into the past of the victim.²⁰ While evidence of PTSD does not deal with previous sexual conduct of the victim, the effect of allowing the defense to probe into the trauma of the victim is potentially just as damaging, creating a real danger of confusing the jury as to who is truly on trial.²¹ This is much more likely if PTSD and conversion are offered for substantive evidence because the jury will be allowed to occur to determine whether the victim was raped by looking at the resulting trauma, not as the facts existing at the time of alleged crime.

The Hall decision, however, does leave some questions unanswered. For instance, in a rape case where the defendant does not raise the issue of consent, such as in Hall how will a jury be able to differentiate between PTSD evidence offered for credibility purposes and not for substantive purposes. Even with a strong limiting instruction by the judge, isn't a jury likely to draw the conclusion that PTSD means the victim must have suffered some trauma? In addition, in a case where the jury is asked to differentiate between rape, attempted rape, sexual assault, attempted sexual assault, or some other sex-related offense, what benefit will PTSD evidence provide in determining whether technical statutory elements have been met? A jury may be likely to confuse evidence of trauma as evidence of the greater crime and not focus on the particular requirements of each crime.

Another unanswered question is what would happen in a rape case where the defendant presents evidence that the alleged victim has not suffered from PTSD? As one commentator suggests, courts may risk establishing that PTSD is an unofficial element of rape." Yet another risk is that the jury may not feel that the statutory elements, dealing with lack of consent by the victim, are met unless the victim has suffered PTSD. The final question not addressed in Hall is how does the evidentiary value and admissibility iterations change when PTSD is presented in a civil case? Undoubtedly, creative lawyers will seek the answers to these questions; let us hope that our courts have the "right" answers.

CONCLUSION

The decision in Hall does represent the grow-

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ing acceptance of psychological testimony in American jurisdiction. If anything, Hall represents a signal to women that North Carolina courts are dedicated to protecting women from rape offenders.

The purpose of the PTSD and conversion evidence determines admissibility, but that purpose can not be to prove that the rape actually occurred. In addition to helping lower courts, this rule will enable lawyers to establish new ways of using PTSD and conversion evidence at trial. It remains to be seen, however, upon the retrial of Donnie Ray Hall, whether the jurors, particularly, can a jury of twelve reasonable minds differentiate between evidence offered for corroborative as opposed to substantive purposes.

By: Jerry Smith

Edited by WJO

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collateral wrongs, crimes or acts by filing timely motions *in limine*.

As the above preliminary discussion of some of the issues raised in recent North Carolina and federal appellate cases suggests, Rule 404(b) does not lend itself to a simple or mechanical application. The courts and litigants must address six factors in determining the admissibility of "other purposes" evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence:

1. IDENTIFY THE SPECIFIC "OTHER PURPOSES" WHICH THE EVIDENCE OF OTHER WRONGS, CRIMES OR ACTS MAY PROVE.

The threshold consideration is to identify the specific purpose(s) for which collateral wrongs, crimes or acts would be admissible. The second sentence of Rule 404(b) of the North Carolina Rules of Evidence lists ten "pigeonholes" or "other purposes" which prior or subsequent offenses may prove: "motive, opportunity, intent, preparation, plans, knowledge, identity, or absence of mistake, entrapment or accident." (Rule 404(b) of the North Carolina Rules of Evidence). In addition to the ten categorical purposes stated in Rule 404(b), "there are numerous other uses to which evidence of criminal acts may be put, and those enumerated are neither mutually exclusive nor collectively exhaustive." (*McCormick On Evidence*, Fourth Edition, page 345). Several examples include the "chain of circumstances" or *res gestae* purpose; acts of ill-will to prove malice; unique *modus operandi*; and to show a passion for unusual or abnormal sexual relations.

The proponent of the "other purposes" evidence (typically, the prosecuting attorney) bears the burden of identifying the specific purpose(s) that the other wrong, crime or act would tend to prove. In appropriate cases, the opponent to the admission of the "other purposes" evidence should specifically object to the evidence on the ground that it does not fall within the "other purposes" clause of Rule 404(b) and, if the court overrules the objection, the opponent should force the proponent's attorney to state for the record the specific purpose for which the collateral wrong, crime or act is being offered. The main two advantages that the opponent gains by compelling the proponent to state the explicit purpose for which the collateral evidence is being tendered: (1) sometimes the proponent is unable on the spur of the moment to correctly identify the applicable 404(b) purpose; and (2) the statement of a particular 404(b) purpose has the effect of painting the proponent of the evidence into a corner. During closing arguments or on appeal, the proponent cannot rely upon some other 404(b) purpose that he

did not previously identify. Also, by forcing the proponent of the evidence to explicitly state the purpose for which the collateral offense is being offered, the opponent is laying the groundwork for a possible appeal in the event that the proponent failed to state a proper purpose for admitting the collateral evidence.

2. DETERMINE THE LOGICAL RELEVANCY AND MATERIALITY OF THE "OTHER PURPOSES" EVIDENCE PURSUANT TO RULE 401.

The next consideration is to determine whether the collateral wrongs, crimes, or acts are relevant pursuant to Rule 401 of the North Carolina Rules of Evidence. Although evidence of a collateral event may fall within one or more of the other purposes listed in Rule 404(b), evidence of the collateral event is not admissible unless the offer of proof is logically relevant as defined in Rule 401 of the Rules of Evidence:

Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [emphasis added]

This definition embraces two important evidentiary concepts — relevancy and materiality. To satisfy the two-fold requirements of Rule 401, an offer of proof made pursuant to Rule 404(b) must first have a tendency to prove either a listed or unlisted purpose pursuant to Rule 404(b) and second, the purpose must fall within the range of allowable proof as determined by the claims, charges or defenses raised in the particular case. In *State v. Rowland*, the North Carolina Court of Appeals stated:

Before extrinsic conduct evidence is admissible pursuant to Rule 404(b), the trial court is required to first determine whether conduct is being offered pursuant to Rule 404(b); second, the trial court is required to make a determination of the evidence's relevancy. State v. Rowland, 366 S.E.2d 550, 556 (1988).

The North Carolina Supreme Court has described logical relevancy as "the touchstone" in deciding whether extrinsic evidence is admissible under Rule 404(b). *State v. Fowler*, 230 N.C. 470, 53 S.E.2d 853 (1949). The court has also stated that the "acid test" for determining whether evidence of collateral events falls within Rule 404(b) is "its logical relevancy to the particular purpose for which it is sought to be introduced." *State v. Jeter*, 326 N.C. 457, 389 S.E.2d 805 (1990). *McCormick On Evidence* points out that the "other purposes" which the extrinsic evidence purports to prove must be in controversy:

[T]he connection between the evidence and the permissible purpose should be clear, and the issue on which the other crimes evidence is said to bear should be the subject of a genuine controversy. For example, if the prosecution maintains that the other crime reveals defendant's guilty state of mind, then his intent must be disputed. Thus, if the defendant does not deny that the acts were deliberate, then the prosecution may not introduce the evidence merely to show that the acts were not accidental. Likewise, if the accused does not deny performing the acts charged, the exceptions pertaining to identification are unavailing. McCormick On Evidence, 4th Ed. pages 346-347.

Also, in determining the probative value of an extrinsic act, the remoteness in time of the prior event diminishes its probative value. The North Carolina supreme court has held that evidence of similar prior sexual assaults by the defendant which happened seven years before the sexual assault in question was prejudicial to defendant's fundamental right to a fair trial because the prior acts were too remote in time. [*State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988)]. Rule 402 of the North Carolina Rules of Evidence provides in pertinent part that "relevant evidence is admissible" unless excluded by some other rule of law and that "[e]vidence that is not relevant is not admissible."

3. DETERMINE IF THE "OTHER PURPOSES" EVIDENCE IS SUFFICIENT TO PROVE THAT THE DEFENDANT COMMITTED THE COLLATERAL ACT.

The third step in analyzing the admissibility of other wrongs, crimes or acts evidence, is to determine whether the evidence is sufficient to prove that the party (usually the defendant in a criminal case) actually committed the collateral act. In 1988, the United States Supreme Court addressed this burden of production issue in *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L.Ed.2d 771 (1988). The Supreme Court held:

We conclude that a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a) . . . In the Rule 404(b) context, similar act evidence is relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor. (Huddleston, 108 S.Ct. 1496, 1501).

Therefore, the Court in *Huddleston* proceeded to adopt the conditional relevancy standard provided in Rule 104(b) of the Federal Rules of Evidence:

In determining whether the Government has introduced sufficient evidence to meet Rule

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104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact... by a preponderance of the evidence. ... Often the trial court may decide to allow the proponent to introduce evidence concerning a similar act, and at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite finding. (Huddleston, 108 S.Ct. 1496, 1501).

Although the *Huddleston* standard has become known as the "sufficiency of evidence" standard, a careful reading of the case reveals that the Court actually adopted the Rule 104(b) conditional relevance standard:

When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Now the North Carolina Supreme Court has purportedly adopted the *Huddleston* burden of production standard. In *State v. Stager*, per Justice Mitchell stated:

In Huddleston, the Supreme Court of the United States held that evidence may be admitted under Rule 404(b) of the Federal Rules of Evidence if there is sufficient evidence to support a jury finding that the defendant committed the similar act; no preliminary finding by the trial court that the defendant actually committed such an act is required. Huddleston, 485 U.S. at 687-88, 108 S.Ct. at 1500-01, 99 L.Ed.2d at 781. We find the reasoning of Huddleston compelling and conclude that evidence is admissible under Rule 404(b) of the North Carolina Rules of Evidence if it is substantial evidence tending to support a reasonable finding by the jury that the defendant committed a similar act or crime and its probative value is not limited solely to tending to establish the defendant's propensity to commit a crime such as the crime charged. State v. Stager, 329 N.C. 278, 406 S.E.2d 876, 890 (1991).

It is interesting to note that even though the North Carolina Supreme Court has ostensibly adopted the *Huddleston* standard, the court neither discusses nor invokes the terminology of conditional rel-

evancy in conjunction with its analysis of Rule 404(b) offers of proof. Instead, the Court has coined its own phrase, "substantial evidence", as the standard to be applied in determining whether the proponent of "other purposes" evidence has produced enough evidence to connect the defendant to the collateral event. It should also be noted that North Carolina Rule 104(b), the conditional relevancy rule, is identical to its federal counterpart. It appears, though, that contrary to the rationale of *Huddleston*, the "substantial evidence" standard adopted by the North Carolina Supreme Court in *Stager*, *Agee* and *Scott* is treated as a part of a preliminary question analysis pursuant to Rule 104(a), rather than as a question of conditional relevancy pursuant to Rule 104(b). These two rules operate quite differently. The trial judge determines the preliminary question of admissibility under Rule 104(a). "In making its determination, [the trial court] is not bound by the rules of evidence except those with respect to privilege." [Rule 104(a)]. Conditional relevancy (104b), on the other hand, authorizes the trial court to admit, to the jury, evidence of the collateral act, before evidence is offered establishing the fact that the defendant actually committed the collateral act. If the proponent does not offer "sufficient evidence" to prove that the defendant committed the collateral act, then according to the language of Rule 104(b), the condition has not been fulfilled and the judge should withdraw evidence of the collateral fact from the jury. The burden is on the opponent, however, to make a motion to strike evidence of the collateral act if the proponent does not offer "sufficient evidence" to fulfill the condition.

To summarize, a collateral wrong, crime or act is admissible under Rule 404(b) of the North Carolina Rules of Evidence if the proponent of the evidence is able to produce "substantial evidence tending to support a reasonable finding by the jury that the defendant committed a similar act or crime." (p. 890 of *Stager*). The substantial evidence standard is a relatively low threshold requirement. It is a much lower burden of proof standard than the burden of persuasion standard applied in criminal trials (beyond a reasonable doubt). The "substantial evidence" standard merely requires that the proponent of the collateral wrong, crime or act produce enough credible and competent evidence connecting the defendant to the collateral event that the jury's decision on this issue would not be overturned. Although the term "substantial evidence" gives the impression that an enormous amount of evidence is required to link the defendant to the collateral event, in reality the standard is a low quantum of proof requirement that demands only the production of "some evidence" connecting the defendant to the commission of the collateral event.

4. DETERMINE WHETHER THE ADMIS-

SION OF THE PRIOR OFFENSE WOULD BE BARRED BY THE DOUBLE JEOPARDY CLAUSE OR BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

The next step is to analyze the issues of collateral estoppel and double jeopardy when the collateral crime offered into evidence at the present trial has been the subject of a previous adjudication.

A difficult issue arises when the prosecutor in the present criminal trial offers evidence of a collateral crime for which the defendant was previously acquitted or which resulted in a mistrial. The Double Jeopardy clause of the Constitution and the principles of *res judicata* and collateral estoppel normally preclude the re-litigation of the issue of guilt once a final judgment on a case or issue has been entered. The preclusive effect of prior adjudications on the admission of "other purposes" evidence has been the subject of numerous appellate decisions in both the federal courts and the courts of North Carolina.

Dowling v. United States, 110 S.Ct. 668 (1990), is a landmark decision of the United States Supreme Court that addressed the admissibility of collateral offenses against a defendant even though the defendant has been previously acquitted of those offenses. The Court in *Dowling* first discussed an earlier Supreme Court decision:

In Ashe v. Swenson, 397 U.S. 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), we recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel. In that case, a group of masked men had robbed six men playing poker in the basement of a home. The State unsuccessfully prosecuted Ashe for robbing one of the men. Six weeks later, however, the defendant was convicted for the robbery of one of the other players. Applying the doctrine of collateral estoppel which we found implicit in the Double Jeopardy Clause, we reversed Ashe's conviction, holding that his acquittal in the first trial precluded the State from charging him for the second offense. We defined the collateral estoppel doctrine as providing that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe's acquittal in the first trial foreclosed the second trial because, in the circumstances of that case, the acquittal verdict could only have meant that the jury was unable to conclude beyond a reasonable doubt that the defendant was one of the bandits. A second prosecution was impermissible because, to have convicted the

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defendant in the second trial, the second jury had to have reached a directly contrary conclusion. Dowling v. United States, 110 S.Ct. 668, 671-72 (1990).

The facts in *Dowling* were that the defendant was charged with armed robbery while wearing a mask. As proof of his identity, the prosecution offered into evidence the testimony of a witness that she had been robbed in her home by a masked robber several weeks before the armed robbery in question. She testified that defendant was the person who had robbed her. The defendant, however, had been previously acquitted of committing the prior robbery of the female witness. In the *Dowling* decision, the Court distinguished the facts in *Dowling* from the facts in *Ashe v. Swenson*:

... [U]nlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case... and we decline to extend *Ashe v. Swenson* and the collateral estoppel component of the Double Jeopardy Clause to exclude in all circumstances... relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted. [*Dowling v. United States, 110 S.Ct. 668 (1990)*].

Therefore, the critical test under *Dowling* is whether the prior acquittal determined an ultimate issue in the present case. If so, then evidence of the prior offense would be excluded. If not, then evidence of the prior offense would not be precluded by the Double Jeopardy Clause or by the doctrine of collateral estoppel even though the defendant was acquitted of committing the alleged prior offense.

The North Carolina Supreme Court was confronted with this same issue in *State v. Agee*, 391 S.E.2d 171 (1990). The North Carolina Supreme Court held, per Justice Whichard, that in defendant's criminal trial for felonious possession of LSD, it was not reversible error for the trial court to admit evidence of defendant's possession of marijuana to show a chain of circumstances related to the LSD possession charge despite the fact that the defendant had been previously acquitted of the possession of marijuana charge. According to Justice Whichard, the previous acquittal on the marijuana charge would not be precluded because "the prior acquittal did not determine an ultimate issue in the present case." [176 of *State v. Agee*, citing *Ashe v. Swenson*, 397 U.S. 436 (1970) and *Dowling v. United States*, 493 U.S. 342 (1990)].

The North Carolina Supreme Court reconsidered this issue in *State v. Scott*, 413 S.E.2d 787 (1992). In *Scott*, the defendant was tried on several charges including rape, kidnapping and crime against nature. At the trial, the prosecution introduced the testimony of a witness (not the prosecuting witness) that two years earlier, the defendant had raped her under circumstances similar to the alleged rape for which the defendant was then on trial. The defendant had been tried and acquitted of the alleged prior rape. In a carefully written opinion, Chief Justice Exum, speaking for the majority of the court stated:

We conclude that evidence that defendant committed a prior alleged offense for which he has been tried and acquitted may not be admitted in a subsequent trial for a different offense when its probative value depends, as it did here, upon the proposition that the defendant in fact committed the prior crime. To admit such evidence violates, as a matter of law, Evidence Rule 403. State v. Scott, 413 S.E.2d 787 (1992).

The Court concluded:

The North Carolina Rules of Evidence must be interpreted and applied in light of this proposition: an acquittal and the undefeated presumption of innocence it signifies mean that, in law, defendant did not commit the crime charged. When the probative value of evidence of this other conduct depends upon the proposition that defendant committed the prior crime, his earlier acquittal of that crime so erodes the probative value of the evidence that its potential for prejudice, which is great, must perforce outweigh its probative value under Rule 403. State v. Scott, 413 S.E.2d 787 (1992).

The court reversed the kidnapping and rape convictions but upheld the crime against nature conviction. The court's rationale was that evidence of the prior sexual offense (for which the defendant had been acquitted) pertained to the issue of consent in the case *sub judice*. Consent is not a defense to a crime against nature charge and the impermissible admission of the prior offense evidence did not taint the crime against nature conviction.

The court's decision in *Scott* would appear to be in conflict with its decision in *Agee*, even though the court attempted to distinguish the two cases on both the facts and the law. In a dissenting opinion to the majority opinion in *Scott*, Justice Meyer points out that the majority opinion appears to be a departure from the court's traditional analysis of collateral estoppel and of the balancing test found in Rule 403. (1) It is clear that if the prior adjudication determined an "ultimate issue in the present case", as in *Ashe v. Swenson*, then evidence of the prior offense

that resulted in an acquittal would be barred. (2) Also, if the prior adjudication did not determine an "ultimate issue in the present case", then the prior adjudication would be admissible in the subsequent case, unless the court determines, as in *State v. Scott*, that it would be unfair pursuant to a Rule 403 analysis to admit evidence of the prior offense that resulted in the acquittal. *Scott* thus creates an important exception to cases such as *Dowling v. United States* and *State v. Agee*.

5. DETERMINE WHETHER THE PROBATIVE VALUE OF THE "OTHER PURPOSES" EVIDENCE IS SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE PURSUANT TO RULE 403.

The Rule 403 test is referred to as the "legal relevancy test and should be distinguished from the "logical relevancy" test stated in Rule 401. Rule 403 provides as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. [emphasis added]

The inherent nature of "other purposes" evidence creates the danger that the introduction of collateral wrongs, crimes or acts of a defendant in a criminal case might lead the jury to reach a verdict on an improper basis; the jury may intentionally or unwittingly conclude that since the defendant committed other crimes, he probably committed the crime in question. Once the jury is made aware of collateral events, it is difficult to control the manner in which the jury will consider and weigh this evidence. For this reason, 404(b) evidence should not be introduced unless it is clear that the prejudicial effect of the "other purposes" evidence would not substantially outweigh its probative value.

In order to avoid the prejudicial effects that might result if the jury hears testimony concerning a collateral act, it is recommended that counsel for defendant in a criminal case consider taking the following steps:

1. Request through discovery a copy of the Defendant's prior criminal record from the prosecution and (though not listed in the discovery statute) any additional information of prior wrongs or acts that the prosecutor plans to introduce.
2. File a pre-trial motion *in limine* to exclude the introduction of collateral wrongs, crimes and acts.
3. Make specific objections based on Rules 401, 403 and 404(b) to the ruling of the trial court admitting collateral wrongs, crimes and acts.

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404 (b) OR NOT 404 (b):

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4. Make a motion to strike evidence of the collateral wrongs, crimes or acts if there is not "substantial evidence" to connect the defendant to the collateral act.
5. Make a motion for a limiting instruction and provide to the court a proposed limiting instruction.
6. Submit to the court a memorandum of law or trial brief in support of the exclusion of 404(b) evidence.
7. Provide copies of relevant favorable decisions to the court. (e.g. *State v. Scott*).
8. Make a motion for a mistrial (if appropriate).
9. Make a motion for a new trial (if appropriate).
10. Lay the groundwork for an appeal and be prepared to appeal.

6. APPLY THE DOCTRINE OF LIMITED ADMISSIBILITY PURSUANT TO RULE 105.

The final step in determining the admissibility of "other purposes" evidence arises from the application of the doctrine of limited admissibility found in Rule 105 of the North Carolina Rules of Evidence. The rule provides as follows:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

The Advisory Committee's Note to Rule 105 of the North Carolina Rules of Evidence states in pertinent part:

A close relationship exists between this rule and Rule 403 which requires exclusion when "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403.

Evidence which is admitted pursuant to Rule 404(b) may be considered by the jury only to the extent that it proves one or more of the "other purposes" for which it was admitted. "Other purposes" evidence may not be considered by the jury as proof that the defendant may have acted at the time in question in a manner consistent with her character, because as stated earlier, the propensity rule [Rule 404(a)] excludes the introduction of circumstantial character evidence. Normally, the

judge restricts the jury's consideration of evidence of other crimes, wrongs, or acts by giving a limiting instruction to the jury. The essence of the limiting instruction is that the jury may consider evidence of other crimes, wrongs, or acts of the defendant only for purposes of determining whether the prosecution has established proof of specific "other purposes" pursuant to Rule 404(b).

In *State v. Stager*, (the murder case in which the defendant-wife was found guilty of killing her second husband), the trial court did not give a limiting instruction to the jury. Presumably, the jury considered the evidence of other crimes, wrongs or acts for any and all purposes. Despite the failure of the trial court to give a limiting instruction, the North Carolina supreme court held that a limiting instruction is not required "unless specifically requested by counsel." [*State v. Stager*, 401 S.E.2d 876, 894 (1991)]. The Court's ruling in this regard is consistent with Rule 105 of the North Carolina Rules of Evidence which provides that a limiting instruction shall be given "upon request" in an appropriate situation. The danger exists, however, that in the absence of a limiting instruction, the jury will probably consider the "other purposes" evidence as circumstantial character evidence — a result that would clearly contravene the propensity rule.

CONCLUSION

An analysis of the "other purposes" clause of Rule 404(b) would be incomplete without a discussion of the underlying rationale of this rule. The primary policy justification in support of Rule 404(b) is that it provides a means of introducing relevant evidence that might be otherwise excluded by the propensity rule. Some legal commentators believe that justice is best served when the jury is given all of the relevant facts. The counter-argument, of course, is that Rule 404(b) is merely a subterfuge for the admission of highly prejudicial circumstantial character evidence. Rule 404(b) is essentially a "prosecutor's rule" that enables a prosecutor to present to the jury character evidence disguised as "other purposes" evidence. Once the jurors have heard "other purposes" evidence, the efficacy of limiting instructions is questionable. Our role as litigators and as officers of the court is to mitigate the potentially prejudicial effect of "other purposes" evidence so that justice might prevail.

Edited by: WJO

The Barrister editors would like to thank Professor Ringer for allowing us to publish this edited version of his article. You may wish to read his +111,000 word version in a soon to be published NCCU Law Journal.

PARK IT: UPDATE

In the last edition of *The Barrister* it was reported that the availability of student parking was horrendously inadequate. (Over 400 day law & criminal justice students compete for 45 student assigned parking spaces.) Since then, the University has added approximately one hundred and forty student parking spaces across from the Criminal Justice building - a step in the right direction. In addition, the University is looking into other potential parking sites and satellite parking. Dr. Percy Murray is the chairperson of the University Facilitator Planning Committee.

There is of course, the questions concerning the need and statutory requirement of adequate handicap parking, as well as the apparent excessive 'B'(faculty/staff) designated parking spaces surrounding the law school. These matters should be discussed and addressed in the next edition of *The Barrister*.

By: WJO

UPDATE: LEGAL WRITING IS ILLEGAL

In the previous *The Barrister* an article authored by David Lambert set forth the facts which clearly showed that the majority of Instructors/Professors, involved in the most subjective matter courses - legal writing courses - were routinely ignoring the Law School's own rules. The rule is that ALL GRADING IS TO BE ANONYMOUS. The rule does not say except for, or in cases of, or the exceptions are.

Moreover, the law school has at least one writing instructor who blatantly refused ANY anonymity in grading when she DEMANDED STUDENTS NOT USE SOCIAL SECURITY NUMBERS. Students were told to cross out their social security numbers and insert their NAMES.

The Law School Administration was made aware of the above through student evaluations as well as several "one on ones."

Since the previous publication the administration has said and done nothing to correct these practices. *The Barrister* will ask the SBA to bring the matter before the Faculty during a faculty meeting. *The Barrister* will attempt to meet with Chancellor Chambers to ask for his assistance in this matter.

By: WJO

PART II: WHAT THE "L" IS GOIN' ON

Another Opinion: Is Law School Worth It?

Or, Have I or Am I Making the Biggest Mistake of My Life?!

This is a continuation of the article presented in the last edition of The Barrister. We offer it for comic relief.

Professor James Gordon III's¹ satirical look at law school in all of its radiant glory (or is it gory?) suggests that one may be far "better off" being a spelling coach for Dan Quayle or obtaining a Ph.D. (pile it higher and deeper) in Quantum Melodies of the Spheres, then to consider the ludicrous, horrendous, helacious experience of law school and the ungodly profession of law.

VII. THE LAW FACULTY

The faculty is a distinguished group of prison guards who sit in attack formation at law school assemblies. If you want to know what kind of people law professors are, ask yourself this question: "What kind of a person would give up a salary of a zillion dollars a year in a big firm to drive a rusted-out Ford Pinto and wear suits made out of old horse blankets?" Think about this carefully before asking your professor's opinion on any subject.

Politics are often divisive at law schools. In the 1960's, the faculties were conservative and the students were liberal. In the 1980's, the students were conservative and the faculties were liberal. The 1970's were a difficult transitional period during which, for an awkward moment, faculties and students were able to communicate. They discovered that they did not like each other.

When law professors are not doing important things like writing commercial outlines, they are writing casebooks. Of course, they make you buy their casebooks for their classes. Just to prove that at heart they are really gentle, fun-loving people, professors will occasionally do something a little bit zany, like wear a costume to class on Halloween. Before you laugh and cheer, you should check your calendar. It is often difficult to tell whether a professor is wearing a costume or not.

VIII. THE SECOND AND THIRD YEARS

The second and third years are about the same as the first year, except that you get to choose your teachers (this is called forum shopping) based on the difficulty of their grading curve. The professors describe their courses in a list called, appropriately enough, "Course Descriptions." An honest list of course descriptions might look something like this:

Civil Procedure. Learn about the paper wars of

litigation. Discover why, every time a case is filed, another forest dies.

Constitutional Law. Ridicule people who still believe that the Framers' intent has any relevance whatsoever.

Contracts. Study rules based on a model of two-fisted negotiators with equal bargaining power who dicker freely, voluntarily agree on all terms, and reduce their understanding to a writing intended to embody their full agreement. Learn that the last contract fitting this model was signed in 1879.

Criminal Law. Study common law crimes that haven't been the law anywhere for more than 100 years. Then, to bring things up to date, study the Model Penal Code, which is not the law anywhere today.

Criminal Procedure. Learn almost enough about the rationale behind the exclusionary rules to defend yourself at cocktail parties.

Environmental Law. Discover why, if you put an empty oil can to your ear, you can hear the ocean roar.

Evidence. Memorize the hearsay rule and its 50,000 exceptions. Good for people with a photographic memory and gangs of free time.

Income Taxation. Prepare to be a tax lawyer. A tax lawyer is a person who is good with numbers but who does not have enough personality to be an accountant.

Legal Ethics/Professional Responsibility. Learn why "honest lawyer" is an oxymoron.

Torts. Study a compensation system in which the transaction costs generally exceed the payments to the injured parties. Fortunately, most of the transaction costs occur in the form of attorney's fees.

Wills and Estates. Dead people and their things. Also known as "Stiffs and their Gifts."

Alternative Dispute Resolution (ADR). How people resolve disputes without lawyers, because a simple dogbite case takes five years and \$50,000 to get to trial. Learn how to recognize ADR and squash it.

IX. COCURRICULAR PROGRAMS AND STUDENT ORGANIZATIONS

Being fully committed to providing the best possible educational opportunities for every student, law schools offer cocurricular programs, like law journals and moot court. Then, quite naturally, they let hardly anyone participate in them. The most elitist organization is the law

review, which is generally restricted to the top ten percent of the class. These students are given this special honor so that employers will not overlook them just because they are at the top of their class. Law review editors spend their time doing meaningful educational tasks like checking the citation form of articles they don't understand.

Many law schools have also started other law journals. These journals usually focus on a specific area of the law, and have names like The Journal of Comparative Funeral Law. They concentrate in a particular area so that they don't have to be named The Second-String Law Review, which they would consider somewhat demeaning.

There are also student organizations. Some of these ostensibly focus on a particular topic or interest, like "Future Trial Attorneys for the Clinically Brain Dead." However, they really exist only to provide resume padding. A student wants to be able to say that he is the Exalted Grand Excellent Potentate of the Ancient Royal Order of Back Benchers. This is supposed to impress employers.

X. INTERVIEWING FOR JOBS

Before you interview, you will need to prepare a "resume." It is also called a "curriculum vitae," a Latin phrase meaning "preposterous fable." There is a fine art to interpreting resumes. "Top 10%" means "top 20%." "Top 20%" means "top half." "Middle of the class" means "bottom half." Law schools get extremely angry when students pad their resumes like this. They give moralistic lectures telling students that it is just plain dishonest. Because they are the nation's leading law schools, the twenty-five schools in the Top Ten get particularly huffy about it. One final suggestion: to avoid unwarranted federal interference, take care not to send your resume through the mails.

You should ask how many hours associates are required to bill. In some firms, associates bill as many as 3,000 hours a year. Sometimes this is accomplished through "triple billing," a technique by which an associate works on client A's matter while flying to a city for client B, and he thinks that the issue may possibly somehow someday be relevant to client C. So he bills each client full bore. It is also accomplished through a time warp on the 14th floor, which allows associates to bill fifteen hours in a ten-hour day.

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PART II: WHAT THE "L" IS GOIN' ON

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In any case, associates work very hard. One student asked if the associates ever do anything fun together. "Sure," the interviewer replied. "About two o'clock, we knock off for an hour and go play a game of racquetball." The student observed, "What a great way to break up the afternoon." The interviewer responded, "Afternoon?"

The definition of a partner is a "self-employed slave." Partners spend most of their lives squabbling like a pack of hyenas over the firm's profits. You should not get discouraged, however. You should remember that there are many job opportunities and lots of different types of work that lawyers do. For example:

Corporate Work: drafting documents for scumsucking corporations that poison huge numbers of innocent people.

Litigation: defending scumsucking individuals who poison a few innocent people at a time, mostly because they lack the capital and technology to poison huge numbers of innocent people.

Public Interest Work: suing scumsucking corporations that poison huge numbers of innocent people. Lawyers doing this work earn less than what the law firms on the other side of the litigation pay their pencil sharpeners.

Weigh your options carefully!

XI. MAKING YOUR GETAWAY

Before you graduate, you take a test called the "Professional Responsibility Exam." This test asks you questions about ethics and morality. If your answers reveal that you have the slightest trace of a conscience remaining, you are scheduled for surgery. Perhaps you have noticed that many young lawyers wear sporty sweatbands on their heads when they play racquetball. They do this to hide the scar.

After you have graduated, you have to go through an initiation rite called "Preparing for and Taking the Bar Exam." The state bar association says that bar exams are designed to ensure the competency of the practicing bar. You learned about them in your antitrust class, under the topic of "Market Entry Barriers." They make it possible for people who are already admitted to the bar to make a living wage (i.e., about \$200,000 a year). You will probably feel somewhat better about the exam's rationale if you pass it.

You will need to take an intensive, eight-week course, costing a trillion dollars, to prepare for the bar exam. Wait a minute, you say. Why did I

borrow ten trillion dollars and spend three years of my life going to law school? Didn't law school teach me the law? No, you idiot. Law school's purpose is not to teach you the law. Law school taught you to THINK LIKE A LAWYER, unless you attended one of the elite schools, then it taught you to think like a medieval philosopher, or a business school dropout.

Before you take the bar exam and become a "full-fledged"² lawyer, you must do one more thing. You need to ask your law school dean to write a letter recommending you for admission to the bar. The dean's time is very limited, since he (or she) teaches a full three hours out of a forty-hour week. Your dean will probably send a recommendation letter that looks like this:

(SEE LETTER IN ORIGINAL)

Since your dean took the time from his (or her) crushing schedule to write this letter for you, he must not be such a bad person after all. In fact, from now on he (or she) will make you one of his (or her) personal pen pals. Throughout your entire mortal existence, no matter where your career takes you, through all the ups and downs of life, your dean will regularly write you thoughtful and personally computer-generated letters — asking you for money. You just can't put a price on a friendship like that. He or she, however, does have a ballpark figure in mind.

So now you know all there is to know about law school. If you haven't yet decided whether to go to law school, you should consider it carefully. If you are in law school now, you should also consider your options. But if you want my objective, even-handed, carefully considered advice, I'll tell you:

GET THE HEY OUT OF IT WHILE YOU STILL CAN!

Edited By: W.J.O.

The Barrister would again like to thank the Yale Law Journal for the authorization to publish this edited version of Professor Gordon's article which appeared in Yale's April (Fool's) edition.

ENDNOTES

¹ Gordon, *How Not to Succeed in Law School*, 100 Yale L.J. 1679.

² As in "vulture." The principal difference between a lawyer and a vulture is that the vulture doesn't take off its wingtips.

IS JUSTICE TRULY A BLIND GODDESS?: RACE, DISCRETION, AND THE CRIMINAL JUSTICE SYSTEM.

Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence.¹

Atop London's "Old Bailey" stands the blind goddess of justice.^{1a} Her bandaged eyes and beveled scales serve as a testament to the ideal that all persons, regardless of race, are treated equally before the courts. Beyond this idealism, however, lies the naked truth: there are marked disparities in criminal sentencing and favorable parole decisions for white and African-American criminal defendants. Is justice truly a blind goddess?

There are two main types of criminal sentencing in the United States: Determinate and Indeterminate.² Determinate sentencing is based upon a philosophy of deterrence and retribution. Parole is unlikely and criminal defendants will usually serve out their entire term.³ The focus of indeterminate sentencing is on rehabilitating the defendant. A judge will sentence a defendant to a range of years, with the understanding of future release once rehabilitation has been shown.⁴ Sentencing in an indeterminate sentencing scheme is subject to judicial discretion.⁵ In most cases a judge will rely heavily on facts contained in the defendant's pre-sentence report to determine a sentence.⁶ The pre-sentence report reveals information about the defendant's crime, past criminal record, education, employment record, family status and even sexual orientation.^{6a} Indeterminate sentences are thus deemed to fit each individual defendant's needs, and judges are not required to state the reasons for a particular sentence.⁷

Statistical studies of racial disparities in sentencing and parole decisions indicate the disparities exist between African-American and white criminal defendants in various parts of the United States.⁸ This occurs not only in sentencing but in prison populations and in the actual amount of time served.^{8a} Researchers have devised various explanations for this occurrence. Some suggest that minority offenders serve disproportionately

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larger prison terms because their cases are less often disposed of through plea bargains.⁹ Another explanation is the pre-sentence report; researchers have discovered that African-American criminal defendants are more likely to possess characteristics that indicate the potential for recidivism. These include chronic unemployment, unstable families, and lengthy prior criminal records that result in unfavorable treatment.¹⁰ Researchers argue that the mere fact a disproportionate number of minority cases are disposed of more severely than white criminal defendants cannot be prima facie proof of racial discrimination. Yet, still others argue that the system is infested with widespread racial discrimination due to the gross discretionary decision making ability of judges and parole boards.¹¹

Whatever explanation one chooses to accept, it is important to note that the federal courts have not wholly ignored this problem. Congress adopted the Federal Sentencing Guidelines (FSG) which were put into effect in 1988 and 1989.¹² These guidelines were a response to the inconsistency of sentences for similar conduct by similar defendants. The FSG were designed to eliminate the disparate sentences that were a consequence of unfettered discretion of district court judges, and replace them with fair and "scientific" determinate sentences devised by an independent administrative agency.¹³

Before the FSG judges were free to rely on individual philosophies of punishment, or their view of a particular offender. The reasons for a sentence were often poorly articulated; there was little or no appellate review; and the judges were of a mindset that the parole system was the place in which to correct errors.¹⁴ Opponents to FSG however, reason that sentencing has now been reduced to a mere computation and discretion has moved into the hands of the prosecutor. They argue, for example, that it is the prosecutor who dictates the quantity of drugs that will be charged to a criminal defendant. The amount of drugs charged will determine calculation of the FSG "score" which in turn controls the overall severity of the sentence.¹⁵

A troubling aspect regarding parole board decisions is that they are "closed door" proceedings. It is extremely difficult for a prisoner to gather information tending to

show discriminatory practices. Moreover, even when prisoners are able to gather information tending to show racial bias, at least one court has found the evidence insufficient. In *Inmates v. Greenholtz*,¹⁶ the Eighth Circuit held that neither ethnocentric decision making nor racial slurs uttered during parole board deliberations were convincing evidence of racial discrimination.

Even if one concludes that the criminal justice system is fraught with discretionary abuse, a solution to the problem is largely unclear. However, in order to reduce, at the very least, the potential for discretionary abuse, all states should provide for a strict standard of review for all parole board decisions. The cloak and dagger secrecy that often shrouds the decision making process creates an environment where abuse can occur. Some suggest that one way to eradicate discrimination is to shift the burden of proof to the parole review board, or institute parole release guidelines.¹⁷

In *Castaneda v. Partida*,¹⁸ the Supreme Court devised a burden-shifting test in response to claims of racial discrimination in grand jury venires. The court held that to raise a presumption of intentional discrimination defendants must meet two requirements. First, the defendants must show that they are members of a cognizable racial group. Second, defendants must prove that the legal procedure employed, unfavorably affected a disproportionately higher number of their group's members. Only if this two prong test is met does the burden shift to the state to show non-discriminatory reasons for this occurrence. This reasoning is sound. At first glance it appears that the parole board would be unfairly burdened by a presumption of racial discrimination. The presumption however, can be rebutted by the production of all pertinent criteria that went into the decision making process—including past criminal conduct and behavior patterns. This type of burden will force parole boards to be detailed and systematic when evaluating each individual prisoner.

The crux of this issue is not that discretionary decisions are being made; it is the level of discretion officials hold, and the lack of an adequate checks and balances system once a decision is made. Criminal defendants are not only innocent unless proven guilty, they are also entitled to a fair and lucid sentence absent bias or prejudice. Whatever the truth about racial discrimination within the criminal justice system is, it is fair to say that discretionary decision making has the

potential for unfair treatment. Placing limits on discretion, or abolishing it entirely would be a movement toward insuring equal justice for all.

By: Robert L. Lambright

ENDNOTES

1. United States Supreme Court Justice Rufus W. Peckham.
- 1a. Jon Stidolph, *The English Legal Heritage*, Oyez Publishing (1979), (London Central Criminal Court, known as "Old Bailey" stands at the site of the old Newgate prison Newgate was the newest of the cities gates and housed the worst of London criminals.).
2. S. Shane-Dubow, A. Brown & E. Olsen, *Sentencing Reform in the United States* (1985).
3. G. Cavender, *Parole: A Critical Analysis* (1982).
4. P. Cromwell, *Probation and Parole in the Criminal Justice System*, (2d Ed. 1985).
5. Kadish, *Legal Norm & Discretion in the Police & Sentencing Process*, 75 Harv. L. Rev. 904, 916 (1962).
6. Comment, *Insuring the accuracy of the Pre-sentence report in the Wisconsin Correctional System*, 18 Wis. L. J. 612, 613 (1986).
- 6a. *Id.*
7. B. Jackson, *Law and Disorder* 160, 168 (1984).
8. J. Petersilia, *Racial Disparities in the Criminal Justice System*, at X (1983). (concluding that ethnic minorities recieved larger minimum sentences in Michigan, California and Texas.) Also See; Pruitt & Wison, *A Longitudinal Study of the Effect of Race on Sentencing*, 17 Law & Society Review 613, 619-20 (1983). (studies showed that blacks were sentenced in disproportionately higher numbers and higher terms than whites in Milwaukee).
- 8a. *Id.*
9. See, J. Petersilia *supra* note 8 at X.
10. See, J. Petersilia *supra* note 8 at XXVI.
11. Comment, *Disparity & Discretion in Sentencing: A Purpose for Uniformity*, 25 U.C.L.A. L. J. 323 (1978).
12. Title 18 U.S.C.S Appx Ch. 1. (1988).
13. Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, New York Law Journal, at 2 February 11, 1992.
14. Daniel J. Capra, *The Right to Confrontation in Federal Sentencing Proceedings*, New York L. Jour. at 3 September 11, 1992.
15. *Supra*.
16. *Inmates V. Greenholtz*, 567 F.2d 1368 (8th Cir. 1977) cert. denied., 439 U.S. 841 (1978). (plaintiffs were Native Americans who were subjected to various ethnic slurs ie. that they were a "Chippewa off the old block" which was followed by laughter, during a parole board meeting).
17. Comment, *Developments-Race and the Criminal Process*, 101 Harv. L. Rev. 1473 (1988).
18. 430 U.S. 482 (1977).

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