A WARREN COURT OF OUR OWN

The Exum Court and the Expansion of Individual Rights in North Carolina

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To Marcia, Jack, Ted, and Lea

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FOREWORD

NORTH CAROLINA Associate Justice Mark Davis is to be commended for seeing the value in writing about a brief episode in the history of the North Carolina Supreme Court and having it published as the Court celebrates its 200th Anniversary. His book works for those in the legal profession and those who are not. It provides a thoughtful account of the Court's work over a tiny sliver of its history, the justices and their interactions as they decided the cases brought before them, and interesting critiques of some of those decisions by the justices themselves and others familiar with the Court's work. Indeed, that the justices and other knowledgeable lawyers were willing to speak freely to the author about these things enhances both the book's readability and its insights with respect to how courts of last resort go about their work.

For me, the book recalls the most professionally satisfying time of my life. The task of helping to decide significant legal disputes and thereby shape the law of North Carolina as Chief Justice of its highest court was not a job; it was a privilege. It was a privilege not only because of the Court's work, but also because of the associate justices of the Court who served while I was Chief Justice. They were more than colleagues; they became, all of them, good friends. The book prompts memories of those friendships. Yes, we argued, sometimes heatedly; we disagreed, sometimes recording those disagreements for posterity. I suppose there were rare occasions of momentary disagreeableness; but they were insignificant and have long faded from my memory.

During my years on the Court, the justices regularly enjoyed having lunch together at various restaurants within walking distance of the courthouse. We told stories; talked history, sports, pol-

itics; occasionally discussed cases; and kept up with personal and family news, good and bad. Although I was ready to retire when I did, the thing I missed most when I left Raleigh were the relationships I had formed with the people with whom I had worked: justices, staff, law clerks, and those in the Administrative Office of the Courts. This book well reminds me of those relationships. I regret that my dear friend, Justice Louis Meyer, was not available to have his say; the same for Justices John Webb and Harry Martin. Fortunately, this book helps to keep alive their work on the Court and their contributions to the law of North Carolina.

Justice Davis compares the North Carolina Supreme Court while I was Chief Justice (1986–1994) to the United States Supreme Court presided over by Chief Justice Earl Warren (1953–1969), concluding that both courts were similar in their sensitivity to the protection of individual rights and their "judicial boldness." It should not be surprising that the work of a state supreme court, deciding cases in the latter part of the 20th century, would be favorably compared to that of the "Warren Court."

When I was in law school at New York University School of Law (1957–1960), my constitutional law professor was Bernard Schwartz. Shortly before I retired from the Court in 1994, Professor Schwarz called me to say he was putting together a book about the Warren Court's influence on the development of law and legal institutions 30 years after Warren's tenure ended. He planned to include in the book various papers presented at a conference on the Warren Court held in 1994 at Tulsa College of Law, where Professor Schwarz was then teaching. In addition, he planned to solicit contributions to the book from others on discrete influences of the Warren Court not covered at the Tulsa conference.

Professor Schwartz asked me to contribute a chapter on how the Warren Court and its members had influenced the development of state constitutional law. I agreed; and, with Professor Schwartz's permission, quickly engaged then Professor Louis Bilionis at the University of North Carolina School of Law, to work with me on the project. (Professor Bilionis later became Dean of the University of Cincinnati College of Law, 2005–2015, and he is now the College's Dean Emeritus.) Professor Schwartz's book, *The Warren Court, A Retrospective,* was published in 1996. [Hereinafter, "*A Retrospective*"] In the chapter Professor Bilionis and I contributed,

"The Warren Court and State Constitutional Law," we concluded the Warren Court had had, in the intervening thirty years, a profound influence on the development of law at the state level. There were several reasons for this.

A good number of state court judges, like me, had been law students who were taught Constitutional Law during Chief Justice Warren's tenure by professors, like Professor Schwartz, who greatly admired Warren and the Court he led. So, Professor Bilionis and I could write, in 1996: "Probably the greatest influence [of the Warren Court] has been nothing less than the extremely attractive vision of constitutional adjudication impressed upon the current generation of state court judges. . . . Through its own masterful use of the processes of constitutional adjudication, the Court introduced principles of equality, human dignity, fairness, and individual autonomy to succeed the exhausted doctrines of property and contract." *A Retrospective*, p. 317.

Then there is the seminal article, "State Constitutions and Individual Rights," published in the *Harvard Law Review* in 1977 by Justice William Brennan, who, in many ways, epitomized the Warren Court's work. As Professor Bilionis and I noted, it is one of the most cited law review articles and has been referred to as the Magna Carta of the state constitutional law movement. *A Retrospective,* p. 316. Justice Brennan sounded the clarion for dusting off state constitutions and using their provisions to create, with the federal document, a double edged sword for the protection of individual rights. This article influenced many state courts, including ours.

Of course, no state legal precept, statutory or constitutional, can provide less protection for individual rights than the federal Constitution as interpreted by the United States Supreme Court, but it may provide more. Justice Brennan had argued that state court judges should always be willing to consider whether, under given circumstances, a state constitution should be read to provide more protection for an individual right than a concomitant provision in the federal Constitution, as interpreted by the United States Supreme Court. Our Court thought this was a sensible position. Why should state court judges be bound by federal decisions with which they disagree made under federal law when they have the option, but not the obligation, to make a different decision under state law?

That they should not was the basis for the North Carolina Supreme Court's decision in *State v. Carter,* discussed at length by Justice Davis.

Our Court was not alone. The highest courts in Georgia, Vermont, Pennsylvania, New Jersey, Connecticut and New York had, by the late 1990s, reached the same conclusion under their states' respective constitutions. *A Retrospective*, p. 322.

Was the Court over which I presided "activist"? I don't know because I have never really understood what that term means. I don't recall the term being used during my years on the Court; but maybe I just wasn't paying attention. But if during those years it meant, or would have meant, as Justice Davis suggests, overturning a precedent, or making a new interpretation of a legal precept like a statute or the constitution, or stating legal principles more expansively instead of more narrowly, then I suspect every court of last resort, including North Carolina's, has at one time or another engaged in activism.

This must be so because the law, thankfully, is not static; it is dynamic. It constantly changes as circumstances to which it is applied change. Courts must take into account these new circumstances as they decide the disputes brought before them. Novel facts, presenting new legal questions, are the grist of the work of all courts of last resort. Otherwise these cases would not be before these courts; they would have been finally decided by the lower trial and intermediate appellate courts.

The great jurist, Benjamin Cardozo, taught us that there are, fundamentally, only three kinds of cases for courts to decide. The first two are those where the law is clear and its application to the facts clear and those where the law is clear but its application to the facts before the court is in doubt. Finally, there are those cases, as Cardozo put it:

> . . . [W]here a decision one way or another, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and its power. . . . In a sense it is true of many of them that they may be decided either way. By that I mean that reasons plausible and fairly persuasive might be found for one conclusion as for another. Here come into play that balancing of judgment, that testing and sorting of considerations of analogy and logic and utility and fair-

> ness, which I have been trying to describe. Here it is that the judge assumes the function of a lawgiver.
>
> Cardozo, *The Nature of the Judicial Process*
> (Legal Legends Series, 2010, pp. 105–06)

Given that the significant decisions of any court, those which "advance or retard" the law, as Cardozo reminds us, can with reason and logic be decided either way, the question should not be whether a given decision is "activist." The question should be to what end was the activism employed. Was it in the interest of fundamental fairness, the integrity of the judicial process, deterring inimical conduct, or avoiding adverse consequences called, perhaps for the first time, to the Court's attention? Did it advance or retard the law?

Under Justice Davis' criteria for the phenomenon, two of the most "activist" decisions of the United States Supreme Court are *Dred Scott v. Sandford* (1857) and *Brown v. Board of Education* (1954). *Dred Scott* held that a free black person was prohibited by the federal Constitution from being a United States citizen and could not, therefore, sue in federal court. Further, it concluded that the Missouri Compromise, a congressional act prohibiting slavery in all the territories north of the southern boundary of Missouri, was unconstitutional. Dred Scott had argued that although he had been a slave in Missouri, when he was taken by his master to a "free" territory, he had, pursuant to the Compromise, become a free man and a citizen and this status survived his return to Missouri, a slave state.

The Supreme Court unnecessarily reached out to make its sweeping and surprising decision about the constitutionality of the Missouri Compromise. It had already held that even if a free man, Dred Scott, because he was a black man, did not qualify for citizenship under the federal Constitution. It also could have based its decision on the narrow ground used by the Missouri Supreme Court which had earlier considered the case: under Missouri law, a slave was not made free by traveling temporarily in a free territory.

The Court's "activism" in *Dred Scott* was used not to advance the law, but to retard it; it was backward looking, lacking in fundamental fairness, encouraged inimical conduct, and it was blind to the terrible consequences that it helped engender. Chief Justice William Rehnquist concluded the decision "exacerbated rather than ameliorated the clash of opinion over

slavery." Rehnquist, *The Supreme Court* (William Monroe and Company, 1987, p. 143). It was another step on the country's path to civil war.

Brown v. Board is also an activist opinion, almost as surprising and unwelcomed in large parts of the country as *Dred Scott*. When it was decided in 1954, twenty-one states either required or allowed school systems segregated by race. This system of education had been in place for at least a half century in reliance on solid precedents of the Court, particularly *Plessy v. Ferguson* (1896). *Plessy* had declared that separate facilities for the races complied with the Equal Protection Clause so long as the facilities were equal in fact. *Brown* overruled *Plessy*, holding that separate facilities were inherently unequal.

A court is most reluctant to disturb its precedents when there has been substantial reliance on them over long periods of time. Realizing how unwelcome the decision would be in those states with segregated school systems, Chief Justice Warren insisted, and was able to persuade his brethren on the Court, that it be unanimous. Justice Frankfurter was able to persuade the Court not to impose its decree immediately, which it would ordinarily have done. Instead, the Court provided that the decision be implemented "with all deliberate speed," language that encouraged massive resistance to compliance with the decision on the part of many states that lasted for more than a decade.

Nevertheless, the *Brown* decision is judicial activism in the service of fundamental fairness that advanced rather than retarded the development of the law. It was forward, not backward, looking. And it accurately acknowledged new facts, not available to the *Plessy* court, which supported a different interpretation of the Fourteenth Amendment's Equal Protection Clause. The decision, as the Court wisely foresaw, moved our nation in the right direction.

Unlike the other branches of government, appellate courts have, since their beginnings, recognized an obligation to justify their decisions with detailed, written opinions. These opinions contain the court's reasoning, explaining what the court understands the facts to be, how and why the court interpreted a legal precept in a given way, and how that precept as interpreted should be applied to the facts as understood by the court. This need of an appellate court to justify its decision with detailed reasoning promotes the ultimate justifiability of the result reached. All appellate judges have faced situations where the result they wanted to reach, and

initially voted for in conference, could not, in the end, be rationally justified. When this happens, the judge assigned the task of writing the opinion justifying the tentative result supported in the initial vote will report to colleagues, "It just won't write that way." In other words, the tentative result cannot be justified in any rational way that comports with judicial tradition and practice. Then, another result is voted on in the hope that it "will write."

This is a formidable check on the exercise of the judicial power. There are others. Since all judicial decisions are based on an interpretation of a constitution, a statute, or a judicial precedent, our political system provides non-judicial ways of changing them. The people or their representatives can amend the underlying precept. Further, the judicial branch, unlike the legislative and executive branches, is not a self-starting institution. A court is powerless to do anything unless some qualified person or entity requests it to act by filing appropriate petitions. When a court decides a case and writes its justification, it is doing what some legitimate litigant has asked it to do.

For at least these reasons, as a judge, I would not worry much about charges of activism.

Was our Court progressive? I hope so. North Carolina has enjoyed a progressive judiciary from its earliest days. It continues to do so.

Even before the North Carolina Supreme Court came into being in 1819, its predecessor was known as the Court of Conference; and it was composed of trial judges sitting together to hear appeals from the trial courts. Sixteen years before *Marbury v. Madison* (1803) (establishing the doctrine of judicial review for federal courts), North Carolina's Court of Conference announced and applied the doctrine in *Bayard v. Singleton* (1787), holding that a summary proceeding depriving the plaintiff of property unconstitutionally deprived him of a jury trial guaranteed by the North Carolina Constitution.

On January 7, 2019, at a celebration of our Court's 200th anniversary, Governor Roy Cooper made these remarks:

> This Court has been unafraid to do what it thought was right based on the law and the constitution regardless of whether it suited

popular opinion at the time. For example, before the abolition of slavery, this Court overturned the conviction of an enslaved North Carolinian accused of murdering a slave owner by finding in law that the legal doctrine of self-defense could be used. [*State v. Davis* (1859)]

Before women were granted their long overdue right to vote, this Court granted to Tabitha Holton a license to practice law, opening the way for more women to enter the profession. [Gasaway & Wegner, "Women at UNC and in the Practice of Law," 73 N.C.L. Rev. 705, 724 n.7 (1995) (listing the first 12 women licensed to practice law in North Carolina).]

This Court has expanded the rights of working people who were hurt on the job. And this Court held fast to our constitution, finding that every child in this state is entitled to a sound, basic education—no matter who they are or where they live. [*Leandro v. State* (1997)]

As affirmed by these remarks, a North Carolina Supreme Court that was not progressive would be a departure from the Court's historic tradition.

My opposition to the death penalty, noted in this book, has been consistent throughout my professional life. As a legislator in 1967, I worked and voted to abolish it. As a trial and appellate judge, I thought that it was bad policy but not unconstitutional and that it was my duty to enforce it, which I tried to do. After the current death penalty statute was passed in 1977 during my early years on the Court, I believed that, properly interpreted and applied by the Court, the statute would provide a way to enforce this most extreme punishment in some rational way. That is, through the extensive trial and appellate procedures mandated by the statute, based as it was on the American Law Institute's Model Penal Code, courts could and would ensure that the penalty was reserved for only the worst murders committed by the worst perpetrators and that it would not be imposed where the aggravating circumstances were not severe or the mitigating circumstances were substantial.

That hope persisted until a few years before I retired from the Court. As I then considered the death-sentenced defendants whose cases were

pending before us and reflected on the scores of death penalty cases the Court had already decided, it struck me that even when the carefully drawn statutory mandates were assiduously followed in judicial proceedings, they did not seem to be having the desired effect.

Not infrequently, juries were imposing death sentences in cases seemingly no worse than others where juries were imposing life sentences. And vice-versa: juries were imposing life sentences in cases seemingly as deserving of death as cases in which the Court had affirmed a jury-imposed death sentence. The two distinct groupings of cases that could be rationally differentiated were not materializing as I had hoped and believed they would.

If my growing concerns were valid, then death sentences were not being rationally imposed in North Carolina. If not rationally imposed, then death sentences in North Carolina would be unconstitutional under the United Supreme Court's decision in *Furman v. Georgia* (1972). *Furman* taught that a system of imposing death sentences that provides "no meaningful basis for distinguishing the few cases in which it is imposed from the many in which it is not" violates the Eighth Amendment's prohibition against cruel and unusual punishment. 408 U.S. 238, 311.

In the years since I left the Court, during which I followed the Court's death penalty jurisprudence, my concerns ripened into the firm belief that capital punishment was not being rationally administered in North Carolina, and that it could never be rationally administered here or anywhere else. I have come to believe that human beings simply lack the ability to determine rationally whether another human being should live or die. Thus the administration of capital punishment is inherently irrational; therefore, it is inherently unconstitutional.

One year before *Furman*, in *McGautha v. California* (1971), the United States Supreme Court noted, presciently: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express those characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond human ability." 402 U.S. 183, 204. We have, I believe, come full circle to the United States Supreme Court's concern expressed in *McGautha*. Irrationalities like those described by Justice Breyer in his monumental dissenting opinion in *Glossip v. Gross* (2015) are not uncommon:

> Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and an after-the-fact robbery) while another defendant does not, despite having kidnapped, raped, and murdered a young mother while leaving her infant baby to die at the scene of the crime? Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and acting recklessly with a gun), while another defendant does not, despite having committed a "triple murder" by killing a young man and his pregnant wife? For that matter, why does one defendant who participated in a single-victim murder-for-hire scheme (plus an after-the-fact robbery) receive the death penalty, while another defendant does not, despite having stabbed his wife 60 times and killed his 6-year-old daughter and 3-year-old son while they slept? In each instance, the sentences compared were in the same State at about the same time.
>
> *As reprinted in* Stephen Breyer & John Bessler, *Against the Death Penalty*, p. 80 (Brookings Institution Press 2016)

Why, indeed? It is time to acknowledge that no matter how we package the judicial proceedings leading to life or death decisions, human beings are not capable of administering it in a way that produces rational results.

Former Chief Justice I. Beverly Lake, Jr., whose experience as Chief Justice of North Carolina's Supreme Court came after, but was similar to mine, agrees. He stated in 2016: "Our inability to determine who possesses sufficient culpability to warrant a death sentence draws into question whether the death penalty can ever be constitutional under the Eighth Amendment. I have come to believe it probably cannot." Lake, "Why I Changed My Mind About the Death Penalty." *NC Policy Watch* (19 May 2016). The Council of the American Law Institute agrees. In 2009, it withdrew its model death penalty statute and determined not to redraft it, relying on an extensive study of the administration of the death penalty that concluded, "the preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved." Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty, Annex B, p. 49 (15 April 2009).

The best thing one can say about the death penalty today is that for the past decade it has been losing favor with the people. When I was on the Court, we frequently heard three or four death sentence appeals each time we sat for oral argument, usually eight times per year. Today in North Carolina years go by without a death sentence being imposed at all. Recently, one was imposed in Wake County—the first in a decade.

Finally, I note again that appellate courts, especially courts of last resort, are law-making institutions: each decision makes some law. Each decision moves the law in one direction or another. If one thinks of the law as a big brick wall that is constantly being enlarged, a judicial decision is like a single brick in that wall.

Conscious of this role, courts are concerned with the purposes of the law itself. For me, an important purpose of the law is to keep in some sort of balance society's need for order with its need for freedom. Totalitarian, authoritarian societies emphasize order at the expense of freedom. Democratic societies with and because of their independent judiciaries are capable of striking a better balance. Some judges tilt toward order; others toward liberty. Arguably, the Court when I was Chief Justice tilted toward liberty.

The state in the late 20th century was moving in that direction, and the trend was not lost on the Court. To paraphrase a line from the 2018 movie, "On the Basis of Sex," about the early professional life of Justice Ruth Bader Ginsburg, courts do not pay much attention to changes in the weather; they do heed trends in the climate.

I have long admired Columbia Law Professor Emeritus Harry W. Jones' answer to the question: What is law for? He wrote that it was for "the creation and preservation of a social environment in which, to the degree manageable in a complex and imperfect world, the quality of human life can be spirited, improving and unimpaired." Jones, "An Invitation to Jurisprudence," 74 Colum. L. Rev. 1023, 1024–26 (1974), as reprinted, Aldisert, *The Judicial Process,* West 1976, p. 48.

Courts have a large role to play in helping the law achieve this goal. How well they fill this role may be the best measure of the quality of their work.

JIM EXUM, JR.
15 July 2019