CABA
Capital Area Bar Association

DECEMBER 2017

President's Column

By Tiffany M. Graves[1]

I have reached the halfway mark of my term as CABA President. In addition to holding two successful membership meetings, a Fall Social and Bar Review, and a Flash CLE, the past few months have been full with planning for the winter and spring which are, arguably, CABA's busiest seasons. Our organization is incredibly fortunate to have an impressive roster of committee chairs who take the responsibilities of their respective committees very seriously and who are working very hard to develop programming that will provide our members with unique opportunities for professional development, community outreach, and networking. I am pleased with what we have accomplished so far this year and excited about everything that is to come.

Nestled within our busy roster of upcoming events are the Thanksgiving and Christmas holidays. We hosted our annual Christmas Party—a signature event for CABA—on December 5 at the Old Capitol Inn. In addition to giving us the space to socialize and formally usher in the Christmas season, the event also allowed us to give back to the local community through our participation in the Marine Corps' Toys for Tots program. Our Community Service and Pro Bono Projects Committee deposited bins for the toy drive at local firms and the Mississippi Bar Center. Far too many families in our area lack the resources to afford gifts for their children at Christmas. We are thankful to our members for donating toys in one of our bins or at the Christmas Party. We had representatives from the Marine Corps present at the party to pick up the toys we collected. As always, we had a good showing. My heart is warm with thoughts of the many local children whose Christmas holiday will be a little happier because of your generosity.

As many of you know, I am the Executive Director of the Mississippi Access to Justice Commission. In that role, I work with the state's nonprofit community and others to try to improve and expand Mississippi's civil legal services delivery system. It's no secret that Mississippi is the poorest state in the nation. Nearly 700,000 state residents qualify for legal aid. With less than 11,000 attorneys licensed to practice law here, even if every attorney did pro bono, we would still fall far short of being able to assist everyone who qualifies for free legal assistance. Add to that, Mississippi is down to only 34 full-time legal

Continued on Next Page …

1. Tiffany M. Graves is Executive Director of the Mississippi Access to Justice Commission. She may be reached at tgraves@msbar.org or at 601–960–9581.

Inside

Photos, Photos, Photos!

See photos from CABA's first Flash CLE; the Fall Social at The Manship, co-sponsored with JYL and the Miss. Bar Section of Litigation; "Bar Review" at Sombra in Flowood, co-sponsored with the Rankin County Bar Association; and the Christmas Party at the Old Capitol Inn.

Upcoming Events

December 21
Immigration Options in Changing Times CLE
Mississippi Bar Center

January 19
Flash CLE, "Lawyers in Transition: Protecting the Present and Planning for the Future"
Mississippi Bar Center

Coming February 2018

OFFICER ELECTIONS!

Leadership Nominees:

Secretary-Treasurer
Jennie Eichelberger
Brad Moody

Director-Post 3
Nakimuli Davis-Primer
Kaytie Pickett

Director-Post 4
Scott Murray
Lanny Pace

Elections will be held by electronic ballot, so watch your email for the slate and information about each candidate.

aid attorneys. The odds of reaching everyone who needs legal help are not great, but organizations like mine are determined to change that. My full-time work compels me to think of the needs of others less fortunate every day. However, as the holidays draw closer, I become even more aware of the struggles of Mississippi's less fortunate. They are not only struggling financially; they are facing issues that many of us would be extremely challenged to overcome.

I think it is vitally important that we, as lawyers, never forget how fortunate we are to be in this profession, living lives that are vastly different from those with limited means. I am proud of the projects CABA members have engaged in over the years to provide often critically-needed support to individuals and families who could not afford lawyers to help them resolve their legal issues. I am even more proud that we have scheduled several of those events this winter and spring.

The snowy weather conditions in Jackson forced us to cancel the "Immigration Options in Changing Times" CLE that was scheduled for December 8. Fortunately, we have rescheduled the event for December 21. It goes without saying that the immigration landscape is ever-evolving and many in the legal community want to become involved to help those who need support for themselves and their families. Attorneys who attend the CLE will learn how to screen clients for common forms of immigration relief, including immigration benefits available to survivors of domestic violence and other violent crimes, and individuals fleeing persecution in their home countries. My hope is that those who attend will be given the tools and information they need to assist Mississippi's immigrant community on a pro bono basis. We are sponsoring the CLE with the Young Lawyers Division of the Bar and Catholic Charities Migrant Support Center. We are deeply indebted to Amelia Steadman McGowan, Staff Attorney with Catholic Charities, who will lead the CLE and bring the need for this type pro bono service to our attention. Amelia is truly a star within our Bar. Her heart for service is contagious.

As we have done for the last several years, we will hold an Expungement Workshop and Legal Clinic in the spring. Our Community Service and Pro Bono Projects Committee will coordinate those events. We will also return to Stewpot Community Services to assist with serving lunch to the area's homeless men and women. Our community engagement will also reach our local schools with the Law-Related Education Committee's annual essay contest. I am pleased to report that the Committee is undertaking more extensive outreach to local schools this year to ensure participation is robust and inclusive. I am grateful to Christina Seanor, Cydney Archie and Alicia Netterville for their extremely capable leadership of this staple program for CABA.

CABA's rich history of service is one of the many things that has kept me involved in the organization for the past decade. While our activities offer ways for members to do pro bono and otherwise give back, I would be remiss in my role with the Access to Justice Commission if I did not mention our local legal nonprofits who could certainly use your support. Click the names below to find out more:

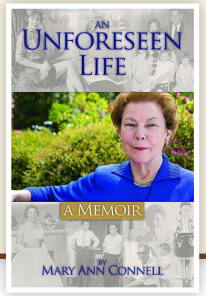
American Civil Liberties Union of Mississippi
Catholic Charities, Inc. Migrant Support Center
Disability Rights Mississippi
Mission First Legal Aid Office
Mississippi Center for Justice
Mississippi Center for Legal Services Corporation
Mississippi Immigrants' Rights Alliance
Mississippi Volunteer Lawyers Project
Southern Poverty Law Center

Thank you for your support of CABA. You, our members, represent the best our profession has to offer. I offer my best and most sincere wishes for a safe, restful and happy holiday season to all of you.

CABA October Membership Meeting

Mary Ann Connell, the speaker for this event, discussed her book, ***An Unforeseen Life***.

Shown in photo (from left to right), Tiffany Grove, Mary Ann Connell, and Tiffany M. Graves.



A BICENTENNIAL REVIEW OF THE JUDICIARY AND MISSISSIPPI BAR

By Chief Justice William L. Waller, Jr.[1]

In considering the Bicentennial of Mississippi's judiciary and legal profession, the courthouse must be the starting point. In nearly every Mississippi county, the first major public structure constructed in the county was the courthouse. Not only is the structure significant architecturally, but it is usually located in a very prominent location in the center of the county seat with abundant green space, all of which signifies the importance of the courthouse. In *Requiem for a Nun*, William Faulkner would speak of the courthouse:

> But above all, the courthouse: the center, the focus, the hub; sitting looming in the center of the county's circumference like a single cloud in its ring of horizon, laying its vast shadow to the uttermost rim of horizon; musing, brooding, symbolic and ponderable, tall as cloud, solid as rock, dominating all; protector of the weak, judicata and curb of the passions and lusts, repository and guardian of the aspirations and hopes…

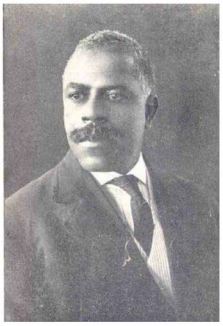
Why the Courthouse?

The courthouse is where life, liberty and pursuit of happiness, as framed by the original writers of the Constitution and Bill of Rights of the United States, are protected and enforced. While it is up to the judge, and the jury, to make the decisions, it is the lawyer, the advocate, who, through investigation, research, and preparation, makes sure that the client has his or her day in court, who stands and speaks for the client, who argues for the fair, efficient and independent administration of justice. And the courthouse is the place where the pursuit of justice is carried on in public view and the results are recorded for posterity. This speech will highlight examples of justice in the courthouse.

Reconstruction

The Reconstruction period witnessed the first public participation of African Americans in the governmental process, including the practice of law. The Constitution of 1868 was the first and only constitution in the history of the State ratified by a popular vote. And it largely reflected a super-majority of Republicans. The new constitution did not necessarily reflect a change of attitude of many white citizens to these newfound freedoms. Nonetheless, African Americans persevered in public life, including the practice of law. One example of courageous action bears publication. Anselm McLaurin, a white Brandon attorney, sponsored Samuel A. Beadle, an African American, for his examination to become a member of the Bar. Back then, the examination took place in open court before the chancellor. The local Bar was invited to attend and participate. McLaurin's first attempt to sponsor Beadle was rebuffed by the chancellor because of Beadle's race. Not to be deterred, McLaurin returned, this time bringing with him Patrick Henry, under whom Beadle had studied the law. This time the examination was permitted to proceed. Beadle was given a rigorous examination by the chancellor, followed by questioning from members of the Bar, which included twenty-six attorneys from Jackson.

Anselm J. McLaurin



Samuel A. Beadle

At the conclusion of the interview, Beadle was admitted to practice. His friends and supporters lifted him to their shoulders and carried him around the courthouse to celebrate the occasion. McLaurin would later be elected Governor and U.S. Senator. Henry would be elected to Congress. Beadle enjoyed a successful law practice in Jackson, Vicksburg, Natchez, and Canton, though racism prohibited his work in other counties.

McLaurin used the public forum of the Courthouse persevering against prejudice

1. Chief Justice Waller was assisted in research and drafting by Chad Byrd, Law Clerk. This is the keynote address given by Chief Justice Waller on September 27, 2017 at the Bicentennial Banquet commemorating the Judiciary and Legal Profession.

Continued on page 4...

to argue that law and justice required that his friend Samuel Beadle be able to sit for an examination.

1890–1952: Transition

James Z. George was the architect of the Constitution of 1890, which was primarily designed for control of the government by Democratic elites to the exclusion of not only African Americans but also poor whites. Though many would call the provisions for the appointment of all judges enlightened, modifying the selection of judges to elections was one of many provision shaping the constitution into what we have today. The constitutional amendments of 1916, requiring elections and increasing the number of Supreme Court Justices to six, define the fundamental architectural changes to mark this period.

While the Mississippi Constitution did not limit or restrict black lawyers, the changing political environment did. Racial hostility saw an upturn under the ugly, race-baiting rhetoric of Governor James K. Vardaman, who served as Governor from 1904–1908, and the number of black attorneys would steadily diminish.

While the black members of the Bar struggled, this era did witness the emergence of female attorneys. Leading the way was Susie Blue Buchanan, who became the first female lawyer admitted to practice before the Mississippi Supreme Court in 1916 and who was an active member of the Rankin County Bar until her death. Lucy Somerville Howorth became the first female to be called "judge" when she was appointed United States Commissioner for the Southern District of Mississippi in 1927. The position of United States Commissioner was the forerunner of today's federal magistrate judge. And Zelma Wells Price became the first woman to serve as a Mississippi trial judge in 1955. Notably, Wells also led efforts to include women in jury venires. In the ensuing years, countless women have left their mark on the Mississippi judiciary, including Lenore L. Prather, our state's first female Supreme Court Justice and Chief Justice, who gave leadership to the design and funding of the Mississippi Supreme Court Courthouse. A second, Mary Libby Payne, holds the distinction of having served in all three branches of the Mississippi government and was the founding Dean of Mississippi College School of Law, as well as the first female judge on the Mississippi Court of Appeals.

One example of justice in the courthouse during this transitional period was provided by Justice Virgil Griffith. His vigorous dissent in ***Brown v. State***[2] in 1935 ultimately resulted in a unanimous reversal of three convictions by the United States Supreme Court. That the defendants' confessions were brutally extracted without any other inculpatory evidence was not disputed. The heinous conduct committed to coerce the confession of Brown and his co-defendants included a near-fatal hanging, with the rope burns on the defendant's neck visible to the court. Though the admission of the confession was objected to and evidence of duress was presented in the defendant's case-in-chief, the Mississippi Supreme Court held the failure to move to exclude the confession was fatal, and the issue was procedurally barred on appeal. To this, Justice Griffith responded:

> If this judgment be affirmed by the federal Supreme Court, it will be the first in the history of that court wherein there was allowed to stand a conviction based solely upon testimony coerced by the barbarities of the executive officers of the state, known to the prosecuting officers of the state as having been so coerced, when the testimony was introduced, and fully shown in all its nakedness to the trial judge before he closed the case and submitted it to the jury, and when all this is not only undisputed, but is expressly and openly admitted.

The United States Supreme Court unanimously reversed the judgment of the Mississippi Supreme Court in an opinion by Chief Justice Charles Evans Hughes.[3] Justice Griffith was mentioned by name in the opinion, and much of his dissent was quoted in full as the opinion of the Court. Justice prevailed because of Justice Griffith's courage to follow the law.

1952–1974: The More Modern Court

By constitutional amendment in 1952, the membership of the Supreme Court was increased from six to nine. This period is highlighted by the advancement of civil rights through the legal system, which is best illustrated by four events.

The first was the re-emergence of black lawyers in Mississippi in the 1960s from Depression-era lows. R. Jess Brown is credited with filing the first modern civil rights lawsuit attacking literacy tests for voter registration in Mississippi. Brown, along with Jack Young and Carsie Hall, led the way for the re-establishment of African Americans into the mainstream of the Bar. The courageous pursuit of justice by these attorneys inspired future generations, such as Reuben V. Anderson, Mississippi's first black Supreme Court Justice, Henry T. Wingate, the state's first black federal judge, and Leslie D. King, one of the original members and Chief Judge of the Mississippi Court of Appeals. Justice King currently serves as a member of the Supreme Court.

Second was the first serious and ultimately successful prosecution of Byron De La Beckwith by District Attorney William L. Waller, Sr., for the murder of Medgar Evers. The first trial and subsequent retrial both resulted in mistrials, leaving open the possibility of justice for another day. And the record from the first trial would provide the core evidence needed for a conviction years later.[4] But the precedent was set, hate crimes would no longer be tolerated in Mississippi.

Third, the admission of James H. Meredith into the University of Mississippi would mark the end of state-sponsored segregation and the opening of public institutions, including

2. ***Brown v. State***, 173 Miss. 542, 161 So. 465 (1935).
3. ***Brown v. Mississippi***, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 2d 682 (1936).
4. ***De La Beckwith v. State***, 707 So. 2d 547 (Miss. 1997).

Continued on page 5...

courthouses, to all citizens. Fittingly, it was R. Jess Brown who represented Meredith in his battle to break the race barrier in Mississippi schools.

Finally, Mississippi was "readmitted to the Union," so to speak, when the United States Court of Appeals for the Fifth Circuit began holding court in Jackson in 1967. Chief Judge of the Fifth Circuit and former Mississippi Governor James P. Coleman was instrumental in this event, because he believed that it was important for residents in every state in the circuit to have access to a courthouse. As noted in his oral history, Coleman explained to his colleagues, "You [the Fifth Circuit] are sitting in every state in the circuit but Mississippi. I think the people of Mississippi would be improved by being given the opportunity to see that y'all don't have horns and I think it would be good for y'all to see the people of Mississippi and see that they are no different that these other states you are sitting in." This important accomplishment is yet another example of the importance of an open and accessible judicial system.

1974–1994: The Court Takes Control

The Supreme Court began to lay the foundation for modern judicial procedure in the 1970s, and the cornerstone of this foundation was the Court's decision in ***Newell v. State*** in 1975.[5] Prior to ***Newell***, it was generally accepted that the Legislature had exclusive control over rules of judicial procedure. But in one of the boldest assertions of authority ever adopted by an American court of last resort, the Court in ***Newell*** struck down a procedural statute governing jury instructions, finding that it interfered with the judicial branch's constitutional mandate for the fair administration of justice. The statute at issue prohibited the trial court from adding any jury instructions that were not offered by the parties. In ***Newell***, this resulted in the jury not being instructed on the burden of proof in a criminal trial. In striking down this statute, it was established for the first time in Mississippi that the inherent authority to prescribe rules of judicial procedure rested with the Supreme Court, not the Legislature.

The assertive stance taken by the Court in ***Newell*** may have faltered under the scrutiny

Bicentennial banquet speaker Chief Justice William L. Waller, Jr.

and opposition it ultimately faced if not for the efforts of Chief Justice Robert G. Gillespie and Associate Justice Neville H. Patterson, the author of ***Newell***. Chief Justice Gillespie was a model of perseverance in his own right, having been forced out of law school by poverty and a career in law enforcement by tuberculosis, but not before participating in the gunfight that ended the life of the notorious gangster John Dillenger. He and Justice Patterson understood the importance of the Court's undertaking in ***Newell***, so they worked tirelessly to ensure that the opinion of the Court was unanimous.

In 1981, the Supreme Court, now led by Chief Justice Patterson, formally acted on the authority it had announced in ***Newell*** by adopting the Mississippi Rules of Civil Procedure. This action was met with immediate confrontation, with the Legislature considering constitutional amendments to limit the Court's rulemaking power, threatening the Court with budget cuts, and even pursuing the removal of pro-Rules justices from the bench. But the Legislature ultimately relented, and the Supreme Court has since asserted its inherent rulemaking power to adopt rules of evidence, rules of appellate procedure, rules of circuit and chancery court practice, and a variety of other procedural guidelines. And under the leadership of Justice Ann H. Lamar, the Court adopted its first comprehensive set of Rules of Criminal Procedure in July of 2017. These rules exist only because the Supreme Court was willing to take a stand for the fair, efficient, and independent administration of justice in ***Newell***, in the face of stiff political pressure.

1994-Present: The Modern Court

The "modern" period of the Mississippi judiciary is highlighted by bold innovations to increase access to justice, none of which was more critical than the creation of the Mississippi Court of Appeals in 1994, in the face of a choking backlog of cases in the Supreme Court. The heroic message of Chief Justice Roy Noble Lee before the Legislature and his dogmatic insistence on reform prevailed, and the Court of Appeals ultimately has provided the citizens of this state with a more timely and responsive court system.

The advent of "problem-solving" courts, such as drug courts, has changed the lives of many Mississippi citizens for the better and serves as another reminder of how justice is carried out in the courthouse. The first drug court pilot program was led by then state Circuit Court Judge Keith Starrett in 1999. Drug courts provide a unique opportunity to address the very real problem of drug addiction, steering individuals into treatment and self-improvement rather than incarceration. This program has been one of the most successful innovations to our judicial system, as it has lowered recidivism rates while paying back money to the counties and reducing the amount that would be spent on incarceration.

The implementation of technology in our court system has brought the judiciary into the digital age and made it more accessible to Mississippians. Chief Justice Edwin Lloyd Pittman spearheaded the adoption of rules to allow cameras in the courtroom, a change that opened our courthouses to the public. And Chief Justice James W. Smith, Jr., began the groundwork that led to the creation of the Mississippi Electronic Courts system, a

5. ***Newell v. State***, 308 So. 2d 71 (Miss. 1975).

Continued on page 6...

comprehensive electronic filing system that is used by our appellate courts and is being implemented throughout our trial courts as quickly as possible. Electronic filing is critical because it gives practitioners and the public around-the-clock access to court documents. These innovations have earned Mississippi recognition for having one of the most transparent judicial systems in the country.[6]

The judicial system can be truly fair only if it is equally accessible to the rich and the poor. Realizing the need for greater access to courts in civil cases, several organizations have established programs to provide legal services and funding for low-income clients. In 2006, the Mississippi Supreme Court worked with the Mississippi Bar and the Bar Foundation to create the Mississippi Access to Justice Commission, which serves as a unifying entity to bring together providers of legal services and improve access to civil courts for the poor. The early leadership of the Commission included former Justice Jess H. Dickinson, as well as Chancellor Denise S. Owens, one of the state's first African American female chancellors, and Joy Phillips, the first female President of the Mississippi Bar. The Commission has helped to implement new procedures to provide funding for and legal services to the poor. These innovations include requiring attorneys to report pro bono hours and mandatory IOLTA[7] accounts for escrow funds, requiring all interest to be used to support access to the courts. And in conjunction with the Commission and other legal-services groups, the Mississippi Volunteer Lawyers Project has begun to promote Pro Se Days throughout the state to generate public awareness and provide legal services to hundreds of low-income citizens.

Maintaining the integrity of the courthouse during this modern period of the judiciary is perhaps best symbolized by the heroic actions of Judge Henry Lackey, who agreed to be the point man in a sting operation memorialized in Curtis Wilkie's book *The Fall of the House of Zeus*.[8] In 2007, a colleague of famed tort lawyer Richard "Dickie" Scruggs approached Judge Lackey and offered a bribe in exchange for a favorable ruling in one of Scruggs's cases. Judge Lackey relayed this information to federal prosecutors and then participated in an undercover operation that resulted in Scruggs's arrest and conviction for conspiring to bribe a judge. In what was otherwise a dark moment for the legal community, Judge Lackey's courage under pressure helped restore public confidence in the justice system.

Conclusion

It is the Courthouse that has and will always be the forum for the fair, efficient, and independent administration of justice in public view, recorded for posterity, and subject to the right of appeal.

6. "Public Access to the State's Highest Courts: A Report Card," Open Virginia Law, http://www.openvirginialaw.com/docs/OVL-PublicAccesstoStatesHighestCourts-2014.pdf (last accessed on Nov. 21, 2017).
7. "IOLTA" stands for Interest on Lawyer Trust Accounts.
8. *See also* Alan Lang and Tom Dawson, *Kings of Tort* (Pediment Publishing, 2d Ed. 2010).

CABA FLASH CLE

November Flash CLE, "Finding Your Niche: Merging Your Passion with Your Law Practice"

Shown above are photos from the event

CABA Fall SOCIAL

This event was held on October 5, 2017
at the Manship

EVENT PHOTOS below!

Co-sponsored by JYL and the Litigation Section of the MS Bar

Diversity Column...
DID YOU KNOW?

By Nakimuli Davis-Primer[1]

Did you know that the Model Rules of Professional Conduct were amended to make it professional misconduct for attorneys to knowingly engage in harassing or discriminatory conduct related to the practice of law?

The American Bar Association's House of Delegates approved resolution 109 last year to amend Model Rule 8.4 to add an anti-harassment and anti-discrimination provision. Pursuant to the amended Rule 8.4, "it is professional misconduct for a lawyer to":

> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

The comments explain that "conduct related to the practice of law" includes, among other things, interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice; operating or managing a law firm; and participating in bar association, business or social activities in connection with the practice of law. The comments also explain that discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others and that harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. The ABA House of Delegates, which is comprised of members from almost every state bar association, explained that the black-letter rule is necessary because the prior comment that addressed "bias or prejudice" in the administration of justice failed to "cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms). The comment also [did] not address harassment at all, even though the judicial rules do so."

The rule change has been met with criticism from a number of organizations and commentators who believe that it infringes on attorneys' first amendment rights. Opponents contend that the rule would be used to chill a lawyer's expression of his or her views on religious, political, and social issues. Supporters contend that lawyers—as officers of the court—should be held to higher standards, that an anti-discrimination rule is necessary, and that the rule only relates to discriminatory and harassing conduct in the practice of law.

1. Nakimuli Davis-Primer is Chair of the Diversity Committee.

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2018 HOLIDAYS

January 1 . . . . . New Year's Day
January 15 . . . . . Dr. Martin Luther King, Jr. & Robert E. Lee's Birthday
February 19 . . . . . President's Day
April 30 . . . . . Confederate Memorial Day
May 28. . . . . Memorial Day and Jefferson Davis's Birthday
July 4 . . . . . Independence Day
September 8 . . . . . Labor Day
November 11 . . . . . Veteran's Day
November 22 . . . . . Thanksgiving Day
December 25 . . . . . Christmas Day

Continued on page 9...

After amending Rule 8.4 to add subsection g, the ABA asked each state supreme court to adopt Model Rule 8.4(g). As of November 2017, however, only the state of Vermont has adopted the rule. Twenty-four states (and the District of Columbia) had previously adopted a rule that in some manner addressed bias or discrimination; thirteen states have a comment but not a rule; and the remaining states, like Mississippi, have neither a comment nor a black-letter rule that directly addresses harassment, discrimination, and bias as intended by Model Rule 8.4(g). Phoenix attorney, Don Bivens, who is a former chair of the ABA's Section of Litigation, stated that he "would like to think that all American lawyers would agree that harassment and discrimination should have no place in the practice of U.S. law" Linda Klein, immediate past president of the American Bar Association, stated that "[r]evised Rule 8.4 is a reasonable, limited and necessary addition to the ABA Model Rules of Professional Conduct." Nonetheless, opponents state that Model Rule 8.4(g) is too broad and would create a speech code.

Despite the varying views on the model rule, each state must decide whether to adopt the rule as written, whether to adopt alternative language, or whether to simply ignore the model rule as some opponents suggest. Consequently, more states are starting to consider the rule and some have requested public comment. Mississippi's current Professional Rule of Conduct 8.4 is identical to the model rule 8.4 except the state has not adopted (or yet considered) subsection (g).

WHAT DEFINES YOU?

A Review of Mary Ann Connell's Memoir, *An Unforeseen Life*

By Alicia Hall

I sat anxiously as Mary Ann Connell took the podium at our fall membership meeting. She opened her presentation with the same story that opens her book: the tragic death of her brother, Billy Strong. At a very young age, Ms. Connell watched her only sibling die, and our hearts went out to her as she described the accident. To begin both a book and a speech with such a raw, human experience proves that Ms. Connell is what we all must strive to be—authentic and courageous. The experience motivated her to be a high-achiever for the rest of her life, working hard to ensure that she honored her late-brother's memory.

It was tempting to open this review on a lighter note. But that's not how Ms. Connell opened her story, and this is her story, not mine. We should not gloss over the defining moments of our lives just because they are difficult. Ms. Connell is a remarkable person because of her perspective: "I got nothing I asked for but all that I hoped for, and I am among all people most richly blessed." *(P. 300)*

Mary Ann Connell was born in Louisville, Mississippi. Her father was a prominent lawyer—the Atticus Finch of the town. "[F]rom the time [she] was eight years old," Ms. Connell wanted "to be as kind and loving and gracious as [her] mother and as good a lawyer as [her] father. The path to emulating [her] mother was open to [her]; the path to being a good lawyer was seldom open to a girl." *(P. 296)*

But Mary Ann Connell forged her own path. After achieving great academic success at Ole Miss, she married Bill Connell and moved to the Mississippi Delta. A lifelong learner, she returned to Ole Miss for a master's degree in history, and then another master's in library science. And then, in the fall of 1973, she enrolled in her first law school class. She kept it a secret from Bill at first, but he eventually found her out. To maintain the balance expected of women in the 1970s, Ms. Connell attended law school while raising four children (one a newborn), serving as a Girl Scout leader, teaching Sunday school, and attending social functions with Bill. As time progressed, Bill became "downright supportive" of his wife's incredible success in law school, taking one or more of their daughters on photography trips to allow for uninterrupted study time before exams. As she described it, "[w]hat started as deceit on my part (and male chauvinism on Bill's) evolved into a mutual effort and shared pride in the end. Bill's views of what women—and his wife in particular—could do had changed drastically over a four-year period." *(P. 118)*

Ms. Connell's legal career took her from private practice to a thirty-year career as Ole Miss's university attorney, and then back again to private practice. The stories of Ms. Connell's time at Ole Miss are a must-read. In her first year, she effectively discouraged the Klan from having a parade on campus. She worked with different Chancellors with ease, gaining their trust each time with her legal expertise, diplomacy, and creativity. She served as president of the National Association of College and University Attorneys. She handled incredibly difficult NCAA investigations. She received her LL.M. from Harvard Law School (explaining that she wanted to take a Harvard education and return to Mississippi to help make it a better place). She spearheaded efforts to make Ole Miss more accommodating to disabled students. She chaired a committee to make the university Title IX compliant in athletics. She taught. She issued guidelines for prohibited items at athletic events, which in effect removed the Confederate flag from stadiums (without running afoul of the Constitution).

No story is safe from Ms. Connell, and I enjoyed her willingness to tease her former classmates and students (many of whom are now distinguished members of our profession). Her humor helps to balance the gravity of some intense life experiences. And her sense of humor pairs well with her sincerity, humility, and resilience.

To Ms. Connell – Thank you for sharing your regrets and your triumphs so freely. It was a gift to read your story. Your life may have been unforeseen thus far, but it has also been extraordinary, just like your spirit.

1. Alicia Hall is President of the Jackson Young Lawyers Association and a member of the CABA Board.

2017 Christmas Party

This event was held on December 5, 2017 at the Old Capitol Inn.

Above are photos from the event.

2017 Christmas Party

Event photos continued…

2017 Christmas Party

Event photos continued…

A DIFFERENT KIND OF BICENTENNIAL LOOMS[1]

By James L. Robertson

Harry and Others vs. Decker & Hopkins[2] is one of the earliest known opinions of the Supreme Court of Mississippi. It is remarkable in many ways. The summer of 2018 will mark its bicentennial.

Freedom-by-residence cases brought by slaves seeking freedom were not uncommon in the years leading into the 1850s. *Harry* was the first known case where at the end of the day the court of last resort in a southern slave state had ruled that the slaves were free. Likely from a very early age, Harry and two others whose gender is not known had been enslaved in Virginia. In 1784, their master, John Decker, took them to lands which—three years later—became "free soil" as a matter of federal law.

But would this matter where slavery was not only legal but was also sanctioned and regulated by the new state's constitution?

Three years after Harry and his fellow slaves won their freedom in a Mississippi court, a white man killed a slave—a black man who was a stranger to the white man. Isaac Jones was that white man, and he had acted with malice aforethought. "The taking away the life of a reasonable creature, under the king's peace, with malice aforethought,… is murder at common law."[3]

And so on July 27, 1821, the sheriff of Adams County, Mississippi, had Isaac Jones hanged. The humanity of the slave whose name is not known, and who was not so fortunate as Harry and the others, was vindicated posthumously.

Thirty-five years later, what little was left of the courage and hope of men and women who had been enslaved came crashing down when the U. S. Supreme Court decided the *Dred Scott* case and fanned the flames that led to war. Mississippi had backpedaled in the 1830s. Its holdings were checkered for the next twenty-five years.

We now know that there was much more to *Harry* is included in Walker's Reports, the first volume of reports of decisions of the Supreme Court of Mississippi. In the fullness of time a Natchez journalist told the nation of

> a decision alike honorable in our state and in humanity. It appeared that, some time in the spring of 1816, twenty-eight black persons, who were slaves for a certain period of time, were brought by the defendants from Indiana, and sold in this state as slaves for life. By the decision of the Court and Jury they were restored to entire freedom.[4]

And so the calendar has scheduled *Harry's* bicentennial for the summer of 2018. Its clarion call should be honored. There was a time when Mississippi was first in doing what was right, not last, a time when the stakes quite high.

The Deckers in the Neighborhood of Vincennes

John Decker (ca. 1719–1790) and his family hailed from Kingston in the Dutch country in New York. Soon after the Revolution succeeded, the Deckers settled in "the neighborhood of Vincennes" in the Indiana territory, bringing with them Harry, Bob, Anthony, Rachel and many other slaves.

Decker Township was on the lower Wabash River—today the boundary between southwestern Indiana and southeastern Illinois—until it flows into the Ohio River, ending to the south against northwestern Kentucky.

The Constitution was not the only important document drafted in 1787. Soon

1. This article is a couple of excerpts from the author's work, tentatively named Constitutional Encounters in Mississippi History, publication pending, University Press of Mississippi. The "Encounters" will include ten chapters, beginning with the full story of an early freedom-by-residence slavery case, centered around *Harry and Others v. Decker & Hopkins*, Walker (1 Miss.) 36, 42-43, 1818 WL 1235 (1818), and the advent of judicial review in Mississippi told in *Runnels v. State*, Walker (1 Miss.) 146, 1823 WL 543 (1823), and in *Cochrane & Murdock v. Kitchens* (1823-1825) as told by James Daniel Lynch, The Bench and Bar of Mississippi 92-97 (1880), and by Prof. John Ray Skates, A History of the Mississippi Supreme Court, 1817-1948, pages 6-9 (1973), and others. See also, *Judicial Review Comes to Mississippi and Stays*, http://caba.ms/articles/features/judicial-review-comes-to-ms.html, posted December 2015. The Encounters will hop and skip across the calendar and Mississippi's constitutions and include two Encounters from the first term of Gov. Hugh L. White, one arising from the Balance Agriculture with Industry (BAWI) Program and the great case of *Albritton v. City of Winona*, 181 Miss. 75, 178 So. 799 (1938), and a second, the "Governor and the Gold Coast" and the great case of *State v. McPhail*, 182 Miss. 360, 180 So. 387 (1938). What follows here is taken from a much more complete and colorful version of "Governor and the Gold Coast."
2. *Harry and Others v. Decker & Hopkins*, Walker (1 Miss.) 36, 1818 WL 1235 (Miss. 1818).
3. *State v. Isaac Jones*, Walker (1 Miss.) 83, 1820 WL 1414 (1821).
4. The news reports published in 1819 say that there were "twenty-eight black persons" involved in the trial "in the case of Harry et al. vs. Decker & Hopkins." Daily National Intelligencer (Washington, D. C.), Tuesday, July 20, 1819, Vol. 7, Issue 2034, page 2, see http://www/genealogybank.com; and New-England Palladium (Boston, Massachusetts), Friday, July 30, 1819, Vol. XLIX, Issue 9, page 1, see http://www/genealogybank.com

Continued on page 14...

after the Deckers established their Township, the Congress enacted the Northwest Ordinance of 1787. *Article the Sixth* read "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes whereof the party shall have been duly convicted."

From the get-go, John Decker had been aware of the problem this new federal ordinance posed for his family's slaveholdings. His five sons inherited the problem when John died in 1790. Luke Decker (1760–1825) was the leader of that five pack.

On 1816, the matter became more urgent. Indiana was admitted to the Union. The Indiana Constitution was more specific than the Northwest Ordinance. Article I, Section 1, in practical effect enshrined the "inalienable rights" clause in the Declaration of Independence in Indiana constitutional law.

Completed on June 29, 1816, the Indiana Constitution had been a shot across the bow to men like the Deckers. Statehood lay ahead, and it was certain to arrive in the not too distant future. Life was about to change for the slaveholders in the southern part of the soon-to-become new state.

The Voyage to Natchez

With appropriate dispatch, the second generation Decker sons gathered Harry and at least twenty-seven other slaves and began navigating downstream. There are no known records of the voyage. Luke saw to it that his son, Hiram Decker (1794–1863)—John Decker's grandson—was in charge, along with other hands who knew the course.

As the Decker vessel headed down-river, Hiram had but one purpose—sell Harry and the others as soon as practicable and for the best price they could get.

"The Natchez slave market, along with [one other], became the most active in the whole South" in the years after the War of 1812. This is consistent with Judge Michael P. Mills' relatively recent showing that, "[f]rom the beginning, the new state [of Mississippi] would be a major destination point for human cargo 'sold down the river' from border states."[5] The Deckers' destination was almost certainly Natchez.

Flatboats or "broad-horns" were in use for transporting a variety of cargoes, including a large number of slaves. Downstream navigation usually meant a float rate of about four miles per hour. Approximately 600 river miles lay between Cairo, Illinois, and Natchez. Commonly the slaves were confined by chains in steerage or on open decks. In the latter instance, slaves would be "forced to sit on open decks, usually surrounded by boxes of cargo and supplies."

Decker's human cargo-laden vessel arrived in Natchez in the late summer or early fall of 1816. Once disembarked and offloaded, Decker sold at least twenty-eight slaves "as slaves for life." But in short order thereafter, Harry and his companions escaped.

The circumstantial evidence leaves little doubt but that at some timely point these escapee slaves found counsel at the hands of lawyers like Lyman Harding and Tully Robinson. By late October of 1816 their plight was formally before a trial court of the Mississippi Territory, called "a superior court holden at the court house in and for the county of Adams."

We know that in the summer of 1818 the Supreme Court of Mississippi decided the case captioned *Harry and Others vs. Decker & Hopkins*. The opinion issued by the high court says John Decker and a man named Hopkins were the appellants in that case. But John had been dead for twenty-eight years. Luke Decker had inherited the bulk of his father's estate.

In his opinion for the court, Judge Joshua G. Clarke makes a reference to "old Decker", and then to "those who claim under him." October 1816 witness subpoenas suggest that Hiram Decker was in fact the Decker defendant in Harry and Others' petition for freedom suit.

Still there are gaps in what is known along the way. As much as we hope that these puzzles may at some point be answered definitively, by records of authenticity and detail, they cause no concerns for the central premise and achievement of this important constitutional encounter in Mississippi's history and whose bicentennial lies a few months ahead.

The Summer of 1818

The Supreme Court of Mississippi was still a gleam in the eye—an imminent gleam, to be sure—when Harry and his companions were force fed into the Natchez slave market. That court formally sat at the tail end of spring and then through the summer of 1818. Statehood had been formally accomplished back on December 10, 1817.

The legal landscape in Mississippi recognized the practice of slavery, before and after statehood. A discrete but unnumbered article labeled "Slaves," and containing two numbered sections, was included in the constitution drafted in the late summer of 1817.[6] Section 1 treated slaves as property in the eyes of the law in any number of contexts. Of concern here, the General Assembly was without power to prevent new settlers coming to Mississippi from bringing their slaves with them.

In early Mississippi constitutional law, "slaves" included "such persons as are deemed slaves by the laws of any one of the United States, so long as any person of the same age or description shall be continued in slavery by the laws of this state." After all, it was the loud and clear public policy of the new state that settlers from older parts of the country be encouraged to emigrate, bringing their slaves with them, and making their homes and fortunes in the new state.

There was no Northwest Ordinance for slaves in pre-statehood Mississippi to turn to for help. The Georgia Compact of 1798 had established the Mississippi Territory and declared applicable the first five articles of the Northwest Ordinance. Article 6, however, had been omitted, and conspicuously so. The Georgia Compact limited slavery only in the sense that the foreign slave trade was declared illegal in the Mississippi Territory.

Mississippi was still a territory at the time Decker's vessel descended the River until

5. Mills, *Slave Law in Mississippi from 1817-1861: Constitutions, Codes and Cases*, 71 Miss. L. Journ. 153 (Fall 2001).

6. The unnumbered article regarding Slaves in the Constitution of 1817 bears a marked similarity to the Constitution of Kentucky, Article IX (1792). At many points the texts of the two are verbatim identical.

Continued on page 15...

Hiram reached what he thought were the more amenable territorial waters of the not-quite-yet twentieth state. The state constitution would in time grant the General Assembly of Mississippi "full power to prevent slaves from being brought into this State as merchandise." But not until December of 1817.

At the moment, however, Luke Decker was more concerned with the constitution of the soon-to-be-nineteenth state when his vessel—his son, Hiram at the helm—embarked from Knox County, Indiana, for more friendly waters, his valuable cargo and merchandise including Harry and the other slaves.

Judge Clarke's Legal Analysis

Cases like *Harry and Others* are difficult to discuss today. Slavery was a monstrous evil. The level of moral wrong and harm from slavery in the antebellum South is such that saying anything positive about participants in the practice invites opprobrium—from within the speaker and from without.

Harry and his companions are the heroes of this story, if only more could be known about *their* story.[7] These are like unknown soldiers.

Indeed, it is not even known whether or how many of the "others" who accompanied Harry may have been women. As with Bob and Anthony back in Indiana, it took courage "to confront a man of [Luke] Decker's reputation." All have earned a unique place of honor in our history.

This brings to mind an insight of Justice Evelyn Keyes of Houston,Texas, though a native of Greenville, Mississippi. "[T]he study of the humanities by lawyers and judges… acquaints us with different modes of perception and understanding of human predicaments and of the essential dignity and worth (or evil [or ambiguity]) of those caught within those predicaments…"[8] Keyes points to "revelations of the dehumanizing experience of slavery captured by Toni Morrison's BELOVED."

In the summer of 1818 the Supreme Court of Mississippi affirmed the judgment granting Harry and two companions their freedom. Judge Joshua G. Clarke began his opinion for the court with the fact that "the three negroes were slaves in Virginia." The constitution emerging from the convention in the late summer of 1817 never affirmatively said, "slavery is legally permissible in this state," but it assumed as much. The lack of an affirmative constitutional blessing for slavery left room within which Clarke could maneuver.

Clarke accepted the above premises, albeit *sub silentio*. He had to. He argued, however, that these were not the outcome-determinative facts before the court in the summer of 1818.

While freedom-by-residence cases later became familiar, Joshua Clarke had no such precedent to guide him. Border slave state Kentucky would grant such a claim for freedom in October of 1820.[9] Virginia so held two months after that.[10] Louisiana's judicial acceptance of freedom-by-residence lay six years in the future.[11] The important Missouri jurisdiction—it wasn't even a state at the time *Harry* was decided—was more than six years away from formally recognizing freedom-by-residence.[12]

In the summer of 1818, Clarke was on his own. Still, he made it clear that he understood his responsibility to decide the case according to accepted legal methods, considering only legal premises known in those times and applied to the relevant facts. Clarke well knew that "the importance of the question is great." While the outcome determinative facts may have been undisputed, the proper understanding of the controlling legal question was very much "controverted."

The basic rationale of freedom-by-residence cases was that, if, with the consent of his owner, the slave lived, resided on "free soil" for a significant period of time, the legal bonds of slavery were deemed expunged.[13] These bonds did not reattach if the former slave was later found in a slave state.

This theme is found in *Harry*. No one moving to a new state or territory, establishing a new home and means of livelihood there, bringing his possessions with him, had a reasonable expectation that the laws of that state or territory would not someday be changed to his personal disadvantage. A new citizen was deemed to acquiesce in the law-making and law-altering processes of his new home jurisdiction. All were subject to what in time became familiar and known as the petty larceny of the police power.

The formal enforceability point aside, Clarke presented the case for state authority "to effect a general emancipation." *Harry* may have been the first time the courts of the new state of Mississippi would be called upon to adjudge a freedom-by-residence suit, but it certainly would not be the last. Lots of slaveholding men like Luke Decker lived in other states north of the Ohio River (or the Mason-Dixon Line).

With improved technology in river navigation and transportation, any number of such men could be expected to use a Decker-like strategy to liquidate their assets on advantageous terms. To be sure, points the court might make on an issue not properly justiciable in the case *du jour* would be considered *dicta* and not binding precedents. An exposition of the law on the effect *vel non* of freedom-by-residence emancipation in another state could nonetheless

7. Lea Vandervelde has told the story of Dred Scott and his wife in Mrs. Dred Scott: A Life on Slavery's Frontier (Oxford University Press, 2009); see also, Lea Vandervelde, *The Dred Scott Case in Context*, Journal of Supreme Court History, Vol. 40, No. 3, pages 263-281 (2015). It would be a great good fortune to history and humanity if some day something approaching that level of personal information will be found so that Harry's story and the stories of his companions may be told, at least as fully as the story of the Decker family is known.

8. Keyes, *The Literary Judge: The Judge as Novelist and Critic*, 44 HOUSTON L. REV. 679, 699 (2007). Justice Keyes sits on the Texas Court of Appeals, First District. Keyes spent her early childhood and adolescent years in Greenville, Mississippi, *sub nom*. Evelyn Vincent.

9. *Rankin v. Lydia, a pauper*, 2 A.K.Marsh 467, 9 Ky. 467, 1820 Westlaw 1098 (Oct. 1820).

10. *Griffith v. Fanny*, Gilmer (21 Va.) 143, 1820 Westlaw 809 (Dec. 1820).

11. *Lunsford v. Coquillon*, 2 Mart. (n.s.) (La.) 401, 1824 Westlaw 1649 (May 1824).

12. *Winny v. Whitesides Alias Prewitt*, 1 Mo. 472, 1824 Westlaw 1839 (Nov. 1824).

13. For a full discussion of this point of slavery law in all of its complexities, and over time until *Dred Scott* in 1857, see Andrew T. Fede, *Freedom Suits Based on the Movement of Slaves* in his ROADBLOCKS TO FREEDOM: SLAVERY AND MANUMISSION IN THE UNITED STATES SOUTH 287-337 (2011).

Continued on page 16...

be useful in future cases, if that discussion were well reasoned and persuasive. And not only future Mississippi cases. The soon-to-follow decisions in Kentucky, Virginia, Missouri and adjacent Louisiana lay in the future.

Joshua Clarke, Political Theorist and Practitioner

Clarke cites the teachings of Jean-Jacques Rousseau. Each person gives "all his rights and privileges to the whole community." "[A]ll are in the same circumstances, so that no one can be interested in rendering burthensome their common connection."

Clarke *qua* Rousseau follows with an incisive insight.

> If anyone had a right distinct from another, which he pretended had not been surrendered, each individual might question the acts of the social compact, and if this were permitted, it would destroy itself, as there would be no common umpire to appeal to, a state of nature would exist, and the social compact would be a splendid bauble.

We read these words, and they immediately call to mind the first section in the Declaration of Rights in Mississippi's first constitution.

> That all freemen, when they form a social compact, are equal in rights, and that no man or set of men, are entitled to exclusive, separate, public emoluments or privileges, from the community, but in consideration of public services.[14]

Read together with Section 2, little doubt is left that Clarke was not just a delegate to the convention held in little Washington, Mississippi. He had played a substantial drafting role at the convention. With or without the awareness of his fellow delegates, Clarke had infused the core political ideology of Jean-Jacques Rousseau at the heart of the new constitution.

Cases of Doubt

Legal questions of retroactivity were central. The Deckers argued that freedom-by-residence laws could apply prospectively only. Otherwise vested property rights would be disturbed. This required the court to face a question of constitutional dimensions.[15] No one doubted that Harry and the others were in slave legal status before they were ever brought to land "in the neighborhood of Vincennes." And before there was an Ordinance of 1787. As this was so, neither the federal Northwest Ordinance, much less the pending new Indiana Constitution, could change their status, or so the argument would go.

When *Harry* reached the Supreme Court of Mississippi in the summer of 1818, the meaning and effect of the positive law on retroactivity *vel non* was disputed, subject to differing constructions and applications. In this setting Clarke answered,

> But it is contended that the provisions of the constitution admit of a different construction—that it is prospective, and to give it the meaning its language imports, would violate vested rights. What are these vested rights, are they derived from nature, or from the [positive] municipal law? Slavery is condemned by reason and the laws of nature. It exists and can only exist through [positive] municipal regulations, and in matters of doubt, is it not an unquestioned rule, that courts must lean "*in favorem vitae et liberatatis*." … How should the Court decide, if construction was really to determine it? I presume it would be in favour of liberty.

It is easy to applaud Clarke's decision. Earlier in the opinion, he had articulated his understanding of the law of nature, providing the Mississippi Supreme Court's first and only discussion (to date) of Jean-Jacques Rousseau's social contract. Such talk was still in the air in 1818, revered by many, though its heyday in Jefferson's introductory clauses of the Declaration of Independence was almost forty years in the past.

Judge Clarke implicitly followed the 1772 King's Bench opinion of Lord Mansfield in *Somerset v. Stewart*.[16] Slavery, according to Lord Mansfield, was "incapable of being introduced on any reasons, moral or political; but only [by] positive law[.]"[17]

Whatever *de facto* form of submission Harry and others may have endured after 1787, legally they had become free men. Whether the positive law may have reattached the bonds of slavery once Harry and the others entered Mississippi waters was sufficiently open to question that the case was controlled by the maxim "*in favorem vitae et liberatatis*."… How should the Court decide,…? I presume it would be in favour of liberty."

The "Ought" versus the "Is"

There are legal problems—realities, if you will—with Judge Clarke's most famous judicial utterance. Does he have a defense to the acrid criticism: that's just your opinion? Have you really rendered a judgment which emanated from a reasoned application of legal premises that satisfied the criteria for legal validity?

In fairness, Clarke reasoned through the points in his opinion in the summer of 1818

14. Miss. Const., Art. I, § 1 (1817).

15. Decker's and Hopkins' particular constitutional argument is not articulated in the opinion. Given the times and the brand new Constitution of Mississippi, one can easily see an argument based on one or more of the following: Miss. Const. Art. I, § 10 (1817) (no person "can be deprived of his… property, but by due course of law"); Miss. Const. Art. I, § 13 (1817) ("nor shall any person's property be taken or applied to public use… without just compensation being made therefor; and/or Miss. Const. Art. I, § 19 (1817) ("that no ex post facto law… shall be made").

16. *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499, 20 How. St. T. 1 (K. B. 1772). Lawyer and historian Andrew T. Fede presents a helpful explanation of Lord Mansfield's opinion in *Somerset* and its use and influence in the United States, including Mississippi, in his Roadblocks to Freedom: Slavery and Manumission in the United States South 289-308 (2011).

17. See *Somerset v. Stewart*, Lofft 19. Judge Clarke would repeat this point three years later in *Jones v. State*, Walker (1 Miss.) 83, 85, **1, 1821 WL 1413 (1821). See also, Andrew T. Fede, *Judging Against the Grain? Reading Mississippi Supreme Court Judge Joshua G. Clarke's Views on Slavery in Context*, FCH Annals, page 16, fn. 38 and accompanying text (May 2013), http://fch.ju.edu/fch_vol_20.pdf.

Continued on page 17...

more carefully than most appellate judges do today. But he found himself stuck in the end with the choice for which he is celebrated.

Clarke decided and adjudged in favor of what he thought the law ought to have been. Does this differ from *Olmstead v. United States*, more than a century later, an exclusionary rule search and seizure case, where Justice Holmes in dissent faced up to the fact that no law mandated this result or that, and then famously said, "We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."[18]

Considered today, was Clarke's reasoning any more acceptable to those who disagreed than are *Roe v. Wade*[19] and progeny[20] acceptable to those who believe abortion to be a great moral wrong? Conversely, a ruling that Harry and the others were still Decker's slaves—or Hopkins' after their sale—would have been just as outrageous as overruling *Roe v. Wade* would be to those who believe that it would be a great moral wrong to deny a pregnant woman the right to make the terrible choice whether to have an abortion.

Does Natural Law Have a Place?

Thoughts of natural law or the law of nature have long been interesting and at times uplifting, but no man may be hanged or enslaved by virtue of the natural law alone, nor may he be acquitted or freed. To be sure, we wish to celebrate Judge Clarke and in particular *Harry*, as its 200th birthday approaches. A barely known human being named Harry and others utterly unknown were found and placed on the side of the angels by Justice John McLean in 1857 in his dissenting opinion in the *Dred Scott* case.[21]

But time has taught that constitutional constructions "when the importance of the question is great" should be made of sterner stuff than Clarke brought to bear, if that is at all possible.

There is a limited place for the idea of natural law[22] in a constitutional democracy. When the positive legal materials play out without producing a reliable decision, a judge has no choice but to look elsewhere. In *Jones* the positive legal materials were the common law of homicide as accepted in Mississippi, any superseding statutory law, and ultimately the Constitution of 1817,[23] reliably applied, of course, to the relevant facts of the case, and according to the common law adjudicative process of reasoned elaboration (which is not to be confused with some imaginary process of mathematical or mechanical elaboration).

Three years earlier in *Harry*, the positive legal materials included the Northwest Ordinance of 1787, and implicitly the Supremacy Clause of the Constitution of the United States.[24] Judge Clarke thought it included the Indiana Constitution of 1816, although he may have erred in this. And the positive law of Mississippi included the "judicial power" identified and authorized in its constitution[25] and laws.[26] Within these, the court was charged to consider the legislative facts of "what was expedient for the community concerned."[27]

Without arguable doubt, the legislative facts include the humanity of the affected community, the fears and prejudices that cause men to fail, the objectively foreseeable consequences of the case, and the reasonable reliance, if any, of persons affected.

The legal materials became scant when the court came to the retroactivity issue in *Harry*, excluding the two firmer foundation points found via Monday morning quarterbacking and set out above. Luke Decker's defense was that he and his predecessor in title—his father—held property rights which had vested prior to the Ordinance of 1787.

A careful reading of the opinion of the court suggests that Clarke saw the seriousness of this defense, perhaps more so than do sympathetic readers 200 years later. He had tried to head this one off. Early in his opinion, Clarke analyzed the treaty of cession whereby Virginia has surrendered the Northwest Territory to the United States. Nothing that happened before July of 1787, Clarke argued, stood as an impediment to the confederated states enacting and the United States later recognizing and enforcing the Northwest Ordinance.

A thinking lawyer reading this argument might find it a bit iffy. That slavery had never been imposed by positive law in the lands Virginia ceded in 1784 did not mean that, prior to their removal, Harry and the other two had not been slaves in Virginia proper. Remember, at that time, the lands we now know as the state of West Virginia were—until 1863—a part of Virginia proper. Clarke was smart enough to see this.

Recall that Clarke had exclaimed "Slavery is condemned by reason and the laws of nature." As a matter of fact he was surely correct, so long as he limited the source of condemnation to civilized men of reason and moral understanding. As a matter of enforceable positive law, something very different was happening in the penultimate paragraph of the *Harry* opinion. Clarke had to decide the case.

Judges have no authority not to decide cases within their jurisdiction.[28] Judge Clarke had to adjudge Decker's vested rights defense, and to

18. *Olmstead v. United States*, 277 U.S. 438, 469-471 (1928) (Holmes, J., dissenting).

19. *Roe v. Wade*, 410 U.S. 113 (1971).

20. *See, e.g., Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833 (1992).

21. *Dred Scott v. Sanford*, 19 How. (60 U.S.) 393, 561, ** 124, 15 L.Ed. 691, 765, 1856 WL 8721 (1857) (McLean, J., dissenting).

22. *See* John Finnis, Natural Law and Natural Rights (2d ed. 2011), explaining that there is so much more that is rich and complex in the idea of natural law than Joshua Clarke and so many others ever thought.

23. See Miss. Const., Schedule, § 5 (1817).

24. U. S. Const., Art. VI, §2.

25. Miss. Const., Art. II, § 1, and Art. V, §§ 1, 2 (1817), and the statutes creating and empowering the Supreme Court.

26. *See* Hoffheimer, Michael H., *Mississippi Courts:1790-1868*, 65 Miss. L. Journ. 99, 113-117 (Fall 1995)

27. Oliver Wendell Holmes, The Common Law, at page 35 (1881).

28. *Shewbrooks v. A. C. & S., Inc.*, 529 So. 2d 557, 560 (Miss. 1988); *See also, Lexmark Int'l, Inc. v. State Control Components, Inc.*, 134 S.Ct. 1377, 1386 (2014) ("court's [duty] to hear and decide cases within its jurisdiction is virtually unflagging") (citing and quoting *Sprint Communications, Inc. v. Jacobs*, 134 S.Ct. 584, 591 (2013)); *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264, 404, 5 L.Ed. 257, 291 (1821) ("treason to the constitution"). The federal cases are summarized in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358-359 (1989). The supreme court has recognized this judicial duty in civil actions against churches and their officials, e.g., *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213, 1223 (¶23) (Miss. 2005).

Continued on page 18...

do so forthrightly. There was no legal premise of speed limit precision and application available to help. So he turned to the maxim. Perhaps he gilded the lily with "it is the unquestioned rule." No matter. He had to decide, and he decided well and legitimately.

Clarke honored his duty in exercising the constitutional judicial power to draw on the best premises he could find. Lest the point be overlooked, in doing so, "*in favorem vitae et liberatatis*" as a rule of construction became incorporated into the positive law of Mississippi. Judge Clarke did this and more, first and before any other state.

Reflections While Awaiting A Bicentennial

History tells us that Judge Clarke's *tour de force* did not last. Judge Mills told that sad story back in 2001. Others might place Mississippi's story in the context of the hell-bent-on-self-destruction view of social existence that practicably blinded the South as a whole.[29] Fear and isolationism and their alter egos, southern nationalism and nativism, grew. And more fear, as Armageddon approached. The nation's survival of the fiery trial through which it passed, plus the Reconstruction Amendments to the U. S. Constitution, rendered *Harry* unnecessary.

Joshua Clarke set a standard. Coming across Clarke's citation of Rousseau in *Harry* brings to the mind a jewel Judge Learned Hand offered years ago in this context.

> I venture to believe that it is as important to a judge called to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare, and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject.[30]

With little doubt, Hand would have assented to the addition of Rousseau, probably placed between David Hume and Immanuel Kant, and with an apology for his omission.

The law and its centerpiece, the exercise of judicial power, most assuredly are a dimension of the humanities. These have arisen from human experience and govern human behavior. Their end is nothing less than a society in which we should want to live.

Mississippi born and bred Evelyn Vincent Keyes also notes the other side of the coin, "[O]nly a morally literate and humanistically informed people can maintain a free society against the dehumanizing forces of totalitarian ideology and destructiveness that constantly assail it, for only then will they know what is at stake."[31] "Ay, there's the rub."[32] Now, as it was 200 years ago.

Regarding Joshua Clarke, it would be hard to improve on what Judge Mills has had to offer. "Great-souled men and women must occasionally fret their hours on the stage and steer institutions aright… Joshua G. Clarke possessed the courage, idealism and will to" do what was needed in 1818. "Clarke establishes that men of good will and fair minds can speak the truth, even in the worst of times."

In the end, there can be no serious doubt but that "the high point of antebellum Mississippi judicial sentiments supporting universal freedom and human compassion was clothed in the robe of one Joshua G. Clarke."

There is a place for humanity in the use and application of our constitution and laws, albeit a limited one. Judge Clarke provided two instances—*Harry* and *Jones*—where a court has turned to the humanities, ideas of our fleeting existence as well as insights from Rousseau, to enrich the quality of its adjudications. He enriched the quality of our history, and our lives. His lessons endure.

We have little or no authority outside that practical corner and should confine ourselves thereto. But we should never forget that this practical corner includes John Marshall's counsel that judges should never "decline the exercise of the jurisdiction which is given," lest they commit "treason to the constitution."[33] And that this is and always has been true in Mississippi and in all states with a constitution that creates and upon a chosen few confers the judicial power.

Men and women, lawyers and judges and jurors, citizens all, do have an opportunity that the proverbial blunt instrument—the process of adjudication—which they work with daily be made and seen a bit more discerning. With hopeful hearts, people pursue optimal permissible levels of humanity in adjudication, their opportunities for good legal practice made richer, their souls less fearful of those who are different, or merely beg to differ.

29. Lawyer and historian Andrew T. Fede has told this story well and often, particularly in his Roadblocks to Freedom: Slavery and Manumission in the United States South 147-150 (2011).

30. Learned Hand, "Sources of Tolerance," in Hand, The Spirit of Liberty: Papers and Addresses of Learned Hand 66, 81 (Irving Dillard ed. 1952).

31. Keyes, *The Literary Judge: The Judge as Novelist and Critic*, 44 Houston L. Rev. 679 (2007).

32. Shakespeare, *Hamlet*, Act III, Scene 1, line 65.

33. *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264, 404, 5 L.Ed. 257, 291 (1821).

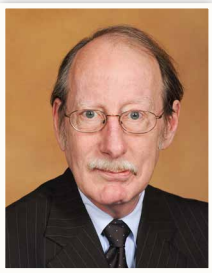
Sombra
Mexican Kitchen

CABA BAR REVIEW

November 16, 2017 at Sombra in Flowood

Photos from this event are shown below

Best Apps for the iPad...



By Joel Howell

Transcript Review Apps

AgileLaw (https://www.agilelaw.com) This free app allows lawyers, witnesses and other participants to view and annotate documents with paperless depositions.

DepoPlus This free app can be used for a more interactive deposition. With it, you can instantly stream deposition videos and make video clips by merely highlighting transcript text.

Mobile Transcript (https://www.mobiletranscript.com/transcript/lawyers/) This free app is enhanced for reviewing and annotating transcripts on mobile devices, such as iPhones, iPads, BlackBerry and Androids. However, you can only upload your transcripts with the paid add.

Legal Research Apps

Bloomberg Law The app is free, but requires a full subscription to utilize fully. It allows users to view news and analysis targeted to their interests, receive the latest Bloomberg Law alerts for legal and news searches, access legal documents and news articles saved in their queue, and track dockets, opinions or bills. It customizes what is displayed based on the subscriber and their interests.

Courtroom Evidence This app was renamed from TrialEvidence to CourtroomEvidence, but functions the same and costs $1.99. It serves as a mobile reference guide for courtroom evidentiary foundations and is used to review predicates for admission of evidence.

Fastcase (https://www.fastcase.com) This is a very convenient free app when you are on the road and need to do some quick legal research. You can research federal and state case laws and statutes directly on your iPhone or iPad.

Settlement Apps

Picture It Settled (www.pictureitsettled.com) This is another free app that is helpful for predicting when a case may settle and for how much using data from thousands of cases. It is also helpful when you are trying to reach a settlement but are unable to come to terms. It can help litigants analyze their positions and develop a successful negotiation strategy.

Date Calculator Apps

DocketLaw (www.docketlaw.com/features.php) This app allows users to calculate event dates and deadlines free of charge based on the Federal Rules of Civil Procedure. Users can add subscriptions to rules-based calendars for specific state and federal courts for additional monthly fees.

Docket Apps

PacerMonitor (https://www.pacermonitor.com) This is the companion app to PacerMonitor.com, a service used for tracking and searching for cases in the federal courts' PACER system. It can be used free of charge by linking your own PACER credentials, or by signing up for a paid subscription to the service with charges per-document.

Trial Presentation Apps

TrialDirector (www.indatacorp.com/TrialDirector.html) This free app permits you to create case folders on your iPad and then add exhibits, including video, through a Dropbox or iTunes account. Once you add the files you may need, you can use the app to annotate and present the exhibits.

TrialTouch This is a free app that provides on-the-go access to case materials, including photographs, illustrations, 3D animations, medical imagery, video and documents. The only requirement is an account with the trial graphics company DK Global.

Happy Holidays!

Questions or comments?
Drop me an email: jwh3@mindspring.com

MISSISSIPPI COLLEGE LAW LIBRARY HOURS

SPRING 2018

January 2—January 9

Monday—Friday . . . . . 7:00 am—5:00 pm
Saturday & Sunday . . . . . CLOSED

January 10—May 10

Monday—Thursday . . . . . 7:00 am—midnight
Friday . . . . . 7:00 am—7:00 pm
Saturday . . . . . 9:00 am—7:00 pm
Sunday . . . . . noon—midnight

Final Exam Hours to be posted at a later date.
Hours subject to change without notice.
For more info call the Circulation Desk at 601-925-7120

EXCEPTIONS

MLK HOLIDAY: *January 15*

Monday . . . . . 9:00 am–5:00 pm

SPRING BREAK: *March 9—March 18*

Friday (Mar 9) . . . . . 7:00 am–5:00 pm
Saturday & Sunday (Mar 10 & Mar 11) . . . . . CLOSED
Monday—Thursday (Mar 12—Mar 15) . . . . . 7:00 am–5:00 pm
Friday—Sunday (Mar 16—Mar 18) . . . . . CLOSED

EASTER: *March 30—April 1*

Friday & Saturday (Mar 30 & Mar 31) . . . . . 9:00 am–5:00 pm
Sunday (April 1) . . . . . CLOSED

GRADUATION: *May 11*

Friday . . . . . 7:00 am–5:00 pm