

John Chipman Gray

John Chipman Gray

*The Harvard Brahmin of
Property Law*

Gerald Paul Moran

PROFESSOR OF LAW
FLORIDA COASTAL SCHOOL OF LAW

CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2010
Gerald Paul Moran
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Moran, Gerald Paul.

John Chipman Gray : the Harvard Brahmin of property law / Gerald Paul Moran.

p. cm.

Includes bibliographical references and index.

ISBN 978-1-59460-398-3 (alk. paper)

1. Gray, John Chipman, 1839-1915--Biography. 2. Lawyers--Massachusetts--Biography. I. Title.

KF368.G73M67 2010

340.092--dc22

[B]

2010007568

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

For Judith K. Moran

I was fortunate to have a muse who sparked the light in my early years in high school. She was also my high school girlfriend and who, to my delight, became some forty-six years later my wife. It is to her that I dedicate this book with special love and everlasting appreciation.

Contents

| | |
|--|------|
| Illustrations | xi |
| Preface | xiii |
| Acknowledgments | xv |
| Chapter 1 • John Chipman Gray and the Rule Against Perpetuity | 3 |
| General Introduction | 3 |
| Twentieth-Century Perspective on the RAP | 5 |
| The Culture of the Boston Brahmin | 7 |
| Gray's Philosophical Approach to the Law | 9 |
| Cultural Influences of Gray as Related to the RAP | 15 |
| Symbiotic Relationship of Gray and the RAP | 17 |
| Summary Preamble | 21 |
| Chapter 2 • Gray's Cultural Experience and Formulation of the RAP | 25 |
| The Gray Family Tree | 31 |
| Trouble in the Financial World of Horace Gray Sr. | 35 |
| Impact of Father's Insolvency on Gray's Articulation of the RAP | 39 |
| Chapter 3 • Scholarly Influence of Half-Brother | |
| Justice Horace Gray Jr. | 45 |
| Distant in Birth but Identical in Interpretation of the Common Law | 45 |
| Parallel Pathways on Interpretation of the Common Law | 49 |
| Modus Operandi of the Gray Brothers | 55 |
| A Case of Financial Inheritance for the Descendants of William Gray | 62 |
| Judicial Criticism by the Gray Brothers | 64 |
| The Attack of the <i>Dred Scott</i> Decision | 64 |
| Chief Justice Doe's Decision Providing Relief from the RAP | 65 |
| Chapter 4 • The Early Years | 69 |
| Academic Study | 69 |
| Intervention of the Civil War | 69 |
| Gray's Entry into the Civil War | 73 |

| | |
|---|-----|
| Chapter 5 • Practice of Law and Wedded Bliss | 83 |
| The Mating Season: Readjustment to Civilian Life | 83 |
| Spring of 1865: The Dance of Rivalry, Courtship, and Mating | 89 |
| Marriage to Anna Lyman Mason: Perfect Spouse, Friend, and Participant in the Gilded Age | 94 |
| Transition from Military Service to Private Practice of Law: | |
| Creation of Ropes & Gray | 98 |
| Addendum: The Establishment of Judicial Law Clerks | 102 |
| Chapter 6 • Harvard Law School Years | 105 |
| Eliot: Guiding Innovator of the Academic Law School | 105 |
| Gray's Appointment to the Law School Faculty | 107 |
| Law as Science: Langdellian Innovation under Eliot's Supervision | 115 |
| Relation of Case Method to Socratic Dialogue | 121 |
| The Invention of the Academic Lawyer | 124 |
| Faculty Conflict and Gray's Plea to Eliot | 127 |
| Gray and University Relations | 136 |
| Gray Teaching Style Unaffected by Case Method and Socratic Dialogue | 137 |
| Gray and Student Relations | 146 |
| Chapter 7 • Gray as Philosopher in the Age of Classical Formalism | 155 |
| Gray as Legal Philosopher | 155 |
| Harvard Law School and Its Scientific Modality | 158 |
| Impact of Law Practice on Gray's Philosophy | 163 |
| Gray as an Incipient Legal Realist | 166 |
| Categorizing Gray's Philosophical Offerings | 168 |
| Gray's Treatises on the Law | 171 |
| Interpretive Analysis of Gray's Philosophy | 173 |
| Resolution of Gray's Philosophical Analysis | 177 |
| Chapter 8 • Consideration of <i>Restraints on the Alienation of Property</i> and the Spendthrift Provision | 181 |
| Gray's Separation of the RAP and Restraints on Alienation | 181 |
| Gray's Attack on the Enforceability of the Spendthrift Provision | 183 |
| Footnote to Legal History | 185 |
| Pain of the Judicial Invention of the Spendthrift Doctrine | 186 |
| Law as the Source of Secular Morality for Gray | 188 |

| | |
|--|-----|
| Chapter 9 • Gray and His Contemporary Critics | 195 |
| Sir Howard Warburton Elphinstone | 195 |
| H. W. Challis | 200 |
| Charles Sweet | 201 |
| Judge Jabez Fox | 207 |
| Albert Martin Kales | 211 |
| The Gray and Kales Dialogue | 218 |
| Sidebar: W. Barton Leach on the Class Gift Rule | 223 |
| Endgame | 225 |
| Chapter 10 • Americanization of the Rule Against Perpetuities | 227 |
| Legal Education and Student Indoctrination of the Modern RAP | 231 |
| Leach: De Novo Criticism of Gray's RAP | 236 |
| Revision of Gray's RAP by the American Law Institute and Adoption of ModifiedUSRAP | 241 |
| Public Choice Theory and Repeal and/or Modification of the RAP | 246 |
| The Reigning Oracle of the RAP | 251 |
| Chapter 11 • The Modern Rule Against Perpetuities: Direct Derivative of the Common Law Rules Against Perpetuities | 253 |
| Impact of Historical Context on the Creation, Application, and Comprehension of Property Rules | 253 |
| Common Law Rules against Perpetuity (CLRAP) | 259 |
| Contemporary Relevance of the RAP: Uncertain and Questionable | 268 |
| Final Denouement of the RAP? | 271 |
| Chapter 12 • Conclusion | 273 |
| Appendix A • Butler's Note | 283 |
| Appendix B • Students' Letter to Gray | 289 |
| Appendix C • Gray's Appreciation of Students' Letter | 293 |
| Bibliography | 295 |
| Index | 311 |

Illustrations

- Cover*: Etching of John Chipman Gray, Royall Professor of Law (1883–1913), Harvard Law School [Courtesy of Historical & Special Collections, Harvard Law School Library].
- John Chipman Gray, Royall Professor of Law (1883–1913), Harvard Law School [Courtesy of Historical & Special Collections, Harvard Law School Library]. 148
- The young Miss Nina Lyman Mason [Courtesy of Jeffrey B. Gray, Esq. & Roland Gray III, Esq.]. 148
- Horace Gray Jr., Associate Justice of the United States Supreme Court [Courtesy of Historical & Special Collections, Harvard Law School Library]. 149
- John Codman Ropes (circa 1870), co-founder of the prestigious law firm, Ropes & Gray [Courtesy of Historical & Special Collections, Harvard Law School Library]. 149
- John Chipman Gray upon graduating Harvard College, 1859 [Harvard University Archives, call # HUP Gray, John Chipman(1)]. 150
- Oliver Wendell Holmes Jr. upon graduating Harvard College, 1861 [Harvard University Archives, call # HUP Holmes, Oliver Wendell Jr. (1)]. 150
- Mary (Minnie or Minny) Temple, age 16, with her hair cut short (1861) [bMs Am 1092.9 (4597) No. 16, Houghton Library, Harvard University]. 150
- Mary Temple, age 24 (1869), one year before her death [pfMs Am 1094 (Box 3 #29, Houghton Library, Harvard University)]. 150

- Harvard Law School Faculty, 1901: (top row, left to right) John Chipman Gray, Joseph Brannan, Jeremiah Smith, Samuel Williston, Eugene Wambaugh, Dean (Emeritus) Christopher Columbus Langdell; (bottom row, left to right) Jens Iverson Westengard, Joseph Henry Beale, Edward Henry Strobel, James Bradley Thayer, Dean James Barr Ames [Courtesy of Historical & Special Collections, Harvard Law School Library]. 151
- Christopher Columbus Langdell, Dean (1870–1895), Harvard Law School [Courtesy of Historical & Special Collections, Harvard Law School Library]. 151
- James Barr Ames, Harvard Law School Dean 1895–1910 [Courtesy of Historical & Special Collections, Harvard Law School Library]. 151
- James Bradley Thayer (circa 1885), Royall Professor of Law (1874–1883), Weld Professor of Law (1883–1902), Harvard Law School [Courtesy of Historical & Special Collections, Harvard Law School Library]. 152
- William Albert Keener, Story Professor of Law (1888–1890), Harvard Law School [Courtesy of Historical & Special Collections, Harvard Law School Library]. 152
- Albert Martin Kales, Visiting Professor (1916–1917), Harvard Law School [Courtesy of Historical & Special Collections, Harvard Law School Library]. 152
- Maj. John Chipman Gray, Civil War (served 1862–1865) [Courtesy of Jeffrey B. Gray, Esq. & Roland Gray III, Esq.]. 153
- Nina Lyman Gray [Courtesy of Jeffrey B. Gray, Esq. & Roland Gray III, Esq.]. 153
- Mrs. Nina Lyman Gray (1922) [Courtesy of Historical & Special Collections, Harvard Law School Library]. 153

Preface

This project started when I was involved with the discussion of whether Ohio should enact a statutory modification to the Rule Against Perpetuities (RAP) for the purpose of allowing the establishment of private trusts to be exempt from the limitations imposed by this ancient rule of law. Recognizing that a number of other states had taken the action for commercial reasons, I was interested in the current function of the rule. Intuitively, it did not appear that there was a current reason for the continuance of the RAP. Yet, to repeal a rule which is so embedded in legal education seemed like a monumental event. A brief review of the legal literature did not provide a current basis for its continuance.

My primary teaching experience at that time was in the area of taxation and my practice involved tax controversies against or as a former representative of the Internal Revenue Service. A comprehensive study of the matter would take an enormous amount of time. Several years later, I retired, as a professor emeritus, from the University of Toledo College of Law and accepted a position with Florida Coastal School of Law. In time, I decided to teach property law and slowly drifted into a comprehensive study of the development of the RAP. It is a complex area of law which calls for extended study. Reading the history of the common law of property, reviewing original cases of importance, and law review articles from the late nineteenth century to the present led me to question the hand of the distinguished Professor John Chipman Gray, as he was the principal marketing agent of the RAP in the United States. He, along with Lord Chancellor Nottingham and Lord Kenyon (as well as others), shaped the contours of the RAP. Gray interpreted the RAP in his famous treatise on the RAP in a very dogmatic and restrictive fashion. Because Gray's treatise on the RAP was, and is, universally accepted, it became obvious that one could not study the RAP as a legal abstraction apart from understanding the life and times of Gray himself.

The more I backed into the study of his life, the more I realized the intrinsic relationship of the man to his RAP. This historical essay is intended to pro-

vide that context and also to suggest that there is no present reason for the continued hegemony of Gray's RAP. John Chipman Gray is and continues to be a special scholar. He did so much in his life: soldier in the Civil War, principal participant in the ascension of Harvard Law School in the late nineteenth century, practitioner of the law *extraordinaire*, founder of one of the major law firms in the United States (Ropes & Gray), founding Editor of *American Law Review*, member of a very distinguished family, and scholar of the first order. As a Brahmin, Gray was trained to be a perfectionist, and certainly fulfilled that mission.

What follows here is an extended essay on the man, John Chipman Gray. The object here is not to exempt private trusts from legal accountability, but to suggest continued utilization of his RAP as achieving that goal constitutes reliance on a custom instilled in legal education for far too long. A rule of law formed when real estate was the foundation of wealth and future interests in dirt were conveyed in kind has little relationship to the availability of a modern complex trust (funded with stocks, bonds, and other intangible assets) that possesses an arsenal of powers exercisable by an active and accountable trustee. I leave it to you to agree or disagree, however, that determination cannot be made without a focus on the hand applying the RAP.

Acknowledgments

I take note of the valuable contributions of the many legal scholars on the common law and express deep respect for their dedicated work in providing a comprehensive narrative of the past. I am fully indebted to their contribution to the goal of attempting to establish a rational framework of the law of property. Although I may personally decry the fiction of the exclusively rational development and/or application of the rules of the common law in the Blackstonian rendition, I would have nothing to address but for the discipline and debt of the massive scholarship produced by the masters of the common law such as Maitland, Pollock, Plucknett, Holdsworth, Baker, Milsom and others of the English sort, as well as numerous American scholars. I owe and express special recognition to the historical scholarship of A. W. Brian Simpson. Also especially important to my study of John Chipman's family was the information provided by Stephen Robert Mitchell's doctorate dissertation (1961) on Horace Jr. Mitchell's dissertation provided important data as it relates to my analysis of the relationship between the two brothers and the enormous impact that the relationship with Horace had on Gray and his scholarship.

The scholarship of Steven A. Siegel on Gray has been also helpful in the development of my thesis although there are differences in our perspective of Gray. Bruce A. Kimball's extensive study on the life and contributions of Christopher Columbus Langdell, the first dean of Harvard Law School, is also noteworthy and particularly relevant.¹ Kimball's scholarship will no doubt secure renewed recognition for the significance of Langdell's contributions to the development of modern legal education. He has "ably rescued Langdell from posterity's condescension."² And further, I foremost acknowledge and continue to celebrate the illuminating scholarship, superb insight, and tortuous witticisms of W. Barton Leach whose diligent efforts alone revealed the

1. BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION* C.C. LANGDELL, 1826–1906 (2209).

2. Christopher Tomlins, *Book Review: The Inception of Modern Professional Education*, 59 J. LEGAL EDUC. 657, 662 (2010).

RAP for what it was and remains: an oath of institutional allegiance on the part of the academic community to the mysticism of the legal past.

This extended essay could not have been accomplished without the generous financial summer research grants of Florida Coastal Law School. Dean Peter Goplerud and his administration provided needed resources for employment of several outstanding research assistants. I would particularly note the able assistance of the following past students who have aided me in this endeavor: Lance Neff, JD, Patrick J. Kelly, MD, JD, Catherine Micaud, JD, and Jennifer Shoaf, JD. In addition, I would like to give special appreciation for the editorial and research work of Kyle S[t]ill, JD. Mr. Sill has separately published an article regarding the RAP and its application to commercial transactions; notwithstanding, his contrary conclusion that “the elusive rule against perpetuities will not be going away any time soon.”³ In addition, the assistance of former and present faculty assistants, Holly Bolinger, MaryBeth Evans, and Patricia Maroney, has been invaluable. I further deeply appreciate the editorial assistance and guidance provided by Sondra Greenfield.

I also express deep appreciation for the generous and caring services of the staff of the Florida Coastal School of Law Library and Technology Center, under the leadership of Nickie Singleton, Director, and Martha Smith, Associate Director. In addition, the willingness of Professor Christopher Roederer to read a rough first draft must be more than noted. I equally appreciate the research assistance of the Houghton Library and Harvard Archives of Harvard College and their permission to publish selected portions of materials contained in the correspondence file of Gray as well as letters in the presidential files. My appreciation also extends to the quality of assistance provided by the Harvard Law School Library and the generous services provided by its staff, particularly Lesley Schoenfeld.

Others participants in my life who have added greatly to my sense of exploration include Myrtle Loughney, Professor William H. Osterle (my mentor at the University of Scranton), Donald Keune, Esq., Joseph Patrick Moran (my brother, in whose steps and *direction* I have followed), Nora Kay Zelizer, Ph.D., my special step-children and their progeny, and finally my parents, Evelyn Murray Moran and Joseph Aloysius Moran. Each in different ways has added to my quest for understanding the experience of life.

I must also recognize and express deep appreciation for the willing assistance of Jeffrey B. Gray, Esq., and Roland Gray III, Esq., the great-grandsons of Gray. They openly shared the collected personal and private narrative of

3. Kyle B. Sill, Note, *Is RAP Gone? How Old Port Cove Holdings, Inc. Still Leaves RAP Alive in Florida*, 10 FLA. COASTAL L. REV. 491, 504 (2009).

their Gray ancestors. In addition, they provided previously unpublished family pictures of Gray and his wife, Nina. It is not surprising to note Jeffrey and Roland count seven generations of American lawyers in the Gray family dynasty.⁴ Nicolas Gray, one of the latest family members of the bar and the great-great-grandson of Gray, made available several memorandums setting forth unique information regarding the careers of John Chipman and Horace Jr.

Finally, Gray was a man of enormous talent and energy and his contribution to the formation of a principled system of property law will be with us forever. Nothing stated herein should be interpreted to the contrary. The spirit of Gray's intelligence and relentless dedication to a legal system by which members of society are held accountable to his form of secular morality will resonate with me and others throughout time. Although Gray's original version of the RAP has been modified, his vision as the Harvard Brahmin on the law of property will be preserved in perpetuity. I hope that this essay will add to his record of exceptional achievement.

4. An account of the lawyer tradition of the Gray family was published in the Massachusetts Lawyer Weekly. See Dick Dahl, *The Long Gray Line*, 18 MASS. LAW. WKLY. 1661, 1666 (May 1991).