April 2017

# TRIAL BRIEFS

## THE 14TH AMENDMENT:
### A Promise of Liberty and Equality

NORTH CAROLINA
ADVOCATES for JUSTICE
*Protecting people's rights.*

## INSIDE



**LAW DAY 2017**

**THE 14TH AMENDMENT**

**TRANSFORMING**

**AMERICAN DEMOCRACY**


Lawyers Mutual was founded 40 years ago with a simple mission:

Lawyers Helping Lawyers. We have been doing that ever since.

Now we are moving forward by remembering yesterday and building for tomorrow.

***A lasting legacy - A bold future.***

**919.677.8900 800.662.8843 www.lawyersmutualnc.com**

Lawyers Insurance
A SUBSIDIARY OF LAWYERS MUTUAL

LAWYERS MUTUAL

CONNECT WITH US

TRIAL BRIEFS

NORTH CAROLINA ADVOCATES for JUSTICE

Protecting people's rights.

April 2017

Editorial Board Chair: **Ann Ochsner**

Editor: **Liz Avery-Jones**

Coordinating Editor: **James E. Williams, Jr.**

Published bimonthly by
North Carolina
Advocates for Justice
Post Office Box 10918
Raleigh, NC 27605-0918
919.832.1413 ◆ 919.832.6361 Fax
**www.ncaj.com**
Subscription Rate: $75 Annually



# NORTH CAROLINA ADVOCATES FOR JUSTICE

The North Carolina Advocates for Justice is a nonpartisan association of legal professionals dedicated to protecting people's rights through community, education, and advocacy.

## 2016–2017 BOARD OF GOVERNORS

### OFFICERS

President
**Bill Powers** / Charlotte

President Elect
**Bradley Bannon** / Raleigh

Immediate Past President
**Christopher Nichols** / Raleigh

Legislative Vice President
**John McCabe** / Cary

Membership Vice President
**Sonya Pfeiffer** / Charlotte

Education Vice President
**Valerie Johnson** / Durham

Communications Vice President
**David Henson** / Raleigh

Legal Affairs Vice President
**Mary Pollard** / Raleigh

President Emeritus
**Charles Blanchard** / Raleigh

Past President Appointed by the President
**Margaret "Peggy" Abrams** / Raleigh

Fundraising & Development Officer
**Vernon Sumwalt** / Charlotte

At Large
**Jason Taylor** / Hickory

AAJ Governor
**Lauren Newton** / Charlotte

PAC Chair
**R. Steve Bowden** / Greensboro

Chief Executive Officer
**Richard M. Taylor, Jr.** / Raleigh

### BOARD OF GOVERNORS

**Douglas Abrams** / Raleigh
**Andrew Banzhoff** / Asheville
**Matt Ballew** / Raleigh
**Julie Bell** / Winston-Salem
**Adrienne Blocker** / Durham
**Kevin Bunn** / Cary
**Elizabeth Beall** / Morganton
**Charles Bentley** / Durham
**Clifford Britt** / Winston-Salem
**Meghan Burke** / Asheville
**John Chilson** / Winston-Salem
**Sarah Jessica Farber** / Raleigh
**Christopher Fialko** / Charlotte
**Charles Francis** / Raleigh
**William Goldfarb** / Monroe
**C. Douglas Maynard** / Winston-Salem
**Bailey Melvin** / Greenville
**Philip Miller** / Raleigh
**Charles G. Monnett III** / Charlotte
**Christine Mumma** / Durham
**Ann Ochsner** / Raleigh
**Curtis Osborne** / Charlotte
**C. Melissa Owen** / Charlotte
**Chet Rabon** / Charlotte
**James Rogers** / Morrisville
**Crystal Rouse** / Durham
**Ruth Sheehan** / Raleigh
**Mark Sternlicht** / Fayetteville
**Gabe Talton** / Raleigh
**Hank Teich** / Asheville
**Deonté Thomas** / Raleigh
**Kristina Brown Thompson** / Raleigh
**Karonnie Truzy** / High Point
**Joseph Tunstall III** / Tarboro
**Kim Wilson White** / Raleigh
**Norman Cole Williams** / Durham

### SECTION AND DIVISION CHAIRS

Auto Torts Section
**Jason Orndoff**

Civil Rights Section
**Mark Dorosin**

Consumer/Commercial Rights Section
**Davis Poisson**

Criminal Defense Section
**Sonya Pfeiffer**

Disability Advocacy Section
**Charlotte Hall**

Eminent Domain Section
**David Murray**

Employment Law Section
**Bartina Edwards**

Family Law Section
**Katie Fowler**

Hispanic Latino Division
**Anabel Rosa**

Juvenile Defense Section
**Valerie Pearce**

Legal Aid & Public Defenders Division
**George Hausen**
**Thomas K. Maher**

Legal Assistants Division
**Linda Ethredge**

New Lawyers Division
**Toussaint Romain**

Nursing Home Litigation Section
**Charles Bentley**

Products Liability Section
**Jon Moore**

Professional Negligence Section
**Will Elam**

Small Office Practice Section
**Jones Byrd, Jr.**

Workers' Compensation Section
**Stewart Poisson**

### STAFF

**Liz Avery-Jones**
Communications Coordinator

**Katie Bryant**
Marketing and Graphics Coordinator

**Mary Lee**
Executive Administrator

**Veronica McKoy**
Assistant Director of CLE

**Karen Modrow**
Membership Services Coordinator

**Alex Rogers**
CLE Director

**Andrea Rutherford**
Assistant Director of CLE

**Amy Page Smith**
Director of Membership

**Lou Ann Vincent**
Director of Finance and Administration

**Rob Wall**
Program Manager, NC Comm. on Racial and Ethnic Disparities in the Criminal Justice System

**Sonja Way**
Receptionist

**Kimberly Williams**
Chief Operating Officer

### CONTRACT STAFF

**Randolph Cloud**
Lobbyist

**Burton Craige**
Legal Affairs Counsel

**Philip Isley**
Lobbyist

**Kris Parks**
Lobbyist

**Palmer Sugg**
Lobbyist and Strategist

**Carter Wrenn**
Strategist

**Design and Composition:** Jacky Woolsey, Paper Moon Graphics, Inc., jwoolsey@nc.rr.com

**Printing:** Classic Graphics, Inc., Morrisville, NC, www.knowclassic.com

# Introduction

By James E. Williams, Jr.

The American Bar Association's Law Day theme for 2017 celebrates the 14th Amendment and the many ways its Citizenship, Due Process and Equal Protection clauses have reshaped American law and society and advanced the rights of all Americans. This TRIAL BRIEFS magazine looks at the history and current state of these laws. First, Professor **Theodore M. Shaw**, the Julius L. Chambers Distinguished Professor of Law and Director of the Center for Civil Rights at the UNC School of Law at Chapel Hill, reviews how the passage of the Fourteenth Amendment in 1868 changed America in fundamental ways and how this law has been applied during the subsequent 150 years. Then, ACLU of North Carolina's Legal Director **Christopher Brook** outlines the legal fight since the passage of HB589 which imposed new restrictions on voter access including a photo identification requirement. **Rob Wall**, Director of NC-CRED, discusses how the racial discrepancies within the criminal justice system work against the equal protections promised in the 14th Amendment and how data can be a powerful tool for change. Next, attorneys **Alyson Grine** and **Emily Coward** examine how implicit bias and institutional bias should be discussed when raising an Equal Protection challenge. Also, **Paige Pahlke** offers best practices surrounding juror rehabilitation and juror selection in civil cases. We end this issue with a new feature edited by **Robert Jessup**: a Verdicts, Settlements and Dispositions column.

Visit ncaj.com/trialbriefs for a bonus article: NCAJ Executive Committee member **Ruth Sheehan** profiles lions of criminal defense practice — *Joe Cheshire, Locke Clifford, Sean Devereaux, David Rudolf, Wade Smith, Steve Bernholz* and *Barry Winston* — who share their advice as they reflect on their incredible careers. ◆

**James E. Williams, Jr.** is Public Defender for Orange and Chatham Counties in North Carolina where he has served since 1990. Prior to 1990 he was felony chief of the Mecklenburg County Public Defender's Office. He graduated from Duke University with a Bachelor of Arts Degree in Political Science in 1973 and Duke University School of Law with a J.D. in 1979. In October 2010, while a NCAJ Board member, Mr. Williams moved the Board to establish a Task Force on Racial and Ethnic Bias in the Criminal Justice System. The motion carried and Mr. Williams served as Chair of the Task Force. The work of the Task Force led to the establishment of the North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System in September 2012. Mr. Williams is a member of the Board of Directors of the Commission. He is the founder and Board member of the North Carolina Public Defender Committee on Racial Equity. He served as the Committee's President from its creation in 2011 until 2016. He has twice served on the North Carolina Chief Justice's Commission on Professionalism. Mr. Williams serves on the Advisory Board of the National Consortium on Racial and Ethnic Fairness in the Courts. He chairs the Orange Bias Free Policing Coalition and co-chairs the District 15B Bar's Racial Justice Task Force. Mr. Williams was presented the Thurgood Marshall Award in 2016 by the North Carolina Advocates for Justice. He is a regional co-chair of the National Association of Public Defense Racial Justice Task Force.

NORTH CAROLINA ADVOCATES for JUSTICE
Protecting people's rights.



# 14th Amendment: A Promise of Liberty and Equality and its Relevance Today

TRIAL BRIEFS ◆ April 2017



## FOCUS



BONUS ARTICLE available at *ncaj.com/trialbriefs*:

# CONTRIBUTORS

**Chris Brook** joined the ACLU of North Carolina as its Legal Director in 2012. His practice areas correspond with the ACLU's civil rights and liberties focus, touching particularly on racial justice as well as privacy and women's rights. In his time with the ACLU-NC, he successfully argued in defense of North Carolinians' First Amendment rights in the Fourth Circuit Court of Appeals and played a key role in efforts to secure the freedom to marry for LGBT North Carolinians as well as to safeguard voting rights throughout the state. He is a member of the North Carolina Bar Association Constitutional Rights and Responsibilities Section. In 2015 he was chosen as the recipient of the Outstanding Recent Graduate Award by Carolina Law and the Community Impact Award by the LGBT Center of Raleigh. He also received the Gwyneth D. Davis Award from the North Carolina Association of Women Attorneys in recognition of his work to promote the rights of women under the law in 2016.

**Emily Coward** is a project attorney with the UNC School of Government's Indigent Defense Education Group. In the past, she has served as a staff attorney with North Carolina Prisoner Legal Services and a law clerk for U.S. District Judge James Robertson and for Justice Thembile Skweyiya of the Constitutional Court of South Africa. At Duke University School of Law, she was lead articles editor for Law and Contemporary Problems and received the faculty award for outstanding achievement in criminal law and procedure. She co-authored Raising Issues of Race in North Carolina Criminal Cases, for which she received the Margaret Taylor Writing Award in 2015. She earned a BA from Oberlin College and a JD *magna cum laude* from Duke University School of Law.

**Alyson A. Grine** is an Assistant Professor at North Carolina Central University School of Law. Previously, she served as the Defender Educator at the UNC School of Government from 2006 until August, 2016, focusing on criminal law and procedure and indigent defense education. Prior to 2006, she worked for five years as an Assistant Public Defender in Orange and Chatham counties. She served as a judicial clerk for Chief Justice Henry Frye of the N.C. Supreme Court in 2000 and for Judge Patricia Timmons-Goodson of the N.C. Court of Appeals in 1999. Ms. Grine received the Albert and Gladys Hall Coates Teaching Excellence Award for 2012-2014. She is co-author of the *North Carolina Defender Manual, Volume I; North Carolina Juvenile Defender Manual;* and *Raising Issues of Race in North Carolina Criminal Cases*, for which she received the Margaret Taylor Writing Award in 2015. Ms. Grine earned a BA with distinction and a JD with honors from UNC-Chapel Hill, and an MA in Spanish from the University of Virginia.

**Robert "Robby" Jessup** is a partner at Howard Stallings' Raleigh office. Mr. Jessup has successfully represented many individuals hurt or killed by truckers, drunk drivers, freight train companies and amusement park operators. He has also represented landowners, ranging from Fortune 100 companies to homeowners, in eminent domain cases. He has obtained recoveries in excess of one million dollars for his clients. He is from Greenville, and he attended UNC-Chapel Hill for college and law school.

# CONTRIBUTORS

**Paige Pahlke** is an associate attorney at Brown Moore & Associates, PLLC in Charlotte where she focuses her practice in the areas of personal injury, wrongful death, and medical malpractice. Ms. Pahlke grew up in Scottsbluff, NE, graduated from Creighton University in Omaha, NE in 2007, and received her J.D. from the University of Iowa in Iowa City, IA in 2010. Following law school graduation, she moved to Charlotte for warmer weather and ended up falling in love with the city. Ms. Pahlke is admitted to practice law in all state and federal courts in North Carolina and all state courts in South Carolina.

**Bill Powers** is a partner with Powers McCartan, PLLC in Charlotte. His statewide practice focus is on DWI/DUI related matters in both criminal and civil court. A graduate of NCSU and Campbell Law School, Mr. Powers is a Board Certified Criminal Law Specialist by the NBLSC/NBTA and has been named in *Super Lawyers* since 2007. He is currently serving as President of the North Carolina Advocates for Justice and has previously served as President-Elect, NCAJ Vice President for Communications, and as a NCAJ Board member. He has also served in leadership roles within the NCAJ Criminal Defense Section and the Education Committee and is a recipient of NCAJ's Ebbie Award.

**Theodore M. Shaw** is the Julius L. Chambers Distinguished Professor of Law and Director of the Center for Civil Rights at the University of North Carolina School of Law at Chapel Hill. Professor Shaw teaches Civil Procedure and Advanced Constitutional Law/Fourteenth Amendment. Before joining the faculty of UNC Law School, Professor Shaw taught at Columbia University Law School from 2008 until 2014, where he was Professor of Professional Practice. During that time he was also "Of Counsel" to the law firm of Norton Rose Fulbright (formerly Fulbright & Jaworski, LLP). His practice involved civil litigation and representation of institutional clients on matters concerning diversity and civil rights. Professor Shaw was the fifth Director-Counsel and President of the NAACP Legal Defense and Educational Fund, Inc., for which he worked in various capacities over the span of twenty-six years. For more on Professor Shaw's career visit http://www.law.unc.edu/.

**Ruth Sheehan** is an associate attorney with The Francis Law Firm, PLLC, specializing in civil litigation, especially personal injury, eminent domain and employment cases. In a previous life, she was a reporter and metro columnist for *The News & Observer* of Raleigh. It was in that role that she first made the acquaintance of Joe Cheshire, comparing his appearance in a big criminal case to the cheeseball at a holiday party: you knew eventually he was going to show up. Luckily, Joe is a Lion with a generous sense of humor. Next up: the Lionesses.

**Rob Wall** is the director of the North Carolina Commission on Racial and Ethnic Disparities.


My firm is looking for **post-settlement financing.**

See what ***else*** Counsel Financial can do for your firm.

# Counsel Financial

The power of attorney funding.®

**1-888-493-3268** | CounselFinancial.com

EXCLUSIVE ENDORSEMENTS

American Association for Justice

The National Trial Lawyers

PARTNERSHIPS & ACCREDITATIONS

TRIALSMITH NATLE NACA BBB Accredited Business

Stay informed with legal news updates at blog.counselfinancial.com

**Bill Powers**
is a partner with
Powers McCartan, PLLC in
Charlotte, North Carolina

# Reap a Harvest of Justice for All

by Bill Powers

"Let us not become weary in doing good, for at the proper time we will reap a harvest if we do not give up." Galatians 6:9 NIV

I'll be honest; there are times I feel overwhelmed with the responsibilities of the legal profession. I focus on my natural weaknesses, becoming consumed with the obstacles and opposition I face from sometimes not nice and/or good people.

Yes, there can be a distinction. Good people tend to be nice. If they are not nice, it is only for a time. And I honestly believe there are very few "not good" people out there.

In my heart, I know why it is all too easy to conflate not nice with not good. We see people at their worst in the pressure-cooker of the Judicial System.

- Clients need our help because something bad has happened
- Courts need to move dockets because of lacking resources and limited time
- Opposing Counsel's clients had something bad happen too

Even with the best of intentions to help others, I get derailed. There truly is so much work to be done and there is no way I can possibly do it all. There are many who need me. They drain me of my time, energy, and resources.

They also do not seem to appreciate what I do. "Thanks" is a word seldom heard. Courtesy, I fear, is rapidly becoming a thing of the past.

Many of us conceptually agree with the precept of Justice For All; but, actually living what you believe, fighting for and ensuring justice, is often inconvenient and most certainly, untimely.

It is easy to become exhausted . . . or weary.

I know, "Thanks a lot, Debbie Downer. As President aren't you supposed to build us up?" I believe I am . . . or will.

I want to talk to you, just you, in this President's Column. I want to ask some hard questions. It's just the two of us chatting. I'd appreciate your honesty. If you lie, you will be the only one who knows. We good?

**So let me ask you:**

**1. Why do you get this** TRIAL BRIEFS **magazine?**
Before you answer, I want you to think for a minute. Anyone can come up with an easy answer. As someone who is good on your feet—and you would not be an in-the-trenches courtroom lawyer if you were not—answers, especially obvious ones, should come easy.

**2. Do you drink too much? Do you have mental health problems?**
Whoa. What? Where did that come from? How dare you! That's a personal question. What business is it of yours? I am fine. I am just like everyone else out there. I'm good. Mind your own business.

**3. Do you wonder whether Dental School is still an option?**
No. I am proud of my work and my profession. I love what I do. I am making a difference in people's lives. I am exactly where I am supposed to be in life. Seriously, Bill, are you going to start talking about presidential things?


Again, I asked you to be honest with yourself. Right now you are deflecting. Let us start talking about some truths. Let us be honest with one another.

Let's make it a "Do Over."

We will ignore your first, visceral responses. The purpose of all this is not for me to get answers. I want you to get answers for and about yourself. You get to grade yourself. It's your test, but if it were me, I'd make it Pass or Fail.

I suspect I already know some of the Easy Answers. I hear them a lot, probably no louder than from myself. I want you to think about the Model Answers I propose.

1. Why do you get this TRIAL BRIEFS magazine?
Easy Answer:

I have been provided TRIAL BRIEFS magazine because I am one of 2,910 people in the State who paid membership dues to the North Carolina Advocates for Justice.
Model Answer:

I receive and read TRIAL BRIEFS magazine because I belong. I care about Justice in North Carolina. I want to be a better lawyer or legal professional. I want to help people. I want to become engaged. I want to make a difference. I believe in the Mission, the three pillars of NCAJ. I want to surround myself with excellence. I want to network. I want to enjoy the practice. I want others to enjoy their work too. I want to help build and grow the only organization in North Carolina that takes stands, that gets in the mix, and is comprised of truly good people who share not all, but many of my beliefs and passions. I know I will be valued. I know it does not matter what I look like. I know no one cares how I vote or who I love or in what God I believe or don't believe. I live what I believe and say. I understand there is room to improve, but there is a mighty tradition and history of excellence at NCAJ. I'm all in, 100 percent. What I do is more than a job. I am my job and the job is me. I get TRIAL BRIEFS because not only do I belong, but *I AM NCAJ.*

Then again, maybe you just pay the subscription price of membership.

2. Do you drink too much? Do you have mental health problems?
Easy Answer:

I'm good. Just like everyone else around me. I'm a normal lawyer. I've got a handle on things. Nothing controls me, especially my emotions.
Model Answer:

If I am honest with myself, this is something I should consider. I have seen mental health go south for some people I knew in law school. I heard someone in court isn't doing well. There are days I am tired. I get worn out. I am weary of the system, not all the time, but some of the time. I wish people would be a bit nicer, if not more professional. I wish people in power understood I do not control many things in court, if anything.

3. Do you wonder whether Dental School is still an option?
Easy Answer:

Again, I'm good. Everything is fine in the practice. I make plenty of money. I am satisfied. Could I really have gotten into Dental School?
Model Answer:

What I do for a living is tough. I live during a time when civility is a rarity. My profession and I are under attack. Thank goodness I have NCAJ.

## How'd You Do? Pass or Fail?

I hope you know you are valued at and a valuable asset to the Advocates for Justice. I also hope you recognize that it is ok to become weary. In fact, given the crazy time in which we live, we should expect to become so.

We will reap a harvest if we do not give up. We will change lives. We will make North Carolina a better place in which to live. We will comfort others when they are at their worst. We will make a difference.

And in so doing, we will live up to our highest ideals, justifying the blessing and honor we have been given to help others in need.

## What Are Our Wares?

We do not sell or trade tangible goods. Our wares are understanding, and patience, and compassion, and information, and experience, and advice.

We must continue our important work. We must press on towards the mark, knowing if we persist we will eventually reap the harvest of Justice for All.

That requires refueling. That necessitates maintenance. We need rest.

The best place I know to go get sustenance when I am weary is NCAJ. I am recharged when I surround myself with people who understand me and like me, despite my many weaknesses.

I also recognize that I cannot always take. If I am "normal," whatever that means today in our profession, I must help others whom feel the same way and need the same things I do.

Now that I think about it, I get recharged helping my fellow attorneys. At NCAJ, I do hear "thanks." In fact, I hear it all the time.

The people at NCAJ appreciate the work I do. They are not mad that I seek what is written in the Constitution. They believe 100 percent in the concept of Justice and the necessity to maintain a civilized society.

They do not care if I am an R, or an D, or an I. They are my best and closest friends and confidants. They want me to succeed. They want me to be engaged.

They see value in who I am, even if we do not seem very much alike at first glance.

## So Here's the Point . . .

We need you engaged. We need you 100 percent sold-out to our mission. Our greatest strengths are who we are and the purpose of our existence: To Help Others.

We need more people like you . . . and not like you. We want lawyers, and paralegals, and legal assistants from Greenville, and Greensboro, and Ahoskie, and Elizabeth City, and Oxford, and Cherokee.

We don't care what you look like.

You can be young or well-seasoned by life. You can be an experienced trial dog or in possession of a license still wet from printing. You can litigate civil cases or defend people accused of crimes. You can be poor or rich. You can be garrulous or quiet.

We need more of you. We need more members. We need your help getting them.

We want to see you at Continuing Legal Education programs, Sidebar Socials, and Section Meetings. We want to hear what you think.

## Membership Is a Priority

Right now we are enjoying a slow uptick in membership. That's good. We have an increased number of opportunities for people to get out a meet folks at Sidebar Socials, Section Meetings, and CLE.

Membership is central to just about everything in our organization. It affects our financial position, CLE attendance, our lobbying efforts, and our PAC participation.

It is not all rosy. Within the last few years, membership has been problematic at times. We cannot lose members. We cannot just maintain membership. We must grow if we are to reap our harvest.

Achieving a little bit of Justice, knowing we have a storehouse of need, somehow just doesn't cut it.

During the second half of my term, membership is going to be one of my top priorities. Please make it your priority too.

We need you to invite a non-member to the next NCAJ event you attend. They would see what great people comprise our organization and how dedicated they are to our causes.

I ask you to bring a membership application for your guest to complete and help us double our membership almost overnight. ***You can print an application at nacj.com.***

It will be easier to do if you bring one person to an "event." It can be a Sidebar Social. Those are free and we normally have snacks.

It can be an CLE. Everyone needs some learnin'.

It also can be a Section Meeting. They might appreciate hearing what we do and why we're doing it.

We challenge you. Can we double membership?

## In our Differences and Diversity, We Are Strong

These are not mere words or platitudes. We are taking action at the North Carolina Advocates for Justice.

Diversity and inclusion have always been important to us. We have not always been good about sharing what we do.

We have been talking about Diversity since the inauguration ceremony this past June. It is has been a regular topic of discussion at our Board of Governors meetings. We have participated in presentations, and meetings, and discussion on this issue. During the Board meeting at Mountain Magic, we took a hard look at our numbers.

Here is our conclusion: While we know diversity is important to us, we also know we have room to grow.

We have made it a priority for the North Carolina Advocates for Justice, from stem to stern, to consider diversity in everything we do. We need to be accountable to one another. Our members need to know of and understand our efforts.

Know this—as has been confirmed through an exhaustive review of our numbers:

Leadership in our organization meets or exceeds the metrics of our organization. Including Section Chairs, the Board of Governors, Professional Staff, and the Executive Committee, NCAJ represents who we are.

## That Is not Enough

We need diversity on our CLE panels. We need diversity at the highest levels of our Leadership. We need to get all kinds of people involved.

And while we may meet or exceed our membership statistics, it does not meet or exceed those of our profession and our communities.

As such, I have established the President's Diversity Task Force.

My friends Karonnie Truzy and Sarah Olson have agreed to serve as Co-Chairs. We are actively seeking options for training for the Board of Governors and the Executive Committee.

We are taking steps to make sure everyone feels included. This is a deliberative process. It will take time.

Executive Committee Member Jason Taylor recently emailed me, sharing what diversity meant to him:

*It is important to reiterate the unwavering purpose behind NCAJ. There is a constant, like our Constitution, that defines NCAJ and what we do and what we represent. We stand for the rights of the people, all people, regardless of race, gender, religion, political affiliation, sexual orientation or any other quality that makes us different from one another. These are the rights granted to us by our Constitutions and our Bill of Rights, and defended by us its protectors, in our actions and interactions with the legislative, executive and judicial branches of government.*

Jason is a gun-toting, middle-aged, white male Republican.

He is as much part of NCAJ as any other member and he is dedicated to making certain you feel just as important and necessary to the success of our beloved organization.

We're on it. Please join us in the effort.

## The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys

In February 2016 the *Journal of Addiction Medicine* published a report describing Substance Abuse and Mental Health issues among attorneys. Establishing itself as one of the most comprehensive studies to date, utilizing nationwide data, the results are troubling at best.

Of attorneys engaged in the practice of law:

- Twenty-one percent meet the description of a "Problem Drinker"
- Twenty-eight percent suffer from some level of depression
- Nineteen percent exhibit anxiety symptoms

The highest incidence of issues manifests itself within the grouping of "young" lawyers, defined as attorneys whom have practiced ten years or less.

The *Journal* surveyed 12,825 employed attorneys, evaluating alcohol and drug use, and also assessing symptomatology of stress, depression, and anxiety. The study results are shown below.

"Substantial" rates of behavioral health problems were found.

- Positive for Hazardous, Harmful, and Potentially Alcohol-Dependent Drinking (20.6%)
- Significant Levels of:
  - Depression (28%)
  - Anxiety (19%)
  - Stress (23%)

Younger age predicted higher frequencies of drinking and quantity of alcohol consumed.

According to the Study, *"Attorneys experience problematic drinking that is hazardous, harmful, or otherwise consistent with alcohol use disorders at a higher rate than other professional populations. Mental health distress is also significant. These data underscore the need for greater resources for lawyer assistance programs, and also the expansion of available attorney-specific prevention and treatment interventions."*

Here are some resources to know about:

**Stress, Mental Health and Substance Abuse Assistance**
**BarCARES — Confidential, Free of Charge**

Help in dealing with problems that might be causing distress or to identify resources for longer term assistance

BarCARES Coordinator: 919-929-1227 or 1-800-640-0735

http://www.ncbar.org/members/barcares/
www.barcares.org

**NC Lawyer Assistance Program — Confidential, Free of Charge**

Short-term counseling and crisis management, intervention assistance, assessments, referrals to outside resources (such as therapists and treatment centers), long-term aftercare case management and follow up, on-going support, or just a safe space to discuss your issues

Charlotte Area: 704-910-2310

www.nclap.org

I'd like to hear your ideas on how we can help address this issue. Please feel free to email me at Bill@PowMac.com or call 704-342-4357.

We need to jump on this issue. Let's stop saying one thing, but doing nothing. Just Sayin'.

Bill Powers, I Am NCAJ. ◆

Results: Substantial rates of behavioral health problems were found, with 20.6% screening positive for hazardous, harmful, and potentially alcohol-dependent drinking. Men had a higher proportion of positive screens, and also younger participants and those working in the field for a shorter duration ($P<0.001$). Age group predicted Alcohol Use Disorders Identification Test scores; respondents 30 years of age or younger were more likely to have a higher score than their older peers ($P<0.001$). Levels of depression, anxiety, and stress among attorneys were significant, with 28%, 19%, and 23% experiencing symptoms of depression, anxiety, and stress, respectively.

**Theodore M. Shaw**

is the Julius L. Chambers Distinguished Professor of Law and Director of the Center for Civil Rights at the University of North Carolina School of Law at Chapel Hill

# On the Sesquicentennial of the Fourteenth Amendment

by Theodore M. Shaw

In 1868 the Thirty-ninth Congress' most important accomplishment, the Fourteenth Amendment to the Constitution of the United States, was enacted. One of the three great post-Civil War amendments, it was bought and paid for again and again, first with the blood of 620,000 Americans killed on both sides of a terrible conflict, then in the untold number of deaths of African Americans and others who gave their lives to the struggle to redeem the promise of equality. The Thirteenth, Fourteenth, and Fifteenth Amendments promised to wipe clean the stain of slavery and governmental discrimination. The Thirteenth ended slavery and involuntary servitude. The Fourteenth Amendment guaranteed citizenship to all born or naturalized in the United States, prohibited the states from abridging the privileges and immunities of the United States, and guaranteed due process and the equal protection of the laws. The Fifteenth Amendment guaranteed the right to vote for men against discrimination on the basis of race, color, or previous condition of servitude. Taken together, these three amendments changed the lives and conditions of those who emerged from slavery, but it was the Fourteenth Amendment that worked a profound change in the United States for all within its borders. It changed America in a fundamental way, and it charted a course on which we continue today. It is central to the promise of American democracy.

Historian Eric Foner has written:

> Some amendments, dealing with narrow, immediate concerns, can be thought of as statutes writ large; altering one aspect of national life, they leave the larger structure intact. Others are broad statements of principle, giving constitutional form to the resolution of national crises, and permanently altering American nationality. The Fourteenth Amendment was a measure of this kind. In language that transcended race and region, it challenged legal discrimination throughout the nation and broadened the meaning of freedom for all Americans.[1]

The Supreme Court first interpreted the Fourteenth Amendment in *The Slaughterhouse Cases*,[2] in which it ruled against New Orleans butchers who challenged a state statute granting a monopoly to operators of a slaughterhouse. Justice Miller wrote of the Fourteenth Amendment that "[W]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." *Slaughterhouse* rejected the butchers' claims invoking the privileges and immunities clauses of the Fourteenth Amendment, as well as due process and equal protection claims.

*Slaughterhouse* was almost immediately abandoned by judges and has been widely discredited by scholars. The Fourteenth Amendment, by its own terms, is not limited in applica-

tion to African Americans or any other group, and its privileges and immunities are applicable to the states.

In *Bradwell v. Illinois*[3] the Court, steeped in gender stereotypes and patriarchal assumptions, ruled against the claims of a woman who sought admission to the Illinois Bar. It would take another century before the Supreme Court would apply the Fourteenth Amendment to gender discrimination,[4] and even then it applied a less exacting standard to constitutional gender-based claims, intermediate scrutiny, than to race-based claims.

> [The 14th Amendment] changed America in a fundamental way, and it charted a course on which we continue today.

In the battle against racial discrimination late nineteenth century jurisprudence was at best a mixed story. The Fourteenth Amendment was interpreted to require state action,[5] and proof of intentional discrimination. In 1883 the Court struck down the Civil Rights Act of 1875,[6] which prohibited discrimination by private actors, ruling that the Fourteenth Amendment did not reach private conduct either on its own terms or through its enforcement clause, and that the Thirteenth Amendment "merely abolished slavery". The Court opined that ". . . it would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may seem fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car; or admit into his concert or theater, or deal with other matters of intercourse or business".[7] In language anticipating the "reverse discrimination" jurisprudence of the late Twentieth Century, Justice Bradley wrote that "When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the law. . . ."[8] Thus, fewer than twenty years after the adoption of the Thirteenth Amendment the Supreme Court turned its back on protective civil rights legislation because African Americans sought to be "special favorites of the laws".

In *Plessy v. Ferguson* the Court upheld the principle of 'separate but equal'. *Plessy* joined *Dred Scott* as one of the most infamous Supreme Court's decisions. Yet, *Plessy* is as well-known for the lone dissent of Justice John Marshall Harlan as for its introduction of the "separate but equal" regime. Harlan famously wrote that "Our constitution is color-blind, and neither knows nor tolerates classes among citizens."[9] "Color-blindness" became an aspiration for many Americans, and even if it did not become reality, for some it became the governing jurisprudential paradigm guiding equal protection.

In 1886 the Supreme Court was deemed to have decided that the Fourteenth Amendment protected corporations as well as people.[10] And in1905 *Lochner v. New York*[11] began a long line of cases which upheld corporate interests against governmental regulations intended to protect workers and others in health and safety matters. These tensions between business and governmental regulators came to a head in the 1930s when the FDR Administration's New Deal Agenda, stymied by a conservative Court, led to a court packing plan which would have given the President a sympathetic majority. In *West Coast Hotel v. Parish*,[12] Justice Owen Robert's vote signaled a shift that defused the scheme, and signaled the end of the *Lochner* Era.

Equal protection jurisprudence changed dramatically in *United States v. Carolene Product*s,[13] in which the Supreme Court acknowledged the ordinary deference and presumptive constitutionality accorded legislative actions, subject to an important reservation. In what has been called the most important footnote in constitutional history, the Court, in a case involving the constitutionality of governmental regulation of milk filler products, suggested that laws affecting vulnerable minority groups deserved less deference.

*Carolene Products*' footnote 4, penned when Europe was on the verge of WWII and during the rise of Nazism, was a warning shot across the bow of American racial segregation. It introduced "tiered scrutiny" under the Fourteenth Amendment, pursuant to which race-conscious measures are subject to the strictest level of judicial review. It was a significant step on the path toward the end of Jim Crow segregation and the revitalization of the equal protection clause. Still, strict scrutiny did not save loyal American citizens of Japanese descent from racial discrimination and internment camps during WWII.[14]

In the same year as *Korematsu,* the Supreme Court struck down Texas' white-only primary, rejecting the argument that the Democratic primary was not a state action reachable by the Fourteenth Amendment.[15] During this era the NAACP Legal Defense Fund, Inc., under the direction of Thurgood Marshall, launched a campaign mapped out by the brilliant Charles Hamilton Houston, aimed at overturning *Plessy*'s "separate but equal" regime.

Houston and Marshall attacked *Plessy*'s Achilles' heel: separate but equal was never equal. In a series of cases concerning higher education[16] the NAACP Legal Defense Fund cracked the edifice of Jim Crow, culminating in the Supreme Court's 1954 decision in *Brown v. Board of Education*.[17] In *Brown* a unanimous court ruled that "in the field of public education, separate educational facilities were inherently unequal". *Brown* broke the back of *de jure* segregation in Amer-

ica. Ironically, the battle to desegregate schools bore limited fruit until the Court's 1971 decision in *Swann v. Charlotte-Mecklenburg Bd. of Ed.*,[18] which sanctioned the use of "busing" as a remedy to negate segregated housing patterns. Mandatory school desegregation moved to the North[19] and West[20] for a time, before the Supreme Court finally decided a series of cases[21] curtailing, if not ending, most public school desegregation efforts, even on a voluntary basis.[22]

Much of the Fourteenth Amendment race jurisprudence over the last three decades, however, has emerged from cases involving "reverse discrimination" claims. In the decade after the end of the Civil Rights Movement, the end of formal segregation, and the assassination of D. Martin Luther King, Jr., a powerful backlash found its way into federal courts. In 1978 the Supreme Court splintered 4-1-4 in *Bd. of Regents of the Univ. of California v. Bakke*,[23] in which it struck down the U.C. Davis Medical School's efforts through its admissions program to increase the number of physicians from underrepresented racial minority groups but allowed colleges and universities to seek diversity in admissions. The effort to overturn *Bakke* remained a pet target of conservatives for a quarter of a century, until the Supreme Court decided *Grutter v. Bollinger*,[24] which commanded a 5-4 vote to reaffirm *Bakke*.

*Grutter* did not end challenges to diversity efforts in higher education. The University of Texas twice defended its admissions program in the Supreme Court in recent years.[25] As of this writing, additional actions challenging diversity efforts in admissions and alleging Fourteenth Amendment violations have been filed and are pending in federal district courts against the University of North Carolina and Harvard University.

In recent years the Fourteenth Amendment has been invoked to protect LGBTQ individuals. In *Roemer v. Evans*[26] the Supreme Court invalidated a Colorado state initiative banning local jurisdictions from enacting measures protecting individuals on the basis of sexual orientation. In *Lawrence v. Texas*,[27] the Supreme Court ruled that Texas' sodomy law violated the Fourteenth Amendment's due process clause. A narrow majority overruled the Court's 1986 decision in *Bowers v. Hardwick*,[28] which upheld a similar Georgia law. In 2013 the Court ruled that under the Fifth Amendment's Due Process Clause the Defense of Marriage Act (DOMA) could not be applied to deny a surviving partner of a same–sex marriage a federal benefits for surviving spouses.[29] More recently, in *Obergefell v. Hodges*,[30] the Court extended to same-sex couples the protections it granted to interracial couples in its 1967 decision in *Loving v. Virginia*. *Obergefell*, *Windsor*, and the recent Supreme Court cases applying the Fourteenth

Amendment's protections to LGBTQ persons have further expanded the meaning of equality and due process, and constitutionalized important changes in American values.

Over one hundred years after its adoption, the Fourteenth Amendment is one of the most important bedrocks of American constitutionalism. Its original purpose, the protection of African Americans from the stain of racism, is incomplete, as racial discrimination and inequality remain a fact of American life. The promise of equality for women, people of color, for gays and lesbians, and other historically disfavored groups, remains work in progress, as the United States continues its journey toward "a more perfect union". In early Twenty-first Century America, economic inequality grows greater and greater, threatening the social compact and the ties that bind us together. The Constitution, as recognized in *San Antonio v. Rodriguez,*[31] is silent on economic status and wealth discrimination. The growing tensions on this fault line finds no solutions in America's most sacredly stated values.

And in the second decade of the new millennium, new dangers threaten American democracy and the promises of due process and equality. Some people foretell the collapse of our republic. Many of those who foresee doom believe that America has never been more divided. These people, however, are not students of history. We fought a civil war. Early in the republic, a vice-president of the United States, shot and killed a former secretary of the treasury. Our divisions have always run deep. While we can never be sanguine about the uncharted waters in which we now find ourselves, and we have never had a head of state who represents such an existential threat to our democracy as we know it, we do well to remember that we ended slavery. We brought African Americans, Native Americans, Asian Americans, Latinos, women, religious minority groups, the differently abled, and people from all backgrounds under the protections of our constitution and laws. We gave a new birth to freedom to America, and if needs be, we can do it again. That is the lesson of the Fourteenth Amendment. ◆



1. Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877, Harper and Row, pp. 257-258.
2. 83 U.S.36 (1873).
3. 83 U.S. 130 (1873).
4. *Reed v. Reed*, 404 U.S. 71 (1970).
5. *U.S. v. Cruikshank*, 92 U.S. 542 (1875).
6. 109 U.S. 3 (1883).
7. 109 U.S. 24-25.
8. *Id.*, at 25.
9. *Plessy v. Ferguson*, 163 U.S. 537 (1896) at 559.
10. *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886).
11. 198 U.S. 45 (1905).
12. 300 U.S. 379 (1937).
13. 504 U.S. 144 (1938).
14. *Korematsu v. U.S.*, 323 U.S. 214 (1944).
15. *Shelley v. Kraemer*, 334 U.S.1 (1948).
16. *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma*, 339 U.S. 637 (1950).
17. *Brown v. Board of Education*, 347 U.S. 483 (1954).
18. 402 U.S. 1 (1971).
19. *E.g., Morgan v. Hennigan* (Boston); *Reed v. Rhodes* (Cleveland, Oh.); *Bd. of Educ. of Columbus, Ohio v. Penick*; 443 U.S. 449 (1979); *Dayton, Ohio Bd. of Ed. v. Brinkman*; 443 U.S. 526 (1979).
20. *Keyes v. Denver School District No. 1*; *Washington v. Seattle School District No.1.*
21. *Bd. of Ed. of Oklahoma City Schools v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Missouri v. Jenkins*, 515 U.S. 70 (1995).
22. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).
23. 438 U.S.265 (1978).
24. *Grutter v. Bollinger*, 539 U.S. 306 (2003).
25. *Fisher v. Univ. of Texas*, 579 U.S. ____ (2016) (*Fisher* II); *Fisher v. Univ, of Texas,* 570 U.S. ____ (2013) (*Fisher* I).
26. 517 U.S. 620 (1996).
27. 539 U.S. 558 (2003).
28. 478 U.S. 186 (1986).
29. *United States v. Windsor,* 570 U.S. ____, (2013).
30. 576 U.S. ____(2015).
31. 411 U.S. 1 (1973).

# FROM GUESSWORK TO PRECISION

## HOW PAID SOCIAL MEDIA DELIVERS FOR YOUR FIRM

FindLaw®

AVAILABLE NOW AT **LAWYERMARKETING.COM/NCAJ-SOCIAL**

**Christopher Brook**
is the Legal Director of ACLU-NC



# *NAACP v. McCrory*[1]: What Constitutes Intentional Discrimination in Voting Regulations?

by Christopher Brook

In 2013, North Carolina adopted "the first meaningful restrictions on voting access" since the end of Jim Crow through the passage of House Bill 589 ("HB 589").[2] Specifically, the state for the first time required photo identification from an individual every time he or she voted in person. A voter wishing to cast such a ballot would have to produce a qualifying form of identification to have his or her vote count.[3] In addition, HB 589 eliminated seven days of early voting, same day registration, pre-registration allowing 16- and 17-year-olds to register to vote (though, of course, not participate) in advance of turning 18, and out-of-precinct balloting allowing the counting of eligible votes cast in the correct county but wrong precinct.

These changes immediately resulted in a flurry of legal challenges focusing predominantly on the prohibition on racial discrimination in the regulation of elections found in the Fourteenth Amendment to the United States Constitution and the Voting Rights Act of 1965. The district court upheld each of these changes on April 25, 2016. The Fourth Circuit Court of Appeals reversed on July 29, 2016, finding that the challenged "provisions target African Americans with almost surgical precision[]" in violation of the Fourteenth Amendment's Equal Protection Clause.[4] On August 31, 2016, the Supreme Court, in a split 4-4 vote along familiar ideological lines, refused to stay the impact of the Fourth Circuit's decision. The 2016 elections consequently proceeded without the photo ID requirement and with the four previously eliminated means of participation restored. North Carolina recently sought Supreme Court review in the case; briefing continues on point.

Given the sharp ideological divide on the Supreme Court pertaining to voting rights, the decision to grant cert in this case and, if granted, its ultimate outcome could turn on the views of either Justice Anthony Kennedy, often at the ideological center of cases and a vote to stay the Fourth Circuit's decision in part in August, or perhaps Judge Neil Gorsuch provided he is confirmed to the bench. What follows below are brief overviews of the Fourth Circuit decision as well as North Carolina's recent cert petition, both with an eye toward the pivotal points of contention that might take center stage during the 2017-2018 term of the Supreme Court.

## 4th Circuit Decision

"[T]he ultimate question remains: did the legislature enact a law 'because of,' and not 'in spite of,' its discriminatory effect."[5] The Fourth Circuit thusly focused its inquiry on whether North Carolina had acted with discriminatory *intent* in violation of the Fourth Amendment. Plaintiffs' allegations of discriminatory *effect*, the basis for stand-alone allegations deriv-

ing from Section 2 of the Voting Rights Act, were a subset of this intent inquiry.

Recognizing "that a facially neutral law . . . can be motivated by invidious racial discrimination[]"[6] and that "[o]utright admissions of impermissible racial motivation are infrequent[,]"[7] the Court turned to the prescribed "sensitive inquiry into [the] circumstantial and direct evidence of intent" surrounding HB 589.[8] Per *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, this assessment turned on "'[t]he historical background of the [challenged] decision'; '[t]he specific sequence of events leading up to the challenged decision'; '[d]epartures from normal procedural sequence'; the legislative history of the decision; and of course, the disproportionate 'impact of the official action—whether it bears more heavily on one race than another.'"[9] Finding these factors pointed toward discriminatory intent, the Court then assessed whether HB 589 would have been adopted absent racial implications and concluded it would not.

First, the Fourth Circuit held that "North Carolina has a long history of race discrimination generally and race-based vote suppression in particular[,]" realities that continue through the present day.[10] After briefly chronicling that State's "'shameful' history of 'past discrimination,'"[11] the Court documented that this history did not stop with the adoption of the Voting Rights Act in 1965. Pursuant to the preclearance regime of the Voting Rights Act's Section 5, the "[United States] Department of Justice issued over fifty objection letters to proposed election law changes in North Carolina—including several since 2000—because the State had failed to prove the proposed changes would have no [racially] discriminatory purpose or effect."[12] "During the same period, private plaintiffs brought fifty-five successful cases under § 2 of the Voting Rights Act."[13] Finally, the panel noted that a three-judge federal court recently concluded that the same legislature that had adopted HB 589 had also adopted a redistricting plan in which "race was the predominant motive in drawing two congressional districts, in violation of the Equal Protection Clause."[14]

Overlaying this history, the Fourth Circuit "noted that racially polarized voting between African Americans and whites remains prevalent in North Carolina."[15] The fact that African Americans overwhelmingly support Democrats could incentivize Republicans to re-erect "barriers to African American access to the franchise[.]"[16] The panel concluded this was precisely what had transpired here: for example, North Carolina justified its elimination of a week of early voting and thereby one Sunday of early voting by referencing that "[c]ounties with Sunday voting in 2014 were disproportionately black" and "disproportionately Democratic[,]" rationales "as close to a smoking gun as we are likely to see in modern times."[17]

Second, the Fourth Circuit held that the sequence of events culminating in the adoption of HB 589 signaled discriminatory intent. The Court noted that HB 589 was initially "only sixteen pages and contained none of the challenged provisions, with the exception of a much less restrictive photo ID requirement."[18] This version was adopted with bipartisan support by the North Carolina House and sent to the Senate, where "[f]or the next two months, no public debates were had, no public amendments made, and no action taken on the bill."[19] "Then, on June 25, 2013, the Supreme Court issued its opinion in *Shelby County* [*v. Holder*, 133 S. Ct. 2612 (2013)][,]"[20] freeing North Carolina from its preclearance obligation to receive federal approval for election changes. "The very next day, the Chairman of the Senate Rules Committee [Bob Rucho] proclaimed that the legislature 'would now move ahead with the *full bill*'[.]"[21] The full bill, "now fifty-seven pages in length[,]" made the original photo ID provision more onerous by removing forms more likely to be possessed by African Americans, including public assistance IDs, from the list of acceptable IDs.[22] This version also included the other challenged provisions for the first time. The 57-page version of HB 589 then "moved through the General Assembly in three days: one day for a public hearing, two days in the Senate, and two hours in the House[,]" a "hurried pace . . . strongly suggest[ing] an attempt to avoid in-depth scrutiny."[23]

Third, though sparse due to claims of legislative privilege, the Fourth Circuit found the legislative history surrounding HB 589 troubling. "[P]rior to and during the limited debate on the expanded omnibus bill, members of the General Assembly requested and received a breakdown by race of DMV-issued ID ownership, absentee voting, early voting, same-day registration, and provisional voting (which includes out-of-precinct voting)."[24] Of this list, only absentee voting was disproportionately utilized by white voters; it alone from the above list remained unchanged after *Shelby County*. For example, absentee voting was exempted from the photo ID requirement.

Finally, the Fourth Circuit held that the challenged provisions disproportionately impacted African American voters as they were more likely to utilize the eliminated means of participation and more likely to lack an acceptable ID.

Having found that race was a "factor that motivated enactment of the challenged provisions . . . , the burden . . . 'shift[ed] to the law's defenders to demonstrate that the law would have been enacted without this factor.'"[25] The panel concluded North Carolina could not do so. On the one hand, "the photo ID requirement, which applies only to in-person voting and not to absentee voting, is too narrow to combat fraud."[26] There was no evidence of in-person fraud. There was evidence of mail-in absentee voter fraud. On the other hand, "[t]he photo ID requirement is also too broad[,]" for example, in its exclusion "as acceptable identification all forms of state-issued ID disproportionately held by African

Americans."[27] Along the same lines, the elimination of a week of early voting did not achieve the consistency across counties that had supposedly animated it. The administrative burdens cited by the state in support of its elimination of same-day registration were overstated. Justifications for cutting out-of-precinct balloting were post hac rationalization meriting no deference, according to the Court. And, finally, instead of remedying voter confusion, gutting pre-registration made the election system even more complex. In short, the Fourth Circuit concluded that the challenged provisions "constitute solutions in search of a problem."[28]

## North Carolina Petition for Supreme Court Review

On December 27, 2016, North Carolina filed its petition for Supreme Court review seeking to have the Fourth Circuit's ruling overturned and the challenged provisions of HB 589 reinstated. Accusing the decision below of "insult[ing] the people of North Carolina and their elected representatives by convicting them of abject racism[,]"[29] the petition asserts that ruling must be reviewed and overturned because it misapplied governing law in three ways.

First, North Carolina argues "[t]he Fourth Circuit's decision cannot be reconciled with *Shelby County*, which invalidated the formula for application of § 5 of the Voting Rights Act."[30] Specifically, the petition claims the Fourth Circuit resurrected Section 5's retrogression standard, which "establish[ed] a one-way ratchet that locked in incremental improvements in minority voting opportunities."[31]

Second, North Carolina contends that the panel below diluted the governing standard for proving an enactment was adopted with discriminatory intent and did so in a fashion likely to result in downstream consequences. North Carolina's reforms impose no draconian burdens, let alone did they intend to do so, according to this argument, but instead leave the state "with a voting system in the national mainstream[.]"[32] Of particular note, the petition favorably compares North Carolina's photo ID requirement to that of Indiana's upheld in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). This alleged dilution of the standard "could readily be deployed to invalidate the election laws of numerous States[,]"[33] as there are racially polarized voting patterns, histories of racial discrimination, and racial disparities in possession of photo ID nationwide.

Third, North Carolina contends the Fourth Circuit utilized "statistical racial disparities in the use of voting mechanisms" as evidence of discriminatory purpose "even when the challenged laws lack discriminatory impact."[34]

## Conclusion

While the outcome is anything but clear, the battle lines are now well drawn between the judicial assessment advocated for by North Carolina and adopted by the district court, and that advocated for by those challenging these enactments and adopted by the circuit court. Decisions on cert and potentially on the merits will turn in large part on how the Supreme Court situates HB 589 in the competing frames offered by the parties.

Will the Supreme Court view HB 589 as a modern variant on North Carolina's shameful history of racial discrimination? Or will the Court accept the State's assertion that, contrary to the progress that has occurred since then, the Court's skepticism owes to the fact that "in the Fourth Circuit's eyes . . . it is *always* 1965[]"?[35]

Will the Supreme Court focus narrowly on HB 589 and its supporting rationales (or lack thereof)? And, relatedly, will it consider the unprecedented scope of HB 589 and its cumulative impacts on voting in the state? Or will the Court focus its inquiry on where HB 589 would place North Carolina relative to other states? Will this assessment simply consider each revision on its own merits or as pieces of a larger puzzle?

Each of these questions, at bottom, points to a larger question: how much should courts defer to states in their management of elections? Does the Fourth Circuit evince appropriate suspicion for implausible governmental motives and appropriately arrive at the only tenable conclusion? Or does it set a course in which every revision is suspect and federalism is imperiled?

We shall see. ◆

1. The author is a counsel for the Plaintiffs in this litigation.
2. *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir. 2016).
3. Weeks before trial in the district court, North Carolina amended the photo ID requirement to permit "a voter without acceptable ID to cast a provisional ballot if he completed a declaration stating that he had a reasonable impediment to acquiring acceptable photo ID." *Id.* at 219.
4. *Id.* at 214.
5. *Id.* at 220 (internal citations omitted).
6. *Id.*
7. *Id.* at 221 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999)).
8. *Id.* at 220 ((quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977)).
9. *Id.* at 220-21 (quoting *Vill. of Arlington Heights*, 429 U.S. at 266-67).
10. *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d at 223.
11. *Id.* at 223 (citing *North Carolina State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 428 (M.D.N.C. 2016)).
12. *McCrory*, 831 F.3d at 224. "Forty North Carolina jurisdictions were covered" by Section 5, which required preclearance for any change to "the procedure or qualifications for voting" from either the United States Department of Justice or the United States District Court for the District of Columbia. *Id.* at 215.
13. *Id.*
14. *Id.* at 225 (citing to *Harris v. McCrory*, F. Supp. 3d 600, 603-04, 621 & n.9 (M.D.N.C. 2016)).
15. *Id.* (citing *McCrory*, 182 F. Supp. 3d at 429).
16. *Id.* at 226 (citation omitted).
17. *Id.*

18. *Id.* at 227 (citing *McCrory*, 182 F. Supp. 3d at 338).
19. *Id.*
20. *Id.* (citing *McCrory*, 182 F. Supp. 3d at 339).
21. *Id.* (quoting *McCrory*, 182 F. Supp. 3d at 339) (emphasis added).
22. *Id.* at 227-28 (quoting *McCrory*, 182 F. Supp. 3d at 497).
23. *Id.* at 228 (emphasis in original).
24. *Id.* at 230.
25. *Id.* at 233 (quoting *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)).
26. *Id.* at 235.
27. *Id.* at 236. Judge Wynn, joined by Judge Floyd, invalidated the photo ID provision even though it had been revised to include the aforementioned "reasonable impediment" exception. *Supra* n.ii. The majority held that, "even if the State were able to demonstrate that the amendment lessens the discriminatory effect of the photo ID requirement, it would not relieve us of our obligation to grant a complete remedy . . . That remedy must reflect our finding that the challenged provisions were motivated by an impermissible discriminatory intent and must ensure that those provisions do not impose any lingering burden on African American voters. We cannot discern any basis upon which this record reflects that the reasonable impediment exception amendment fully cures the harm from the photo ID provision." *Id.* at 240. Judge Motz, author of the primary opinion, would have instead "temporarily enjoin[ed] the photo ID requirement and remand[ed] the case to the district court to determine if, in practice, the exception fully remedies the discriminatory requirement or if a permanent injunction is necessary." *Id.* at 244 (Motz, J., dissenting as to Part V.B.).
28. *Id.* at 238.
29. Petition for a Writ of Certiorari at 2, *North Carolina v. North Carolina State Conference of the NAACP*, 831 F.3d 204 (4th Cir. 2016) (No. 16-833).
30. *Id.* at 16.
31. *Id.* at 17.
32. *Id.* at 20.
33. *Id.* at 24.
34. *Id.* at 34. All parties agree that African Americans disproportionately lack qualifying ID and disproportionately utilized the other challenged provisions. The parties disagree passionately about whether the adoption of these provisions signal discriminatory intent toward or had a discriminatory effect on African Americans. North Carolina highlights "African-American participation . . . increased . . . from 40.4% [in the 2010 midterm elections] to 42.2% [in the 2014 midterm elections,]" when all of the challenged provisions save the photo ID provision were in effect. *Id.* at 8. The Fourth Circuit dismisses this data point as legally irrelevant and unpersuasive. Showing discriminatory impact does not require proving that the "challenged provisions prevented African Americans from voting at the same levels they had in the past[,]" according to the Court. *McCrory*, 831 F.3d at 232. Further, drawing causal conclusions on the strength of one midterm election is fraught. Finally, the Court found evidence of impact in 2014 that hinted at an effect: "African Americans disproportionately cast provisional out-of-precinct ballots, which would have been counted" in previous years and "thousands of African Americans were disenfranchised because they registered during what would been the same-day registration period[,]" contributing to "a significant decrease in the rate of [positive] change" in African American participation. *Id.* (emphasis in original).
35. *Id.* at 2. This, of course, builds off of *Shelby County*'s admonition that "history did not end in 1965" in justifying its invalidation of the formula determining the jurisdictions subject to preclearance. 133 S. Ct. at 2628.

**Rob Wall**
is the director of the North Carolina Commission on Racial and Ethnic Disparities

# Promise Unfulfilled: Equal Protection and Racial Equity in North Carolina's Criminal Justice System

by Rob Wall

Though the words "Equal Justice Under Law" are chiseled into the U.S. Supreme Court's facade, one need only visit a local jail, sit in the back of a courtroom, or spend time in a prison to see that our justice system punishes people of color more often and more severely. Data tells us conclusively that the promise of equal protection is yet to be achieved in the criminal justice system. In North Carolina, black people make up 22 percent of the population, but account for 57 percent of our prison population.[1] Nationwide, black people account for nearly 1 million of the total 2.3 million people incarcerated, a rate nearly six times that of whites.[2] It is estimated that one in every three black male babies and one in every six Latino male babies born today will go to prison in his lifetime.[3]

While the promise of equal protection is widely understood as the foundational bedrock of our justice system, it is equally plain that it is a promise unfulfilled. These racial disparities that pervade every stage of our criminal justice system are not particularly surprising when one considers that for much of our country's history the criminal justice system was used to actively prevent communities of color from achieving the very equal protection guaranteed by the 14th Amendment. This dichotomy between the aspiration of equal protection and the realities of discriminatory treatment of people of color in the justice system has existed since the 14th Amendment was passed 150 years ago.

In the era of Black Lives Matter, communities across the country have called for renewed discourse and reckoning with the history of the criminal justice system's antagonistic relationship with people of color. Works like Michelle Alexander's book, *The New Jim Crow,* and Ava Duvernay's film, 13th, are full of examples of the criminal justice system working in opposition to equal protection for black and brown people throughout history.[4] Shortly after the passage of the Reconstruction Amendments, the system of convict leasing, where southern planters and state and local governments created a system of onerous criminal vagrancy laws, put former slaves back into involuntary servitude on the same plantations from which they had been freed.[5] It was not until 1928 that county governments ceased "renting" black people convicted of crimes to coal mines, lumber camps, rock queries and farms in the industrializing south.[6] Later, the repressive Jim Crow laws establishing the perverse "separate but equal" doctrine were enforced by police and courts throughout the country. Our criminal justice system punished violators of Jim Crow laws for breaking the legally-enforced racial status quo while turning a blind eye when lynch mobs terrorized black communities often with impunity.[7] During the so-called "War on

Drugs" and subsequent explosion in the U.S. prison population, black communities were disproportionately targeted. Though using drugs at about the same rates as whites, from 1980 to 2007 about one in three drug arrests were of black people.[8] Asked about the efficacy of the War on Drugs, an aid to Richard Nixon said, "The Nixon White House . . . had two enemies: the antiwar left and black people. . . . [B]y getting the public to associate the hippies with marijuana and blacks with heroin, [a]nd then criminalizing both heavily, we could disrupt those communities."[9]

It is this history that has shaped our contemporary criminal justice crisis, where more black people live under corrections control today than were enslaved in 1850.[10] The groundswell of support for criminal justice reform in recent years has brought people of all political stripes into the conversation about how to safely reduce our overreliance on incarceration and minimize the negative effects of criminal justice involvement.

However, the overrepresentation of people of color in the criminal justice system cannot be reduced simply though colorblind "smart-on-crime" policy making. For example, reforms in North Carolina's juvenile justice system between 2000 and 2014 reduced the overall number of black children detained by 60 percent, compared to a 73 percent reduction for white children. Despite a reduction in the detention footprint, the racial disparities persist.[11]

Instead, using data to intentionally focus on the racial impact of proposed or standing policies allows us to proactively alleviate these disparities. Across North Carolina, available data has been used to take a hard look at criminal justice practices and make meaningful change towards equity:

- Responding to the pervasive overrepresentation of children of color at all stages of the juvenile justice system, Charlotte-Mecklenburg launched the much-lauded Race Matters for Juvenile Justice (RMJJ) program in 2010. Since then, RMJJ has worked comprehensively, through public education, workforce racial equity trainings, institutional organizing and ongoing data analysis to build a more equitable juvenile justice system.[12]

- In 2014, the Fayetteville Police Department (FPD) became the fourth department in the country to enter into a voluntary collaborative process with the Department of Justice (DOJ) to pursue long-term policing reforms. Over the course of a year, the FPD and DOJ examined the role of race in use of force incident reports, traffic stops, and interactions with community members. Over 2016, the FPD worked to put in place the 76 recommendations issued by the DOJ, which included prioritizing moving violations over minor regulatory stops, de-escalation training for officers and use of force policy reforms.[13]

- Similarly, after *The New York Times* reported on data showing that black drivers are pulled over twice as often as whites in Greensboro, the Greensboro Police Department suspended its enforcement of equipment violations, long shown to be where the racial disparities in traffic stops are most prevalent.[14] Over four months, Greensboro examined its traffic stop and search practices and, in December 2016, initiated procedural justice trainings for officers, the use of cameras, written consent for searches and traffic stop data reporting procedures.

> While the promise of equal protection is widely understood as the . . . bedrock of our justice system, it is equally plain that it is a promise unfulfilled.

- In 2015, Halifax County partnered with the American Bar Association Racial Justice Improvement Project to analyze a snapshot of its jail population. The resulting report showed that 15 percent of the pretrial jail population were considered low-risk, of whom 77 percent were black.[15] In response, Halifax is launching a pretrial release pilot project in 2017 aimed at exploring strategies for the county to safely reduce racial disparities in this jail population.

Though these few examples are emblematic of meaningful uses of data to reduce racial disparities occurring across the state, there is much more work to be done. We have ample data to make intentional, well-informed policy decisions aimed at building a more equitable criminal justice system:

- North Carolina stands essentially alone in its treatment of 16- and 17-year-old children accused of crimes, a group that is disproportionately children of color. The U.S. Supreme Court has consistently recognized, and social sciences have shown, that the differences between children and adults brains require a different response from our justice system. By providing the developmentally appropriate resources available in the juvenile justice system, raising the age of juvenile court jurisdiction would reduce long-term racial disparities, reduce recidivism and benefit public safety.[16]

- Two recent studies have shown that eligible potential jurors of color are disproportionately excluded from jury service in North Carolina. One showed that in District 15b, juries consistently had more white jurors and fewer

black jurors than represented in the census.[17] Another examined all non-capital felony trials from 2011–12 and preliminarily found that prosecutors strike non-white jurors disproportionately.[18]

- In the years since the "Great Recession," North Carolina has followed the national trend of shifting an ever-increasing cost burden, of both the courts and the state's general fund, on criminal defendants, who are disproportionately low-income people of color. These court debts destabilize people's lives often at their most vulnerable point when failing to pay can lead to additional criminal charges, re-incarceration, license suspensions and a negative credit report.[19]
- North Carolina law contains hundreds of legal restrictions on people with criminal records, and the damaging effects of criminal records are felt more severely for people of color. Though a criminal record lowers the chance of being called back by a potential employer by 50 percent, a landmark study showed that a potential employer is more likely to call back a white applicant with a felony conviction than a black applicant with no criminal record at all.[20] Expanding the availability of expunctions and certificates of relief, as well as promoting fair hiring policies across the state, is a matter of racial justice.

Data alone, of course, accomplishes little. We cannot confuse measuring the problem with taking concrete action to rectify the tragedy of unequal justice in our country. In the end, change requires the political and institutional will to adopt equitable policies and practices under the law. Data does, however, provide a powerful tool for activists, policy makers and institutional actors to wield in becoming better organized, informed and equipped in the ongoing struggle for equal justice. ◆

1. The North Carolina Commission on Racial and Ethnic Disparities, North Carolina Prison Population Figures and Demographics (2015), *available at* http://ncracialjustice.org/wp-content/uploads/2015/08/North_Carolina_Prison_Population_Figures_and_Demographics-7.png.

2. NAACP Criminal Justice Fact Sheet (2017) available at http://www.naacp.org/criminal-justice-fact-sheet/..

3. the sentencing project, report of the sentencing project to the united nations human rights committee (2013), p. 1, *available at* http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf.

4. *Id.;* 13th, (2016).

5. *Id.*, at 156-157.

6. Slavery By Another Name, (2012), available at http://www.pbs.org/tpt/slavery-by-another-name/watch/.

7. See Equal Justice Initiative (2015), Lynching in America: Confronting the Legacy of Racial Terror, available at http://eji.org/reports/lynching-in-america.

8. Human Rights Watch, Decades of Disparity: Drug Arrests and Race in the United States (2009), *available at* https://www.hrw.org/report/2009/03/02/decades-disparity/drug-arrests-and-race-united-states.

9. Dan Baum, *Legalize It All: How to Win the War on Drugs*, Harper's Magazine, April 2016, *available at* http://harpers.org/archive/2016/04/legalize-it-all/.

10. Thoai Lu, *Michelle Alexander: More Black Men in Prison Than Were Enslaved in 1850*, Colorlines, March 30, 2011, *available at* http://www.colorlines.com/articles/michelle-alexander-more-black-men-prison-were-enslaved-1850.

11. Eric Zogry (2016), *Race and Reform: A Missed Opportunity for Meaningful Impact and Potential Remedies*, 51 Wake Forest Law Review 545, 559.

12. See Race Matters for Juvenile Justice, *available at* https://www.rmjj.org/who-we-are/history/.

13. Denise Rodriguez, et. al., Collaborative Reform Initiative: Assessment Report on the Fayetteville Police Department (2015), *available at* https://ric-zai-inc.com/Publications/cops-w0790-pub.pdf.

14. Sharon LaFraniere, et. al., *The Disproportionate Risks of Driving While Black: An Examination of Traffic Stops and Arrests in Greensboro, N.C., Uncovered Wide Racial Differences in Measure After Measure of Police Conduct,* New York Times, October 24, 2015.

15. Chloe Johnson, Halifax County Pretrial Release Risk Assessment Pilot Project: Project Data and Analysis (2015), *available at* http://ncracialjustice.org/wp-content/uploads/2015/08/2015-06-Risk-Assessment-Data-Analysis_Final.compressed.pdf.

16. See The North Carolina Commission on the Law and Administration of Justice, Interim Report: Criminal Investigation and Adjudication Committee (2016), *available at* http://nccalj.org/wp-content/uploads/2016/07/Criminal-Investigation-and-Adjudication_-interim-report_NCCALJ.pdf.

17. Maureen Berner, et. al., *A Process Evaluation and Demographic Analysis of Jury Pool Formation in North Carolina's Judicial District 15B*, UNC School of Government, September 2016, *available at* https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/2016-10-05%2020150100%20REPORT%20Jury%20Pool_Berner.pdf.

18. See KAMI CHAVIS, The Supreme Court Didn't Fix Racist Jury Selection, THE NATION, May 3, 2016.

19. Karin D. Martin et. al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create,* New Thinking in Community Corrections, January 2017, *available at* https://www.hks.harvard.edu/content/download/82419/1848321/version/1/file/shackled_to_debt.pdf.

20. Devah Pager et. al. (2005), *Walking the Talk? What Employers Say Versus What They Do*, 70 American Sociological Review 355.

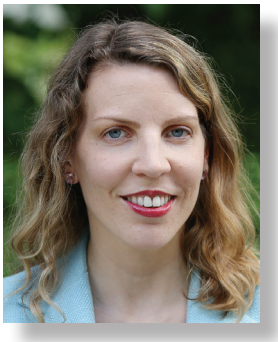

## Free, confidential assistance is available.

Contact us today: info@nclap.org or **WWW.NCLAP.ORG**

NCLAP
NORTH CAROLINA
LAWYER ASSISTANCE PROGRAM

| Charlotte & West | Piedmont Area: | Raleigh & East: |
|---|---|---|
| **(704) 910-2310** | **(919) 719-9290** | **(919) 719-9267** |

**Alyson Grine**
is an Assistant Professor at North Carolina Central University School of Law



**Emily Coward**
is a project attorney with the Indigent Defense Education Group at the UNC School of Government

# Recognizing Implicit Bias within the Equal Protection Framework

by Alyson Grine and Emily Coward

Public Defender Davis can't shake a bad feeling she has about her case, which started with a traffic stop. Her African American client, Mr. Clark, was stopped for driving 45 mph in a 35 mph zone. Video evidence revealed that six other drivers were traveling on the same stretch of road at that time of day; five of them were going the same speed as Mr. Clark and one passed him. The police officer, who was staked out on a side road, did not stop any of those drivers, all of whom were White. The stopping officer is known to be professional and a "straight shooter," who doesn't embellish the facts. Defender Davis knows the stop was supported by reasonable suspicion and therefore justified under the Fourth Amendment. She isn't sure, however, if the evidence supports some other good-faith ground for challenging the stop.

## The Equal Protection Clause

Like many criminal defenders, attorney Davis has experience litigating Fourth Amendment claims, but has never raised an Equal Protection challenge. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and article I, section 19 of the N.C. Constitution recognize the right to equal protection under the law. Both provisions prohibit "selective enforcement of the law based on considerations such as race."[1] Thus, a law that appears racially neutral on its face (such as one that prohibits exceeding the speed limit) is unlawful if it is applied in an unequal way, for example, based on a person's race.

The Equal Protection Clause was intended to provide protection to African American people who confronted explicit discrimination after the Civil War. Southern states like North Carolina had enacted "Black Codes," laws that barred Black people from owning land, serving on juries, and voting; and punished Black people more harshly than White people for crimes. The Equal Protection Clause guaranteed African Americans the rights of citizenship, and eventually served as grounds for overturning the doctrine of "separate but equal."[2]

Today, the Equal Protection Clause is an important source of rights for defendants challenging unequal treatment in criminal cases. Defendants may rely on it to challenge practices like selective enforcement of the laws, discrimination in pretrial release, racially biased jury selection procedures, and considerations of race at sentencing.[3]

## The Intent Standard

To succeed on a claim of racially selective enforcement, a defendant must show that the challenged police action was: 1) motivated by a discriminatory purpose; and 2) had a discriminatory effect on a racial group to which the defendant belongs.[4] The United States Supreme Court announced the "discriminatory purpose" standard in *Washington v. Davis*.[5] In *Davis*, plaintiffs argued that the exam for people seeking jobs as police officers

in the District of Columbia discriminated against Black applicants, who failed at rates four times higher than White applicants. The Court found that the plaintiffs' evidence showed a discriminatory impact, but did not show that the government's actions resulted from an "invidious discriminatory purpose," and therefore did not violate the Equal Protection Clause.[6]

Later cases reaffirmed the intent standard, perhaps none more significantly than *McCleskey v. Kemp*.[7] In that case, McCleskey, a Black man sentenced to death for murdering a White police officer in Georgia, argued that the state administered the death penalty in a racially discriminatory manner. In support of his argument, McCleskey introduced a study analyzing over 2,000 Georgia murder cases and concluding that "black defendants . . . who kill white victims have the greatest likelihood of receiving the death penalty" in Georgia.[8] In fact, the study indicated that "over half—55%—of defendants in white-victim crimes in Georgia would not have been sentenced to die if their victims had been black."[9] The U.S. Supreme Court rejected McCleskey's claims, however, concluding that the study failed to prove that a specific person or group of people acted with a racially discriminatory purpose in McCleskey's case.

## Problems Caused by the Intent Standard

### Daunting Evidentiary Standard.

Since its adoption, scholars and advocates have expressed concerns that "the intent doctrine . . . places a heavy burden on plaintiffs who are alleging discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment."[10] For example, when a criminal defendant challenges a statute on the ground that it is racially discriminatory, it is "almost impossible to detect, sort out, and quantify the motives of individual legislators who vote [] on the basis of their own disparate beliefs, values, interests, and circumstances."[11] Thus, there is a real danger that "[r]equiring proof of discriminatory intent essentially closes the courthouse doors to victims of racial bias."[12]

### Outdated Notion of Discrimination.

As one advocate observed, "equal protection jurisprudence has failed to keep pace with the way discrimination is now practiced and experienced in contemporary society."[13] While individuals may still commit overt acts of discrimination such as refusing to serve a Black customer at a lunch counter, scholars believe that racial inequity more often arises from a more subtle and complex mix of factors, including historical legacies, uneven distribution of opportunity, implicit bias, and covert bias.[14]

### Clash between Intent Standard and Science of Implicit Bias.

The emerging science of implicit bias raises difficult questions about the meaning and viability of the intent standard. Implicit biases are attitudes and stereotypes that we are not aware of, and that may even conflict with our consciously held beliefs, but that can influence our thoughts and behavior.[15] If we are unaware of our own biases and their influence on our decisions, how can we expect judges to determine our intent?[16] The tension between the science of implicit bias and the demands of the intent standard has become more evident in recent years, as social scientists have gained insights into the pervasiveness of implicit biases. For example, researchers have concluded from the results of the Implicit Association Test, which has been administered over six million times, that "the majority of tested Americans harbor negative implicit attitudes and stereotypes toward blacks [and] dark-skinned people . . . among others."[17] Such unconscious biases could produce discriminatory results in settings including health care, education, housing, and criminal justice.

> The Equal Protection Clause is an important source of rights for defendants challenging unequal treatment in criminal cases.

## Recognizing Implicit Bias within an Evolving Standard

For practitioners discouraged by the "intent standard," it is important to remember that the Supreme Court's definition of discrimination prohibited by the Equal Protection Clause is always in flux. Each case that interprets the intent standard gives the court a chance to reconsider its meaning and scope. Notably, the intent standard does not arise from the text of the Equal Protection Clause or from the history of its adoption.[18] The *Davis* Court embraced the standard based largely on a "floodgates" type of rationale: the Court was concerned that a broader understanding of discrimination "would be far-reaching and would raise serious questions about, and perhaps invalidate, [a wide range of laws]."[19] As practitioners become more adept at bringing evidence of implicit bias into the courtroom, the standard may expand to encompass a broader understanding of factors—conscious and unconscious—that are relevant to the determination of intent.

Consideration of social scientific evidence in cases interpreting the Equal Protection Clause is not new. The Supreme Court's willingness to consider such evidence when reviewing equal protection claims dates back at least as far as *Brown v. Board of Education*. In that landmark 1954 decision strik-

ing down the "separate but equal" doctrine, the Court relied in part on the famously poignant "doll test" when it declared school segregation unconstitutional.[20] While it is still relatively rare for courts to consider implicit bias in criminal cases, some judges reviewing equal protection claims raised by criminal defendants have acknowledged that discriminatory results can be produced by unconscious bias. For example, the Ninth Circuit observed that "racial stereotypes often infect our decision-making processes only subconsciously. Thus, Border Patrol officers may use racial stereotypes as a proxy for illegal conduct without being subjectively aware of doing so."[21] When considering a criminal defendant's equal protection claim in *Chin v. Runnels*, the federal district court noted that grand jury foreperson selection involves "subjective judgments entail[ing] subtle and unconscious mental processes susceptible to bias".[22] In a number of different cases, U.S. Supreme Court justices have recognized the existence of implicit bias and expressed concern that the Equal Protection Clause may not effectively regulate it.[23]

## Gathering Evidence of Intent to Support a Selective Enforcement Claim

Returning to our example involving Public Defender Davis, does she have any proof that the officer had a discriminatory purpose when he stopped her client? She should bear in mind that the purpose prong does not require proof that race was "the sole, predominant, or determinative factor in a police enforcement action."[24] Nor must a defendant show that discrimination was based on "ill will, enmity, or hostility."[25] It is sufficient to show that a "discriminatory purpose has been *a* motivating factor" in the challenged action.[26] This line of cases suggests that discriminatory action motivated by implicit bias *does* violate the Equal Protection clause, as there is no exception to the intent doctrine for discrimination that is motivated by race but not consciously so.[27] Discriminatory purpose may be demonstrated using direct, statistical, and circumstantial evidence, including:

- data demonstrating a disparity between the overall population and the population targeted by the officer[28];
- data demonstrating a disparity between the population targeted by the officer and the population targeted by similarly situated officers;
- the officer's failure to comply with state law mandating reporting of traffic stop data;

- the officer's questions or statements to the defendant or others related to race during the encounter;
- the officer's history of racially motivated behavior, as evidenced by interviews with community members or internal affairs investigations;
- a police department's history of racially motivated behavior, as reflected in reports, investigations, or complaints; or
- data demonstrating that when the suspect is a racial minority, the officer more frequently conducts discretionary stops (e.g., for regulatory violations), consent searches, or canine searches.

The officer did not make any statement to indicate that he consciously decided to stop Mr. Clark based on his race, and defense counsel does not have any reason to believe that he set out to discriminate against her client. However, the circumstance that six White drivers passed the officer while driving as fast (and faster) than Mr. Clark and were not stopped is relevant, circumstantial evidence that the court may consider when evaluating the officer's intent.[29] Defender Davis' claim that the officer's stopping decision was influenced by bias that was perhaps unconscious in nature would be strengthened by the introduction of data suggesting that the officer has a pattern of racially disparate stops, as well as studies documenting the influence of implicit bias on all of our decision-making. ◆

## Conclusion

Given the difficulty of demonstrating purposeful discrimination under the intent doctrine, particularly where bias is operating at an unconscious or covert level, some scholars have suggested that it is time to reform or expand the standard. For example, Reggie Shuford, Executive Director of the ACLU of Pennsylvania, has argued that it is time to "dismantle or reformulate the intent doctrine, and introduce concepts of unconscious or implicit bias . . . into legal jurisprudence."[30] In adopting the intent standard, the Court effectively required consideration of the mind sciences in order to uphold the guarantee of equal protection under the law. It is therefore necessary to take proper account of the latest research in the mind sciences when interpreting discrimination claims raised under the Equal Protection Clause. The good news is, emerging developments in social science, law, and education all support the importance of acknowledging unconscious and institutional bias within our judicial system.[31] Implicit bias training for court actors, juror education and instruction on the topic of implicit bias, and reform of the *Batson* framework are some possibilities that have been proposed. In the meantime, practitioners can play an important role by introducing evidence of implicit bias whenever discrimination is an issue in their cases. As one Supreme Court Justice observed, "[o]nly by integrating scientific advancements with our ideals of justice can law remain a part of the living fiber of our civilization."[32] ◆

1. *State v. Ivey*, 360 N.C. 562, 564 (2006) (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)), *abrogated in part on other grounds by State v. Styles*, 362 N.C. 412 (2008).
2. *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954).
3. *See United States v. Armstrong*, 517 U.S. 456 (1996); *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc);
*Peters v. Kiff*, 407 U.S. 493 (1972); *State v. Cofield*, 320 N.C. 297 (1987); *Batson v. Kentucky*, 476 U.S. 79 (1986);
*United States v. Smart*, 518 F.3d 800, 804 n.1 (10th Cir. 2008).
4. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *S.S. Kresge Co. v. Davis*, 277 N.C. 654 (1971).
5. 426 U.S. 229 (1976).
6. *Davis*, 426 U.S. at 242.
7. 481 U.S. 279 (1987).
8. *McCleskey*, 481 U.S. at 287.
9. 481 U.S. at 326 (Brennan, J., dissenting).
10. Eva Paterson, *Litigating Implicit Bias*, Poverty & Race, Sept./Oct. 2011, at 7, 7.
11. K.G. Jan Pillai, *Shrinking Domain of Invidious Intent*, 9 Wm. & Mary Bill Rts. J. 525, 530 (2001).
12. Paterson, *supra* note x. *See also* Theodore Eisenberg & Sherri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 Cornell L. Rev. 1151, 1153 (1991) (concluding based on a study of cases that intent standard discourages victims of racial discrimination from seeking relief in court).
13. Reggie Shuford, *Reclaiming the 14th Amendment*, Daily Journal, Feb. 3, 2011.
14. Alyson Grine & Emily Coward, Raising Issues of Race in North Carolina Criminal Cases, at 1.3: Potential Factors Relevant to Racial Disparities in the Criminal Justice System (2014).
15. Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 St. Louis L.J. 1139, 1139 (2010).
16. Many jurists have expressed concern about how this problem may play out in the *Batson* context. *See, e.g., Rice v. Collins*, 546 U.S. 333, 343 (2006) (Breyer, J., concurring).
17. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795, 802 (2012).
18. As one scholar explained,
"The Court has never attempted to authenticate the invidious intent doctrine by reference to the text or legislative history of the Equal Protection Clause. Indeed, to pave its way for the adoption of the doctrine, the Court in *Davis* had to abandon some of its important precedents and disagree with sixteen lower court decisions that 'impressively demonstrate[d] that there [was] another side to the issue . . . ."
Pillai, *supra* note xi, at 529 (quoting *Davis*, 426 U.S. at 245). *See also* Nathanial Persily, *The Meaning of Equal Protection: Then, Now, and Tomorrow*, ABA GP Solo, Nov./Dec. 2014, at 13, 14 ("The Court could have gone in a very different direction in a series of cases in the 1970s and developed rules for prohibited discrimination that did not rely, in effect, on reading the minds of decision makers responsible for discriminatory state action.").
19. *Davis*, 426 U.S. at 248.
20. *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, 494 n.11 (1954) (discussing the "doll test" which demonstrated that Black children preferred White dolls to Black dolls and other studies considering the psychological impact of segregation).

21. *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1450 (9th Cir. 1994) (internal citation omitted).

22. 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004), *aff'd sub nom.*, *Chin v. Carey*, 160 F. App'x 633 (9th Cir. 2005) (unpublished).

23. *See, e.g.*, *Texas Dept. of Public Housing v. Inclusive Communities Project, Inc., et al.*, 576 U.S. ____, 135 S. Ct. 2507, 2522 (2015) (noting that disparate impact liability "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment"); *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J. dissenting) ("It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."); *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically.").

24. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 662 (S.D.N.Y. 2013).

25. *Id.* (quotation omitted) (citing *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 473 & n.7 (11th Cir. 1999)).

26. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (emphasis added).

27. *See* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 Emory L. J. 1053, 1089-1100 (2009) ("One might conclude that the [claimant] need not prove bias at all, but instead simply that the decision would have been different but for the races of the parties"); Sheila Foster, *Intent and Incoherence*, 72 Tul. L. Rev. 1065, 1094-97 (1998) (explaining that peremptory strikes motivated by race may be challenged successfully without proof of conscious intent to discriminate). *See also* Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 Geo. Mason U. Civ. Rts. L.J. 219, 247 (2005) (while the "*McCleskey* Court believed that the Baldus study was insufficient to support an inference of discrimination, a properly conducted analysis of an individual officer's traffic stop patterns can produce exceptionally clear evidence of purposeful discrimination" (quotation omitted)).

28. North Carolina law requires law enforcement officers to file reports "[i]dentifying characteristics of the drivers stopped, including the race or ethnicity" and "the race or ethnicity . . . of each person searched." See G.S. 143B-903. This data can be searched by the public at https://opendatapolicing.com/nc/.

29. *See United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997) ("[o]ften, it is difficult to prove directly the invidious use of race[,]" so "'an invidious discriminatory purpose may often be inferred from the totality of the relevant facts'" (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976))); *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006) ("Discriminatory intent can be shown by either direct or circumstantial evidence.").

30. Shuford, *supra* note xiii.

31. Eva Paterson et al., *The ID, the Ego, and Equal Protection in the 21st Century*, 40 Conn. L. Rev. 1175, 1194-95 (2008).

32. *Fisher v. United States*, 328 U.S. 463, 494 (1946) (Murphy, J., dissenting).

## Equine Law





## South Carolina



## Asbestos



## Medical





## Workers' Compensation





## Personal Injury



## Intellectual Property

**Paige Pahlke**

is an associate attorney at Brown Moore & Associates, PLLC in Charlotte

# Knowing and Understanding the Law on Juror Rehabilitation to Make the Most Effective Use of your For Cause Challenges During Jury Selection

by Paige Pahlke

Jury selection is a very important part of trial and is also one of the most difficult parts of trial. Our goal during jury selection is to locate and remove jurors who will be dangerous to our case. This is not an easy task, but we can enhance our chances of success if we know and understand the law regarding juror rehabilitation and use that knowledge to thoughtfully prepare and execute our voir dire examination and wisely exercise our peremptory and for cause challenges.

## Voir Dire

We cannot expect to locate prospective jurors who will be harmful to our case if we do not take the time to prepare and refine our voir dire examination. Through our questions, we need to learn what opinions, points of view, and biases our prospective jurors hold, how strongly our prospective jurors hold their opinions, points of view, and biases, and how committed our prospective jurors are to their opinions, points of view, and biases.

Although it is easy to fall into, cross examining or lecturing our prospective jurors will not yield the information needed and it will close the door to the open communication required for determining whether a prospective juror will be harmful to our case. This is why we need to ask open-ended questions (and even presuppose harmful opinions) to get the prospective jurors talking. Then, we must listen nonjudgmentally to what they have to say. When prospective jurors give us negative responses during voir dire, we need to embrace those responses and inquire further instead of fearing those responses will taint the jury and trying to dismiss those responses as quickly as possible. Remember—what you don't know can hurt you. If there are prospective jurors who are dangerous to our case, it is much better to find that out during jury selection when we can do something about it.

## Peremptory and For Cause Challenges

In state court, each party has the right to exercise eight peremptory challenges[1] during jury selection; however, there is no limit on the number of for cause challenges a party can make. To preserve our peremptory challenges for when we really need them, we must focus on locking the dangerous jurors into their opinions, points of view, and biases so we can seek to remove them for cause instead of using a peremptory challenge. If we can remove a juror for cause, there is absolutely no reason to waste a peremptory challenge.

## Getting the Most out of For Cause Challenges during Jury Selection

To use our for cause challenges as effectively as possible, we need to understand when juror rehabilitation is permitted and when a juror cannot be rehabilitated and must be removed

for cause. In North Carolina, Judges have broad discretion to ensure the jury impaneled on a case is competent, fair, and impartial.[2] When a juror is challenged for cause, a Judge is "accorded great deference in [his or her] refusal to permit rehabilitation of a prospective juror"[3] and when a Judge does permit rehabilitation of a prospective juror, the North Carolina Supreme Court has held that Judge is best able to determine whether the juror should be excused for cause because that Judge observed the prospective juror's demeanor as he or she responded to questions and efforts at rehabilitation.[4]

When the trial court excuses a prospective juror for cause, neither party has an "absolute right to question or to rehabilitate [the] prospective [juror] before or after" he or she is excused for cause.[5] Additionally, when a prospective juror expresses unequivocal opposition to a central issue involved in the case, the parties have *no right* to question or rehabilitate the prospective juror.[6] This rule prohibiting rehabilitation of prospective jurors who express unequivocal opposition originates from criminal cases involving the death penalty,[7] but it is applicable to civil cases as well. In civil cases when we encounter prospective jurors who have strong views about issues that are central to our case we can use this prohibition against rehabilitation to our advantage by learning about our prospective jurors' biases and then eliciting responses from them to show they are unequivocally committed to their biases, and therefore, cannot be rehabilitated and should be excused for cause.[8]

When we discover a prospective juror's bias during jury selection, we need to follow-up with open-ended questions and allow the prospective juror to fully express his or her opinion or point of view on the issue.[9] Then, we need to switch to close-ended questions to establish the prospective juror's level of commitment to his or her opinion or point of view, including the prospective juror's willingness and ability or unwillingness and inability to set his or her opinion or point of view aside.[10]

If the prospective juror's responses reveal that he or she is strongly committed to his or her bias, move to excuse the prospective juror for cause.[11] When a party moves to excuse a prospective juror for cause, the trial court must determine "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[12] Unmistakable clarity is not required in order for the trial court to determine that a prospective juror is substantially impaired and should therefore be excused for cause.[13]

However, before challenging a prospective juror for cause, make sure the prospective juror is unequivocal in his or her responses to your questions. If the prospective juror is simply equivocal, the other side is entitled to attempt to demonstrate that the prospective juror is competent.[14] Do not give opposing counsel the opportunity to rehabilitate the prospective juror and force you to use one of your peremptory challenges. Follow-up with prospective jurors who are equivocal about important issues in the cases and get those jurors to strongly commit to their position before challenging them for cause.

Jury selection will never be easy, but when we know and understand the law regarding juror rehabilitation and use that knowledge in preparing our voir dire and exercising our challenges, jury selection becomes less daunting and we are better able to locate and remove the jurors who are harmful to our cases. ◆

1. N.C. Gen. Stat. § 9-19 (Peremptory challenges in civil cases). *See also* N.C. Gen. Stat. § 9-19 (Civil cases having several plaintiffs or several defendants; challenges apportioned; discretion of judge).

2. *See State v. Anderson*, 350 N.C. 152, 170, 513 S.E.2d 296, 370 (1999). *See also State v. Rogers*, 355 N.C. 420, 434, 562 S.E.2d 850, 870 (2002) (quoting *State v. Smith*, 352 N.C. 531, 543, 532 S.E.2d 773, 782 (2000) *cert. denied,* 532 U.S. 949, 121 S.Ct. 1419, 149 L.Ed.2d 360 (2001). *See also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

3. *State v. Kemmerlin*, 356 N.C. 446, 462, 573 S.E.2d 870, 883 (2002) (citing *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990). *See also State v. Call*, 349 N.C. 382, 401, 508 S.E.2d at 496, 508 (1998). *See also State v. Anthony*, 354 N.C. 372, 397, 555 S.E.2d 557, 576 (2001) (quoting *State v. Blakeney,* 352 N.C. 287, 301, 531 S.E.2d 799, 811 (2000), *cert. denied,* 531 U.S. 1117, 121 S.Ct. 868, 148 L.Ed.2d 780 (2001).

4. *Rogers*, 355 N.C. at 430, 562 S.E.2d at 867. *See also State v. Nobles*, 350 N.C. 483, 495, 515 S.E.2d 885, 893 (1999); *State v. Dickens*, 346 N.C. 26, 42, 484 S.E.2d 553, 561 (1997).

5. *State v. Warren*, 347 N.C. 309, 326, 492 S.E.2d 609, 618 (1997) (citing *State v. East*, 345 N.C. 535, 547, 481 S.E.2d 652, 660, cert. denied, 522 U.S. 918, 118 S.Ct. 306, 139 L.Ed.2d 236 (1997)).

6. *Kemmerlin*, 356 N.C. at 462, 573 S.E.2d at 883. *See also State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002); *State v. Nicholson*, 355 N.C. 1, 558 S.E.2d 109 (2002); *Anthony*, 354 N.C. 372, 555 S.E.2d 557; *Smith*, 352 N.C. 531, 532 S.E.2d 773; *Nobles*, 350 N.C. 483, 515 S.E.2d 885; *State v. Thomas*, 350 N.C. 315, 514 S.E.2d 486 (1999); *State v. Fleming*, 350 N.C. 109, 512 S.E.2d 720 (1999); *State v. Richardson*, 346 N.C. 520, 488 S.E.2d 148 (1997).

7. *See Id.*

8. *See* David Ball, David Ball on Damages 3, Supplement A, *Jury Voir Dire* (p. 312-315) (NITA 2011).

9. *See Id.*

10. *See Id.*

11. *See Id.*

12. *State v. Cummings*, 361 N.C. 438, 648 S.E.2d 788 (2007) (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

13. *See Id.* (adopting the standard set forth by the Court in *Wainwright* for determining when a trial judge should excuse a juror for cause).

14. *State v. Brogden*, 334 N.C. 39, 50, 430 S.E.2d 905, 912-13 (1993). *See also Nicholson*, 355 N.C. at 27, 558 S.E.2d at 128 (citing *Cummings*, 326 N.C. at 307, 389 S.E.2d at 71).

# WANT TO GROW YOUR PRACTICE WITH NOT ONLY MORE CLIENTS, BUT BETTER ONES?

Join an *Elite* Marketing Program for Select Attorneys

## WHAT IS IT?

**The Transformational Experience** is a year-long, practice-building program that grows your law firm into a premier, elite-level practice.

## WHO IS IT FOR?

This program is for **attorneys serious about growing** and learning the skills and processes needed to build their practice in a sustainable way.

## WHAT'S INCLUDED:

- **8 Days of In-person Meetings**

Four 2-day in-person meetings to learn concepts, workshop your firm's marketing, and mastermind with other practices. These are **highly-focused sessions** that expand on core concepts, examples, and provide feedback specifically on your practice.


- **4 Practice Building Binders**
- **12+ Explainer Videos**
- **2 Premier Professional Reports**
- **12 Monthly Mastery Calls**
- **Online Portal**
- **And Much More...**

Programs Have Limited Availability.
**Join Now!**

**Get More Info Today at TheThrivingPractices.com**

# STOP Losing Clients that Should be YOURS

**How many clients are you losing** now because your communication isn't clear, specific or resonating with them? How many potential clients find your website or ad and **choose not to hire you**? Stop letting these possible clients slip through your fingers and **discover the secret to converting them** into YOUR clients.

> **If you are an attorney who is questioning how to build your business, drive profitability and, most importantly, create a practice and business that achieves great things, then Tim is a person that you need to speak to. I have had the benefit of working with Tim for years and there are very few people with a deeper understanding of direct response marketing and the know-how required for scaling-up and growing a legal practice.**
>
> -Charles N. Internicola, New York Franchise Lawyer

## About the Program Leader

Tim Young is a **23-year litigator and law firm owner in New Orleans, LA**. He has spent the last 10+ years with coaches, consultants, attending workshops, conferences, masterminds as well as other business development seminars and courses. He tested and implemented what he learned in his own practice and it has paid dividends. Building on this experience and success, Tim now coaches other attorneys to help them grow their practice.

THRIVING PRACTICES

**MORE CLIENTS. BETTER CLIENTS.**

**Robert "Robby" Jessup**
is a partner at Howard Stallings' Raleigh office and serves as editor for the Verdicts, Settlements & Dispositions column

# Verdicts, Settlements & Dispositions

## $4.1 Million Dollar Wrongful Termination Verdict

Robert Elliot and Michael Elliot of the law firm Elliot Morgan Parsonage in Winston-Salem and Charlotte, respectively, obtained a $4.1 Million Dollar Wrongful Termination Verdict for three former Mocksville police officers who said that the police chief and the town manager fired them in 2011 for reporting allegations of corruption within the department to state officials. The terminations came just two weeks after the officers contacted the N.C. Attorney General's Office and the N.C. Office of the Governor. The allegations centered on reports that the then-police chief drank excessively while on duty, ignored officer misconduct and mismanaged the department's money. The Town of Mocksville alleged that it fired the officers for poor performance. In May of 2016, after an eight-day jury trial in U.S. District Court (Winston-Salem Division), before U.S. District Court Judge Thomas Schroeder, a jury disagreed and sided with the Mocksville police officers. The jury awarded compensatory and punitive damages, in addition to an advisory verdict on front pay, to each of the officers, in the total amount of $4.1 Million Dollars. In August of 2016, Judge Schroeder determined that the front pay damages award

## Introducing the Column

Beginning with this April 2017 issue of TRIAL BRIEFS, NCAJ will publish a quarterly Verdicts, Settlements and Dispositions column. We want to encourage all NCAJ members to share their successes. Through your stories, all members learn how to fight, how to persevere, and how to win. NCAJ members become stronger as a group when we share our struggles and triumphs with fellow practitioners.
Contributor deadlines are as follows:

| | |
|---|---|
| July 2017 Issue | Submissions due by April 30, 2017 |
| October 2017 Issue | Submissions due by July 31, 2017 |
| January 2018 Issue | Submissions due by October 31, 2017 |

**Civil practitioners:** Please use the online form located at www.ncaj.com/verdicts to submit your verdicts/settlements to be considered for publication.
**Criminal practitioners:** Please use the online form located at www.ncaj.com/dispositions submit your dispositions to be considered for publication.
If you prefer, you may also email your submissions directly to rjessup@hsfh.com. We are looking forward to hearing from you.

for each of the officers was too high and lowered the total amount of damages to about $2.1 Million Dollars. In February of 2017, Judge Schroeder further reduced the amount of damages that Mocksville is liable for to $1 Million Dollars. There was a dispute about how much the town's insurance could cover—$1 Million Dollars or $3 Million Dollars. Judge Schroeder determined that it was $1 Million Dollars for all three officers. According to third-party reports, Robert Elliot and Michael Elliot plan to appeal Schroeder's rulings on insurance and the officers' constitutional claims to the 4th Circuit Court of Appeals.

*Source: NCAJ Employment Law Listserv*

## Dismissal of Felony Charges Arising From Shooting

Chris Fialko of the law firm Fialko Law in Charlotte obtained a dismissal of all criminal charges arising from a Mecklenburg County shooting. The Defendant was a tow-truck driver who had booted a car that was parked improperly in an apartment complex. The driver of the car called the Defendant to come take the boot off. On arrival, the driver refused to pay the Defendant. When the Defendant began to back the tow-truck, the driver pulled open the door to confront him. The Defendant (who had a concealed carry permit) shot the driver in the lower abdomen. Witness interviews by the defense showed the aggressive nature of the driver. Defense investigation also found a favorable cell phone video from a witness. Counsel made a self-defense (and defense of vehicle) presentation to the district attorney's office, which agreed to file a voluntary dismissal with prejudice.

*Source: NCAJ Member Submission*

## $6.13 Million Dollar Medical Malpractice-Wrongful Death Verdict

R. Kent Brown, Jon Moore, and Paige Pahlke of the law firm Brown Moore & Associates in Charlotte represented the Estate of Anthony Savino against Carolinas Healthcare System. Mr. Savino, a 53 year old, was transported by ambulance to the ED at Carolinas Medical Center-Northeast. Mr. Savino reported to the paramedics that he was experiencing mid-sternal chest pain radiating down his arms. This information was recorded on the EMS written record, which was provided to and signed by the triage nurse. After initial testing, Mr. Savino was discharged. Five hours after leaving the hospital, Mr. Savino suffered a fatal heart attack at his home. The case was tried in Cabarrus County Superior Court during the Fall of 2016. The jury found that the hospital acted with "reckless disregard" with respect to both medical negligence and corporate/administrative negligence. This finding of "reckless disregard" negates the statutory cap on non-economic damages. Therefore, the judgment rendered encompassed $5.5 million dollars in non-economic damages, in addition to $680,000 in economic damages, combining for a total award of $6.13 million dollars. As of the time of writing this column, Carolinas Healthcare System has the verdict on appeal.

*Source: NCAJ Auto Torts Listserv*

## $3.75 Million Dollar Whistleblower Verdict

J. Heydt Philbeck of Raleigh, in association with Mike Doyle of Houston, TX, represented a former N.C. State Highway Patrolman who claimed that he was fired after he had truthfully reported information about possible excessive use of force by other officers in connection with a DWI stop. The case was brought to trial in Wake County Superior Court, with Judge Michael J. O'Foghludha presiding, during the Winter of 2016; although, the trooper's termination came in 2001. The jury heard one week's worth of testimony and found that the trooper was unlawfully terminated in retaliation for breaking a "code of silence" that prohibited officers from reporting misconduct by their peers. The jury awarded the terminated trooper $3.75 Million Dollars, plus attorneys' fees, court costs and about 14 years of prejudgment interest.

*Source: NCAJ Auto Torts Listserv*

## Veteran Disability Verdict

Richard W. Gabriel of the law firm Gabriel Berry & Weston, LLP in Greensboro obtained a notable verdict before the Board of Veterans Appeals (heard in the Winston-Salem, N.C. Regional Office). The Veteran/Claimant served in the U.S. Coast Guard from October 23, 1963 to October 20, 1967. He did not serve in a combat role. He was a Seaman's Apprentice on the Coast Guard vessel CG Cherokee, a search and rescue ship. He was assigned to support management of the Alaskan fisheries, and he recovered fishermen who were lost at sea, including the remains thereof. The Veteran/Claimant received a diagnosis of PTSD arising from his service in the Coast Guard. He was assigned a 70% disability rating, effective from the date of application for benefits on January 26, 2010. The case was heard on the medical records of treatment, with no additional expert testimony, in the Winter of 2016. Veterans Law Judge Michelle L. Kane presided. Upon the conclusion of the trial, it was determined that the Veteran/Claimant would receive an initial payment of $100,461.45, plus monthly payments of $1,334.71 for the remainder of his natural life, subject to material changes in health.

*Source: NCAJ Member Submission*

## Acquittal in Felony Charge of Indecent Liberties With a Minor

Russell Johnson and Andrew Neal of the law firm Diener Law in Greenville obtained a not guilty verdict in a Pitt County Superior Court jury trial, before the Honorable Judge Marvin Blount, III. The alleged victim was 14 years old at the time of the purported indecent liberties, and she was 17 years old at the time of trial. She testified against the Defendant, and the Defendant testified in his own defense. The Defendant, an immigrant to the United States, faced significant prison time and subsequent deportation, if convicted. Jury deliberations took less than 4 hours. The not guilty verdict came in late February of 2017.

*Source: NCAJ Member Submission*

## Eminent Domain Settlement

B. Joan Davis of the law firm Howard Stallings in Raleigh (attorney for anchor tenant) and Keith Nichols of the law firm Horack, Talley, Pharr & Lowndes in Charlotte (attorney for landlord) obtained a $620,000 settlement from the NCDOT for the taking of a small temporary construction easement, minor new right-of-way, and a parking area drainage easement. The takings occurred at a Cabarrus County shopping center, anchored by a Harris Teeter. The initial condemnation deposit was $334,925, and during litigation, the NCDOT agreed to pay an additional $285,075 to the shopping center and anchor tenant—more than 85% over initial deposit. Damon Bidencope of Charlotte served as the anchor tenant's appraiser. The settlement was paid in or around January of 2017.

*Source: NCAJ Member Submission*

## Dental Malpractice Pre-Suit Settlement

William Mills of the law firm Glenn, Mills, Fisher & Mahoney in Durham recently obtained a $480,000 Settlement in a Dental Malpractice Case. The Dentist gave the Plaintiff anti-anxiety medicine because he was nervous about having dental work; however, the Dentist failed to warn the Plaintiff that it would be dangerous for him to drive after taking the medication. Thereafter, the Plaintiff drove away from the Dentist's office. While driving, the Plaintiff lost consciousness, flipped his truck and hit other vehicles. The Plaintiff suffered severe lacerations and other traumatic injuries, which necessitated a nine day hospital stay. Plaintiff claimed $26,000 in lost wages and $54,000 in recoverable medical bills. The case settled pre-suit, and the identity of the parties is confidential.

*Source: North Carolina Lawyers Weekly*

## $5.2 Million Dollar Nursing Home Verdict

In February of 2017, Rachel Fuerst and Thomas Henson, Jr. of HensonFuerst, P.A. in Raleigh obtained a $5.2 Million Dollar Verdict against a nursing home. These attorneys represented the estates of three ventilator dependent residents against the now-defunct Blue Ridge Health Care Center, as well as its parent and management companies, CareOne and CareVirginia, claiming the provider's negligence caused the residents' deaths. The first decedent died 9 hours after being admitted to the facility in late 2011 after his ventilator and its alarms were allegedly turned off. The second decedent died in 2012, six hours after being re-admitted to the facility, when the proper respiratory equipment was not available at the bedside to maintain a proper airway. The third decedent also died in 2012 after being found with her breathing tube pulled out without an alarm in place to alert anyone of the problem. The jury found that Blue Ridge's conduct "was in reckless disregard of the [residents'] rights," and each residents' estate was awarded $1.5 million in punitive damages, along with $50,000 in compensatory damages for one estate, and $300,000 in compensatory damages for each of the other two estates. The case was tried to a jury in the U.S. District Court for the Eastern District of North Carolina, U.S. District Court Judge Terrence W. Boyle presided. As of the time of writing this article, the Defendants had not yet appealed the verdict.

*Source: E.D.N.C. Court Records—Vandevener, et al v. Blue Ridge Health Care Center, et al (No. 5:14-CV-150-BO)*

## $20.5 Million Dollar Verdict Against Dish Network

In January of 2017, a Greensboro jury rendered a $20.5 Million Dollar verdict against **Dish Network** in a class-action lawsuit, *Krakauer v. Dish Network L.L.C.* (M.D.N.C. 1:14-CV-333), brought under the **Telephone Consumer Protection Act**. The verdict came after a five-day trial presided over by U.S. District Judge Catherine Eagles. Class representative, Dr. Thomas Krakauer, alleged Dish Network was responsible for telemarketing calls placed by an authorized Dish Network dealer to persons whose telephone numbers were on the National Do Not Call Registry. The Plaintiff represented 18,000 class members, and he alleged that over 51,000 calls were made to class members in violation of the TCPA. Plaintiff asserted that Dish Network turned a blind eye to its dealer's illegal telemarketing conduct in an attempt to shield itself from liability. After a five-day trial, the jury in the case agreed. The jury awarded $400 per violation of the TCPA, for a total of $20.5 Million Dollars. This marks one of the first jury verdicts for a class of consumers alleging Do Not Call violations since the enactment of the TCPA in 1991. The Plaintiff class was represented by Bailey & Glasser LLP in Wash-

ington, DC and Charleston, WV. At the time of writing this column, the verdict has not yet been appealed.

*Source: M.D.N.C. Court Records—Krakauer v. Dish Network L.L.C. (No. 1:14-CV-333)*

## $9 Million Dollar Libel Verdict

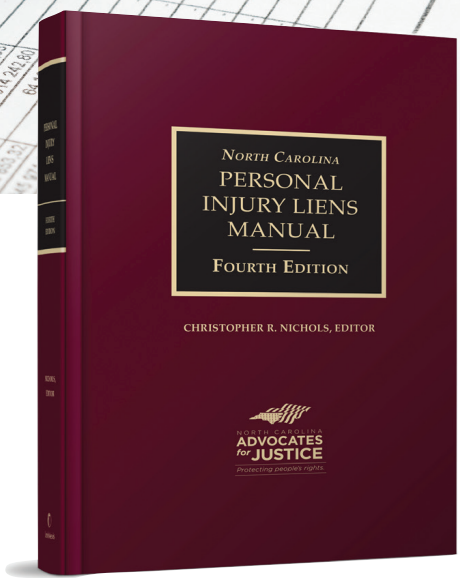
James Johnson of the law firm Dement Askew in Raleigh obtained a $9 Million Dollar Libel Verdict against the *News & Observer* for defaming a state government employee. At issue in the case were six statements the N&O published in 2010, among them that independent firearms experts questioned whether the state government employee knew anything about her field, and also that some suspected the state government employee falsified evidence in a 2006 criminal trial to help Pitt County prosecutors win a murder conviction. The state government employee sued the *N&O* and the reporter, and she alleged that the newspaper article triggered events that led to her developing post-traumatic stress disorder. After a 3 1/2-week trial in Wake County Superior Court, during the Fall of 2016 term, with Judge A. Graham Shirley, II presiding, the jury awarded $1.5 Million Dollars in compensatory damages and $7.5 Million Dollars in punitive damages. The compensatory damages award consisted of compensation for suffering, humiliation, lost wages and medical expenses. The jury's punitive damages award exceeded the cap limiting punitive damages to three times the amount of compensatory damages, in this case $1.5 Million Dollars. Accordingly, the N&O ultimately owed the state government employee a little over $4.5 Million Dollars in punitive damages, for a total award of about $6 Million Dollars. The jury decided that the reporter must pay the state government employee $75,000 in punitive damages. The N&O vowed to appeal the verdict; however, at the time of writing this column, it does not appear that the case was appealed, and it is unknown if the verdict has been paid in whole or in part.

*Source: Raleigh News & Observer*

## Acquittal Of Voluntary Manslaughter

W. James Payne of W. James Payne Law Firm in Shallotte (lead counsel), J. Michael McGuinness of The McGuinness Law Firm in Elizabethtown, and Megan Milliken of Milliken Law in Bolivia obtained an acquittal for a former Southport police detective who was charged with voluntary manslaughter arising from the January 5, 2014 shooting death of an 18-year-old man diagnosed with schizophrenia. The defense argued that the detective shot the allegedly mentally unstable man in defense of another officer, while the prosecution asserted that the detective used excessive force. The prosecution solicited testimony from a Boiling Spring Lakes law enforcement officer, who was present at the shooting, who said the detective failed to properly assess the situation and use the appropriate degree of force. The case was tried in Brunswick County Superior Court, with Judge Richard Brown presiding. The detective opted for a bench trial under a voter-approved law that hit the books in 2014 allowing defendants charged with felonies to have their cases heard by a judge instead of jury. The acquittal was rendered in the Summer of 2016.

*Source: Wilmington Star News*




# North Carolina Personal Injury Liens Manual

## FOURTH EDITION

*Christopher R. Nichols, Editor*

This best-selling publication is your ideal source for understanding the complexities associated with personal injury liens. Written by and for North Carolina personal injury attorneys, the comprehensive 700-page book will prepare you to secure maximum net recovery for your clients.

### PRACTICE-READY MATERIALS

With this volume you will also have the tools you need to work efficiently and accurately. The volume is replete with 35 sample forms, letters, complaints and dozens of practice tips and pointers.

### EASY ACCESS TO THE LAW

In addition to practice commentary and tools, the manual provides fingertip access to the text of relevant state and federal statutes, regulations and case law.

### EDITORIAL EXPERTISE

Edited by Christopher R. Nichols, leading personal injury attorney and NCAJ member, this comprehensive and user-friendly fourth edition includes several original chapters completely re-written to reflect new state laws, including the ERISA and Medicare chapters.

*$195.00*

1 volume, hardbound,
Pub # 30326
***ISBN***, 9781522123453
***eISBN***, 9781522123460


**eBOOK AVAILABILITY**

Lighter than a book, and with the same authoritative content you've always relied on, NCAJ eBooks belong in your digital library!

Price does not reflect sales tax, shipping and handling. Price is subject to change without notice. To receive future updates for these publications, call 800.533.1637 to become a subscriber under the automatic shipment subscription program and to obtain full terms and conditions for that program.

*Online at*

**LEXISNEXIS.COM/NCAJ**

**CALL 800.533.1637**

NORTH CAROLINA ADVOCATES for JUSTICE
Protecting people's rights.



LexisNexis®

NORTH CAROLINA
ADVOCATES for JUSTICE
*Protecting people's rights.*

Post Office Box 10918
Raleigh, NC 27605-0918

Nonprofit Organization
U.S. Postage
**PAID**
Raleigh, NC 27611
Permit # 1203

**DATED MATERIAL**
**PLEASE RUSH**

Join us for **NCAJ's Convention 2017** – **June 17–20, 2017** at **Sea Trail Resort** in **Sunset Beach, NC**. It's a time to celebrate each other as well as reconnect and re-energize for the coming year – all while learning new practice-enhancing skills. *You don't want to miss it!*

*save the date*

# NCAJ CONVENTION 2017 JUNE 17-20

sea trail resort, sunset beach, nc

NCAJ, like the lighthouse, provides a ***beacon to guide the way*** for lawyers in their daily practice – Offering LEADERSHIP, STABILITY and a GUIDING LIGHT.

MARK YOUR ***calendars*** JUNE 17-20

We've reserved a room block at the **SEA TRAIL RESORT** (a variety of accommodations are available – ranging from Mini-Suites to Four Bedroom Villas)

Call Sea Trail Reservations at **800.624.6601** and mention *"NC Advocates for Justice"* for the group rates – ***available until June 2, 2017***

ncaj.com
*more information coming soon*

## CONVENTION HIGHLIGHTS

### SUNDAY KEYNOTE SPEAKER
**Margaret Burnham**, Northeastern University Law Professor focusing on civil and human rights, comparative constitutional rights, and international criminal law and founder of the Northeastern University School of Law Civil Rights and Restorative Justice Project which engages students in legal matters relating to the 1960s US Civil Rights movement.

### SATURDAY LUNCHEON SPEAKER
**Colin Miller**, University of South Carolina School of Law Associate Dean of Faculty Development and Professor of Law, contributor to "***Undisclosed***," a podcast that investigates wrongful convictions and the U.S. criminal justice system, by taking a closer look at the perpetration of a crime, its investigation, the trial, and ultimate verdict… and finding new evidence that never made it to court.

### CIVIL MASTERS IN ADVOCACY
Featuring North Carolina Masters including **Judge Doug Parsons**, **Judge Mary Ann Tally**, **Charles Becton**, **Janet Ward Black**, **Jones Byrd**, **Wade Byrd**, **Tom Comerford**, **Liz Kuniholm**, **Bill Mills**, and **John Drew Warlick**.

### CRIMINAL MASTERS IN ADVOCACY
featuring nationally and internationally recognized speakers **David Ball**, **Ian Friedman**, **Iain Morley** and **Christopher Adams**.

### SUMMER CONFERENCE FOR PARALEGALS
focusing on Discovery – get a full year's CPE credit.