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IN THIS ISSUE

How Can You Defend Those People?[1]

By the Honorable Robert H. Edmunds Jr.

Although we attorneys often grumble and fret about negative public perceptions of our profession, I suspect that lawyers have never *not* had this problem.

Most of the public does not really understand that everyone has a right to counsel. One of the questions commonly asked of lawyers is "How can you defend those people?" When I was a prosecutor I heard it asked of the honorable opposition; when I was practicing as a criminal defense attorney, people asked it of me. Although the question comes up more frequently in criminal cases, where "those people" can be pretty unsavory, I've heard the equivalent question asked in civil cases. I have even heard lawyers ask it of other lawyers.

If law school teaches us anything, it should teach us the answer to that question. Better minds than mine have addressed it and better writers have explained it. I do not propose to defend once again the importance and effectiveness of our adversarial system. Instead, I want to tell a story that may shed a little light on just why we (and by "we" I mean all of us lawyers) defend those people.

The hero of the story is John Adams, who later served as our second president. However, the event I want to discuss occurred much earlier, when Adams was a Boston lawyer. The year was 1770. Adams was 34 years old, had built up his practice, and was by any measure successful and respected.

At this time, Boston was an unquiet place. British rule was becoming increasingly unpopular and the city was a hotbed of opposition to the Crown. Not only were many citizens vocal in their displeasure, Boston was also the home of such groups as the Sons of Liberty which were willing to do more than just talk. One of the principal agitators against the British was Samuel Adams, John Adams' older cousin. Sam was something of a zealot in those days and happy to brew up a little trouble when he saw a chance.

An opportunity arose on March 5, 1770. Normally, Boston was garrisoned by two regiments of regular British soldiers. However, on that date, a detachment of only eight soldiers and one officer was guarding the Boston Customs House. Sam sent some of his men and any others they could find to harass those guards. I suspect that he only wanted to cause a small fracas and did not anticipate that anything worse would develop. Moreover, Sam surely believed that his men could act with impunity under the law of the day. The only way authorities could compel a gathering to disperse was to obtain a warrant from a magistrate, then read the Riot Act to the crowd. Force could be used only if the people still refused to leave.

As a practical matter, it is unlikely that any magistrate in Boston would be likely to risk the displeasure of the mob by issuing such an unpopular warrant. So the crowd that went to the Customs House that day probably felt with some justification they were at no risk of being arrested. However, matters quickly got out of hand. The crowd grew to over 100 and became increasingly rowdy as the outnumbered British guards watched with apprehension.

People began to throw stones, chunks of ice, and pieces of wood at the soldiers. Finally, when one was hit hard and knocked flat, he came up shooting. His comrades also fired, and by the time the smoke cleared, five Bostonians lay dead and six more had been wounded. This event later became known, of course, as The Boston Massacre. Local public sentiment immediately convicted the British of cold-blooded murder. Sam Adams called the affair a "bloody butchery," and Paul Revere portrayed the incident in a widely-circulated print as a slaughter.

Seen in a larger context, though, this shooting presented a particularly intractable problem. The soldiers were charged with murder in the colonial courts of Massachusetts. From the point of view of those in London, their soldiers had been defending themselves from a mob that had attacked them without justification. If the soldiers were convicted of murder, authorities in London would surely have intervened. However, any such tampering in the judicial processes of the Massachusetts colony would have played squarely into the hands of those agitators who claimed both that Britain saw its American colonies as little more than sources of tax revenue and that the judges, appointed by the Crown, cared little for colonial citizens. Yet there was no avoiding a trial. The soldiers had fired into a crowd without legal authorization and had killed unarmed men.

To complicate matters further, no lawyer wanted to take the case. In the atmosphere of the day, undertaking the defense of the soldiers could be both physically dangerous and financially ruinous for an attorney. Moreover, I expect that few lawyers had much sympathy for the defendants. Even Wellington some years later referred to English infantrymen as the "scum of the earth." So while I have not seen any description of the charged soldiers as individuals, it would not surprise me if most of the citizens of Boston saw the soldiers as nothing more than uniformed thugs.

Still, a lawyer was needed, so with some hesitation John Adams volunteered to represent the soldiers. He did not want to do it; he knew that an attorney representing an unpopular cause is often shunned. However, Adams had studied the case and was convinced that the soldiers had acted in self-defense. He was known as a patriot, so no one could accuse him of kowtowing to the British. No less important, he could be comfortable that his cousin, Sam Adams, would control the volatile elements of Bostonian society that might otherwise try to interfere in the case or intimidate the soldiers' attorney. Nevertheless, taking the case risked Adams' established practice. Moreover, it was not going to make him rich, because he was paid but "18 guineas" for his work. I do not know how much that fee would be in contemporary currency, but it is safe to assume that it compared unfavorably with his usual rates.

The officer was tried separately from the other soldiers, and Adams conducted both trials with skill and vigor. The officer was acquitted in the first trial on the grounds of self-defense. In the second trial, two of the soldiers were found guilty of manslaughter and sentenced to be branded on the thumb, while the remaining soldiers were acquitted. This compromise verdict recognized the unlawfulness of some of the soldiers' acts, while acknowledging the heated circumstances under which

the shooting took place. It was a verdict that satisfied almost everyone, and Boston again calmed down, at least for a while.

It is difficult to think of a better outcome of this vexing case. If the soldiers had all been convicted of murder, as might have happened had a less able advocate represented them, the verdict would surely have been seen in Britain as the foreordained result of a kangaroo court that deprived the soldiers of a fair trial. On the other hand, if the British had intervened, either during trial through a crown-appointed judge or after a murder conviction, the Bostonians would surely have seen it as a unjustified royal intrusion into the workings of a duly constituted colonial court. We cannot know whether history might have played out differently if other verdicts had resulted, but none of the alternate scenarios seem particularly promising.

If the soldiers had been convicted of murder, a natural British reaction would have been to impose increasingly repressive measures on Massachusetts. It is possible that such acts would have quenched the spark of liberty. A few well-chosen deportations or hangings could have broken the nascent spirit of rebellion that existed in 1770.

It is equally possible that repression could have led to increased unrest in Boston, resulting in an outbreak of armed rebellion earlier than happened in fact. It is hard to imagine that any such hostilities would have led to American independence. History records that the American Revolution that started in 1775 at Lexington and Concord went on for many years, often teetered on the verge of failure, and only barely succeeded thanks to the participation of the citizens, leaders, resources, and treasure of all the colonies. In 1770, Boston may have been the home of revolutionary fervor, but most citizens in New York, Virginia, and the other colonies still saw the British as no worse than heavy-handed. Few of the colonies were anywhere near revolt, and many thought the Bostonians were a bunch of hotheads. An early start to the Revolution, without all the colonies united in the hope of independence, would almost certainly have ended in defeat.

From almost any perspective, the sudden flare of the Boston Massacre was a moment of peril in our history. John Adams' cool and sensible handling of the soldiers' case allowed everyone to simmer down. He also bought time for the many elements necessary for a successful revolution against a powerful continental power to coalesce. How did it happen? A good lawyer ably defended a bunch of unpopular criminal clients. From our perspective, it is no wonder that Adams always thought that his defense of the British was one of the best day's work he ever did as a lawyer. But I'll bet a month's pay that a lot of his friends asked him: "John, how can you defend those people?" ■

Justice Robert H. Edmunds Jr. was elected in 2001 as an associate justice with the North Carolina Supreme Court. He earned his JD from the University of North Carolina School of Law and in May 2004 anticipates earning a Master of Laws in the Judicial Process (LL.M.) from the University of Virginia Law School.

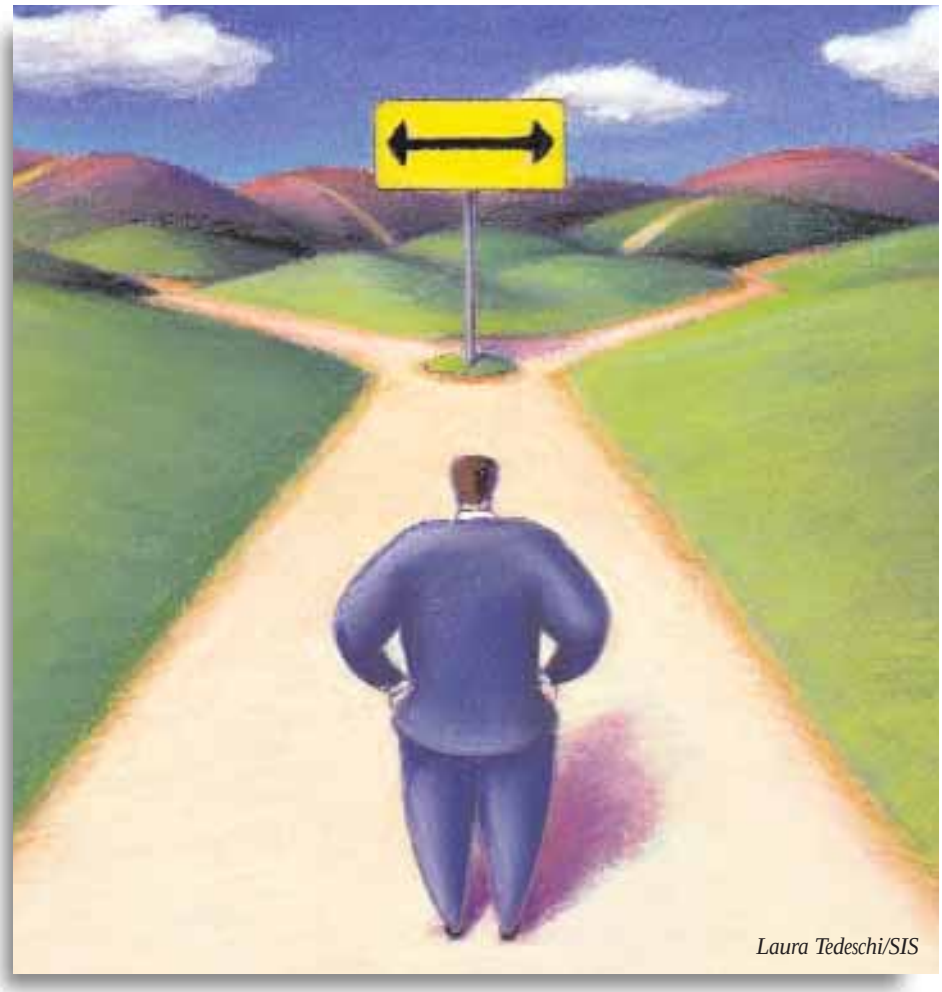
Endnote

1. This article is adopted from a speech given to the Greensboro Young Lawyers in March 2003. I ask your forbearance. My sources were not always consistent, and I am no authority on colonial law. This article was written by a lawyer for lawyers.

When Statutes are Absurd

By Thomas L. Fowler

Occasionally, our General Assembly passes a law that could reasonably have more than one meaning. If the language the legislature chooses to use in a statute is ambiguous, then the courts are free to—indeed they have little choice but to[1]—interpret the ambiguous language, that is, choose the proper meaning to be assigned to the imprecise language of the statute.



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A recent law review article has observed that legislators may on occasion actually intend to include ambiguity in the statutes they pass. This is so because ambiguity may serve a legislative purpose:

> When legislators perceive a need to compromise they can, among other strategies, "obscur[e] the particular meaning of a statute, allowing different legislators to read the obscured provisions the way they wish." Legislative ambiguity reaches its peak when a statute is so elegantly crafted that it credibly supports multiple inconsistent interpretations by legislators and judges. Legislators with opposing views can then claim that they have prevailed in the legislative arena, and, as long as courts continue to issue conflicting interpretations, these competing claims of legislative victory remain credible.[2]

But whether or not the legislators intended the ambiguity, when statutes require interpreting, judges may actually be good at performing this limited kind of legislation, i.e., cleaning up loose language or filling in the gaps left by sketchy or tentative statutes,[3] and thereby supporting the statute's internal consistency and basic procedural fairness. For this sort of judicial legislation, however, judges are not free to adopt any interpretation that strikes them as preferable—rather they are guided and limited by a set of rules for statutory interpretation which narrow and direct, and sometimes compel, the judges' interpretive choices.[4] And, of course, the trial court's efforts to make interpretive choices and to fill in the gaps with judicial legislation are subject to review and confirmation or correction by the appellate courts. All in all this may be a useful two or three step process to produce functioning, comprehensive, and just statutes.[5]

But what happens when the language in the statute is unambiguous? What if the language is not reasonably subject to more than one interpretation? Then judges must not legislate at all, and must follow that one interpretation. The constitutional mandate of separation of powers demands it. And the North Carolina Supreme Court's rule in this regard is longstanding and unambiguous[6] itself: "When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded . . . under the guise of construction."[7] The Supreme Court has long warned

> against any inclination toward judicial legislation, and in the words of Justice Ervin, speaking for this Court, "'[j]udges must interpret and apply statutes as they are written.'" [cites omitted]. This Court has long distinguished between liberal construction of statutes and impermissible judicial legislation or the act of a court in "'ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced.'" [cites omitted].[8]

Thus, although judges may strongly disapprove of a statute or strongly doubt its wisdom, if that's what it says, the courts must treat it as though it means what it says. Justice Oliver Wendell Holmes Jr., delineated the judges' limited role vis-a-vis the legislature best, perhaps, when he said:

"[I]f my fellow citizens want to go to Hell, I will help them. It's my job."[9]

There are many examples of cases where judges have followed this principle, i.e., where the judges criticize or declaim the harshness or unfairness of a statute, but then point to the legislature, rather than the courts, as the proper source of relief.[10] But what if the statute in question is not just harsh, ill-advised or, unwise? What if the statute is *insane*? Well, that's different, of course.

North Carolina courts, and almost all other jurisdictions,[11] follow a rule that states: "[W]here a literal interpretation of the language of a statute will *lead to absurd results*, ... the reason and purpose of the law shall control and the strict letter thereof shall be disregarded."[12] Apparently, if it's insane, then it doesn't matter that the statutory language is unambiguous—judges can rewrite the statute.[13]

The first question that comes to mind is, what distinguishes the merely bad or regrettable results of a statute that the courts will decline to correct, from the results of a statute that are absurd that the courts will correct? What does absurd mean? North Carolina case law provides the following definition:

> It is presumed that the Legislature does not intend an absurdity, or that absurd consequences shall flow from its enactments. Such a result will, therefore, be avoided, if the terms of the act admit of it, by a reasonable construction of the statute. By an absurdity, as the term is here used, is meant anything which is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of men of ordinary intelligence and discretion. The presumption against absurd consequences of legislation is, therefore, no more than the presumption that the legislators are gifted with ordinary good sense.[14]

This is similar to the definition of absurdity found in Black's Law Dictionary: "That which is both physically and morally impossible; and that is to be regarded as morally impossible which is contrary to reason, so that it could not be imputed to a man in his right senses. ... obviously and flatly opposed to the manifest truth; inconsistent with the plain dictates of common sense; logically contradictory; nonsensical; ridiculous."[15] Thus, although statutory results that are logical or physical impossibilities are indeed absurd,[16] absurdity is not limited by such formal logic or scientific analysis. If the statutory result, though possible, can be described as unjust,[17] bizarre,[18] unfathomable,[19] unthinkable,[20] ridiculous,[21] an affront to common sense,[22] or an evisceration of statutory intent,[23] then the statutory result may be found to be absurd. With this definition of the absurd results principle, can we predict, then, when the courts will acknowledge the problem with a statute but declare it a matter for the legislature to address, and when the courts will simply rewrite the statute itself without recourse to the legislature based on the problem with the statute implicating absurd results? Probably not.[24] The true test of absurdity may be whether the court can conclude that the legislature's choice of statutory language was a manifestly obvious mistake or oversight[25] that need not await legislative correction because of the particularly significant or egregious consequences resulting from application of the literal language to a specified set of facts. Or as one commentator has put it:

> The term absurd represents a collection of values, best understood when grouped under the headings of reasonableness, rationality, and common sense. Based on those values, courts reject certain outcomes as unacceptable, thereby rejecting the literal interpretations of statutes when they would result in those outcomes. ... [T]hose values represented by the term absurd accordingly act as a pervasive check on statutory law, and are rooted in the rule of law. The absurd result principle is both a surrogate for, and a representative of, rule of law values.[26]

While this definition of the test may be more accurate, and attorneys may be well-advised to argue that an unambiguous statute's harsh or unfair results makes the statute unjust, and therefore absurd, and therefore subject to the court's authority to reinterpret, many cases decline to apply the absurd result principle despite acknowledging the statute's harsh or unjust results. It is not uncommon for cases to conclude: "While the result may be harsh as to defendant..., modification, if any, [of the statute]...is within the province of the Legislature."[27] A harsh result is apparently a necessary but not a sufficient prerequisite for application of the absurd results principle.

Although application of the absurd results principle—what one commentator has called a "dubious, obscure canon of statutory construction"[28]—may be uneven, there is little doubt that the principle itself is legitimate and sound. Even

the prime proponent of textualism,[29] US Supreme Court Justice Antonin Scalia,[30] has accepted and applied the principle to rewrite a federal statute which though unambiguous nevertheless contained an obvious mistake or oversight on the part of Congress. In *Green v. Bock Laundry Machine Co.*,[31] the Supreme Court considered language in Federal Rule of Evidence 609(a) that extended a specific provision of the Rule "to the defendant." The issue before the Court was whether, in addition to a criminal defendant, this provision applied to the defendant in a civil case, and, if so, why it should apply only to the civil defendant and not the civil plaintiff. The lower court had applied the statute as written, concluding that because the language did not restrict its application to criminal trials, it applied to both civil and criminal trials, and because it clearly specified "defendant," it did not extend to civil plaintiffs.[32] The Supreme Court did not disagree with the accuracy of this literal interpretation of the language, but the majority, invoking the absurd results principle, stated that this part of Rule 609(a) "can't mean what it says."[33] It was not that the literal interpretation was a logical impossibility or was internally inconsistent—it was absurd because its results were "unfathomable,"[34] and because it appeared to be a legislative mistake or oversight. After considering the legislative history of the Rule, the majority then rewrote the Rule to apply only to the defendant in a criminal trial. In his concurrence, Justice Scalia agreed in part.

Justice Scalia agreed that the statute, "if interpreted literally," produced an absurd result, and that the task of the Court was "to give some alternative meaning to the word 'defendant' " that would avoid this absurdity. Scalia noted that it was "entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition (civil defendants but not civil plaintiffs receive the benefit of weighing prejudice) was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word 'defendant' in the Rule."[35] Scalia thought it manifest that the word "defendant" could not "have been meant literally."[36]

But Scalia disagreed with the majority that the alternative meaning adopted by the Court should be based on the statute's background and legislative history. He explained his basis for selecting an alternative meaning, as follows:

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest.[37]

Applying this analysis, Justice Scalia determined, as the majority had concluded, that the word "defendant" should be read to mean "criminal defendant." He noted that this interpretation did the "least violence to the text," in that although it added "a qualification that the word 'defendant' does not contain..., [it did] not give the word a meaning ("plaintiff" or "prosecutor") it simply will not bear. The qualification it adds, moreover, is one that could understandably have been omitted by inadvertence."[38]

The absurd results principle, as defined and endorsed by Justice Scalia, does, then, appear to focus on whether the choice of words in the statute that create the problem results, manifestly appear to be a mistake or an oversight. And, of equal importance, Justice Scalia indicates that the alternative meaning, selected when the literal statute is absurd, must also be based on the legislative "intent" to the extent such is ascertainable from—or at least as compatible as possible with—the text of the statute and the "surrounding body of law into

which the provision must be integrated." ■

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Endnotes

1. *See* Crow v. Citicorp Acceptance Co., 319 N.C. 274, 280, 354 S.E.2d 459 (1987): "The defendants also contend that a change from the 'community of interest' standard to the broader 'same issue of law or of fact' standard we apply today amounts to judicial legislation. To the extent that this may be true, it is unavoidable."
2. Joseph A. Grundfest & A. C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 Stanford Law Review 627, 628 (2002).
3. *E.g.*, Peace v. Employment Security Commission of N.C., 349 N.C. 315, 328, 507 S.E.2d 272 (1998)("In the absence of state constitutional or statutory direction, the appropriate burden of proof must be 'judicially allocated on considerations of policy, fairness and common sense.'"). *Compare* In Re Spivey, 345 N.C. 404, 417, 480 S.E.2d 693 (1997), where the Court upheld the trial judge's appointment of a private attorney to prosecute the case for removal of a district attorney (which was not expressly authorized under the applicable statute), not by reading such authorization into the statute but by finding it to be a proper exercise of the trial judge's inherent power.
4. This familiar arsenal of interpretive techniques are more fully described in the case law and in various treatises. *See* Edward H. Levi, *An Introduction to Legal Reasoning* (1948), Antonin Scalia, *A Matter of Interpretation* (1997), at pages 25-29. For articles critical of these canons of statutory construction, *see* Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 806 (1983)("The usual criticism of the canons ... is that for every canon one might bring to bear on a point there is an equal and opposite canon, so that the outcome of the interpretive process depends on the choice between paired opposites — a choice the canons themselves do not illuminate."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405 (1989).
5. See discussion in Edward H. Levi, *An Introduction to Legal Reasoning* (1948), at pages 20-24: "Legislatures and courts are cooperative lawmaking bodies."
6. Well, okay, not entirely unambiguous. The Court has, on the record, undermined the very concept of language being unambiguous: "Few words have so fixed and literal a meaning as to preclude the necessity of examining the circumstances of their context and occasion for use." Sneed v. Board of Education, 299 N.C. 609, 613, 264 S.E.2d 106 (1980).
7. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977), as quoted in State v. Bates, 348 N.C. 29, 34-35, 497 S.E.2d 276 (1998).
8. Johnson v. Southern Industrial Constructors, 347 N.C. 530, 536, 495 S.E.2d 356 (1998).
9. As quoted in Robert Henry, *The Value(s) of Oliver Wendell Holmes, Jr.: Through a Magic Mirror Darkly*, 5 Green Bag 105 (Autumn 2001). See also Holmes-Laski Letters 249 (M. Howe ed. 1953).
10. State v. Gibbons, 303 N.C. 484, 491, 279 S.E.2d 574 (1981)("We do not disagree that it might be wise policy for the legislature to enact a law making mere possession of a firearm during a robbery a crime, but we do not believe this commendable result should be reached by judicial legislation."); Blankenship v. Town and Country Ford, __ N.C.App. __, __ S.E.2d.__ (12-31-2002)("[W]e urge the legislature to review the applicable statutes to again determine whether in each instance, before obtaining entry of default and before obtaining a default judgment, notice to defendant should be required."); Keech v. Hendricks, 141 N.C. App. 649, 654, 540 S.E.2d 71 (2000)("We urge the General Assembly to reexamine the one-year statute of limitations for intentional torts and determine whether it is in the interest of justice to [amend it].".
11. The U.S. Supreme Court has applied the absurd results rule and, as one commentator notes, the highest courts of all 50 states and the District of Columbia have endorsed this principle. Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 Am. U.L. Rev. 127, fn 9, at page 129 (1994).
12. Petty v. Owen, 140 N.C. App. 494, 499, 537 S.E.2d 216, 219 (2000); Mazda Motors v. Southwestern Motors, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979), as quoted in Velez v. Dick Keffer Pontiac-GMC Truck, 144 N.C. App. 589, 593, 548 S.E.2d 560 (2001)(*emphasis added*). See also Town of Hudson v. City of Lenoir, 279 N.C. 156, 162, 181 S.E.2d 443 (1971)("It is well established, however, that the literal language of a statute will be interpreted to avoid an absurd result."); State v. Barksdale, 181 N.C. 621, 107 S.E.2d 505 (1921); 27 Strong's North Carolina Index 4th Statutes § 35 (1994), as cited in Carrington v. Brown, 136 N.C. App. 554, 561, 525 S.E.2d 230 (2000): "Where a literal interpretation of the language of a statute would lead to absurd results and contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded."
13. It may bear repeating that if a statute is ***ambiguous*** the courts should reject the interpretation that leads to absurd results—but that is ***not*** the rule cited above. This rule allows the court to reject ***unambiguous*** language on this ground. Some do argue, however, that the absurdity itself makes the unambiguous language ambiguous. See Carrington v. Brown, 136 N.C. App. 554, 561, 525 S.E.2d 230 (2000): "This result would be impracticable ... [and] [t]his impracticable result leads us to hold that N.C. Gen. Stat. § 126-5(e) is ambiguous and therefore subject to interpretation for legislative intent." For this proposition, this case cites 73 Am. Jur.2d Statutes § 195 (1974): "An ambiguity justifying the interpretation of a statute is not simply that arising from the meaning of particular words, but includes such as may arise in respect to the general scope and meaning of a statute when all its provisions are examined. The courts regard an ambiguity to exist where the legislature has enacted two or more provisions or statutes which appear to be inconsistent. There is also authority for the rule that uncertainty as to the meaning of a statute may arise from the fact that giving a literal interpretation to the words would lead to such unreasonable, unjust, impracticable, or absurd consequences as to compel a conviction that they could not have been intended by the legislature." *See also* Steven J. Johansen , *What Does Ambiguous Mean? Making Sense of Statutory Analysis in Oregon*, 34 Willamette L. Rev. 219, 256-57 (1998)(statutory language that leads to an absurd result cannot be unambiguous, i.e., that it is the absurd result itself that creates the ambiguity—apparentlly because the legislature can never intend an absurd outcome).
14. State v. Scales, 172 N.C. 915, 919, 90 S.E. 439 (1916), quoting with approval *Black on Interpretation of Laws*.
15. *Black's Law Dictionary* (1968), at page 24.
16. For cases dealing with results that are impossible, *see* Underwood v. Howland, Comr. of Motor Vehicles, 274 N.C. 473, 479, 164 S.E.2d 2 (1968)("The interpretation urged by plaintiff would require the impossible and would defeat the reason and purpose of the law."); Comr. of Insurance v. Rate Bureau, 300 N.C. 381, 436, 269 S.E.2d 547 (1980)("[W]e believe the Legislature did not intend a result impossible to obtain in practical terms ...."); In Re Appeal of Bosley, 29 N.C. App. 468, 472, 224 S.E.2d 686 (1976)("[W]e must assume that the legislature recognized this impossibility and did not intend an unjust or absurd result.").
17. For cases describing an absurd result as an unjust result, *see* King v. Baldwin, 276 N.C. 316, 325, 172 S.E.2d 12, 18 (1970)("It is presumed that the legislature acted in accordance with reason and common sense and that it did not intend an unjust or absurd result . . . ."); State v. Jones, 353 N.C. 159, 170, 538 S.E.2d 917 (2000)("When interpreting statutes, this Court presumes that the legislature did not intend an unjust result."); Harris v. Ntionwide Mut. Ins. Co., 332 N.C. 184, 193, 420 S.E.2d 124 (1992)("Clearly, the legislature 'did not intend [such] an unjust or absurd result.'"); State v. Bidgood, 144 N.C. App. 267, 276, 550 S.E.2d 198 (2001)("[I]t would be unjust to permit an enhanced sentence to stand where it is made to appear that the Prior Record Level has been erroneously calculated due to a subsequent reversal of a conviction on appeal, and we do not believe the General Assembly intended such a result.").
18. For cases describing an absurd result as a bizarre result, *see* Commissioner of Insurance v. Automobile Rate Office, 294 N.C. 60, 68, 241 S.E.2d 324 (1978)("In constru-

ing statutes courts normally adopt an interpretation which will avoid absurd or *bizarre* consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results.")(*emphasis added*); *see also* concurrence of Justice Scalia in Green v. Bock Laundry Mach. Co., 490 U.S. 504, 576, 109 S. Ct. 1981; 104 L. Ed. 2d 557 (1989)(discussing statutory language that results in "a *bizarre* disposition").

19. For cases describing an absurd result as an unfathomable result, *see* Charns v. Brown, 129 N.C. App. 635, 639, 502 S.E.2d 7 (1998)("We find it *unfathomable* that a superior court judge would be powerless to dismiss an action for lack of personal jurisdiction and insufficiency of process simply because another superior court judge had entered an ex parte order prior to the commencement of the action. Such an *absurd result* would be contrary to statutory and constitutional jurisdictional requirements.")(*emphases added*).

20. For cases describing an absurd result as an unthinkable result, *see* Concurrence of Justice Scalia in Green v. Bock Laundry Mach. Co., 490 U.S. 504, 575, 109 S. Ct. 1981; 104 L. Ed. 2d 557 (1989)(discussing statutory language that results in "what seems to us an *unthinkable* disposition").

21. For cases describing an absurd result as a ridiculous results, *see* State v. Spencer, 276 N.C. 535, 547, 173 S.E.2d 765 (1970)("Even so, an interpretation which leads to a strained construction or to a ridiculous result is not required and will not be adopted."); Montgomer v. Hinton, 45 N.C. App. 271, 275, 262 S.E.2d 697 (1980)("This would obviously be a ridiculous result and just as obviously not the intent of the Legislature."); State v. Cole, 19 N.C. App. 611, 614, 199 S.E.2d 748 (1973)("[C]ourts will not adopt an interpretation which will lead to a strained construction of a statute or to a ridiculous result ....").

22. For cases describing an absurd result as a violation of common sense, *see* State v. Raines, 319 N.C. 258, 263, 354 S.E.2d 486 (1987)(quoting with approval a U.S. Supreme Court case: "The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense ...."); Darby v. Darby, 135 N.C. App. 627, 628, 521 S.E.2d 741 (1999)("[T]he courts in reading our statutes must *import common sense* to the meaning of the legislature's words to avoid an absurdity.")(*emphasis added*).

23. For cases describing an absurd result as an evisceration of statutory intent, *see* Bledsole v. Johnson, __ N.C. __, __ S.E.2d __ (2003)(Adopting a non-literal interpretation of Arbitration Rule 3(p) because "[t]o hold otherwise would be to *eviscerate* the nonbinding nature of the arbitration proceeding and violate the statutory intent.")(*emphasis added*); Brisson v. Santoriello, 351 N.C. 589, 597, 528 S.E.2d 568 (2000)("The literal interpretation of such a comprehensive and unlimited statement could essentially *eviscerate* the legislature's intent in creating the long-standing benefit of a Rule 41(a)(1) voluntary dismissal one-year extension.")(*emphasis added*); N.C. Bd. of Exam. for Speech v. Board of Educ., 122 N.C. App. 15, 20, 468 S.E.2d 826 (1996)("Were we to read the language of [the statutue] ... as preeminent over the provisions of the Licensure Act, we would eviscerate the purpose of that Act [and so] ... undo an act of our legislature. Such an action exceeds the scope of our function, which is to interpret, not repeal, statutes.")..

24. E.g., State ex rel. Utilities Com. v. Cellular Assn., 111 N.C. App. 801, 808, 433 S.E.2d 785 (1993)("Although we agree with petitioners that appellant's construction produces an absurd result, we cannot ignore the express language of the statute."); for articles critical of some courts' consistency in applying the absurd results principle *see* Francis D. Doucette, *Literal Interpretation and "Absurd" Results: Commonwealth v. Wallace and "Trial on the Merits,"* 36 New Eng.L. Rev. 373 (2002); Michael S. Fried, *A Theory of Scrivener's Error*, 52 Rutgers L. Rev. 589 (2000).

25. The test, at its most basic, is that the court must be able to say, in complete seriousness: "Surely this is not what the General Assembly intended," as it did in State v. White, 127 N.C. App. 565, 571, 492 S.E.2d 48 (1997). *Compare* Hunt v. Reinsurance Facility, 302 N.C. 274, 293, 275 S.E.2d 399 (1981)("We cannot believe that the Legislature would have expressed its intention that the Facility operate on a break-even basis and provided an apparent means for the Facility to do so and, in the same breath, made such a result impossible to achieve with the 6% cap. Instead, we find it infinitely more logical to presume that the Legislature acted in accordance with reason and common sense and did not act to produce an unjust and absurd result."); Insurance Company v. McDonald, 277 N.C. 275, 286, 177 S.E.2d 291 (1970)(In interpreting a constitutional amendment, the Court stated, "Manifestly, neither the General Assembly nor the electorate intended or contemplated such an absurd result.").

26. Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 Am. U.L. Rev. 127, 133-34 (1994).

27. Estrada v. Burnham, 74 N.C. App. 557, 560, 328 S.E.2d 611 (1985). *See also* In Re Estate of Morris, 123 N.C. App. 264, 267, 472 S.E.2d 786 (1996)(Petitioner argued unfairness and court admitted that "there may be some merit to this argument," but nevertheless concluded that "[w]hen, as here, the statutory language is clear and unambiguous, there is no room for judicial construction and the court must give the statute its plain meaning without superimposing provisions or limitations not contained therein."); Hayes v. Dixon, 83 N.C. App. 52, 54, 348 S.E.2d 609 (1986)("The statute mandates what at times may create a harsh result. It is not, however, for the courts but rather for the legislature to effect any change."); Palmer v. Wilkins, Com'r of Motor Vehicles, 73 N.C. App. 171, 173, 325 S.E.2d 697 (1985)(court concluded that the General Assembly simply had not provided for appeals in the matter, "harsh as the result may seem."); Boyce v. Boyce, 60 N.C. App. 685, 691, 299 S.E.2d 805 (1983)("While this result may appear unjust to the wife, ... [r]elief ... must come, if at all, through the Legislature."); Peeler v. Highway Comm., 48 N.C. App. 1, 7, 269 S.E.2d 153 (1980)("Our holding in this case produces a harsh result. However, ... [i]t is the duty of the courts to declare the law as written, and not to make it."). But compare the following cases where a mildly unfair result was found sufficiently absurd to justify rewriting the statute: Darby v. Darby, 135 N.C. App. 627, 521 S.E.2d 741 (1999)(statute literally allowed plaintiff-wife to accept service of her own complaint on behalf of her defendant-husband); Best v. Wayne Mem'l Hosp., Inc., 147 N.C. App. 628, 556 S.E.2d 629 (2001)(statute literally authorized action only by superior court judges resident in the district and not by non-resident judges holding the courts of the district by assignment); In Re Brake, 347 N.C. 339, 493 S.E.2d 418 (1997)(statute literally denied court authority to permit DSS to discontinue efforts to reconcile the juvenile and his mother).

28. Francis D. Doucette, *Literal Interpretation and "Absurd" Results: Commonwealth v. Wallace and "Trial on the Merits,"* 36 New Eng.L. Rev. 373, at 379 (2002).

29. "The text is the law, and it is the text that must be observed. ... Textualism should not be confused with so-called strict constructionism .... I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." Antonin Scalia, *A Matter of Interpretation* (1997), at pages 22-23.

30. Justice Scalia has been described as the Supreme Court's "strongest proponent of precision in statutory construction." Joseph A. Grundfest & A. C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 Stanford Law Review 627, 630 (2002).

31. 490 U.S. 504, 109 S. Ct. 1981; 104 L. Ed. 2d 557 (1989).

32. 845 F.2d 1011 (Decision without Published Opinion, 1988); see discussion of lower court decision in Green, 490 U.S. 504, 506-508, 109 S. Ct. 1981; 104 L. Ed. 2d 557 (1989).

33. Green v. Bock Laundry Machine Co., 490 U.S. 504, 511, 109 S. Ct. 1981; 104 L. Ed. 2d 557 (1989).

34. Id., at 510.

35. Id., at 527.

36. Id., at 528.

37. Id.

38. Id., at 529.

Bruno DeMolli, staff auditor for the North Carolina State Bar, will speak at a continuing education program for lawyers, sponsored by the North Carolina Bar Foundation, the educational and charitable arm of the Bar Association.

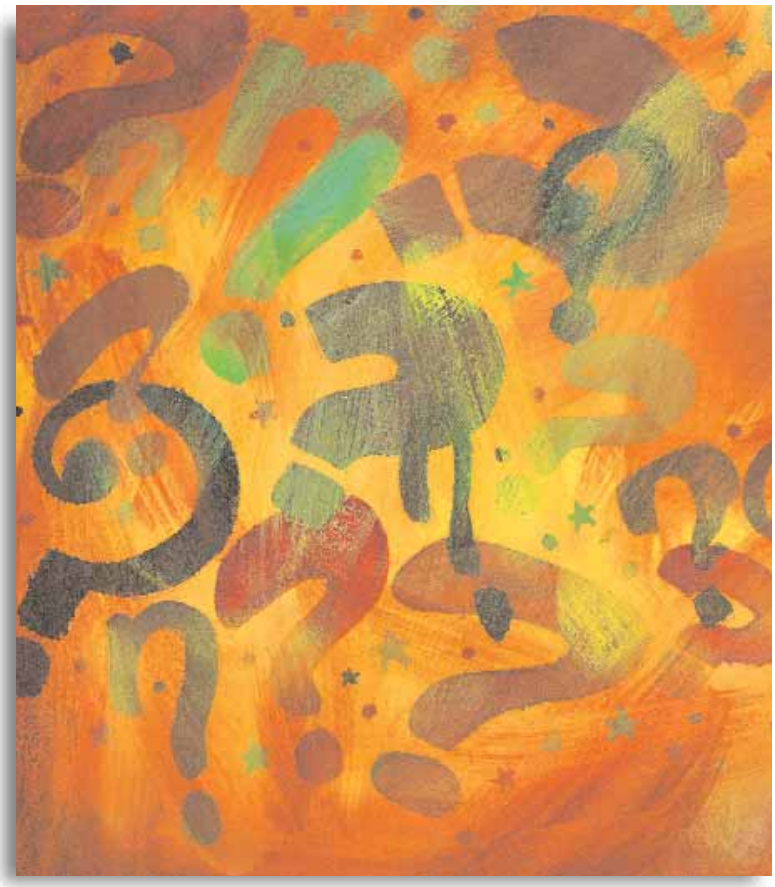
The program, titled "Venturing into the Real World," will be held at 10:15 AM, September 17, 2003, at the NC Bar Center in Cary, NC.

To register, call Amy Page, assistant director of CLE, at 800.228.3402 or e-mail CLE@ncbar.org.

How Can Criminal Lawyers Represent Bad People? Good Question.

By Louis C. Allen III

"A criminal lawyer is a person who loves other people more than he loves himself; who loves freedom more than the comfort of security; who is unafraid to fight for unpopular ideas and ideals; who is willing to stand next to the uneducated, the poor, the dirty, the suffering, and even the mean, greedy, and violent, and advocate for them not just in words, but in spirit; who is willing to stand up to the arrogant, mean-spirited, and uncaring with courage, strength, and patience, and not be intimidated; who bleeds a little when someone else goes to jail; who dies a little when tolerance and freedom suffer; and most important, a person who never loses hope that love and forgiveness will win in the end."



Comments of Joe Cheshire introducing Wade Smith

I wasn't there when Joe gave this introduction. I don't even know the occasion that inspired it. Knowing Joe, he could have been introducing Wade to his barber. And knowing Wade, he would have been just as honored as if he were meeting a head of state, or even Dean Smith. Those two are legendary for their consistent inability to recognize clear distinctions in the value of different humans.

At any rate, the quote was brought to my attention, and I have made it my own. When I speak to groups of lawyers, I will frequently open or close with those remarks. It never fails to bring a hushed appreciation for the sheer eloquence of the phrasing and admiration for the fabled lawyers mentioned.

As I talked to a law school class about criminal law a few months ago, I thought I was imparting the same theme. Then, after an hour of what I thought was brilliant enlightenment, the hand goes up and the question comes; the same question I have been asked over and over by people who have just heard Joe's crystal clear definition.

What is it that we are not getting? Why is this so hard to understand....or accept? It could be because it is the most radical thing to ever escape a lawyer's lips.

The next day, I wrote that student the following answer.

Mr. Johnson,

You acknowledged that, perhaps, I was telling the truth when I described a man who struggled mightily with his addiction, but worked even harder to hold two jobs, care for his sick wife, and support his children. Then the crisis came and he was threatened with the power being cut off and possible eviction from his house. In desperation, he walked into a bank and handed them a simple note saying, "This is a robbery." You acknowledged that I had painted a picture of a man whom the system might treat more harshly than he deserved.

But with the keen eye of a lawyer-to-be, who knows when he is being manipulated, you zinged me with the cross-exam that would expose the flaw in my theory that our justice system is too harsh and inflexible. Your question was something like this, I recall: "For every one of these pitiful cases you can come up with, there are three other defendants who have criminal records as long as your arm. How do you stand up for those scum-bags?"

I don't remember exactly how I answered, but I feel certain it was unsatisfactory. If not for you, it certainly was for me. I know I came back immediately and passionately, because you had tread upon a live nerve ending. But I don't think I communicated well. I don't think you, or anyone else, understood what I believe. I imagine you recognized my passion but I doubt you appreciated the belief system behind that passion. That was my fault. You would think I would be able to explain myself since that question, with minor variations, is the single most-asked question I encounter in my life.

It is a question that belies some of the either/or, good/evil, simplistic thinking I had been ranting about earlier in the class. I am not trying to be insulting. Some of the smartest, best-educated people I know have asked that question; people thought to have the wisdom which sometimes come with age. I have seen it in the eyes and heard it hidden in the comments of some of the highest jurists in this land. I am sure I asked that question myself at some point. You and I share the common characteristics of the ones who usually ask the question. We are white, we are not poor, and we grew up with American television. We work hard on many responsible things and we deserve to be lazy thinkers about tangential matters from time to time. So I don't think it was a stupid question, nor do I think less of you for asking it. Far better to ask it than to think it silently. I thank you for giving me the chance to answer it. Sorry I blew my opportunity.

All the way home on I-40, like the loser in an insult contest, I kept coming up with the line I wish I had said. I don't deserve a do-over, but I want one anyway. You may not understand or appreciate this either, but at least I will have given it my best shot. So here goes.

Wait. I must preface this further. About seven or eight years ago I wrote a short essay on this same question, titled *Why I Do What I Do*. It sought to show reasonable minds that representation of every criminal defendant was necessary to provide a check on law enforcement and to make our system of justice work. It was concise, moderately clever, and didn't make anyone very uncomfortable. Their response was generally a grudging, "Well, I guess that makes sense." The late Dean Taylor would occasionally hand out copies of that essay to first year law students at Wake Forest to help them become a little more receptive to a criminal law class that might have otherwise seemed like a waste of time and energy. The essay also reflected about all I understood and could articulate at the time.

In the last seven years, I have come to understand much more. I am not at all sure I can articulate it, but you have motivated me to try. My father is a 77-year old, retired lawyer who is both well-read and thoughtful. Upon reading a draft of this effort, he opined that he liked my old essay better. It was easier to understand. Frustrated, I said of course it was easier to understand, you old fart. Back then, I was writing a black and white answer so anybody could understand it and nobody could argue about it. This one is both much harder and much more important. It requires a self-awareness that we all resist. It requires seeing infinite

"We choose to define personal drug use as evil. Yet a 'deadly sin' such as greed or pride, we do not criminalize. Therefore we greedy, proud people can believe we are not 'evil' like the guy smoking a joint at the end of a long day of picking up our garbage, the refuse of our gluttony."

shades of gray. It requires a willingness to admit weaknesses in ourselves and in our foundational systems. We have to acknowledge that life *is* unfair, and no amount of organization or accessible representation can change that. It makes me admit that I don't do what I do because it will make this world more "fair." But this is really far more important. It is worth a little effort. And somebody may be ready to hear it. It certainly helps me to try to say it. So here goes....again.

There are not good people and bad people on this earth. There are only people who are both good and bad. Read Socrates or Shakespeare or Carl Jung or those Bible guys and you will know that the evil within us all has been a theme throughout time. Yet, if we reduce life to a set of codifiable rules, we can objectively determine that all humans fall into one of two groups: the ones who follow the rules, and the ones who have broken rules. Then we can label the rule-breakers as "bad" or "evil." We don't do this so much because we dislike the rule-breakers. We do it because it lets us believe the corollary: "The rule-followers (who also happen to be the rule-makers for the most part) must, therefore, be "good." This allows us to engage in the actual life's work of most of humanity: Denying our dark side.

Some incredibly smart people, Pulitzer Prize-winning anthropologist Ernest Becker for one, have advanced the theory that we develop our most powerful denial mechanism at a very early age when we first become aware of the concept of death: both ours and that of our parents/caretakers. All other neuroses and psychoses spring from the lengths to which our minds have gone to shield us from this most terrifying fear. Our fear of being unworthy comes directly from those earliest childish defenses. As children we are programmed to believe that being "good" is the only way to avoid the sting of death. Just because we learn to think more critically as we grow doesn't mean we cast aside our early messages. In fact, those have the greatest staying power and the wily craft to hide in our subconscious. So, even as adults, we will go to great lengths to convince ourselves that we *are* good. The most time-honored psychological technique for convincing ourselves is to "project" our evil or our dark side onto someone else. While we have refined the technique somewhat since the human sacrifice days, we are not yet at the point of recognizing it when we do it. If your reaction to this theory is "Bullshit," then I welcome you into the global fellowship of the culture of denial.

To modernize the human sacrifice, we have systematized our mechanism for assigning good and evil. But, as I mentioned before, you can see the heavy hand of the rulemakers as they select the criteria for judging. As fate would have it, I watched *Les Miserables* for the first time last night. Our hero, Jean Valjean, had been branded a convict and evil for life for stealing a loaf of bread when he was a starving child. His nemesis, the Inspector, had never done anything "wrong" in his wretched life. Yet he was filled with bile and hatred. The folly of determining good and bad solely by the letter of the law was made clear. We read the book and watch the movie, but we somehow don't think Hugo was talking about us. We believe, because there may be differences in degree, our current system has no relation to the France of another century. In fact, instead of recognizing ourselves in the inspector, we feel noble at how far our society has come since then. We see *Les Miserables* as a period piece, not a timeless warning about our very nature. We are convinced the present, United States of America definition of evil is true and accurate.

Yet, are we any less selective in our rationalizing than in the past? We choose to define personal drug use as evil. Yet a "deadly sin" such as greed or pride, we do not criminalize. Therefore we greedy, proud people can believe we are not "evil" like the guy smoking a joint at the end of a long day of picking up our garbage, the refuse of our gluttony. And so the system is developed to protect the consciences of the guilty deniers, you and me.

The lengths we have gone to make this system quantifiable are obscene. We started with ten rules about 4,000 years ago. When my grandfather practiced law, those rules had expanded so they could barely fit in one large book....with very small print. In the last 50 years, we have not been able to define that which separates good from bad in an entire bookcase of very small print. But that doesn't stop us from making more rules. Yet somehow we are able to speak of the Scribes and the Pharisees—those anal-retentive legalists—with scorn and pity, and without the slightest sense of irony. That, my friend, is denial. The impulse to deny must be the second strongest force motivating humanity. Atheists could effectively argue it is the strongest. I tend to believe there is one force that is stronger. That is the only reason I have hope for me and the world.

But you are still not convinced. It is so obvious there is a difference between you and the scum-bags. Any reasonable person should be willing to admit there is a point on the spectrum of humanity where the mostly good should be able to separate themselves from the mostly bad, and not feel guilty about anything we do to those who fall below the cut-off. That certainly must be the belief that allows us to keep saying we have the best system of justice in the world.

You might argue that the alternative belief system I imply is so unquantifiable, so undefinable, that it would render the operation of a civilized world impossible. For that I have no answer. I have an idea, but to propose it would sound so radical as to marginalize me even further. It would guarantee that the words I have written thus far would be discarded before they had a chance to sneak past your denial defenses and be confronted by your highly-evolved and logical brain, which would have to admit at least enough to make you slightly uncomfortable.

I don't like being uncomfortable. I was always a little uncomfortable with my desire to punish people, but I soldiered on for a good long time, happy to see bad people getting their just desserts. As I said, it is easier to keep those denial defenses fortified when you are white, economically secure, and have grown up watching Walt Disney, John Wayne, and Bruce Willis kick some serious evil ass, before living happily ever after. But somewhere beneath my conscious level, a cognitive dissonance festered, suggesting that there was something very wrong with that picture.

As unfinished and unsophisticated as my belief system is, my poor little mind still needed some way to visualize the range of human behavior. I needed a framework to hang it on so I could at least talk about it with someone else. So here is my working model. You don't have to accept any of the numbers. They are highly subjective, if not arbitrary. The numbers aren't important.

You do, however, have to accept the proposition that good and evil exist within each one of us. If you can't accept that, you may stop reading now, though I would encourage you to travel as often as possible on the road to Damascus. I have heard that is a place where light bulbs are known to come on.

My road led me to sit down and come to know some of these "evil" persons through actual interaction, not just a written record of their lives sometimes known as a rap sheet or a pre-sentence report. It was not a short road. I was on it more than 15 years before the dim bulb in my head achieved sufficient wattage for me to begin to realize that the difference between me and them was not quite what I had believed, and certainly not what I wanted to believe. Yet, when I did come to believe it, the world did not become darker. It in fact became far brighter and more colorful, and I realized that my vaunted Maginot Line of denial defenses was penetrable. Not only were my defenses ultimately ineffective, they were toxic, but in a slow, undetected, cancerous sort of way. I came to see that those defenses allowed me to disrespect and de-value many human beings. They allowed me to simultaneously support the concepts of retribution and unconditional love, without acknowledging that they are mutually exclusive. It was a cancer in my soul.

So how could I explain my new vision? I remembered the bell curve that was so much a part of my educational experience, from explaining laws of probability to determining why I must get a C in my Secured Transactions class in law school. I encourage you to imagine that the human mix of evil and good can be placed on a bell curve scale of 1 to 100, with 1 being absolute evil and 100 being absolute good. Each of us, when graded by some all-knowing professor in the sky, would fall at some point on that curve. Let us assume that Saddam would rate about a 5 on the scale. (You pick your favorite villain.....Hitler, Bobby Knight, whomever). Then let us assume that your favorite hero (e.g., Mother Teresa, Gandhi, Andy Griffith) would be a 95. But the psychopaths and the saints are at the skinny ends of the curve. There ain't many of them. I would suggest that George W. Bush and Bill Clinton are within a couple of points either way of the mid-point; you choose which one is over 50 and which is under. The vast majority of us are within 10 points of the mid-point. I have yet to meet a soul I would rank over 70, and I have met a lot of "good" people (lawyers, doctors, ministers, and the like). I have yet to meet a soul I would rank under 30, and I have met some pretty mean people (drug dealers, murderers, addicts, lawyers, doctors, ministers, and the like).

But who am I to rank anyone? How subjective is that? What are my criteria? If it were important to know the correct number, I could spend my life coming up with a set of standards. Of course it would still be subjective, if I chose to place a high negative value on whether you have stolen a bicycle

and a low positive value for the time you sat with your neighbor in the hospital while her son was dying of a gunshot wound. The fact that I have more criteria doesn't make it any less subjective, though it may allow me to believe that I am being a fair judge. There's that denial thing again.

Perhaps, in some cosmic courtroom, there is a number that could be assigned to each of us. But I suggest to you that the assignment of that number is not the most important determination for our lives. That number would only be correct for the present moment, and would become immediately inoperative. Five short minutes after I helped the old lady across the street, I flipped off the geezer who was driving 45 miles an hour in the passing lane. In an instant, I slipped two points on the evil/good continuum. I was good before, and now, suddenly I am bad. OK, maybe I'm not bad, but I did move in that direction. The addict that struggled for five years to hold on to both his jobs, not resorting to crime to support his habit, did not go from a 50 to a 30 the moment he gave in to desperate futility and robbed the bank, but he did move in that direction.

I don't always flip off slow-driving geezers. I hope never to do it again. There is hope for me. The most important thing in my life is not where I am at any given moment. *It is the direction I am heading.* I am far more moved by the person on the back side of the bell curve who is striving to climb the hill of the curve, than the person sitting fat and happy with his rating of 65. The more I sit and talk with the "scum-bags," the more I realize that some of them are truly trying, at least at that moment. Sometimes I can actually see that the simple fact of my sitting and talking to them can cause them to try a little harder. The unexpected miracle is that it helps me to try a little harder, too. It helps me to stop and see which way I happen to be heading at that particular moment in time.

What about the ones who aren't trying? If I believed they couldn't, or never would try, perhaps I would join the ranks of those ready to pull the switch. I simply haven't met that person yet. If you think you have, I respectfully doubt it. You may have met his rap sheet, you may have met his own shadow denial, but you haven't met him.

So I suggest that each person's measure of success is not his score, it is whether he is moving forward on the bell curve at any particular point. Success is then never something you have *done*, upon which you can reflect and be proud and look down on others, but what you are *doing*. This means that wherever you are, no matter how good or miserable your circumstances, the next moment is the most important in your life. You have a choice to move forward or backward, and what you did yesterday will not determine that choice. It may make the choice easier or more difficult, but it always remains a present choice.

So is a criminal justice system successful if all it does is rank, albeit subjectively, and sort humanity? Does that not deny the hope of change and place obstacles before those whose choices were the hardest already? Of course it does. And it has the extra denial value we already mentioned about making us believe that you and I have higher scores and that those scores are what really count.

Surely I can't be suggesting we don't need a criminal justice system. That would be so unrealistic and downright insane as to render everything I have said meaningless. You would reach your choke point, even if you were beginning to think there was something in what I have said that resonated with a still, small voice in your soul.

So I won't suggest that...now; maybe in another thousand years.

What I would suggest, and hope with all my being, is that we as a society can stop believing we are doing all this because it is absolutely right, and ordained by either God or evolution. I want us to admit that we are trying to do something to bring some order and security to a scary and unstable world because we are afraid of what might happen if people like us are not in control. *We are more afraid than we are right*. I want us to realize that the best of us is not nearly as different from the worst of us as we would like to believe.

Consciousness is better than denial, though not always as comfortable.

This might not create Heaven on Earth. But, perhaps it might make us a little less arrogant in the way we rank our fellow man and a little more compassionate in how we punish him. That wouldn't be Heaven, but at least it would be moving in that direction...and that's all that really counts in the here and now.

That is how I wish I had responded to the law student.....and every other person who simply doesn't get it. But what I think is enlightening may seem more like blathering. All this consciousness and denial stuff won't make many radar screens.

So disregard everything in the middle, and go back to Joe's introduction of Wade. Why is it the most radical thing ever uttered by a lawyer? What two words are conspicuously absent from Joe's definition?

"Justice" and "Fairness."

What word is rarely heard in any facet of the legal system, but is used four times by Joe?.....You find it.

Now, what don't you understand? ■

Louis Allen is the federal public defender in the Middle District and a member of the Guilford County Bar.

The American Inns of Court Movement

By Robert K. Walsh

Over the past several decades, no subject has received more attention at bar association meetings at all levels than "professionalism." Teaching and mentoring law students and young lawyers in the highest values and customs of the legal profession is one of the prime challenges posed to law schools and the organized bar. Over the last two decades, one of the greatest contributions to meeting this challenge has been made by the American Inns of Court movement.

In 1977, then Chief Justice Warren Burger went to England with a delegation of American lawyers and judges as part of a exchange program. There they observed the English Inns of Court system. English lawyers are either barristers (basically trial lawyers) or solicitors (basically office lawyers). An English barrister must belong to one of the four Inns of Court in London: Inner Temple, Middle Temple, Gray's Inn, or Lincoln's Inn. The Inns of Court, and not the English judiciary, admit people to become practicing barristers. The Inns of Court have educational requirements, including vocational courses, apprenticeship programs, and the requirement of a set number of formal dinners with fellow members in the hall of the Inn. Indeed, there are additional dining requirements for barristers in the Inn for members akin to American continuing legal education requirements.

Chief Justice Burger was very impressed with the civility and high professional standards he observed on his two-week exchange in England. Upon his return to the United States, he initiated a pilot program which resulted in the establishment of the first American Inn of Court in 1980 at the law school of Brigham Young University in Provo, Utah. By 1985, a dozen Inns of Court had been formed around the country and their leaders felt the need for a national umbrella organization. That year, the American Inns of Court Foundation was chartered at Washington, DC, as a non-profit, tax exempt corporation. This foundation serves as the hub for communications among the nation's Inns, aids the establishment of new Inns, and provides support for services and programs for Inns in a way that would be beyond the resources of autonomous small local groups. Today, there are 325 active Inns of Court with over 24,000 active members and twice as many alumni members. About two-thirds of America's law schools have some association with a local Inn of Court.

I first became involved in the American Inns of Court movement in Little Rock, Arkansas, in 1988. I was a litigator in a law firm there, having previously served as dean of the University of Arkansas at Little Rock School of Law. I had been president of the county bar association four years previously. The then current president of this bar was another partner in our firm. Under the auspices of the county bar and the law school, we founded the 43rd Inn of Court in the United States, the Judge William R. Overton Inn.

When I came to North Carolina to be dean at Wake Forest in 1989, there were no chapters of the American Inns of Court in the state. I immediately went to work with five great Wake Forest lawyers (Judge Carlton Tilley, Grady Barnhill, Bill Davis, Dan Fouts,[1] and Fred Crumpler) to establish a chapter at the Wake Forest School of Law. The Chief Justice Joseph Branch Inn of Court began operation the next year,

1990, the same year that the Chief Justice William H. Bobbitt Inn of Court began operation in Charlotte. The Branch and Bobbitt Inns were the first Inns in North Carolina. The Branch Inn was Inn number 117 and the first associated with a law school in the state.

Initially, our Inn had 60 members, consisting of about 24 masters of the bench, 24 barristers, and 16 Pupils. The masters of the bench are judges and experienced trial lawyers who have demonstrated superior litigation ability and professionalism, and are really the faculty of the Inn. The barristers are younger attorneys with a few years of litigation experience. In our Inn, we initially graduated barristers after three years of being an Inn member and now we turn over our barrister classes every two years to allow for more young lawyers to participate in our Inn. The pupil members of the Inn are Wake Forest law students.

The popularity of our Inn of Court has grown greatly in the 13 years since 1990. We have expanded each member category of the Inn, so that today there are approximately 150 Inn members, 50 in each of the three categories. From the beginning, the Branch Inn has involved lawyers in both Forsyth and Guilford Counties. The interest in being a member of the Inn outstripped our ability to expand in size and keep our collegial character, and in 1996, the Guilford County chapter of the American Inns of Court was chartered as Inn number 278 under the great leadership of Steve Crihfield. Steve has volunteered to write an article for the next *North Carolina Bar Journal* focusing particularly on how to form an Inn. On this subject, I will only say that the first thing to do in forming an Inn is to get the agreement of judges to be in the initial masters of the bench class. If the judges agree, your subsequent recruitment will be far easier.

Every year we have six meetings of our Inn. The meetings begin in the early evening for a demonstration of particular facets of the litigation process, almost always involving ethical and professionalism issues. After the demonstration, we have a reception and dinner to allow members of the Inn to discuss the technique, ethics, and professionalism issues raised by the presentation. We have a custom during dinner at our Inn which we have for years called "the Rule." We have tables for six at dinner and ask one judge and one lawyer master of the bench to be at each table with two barristers and two pupils. We also ask that people concentrate on being at a table with different members at each of the six meetings and not people whom they see

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regularly.

After the first couple of years of the operation of our Inn, one of our five founding Board of Directors members confided in me that when I first proposed the idea to him, he thought "Gee, just what I need, another trial lawyer organization." He indicated that he agreed to work on the project as a favor to me and to Wake Forest. After this revelation, however, he then stated that being a master of the bench of our Inn was one of the most worthwhile professional activities in which he had ever engaged. It allowed him to participate as a teacher and mentor to a great number of young lawyers and law students outside of his own law firm. He was able to pass down the values and customs of the profession that he had learned since he began practice in a smaller and more intimate bar over 40 years ago.

In addition to mentoring in ethics, professionalism, and the highest customs of the legal profession, the establishment of an American Inn of Court chapter in an area has one other great professionalism benefit: collegiality at the bar. In *The Taming of the Shrew*, Shakespeare said: "Do as adversaries do in law, strive mightily, but eat and drink as friends." One great advantage that our British counterparts enjoy is that their trial lawyers all practice in one jurisdiction in one of four Inns in the city of London in a country with most of its population within 250 miles of London and a very much smaller bar. One great effect of our two-county Inn of Court has been that it has greatly contributed to lawyers on different sides of the bar getting to know each other better in an atmosphere that makes for a cooperatively functioning bench and bar, avoiding the anonymity that helps breed incivility.

I was a litigator in Los Angeles in the late 1960's and early 1970's. I later was a trial lawyer in Little Rock during the 1980's. Most lawyers who have practiced for approximately the same amount of time would say that collegiality and civility at the bar were greater in the earlier time. That was not my experience, because I practiced in a smaller community in the later time. Even though Little Rock had about 1,000 lawyers, those who did the same type of civil litigation that I did were a smaller group. Lawyers on the other side of a case would know that they would probably be seeing you or your partners in future litigation and also got to know you as people. It is harder to be uncivil to someone you really know.

I have been an evangelist for the American Inns of Court movement since I was first introduced to it in Little Rock in 1988. In the last year, I have been ordained as a more formal evangelist by being elected as a member of the Board of Trustees of the American Inns of Court Foundation. I have made it my mission to both expand American Inns of Courts to the approximately one-third of America's law schools that have no associated Inn and to try to expand the Inns in my home state of North Carolina. The American Inns of Court Foundation has a wonderful staff who are devoted to helping new Inns get up and running. I hope that many of you will consider starting new Inns in your area and will associate with the American Inns of Court Foundation. I would personally be happy to help, if you contact me. I will also ask the national foundation staff to help. You can make a difference to the professionalism of the next generation of lawyers.

Robert K. Walsh has been dean of Wake Forest University School of law since 1989. Since coming to North Carolina, he has chaired the North Carolina Bar Association's Bench, Bar and Law School Liaison Committee for two years and was a vice president of the North Carolina Bar Association and a member of its Board of Governors. He also has been a member of the North Carolina Chief Justice's Professionalism Commission since its founding in 1999.

Endnote

1. As I was writing this article, Dan Fouts passed away suddenly. He had been president of our Inn for the past several years, taking that job seriously and doing it brilliantly. He was a wonderful role model of professionalism for our law student and young lawyer members.

The Redemption of Hamish O'Halloran

BY DAVID R. TANIS

No one really knew where he came from. When anybody asked he would just say he was from here. He was old enough that none of the other attorneys remembered when he wasn't a fixture in the old courthouse that occupied the center of the sleepy old southern town of Pine Ridge.

Of course, Hamish O'Halloran wasn't the kind of antebellum name that could be related to the old solid aristocracy and other land owning families in the area. Nevertheless, he had a queer kind of pedigree for just having been there so long.

He was a tall, gaunt man in his sixties, somewhat Lincolnesque. His hair was thinning, but he wore it in a scraggly pony tail the color of dish water. He usually sported a rumpled old suit which seemed to be one of two that he alternated regularly without bothering to ever send to the cleaners. He wore nondescript ties and a white shirt that never seemed quite white and was usually frayed at the collar. His lack of sartorial splendor was just one of the many factors that did not endear the old barrister to the other members of the bar.

He held himself aloof, never bothering to engage in the legal prattle or courthouse gossip that so delighted the other members of the bar. When he would find himself in the little lounge that was the hangout of the other district court denizens he sipped his coffee diffidently, did the unchallenging cross word puzzle, and casually perused the local newspaper, spending most of his time on the obituaries and trivia that was the local news. He was polite enough, responding with a nod or a good morning, to the kindly few that deigned to acknowledge him, but he didn't appear to have what you would call friends among members of the bar.

Behind his back, though, he was often the subject of stories and myths, often floated by one of the lawyers whose cousin or family friend claimed to be in the know. Sometimes it was rumored that he was a burnt-out hippie, a stoner whose best days had been spent in the mud at Woodstock. Some said he had been a draft dodger and had anonymously reinfiltrated back to the state from Canada, where he had fled to avoid service in the military during the Viet Nam War. Others said that he had been a soldier and was burnt out after having seen more than his share of death and degradation in Viet Nam. No one really seemed to know for sure.

He lived alone in a small, old, white clapboard house on the edge of town. It wasn't particularly run down but wasn't what you would call well kept either. It had a certain Victorian charm with its carpenter Gothic tracery. There were a couple of mutts that roamed his fenced-in back yard, and one rather vicious looking animal that he kept chained to a tree stump in the middle of his back yard. No one knew anybody who claimed to be related to him or even be his friend. And none of the other lawyers had ever been invited into his house. But it was his office, at least the front room was, for he had a simple old sign that said "H. O'Halloran, Lawyer," inauspiciously nailed next to the front door.

He was a peculiar old bird, was Hamish O'Halloran. His law practice consisted almost entirely of court-appointed cases, and most of those were misdemeanors. The judges just didn't feel right in appointing him to anything more complex than a misdemeanor case. Invariably, he would enter pleas of guilty for his court-appointed clients, and not make much of an argument on their

The Results Are In!

In 2003 the Publications Committee of the State Bar sponsored its first Annual Fiction Writing Competition. Sixteen submissions were received and judged by a panel of five committee members. The first, second, and third place entries follow.

behalf. He never showed any expression either way after a judge ruled, merely accepting the sentence, nodding to his client, and silently leaving the courtroom or sitting down to wait for his next case to be called.

One day the courthouse was all astir when Mrs. Viveca Sandfort was charged with perjury and she showed up in court at her first appearance represented by none other than old Hamish O'Halloran, and not even court appointed at that. Viveca was a human exaggeration. She was a woman in her mid forties with an outlandish physique, and traditionally wore clothes and makeup which were designed to make you turn your head and think things which would get them arrested. She was married to a ne'er do well who used to beat her regularly, it was pretty well acknowledged, and nobody could understand why she stayed with him. Sanford Sandfort sometimes worked as a used car salesman and sometimes he didn't, but he was never far from his favorite bottle of booze.

The prosecutor assigned to the case was an arrogant young scion of one of the town's more noble families. G. Earl Farnsworth III had gone to the state's best university, where he lettered in volleyball or some such non-contact sport. He was tall, perhaps 6' 3", with a finely honed physique, and slicked back hair popular in the yuppie style. He was fond of wearing fine, silk, yellow ties superimposed on the colour de jour, usually royal blue or magenta. He fancied himself a ladies' man, but for some unannounced reason he seemed out to get Miss Viveca, a woman a good ten years his senior. There was certainly more between them then the normal prosecutor-defendant animus. Their held glances shot daggers at each other. You could almost see the smoke steaming forth from their eyes. This obvious intense mutual emotion caused a lot of tittering among the spectators, especially the lawyers, who began to read much more into the situation as the rumors began to spread.

But the way the young prosecutor treated old Hamish was rather pathetic. He seemed to take him for granted, as if Hamish played no role whatsoever in this show. Farny, as he was disrespectfully referred to by the bar behind his back, simply thought of old Hamish as a non-person, and with respect to the first appearance, the attention of all was focused on Miss Viveca, wearing a red satin skirt and turtle neck sweater, both a few sizes too small.

Judge Abel Cain, the district court judge whose lot it was to have to conduct first appearances that day, was not a man to abide shenanigans, either from the state or the defense bar. His heavy hand came down evenly on both sides, and there was no doubt whatsoever who ran his courtroom. He quickly read Viveca her rights, announced the rather lengthy maximum sentence for perjury, obtained her signature on the rights waiver, and dramatically paused before he said, "Now what about the bond."

Seizing his cue, Farnsworth jumped up and announced that this felony was mighty serious and required at least $100,000.00 bond to insure her presence in court at future hearings. The magistrate, having been hypnotized by the defendant's form and the shortness of her skirt, had set the bond at a mere $1,000.00 despite the fact that perjury was a class E felony. This she immediately posted through one of the myriad bondsmen with whom she was familiar, and walked, minutes after her arrest. She had immediately called O'Halloran on her fancy new cell phone replete with glitter and gadgets.

Anyway, Judge Cain looked at Hamish with an expectant air waiting for some kind of response from him. None came. Everyone waited and Hamish still said nothing. Finally Judge Cain, in disbelief, said, "O'Halloran, are you going to respond to Mr. Farnsworth's impassioned plea to jack up this woman's bond, or are you going to stand mute while she is carted off to jail?"

Hamish paused a minute and seemed to be considering what to say. At last, after having received a not so gentle nor subtle nudge from his increasingly anxious client, he quietly responded, "Judge Cain—everybody in town knows this woman. Where is she going to go? She enjoys the publicity and wouldn't miss a minute of the drama. I guess the bond's about right." And with that, the lanky lawyer sat down in a way that looked as if he did it in sections.

The onlookers and court hangers on were aghast, but the lawyers did not expect anything more from O'Halloran. However, everyone was surprised when Judge Cain boomed, "I guess you're right, Mr. O'Halloran. Even I know Mrs. Sandfort. I expect she'll be in court, all right. Bond stays the same. Sit down Mr. Farnsworth."

Well, the case proceeded on through the system and everyone expected Farnsworth to offer a plea and O'Halloran to take it. But it didn't happen and soon enough the case was the first on the Superior Court trial calendar. The trial judge was no-nonsense Judge Harley Martin. There were dozens of judges throughout the state named Martin, but old Harley was the most feared of them all. Some of the lawyers speculated that the members of the Martin clan were trained to be lawyers and judges from birth. Judge Harley Martin looked like he was crafted by some Hollywood director. He was the epitome of judgeness with his long well combed snow white hair, dark piercing eyes looking out from under bushy black brows, and his jutting jaw. The courthouse crowd just knew that Miss Viveca was doomed.

Harley called the case for trial. He grimaced as he saw the antagonists were Farnsworth and O'Halloran. He didn't like either of them, and any thoughts he might have had that justice would be done were beginning to dissipate like the morning dew with the rising sun. He scanned through the court file as the lawyers set up their books and props at their tables, and everyone in the now jammed-packed courtroom sat with an expectant air as the trial was about to begin.

"Mr. O'Halloran" Judge Harley Martin boomed, apparently startled by the amplification of his own voice in the microphone the bailiff had set up in front of him, "I don't see any motions in the file."

Hamish rose, slowly, hesitantly, the antithesis of the character seated beside him. "I didn't file any," he stammered sheepishly, and sat back down awkwardly without further explanation.

"Hmmph," replied the old judge, "Put 12 in the box, Mr. Speedy." The clerk did as he was bid, and in a few minutes 12 prospective jurors were seated, nervously anticipating the start of the proceedings. Farnsworth began and put on a clinic in jury selection. The spectators were impressed as the 12 conservative-looking, hanging jurors were turned over to the defense. Nine women and three stern-looking men. They looked at Hamish, with his ragged pony tail, suspiciously.

He started by addressing one older somewhat rotund lady in a simple chintz print dress, directly. "Mrs. Bean, I don't think you could be impartial in this case, do you?" He seemed to know her and she him.

She gave a coy smile, and said, "Guess

not, Hammy." There was a buzz in the courtroom. Hammy? Someone in the real world actually knew Hamish O'Halloran. Without asking why she couldn't be impartial, Judge Martin excused her for cause, a slight smirk creasing his normal poker face. Farnsworth, with all his greatly advertised legal skill, had missed one. The lawyers, at first, were taken aback that Hamish had actually removed an apparently favorable juror. But it didn't take long for a little admiration to creep in as the audience realized Hamish had done the honorable thing.

Another woman who looked like a business executive, wearing a black pin stripe suit, replaced Mrs. Bean. Her eyes dared Farnsworth to challenge her. He didn't. Then it was O'Halloran's turn. He stared at her a long time without speaking.

"Mr. O'Halloran?" queried the Judge whose patience was not one of his stronger virtues.

"In a minute, Judge," he tersely responded as the juror and the lawyer stared each other down, as some sort of unspoken communication seemed to be going on between them. Farnsworth began to get edgy, fidgeting in his chair and nervously rapping a pencil on the table in front of him, the only sound in the eerily still courtroom, but the prospective juror held her ground, unwavering in her stare.

Finally, O'Halloran breathed an audible sigh. He had won or lost the staring contest, no one knew for sure, but he said succinctly, without asking the adamant woman a single question, "Defense is satisfied with the jury."

The trial proceeded and each lawyer made brief, pithy opening statements, O'Halloran's being the essence of brevity lasting less then a single minute. It appeared, according to Mr. Farnsworth's brilliantly eloquent forecast of the evidence, that Ms. Viveca Sandfort had sworn out a domestic violence complaint against the dubious Sandy, alleging under oath that he had slugged her in the jaw causing her to suffer serious injury. This being the fourth time that the old sot had assaulted her, or so it was alleged, the misdemeanor became a felony, and Sandy was looking at some hard time. At Sanford Sandfort's arraignment, Mr. Farnsworth had hopped to his feet and self righteously asked the judge to raise Sandy's bond, alleging all the menace to society drivel that prosecutors often rely on. His lawyer asked for a bond hearing and called Viveca to the stand. In an effort to save her no-account husband from years of punkdom, she tried to resurrect the scoundrel by down playing the incident and finally admitting that, well no, he didn't hit her. You could tell that Farny was basking in the slam dunkness of this situation as he pictured Viveca trying to explain to the jury the fact that she swore under oath that Sandy had assaulted her and said just the opposite under oath at the arraignment.

The assistant district attorney called Mr. Sandy Sandfort to the stand. After the pleasantries, Farny got down to business. "Mr. Sandfort, did you, or did you not, on the night of April 24, slug your wife in the jaw with your fist?"

"Objection," Hammy called out casually.

Farny jumped to his feet spluttering, "It's not leading your Honor," his face reaching a peachy shade of beet red at the insult of Hammy O'Halloran, of all people, interrupting him with a worthless objection.

"Grounds, Mr. O'Halloran?" Harley peevishly demanded.

"Fifth Amendment right against self incrimination," came the reply, again, rather casually without the slightest hint of insistence.

"You're not his lawyer, Mr. O'Halloran. You can't raise the objection for him," growled Judge Martin. "Go on, Mr. Sandfort."

Although Sandy Sandfort may have been a drunk and a beater of helpless women, he was no fool, and he sensed that something bad was happening. He took the cue offered by O'Halloran and turned to the Judge. "Uh, Judge Martin, uh. I don't want to testify against my wife. Do I have to answer if I think it may tend to incriminate me?" He had watched a lot of people take the Fifth (as he himself had, especially on some of his weekend-long toots) on the myriad lawyer shows on television.

Farny was apoplectic. The particular color of purple his face had become complemented his yellow tie quite nicely. He sputtered and spumed and finally blurted out like a spoiled child, "Judge Martin, O'Halloran is telling him what to do. He can't do that. Anyway, the statute says he has to testify in assault cases, and the spousal privilege doesn't apply."

Judge Harley Martin was a clever old jurist and had seen this coming. He looked at Hammy who had a kind of smug grin peeking out of the corners of his mouth. The two of them looked at each other a moment and understood, and Hammy realized he didn't have to say anything. Harley turned his studious gaze on the ADA, and gave a slight contemptuous shake of his head. Then looking over his shoulder at the witness, he said, "No, Mr. Sandfort, you don't have to testify against your wife." Then turning back to the slack-jawed Farny, gaping aghast at the Judge's ruling, he said, "Mr. Farnsworth I hope you realize this is not an assault case but a perjury case. The spousal privilege does apply and he or Mr. O'Halloran, on behalf of his client, can invoke it."

Farny, like a cornered rat, instinctively began the fateful course of action of trying to take on the Judge. "But, your Honor, if this is a perjury case, how will testifying about the assault tend to incriminate him?" He was serious. The audience snickered. The lawyers, bailiffs, and clerks snickered. The jury even snickered. And then it dawned on Farny and his blush came close to the beautiful purple of a Crown Royal bag. Embarrassed beyond belief, he sat down and thought for a minute, sweat darkening the pretty white collar on his purple shirt. "Come down Mr. Sandfort," he said, totally subdued.

Farnsworth asked for a recess in order to be able to compose himself and to figure out what to do next. Harley benevolently granted him 15 minutes. The murmur of the crowd was intense, and there was some laughter at Farny's expense as the jurors filed out of the courtroom to the haven of the jury room.

When court came to order 15 minutes later, for Judge Martin was certainly punctual, some of Farnsworth's arrogance had returned after he had looked at the elements of perjury and considered what he had left as far as evidence was concerned. He quickly and efficiently called the clerk who had given the oath when Mrs. Viveca Sandfort had testified as to the contents of the domestic violence complaint. He elicited her evidence, clearly and concisely, about giving the oath and about what Viveca said about Mr. Sandfort slugging her in the jaw. O'Halloran had no questions on cross examination and smiled politely at her, and she smiled back benevolently at the eccentric old lawyer as she coyly walked down from the stand.

Next, Farny called the court reporter who had been recording the proceedings at the

arraignment and bond hearing for Sandy Sandfort. She testified about the oath that was given to Ms. Sandfort and read those parts of the transcript in which she said Sandy didn't hit her. Hammy smiled at her too and didn't have any questions for her, and she smiled back. It looked like Farny was going to get his slam dunk after all.

The State rested and Hammy didn't make any motions or ask to be heard. Judge Martin somewhat contemptuously at this lack of lawyerly correctness, said, "Call your first witness, Mr. O'Halloran."

Hamish O'Halloran slowly stood, again as if in sections, and when the erector set that was his angular body had reached full height, he grandly announced, "Defense has no witnesses."

"Oh, no you don't," shouted the vivacious Viveca, none too modestly, as she leapt to her feet and began to march vigorously to the witness stand. "I'm going to tell my side of this story." No one had ever seen Hamish move that fast but before she got half way to the stand, he was next to her with his hand firmly on her arm. She spun to face him and almost shouted, at least in a voice loud enough for the Judge, jury, and everyone in the first 20 rows to hear. "I am not going to sit idly by while this clown railroads me."

Hamish bent over and whispered in her ear. She turned beet red and turned angrily to him. You could just about see the smoke emanating from her. He straightened up, put a finger to his lips, paused, and bent down once more, again whispering in her ear. She meekly returned to her seat without another word and slammed her well padded posterior into the chair. "Defense rests," O'Halloran announced with finality.

Judge Harley Martin took over after letting a trace of a grin escape from his stern visage. He talked to the jury briefly and then announced that Mr. Farnsworth would be addressing them first.

Farnsworth was brilliant in his closing speech. One of the statements made by Viveca Sandfort under oath obviously was a lie. He left no doubt in the minds of the jurors that the Defendant was clearly lying because she had told two contradictory stories under oath. His speech was full of vim and vehemence. He had put his heart and soul into the closing speech, for some reason, and it was worthy of comparison to a speech by the world's greatest orators. When he was finished he sat down, as if to punctuate his great oration, smug in the knowledge of the excellence of his speech and certain that victory was his. Mrs. Viveca Sandfort would go to jail and the thought appeared to give him an odd sense of satisfaction.

Hamish O'Halloran just sat in his seat smiling at Farny in an almost congratulatory way. After a few moments Judge Harley looked at him and gave him a little, "Ahem," just to remind him where he was and that it was his turn to address the jury, in case he had forgotten.

Hamish rose slowly, looking a little confused. He slowly and purposely buttoned the front button of his ill fitting, rumpled suit and brushed his hair back with both hands, although his hair was already tightly pulled back in that scruffy pony tail he wore. Awkwardly, he stood facing the jury and he could read the antagonism on their faces. Farnsworth had snowed them, no doubt about it. Hamish was always uncomfortable speaking in public. He had read an article once which propounded the idea that speaking before a group was the number one phobia of mankind. He agreed, and the idea swept over him that perhaps he should give up and just sit down without saying anything. He knew he was no orator, and certainly was no match for a polished and for some inexplicable reason, zealous speechmaker like Farnsworth. Nevertheless, duty required him to speak.

He opened his mouth and sure enough he had a frog in his throat. He coughed a little bit, turning crimson with embarrassment, but quickly regaining his composure, he took a sip of water and began again.

"Ladies and Gentlemen of the jury, that was sure a good talk Mr. Farnsworth gave. But one thing he didn't do, not in his talk just then, and not in the evidence he presented to you, was to tell you which one of those two statements Mrs. Sandfort made was true. Now Judge Harley Martin, here, is going to tell you that the State has to prove all the elements beyond a reasonable doubt, and he will tell you what reasonable doubt is. If you can't tell from the evidence which one of those two statements is a lie and which one is true, then Ladies and Gentlemen, that is a reasonable doubt." And with that, Hamish O'Halloran, attorney at law, sat down.

There was a long pause as the two attorneys sat there looking at each other, Hamish with a simple expression on his face, which maybe contained a hint of a grin, and Farnsworth, absolutely livid. The Judge, anticipating a nice boring talk of a reasonable length of time, had walked off the bench and the bailiff had to run off to find him. When he returned, wearing a surprised look, he immediately dove right into the jury instructions. He told them of all the rules, explained what reasonable doubt is, and what constitutes the elements of perjury. Finally, he told them to go out to the jury room and select a foreman and begin deliberating when the bailiff brought them the verdict sheet in a few minutes.

They weren't out ten minutes. They all smiled at Viveca as they marched back in the courtroom. The bailiff handed Judge Martin the verdict, and the judge let a slight whistle out as he handed the verdict sheet to the clerk to read out loud. The courtroom erupted when the clerk read, "On the charge of perjury, we, the jury, find the defendant, Viveca Sandfort, not guilty."

Apoplectic, Farny jumped to his feet sputtering his vain objections. Viveca reached up and planted a big sloppy kiss on Hamish leaving her bright red lipstick on his cheek like a neon sign. The audience actually cheered, and Judge Harley Martin smiled as he brought his gavel down.

After that, Farnsworth and Hamish O'Halloran would occasionally pass in the hallowed halls of justice, but they never again tried a case together. Farnsworth would deferentially nod his head slightly, and say, "Good morning, Mr. O'Halloran." For some reason, thereafter, whenever Hamish was appointed to one of Mr. Farnsworth's cases, some other assistant district attorney would end up prosecuting it. ■

David Tanis graduated from Wake Forest University School of Law in 1976. In 1980 he was elected district court judge for Forsyth County. In 1984 he joined the practice of Leonard, Tanis & Cleland. Since 1987 he has been a sole practitioner. Tanis served in the military and earned the Purple Heart, Bronze Star, Air Medal, Combat Infantry Badge, and Parachute Badge. He is active in numerous community activities and was appointed by President Regan to be chairman of the North Carolina Viet Nam Veteran's Leadership Program.

First Cousins

By Jay Reeves

It turned out that my client was related to another defendant in criminal court that day. That was how it started, the kinship between them. I was not surprised. Everyone seemed more connected back then.

This was years ago, when Judge Jeremiah Betts was still presiding in Clarendon County and I was a young lawyer in Manning with a general practice and a square windowless office over a feed store.

The courtroom was packed that sunny morning. My client, Janie Mae Burrows, was there to plead guilty to a single count of disorderly conduct. I anticipated Judge Betts would fine her $50 and order her to spend several weekends picking up trash along the overpass. My plan was to get in and get out. I hoped to be back at my desk by noon, banging out a closing memo on my IBM Selectric, concluding this matter cleanly and efficiently while banking a tidy fee to boot.

The great Jay Foonberg—whose guide to building a successful practice had become my holy text—would have been proud.

Just ahead of us on the docket was Rance Dinkins. Rance was a knotty little fellow with a wayward soul and an extraordinarily narrow head. He was also the only person in court that day in handcuffs and ankle chains.

I sat in the jury box with the other lawyers, watching with less than rapt interest as Rance Dinkins shuffled clankingly forward, his bored-looking public defender at one elbow and a deputy sheriff at the other. I was familiar with the antics of Rance Dinkins, a pathetic character who had stumbled so far off life's path and was in district court so frequently that the courthouse crowd considered him one of their own.

As the prosecutor began his recitation of the Dinkins case, I left the jury box and waded into the audience of onlookers, witnesses, and defendants waiting their turn in the sad parade. I slid into the pew next to my client. Janie Mae Burrows looked at me questioningly and I gave her a reassuring pat on the shoulder. I wrote "We're Next" in large block letters on my legal pad and showed it to her. She nodded and I gave her another pat.

Up front, the prosecutor was telling Judge Betts how Rance Dinkins had gone to McAlister's Body Shop—from which he had been fired days earlier—in a highly intoxicated state and had started slapping people around and smashing things with a tire tool. The prosecutor, with flowing white hair and a rumpled seersucker suit, periodically raised his arm and pointed accusingly at Rance as he recounted the sorry saga.

Judge Betts sat impassively on the bench. He appeared to be asleep. His eyes were hidden under shaggy brows and his chin rested in the cupped palm of his one good hand.

My client leaned toward me and brought her mouth to my ear. "That's my cousin," she whispered.

Hearing this, I dropped my Bic medium-point pen, which plinked to the floor and rolled under the bench in front of me and disappeared.

"What?"

"Rance Dinkins up there. He's my first cousin."

I was stunned. Not at the discovery that Janie Mae was related to Rance Dinkins. The county was crawling with Burrows and Dinkins, most of them having fallen from the same scraggly tree.

What floored me was the fact that Janie Mae had spoken at all. I was of the impression that she was unable to speak or hear. Her disability, in fact, was key to our defense. It explained why she hadn't stopped her John Deere riding lawnmower and pulled over to the side of Mill Street that Saturday night when police chief Son MacFarlin blue-lighted her and sounded his siren.

In my mind it was an honest defense, because during our brief acquaintance I had never heard Janie Mae utter a single word. Her father did all the talking for her

and even provided translation through a series of odd and elaborate hand gestures. He had accompanied her to our initial meeting and was here in court this morning if needed.

Who else but someone genuinely speech-impaired would need a translator?

I locked eyes with Janie Mae. "Ssshhh," I said, because no better advice came immediately to mind.

The room was suddenly hotter and smaller. Overhead, the enormous ceiling fan creaked wearily.

Meanwhile, Judge Betts had accepted Rance Dinkins' guilty plea to five counts of assault and one count of malicious destruction of property. He asked if Rance had anything to say before sentence was pronounced.

"Yessir I do," Rance said.

Then Rance threw his head back and hollered "SSOOOEEYY!" For half a minute he bellowed, and when he finished the courtroom was dead silent but for the groaning fan. A few nervous titters ran through the crowd.

Judge Betts had sat through the hog call without so much as a blink. Now he slowly raised his head and peered down at the prosecutor and the public defender.

"Is there anything else?"

The lawyers shook their heads in unison. Sandwiched between them, Rance Dinkins beamed proudly.

"Well then," the judge said. "Mister Dinkins, your statement is duly noted. I hereby sentence you to 30 days on each charge plus an additional 90 days for contempt of court. Said sentences to run consecutively."

The deputy grabbed Rance's arm and guided him towards a side door that opened into a tiny holding room, where he would wait until another deputy came to take him across the street. On his way out, Rance turned to the crowd and let rip another "SSOOOOOEEEYY!"

"That's my cousin," Janie Mae said, her eyes twinkling in admiration.

"Ssshhh," I said, with a little heat. "Not another word."

After the room settled down, the clerk called out "Janie Mae Burrows." We rose and began our slow slog toward the bench. My mind was spinning. Should I stick to the contention that Janie Mae could not speak and hear? Not only had I successfully sold this story to the State, but in fact the prosecutor's sympathy for her alleged disability had been the basis for his leniency in reducing a handful of charges to a single misdemeanor. Or did I have a duty to clarify this misconception and avoid perpetrating a fraud upon the court?

What would Foonberg do?

As I reached the defense table, I saw that Judge Betts' forehead was flushed pink. Not a good sign. Plus it was getting close to lunchtime, and I had lost my pen.

The prosecutor began reading the litany of original charges—driving an unauthorized vehicle, to-wit a John Deere 3000 lawnmower, along a public thoroughfare; running a red light; reckless endangerment; failure to stop for a police officer—and announced that all offenses had been rolled into the single charge of disorderly conduct. As I quickly voiced our assent, I had a glimmer of hope that we would be out of there cleanly in seconds.

But then Judge Betts looked down at Janie Mae.

"After that last debacle I am almost afraid to ask this," he said. "But before I pronounce sentence, is there anything you wish to tell the court?"

I looked over at Janie Mae. To my horror I could see her mouth working, and I knew that she was not about to miss her moment in the sun without saying something. With my left foot I gave her a sharp darting kick to the shin. Simultaneously, I coughed loudly to cover up her little yelp of pain, then blurted out: "Your honor, my client has nothing to say."

The slicing blades of the ceiling fan seemed only inches above my head. I prayed that Janie Mae—who was bent over rubbing her leg—would keep her mouth shut. So far I had not actually lied to the judge. To my great relief, the prosecutor stepped in.

"Judge," he said. "The defendant suffers from a verbal and auditory disability."

"You mean she can't speak or hear?" Judge Betts said, his shaggy eyebrows rising.

"That's correct," said the prosecutor. "Her condition was a mitigating factor in this plea arrangement."

Suddenly there was a sharp crack, followed by a terrific boom directly overhead. There was a shower of dust and smoke and Rance Dinkins came crashing through the ceiling with a bloodcurdling scream. He landed with a sickening thud on the oak floor just in front of the bench. Chunks of asbestos tile and particle board rained down from the jagged hole in the ceiling from whence he had come.

He lay there in a tangled pile of debris and his own limbs, bleeding from the head with one leg bent back funny. He looked up, dazed, a line of blood trickling down his cheek. Spotting my client, his eyes flickered with recognition.

"Why Janie Mae," he said. "What are you doing here, cuz?"

Janie Mae stood frozen and gape-eyed. The deputy sprang over, pistol drawn, and jabbed the gun at Rance Dinkins' nose.

"Freeze," said the deputy, a perfectly ridiculous command because what else could Rance do, lying there in a broken jumble.

Judge Betts had risen to his feet, veins throbbing in his wrinkled neck.

"You," he said, pointing a quavering finger at Rance Dinkins.

Rance looked up at Judge Betts and grinned. He opened his mouth and let out a feeble "SOOOEEEYY."

And it was at this point that Janie Mae fainted, toppling beside me like a sack of cornmeal.

■ ■ ■

For days it was the talk of the courthouse crowd, how Rance Dinkins had tried to escape from the holding room by crawling up into the ceiling and nearly crashing onto Judge Betts' head.

Nobody remembers that I was there, too. Nobody much cares that I was pleading my case at the very moment Rance came through the ceiling.

I don't mind. This was years ago, and I don't consider myself a part of the story.

What I most remember is later that same day, after Rance had been taken away by the first ambulance. My client Janie Mae Burrows lay on a stretcher, conscious but groggy with a nasty bump from her swoon and collapse. I was holding her hand when Judge Betts came over.

"Miss Burrows," he said. "I must apologize for the distraction. As a courtesy of the court I am summarily dismissing all charges against you with the admonition that you refrain from operating your lawn

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Jesus Freak

By Valderia D. Brunson

"Charlie, I gotta case for you."

Charlie Entwistle sat in his high back leather attorney's chair running his tongue slowly across the front of his teeth. Charlie knew Ron Winters, a fellow colleague and law partner, wouldn't willingly hand over a gem of a case. Even though they worked together, the deal was the lead attorney took the majority split. He knew straight away that Ron wasn't giving him this case out of benevolence. He was certain he was trying to unload a dud.

"Before you start assuming that I'm passing over a worrisome matter, know that the kid's family approached me early this morning, and tempting as it was, I thought you'd be better suited. I'll serve as your co-counsel and you can order me around."

"Is that so?"

"Yep, now let me tell you, as the ungod-fearing atheist that I absolutely am, this one has really struck a chord with me. Kid's a bonafide, tambourine thumping, hallelujah singing, yes mammin', no sirrun' Christian as you'd ever want to see. Got a clean record, volunteers at a nursing home, Eagle Scout, the works. You name it, if it's do goodin, he's doing it."

"So what's the charge?"

"Murder."

"You've got to be kidding me." Charlie sat forward. "Are we talking about the same kid you just described?"

"Yep, remember that Lawson girl? Well, he was the last one to see her before she disappeared. They were childhood friends. Last night a sheriff's deputy found him on a country road, digging up her corpse."

"Are you serious?"

"He was pawing at the ground like a dog digging up a meaty bone."

"Why not get the judge to appoint a public defender."

"That's just it, the family wants to choose the attorney."

"For a murder trial, that's ridiculous. Do they know how much it'll cost?"

"His church raised the money. Since this morning, they already have close to a hundred grand sitting in an account with more to come. They're waiting for a bond to be set so they can put up the church building and bail him out. That's how much they love and believe in this kid. I'd represent him, but they specifically requested a Christian attorney. Someone that can understand the kid."

"What's to understand?"

"He says he didn't kill her. He gets caught about 11:30 last night with dirt in his nails, kneeling over her rotting corpse when the deputy walks up, and he says he didn't do it. Don't that beat all? Thing is, I believe him." The look on Ron's face let Charlie know he was serious.

"So what's his reasoning?" Charlie was more than a little curious to know what story the boy had told that was enough to get Ron Winters on his side. Ron had served 15 years as an assistant district attorney, and then ten more as the DA himself, before entering private practice as one of the most revered defense attorneys in Wake County. He was known to be a skeptic over less.

"That, my friend, he'll have to tell you himself. I'm afraid my heathen lips wouldn't do the tale justice. He's at the jail now. The judge won't set a bond."

"I'm honored that you thought of me, but I've got plenty to keep me busy," Charlie stood to cut the conversation short before he ended up with a client that could prove to be more trouble than it was worth.

"Charlie, before you evict me, hear me out. You've known me 20 plus years and you know how I stand. I'm telling you I've never heard a thing like this in all my life. This story made the hairs on my neck stand at attention. Don't blow him off without at least hearing his story. If you don't do it for me, then do it as your Christian duty. Isn't that what you guys are all about anyway, helping your brother?"

Charlie bristled and felt his forehead wrinkle involuntarily. It was religious blackmail and Ron knew it. It was a tactic he used on occasion, and out of respect, Charlie could only assume, he only brought it up in moments of desperation.

"I'll go, but just to listen."

"Well, c'mon." Ron gestured towards the door.

"Now?"

"Time is of the essence."

■ ■ ■

Charlie sat in the musty attorney's booth waiting for Nicholas Wade to appear. He heard a series of buzzers and clicks deep in the belly of the jail, sounds that slowly worked their way toward him. Even after years of working with criminal cases Charlie never ceased to feel uneasy in the jail. He couldn't let go of the unrealistic fear that a trigger-happy guard would mistake him for an inmate and lock him away. He didn't know where the crazy thought came from.

Finally the boy appeared through the plexiglas. His blond hair shone brightly even in the dim light. For a brief moment, Charlie was envious of the boy's physique. Even beneath the faded orange jumper, he could tell the kid was an athlete. It reminded Charlie of his younger days with his high school baseball team. Nicholas was a veritable poster child for dentists everywhere with his radiant white teeth. His flawless complexion appeared smooth even

through the scarred glass. His blue eyes seemed to sparkle in the midst of his solemn countenance. He was as apple pie as they came. What on earth was he doing in this dank pit?

"Mr. Entwistle?"

"Yes."

"Mr. Winters said to expect you." Charlie should have known Ron's hard pressure antics were all part of fulfilling his grandiose promises.

"I'm here to hear your story." Better to cut to the chase, with a murder charge, every minute counted.

"You're a Christian?"

When Charlie nodded, he noted relief spread across the boy's face.

The boy shifted a little. "Rachel was my best friend. I suppose they already told you that I was the last person to see her alive. Our church, along with a few others, got together for a social a few weeks back and she drove."

Charlie made a quick note on his legal pad, but waited for the zest Ron had promised him.

"At the end of the night, she dropped me off. I said goodbye and that was the last time I saw her…alive."

Charlie nodded.

"Her parents called later that night and said she hadn't come home. I'm sure you saw all the news about the search parties and them finding her car abandoned off of Highway 98."

Charlie nodded. Only hermits and the Amish could have missed that week-long news frenzy.

"Well, I'd been praying for her to be found. Every night I prayed and fasted that she'd be found. It was torment not knowing." The kid lowered his head and recited the story as though Charlie wasn't there.

"I couldn't sleep at all. They had to prescribe tranquilizers and even then I only slept a couple hours at a time. I kept having these dreams that she was fighting against something. I thought that meant she was still alive, you know, fighting for her life." the boy paused a second before continuing. "Then the dreams morphed into her lying still and lifeless. I knew that God was telling me she was dead." The boy placed his face in his hands and wept.

Charlie tried to watch with an open mind. The tears seemed genuine enough, but hadn't he seen enough feigned tears in his lifetime to grow callous at their seemingly scripted appearance? He prayed this boy wasn't trying to pull the wool over his eyes.

"So when did you go dig up her body?" Charlie needed to get to the meat and quick. Save the drama for the jury.

The boy looked up with an astonished look.

"After the dream," he stammered. "Are you familiar with the Genesis story where Cain killed Abel?"

"Yeah." The boy visibly relaxed at Charlie's response.

"You remember the part where Cain told God that he wasn't his brother's keeper and didn't know where Abel was?"

Charlie nodded and the boy seemed almost giddy. Surely the kid wasn't about to say that he had killed the girl like Cain had killed his brother, Abel.

"Well, God said that Abel's blood was crying out to him from the ground. Well, that's what happened to me. It was one of those dreams where you dream that you're actually awake. Kind of a dream within a dream. I kept hearing this weird scream. It kept resounding over and over in my head. I shot straight up in my bed and I knew without knowing that her blood was calling me. She had died a violent death and needed to be put to rest so her family could grieve."

Charlie furrowed his brows in what he hoped was a look of interest. He knew that anything less than a vote of confidence would shake the kid.

"When I woke up it's like I knew exactly what to do. I went out to my car and started driving. I didn't know where I was headed; I could just hear her blood calling out to me. It was like it was beckoning me to come to the exact spot where she was. Before I knew it I was in a field and digging at a patch of dirt. I promise you, if you carried me to my house right now, I couldn't find that place again if my life depended on it. It was just that night, I was led to that spot."

"That's it?"

"Yes, sir. I don't remember anything after that. I woke up the next day in a cell."

"Okay, well, you know that sharing this information is confidential." Charlie began his spiel about attorney-client relationships and confidentiality. "I will take everything you've said into consideration and inform you of my decision by tomorrow afternoon." He started to tell him right then, but he had decided to wait until he could refer the name of another attorney. Pass the buck, as Ron had done to him.

"You don't believe me." The boy's pained expression pleaded for his acceptance.

"It's not about whether I believe you. The job of a defense attorney is to ensure that the letter of the law is followed. Now, I will see you tomorrow with my decision. Do not speak with anyone else about this matter, okay?"

Charlie left the small room and walked into the cool air.

"So, what'd you think?" Ron appeared from nowhere.

"Be careful how you go leaping from corners in here. You're liable to get a butt whooping."

"You're avoiding the question, counselor. What'd you think?" The two climbed into the elevator.

"It was interesting."

"You're being elusive. What'd he tell you?"

Charlie summarized the boy's story as they crossed the street.

"He left out a few things."

"How so?"

"Well, you know of course that he was a prime suspect long before this grave digger incident. Even though no one on the force will admit to it, he was being watched. The way I hear it, the girl's cousin is a police officer with the city, Curt Thompson. He was tailing the boy's every move. He was the one that followed the kid."

"And?"

"You sure are curt today. What's crawled up your pants and died?" Ron's colorful expressions worked well with a jury, but at times they worked Charlie's nerves.

"I'm just not in the mood to be entertained. You're here relaying the events like the *National Enquirer* and the boy's in there pulling out the tears like he's up for an Oscar. I can do without all the drama."

"Well, I can see you're having one of your days. I'll make this short. Thompson followed him to the clearing, and then pulled off on the other side of the road out of sight. When the boy climbed out and walked into the woods, Thompson radioed for backup. He was communicating with headquarters when the boy screamed.

Man, I went down there this morning and heard the tape myself. That scream was enough to tie your balls in a knot. I tell you, I about messed myself."

Charlie tried not to chuckle.

"That was part of what sent me over to his side. I mean, why would a cold-blooded murderer scream like that. It was like he was just realizing that she was really dead. Thompson ran out after him and said when he walked up on the boy he was mumbling something over and over. He thought it was jibberish until he realized the boy was praying. Come forth, come forth, isn't that somewhere in the Bible?"

"When Jesus told a dead man named Lazarus to come forth out of the grave."

"Yeah, I thought it sounded familiar. He was also saying something about dry bones…"

"Where the prophet Ezekiel resurrected an army of dry bones." Charlie felt like he was back in Sunday school.

"That's it, the boy was praying this fervent prayer for the girl to be resurrected from the dead. Don't that beat all?"

Charlie was quiet as he pondered the matter. Ron was right; this case was going to be a doozy. The facts, whether he believed them or not, weren't the best, and a murder trial would completely eat up his calendar for the next year, at a minimum.

"Do you believe him?"

"You know that's not the issue." Charlie had long ago shifted his standard from guilt and innocence to simply ensuring that the DA did their job without bypassing his client's constitutional protections.

"Yeah, well I'm telling you, without a good attorney, the best, and a miracle from his god, this boy is going to fry. And you know like I know, that a good attorney, no matter whether it's politically correct or not, has to believe, at least on some level, that his client is innocent. It gives us the drive to fight a little harder and a little longer. You've got to be on his side if you're even considering taking this case."

"I can't say I'm considering it yet."

"Suit yourself, Entwistle, but this boy needs you more than any client you've ever had and you know it. You'd do him, his family, and his god a huge disservice if you punk your way out of it."

■ ■ ■

At home, Charlie sat in front of the television mulling over his decision. He and Ron were a formidable team and well known statewide for busting the behinds of many a DA. His mind churned over his choices as he aimlessly flipped through the channels.

"Chuck, are you feeling okay?" His tall, lean wife of 26 years stood before him with her forehead furrowed. "You've been out of it since you came home. I was going to give you a few hours to yourself, but this is ridiculous. Talk to me."

"I wish I could. It's nothing to worry your pretty little head over. Come here." He patted the cushion next to him and she smiled. She was the saving grace that had kept him sane over the years. Her gentleness and love made him feel invincible. She quickly nestled in beside him with her head resting on his shoulder. His fingers made their way through her curly gray tendrils as he smelled her sweet aroma.

He closed his eyes and reveled in the tranquility of the moment. If every man had this peace there would be less crime and unemployment for criminal lawyers everywhere. He wouldn't mind, he'd take up gardening and never leave Ruth's side.

The news anchor on the set interrupted their quiet moment.

"Charlie Entwistle is representing the defendant in what promises to be a very dramatic trial."

Charlie sat up abruptly, "What the…"

"Is it a new case, dear?"

He motioned for his wife to keep quiet. Surely Ron hadn't accepted the case without his consent.

"Nicholas Wade is innocent…" A family representative defended the boy. Didn't they know better than to go to the bloodthirsty media without legal counsel?

"I think it's a tragedy that he claims God had anything to do with this. He's using God's name in vain, yep, that's what he's doing. Blasphemy!!" The voice of the black preacher rumbled through the antiquated speakers.

A spindly brunette spoke up from the gathering outside the jail, "He's telling a lie and they ought to electrocute the truth out of him. It's a shame what he did." Subtitled beneath her image it simply read "Angry member of a local church."

"According to an anonymous police source, Nicholas Wade was discovered late last night digging up the remains of Rachel Edwards off of Highway 401 near Rolesville. He is now in police custody at the Wake County jail where he is being held without bond. A bond hearing will be held at 10 a.m. tomorrow morning where his attorney will attempt to have him released until trial."

"Nicholas was and is a wonderful young man who has served our church faithfully over the past several years." This man was identified as Nicholas's pastor.

"He is an active member of my congregation, who has always had a compassion for people. He would never do the things they're alleging. It's unthinkable that they would charge him with this."

The field reporter turned the report back over to the news team, which discussed the tragedy of it all before going to the sports report.

Charlie sat with his mouth open. In a brief moment of lucidity he found the phone and dialed Ron Winters.

"Yello," Ron's laid-back greeting was unmistakable.

"Have you seen the news?"

"Man, you know I don't fool with all that gore and mayhem they report. *Wall Street Journal* every morning with the business section of the local paper. That's all I need to stay current."

"Please tell me you didn't have anything to do with my name being plastered all across the local news as Nicholas Wade's attorney."

"What are you talking about?"

"Just now, they've got family and friends down at the jail holding a vigil slash protest over all of this. Turn to channel 3, they're running their version of it now."

"Get out. Partner, you know I wouldn't do something like that. Not without talking to you first. What do you make of it?"

"I have no idea, but I'm not going to be forced into this decision. I'm going to call into that station and give them a piece of my mind. If they don't want to deal with a slander suit, they'll run a retraction tonight."

"Well, keep me abreast. Does all of this hoopla mean you're not going to represent the kid?"

"You don't ever let up, do you? Good night, Ron."

He hung up only to find his wife staring at him intently. He could only shake his

head. He knew that if he took the case, and that was a big if, she was going to worry until the minute it was resolved.

"Take it."

"What?"

"Take the case, Chuck. You're running from this, but I can tell that deep down you want to help."

"Not you, too."

■ ■ ■

Charlie lay in bed with a large goose down pillow fluffed under his head; he could feel the cool satin of his wife's gown as she snored quietly. She was right, but he couldn't take this case; he had lost his instinct. His ability to see through tall tales was permanently clouded.

The words of the autopsy report burned in his mind like a piercing migraine:

"Semen was found in small traces running down the inner thigh of the victim. DNA tests have been conducted and are conclusive that the semen found on the victim is a positive match for Michael Brier."

His stomach still sickened at the thought that Michael had done this to an eight-year-old child. How could this "Christian" be the same animal who had tore at this child's virtue? The two of them had prayed together, for crying out loud. He had believed him until the report spoke the truth that Michael had so artfully denied.

That was the last murder case he had defended and now this. He wanted to believe Nicholas, but he couldn't.

Are you afraid that he's lying or that he's telling the truth?

The question appeared plainly and awaited a response. Nicholas' story was incredible, but if he couldn't move past Michael, then it was time to retire. Criminal law had been his only trick and he was too old to learn new ones. The question hung in his mind and he knew it wouldn't go away without an answer.

After a sleepless night, Charlie arose early and called Ron.

"I'm going to take it."

"Good, I've got the paperwork all drawn up. I did it yesterday, just in case you came to your senses."

Charlie should have known.

■ ■ ■

"That wasn't too bad." The team walked hastily towards the car.

"Which part, when the judge summarily denied my request or when the little old lady yelled out that Nicholas was the antichrist and me the spawn of Satan?"

"Well, this one has people's emotions running wild. There's two things you don't mess with, people's religion and their money."

"Thanks for your wisdom Ron. You are a veritable fortune cookie full of advice."

"I do what I can."

Ron's humor helped relax Charlie's nerves, but he knew this was going to be a long haul.

■ ■ ■

"I know it's early in the process, but what angle do you think you're gonna use?" Ron pulled the tab off his beer. Every Friday night the two stayed late and shot the breeze. Topics were limitless; from the partnership to the lump Ruth had found on her breast a few years earlier, anything went.

"I think I'm going to let him tell his tale."

"Are you crazy?"

"I know silence is usually best, but with his spic and span clean record and a horde of character witnesses lined up, I think it would be best to allow him to explain it in his own words, the way he did for you and me."

"Let me rephrase, are you surely crazy?"

"I thought you believed him." Charlie sipped on his Coke, then beat his chest as a belch forcefully escaped.

"Yes, I believe him, but you must have noticed that his story is crazy. Who else, but a couple of gullible defense attorneys and his dear mother, would believe that her blood cried out to him?"

Charlie sat in disbelief. Was this the same man that had pleaded for him to take the case?

"They're going to rip that story to shreds. They'll say he got scared and went to move the body or better yet, that he regretted killing her and was trying to bring her back to life. They'll make him look like a complete loon. They're already labeling this the case of the Jesus Freak in the media. Besides that, his alibi is that he was at home with his mommy and daddy. Everybody knows that parents don't carry water where alibis are concerned. The DA will eat him to shreds."

"So what do you suggest?"

"I haven't a clue, just do your part and let justice do hers." Ron raised his beer in a mock toast and threw back the last of the drink.

■ ■ ■

Charlie sat at his desk Monday morning pondering the plight of his client. All weekend he had struggled over the now popular question, "Do you believe him?"

Going to church Sunday had been like going to work. Everyone wanted to discuss the case, which had gained growing momentum on the local news stations. Thank God for confidentiality. So did he believe him? He said he did, but did he really have the extra juice Ron spoke of, the belief that his client was innocent and wronged by the system? Did he believe that the girl's blood had cried the boy out of his sleep and served as a beacon for the location of her decaying body?

No, absolutely not. Not for a second did he believe such an outrageous tale, even as a Christian. He was sad to say it, but his atheist partner had more faith in this matter than he could fathom.

"Knock, knock," Ron peaked his head inside Charlie's office.

"Come in."

"The kid wants to see you." Ron waved the jail stationery.

Charlie took the letter and stared at the choppy script of the teenager. "Let me ask you something, why do you believe him?"

Ron's face fell from the large smile he customarily wore. He sat down in the stiffly cushioned seat across from Charlie.

"Partner, years of distrust and a hard heart make me believe him." His jaws flexed as he clenched his teeth.

Charlie watched as Ron's eyes affixed to an unknown spot on the wall.

"You okay?"

Ron didn't move, while Charlie shifted uncomfortably in his chair. The air pressure seemed to increase as Charlie waited. He knew that eventually Ron would speak, but whatever it was wasn't going to be easy for him to say. He hadn't clammed up like

this since he revealed that Connie had asked him for a divorce.

"Elsie Teatrice. She was a sweet little old lady. The kind that could easily be your great aunt or something like that. She was dying and had specifically asked for me."

Ron could remember the day so vividly he shivered from the chill that ran along his spine. Everything around the aged woman had begged for an iron, from the rumpled sheets to her wrinkled skin.

"She summoned me from her deathbed so she could confess to killing Sam Warner."

Her cracked lips had spat out the vile truth behind the murder of a local businessman in the comfort of her musty bedroom. Her yellowed, dull eyes had eventually poured forth tears of relief while he had joined in, shedding his own tears of guilt. Her burden was finally lifted and his newly loaded. Her confession had come too late.

"What did you do?"

"There was nothing left to do, Selma Warner had already been executed for the murder of her husband."

Charlie felt the pace of his heartbeat quicken as he absorbed the shock of Ron's admission.

The simple housewife had pleaded her innocence from the beginning all the way to her tragic end. Ron had ignored it once, and now, bearing the same look of her sincere desperation, he refused to ignore Nicholas' pleas.

Ron's eyes were hollow as he continued, "That was the day I switched teams."

■ ■ ■

The boy's blue eyes seemed to peer directly into his soul as he spoke, "She had a boyfriend."

"Who was it?" Charlie jotted the note down.

"I don't know his name, but I do know that they spent a lot of time on the phone and e-mailing each other. I think he's a college student."

"Did you tell this to the police?"

"Yeah, but I wanted to make sure you knew too." He wrinkled his lips and shrugged his shoulders.

"What else?"

"She was hanging at parties with some older kids, I told them that too."

"Did she do that a lot?"

"I'm not sure, but it was all pretty new for her. I think she wanted to fit in."

"You guys were close, did she tell you anything else?"

For the first time since he had met him, the boy looked down, breaking his intense gaze for just a moment. Charlie knew immediately that the kid was hiding something. After a few seconds the boy spoke, "I only pray that the Lord reveals the truth to you."

"You'd protect her murderer before you'd absolve yourself?" Charlie's voice quipped.

"I'd protect her honor before I saved myself!" The boy's eyes flashed with such intensity that Charlie knew he had offended him. For a moment he was thankful for the one-inch barrier between them.

"Don't think I haven't considered it, I've thought about it everyday. It's not easy, I wish it were. I don't know who did this to her, I'd scream it from the rafters if I did. She did do some things, but she's gone now and all I have left is our friendship. I can't betray that. Just do what you have to do and if there's a missing link, God will show it to you. I'm sorry, but I can't."

Charlie let out a deep breath. He shook his head as resisted the urge to bark at the kid for being so naive.

"Well it's going to be a long road, we'll have plenty of time to discuss all of this. How're they treating you in here?"

"I guess it's all right. I'm already over kitchen duty."

"Really?" Charlie could only assume that this was a promotion.

"I'm like Joseph in Potiphar's house. God is prospering me even in my captivity." The boy smiled and his look reminded Charlie of a three year old with a piece of cake. He seemed blissfully unaware of his situation.

Finally, the boy rose to leave and Charlie shuffled his papers needlessly as he watched him disappear down the hallway, deeper into the white walled cage.

Nicholas was beyond words. A child that spoke of honor and integrity with such conviction was a strange beast indeed.

For the first time since he had been introduced to him, he had his answer. The question wasn't whether or not he believed the kid. That was not the decision for him to make. The question was whether or not he cared, and yes he did. He knew then what he had to do. In the silence of the booth, he did something he hadn't done in ages; he bowed his head and prayed. ■

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First Cousins (cont.)

mower on public thoroughfares at all times in the future."

Janie Mae grew misty-eyed. She released my hand and reached for his.

"Thank you, your honor," she said.

Then they were sliding her into the second ambulance and screaming off.

I stood there in the parking lot with Judge Betts as my client rolled away free as a bird and the red Carolina sun dipped closer to the pines and all notions of ethics and innocence and guilt had become elusive and vaporous as mist off the river.

Judge Betts unzipped his robe and flung it across his shoulder. There were flecks of asbestos like snowflakes in his hair. He looked old then, and tired. He began trudging back to the courthouse, then suddenly stopped and turned to me.

"Wait a minute," he said. "I thought your client couldn't talk."

"Well Judge," I said. "Sometimes the law is a puzzle." ■

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The View from the Fifth Floor of the Justice Building (On a Clear Day)

By Thomas P. Davis and Thomas L. Fowler

The North Carolina Supreme Court Library is open for public use weekdays from 8:30 a.m. to 5:00 p.m., except on state holidays. The Library is located on the fifth floor of the Justice Building, 2 East Morgan Street, Raleigh, North Carolina.

I. Recently Published Articles of Interest to North Carolina Attorneys

Louis A. Bledsoe III, *Clark v. BASF: An Employer's Antidote to* Vaughn v. Revco, 21 Labor & Employment 1 (April 2003): Many employment law practitioners were surprised by Vaughn v. CVS Revco D.S. Inc., 144 N.C. App. 534 (2001), rev. denied, 355 N.C. 223 (2002), which held that "an employee's state law claims for anticipatory breach of contract and unfair trade practices were not pre-empted by ERISA when the employee sought to recover as damages the value of certain pension benefits the employer had erroneously advised the employee he was entitled to receive under the employer's pension plan." In light of *Vaughn*, "the best general strategy for employers . . . is to remove to federal court under ERISA Section 502 any state court lawsuit asserting state law claims to recover the value of allegedly promised or lost pension plan benefits." A recent federal district court decision, Clark v. BASF Corp., 229 F. Supp.2d 480 (W.D.N.C. 2002), "has provided powerful ammunition for employers seeking to sustain removal of state court suits like *Vaughn* . . . ."

Betsy McCrodden, *Questioning the Practice: Selected Results of the Council's Questionnaire*, 17 Dispute Resolution & the Intermediary 1 (June 2003): The first in a proposed series of short articles discussing issues raised by mediator responses to a questionnaire composed by the Dispute Resolution Council. This article focused on responses to the question of delay of payment, and concludes that mediators, "by and large, do not get paid by the rules."

Barbara R. Morgenstern, *Professional vs. Personal Goodwill – The Time Has Come For An Equitable Approach*, 23 Family Forum 1 (June 2003): The author reviews a difficult issue in the law of equitable distribution: the valuation of the goodwill of solo professional practices. She concludes that we should "distinguish between personal and professional goodwill," and "consider only professional or enterprise goodwill as marital property."

Thomas Fowler, *Law Between the Lines*, 25 Campbell L. Rev. 151 (2003): Are lower court judges bound only by the explicit text of an opinion of the supreme court, or are those logical steps and calculations that are necessary to the appellate decision—those not clarified in the rationale of the court, but nonetheless implicitly accepted—properly extracted as part of the holding? Fowler argues that the issue is raised by opinions interpreting North Carolina's Rule 68, for example. According to Fowler, Purdy v. Brown, 307 N.C. 93 (1982), necessarily presumed that post-offer costs and fees were not within the definition of "judgment finally obtained," though neither the rationale nor any language labeled a "holding" in the opinion explicitly said so. Poole v. Miller, 342 N.C. 349 (1995), though, refused to treat this necessarily presumed exclusion of post-offer fees and costs as precedential, holding that the definition of "judgment finally obtained" included the jury's verdict as modified by "any applicable adjustments." That is, on the ground that the issue had not been before the Court in *Purdy*, *Poole* denied that the necessary calculations implicitly approved by *Purdy* were binding. On the same ground, one could argue that "any applicable adjustment" definitively distinguished the judgment finally obtained from the jury verdict, but did not settle whether post-offer costs and fees were included in the calculation of judgment finally obtained—even though *Poole* implicitly approved such a calculation. Thus, in Roberts v. Swain, 353 N.C. 246 (2000), the court of appeals felt free to read narrowly the "any applicable adjustments" language of *Poole* as not including post-offer costs and fees. Yet, the Supreme Court reversed, stating that the "adjustments" had not been limited in *Poole* to pre-offer costs, and that *Poole* had implicitly approved the calculation of the trial court (such calculation having included post-offer costs and fees). Fowler asks why in *Roberts* the implicit calculation approved in *Poole* was given weight, while in *Poole* the implicit calculation approved in *Purdy* was not.

Judicial Review: Blessing or Curse? Or Both? A Symposium in Commemoration of the Bicentennial Marbury v. Madison, 38 Wake Forest L. Rev. 313 (2003): Includes these articles: Michael Kent Curtis, *Judicial Review and Populism*; Daniel A. Farber, *Judicial Review and Its Alternatives: An American Tale*; Sanford Levinson, *Why I Do Not Teach* Marbury *(Except to Eastern Europeans) and Why You Shouldn't Either*; Frank I. Michelman, *Living With Judicial Supremacy*; Robert F. Nagel, Marbury v. Madison *and Modern Judicial Review*; Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*; Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights—and Democracy-Based Worries*.

Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835 (2002): Peck asserts that "tort restrictionists" seek legislative oversight because juries are biased against defendants of personal injury actions, and judges fail to restrain them. The author suggests, though, that when legislatures enact tort restrictions, they proceed in what amounts to "an assault on the authority, responsibilities, and prerogatives of the judiciary, and the judiciary's partner—the jury—in the exercise of judicial power, while also substantially interfering with the rights of injured people seeking redress from the courts. As such they assume a constitutionally illicit supervisory authority over the courts." The rejoinder that the courts owe great deference to the public policy choices of the legislature does not persuade Mr. Peck: "the restriction of constitutional rights, the obliteration of the jury system, the destruction of fairness in the civil justice system, and the illicit arrogation of judicial power by the legislature" are not, in his view, mere public policy choice within the competence of the legislature.

Laurens Walker, *The Stay Seen Around the World: The Order That Stopped the Vote Recounting in* Bush v. Gore, 18 J. LAW & POLITICS 823 (2002): Professor Walker concludes that "the grant of a stay was correct according to law." He reviews the history of the stay practice in cases from state courts, and its current requirements; responds to the dissent's complaint that the Court had not followed its rules concerning judicial restraint; analyzes the relevant jurisdictional statute, 28 U.S.C.A. sec. 1257; and, finally, discusses the merits of the application for a stay, focusing on the requirement of "irreparable harm."

Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573 (2003): The author defends that "courts have moved toward defining as 'law' some matters that would have been called 'fact' at the time the Seventh Amendment was ratified." She argues that "if the [US Supreme] Court is serious about using history to define law and fact, [as suggested in Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996)] it will have to revisit the constitutionality of the reasonable jury test, the directed verdict, the judgment notwithstanding the verdict, and the summary judgment."

G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANNUAL SURVEY AM. L. 329 (2003): Tarr briefly explains how "textual and philosophical" differences distinguish state and federal constitutional provisions that affect the structure and operation of government. The author describes the federal law of separation of powers as "a relaxed version," which allows a blending and sharing of powers in order to check power. In early state constitutions, on the other hand, the legislative power was clearly predominant, and separation of powers clauses were not designed to balance power among the branches of government. And by the 1830's, when the people of the various states began to look for ways to reign in legislatures, they moved legislative powers "to the people themselves, not to another branch of government." Direct popular election of governors and judges is an example. The people also responded to perceived legislative abuse by imposing constitutional restrictions on the legislative power: some required extraordinary majorities to pass certain legislation; some established restrictive procedural requirements (e.g., the subject of a bill must be reflected in its title); some imposed substantive prohibitions on legislative action (e.g., special or local laws; the lending of state credit); and some limited the duration and frequency of legislative sessions. As of 1998, "forty state constitutions contained express separation-of-powers requirements." Tarr suggests that these clauses point to functional differences between the branches of state governments, and encourage a "formalist approach to the separation of powers." He concludes that "American states require a distinctive separation-of-powers jurisprudence, one that reflects the distinctive text, history, political theory, and institutional design embedded in state constitutions."

Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075 (2003): Murphy argues that "Congress could, consistent with separation-of-powers principles and pursuant to its Sweeping Clause power, free the courts from the horizontal stare decisis effects of many precedents or categories of precedents. The limitation on this power is that Congress may not so increase judicial discretion as to transform judges into legislators."

II. Jurisprudence Beyond Our Borders[1]

State v. Miller, 659 N.W.2d 275 (Minn. Ct. App. 2003): An informant alerted the police to drug activity at a residence. The police initiated surveillance of the home and saw two men leave in a pickup truck. An officer on patrol was told to stop the pickup if he could find any legal reason to do so. This officer pulled the pickup over, believing that he saw a windshield severely cracked and, thus, obstructing the driver's view. The officer used his drug-detection dog, Radar, to search for the presence of drugs, and Radar indicated drugs were present. The officer eventually located methamphetamine under the lining of the front passenger seat. The trial court concluded that the police did not have a reasonable, articulable suspicion of drug-related activity prior to conducting the search of the vehicle using the drug-detection dog. The court of appeals agreed. The court noted that although the stop itself was proper because it was based on an equipment violation—the cracked windshield, the fact that the stop was lawful did not automatically legitimize the canine search. "The reasonableness requirement of the Fourth Amendment is not only concerned with the duration of a detention, but also with its scope . . . . A canine sniff has absolutely nothing to do with an equipment violation. Radar was not sniffing the windshield to determine if it was cracked; instead, he was searching for drugs. Radar's use cannot be justified by the equipment violation." The court held that it is necessary to have a reasonable, articulable suspicion of drug-related criminal activity before law enforcement may conduct a dog sniff around a motor vehicle stopped for a routine equipment violation in an attempt to detect the presence of narcotics.

Richardson v. Sara Lee Corp., 2003 Miss. Lexis 270: While operating a machine called a "Hyster Orderpicker," plaintiff sus-

tained an on-the-job injury. Plaintiff settled his workers' compensation claim and then filed suit against the manufacturer of the Orderpicker alleging negligent design, manufacture, and distribution of the Orderpicker. During the course of litigation, a subpoena was served upon plaintiff's employer requesting documentation concerning the whereabouts of the Orderpicker. The employer responded that it had disposed of the Orderpicker. Subsequently, plaintiff's lawsuit was dismissed on the basis that because the Orderpicker in question had been destroyed, plaintiff would not be able to prove the requisite elements of his case. Plaintiff then filed suit against his employer alleging negligent spoliation of evidence. The trial court dismissed this lawsuit and plaintiff appealed. The Supreme Court declined plaintiff's invitation to adopt and recognize a tort claim against a third party for the negligent or intentional spoliation of evidence. The Court explained the factors weighing against recognizing such a claim: infringement on the rights of property owners, endless litigation, and uncertainty of the fact of harm. The Court also observed that nontort remedies for spoliation are sufficient in the vast majority of cases.

Case v. Milewski, 327 F.3d 564 (7th Cir. 2003): Plaintiff alleged that he went to a golf course on a naval base with the intent of playing a round of golf. When the manager of the course informed plaintiff that he was not properly dressed to play because his shirt lacked a collar, a dispute arose. Eventually, the naval base's police responded. Although plaintiff voluntarily left the golf shop, the officers continued to follow him. They asked plaintiff for identification, told him he would have to move his car, bumped, shoved, and pepper sprayed him, and then arrested him. Plaintiff was charged with disorderly conduct, assault, and resisting arrest. The disorderly conduct and assault charges were subsequently dismissed, and plaintiff pled guilty only to resisting arrest. Plaintiff then filed suit against the officers alleging that the officers violated his Fourth and Fifth Amendment rights by seizing him without probable cause and depriving him of freedom of movement. Plaintiff argued that he could sue the officers pursuant to either 42 U.S.C. § 1983 or as part of an action authorized by Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). The trial court granted the officers' motion to dismiss on grounds that plaintiff's complaint failed to state a cause of action. The court of appeals upheld the dismissals. Regarding the Bivens claim, the court explained that plaintiff had argued that he was entitled to damages because he was arrested without probable cause when he was pepper sprayed and that at the time he was sprayed, he was merely attempting to walk away from the officers. Because plaintiff had pled guilty to resisting arrest, however, his claim was barred by Heck v. Humphrey, 512 U.S. 477 (1994). Heck held that to recover damages for allegedly unconstitutional conviction or imprisonment caused by actions—whose unlawfulness would render a conviction or sentence invalid—a plaintiff must prove that the conviction or sentence has been reversed on direct appeal or otherwise declared invalid by a state tribunal. The court concluded: "Under Illinois law, so long as there is physical resistance an officer has probable cause to arrest someone who resists an arrest attempt. ... Thus, because [plaintiff's] resisting arrest conviction has not been called into question, Heck bars [plaintiff's] Fourth Amendment claim."

Borns v. Voss, 70 P.3d 262 (Supreme Court of Wyoming, 2003): A seven-year-old girl was bitten by the defendants' Red Heeler dog, Tramp. Plaintiff alleged the defendants had knowledge their dog was dangerous. Defendants alleged that Tramp bit the child because she was abusing the dog. The trial court granted summary judgment for the defendants concluding because the defendants had no prior knowledge that their dog was vicious or possessed other dangerous propensities, the defendants owed no duty to the plaintiff. The Supreme Court reversed finding issues of material fact. The Court also considered in detail Wyoming's dog bite law and whether the "one free bite" rule should be abrogated. The Court ultimately declined to abrogate the scienter element of common law strict liability in dog bite cases, noting that: "it would be better for the matter to be addressed by the legislature, just as it has been in many other states. The legislature is a deliberative representative body, designed for policy debates, and designed for constituent input. .... [T]here are many ways to fashion a dog bite law." The Court concluded: "We are not insensitive to the plight of dog bite victims who cannot prove negligence on the part of the dog's owner and who cannot prove the owner's prior knowledge of the dog's dangerousness. We are also mindful of the fact that the common law may be judicially modified under appropriate circumstances. But for all the reasons set forth above, we will not in this case abrogate the scienter element of strict liability."

State v. Fisher, 789 N.E.2d 222 (Ohio 2003): At defendant's criminal trial, prior to the presentation of evidence, the trial court informed the jurors that they would be permitted to ask questions of the witnesses that testified at trial. The trial judge instructed the jurors to submit their questions in writing to the bailiff, whereupon the judge and the attorneys would review the questions in a sidebar conference. The trial judge would then determine whether the questions were admissible under the rules of evidence and would read the admissible questions aloud to the witnesses. At the conclusion of the trial, the jury returned a guilty verdict on the felonious assault charge. Defendant appealed, alleging that the practice of allowing jurors to question witnesses is "inherently prejudicial." The Supreme Court held that "the practice of allowing jurors to question witnesses is a matter committed to the discretion of the trial court." And further: "To minimize the danger of prejudice, however, trial courts that permit juror questioning should (1) require jurors to submit their questions to the court in writing, (2) ensure that jurors do not display or discuss a question with other jurors until the court reads the question to the witness, (3) provide counsel an opportunity to object to each question at sidebar or outside the presence of the jury, (4) instruct jurors that they should not draw adverse inferences from the court's refusal to allow certain questions, and (5) allow counsel to ask followup questions of the witnesses."

Endnote

1. These are recent cases from other jurisdictions that address issues of possible interest to North Carolina attorneys.