SNEAK PREVIEW OF YEAR 2025

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Retro~spectives ON THE 20th CENTURY

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Rationally viewed, the year 2000 will not witness major changes from 1999. The "Y2K" problem is almost certainly exaggerated. The United States will be governed by the same President and the same Congress. Automobiles for the model year 2001 (beginning in the fall of 2000) will generally look like those of the model year 2000. The economy should tend to percolate merrily along into the new year, barring natural catastrophe or colossal human error. Viewed sensibly in the short term, nothing much will change.

Rightly or wrongly, however, years ending with "000" are assumed to be epochal, although there have been few such years in recorded human history. In assembling this issue with its distinguished roster of authors, we have nevertheless adopted that somewhat arrogant assumption. To a person, the contributors to this issue have written thought-provoking – and perhaps most welcomely, optimistic – articles that pay justifiable homage to the past Century of Delaware law and lawyers, while offering some enlightened guidance for the future.

Chief Justice Veasey's analysis and review of the Delaware court system is both a tribute to a century of creative evolution in our Bar and Bench and a call to action for the future. His ambitious and multifaceted "action plan" is a daunting challenge to members of the Bar.

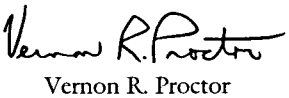
Justice Hartnett has provided an engaging and anecdotal review of the Delaware judiciary from the vantage point of an experienced jurist with a knack for storytelling and a keen sense of history. The wit, wisdom and plain hard work of Delaware judges is nationally renowned, and that tradition should endure.

Former Chancellor William Allen intertwines economic history, psychology and rapid technological change in presenting a seamless and cogent analysis of the principal developments of corporate law in the 20th Century. The result is reflective, highly nuanced and frankly inspirational.

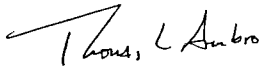
Helen Richards, a newly-minted Family Court Commissioner and an experienced employment attorney, throws down the gauntlet to all of us with her compelling analysis of the progress of diversity in the Delaware Bar late in this Century and her estimation of the work remaining to be done in the next.

Irving Morris has contributed a piece regarding a landmark case in constitutional criminal law that was decided in Delaware's own Federal District Court. Bill Wiggin's introduction describes the article well.

Finally, we offer a blanket disclaimer in connection with the "time line" that appears at the back of the issue. Helen Winslow did a magnificent job in assembling the first draft, and we editors had the unenviable task of trying to whittle it down a bit due to space constraints. The time line focuses on people rather than on events, and the final selections were necessarily arbitrary, with some bias toward "famous firsts." Our sins are of omission, not (we hope) of commission. Had we included the year of appointment of every single Delaware judge, for example, the time line would have required at least an additional page that we did not have. We nevertheless hope that you find it, as well as the rest of the issue, both stimulating and (dare we say it) entertaining.



Vernon R. Proctor



Thomas L. Ambro

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E. Norman Veasey is Chief Justice of Delaware. He is currently serving as President of the Conference of Chief Justices, Chair of the Board of the National Center for State Courts and Chair of the ABA Special Committee on the Evaluation of the Rules of Professional Conduct ("Ethics 2000"). In 1982-83, he was President of the Delaware State Bar Association. During 1992-93 he was the Editor of Volume 48 of *The Business Lawyer*, the scholarly legal journal published by the Section of Business Law of the American Bar Association, and during 1994-95 he was Chair of that Section.

Hon. E. Norman Veasey

THE DRAMA OF JUDICIAL BRANCH CHANGE IN THIS CENTURY

It began on the eve of the Twentieth Century when the delegates to the Constitutional Convention met in Dover from late 1896 to mid-1897 and produced our current Constitution. Those delegates were innovative and courageous, particularly in their vision on judicial selection and the creation of a new corporate law framework, both of which have combined to benefit Delaware beyond measure. What has happened in the Delaware Judicial Branch in the Twentieth Century has been dramatic.

Judicial Selection and the Corporation Law

In this century we have seen the transformation of the archaic Judicial Branch structure and judicial selection method that existed at the end of the Nineteenth Century to a modern judicial selection system which, together with a modern corporation law, propelled the Delaware bench and bar to international prominence. The result has been great service to our citizens and economic benefit to the State that is attributable to the worldwide respect for our Courts and our Bar, as well as for the legislative and executive branches.

For almost eight years, it has been my honor to serve as Chief Justice of Delaware and as a member (now President) of the national Conference of Chief Justices. In that time I have had the opportunity to compare our judicial selection system with those of the other 49 states. As we all know, the Delaware system provides for 12-year terms by gubernatorial appointment with Senate confirmation. But the feature of Delaware's Constitution that mandates a bipartisan judiciary appears to be unique in this Nation. This feature, combined with recent insistence by Delaware Governors on a bipartisan Judicial Nominating Commission, has helped to ensure merit selection. Without denigrating the quality of the judiciaries in other states, I think many of my colleagues around the country would agree that our system may well be the most stable in the Nation.

Delaware's experience has been that depoliticizing the Judiciary tends to attract to the Bench quality people whose focus is likely to be on service and scholarship. This may well be the central reason why Delaware has attracted over 300,000 corporations, including more than half of the Fortune 500 and half of the New York Stock Exchange corporations. It has also attracted some of the finest lawyers in America to our Bar. The role of the Judiciary complements the outstanding work of the Bar, the General Assembly and the Secretary of State's office.

One needs no more impressive testimony to Delaware's preeminence than the proxy statements of corporations seeking to reincorporate in Delaware. Here is a quote from a recent proxy statement that is typical of what corporate management tells its stockholders about Delaware:

> The prominence and predictability of Delaware corporate law provide a reliable foundation on which the Company's [corporate] governance decisions can be based ... The Company believes that shareholders will benefit from the responsiveness of Delaware corporate law to their needs and to those of [their corporation] ... [B]oth the legislature and [the] courts in Delaware have demonstrated an ability and a willingness to act quickly and effectively to meet changing business needs. The Delaware courts have developed considerable expertise in dealing with corporate issues, and a substantial body of case law has developed construing Delaware law... [S]hareholders will benefit from

the well- established principles of corporate governance.

The Court of Chancery and the Supreme Court

The Court of Chancery began handling serious corporate litigation in the decade from 1910 to 1920. Then and later the Court developed its much-heralded international reputation. As noted in the companion article by my colleague — Justice Maurice A. Hartnett, III, there has been a succession of great Chancellors and Vice Chancellors in the rich history of that Court that began in 1792. When we celebrated the Court's Bicentennial in 1992, we catalogued that magnificent succession in considerable detail.

Prior to 1951, the Chancellor was the highest ranking judicial officer in Delaware. To be sure, there was a Supreme Court and a Chief Justice, but the Supreme Court was comprised of the "leftover judges" — the judges who did not decide the case below or who were not otherwise disqualified. In 1951, largely due to the vision, effort and skill of Governor Elbert N. Carvel, the modern, separate Delaware Supreme Court was constitutionally established. At first it had three Justices, expanded to five in 1978.

The Court of Chancery today carries out its great traditions with a succession of outstanding chancellors and vice chancellors. The work of the Court has changed over the years. In the era of the 1980s the Court handled expertly the drama of the corporate law evolution in adjudicating the fiduciary duties of directors in hostile takeovers. Some hostile takeover litigation continues, but it has given way to new business transactions and new judicial challenges arising out of the changing merger and acquisition environment. The use of new, alternative entities, such as limited partnerships, limited liability companies and business trusts, is now giving rise to added judicial gloss by the Court of Chancery and the Supreme Court.

Over the past several years, the Court of Chancery has handled about 500 business cases every year, on average. I use the term "business cases" to include typical corporate cases — derivative, class actions, injunctions, internal corporate affairs, and the like. The term also includes cases relating to contractual disputes and the new, alternative entities. Business cases constitute about 75% of the Chancery docket. That is a staggering caseload, considering the complexity and importance of these cases, plus the fact that the remaining 25% of the Chancery docket consists of other important and urgent equity cases (*e.g.*, wills, trusts, injunctions, contract interpretation, right-to-die cases, government affairs issues and many others) in which the judges of that Court are also expert.

By contrast, only about 5% of the Delaware Supreme Court's docket consists of business cases on appeal from the Court of Chancery (though there are additional business cases that come up on appeal from Superior Court). Many of the business cases adjudicated by the Supreme Court are of such precedential importance that they may take as much as 20% of our time. The nearly 600-case per-year docket of the Supreme Court is one of general jurisdiction (criminal cases, constitutional, business, tort, contract, family, First Amendment, prisoner cases, *etc.*). Thus, the Delaware Judiciary operates in a microcosm of America as well as being the leader in business law adjudications.

The Delaware Courts' disposition rate is remarkably prompt. For example, the Supreme Court averages only about 30 days from the date of submission to the date of disposition for all cases, though some may take 60-90 days and a few take a little longer. As is well known, the Court of Chancery is famous for prompt dispositions and expedited cases. This applies to all our courts. In Delaware, promptness is a hallmark of our Judiciary.

I believe there are seven key obligations that courts must honor, and this is our goal in Delaware:

(1) Be clear;
(2) Be prompt;
(3) Be balanced;
(4) Have a coherent, economic rationale;
(5) Be intellectually honest;
(6) Properly limit the function of the court; and
(7) Render decisions that are stable in the overall continuum.

In recent years, at least, about 95% of the business cases disposed of by the Court of Chancery are not appealed to the Delaware Supreme Court. There are various reasons for that phenomenon (the changing dynamics of individual corporate transactions, satisfaction with the Chancery decision, delay, costs, settlement, *etc.*). About 75% of the Chancery business cases that are appealed are affirmed by the Delaware Supreme Court. In nearly half of those that are affirmed, the affirmance is substantially on the basis or rationale of the Chancery decisions. Only about 15% are reversed outright and about 10% are affirmed in part and reversed in part. When a Chancery decision is reversed, it is often the result of a new approach to the law by the Delaware Supreme Court, or a decision in a case of first impression. I see all this as a tribute to the expert and prompt work of this very special trial court that has had a consistently distinguished record over its 207 year existence.

Superior Court, Family Court, Court of Common Pleas and Justice of the Peace Courts

In my opinion, Delaware has the most modern business laws and the most efficient administration and adjudication of those laws in the world. But our success in business law cannot be taken for granted. Moreover, that success must be replicated in all that we do in the Judiciary. The Judicial Branch of government must strive for the best practices in case management as well as in judicial decision making.

The accomplishments of the Delaware Judiciary extend far beyond the adjudication of worldwide business disputes in the Court of Chancery and Supreme Court. The success of our Superior Court in handling drug cases and a calendar of complex, as well as high-profile, civil and criminal cases is just one further example of the accomplishments of the Delaware courts. It is important as well that we respect and support the difficult and emotionally draining work of the Family Court, so well carried out under extraordinarily stressful conditions. The Court of Common Pleas and the Justice of the Peace Courts are the high-volume courts whose fair and efficient case management in an environment of extraordinarily increasing caseloads and complexity deserve our continuing praise and assistance.

The Superior Court has always been the bellwether court of general jurisdiction in Delaware. Recent management innovations such as electronic filing, drug court, case management technology, arbitration, mediation, summary procedures, videoconferencing, jury reform and other advances have only added to its nationwide reputation for excellence. Criminal cases, including death cases, crowd its docket, complicate its ability to move cases expeditiously and present the judges of that court with vexing challenges of meeting speedy trial and disposition guidelines consistent with quality

adjudication. The Court's jurisprudence and case management in civil litigation is exemplary, with particular emphasis in the late 1980s and the 1990s in the businesslike handling of complex, national insurance coverage litigation, during which period the Court became a national innovator in electronic filing.

The Family Court of Delaware is a unified, statewide court that faces challenges daily in handling its myriad and diverse caseload in an astonishing variety of subject areas, including termination of parental rights, adoption, divorce, alimony, property division, custody, visitation, protection from abuse of children and spouses, juvenile delinquency and related family litigation. The vastness of the Court's jurisdiction is as extensive as any specialized court of its kind in the Nation. The innovations of the Court in jurisprudence and case management are extremely well respected nationally as it struggles to keep up with and manage fairly and expeditiously its complicated, ever-growing and emotionally-draining docket.

We have seen a modern resurgence and continuing positive change in the Court of Common Pleas and the Justice of the Peace Courts. These courts are among the oldest and most venerable in Delaware history. Today they rank among the most efficient courts in our system. They manage such a high volume of criminal misdemeanor and limited jurisdiction civil cases that their accomplishments in case-processing and collections of fines, costs and restitution, together with fair procedures to protect constitutional rights, are among the most laudable of our system, or any system.

We have seen over this century modern structural changes in these courts. For example, the Court of Common Pleas has gone from a small county court system to a well-managed, high volume statewide court. Recently it absorbed the Municipal Court of the City of Wilmington along with some of its judges and all of its cases. The Justice of the Peace Courts have gone from home-grown refereeing of small disputes to a smoothly-running engine under the capable leadership of a succession of highly professional Chief Magistrates.

Court Administration and Facilities

Administration, courthouses and court facilities for all the courts have developed remarkably over this Century. Today we have an Administrative Office of the Courts to assist the Chief Justice in carrying out the administrative part of the job. That administrative side of the Office of Chief Justice is described in the Delaware Constitution in this broad mandate of authority. "The Chief Justice shall be administrative head of all the courts in the State, and shall have general administrative and supervisory powers over all the courts." The Chief Justice usually takes a full adjudicatory caseload as well, thus necessitating a professional and efficient Administrative Office.

The Chief Justice and the Administrative Office have an onerous responsibility for systemwide planning and management in such areas as: case management techniques; uniform technology; budget; legislative reform; expansion of courts; law reform; facilities; security; speedy trials; prompt judicial decision making; court interpreters; gender, racial and ethnic fairness and the like. In 1992, shortly after my term commenced, the Commission on Courts 2000 was created to study the future of the Judicial Branch and make recommendations. That Commission recommended a series of reforms that are being implemented even as new committees and commissions come forth with more specialized studies and innovations that are also currently being implemented. Diversity, efficiency and fairness are the key ingredients.

Delaware's experience has been that depoliticizing the Judiciary tends to attract to the Bench quality people whose focus is likely to be on service and scholarship.

By the advent of the new Millennium, we will have seen enormous change, including an entirely new world of technology and court management protocols. In recent years, we have already seen dramatic changes. The Delaware Judiciary is small enough and good enough that it should be "ahead of the curve" and a national leader in administration as well as in jurisprudence. We are not there yet, but that is our goal. We must prepare now to address these objectives and not be content with "business as usual" (as I know we are not).

Here are only a few of the major initiatives that have been accomplished or are actively underway.

- Modern courthouses and court facilities in all three counties
- Systemwide technology improvements
- Expanding videoconferencing capability
- Improved nationally-attractive business court procedures
- Innovative drug courts
- Electronic filing
- Domestic violence initiatives
- Truancy court in the Justice of the Peace Courts
- Enhancement of victims' rights
- Improved security
- Sophisticated strategic planning for all courts and the Administrative Office of the Courts
- Rationalized personnel practices and adequate pay scales for all Judicial Branch personnel
- Development of modern and efficient internal operating procedures for all courts
- Automated sentencing and coordinated release date systems
- Disciplined examination of the need for additional judicial officers
- Improved and businesslike central collection procedures
- Modernization of jury procedures
- Procedural law reform
- Streamlining the Arms of Court
- Increased use of mediation and arbitration to resolve disputes and relieve the increasing pressures on the courts
- Proper representation for criminal defendants and civil litigants
- Systematic assistance to the ever-increasing number of *pro se* litigants
- Public education to build trust and confidence in the courts
- State-of-the-art judicial and staff training
- Delay reduction

- More sophisticated court interpreting programs
- Implementing the recommendations of the Racial and Ethnic Fairness Task Force, the Gender Fairness Task Force and the Commission on Courts 2000 and the many other committees, commissions and task forces that have assisted the courts.

New court facilities are becoming a reality, and they are desperately needed. New courtroom facilities are being undertaken in Kent and Sussex Counties. Most dramatically, however, is the new New Castle County Courthouse. The ground breaking in May of this year for the new Courthouse in Wilmington marked another major development in our effort to improve the administration of justice. It was a long time in coming and required the combined multi-year effort of many members of the Judiciary, the Bar, the business community and the executive and legislative branches of government. This facility, designed to house 52 courtrooms and nearly 1,000 staff, should serve the public for decades in a safe and user-friendly environment that will allow our Judiciary to continue to earn the trust and confidence of our citizens. Our hope is that, in the process of designing this potentially superb Courthouse, we do not allow this great opportunity to be squeezed by ending up with inadequate space, configuration or facilities.

Law and Professional Reform

Law reform and innovation goes forward in Delaware. Leaders of the Delaware Bar are in the forefront of these developments. The renewed emphasis on professionalism has made Delaware a leader. The Delaware Bar is a great bar that has international respect for competence, integrity, ethics and professionalism. But there remains a professionalism challenge we must address at home and through which we must continue to lead a national renaissance. Concern over the state of the national legal profession has been expressed in many ways over many years. Bar groups, citizens, judges, elected officials, authors and others have bemoaned the lack of professionalism that has befallen our profession and have criticized the judiciary for contributing to the problem or for not

doing enough about it.

In the 1994 decision in *Paramount v. QVC*, the Delaware Supreme Court, in an extensive addendum to an opinion in a complex and expedited corporate takeover case, rebuked as unacceptable the unprofessional conduct of a Texas lawyer who disrupted a deposition being taken in Texas for that Delaware proceeding. That case spells out the expectation that Delaware Courts will not tolerate abusive litigation tactics. This decision is but one example of appellate declarations that have strengthened the hands of trial judges around the country to deal with unprofessional conduct in court and in depositions.

The Conference of Chief Justices has heeded this call to action by commissioning a study and developing a National Action Plan on Professionalism and lawyer competence. This Plan was adopted by the Conference in January 1998, which urged its implementation by all state supreme courts. The Plan contains over 100 separate recommendations to improve professionalism, including law school responsibilities, bar exam subjects, disciplinary enforcement, "bridge the gap" programs, and strengthening trial court determination to stop unruly conduct. Many of these recommendations had already been adopted in Delaware, but more work remains.

Not only have we seen Delaware in the forefront of professionalism, we have also seen Delaware progress responsibly from a poor record in the first half of the century in gender, racial and ethnic diversity in the Bar and the Bench. We have achieved significant progress in recent years, but we must continue to build on and improve these efforts. As we strive to improve diversity among professionals, we must also intensify our efforts to achieve fairness, equality, expedition and cost effectiveness in our handling of litigation in Delaware at all levels. Only in this way can we reasonably expect to achieve public trust and confidence.

* * * * *

Excellence in judicial management calls for vision, creativity and analysis in working out ways to deal with the increasing complexity of litigation (not merely the increase in raw numbers of cases). My objective is to devote the remainder of my term to ever-progressive administrative enhancement of the Judicial Branch as a whole while maintaining appropriate autonomy of trial courts and improving the excellent quality of our judicial decisions and

efficient case management.

It is only when a court system is functioning well, is understood and trusted, that it will have the necessary respect of our citizens. Courts do not have the taxing or law-making powers of the Legislative Branch or the police powers of the Executive Branch. Courts must rely on the understanding, trust and confidence of their citizens. That, in turn, requires information, education and being receptive to citizen input.

We must keep in mind the wisdom of Alexander Hamilton, expressed more than two centuries ago:

> The ordinary administration of criminal and civil justice contributes, more than any other circumstance, to impressing upon the minds of the people affection, esteem, and reverence toward the government.

The principal goal of the Delaware Judiciary is easily stated: we need to have, for our individual and corporate citizens, the most modern and businesslike court system achievable, coupled with old fashioned values of work ethic, integrity, fairness, efficiency, competence and promptness. It is the right way to go to build public trust and confidence in the Judiciary. ◆

FEATURE

Hon. Maurice A. Hartnett, III

THE DELAWARE JUDICIARY IN THE 20TH CENTURY

Space precludes a comprehensive treatment of the judges who served Delaware so capably during the 20th Century. But this article will refresh pleasant recollections of some of those judges. A more detailed view of the courts and judges of the 20th Century appears in *The Delaware Bar in the Twentieth Century*, Helen L. Winslow, ed., The Delaware State Bar Assn., Wilmington (1994).

In 1897, on the eve of the 20th Century, a new Constitution for the State was promulgated by the Convention that drafted it. It abolished the terms of the judges that had been serving under the Constitution of 1831 and it provided for only six judges: the Chancellor, a position initially created by the Constitution of 1792, and five Superior Court judges — a Chief Justice, one resident judge from each of the three counties of Delaware, and an "at large judge." The same six judges also constituted the Delaware Supreme Court and heard appeals from the trial courts on which they sat until the separate Supreme Court was established in 1951. The Chancellor presided over the Supreme Court unless an appeal was from his decision. He was considered to be the highest judicial officer in the State and received the highest salary. The number of constitutional judges was not increased until 1949 when the position of Vice Chancellor was created by Constitutional amendment. Since 1961 the Superior Court has gradually been increased from five judges to nineteen judges.

Upon the Constitution of 1897 taking effect, the sitting Chancellor, John R. Nicholson, of Dover, was reappointed, as were Chief Justice Charles B. Lore and Associate Superior Court Judge Ignatius C. Grub, both of Wilmington. The other Associate judges were not reappointed, however, and William C. Spruance of New Castle County (who was an outspoken member of the Constitutional Convention of 1897), James Pennewill of Kent County and William H. Boyce of Sussex County were appointed in their places. James Pennewill of Dover, who was very popular with the Bench and Bar, became Chief Justice in 1909. He served until 1933 when he was succeeded by Daniel J. Layton of Sussex County, who served until 1945, when Charles Sudler Richards, also of Sussex County, became Chief Justice. Richards served as Chief Justice until 1951 when the separate Supreme Court was created. He then became the first President Judge of the Superior Court.

Richards, first appointed as an Associate Superior Court judge, served on the bench from 1929 until he retired in 1956. He never married, was quiet and self-effacing, and was approached with considerable trepidation by the younger members of the bar. His stern presence suffered no frivolity in the courtroom. Many a lawyer's heart sank when Judge Richards suddenly appeared on the bench on a Saturday morning, the time for sentencing, instead of Judge Charles L. Terry. Judge Richards was known for his stiff sentences. Judge Terry was the judge to have if there existed some valid mitigation.

In 1955 Judge Richards presided over the criminal jury trial of Bryant Bowles, who came to Delaware to form the National Association for Advancement of White People in response to the efforts to integrate Milford High School. During a segregation rally he held his young daughter up in the air and said "my daughter never would attend school with Negroes as long as there is gunpowder to burn — (prolonged applause) — and gunpowder to burn — I've been burned before and I'll be burned again." He was indicted for this and other strong statements. At his trial in Dover, the jury, after a very brief deliberation, returned a verdict of "not guilty." Many years later it was learned that one of the jurors was a member of Bowles' organization. The story of this unfortunate period appears in Ed Kee's *The Brown Decision and Milford, Del.*, 27 Delaware History 205-243, The Delaware Historical Society, Wilm. (1966-67).

Early in the Century all the judges were given complimentary passes on the Delaware Railroad and, with a train passing through Dover every hour or so, had no difficulty in sitting in all three counties. In this way a visiting judge would spend the

week in the county where he was sitting. It was customary for the lawyers (on both sides of a case) and the judges to gather for lunch in the same restaurant, and often at the same table. This tradition continued in Dover until mid-century. The comraderie of the judges may have been one reason there were so few reversals on appeal.

In Georgetown, at the beginning of a court term, it was long a tradition for the bar to meet the incoming train from Wilmington or Dover and to walk with the judges to the Court House.

The Constitution of 1897 contained a provision that was soon to have a great effect on all the courts and the State. It provided for the creation of corporations only under general law rather than by a special act of the General Assembly. The new General Corporation Law was enacted in 1899 just when many national corporations were looking for a new situs after becoming disenchanted with a similar law of New Jersey.

The growth of corporate litigation in the Delaware Courts was slow but sure. The judges in Delaware had little or no experience in corporate law and there were few precedents to guide them. Nevertheless, the equity and law judges soon demonstrated their ability to craft a modern body of corporate law that, by the middle of the 20th Century, had become the national model.

The first Chancellor to bear the new responsibilities was John R. Nicholson, who was first appointed in 1895 to succeed James L. Wolcott, who served only two years (1893-95) before returning to the practice of law. (Wolcott in turn had succeeded Willard Saulsbury, who had died in 1892. Saulsbury was a United States Senator during the Civil War, where he was a strong critic of President Lincoln. He had been elected to the U. S. Senate by the Delaware Senate over his two brothers.) Chancellor Nicholson was born in Dover in 1849, graduated from Yale College and Columbia Law School. He was reappointed Chancellor under the new Constitution in 1897. To Charles Minot Curtis (1909-1921) fell the primary early responsibility of developing the Delaware General Corporation Law. His well-reasoned decisions set the stage for Delaware's eventually obtaining its preeminence as the legal situs of many national corporations. When his term expired in 1921, despite his excellent reputation and the bar's respect for him, the mild and unassuming Governor William D. Denney decided not to reappoint Curtis, a fellow Republican. Rather, the Governor appointed Democrat Josiah Oliver Wolcott, who was then a United States Senator, having been the first popularly elected Senator from Delaware.

The announcement was met with disbelief by the bar, but Governor Denney insisted on appointing Wolcott so that he could replace him as Senator with T. Coleman du Pont, a prominent Republican. du Pont had paid for the construction of the du Pont Highway from Selbyville to Wilmington and had supplied the finances needed to defeat the attempt of John Edward Addicks and his Union Republicans to buy his way into the United States Senate. du Pont was the recognized leader of the Regular Republicans and was widely believed to be the architect of what became known as "the dirty deal". Ironically, Josiah Wolcott became one of the giants of the Delaware bar. He was the son of Chancellor James L. Wolcott, and the father of Judge, Chancellor and Chief Justice Daniel L. Wolcott. Wolcott was born in Dover in 1877, graduated from Wesleyan University and studied law under Edward Ridgely and Henry R. Johnson in Dover. His opinions, especially in corporate matters, soon became nationally recognized seminal precedents for their clarity and logic. It was during his tenure (1921-38) that the excellence of the Delaware courts came to national attention.

N. Maxson Terry, Sr., the husband of Rebecca Terry, Chancellor Josiah Wolcott's grand-daughter, often told a story about the Chancellor. One Friday the Chancellor received a telephone call from a New York lawyer requesting an emergency hearing on a temporary restraining order. The Chancellor agreed to hear him and his opponent in his home in Dover the next day. The lawyers took the Norfolk Express from New York to Dover, arriving in the early afternoon. The Chancellor, a devoted hunter, spent Saturday morning in the field with his beloved dog. When the Chancellor returned home, he found both lawyers awaiting him. He welcomed them to his living room on South State Street, still dressed in hunting garb and with dog in tow. At the end of the arguments, while his dog laid quietly at his feet, he said, "Well, we'll consider it and let you know." The lawyers then departed to catch the next train back to New York, but one was heard to say, "I wonder which of them (man or dog) will decide?"

In 1938, Chancellor Wolcott died and was succeeded by William Watson Harrington, of Dover. He graduated from Delaware College and attended Harvard Law School. Before becoming Chancellor, he served as Register of Wills, Deputy Attorney General, and Superior Court Judge. A probably apocryphal story is told about him.

One Saturday he agreed to hear a temporary restraining order in Dover in an important corporate matter and the lawyers arrived by train from Wilmington and New York. (Both this and the immediately prior story belie the allegation that Dover judges do not work on weekends.) Melvin Hopkins, a Dover lawyer, who had his office in the same building as did the Chancellor, was co-counsel with the New York lawyer. The arguments were long and complex and stretched into the late afternoon. The New York lawyer persisted and finally was asked a question as to a particular fact by the Wilmington lawyer. He began to shuffle through his papers for the answer. Finally, Chancellor Harrington said, "Oh, never mind. I'll just ask Melvin at lunch tomorrow."

Chancellor Harrington was a member of the Board of Trustees of the University of Delaware for 59 years (a record). He was chairman of the board in 1949 when a suit was brought against the University seeking the admission of several black students. Vice Chancellor Collins J. Seitz entered an order against the University that was personally served on Chancellor Harrington, who accepted it politely.

Chancellor Harrington once complained to Seitz about his lazy handyman who sometimes failed to stoke his coal furnace. Seitz asked him why he did not put in an oil burner and Harrington responded that he couldn't do that because it would put the man out of a job.

In May 1939, the General Assembly passed a statute creating the office of Vice Chancellor, who was appointed by the Chancellor and reported to him with a recommendation for disposition. George Burton Pearson, Jr. was chosen by Chancellor Harrington and he served until 1946 when he resigned to serve on the Superior Court. Collins J. Seitz was appointed to succeed him. In 1949 a Constitutional amendment made the office of Vice Chancellor a Constitutional judge and Seitz was appointed to that position by the Governor.

In 1950, Daniel F. Wolcott was appointed Chancellor to succeed Harrington. He served only until 1951 when he was appointed to the newly

separate Delaware Supreme Court, as is discussed elsewhere. Howard W. Bramhall served as Vice Chancellor from 1951 to 1954 when he was appointed to the Delaware Supreme Court to succeed James M. Tunnell, who resigned. In 1951 Vice Chancellor Seitz (by then highly controversial because of the University of Delaware desegregation decision referred to elsewhere in this article) was appointed Chancellor after a razor thin majority of the Delaware Senate confirmed his nomination at 1:00 a.m. In the early 1950s, Seitz and Vice Chancellor William Marvel, both known for their gentlemanly manners, had to face the emotional issue of racial segregation. Delaware, as a border state, had a mixed record on segregation. All the public schools were segregated, some restaurants were segregated, but buses and trains were not. Some theaters in New Castle County were not segregated but those downstate always were.

In the first case attacking racial segregation, *Parker v. University of Delaware*, Del. Ch., 75 A.2d 225 (1950), Seitz ruled that all black Delaware State College and all white University of Delaware were not equal and therefore the separate but equal doctrine of *Plessy v. Ferguson* did not preclude black students from being admitted to the University. The University accepted the verdict and admitted the students. Several trustees, including Bob Carpenter and Judge Terry, then quietly undertook to recruit black athletes to play football at the University. Soon thereafter, Seitz ruled in *Bulah and Belton v. Gebhart*, Del. Ch., 87 A.2d 862 (1952), that the public black schools were not equal to the white schools. This order was appealed to the United States Supreme Court and was affirmed as part of *Brown v. Board of Education*, 347 U.S. 483 (1954). Seitz's role won him a well-deserved national reputation.

Seitz graduated from the University of Delaware and Virginia Law School. A recognized legal scholar, he taught and lectured at numerous law schools. By any standard, he was one of the finest judges ever to serve as Vice Chancellor, Chancellor, and as a judge of the United States Circuit Court of Appeals for the Third Circuit. His opinions are a model of brilliance, clarity and logic. He once apologized that an opinion was so long because he did not have time to shorten it.

William Marvel of Wilmington was appointed Vice Chancellor in 1954 and as Chancellor in 1976. He served on the court until he retired in 1982, a term of 31 years, second only to the service of Chancellor Nicholas Ridgely (1801-1830). His father, Josiah Marvel, was the only Delawarean to serve as President of the American Bar Association. Marvel was educated at Yale, Cambridge University in England and Virginia Law School. He had an encyclopedic memory of cases and his opinions were almost always correct. They reflected his study of literature, and were often written in a style more often seen in novels. His dry humor was legendary. Once when he was somewhat disenchanted at being again called upon to sit in the Supreme Court to fill a quorum, he said, "I think I'll just blow up a balloon, paint my face on it and send it to the Chief Justice."

In a segregation case, Vice Chancellor Marvel was not as lucky as Seitz. In 1954, a few months after the decision in *Brown*, the Milford Board of Education, without any pending court proceeding, decided to admit some black students. This led to strong protests and to the case of *Simmons v. Steiner*, Del. Ch., 108 A.2d 173 (1954). The recently appointed Vice Chancellor ruled that the students were properly admitted. His opinion, however, was reversed by the Delaware Supreme Court. *Simmons v. Steiner*, Del. Supr., 111 A.2d 574 (1955).

Delaware judges crafted a modern body of corporate law that became the national model.

Isaac D. Short, II, of Georgetown served as Vice Chancellor from 1961 to 1973. The Vice Chancellor, very capable in his own right, was the father of former Philadelphia Phillies pitcher Chris Short. One day the Vice Chancellor requested permission to adjourn a hearing one hour early, in exchange for starting one hour early the next day, in order to go to Philadelphia to watch his son pitch. No one, of course, had the temerity to oppose this request.

William Duffy of Wilmington served as Judge and President Judge of the Superior Court before becoming Chancellor in 1966. In 1973 he was appointed to the Supreme Court where he served until his retirement in 1982. He served in Europe in World War II as a pilot and received the Air Medal and Distinguished Flying Cross. He was universally recognized for his hard work, logical mind and as being the conscience of the court. In *Singer v. Magnavox*, Del. Supr., 380 A.2d 969 (1977), he wrote a strong opinion holding that the majority stockholders of a Delaware corporation owe a fiduciary duty to the minority stockholders.

Others who served on the Court of Chancery during the 20th Century and are retired or still serving are: William T. Quillen, Ch. 1973-1976; Grover C. Brown, V.C. 1973-1982, Ch. 1982-1985; William T. Allen, Ch. 1985-1997; William B. Chandler, III, V.C. 1989-1997; Ch. 1997-; Maurice A. Hartnett, III, V.C. 1976-1994; Joseph J. Longobardi, V.C. 1982-1984; Carolyn Berger, V.C. 1984-1994; Joseph T. Walsh, V.C. 1984-1985; Jack B. Jacobs, V.C. 1985-; Myron T. Steele, V.C. 1994-; Bernard Balick, V.C. 1994-1999; Stephen P. Lamb, V.C. 1997-; and Leo E. Strine, Jr., V.C. 1999-.

In 1945, the bench and bar was shocked when the Republican-controlled Senate rejected the decision by Republican Governor Walter W. Bacon to reappoint Republican Daniel J. Layton of Georgetown as Chief Justice. Layton had served since 1933 and was from a prominent family associated with the legal history of Delaware from earliest times. He was a brilliant and persuasive judge, writing almost one-half of the opinions handed down by the Superior and Supreme Courts during his twelve-year tenure. In *Guth v. Loft*, Del. Supr., 5 A.2d 503 (1939), Layton used powerful language to define the fiduciary duty imposed upon directors of a Delaware corporation. That ruling is the benchmark of Delaware corporate law. Layton, however, did not suffer fools lightly and made no effort to disguise his contempt for an ill-prepared lawyer or even a valid argument that he disagreed with. This incensed many influential members of the bar (especially former Federal Judge Hugh M. Morris) who secretly prevailed upon the Senate to reject him. The details are set forth in Carol Hoffecker's

Federal Justice in the First State.

After Layton's rejection, Charles S. Richards was appointed Chief Justice and James B. Carey was appointed Resident Judge for Sussex County, succeeding Richards.

The effect on the judiciary did not end with Richards' appointment, however. In 1946, the second term of Richard S. Rodney as a Superior Court judge expired. Rodney was one of the most learned and popular judges ever to serve on the bench and everyone thought it was a foregone conclusion that he would be reappointed. Governor Bacon, however, still smarting over the rejection of his reappointment of Layton, decided to take revenge on those who had opposed Layton by replacing Rodney, a Democrat, with Vice Chancellor George Burton Pearson, a Republican and a supporter of Rodney's reappointment. Rodney was a learned historian and the author of many publications on the history of the state. He had such a pleasant manner in court that a lawyer once remarked he felt better when ruled against by Judge Rodney than when he was affirmed by Judge Layton.

Judge Rodney received the surprising, unanticipated news that he would not be reappointed while walking out of the court house in Wilmington. Fortunately for the people of the State, Rodney was soon appointed to the United States District Court in Wilmington, where he served with great distinction.

In 1951, after a campaign begun in 1933, the General Assembly amended the Constitution of 1897 to provide a separate Supreme Court consisting of three Justices. The appointments were to be made by Governor Elbert N. Carvel, a Democrat from Laurel, who was determined to appoint the most qualified persons he could find. His task was made difficult because two prominent Democrats desired to be Chief Justice: Chancellor Daniel L. Wolcott of New Castle County, the highest ranking judicial officer under the prior Constitutional provisions, and James M. Tunnell, Jr., of Georgetown. Wolcott had been a Superior Court judge as well as Chancellor and was highly respected as lawyer and judge. His family members had been powerful leaders in the Democratic party of New Castle and Kent Counties for generations. Tunnell, the son of U. S. Senator James M. Tunnell, was likewise from a powerful Democratic family in Sussex County. Both indicated they would not be interested in serving as an Associate Justice. Both had powerful supporters in the State Senate that would have to confirm any appointee. Carvel decided that the only way to break the impasse was to find an attorney so qualified to be Chief Justice that the other two men would agree to serve with him.

Many members of the bar whom he consulted recommended Clarence A. Southerland, a nationally known corporate lawyer and generally acknowledged to be one of the most prominent members of the Delaware bar. Carvel approached him and, somewhat to everyone's surprise, he agreed to accept the appointment. Both Wolcott and Tunnell promptly agreed to serve with him and the new justices were sworn in on June 7, 1951. Although some Democratic politicians complained for years that a Republican Chief Justice had been appointed, there was a general acknowledgment by the bar that the reputation of the new Justices for excellence was not surpassed by any other State Supreme Court.

Southerland was known for always opening court at exactly 10 a.m., whether the lawyers were present or not, and would proceed to hear oral argument even if only one side was present. The first year the Supreme Court heard only twelve appeals and the Justices complained they did not have sufficient work. Tunnell, after three years, resigned and joined the Wilmington law firm of Morris, Nichols, Arsht & Tunnell, where he continued a distinguished legal practice. He excelled both as a brief writer, a trial and appellant litigator, and as an extraordinary advocate before a jury. He was generally admired as being one of the finest Delaware lawyers of the 20th Century. Although a fine orator, he failed in his goal to be elected to the United States Senate, perhaps because he early questioned the country's military involvement in Viet Nam.

In 1954, Justice Tunnell was succeeded by Howard W. Bramhall of Georgetown, who was a Vice Chancellor when appointed. Justice Bramhall, a quiet man, served with distinction until his death in 1962.

In 1962, Charles L. Terry, Jr., who had been a Superior Court judge since 1938 and President Judge since 1957, was appointed to succeed Bramhall as Associate Justice. In 1963 Terry became the second Chief Justice of the separate Supreme Court, succeeding Southerland at the end of his term.

Also in 1963, James B. Carey of Sussex County, the Resident Superior Court Judge of Sussex County for nineteen years, was appointed to the Supreme Court to fill the vacancy caused by Terry's elevation to Chief Justice. Former Chief Justice Andrew Christie, in reminiscing about Carey, said that shortly after he was appointed as a Superior Court judge he was presiding over a jury trial in Georgetown. During a recess he told Judge Carey how he had just ruled on an evidentiary issue. Carey made no comment. At the next recess, however, Christie found three law books opened on his desk, all containing cases showing that he had been incorrect.

In 1964, Terry retired from the Supreme Court to accept the draft of his Democratic Party to run for Governor. He was elected and thus became the only person to hold the two highest offices in Delaware: Chief Justice and Governor.

Terry, from Camden, Delaware, graduated from Washington and Lee University Law School, where he was a notable athlete. He was one of the most friendly and popular judges ever to sit on the Delaware bench. He had a genuine interest in people regardless of political party, race, religion or wealth. His efforts to help people in need was legendary as was his ability to obtain from politicians the resources needed for the courts.

Once Justice Wolcott, at the request of Chief Justice Southerland, headed an effort to obtain passage of a bill in the General Assembly to improve the administration of justice. Wolcott appeared on the floor of the Senate expecting no opposition to the bill, but then saw it defeated by an almost unanimous vote. Shocked by this result, he immediately called Terry, who was then a Superior Court judge, to ask his advice. Terry said, "Don't worry, Dan. I'll take care of it." Terry promptly got the bill restored to the calendar and, after a respectful delay, went on the floor of the Senate to re-explain the bill and the reasons it was needed. It then passed unanimously!

Terry also had a wonderful way with subordinates. Whenever he had a problem involving a judge he would call the judge and ask permission to visit in the judge's chamber. He and the errant judge always departed as friends with the problem resolved.

Upon Terry's resignation to run for Governor, Daniel F. Wolcott became Chief Justice. Wolcott grew up in Dover and, in 1949, had been appointed to the Superior Court. The following year he

was appointed Chancellor, as his father and grandfather had been before him. Six months later, in 1951, he became an Associate Justice of the new Supreme Court. He died in office in 1973. During his 22-year tenure on the Supreme Court the filings increased from twelve per year to almost 260. His many opinions were clearly and concisely written and still serve as benchmarks of Delaware law.

In 1973, at the death of Chief Justice Wolcott, Daniel L. Herrmann became Chief Justice. He had served as a Superior Court judge until 1958 (when he resigned to practice law) and in 1965 he had been appointed an Associate Justice. There was never any doubt who was Chief Justice during his term. His appearance, manner and strong defense of the courts would have permitted a stranger to recognize him. Nor was there any doubt that he saw the judiciary as an equal independent branch of government. Sometimes his strong views were not popular with some members of the General Assembly.

By 1978, the Delaware Supreme Court was the only court of last resort in the nation with fewer than five members and its caseload was overwhelming. Herrmann, recognizing the need, led an effort to have the General Assembly expand the Supreme Court to five members, which finally occurred in 1978. Justice Herrmann retired in 1985 and died in 1991.

In 1985, Andrew D. Christie succeeded Herrmann as Chief Justice after having served as an Associate Justice since 1983. He had served as a Superior Court Judge for almost 26 years before being appointed to the Supreme Court. He was the Executive Director of the Legislative Reference Bureau and was one of the three Code Revisors that drafted the landmark Delaware Code of 1953, the first modern codification of Delaware statutes. During his term as Chief Justice, the case filings in the Supreme Court increased to over 500 per year. Christie submitted the first unified budget for the judiciary, much to the approval of the General Assembly. He was a hard worker and he expected lawyers to be as well prepared as he was. The bar of Kent and Sussex Counties always knew that the calendar would be cleared whenever he was assigned to a term and he sometimes started a second trial after dinner. He was a great defender of the dignity of

the court and required all who appeared (including witnesses) to be properly dressed. He also strongly believed in following precedents, as is reflected in his many opinions.

The following persons are retired or are now serving on the Supreme Court: Chief Justice E. Norman Veasey, 1992-; John J. McNeilly, Jr., 1962- 1974; William T. Quillen, 1978-1983; Henry Ridgely Horsey, 1978-1994; Andrew G. T. Moore, II, 1982-1994; Randy J. Holland, 1987-; Maurice A. Hartnett, III, 1994-; and Carolyn Berger, 1994-. Many other notable judges have served on the Delaware bench in the first half of the 20th century. For the names of the Superior Court judges appointed before 1994, see *The Delaware Bar in the 20th Century*, pgs. 710- 715.

Some of the most distinguished judges have served as judges on the United States Court of Appeals for the Third Circuit. Judge George Gray was once considered to be a serious candidate for President of the United States. Victor B. Woolley's two-volume *Practice in Civil Actions*, published in 1906, is still consulted by careful lawyers, especially as to the law of judgments and executions.

John Biggs, Jr., who was appointed in 1937 and then became Chief Judge of the influential Circuit, was a leader of the federal bar for many years. Biggs knew the trappings of his office and often asserted them. He required that the train he daily took to Philadelphia from Claymont not only stop at unscheduled Claymont, but stop precisely in front of him so that he might enter the dining car from where he waited.

The distinguished U. S. District Court judges who served during the first half of the Century were Edward G. Bradford, Hugh M. Morris, John P. Nields, Paul Leahy, Richard S. Rodney, Caleb M. Wright, Caleb R. Layton and Edwin D. Steele.

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In considering Delaware's Judiciary in the 20th Century, one observation stands out. The Delaware constitutional system that provides that all judges be appointed by the Governor (with confirmation by the Senate), coupled with the requirement of a bipartisan political balance for judges, has attracted persons of exceptional learning and dedication to the judiciary. Most have served with distinction and, along with an illustrious bar, have made the Delaware judicial system the envy of the country. ◆

FEATURE

William T. Allen

20TH CENTURY EVOLUTION AND GROWTH OF DELAWARE CORPORATION LAW

I. THE LARGER SOCIAL CONTEXT OF ORGANIZATION LAW

Standing at the cusp of the millennium invites us to pause for assessment and appraisal. The symbolism of the moment stimulates a meditative mood and a sense that this is a propitious moment to pause and to talk of things old and new and things that are yet to be. Two developments especially contribute to the sense that the shape of our future is a bit less obscure today, on the eve of the millennial change, than it was even ten years ago. The first is the momentous 1989 fall of Soviet communism. With that fall, the model of the planned and tightly controlled national economy landed with a thud in history's wastebasket. "Scientific" Marxism was at its heart polemical, not scientific. It was badly wrong at its root. It failed to understand a fact that Anglo-American corporation law took as foundational when, in 1849, Marx first published his famous critique and that we still take as foundational today: capital contributes value to enterprise, and those who voluntarily contribute it to an undertaking must be protected with legal rights.[1]

Marx's errors were not worked out in seminar presentations. It took 150 years — and much human suffering — for the profound failure of anti-capitalism to be clear to almost everyone. The world has borne, and still bears, unimaginable costs for the injuries wrought by a legal and economic system built on a well-meaning error.

Today, one version or another of a market form of economic organizations is widely thought to provide the only sustainable future for most of the world. For some, this is a deeply regrettable state of affairs. To them, economic liberalism can be corrosive of local cultures and values, tends to alienate people from each other and leads to the exploitation of vulnerable people. They regard the liberal, market-centered regime as being forced upon unwilling peoples around the world by global markets, by soulless modern technology and by American economic hegemony. To them, the future looks chilling, if not frightening.

To others, however, and to most members of the Delaware bench and bar I suppose, the recession of the administered economy as a viable model represents a very positive development, which while not alone assuring improvement in global human welfare, does provide a historic opportunity for growth in human liberty and welfare.

The second recent event that seems to illuminate our future, or at least an optimistic version of it, is the development and exploitation of technology, most notably the Internet. We all, I think, are periodically surprised anew as information technology changes the way we work, play, shop, learn and communicate. Indeed, the effects of the new technology are pervasive. Expressed in economic terms, the make-up of our productive assets is being transformed. A century-long evolution is speeding up: no longer is wealth principally referable to control over land or raw materials, or even over large collections of machines. Nor for individuals can basic sustenance reasonably be assured any longer by a willingness to invest one's brute labor. Today real value, and thus the ability to create wealth, resides principally elsewhere: in knowledge or information and intellectual property in it; in know-how, brand identification and business systems that sustain the firm's ability to create new value; and, finally, in legal forms of organization and governance that sustain efficient production.

The birth of the information or knowledge economy raises the interesting question whether the publicly financed corporate form will itself continue to provide the most efficient form of enterprise in our future economy. The answer I suggest is

that, if the economies of scale and scope that underlie today's giant public corporation undergo fundamental adjustment in a knowledge economy, then we might see a different industry structure emerge in the 21st Century. For the moment, however, that is a part of the future hidden from my sight, at least.

Despite the clarity and charm of a simple vision, our 20th Century market economy has never been simply a self-organizing response of free individuals to the economic problem of scarcity. Collective action — law and public policy — contributed to the wealth creation process in a myriad of vital ways: by public support for education and training; by facilitating the existence of cadres of expert independent professionals; by developed systems of law, accounting and banking; and, most generally, by promoting and protecting a social environment in which long-term planning is rational and a culture in which trust is not for saps only. All of these together constitute public and cultural capital that will continue in the 21st Century to be vital for an efficient, market-centered system of economic order. The choice we are sometimes given between coercive government or free markets as organizing institutions is a false choice. Markets cannot operate without law, but unwise law can smother market efficiency just as wise law can facilitate human welfare.

These developments — the spread of liberal political systems and the head-spinning advance in information and computer technology — allow us to be guardedly optimistic as we stare into the next millennium. The challenges we humans face are great, of course. Human populations are threatened by starvation and disease in large areas of Africa and in Asia as well. Pandemics threaten our heavily populated planet. In the lands of the old Soviet empire, welfare is impeded by distrust and dishonesty born of generations of corruption and the subjugation of law to power. And in some dark corners of the world, basic human rights — rights of free expression, of religious freedom, freedom from torture or slavery — are reputed as cultural imperialism. But despite the pressing need for greater economic growth and for acceptance of the rule of law as a predicate for that growth, we have, I think, good reason to be hopeful about the projection of a line measuring general human welfare into the 21st Century.

Corporation law plays an important role in providing the institutional framework that allows the liberal market economy to function efficiently to satisfy human needs and to facilitate the realization of human potential. Thus, as noted, a deep and pertinent difference between Marxism and capitalism lies in the legitimating of rights of capital — of shareholders — in the latter but not in the former. Corporate law is not trivial, as one law review piece of a few years ago suggested: it is vital.[2] When this law is created poorly or administered unwisely, individuals suffer by not being permitted to arrange their economic relations efficiently, and society as a whole suffers because it does not have available to its members wealth that might otherwise have been used for some good purpose. When corporation law is well-designed and well-administered, it better allows individuals to accomplish their purposes and thereby advances the public good. Thus, corporation law serves important public welfare purposes and effects.

II. CORPORATE LAW EVOLUTION OVER THE CENTURY

In pausing at this millennial moment, we might turn our gaze from the largest aspects of our social life to more particular concerns of our profession. As Delaware lawyers, to a greater or lesser extent, we each do have a special interest in corporation law, if for no other reason than our jurisdiction is so well-known as being of commanding importance in this field. The growth or the decay of this body of law has special meaning to us as lawyers and as citizens. Thus, it seemed plausible to our editor that a brief review of the major corporate law changes that the Century has witnessed and the major challenges that this body of law faces might hold some interest for this audience. I happily accepted the invitation to supply such a view, in the spirit of a traveling brother writing home and describing a country from 30,000 feet. I may be wrong in what follows — I have been before and I can cite judicial authority in support of that — so I encourage corrections in the letters to the editor column.

The first interesting observation I might make about corporation law over the course of the 20th Century is how, as a field of intellectual activity, corporation law fell in prestige and in the seriousness with which it was taken during the first three-quarters of the Century and how it rose, in those same terms, during the last 25 years of the Century. For practical lawyers, the intellectual pedigree of corporation law is probably not very important, but there is something interesting in this reputational volatility. (Of course, the practice of corporation law throughout the Century has continued to have a certain cachet in the profession and among observers, if only for the reason that corporate lawyers tend to work on large-dollar transactions for clients who, generally, are well able to pay their fees. That cachet is not what I am talking about when I talk about the intellectual standing of the field.)

At the start of this Century, the academy had a clear view of the importance of corporation law. Observers then could themselves easily remember days when there were few large-scale organizations of economic production. The elder statesmen of say, 1890, had personally witnessed the unimaginable growth of the Second Industrial Revolution that occurred after the Civil War. They appreciated in a personal way the importance of facilitating the organization of the vast resources necessary to operate enterprise at the large scale that new technology made efficient. Indeed, for that generation, the legal innovation of the publicly financed corporate form was one of the greatest discoveries of the age.

The corporate form has great utility as a device to facilitate the aggregation of capital necessary to support large-scale operations. The late 19th century thought the development of the corporate form represented a singular achievement. It sounds curious to a modern audience to hear that Harvard's Charles W. Eliot regarded the limited liability characteristic of corporations as "by far the most effective legal invention made in the nineteenth century."[3] Columbia University's Nicholas Murray Butler was even more expansive when he said:

> I weigh my words when I say that ... the limited liability corporation is the greatest single discovery of modern times.[4]

Today no one would claim such significance for our formal techniques of organization. We have now grown used to the limited liability, capital-aggregating corporate form. Its contribution to our welfare no longer seems novel or perhaps even noticeable. But these early statements remind us that, when seen with fresh eyes, these rules of organization were seen as enormously important. Those rules, and the policy choices embedded in them, remain important.

For those of us born in the middle to late 20th Century, the organization of effort in large-scale enterprise is no more novel or interesting than, say, the existence of electricity. But earlier eyes saw more clearly. The main corporation law story of the 19th Century to which these commentators referred was the development of free incorporation under general laws of incorporation. At the beginning of the 19th Century, corporations were few, and a special act of the legislature was required to create one. When created, they were limited to a stated purpose and were often limited in other ways as well: geographically, for example (or, more oddly to modern ears, in the size of their permitted capitalization). By the end of the century, the corporate form had become openly available to all. A corporation began to look more like a contract among a group of enterprising persons than an act of state. Capital markets with their roots in the 18th Century had begun in the 19th Century to trade equities and to grow; thus, by the last decades of the 19th Century, affording a condition for the growth of the modern corporation.

The large-scale story of the 20th Century in corporation law is a continuation of this freedom of contract approach to corporation law. Thus, legal restrictions that originally had been imposed as good public policy — such as a restriction on owning the shares of any other corporation — began to disappear. Mergers are a good example. At first, mergers between two corporations were not possible without the issuance of a new certificate by the legislature. This inability followed from the very nature of the corporation. If it required a legislative act to create a corporation and to fix its characteristics, then only the legislature could effectuate such a fundamental change as a merger, in which one of the parties disappears and the surviving one changes in scale or scope. But as the corporation begins to look more like a contract over the 19th Century, then one might expect a different view of mergers to evolve. With the introduction of general laws of incorporation, mergers became possible theoretically, but not practically. If the corporation is seen as a contract to which each investor is a party, it follows that rights that had been achieved in the contract could not be changed without investor consent. Thus, mergers were initially held to require unanimous shareholder approval. While this conception was not aesthetically (or professionally) bad, it didn't work very well in the dynamic economy of the late 19th century. But, by the end of the 19th century, the demands of a dynamic economy required that mergers or other forms of industrial restructuring be more easily available. Thus, corporate law amendments were introduced that permitted mergers with less than unanimous shareholder approval — sometimes 66%, sometimes 75%. The 20th century continued this trend of easier mergers. In 1967, Delaware reduced the share vote necessary to authorize a merger from two-thirds to a majority, and the permissible consideration in a merger was broadened to include cash. Thereafter, it was clearly permitted legally for a majority shareholder to eliminate a minority shareholder from participation in the enterprise.

Delaware lawyers have a special interest in corporation law because our jurisdiction is of commanding importance in this field.

The list of mandatory or prohibited features of corporation law that have evolved into "take them or leave them" options is impressive. In addition to ownership of stock and corporate mergers, we count par value of stock, director ownership of qualifying shares, preemptive rights to more new issues, and prohibition of director self-dealing. Even voting stock, which appears to be a fundamental characteristic of a modern corporation, is today simply an option: a corporation can be formed with a single share of no-par voting stock. All of the capital of the firm could be raised through the issuance of debt and non-voting equity. The fact that we never see such firms simply reflects, I suppose, the practical value of the vote to the holders of equity. Investors would be unlikely to buy a security that has no preferences and no vote.

In all events, the corporation has roughly evolved to the point that very few provisions of law are truly mandatory. The Delaware law proudly proclaims itself to be an enabling statute. By mid-20th century, this evolution lead to the view best expressed by Bayless Manning in his often-cited article, *The Shareholder Appraisal Remedy: An Essay for Frank Cohen*,[5] that corporation law had evolved to the point that there was no "there" there. "[C]orporation law, as a field of intellectual effort, is dead in the United States." Dean Manning proclaimed. "When American law has ceased to take the 'corporation' seriously, the entire body of law that had been built upon that intellectual construct slowly perforated and rotted away. We have nothing left but our great empty corporation statutes — towering skyscrapers of rusted girders, internally welded together and containing nothing but wind."[6]

This theme of an empty body of law was echoed quite recently by Professor Bernie Black in entitling an academic article with the question "Is Corporate Law Trivial?"[7] One might think that it reflects a certain *hubris* to posit that one sees the insignificance of this body of law at the very time at which questions of corporation law were in fact deciding the outcomes of massive restructurings that constituted the hostile takeover movement of the 1980s. In fact, Black's timing for deploying this eye-catching title could not have been worse.

Shortly thereafter, the need to restructure the economies of the former Soviet bloc demonstrated to all that a working and effective body of law of organizational form is an important part of the market superstructure that allows a free market economy to operate effectively. Following the unification efforts of the European Union and the legal infrastructural work needed in Eastern Europe and Asia, few people are saying today that the legal infrastructure of business organization is unimportant.

So, at the end of the 20th century, we arrive back at something like the position announced by the late 19th century academics. Now we tend to refer to "corporate governance," a topic that includes but goes beyond corporate law. But nevertheless, the deep importance to the

economy, and to each of us, of the law of organizational form is evidenced over the whole face of the globe by academic conferences and academic papers, by government commissions and by non-governmental organizations studying comparative ways to organize economic activity.

III. COUNTERVAILING DEVELOPMENTS: FIDUCIARY DUTIES

The continuation of a 19th century movement towards a permissive, contractual view of incorporated organization is not the only remarkable feature of the 20th Century corporation law. The other equally vital aspect of this evolution has been the growth of the fiduciary concept and the frequency with which courts resort to it. This evolution is in fact the countervailing development that facilitates the system's assuring adequate protection to capital to make a permissive regime practicable. The imposition of fiduciary duties is not the only, or perhaps not even the principal, protection that owners of capital have against expropriation or loss of their investment by empowered and loosely constrained boards. Shareholders' abilities to sell their stock and to vote are collectively more powerful tools than their ability to sue. But the exercise of these powers does encounter collective action problems. Equally important, the ability to sue for breach of fiduciary duty protects the ability to sell and the ability to vote, as well as protecting against an unfairly priced, self-dealing transaction.

Thus, while I will not try to demonstrate it here, I suggest that the fiduciary duty has gradually taken a more central place in the operation of the corporate law as this Century has progressed and that this is generally a healthy reaction to the relaxation of legal constraints on board prerogatives. While I do think that this has been a useful and positive development, it is one that is ever-rife with very significant problems. In part, these problems can be systematically contained by legislative reversal of poor policy choices by courts, but that remedy can be risky and costly.

The principal innovation of corporation law over the last 20 years has been the development of an "intermediate" form of judicial review of board action The paradigm cases — the *Revlon*[8] and *Unocal*[9] line of cases — involve threatened or effected "changes in corporate control." In these cases, courts recognize that neither the stringent "fairness" standard nor the permissive "business judgment" standard is quite appropriate. In ultimately adopting an intermediate standard — reasonableness in light of some goal — in *Paramount Communications Inc. v. QVC Network, Inc.*,[10] the Delaware Supreme Court willingly inserted courts more readily into the business of substantive review of decisions. Twenty-five years earlier, the Supreme Court had felt constrained to stray from the business judgment rule's strong bias against judicial action in responding to the novel innovation of option compensation.[11]

Courts have eroded the passivity of the business judgment philosophy where they have been called upon to assure the integrity of the voting process. The vote is the true fountainhead of legal power for shareholders. Its importance cannot be easily overstated. Even were there never any contested proxy contests or hostile takeover attempts, it is the possibility of such action, should stock prices drop too low, that serves as a constant discipline on management. The breadth of managerial discretion, however, can permit

an endless and unforeseeable range of actions that may disadvantage shareholders organizing to remove or to defeat an incumbent board. While courts have always acted to protect the vote,[12] in recent years they seem more inclined to do so.[13]

Thus, from the 30,000-foot level, the development of corporation law over the course of this century has entailed two offsetting trends. The first broadly empowers management in a statutory scheme that is almost without constraints. Of course individual entrepreneurs can put such constraints back into charters, but rarely does one find companies going public with such constraints inserted into the charter. I take this as some evidence that there are important efficiency advantages that can be achieved through such open-textured governance. The second aspect of our history is no less important. It is the increased willingness of courts to act under the fiduciary duty rubric to offer public investors some assurance that their investment will not treated opportunistically by management or the board.

There are risks to our welfare posed by this judicial role. I claim for the judicial role a vital place. I think that the ability to contribute to an efficient system of organization law depends importantly upon courts being able and willing to enforce the unstated terms of investors' expectations under the language of fiduciary duty. This ability to enforce reasonable expectations is highly beneficial for two reasons, one of which is rarely mentioned. The first reason is the utilitarian reason that those in control are somewhat less likely to violate the reasonable expectations of investors if they can foresee a judicial accounting. The second reason is not utilitarian: it is expressive. Directors need to know what constitutes right behavior in office if they are to act in accordance with such standards. Corporate directors are, for the most part, morally of the same sort as the rest of us. They prefer to do the right thing, if they know what the right thing is and all other things are equal. Moreover, like the rest of us, they will even prefer to incur some cost to be able to say to themselves (and their families) that they have done the right thing. Directors are, like all of us, fallible and frail in some circumstances, and diverse in the stresses that will cause them to yield to temptation. But the existence of an

authoritative respected voice of the community announcing the proper standards to these men and women (and the potential that that authoritative voice may publicly criticize their behavior) represents an additional and socially worthwhile source of influence on corporate behavior.

Thus, for more reasons than one, courts have played a critical role in making the 20th Century corporation law an efficient law of organization. But in exercising their fiduciary oversight, courts are certainly capable of mischief as well as great good. Particularly in Delaware, where so much responsibility is borne by the judges of the Court of Chancery and the Supreme Court, it is vital that these positions be filled with individuals of talent, dedication and modesty. In few areas of the law are the demands for judicial self-restraint and judicial courage more frequently brought into apparent conflict. Thus, as the category of "intermediate review" cases expands, that expansion must be balanced by a renewed judicial commitment to judicial self-restraint and a resolve to protect principally the fundamental processes that constitute shareholder voice. ◆

FOOTNOTES

1. See, e.g., 8 *Del.C.* §§211,151,141(b) (directors elected by shareholders annually)(all shares vote in cases of default)(directors manage business and affairs of corporation); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988) (directors' action to interfere with vote is presumptively invalid; only compelling justification can sustain such action.)

2. See Black, Bernard S., *Is Corporate Law Trivial: A Political and Economic Analysis*, 84 NW.U.L.Rev. 542 (1990).

3. On the relative importance of the corporate form, see J. Willard Hurst, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAWS OF THE UNITED STATES, 1780-1970 (1970), pp.9, 155-162.

4. *Id.*

5. 72 YALE L.J. 223 (1962).

6. *Id.*

7. 84 NW. U.L. REV. 542 (1990).

8. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985).

9. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

10. 637 A.2d 34 (Del. 1994).

11. See Supreme Court cases cited in *Lewis v. Vogelstein*, 699 A.2d 327 (Del.Ch. 1996).

12. See *Speiser v. Baker*, 525 A.2d 1001 (Del. Ch. 1987).

13. See *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del.Ch. 1988); *Condec Corp. v. Lunkenheimer Co.*, 230 A.2d 769 (Del. Ch. 1967).

FEATURE

Helen M. Richards

PICTURE THE DELAWARE BAR IN THE 21ST CENTURY

It used to be the practice in Delaware — when the bench and bar numbered only a couple of dozen souls — that the photographs of these illustrious few were combined into a single photographic composite. Each member of the bar received a copy suitable for framing. Countless examples hang in law offices and chambers around the state. What is notable about these composites is not just the uniformly dour expressions but the fact that the faces are all those of white men, except for that of Louis L. Redding, Delaware's first African-American lawyer. Since those early years, the collective face of the Delaware Bar has changed significantly. For example, women now comprise nearly 30 percent of the Bar.

The progress of minorities, however, is more difficult to measure. There is no uniform definition of minority, and no statistics concerning the race or ethnicity of lawyers are gathered in Delaware by the Board of Bar Examiners or the Bar Association. For our purposes, minority will be defined as an individual of African, Hispanic, Native American or Asiatic descent. *The Delaware Bar in the Twentieth Century* 721 n. 60-1 (The Delaware State Bar Association 1994), reported that "reviews of the 1990-1991 Pictorial Directory of the Delaware State Bar Association, old group photographs, oral histories and the memories of knowledgeable members" indicated that only 57 minority attorneys were admitted to the Delaware Bar in its first 70 years. Such under-representation should be of concern. Of course, Delaware is not unique in this regard. There are approximately 28,413 black attorneys in this country, compared to a total black population in the United States of 29,930,524 persons, according to the 1990 Census. There are approximately 26,691 Hispanic attorneys within a comparably large United States Hispanic population.

In recent months, even the Supreme Court of the United States has been under fire for its dismal record in providing opportunities for qualified minorities among its select cadre of law clerks. For the 1999-2000 term, among the new class of law clerks, only five out of 35 are minorities — two blacks and three Asian-Americans. Last year's class included only one, an Hispanic. In 1998, three members of Congress urged the justices to participate in "a dialogue with minority bar associations regarding the hiring process." Chief Justice William H. Rehnquist told the delegation that such a dialogue would be "inappropriate." The Court defends its hiring practices by insisting that the process is neutral. Even so, the issue is not principally one of numbers.

While the gathering of statistics is often useful at the outset of a project as a means of measuring progress towards a goal — in this case, diversity in the practice of law — at some point in time, it becomes an end in itself and no longer serves as an accurate measure of progress. If the Delaware Bar is to achieve real diversity in the new millennium, it must strive for equality of treatment, not just equality of numbers.

From that perspective, Delaware, like many other states, has a long way to go. The Delaware Gender Task Force found numerous instances of gender bias in the judiciary and in the profession. One judge had no reservations about commenting on a female attorney's attire during the course of a hearing. Perhaps this is not surprising, considering the unseemly speculation of the media concerning Marcia Clark's hair style and manner of dress during O.J. Simpson's trial or the attention paid to Hillary Clinton's latest haircut. More surprising, however, is the anecdote of a senior partner's question to a female attorney during a job interview as to whether it was her intention to pursue a career in law. The partner explained that, while he did not ask this question of male applicants, he did not want to hire a woman interested in having a family in the near future. Another female attorney was asked in the course of several job interviews about her husband's occupation and whether he approved of her choice of profession and its time demands. Still another female attorney was advised by a senior partner during an interview that she should wear dresses to work because it is a man's world and a woman should use her

looks to her advantage.

Task forces in other states have identified similar instances of institutional bias. In Connecticut, one female attorney reported that some judges repeatedly addressed them by their first names, while addressing male attorneys by their surnames or titles. Another judge opened court by stating: "Good morning, gentlemen." In Texas, one male attorney stated that "[w]omen get away with murder in court as well as everywhere else. Men suffer great discrimination in divorce cases." Another believed that "the so-called 'gender gap' is vastly overblown. If people who enter the arena will concentrate on their job and get the chip off their shoulders, forgetting their sex, they should do fine in today's society." Similarly, another male attorney stated: "This survey is a waste of time and money. Women should grow up and stop whining."

Such anecdotes indicate that bias is alive and well. As one Delaware attorney commented: "Any one of these kinds of experiences is perhaps not all that earth-shattering. But those who dismiss these incidents fail to appreciate the cumulative effect that incidents like these have when they happen on a frequent basis. Not only do such remarks and attitudes get tiresome but they require a considerable expenditure of energy worrying about how you are being perceived. They also tell you that you are seen first as a sexual/social being rather than respected as a professional colleague."

And, of course, the problem is not just one of gender. Consider the story told by one federal judge who described his joy at being appointed to the bench as follows: "I am even more fortunate, however, because of my background. I am an immigrant. I was born in Hong Kong. My mother was a seamstress in a Chinatown garment factory. My father was a cook in Chinese restaurants. My grandfather was a waiter in Chinese restaurants for many, many years. Yet, with this background, I was able to enter the profession." This judge reported that, in an important business case that he decided, attorneys for the losing side filed a motion to disqualify him because one of the litigants on the winning side was of Chinese descent. The implication was that the judge could not have decided the matter impartially merely because he was of the same ethnic background. The judge sanctioned the two lawyers for questioning his impartiality on the basis of ethnicity. His decision was affirmed by the Second Circuit. (*MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 157 F.3d 956 (2d Cir. 1998) (per curiam)). But, for the judge, that affirmation must have been tinged with the taste of ashes.

For Delaware, as for its sister states, the task for the next century is not merely to increase the representation of women and minorities at all levels of the profession, but to assimilate the richness of their various perspectives into the fabric of the Bar. Having different perspectives in the profession will increase the number and quality of ideas in circulation for solving legal problems and for revising "conventional wisdom." In addition, diversity in the bar and bench will enhance both the actual fairness of public proceedings as well as the public's perception of fairness. Trust is the core of the judicial system, and people must believe that the system is fair. But trust is difficult to achieve when there appears to be a systematic exclusion of certain races and ethnicities — the same people who have historically participated disproportionately in the system's punishment mechanisms.

30% of the members of the bar are now women.

By virtue of having a shared life experience, minority, as well as female, members of the bar may be better able to provide insight on the legal profession to female and minority clients. In addition, while we might wish it were not so, clients have a strong interest in hiring an attorney who understands their background, arguments, hopes and aspirations. An attorney is engaged to influence those who may be called upon to decide matters of great importance to the client — matters involving reputation, home, livelihood, freedom and sometimes even life. Advocacy is enhanced when an attorney understands the client's predicament and struggles. As Professor Carrington stated in a recent article: "Given the role that courts play in our polychromatic society . . . it is an important value that there be a significant number of judges and advocates identifiably connected to those of like color whose rights and liabilities must be determined in those courts. If connections of this kind are too rare or too slender, reasonable persons of color are apt to conclude that the system is unable to synthesize their interests as appropriate dimensions of the common public interest that democratic law is obliged to reflect. As a result, judicial decisions are less effective in bringing social peace." Paul D. Carrington, *Diversity!*, 1992 Utah L. Rev. 1105, 1150.

As we look ahead to the year 2000, it is appropriate for the Delaware Bar to reflect on where it has been and where it wants to go. Self-examination can help us see clearly where we are and help us recognize where we should be. Justice Ruth Bader Ginsburg described the benefits of such an inward look to the courts as follows. "Self-examination of the courts' facilities and practices . . . can yield significant gains. First, such projects enhance public understanding that gender equality is an important goal for a Nation concerned with full utilization of the talents of all of its people. Second, self-examination enables an institution to identify, and devise means to eliminate, the harmful effects of gender bias. Third, close attention to the existence of unconscious prejudice can prompt and encourage those who work in the courts to listen to women's voices, and to accord women's proposals the respect customarily accorded ideas advanced by men. And finally, self-inspection heightens appreciation that progress does not occur automatically, but requires a concerted effort to change habitual modes of thinking and acting."

Although Justice Ginsburg was focusing on gender equality, the benefits she identified apply equally to the larger goal of diversity. The Delaware Bar must take a leadership role in this process and stimulate active participation among the various groups that can influence the outcome of the endeavor, including Widener University School of Law, the courts, private law firms, the corporate community, educators and counselors, governmental leaders and policy makers. It will require the concerted efforts of all these groups to bring about true diversity in the profession, where an individual stands out for the quality of his or her professional ability and not for membership in a minority group. Just think what the Delaware Bar will look like then! ◆

FEATURE

Irving Morris

THE HAIR TONIC BOND (1958)

INTRODUCTION

The following is drawn from a chapter in a book our colleague, Irving Morris, is writing. While he was still in law school, three young men were arrested, tried, convicted and sentenced to life in prison for the crime of rape. At their trial in February 1948, a high ranking police officer in charge of the investigation gave perjured testimony extremely damaging to the defendants' credibility. Outraged at the unfairness of a conviction obtained under these circumstances, Mr. Morris in January 1953 undertook the representation of Curran, Jones and Maguire. He pursued justice for nearly six years and in six different courts until finally vindicating a principle now the law of the land:

> ...a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment...

Napue v. Illinois, 360 U.S. 264, 269 (1959), citing Curran v. Delaware, the case of which Mr. Morris writes. That principle, once unanimously rejected by the Courts of Delaware, now stands as one of the most important advances in the criminal jurisprudence of this State. – William E. Wiggin

Judge Caleb M. Wright's ruling on August 15, 1957, was my first victory in over four and a half years of litigation in The Rape Case. Curran v. State of Delaware, D.Del., 154 F.Supp. 27 (1957). Subsequently, in an editorial on February 26, 1959, at the time the State abandoned further prosecution of my clients, Francis J. Curran, Ira F. Jones, Jr., and Francis J. Maguire, The Journal Every Evening called The Rape Case "One of Delaware's most famous criminal cases... ." When Judge Wright ruled (less than two months before he became Chief Judge on October 8, 1957, upon Chief Judge Paul Leahy's retirement on October 7, 1957), my clients had served almost ten years in jail from their arrest in October 1947. The Rape Case trial in February 1948 resulted in their convictions and incarceration in the New Castle County Workhouse at Price's Corner to serve mandatory life sentences. I had acquired my clients officially on January 1, 1953, when I left my clerkship with Chief Judge Leahy to form a partnership with my mentor and preceptor, Philip Cohen. I brought to the fledgling partnership only a few clients. I did not realize then the profound effect the case of Curran, Jones and Maguire was to have upon my practice and, indeed, the rest of my life.

Judge Wright had now found as a fact, as had six State judges, that Detective John Rodenhiser had not told the truth at trial. But the State judges, with knowledge of the police perjury they referred to as "false police testimony," had denied relief to them: Charles S. Richards, Charles L. Terry and James B. Carey of the Superior Court (each of whom had also served as a judge in the now defunct Court of Oyer and Terminer at the trial in February 1948, that court having been replaced by the Superior Court by constitutional amendment) and Clarence A. Southerland, Daniel F. Wolcott and Howard M. Bramhall of the Supreme Court. *State v. Curran*, Del.Super., 116 A.2d 782 (1955), *affirmed, Curran v. State*, Del.Supr., 122 A.2d 126, cert. denied, Curran v. State of Delaware, 352 U.S. 913 (1956). With President Judge Richards as the exception, five of

the six judges condemned Detective Rodenhiser in unmistakable terms. But Judge Wright had gone further. For him it was not enough to condemn the perjury and ignore its effect on the credibility of my clients at their trial as the State judges had done. Judge Wright, a fairly new Judge of the United States District Court for the District of Delaware, having taken the oath of office on August 4, 1955, courageously held as a matter of law the police perjury had deprived my clients of their constitutional right to a fair trial, as I had argued from the time I first entered the case in 1953.

With Judge Wright's decision in hand, I gave thought to seeking the immediate freedom of my clients by applying for their release on the posting of bail. I decided not to do so because of my concern that tactically it would not be a good move. I did not think Judge Wright would order their release on bail. After all, he had not found them innocent; he had only held their trial was not a fair one. His opinion and order could have ordered their release, since his ruling erased their convictions obtained in a trial he had found constitutionally unfair. But even Judge Wright balked at enforcing his ruling in full. Instead of ordering the immediate release of my clients from their illegal custody in keeping with the literal meaning of the Latin "habeas corpus" (i.e., "you may have the body"), he concluded to the contrary:

> The writ should issue. The issuance of the writ, however, does not preclude a new trial or the taking of proper steps to hold the defendants in custody pending such a new trial.

Curran v. State of Delaware, 154 F.Supp. at 32.

I knew almost immediately the State would appeal to the Court of Appeals for the Third Circuit sitting in Philadelphia. I thought the fact my clients were still in custody despite the State's violation of their rights would itself have a helpful effect upon the thinking of the appellate judges as they considered whether or not to affirm Chief Judge Wright. Moreover, I decided against filing our own appeal to the Third Circuit claiming Chief Judge Wright had committed error in failing to grant the immediate release of my clients. My reasoning was the Circuit Court judges would regard any such appeal without merit, given Judge Wright's conclusion recognizing the State's right to continue to hold my clients in custody pending a new trial or, at least, a decision not to retry them. And, worse, the appellate judges might think I was trying to put our victory before Judge Wright in the face of the State judges, a perception, however much without foundation, might cause the appellate judges "to circle the wagons" and defend the State judges by reversing Chief Judge Wright.

Even though as a practical matter I thought we would not succeed either in seeking immediate release on bail or in taking an appeal, my decision in 1957 not to seek my clients' release weighed heavily upon me. If I did nothing, they would continue to remain in custody. Obviously, it is one thing to dwell upon litigation tactics and quite another piece of goods to do the time in custody. From my experience as a prisoner of war in World War II, I knew what it meant to be in custody and, indeed, in jail. To this day, I am not certain I made the right decision even though Bud, Sonny and Reds supported it. At the time, I think they would have agreed to anything I urged given my successful effort for them, the first in almost a decade.

On the State's appeal the Third Circuit on September 29, 1958, affirmed Chief Judge Wright's opinion, holding the State had violated my clients' rights at their trial. *Curran v. State of Delaware*, 3d Cir., 259 F.2d 797 (1958). Unlike my hesitancy in 1957, I no longer had any doubt I should make the effort to secure my clients' release on bail. The 1958 factual setting was a far cry from that in 1957 intimidating me from acting. I now had two Federal courts with four judges holding the State had violated the constitutional rights of my clients. I would no longer permit my litigation tactics to govern their release. If my clients were to remain in jail, a court would have to deny them their freedom this time. I prepared a petition to set bail for my clients' release. On October 6, 1958, I served my petition on the State and filed it with the Third Circuit.

The issue before the Third Circuit on my motion for bail was whether the change on April 2, 1958, doing away with capital punishment in Delaware, was applicable where the alleged crime had taken place when Delaware punished a rape conviction with capital punishment, absent a jury's recommendation of mercy and the trial court's acceptance of that recommendation. At the time of the trial in 1948, bail was not available in Delaware to a person charged with a capital offense. Over the strenuous opposition of Attorney General Joseph Donald Craven in briefs and after oral argument, the Third Circuit on October 8, 1958, late in the day, granted the petition and entered its order:

Present: GOODRICH, McLAUGHLIN and STALEY, Circuit Judges.

> Upon consideration of the motion of Irving Morris, attorney for the appellees in the above entitled case, and after hearing,
>
> It is O R D E R E D that Francis J. Curran, Francis J. Maguire and Ira F. Jones, Jr., be admitted to bail in the sum of five thousand dollars ($5,000.00) each, each bond to be conditioned that the appellee will personally appear to answer and abide by the judgment in any further proceedings which may be taken from the judgment of this Court entered September 29, 1958 affirming the order of the United States District Court for the District of Delaware.
>
> It is Further O R D E R E D that the bail is to be approved by the clerk of the United States District Court for the District of Delaware.
>
> By the Court,
> Goodrich
> October 8, 1958 Circuit Judge

I promptly reported the good news to the families.

The families and I immediately set about the business of securing the $5,000 bail for each of my clients. I was determined to secure their release from prison by October 9, 1957, so that they would not spend yet another night of unlawful confinement. Arranging for the bail occupied me well past midnight and into the early morning hours of October 9.

There did not seem to me to be any problem in the case of Reds Maguire. I spoke to his parents and they assured me among family members and friends there was sufficient equity in real estate to cover the $5,000. Sonny Jones' sister, Jayne Stigliano, told me she would have no problem, since her husband, Carmen, was a friend of Frank L. Ferschke. Ferschke and his brother, William, owned all the shares of William J. Ferschke, Inc., a private company their

father had founded, which made hair tonic using, of course, a secret formula. As a favor to Carmen, Jayne thought Ferschke would readily help with Sonny's bail. She promptly reported he had agreed to do so.

Bail for Bud Curran was an entirely different matter. Francis and Nellie Curran had nine daughters and another son, the youngest child. They did not own their own home. I decided to raise with Jayne Stigliano her willingness to go to bat for Bud Curran and his family with Ferschke. When I spoke to Jayne, she raised no objection. She said she would speak to Carmen who, in turn, would speak to Ferschke and, as soon as she had an answer, she would call me. I told her I would wait in my office for her call. It was past midnight when I heard from her. Ferschke was prepared to help the Currans but, since he did not know Bud Curran, Jayne told me he wanted me to speak to his lawyer, A. James Gallo, and secure his approval.

Jim Gallo had the largest divorce practice in Delaware. The bulk of the balance of his practice was trial work in the representation of defendants in criminal cases. He was known for his skill in plea bargaining. I then began the search to find Jim Gallo at that hour of the night. It took several telephone calls before I found him playing cards in what I learned was his regular game at the Hotel Olivere at 7th and Shipley Streets. Jim interrupted to talk to me. Given his experience, I did not have to explain much to Jim. His question to me was whether or not I could assure him Bud Curran would stay in the community and appear when called. I had no hesitation in so assuring Jim. With my word to him, Jim said he would tell Ferschke to help Bud Curran as well as Sonny Jones. (So many matters went forward upon a simple reliance on one's word in those days. Perhaps with increasing capability to reduce agreements almost immediately to writing with the use of word processing and transmitting the agreements by facsimile or modem, it is inevitable "one's word" has given way to "one's writing." I do not hold the view people are less reliable today. Until I learn otherwise, I am still willing to rely upon the word of most people with whom I deal.) My elation was great. I called the Currans. I looked forward to the release of all three men from custody later that morning as soon as I could make the arrangements.

Everything was in order. Or so I thought. As soon as I could on the morning of October 9, acting through the Attorney General's office, I alerted the appropriate people at the New Castle County Workhouse to have Curran, Jones and Maguire in the office of Edward G. Pollard, the Clerk of the District Court, by 9:00 a.m. The Maguires assembled the people who were going to give bonds with the deeds to their houses at the appointed time. Through the Stiglianos, I had arranged for Ferschke to bring his stock certificates to the Clerk's office to serve as the collateral for the bonds for Sonny Jones and Bud Curran. I then called and spoke to Ed Pollard to report my success.

Ed knew more about the Federal Rules of Procedure than anyone I have ever met, with the possible exception of J. W. Moore, my law school professor, the author of Moore's Federal Practice.

Ed Pollard was a most unusual human being. I had first met him in February 1951 when I went to work for Chief Judge Leahy as his law clerk. By that time, Ed had served almost nine years as Clerk of the District Court at Judge Leahy's appointment and pleasure. As a young man, Ed, from his own description, had been a wild fellow. His family came from Virginia and Ed still retained an easy Southern drawl in his speech. Without completing high school, he had joined the Army. According to Ed's account of his military experiences, peacetime service in our Army seemed to consist of one barroom brawl after another. A Sunday at the beach in Wildwood, New Jersey, with Ed and his family bore witness to the truth of his stories. Ed's body was covered with jagged scar after jagged scar. The sharp edges of broken beer bottles do not carve with the precision of a surgeon's scalpel. Ed had married a Wilmington girl, Marie Casey, and converted to her Catholic religion. He became active in Democratic politics resulting in his serving and holding the title of Administrative Assistant to the parsimonious Senator James M. Tunnell, Sr., until the Judge asked Ed to assume the position of Clerk of the District Court upon the Judge's swearing in as the sole judge of the United States District Court in Delaware on Ground Hog Day, February 2, 1942. Ed told me the only time Senator Tunnell bought him a meal was at lunch in the publicly supported Senate cafeteria on Ed's last day with the Senator. To pay for both meals the Senator extracted with some deliberation and, Ed thought, some reluctance, coins from a small change purse he always carried.

After I began my service as the Judge's law clerk, I realized in short order Ed knew more about the Federal Rules of Procedure, both civil and criminal, than anyone I had ever met with the possible exception of J. W. Moore, my law school professor and the author and editor of Moore's Federal Practice, recognized as the authoritative text on the Federal Rules of Civil Procedure. Ed was entirely self-taught. He was also one of the most fiercely loyal people I have ever had the delight to know. A lawyer who sought to share with Ed his criticism of one of the Judge's decisions ran into a firestorm. An unhappy lawyer who did so never did it twice.

It was with more than a fair degree of pride I reported to Ed Pollard in detail my accomplishment in securing the bail amount for each of my clients. I told him the collateral I had arranged to post consisted of the equity value of real estate members of the Maguire family and friends owned and, in the case of Jones and Curran, I had assurances Frank Ferschke would come by and deposit with Ed his valuable, unencumbered shares in the hair tonic company. Thus, I told Ed, everything was in order for the release of my clients. Ed told me that was great and he would expect me in a little while. Within a few minutes, Ed called

back. He first observed that I must have checked it out and found everything I was doing was fine, implying I was undoubtedly right and it was he who had made a mistake. But he went on to say he had just looked at the statute covering the posting of bail and it appeared to him only cash or government securities were acceptable as collateral.

My immediate response to Ed was absolute silence. I had been so taken with my success in the Third Circuit I never thought to look for a statute controlling the bail consideration. Knowing my "collateral" did not meet the statutory requirement, Ed broke the embarrassing silence by saying gently, "Of course, I could be wrong." Ed's reputation at the Bar was legendary for being able to correct and educate a lawyer while at the same time making the lawyer believe he and not Ed was the source of the knowledge. It was quite clear to me Curran, Jones and Maguire would not "hit the bricks" that day short of a minor miracle. The minor miracle was about to happen.

It was not news to Ed Pollard when I told him Curran, Jones and Maguire and their respective families had neither cash nor government securities to post as bail. I did not have to tell Ed how heartbreaking it would be to my clients and their families to come so close to freedom after almost eleven years in custody only to be turned aside because of the lack of money. Neither he nor I mentioned my embarrassment in having to tell my clients and their families the bail consideration, for which they had arranged with my approval and encouragement, did not meet the requirements of a statute I had not even thought to look for, let alone to consult.

Ed then told me what we were going to do. Since the United States Court of Appeals for the Third Circuit in its august wisdom in its order granting bail had entrusted to him as "the Clerk of the United States District Court for the District of Delaware" the responsibility for approving the bail for the future appearance of Curran, Jones and Maguire, he considered it well within his discretion to determine what was or was not acceptable as bail for his approval. He ended our conversation by telling me he expected to see my clients and me at the appointed time, then but a few minutes away.

I gathered my papers and walked the block from the small office I shared with Philip Cohen in the North American Building at 10th and Market Streets to the Post Office Building housing the United States District Court on the second floor at 11th and Market Streets. In the Clerk's office, I found the Currans, with Bud's aunt and uncle, Mr. and Mrs. Frank X. McHugh, who had agreed unbeknownst to me to put up their house with their equity in it as collateral for Bud's bond, making unnecessary reliance upon the Ferschke stock. Sonny Jones' sisters, Virginia McKinley and Jayne Stigliano, Jayne's husband Carmen, and Frank L. Ferschke were there. The Maguires, Red's brother, Edward J. Maguire, who put up bail for Reds, along with Joseph V. Segner, a friend of Red's father, who would join with young Ed Maguire to provide the collateral for Red's bond, completed the group.

From the family members, I learned my clients were already in United States Marshal Herbert Barnes' custody (he was a former Superintendent of the State Police) in the lockup at the end of the corridor on the second floor where guards from the New Castle County Workhouse had brought them to await the proceedings before Ed Pollard and their expected release. I met with Ed in his office. On Ed's desk were the various deeds to the houses Ed had collected even before I arrived so he could complete the paper work in his customary efficient style. I witnessed Ferschke's signature to the bond Ed had prepared and Ferschke executed assigning to Ed his shares in the hair tonic company to bind Sonny Jones' appearance:

> I hereby assign, set over and transfer to Edward G. Pollard, Clerk United States District Court for the District of Delaware, 250 shares of the capital stock of William J. Ferschke, Inc. a corporation of the State of Delaware, represented by the attached certificate, to be held by the said Edward G. Pollard, as Clerk aforesaid, subject to the conditions of the Bond which I signed before the said Edward G. Pollard, Clerk as aforesaid, on October 9, 1958, in the matter of Francis J. Curran, et al. v. State of Delaware, No. 12,397, United States Court of Appeals for the Third Circuit for Ira F. Jones, Jr.
>
> Dated: October 9, 1958.
> In the presence of:
> /s/ Frank L. Ferschke (SEAL)
> /s/ Irving Morris

Even before my arrival, Ed had opened to a new page in the Miscellaneous Docket and made the entry sufficient to reflect the action he was taking. He then called the Marshal's Office and instructed the Marshal to bring Curran, Jones and Maguire to his office so they could sign the papers promising to appear upon command of the Court. When they arrived, Ed explained to my clients the procedure, including the meaning of the promise they were about to make by signing the papers he had prepared. Failure to appear upon the Court's command would result in the forfeiture of the bail with the catastrophic effect upon the families and friends who trusted them. Ed was fastidious in explaining obligations and rights.

As he waited his turn to sign the papers, Reds Maguire fished in his pocket for a pack of cigarettes and before he lighted the cigarette he asked a guard if it was alright for him to smoke. The guard answered: "You do as you please. You're on your own now." It obviously was going to take some time for Curran, Jones and Maguire to acclimate themselves to life outside of jail free of its compulsory rules and regulations and constant supervision.

Within a few minutes after they had signed their names, my clients went from Ed's office to the outer office of the Clerk where their families awaited them. It had to be an emotional time for all of them. I did not witness it, since I thought I should leave them to embrace each other without my presence. I did not want to intrude upon them. I left Ed's office by his corridor door and walked back to my office.

On the day of their release from custody, Curran, Jones and Maguire had each spent twenty days shy of eleven years behind bars for a crime they denied under oath ever having committed and the State had never proved at a fair trial.

My clients were not out of the woods yet. Ahead was the State's filing of a petition to the United States Supreme Court for the issuance of a writ of certiorari to review the action of the Third Circuit as Attorney General Craven had promised. Even if the State did not file for certiorari or was unsuccessful with its petition for certiorari, the State still retained the right to retry them on the rape charge. My clients' promise, secured by the bail, to respond to the Federal court's command to appear was not an idle one. In *State of Delaware v. Theodric Thompson*, Cr. A. 107 - 1957 (unreported), a jury had convicted Thompson of murder at his 1957 trial but did not recommend

mercy. Nonetheless, the Superior Court at Thompson's sentencing on April 15, 1958, applied the new statute abolishing capital punishment retroactively and sentenced Thompson to life imprisonment. The best result I could achieve for my clients were we to be successful would only reverse their convictions and sentences but the State could still retry them. If *Thompson* were followed as I expected it would be, my clients would no longer face the death penalty upon conviction at a retrial. But they would face a return to prison and their life terms. Throughout my representation of them, however, neither Curran, nor Jones, nor Maguire ever flinched from pursuing a new trial even when they knew full well prior to Thompson the death penalty confronted them upon subsequent conviction.

But now with their bail for their appearances posted, my clients were back with their families beginning the task of rebuilding their lives while the possibility of continued prosecution hung over their heads.

Ed Pollard, of course, dutifully reported on October 9, 1958 to Ida Creskoff, the Clerk of the Third Circuit Court of Appeals, that Curran, Jones and Maguire had come before him "with their sureties and I approved the bail" in a letter that was not as detailed as it might otherwise have been:

Ida O. Creskoff, Clerk
U. S. Court of Appeals
2046 U. S. Court House
Ninth & Chestnut Streets
Philadelphia 7, Pennsylvania

Re: Curran, et al. v. State of Delaware
Habeas Corpus No. 12
Circuit Court No. 12,397

Dear Mrs. Creskoff:

In accordance with the Circuit Court's order of October 8, 1958, the above defendants were brought before me today with their sureties and I approved the bail. I understand from Mr. Morris that you stated you had no facilities for keeping securities, etc. Accordingly, I assume you would want me to retain the bail bonds and any securities that were pledged. If I am incorrect in this assumption and you should want the bonds sent to you, I would appreciate your so informing me.

I acted on an uncertified order. If you think a certified copy of the order is necessary, I would appreci-

ate your sending me one.

Yours truly,
/s/ Edward G. Pollard
Clerk

EGP:RMP
cc: Irving Morris, Esq.
Richard J. Baker, Esq.,
Deputy Attorney General

But then the Third Circuit's order did not request detail. The Court left the matter to Ed's good judgment.

I knew I had let Ed down by not checking the statute. A good, thorough lawyer would never have done what I did and assume anything of value would qualify as bail to secure an appearance in court when called. Ed knew, as well as I did, there was no way, even if I had read the statute, that I could have done anything to secure the immediate release of Curran, Jones and Maguire given the unequivocal language of the statute. Cash to meet the required $15,000 total bail was beyond the collective means of Curran, Jones and Maguire and their families. Neither my clients nor their families knew about government bonds (except, of course, the war bonds of World War II). Surely, I could not have met my goal to secure the release of my clients that day. Under no circumstances, of course, would I have suggested to Ed Pollard that he accept as bail property outside of the statutory language defining permissible bail in 1958. Ed did not say anything to my clients or their families of my failure to know the law and, worse, my failure to take the few minutes to do the research to learn what it was. So far as I know Ed never told anyone how he saved the day for me.

It was not until the Bail Reform Act of 1966 that Congress led by Senator Sam Ervin struck down "the chief evil of the old bail system [with its] automatic reliance on monetary bail with the result that indigent defendants remained in custody while their wealthier counterparts were set free." See *Allen v. United States*, D.C.Ct.App., 386 F.2d 634, 637 (1967). As in so many other areas of the law, Ed Pollard was but a little bit ahead of his time in accepting the hair tonic stock as part of the consideration for the bail bonds enabling all of my clients "to hit the bricks" on October 9, 1958. ◆

continued from page 32

6. A University of Delaware graduate student in medieval studies, when asked to write a thesis about the "guild system," turns out a 60-page history of the Delaware corporate bar.

7. After almost 40 years of whining and bellyaching by its members, the DSBA finally abolishes mandatory CLE. As a result, July 31 loses all significance for Delaware lawyers, with the possible exception of those whose monthly beach rentals expire on that date. Ecstatic lawyers dance in the streets, burning their affidavits of compliance in celebration.

8. Due to an influx of retirees, there is a boom in "elder law" in Sussex County, and New Castle County law offices rush to open branches there. Georgetown and Rehoboth Beach run out of office space altogether. Enterprising residents rake in substantial profits by renting out their basements and grain silos at a premium.

9. Kent County fends off a hostile takeover bid by its northern and southern neighbors. The Levy Court triumphantly credits its novel "Race Weekend" defense.

10. After years of reflection, somebody finally realizes that Delaware Republicans and Delaware Democrats are actually clones of each other, and the parties agree to merge, with the predictable ripple effects throughout the State's constitutional, political and judicial systems. In revenge, Jesse Ventura and the Reform Party declare that they will not campaign in Delaware in 2028. Nobody cares.

11. Some things never change: Delaware still loves its incumbents. Joe Biden, Bill Roth, Ruth Ann Minner, Tom Carper, Mike Castle and Tubby Raymond all continue to hold statewide office.

12. In response to an announcement that the number of licensed attorneys in Delaware has passed 5,000 for the first time, the Board of Bar Examiners announces that, effective that year, a score of 90% will be required to pass the bar examination, and repeat attempts will no longer be permitted for unsuccessful candidates. The "pass rate" drops to 10%. Antilawyer forces throughout the State are jubilant.

13. Delaware's last piece of farmland is sold off to a developer, and the State's zoning and land use practices disappear.

14. The new Justice Center is finally completed and occupied. Immediately, the tenants complain about the lack of space.

Now, what do you all think? ◆

Some Highlights of the Past Century

1897: Charles B. Lore became first Chief Justice of Delaware under 1897 Constitution • Delaware Constitution substantially revised; groundwork laid for modern corporation law

1899: First Delawarean (George Gray) appointed to new Third Circuit Court of Appeals • Arthur W. Spruance appointed as 1st referee in bankruptcy • General Corporation Law enacted

1901: Delaware State Bar Association (DSBA) formed • Delaware first elected its attorney general (Herbert H. Ward)

1906: Victor B. Woolley published *Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware*

1909: James Pennewill became Chief Justice of Delaware • Charles Minot Curtis became chancellor of Delaware

1912: First Jewish lawyer (Aaron Finger) admitted to Delaware bar

1913: John Paul Laffey became first general counsel to E.I. du Pont de Nemours & Company

1914: Victor B. Woolley appointed to Third Circuit Court of Appeals

1919: Hugh M. Morris appointed to United States District Court for the District of Delaware

1920: Zane's *Story of the Law* published

1921: Josiah O. Wolcott became Chancellor of Delaware

1923: Delaware Constitution amended to prohibit disqualification from the practice of law on the basis of gender • First 2 women (Evangelyn Barsky and Sybil Ursula Ward) admitted to Delaware bar • First book on Delaware corporation law (*Delaware Corporations and Receiverships* by Josiah Marvel) published

1929: First person of color (Louis L. Redding) admitted to Delaware bar

1931: Supreme Court assumed responsibility for bar admissions and appointed first statewide Board of Bar Examiners

1933: Daniel J. Layton became Chief Justice of Delaware

1937: John Biggs, Jr. appointed to Third Circuit Court of Appeals

1938: William Watson Harrington became Chancellor of Delaware • Charles L. Terry, Jr. appointed to Superior Court

1939: George Burton Pearson, Jr. became first Vice Chancellor of Delaware

1941: Paul C. Leahy appointed to United States District Court for the District of Delaware

1945: Charles S. Richards became Chief Justice of Delaware • Legislature created the Family Court for New Castle County

1946: Legal Aid Society of Delaware incorporated • Collins J. Seitz appointed Vice Chancellor • Richard S. Rodney appointed to United States District Court for the District of Delaware

1947: Delaware Superior Court adopted new Rules of Civil Procedure modeled on the Federal Rules

1948: Elbert N. Carvel elected Governor of Delaware • Alexis I. duPont Bayard elected Lieutenant Governor of Delaware

1949: First person of color (Louis L. Redding) allowed to join DSBA

1950: Vice Chancellor Seitz orders desegregation of University of Delaware (*Parker v. University of Delaware*) • Daniel F. Wolcott became Chancellor of Delaware • Louis Redding filed first of public schools desegregation law suits • H. Albert Young became attorney general

1951: Delaware became the last state in the Union to form a separate Supreme Court • Chief Justice Clarence A. Southerland became first Chief Justice of separate Delaware Supreme Court • Collins J. Seitz appointed Chancellor of Delaware

1952: Chancellor Seitz's landmark decision in *Belton v. Gebhart* integrated public schools • J. Caleb Boggs elected Governor of Delaware

1954: Chancellor Seitz's decision in *Belton v. Gebhart* affirmed by U.S. Supreme Court • Caleb M. Wright appointed to United States District Court for District of Delaware

1955: Family Court of New Castle County and Family Court for Kent and Sussex Counties became state courts

1956: Caleb R. Layton, III, appointed to United States District Court for the District of Delaware

1957: Edwin D. Steel, Jr. appointed to United States District Court for the District of Delaware

1958: John J. Williams elected to United States Senate

1960: J. Caleb Boggs elected to United States Senate • Charles L. Terry, Jr. appointed to Delaware Supreme Court

1961: First minority judge appointed in State (Sidney Clark, Sr., to the Wilmington Municipal Court)

1963: Charles L. Terry, Jr. appointed Chief Justice of Delaware Supreme Court • Delaware Chapter of Federal Bar Association formed • First Delaware firm to open satellite office (Cooch & Taylor in Newark)

1964: Charles L. Terry, Jr. elected Governor of Delaware • The Office of the Public Defender created by General Assembly • Daniel F. Wolcott became Chief Justice of Delaware Supreme Court

1965: Justice of Peace Courts brought into state court system

1966: Collins J. Seitz appointed to Third Circuit Court of Appeals • William V. Roth, Jr., elected to United States House of Representatives • William Duffy appointed Chancellor of Delaware

1967: Delaware General Corporation Law substantially revised

1968: Clients' Security Trust Fund, predecessor of the current Lawyers' Fund for Client Protection, established by the Delaware Supreme Court • James L. Latchum appointed to United States District Court for the District of Delaware

1969: Sussex County Courthouse expansion completed

1970: Orphans' Court abolished • The Legal Aid Society and Community Law Service merged and became Community Legal Aid Society, Inc. • Family Court of the State of Delaware for New Castle County and Family Court of the State of Delaware for Kent and Sussex Counties merged into the Family Court for the State of Delaware

1972: *The Delaware Corporation Law* by Ernest Folk published • Joseph R. Biden, Jr., elected to United States Senate

1973: First woman (Jane Roth) made partner in a major Delaware law firm • Judge Murray Schwartz issued school busing order • Multistate bar exam first administered in Delaware • Daniel L. Herrmann became Chief Justice of Delaware Supreme Court • William Duffy appointed to Delaware Supreme Court • William T. Quillen appointed Chancellor of Delaware • Grover C. Brown appointed Vice Chancellor and later served as Chancellor • Three Courts of Common Pleas merged into one statewide Court of Common Pleas

1974: First woman (Helen S. Balick) appointed Bankruptcy Judge for District of Delaware

1975: Jurisdiction over divorce, annulment and ancillary matters transferred from Superior Court to Family Court

1976: First Hispanic (Aida Waserstein, Cuban-American) admitted to bar • Delaware Trial Lawyers Association formally created • William Marvel appointed Chancellor of Delaware • Melson formula adopted as official standard for calculating child support obligations under the name Delaware Child Support Formula • Louis L. Redding City/County Building completed

1977: First African-American woman (Paulette Sullivan Moore) admitted to bar • First African-American to hold cabinet position (James H. Gilliam, Jr. — Secretary of the Department of Community Affairs and Economic Development) • Women and the Law Section of DSBA formed • First master appointed to Family Court

1978: First out of state law firm to open Delaware office (Tomar, Simonoff, Adourian and O'Brien) • First legal clinic opened in Delaware (The Legal Clinic of Cawley, Schmidt and Sharrow)

1980: Adoption and termination-of-parental-rights proceedings transferred from Superior Court to Family Court

1981: Delaware Bar Foundation formed

1982: First African-American (Darrell J. Minott) to clerk for Delaware Supreme Court • First issue of *Delaware Lawyer* published • Delaware Volunteer Legal Services, Inc., began operations

1983: Delaware IOLTA (Interest on Lawyers' Trust Accounts) program began

1984: First Native American (Kenneth S. Clark, Jr.) admitted to bar • First woman (Carolyn Berger) appointed to Court of Chancery • Superior Court Rule 16.1, mandating non-binding arbitration, adopted

1985: Richard S. Rodney Inn of Court began • Andrew D. Christie became Chief Justice of Delaware Supreme Court • William T. Allen appointed Chancellor of Delaware • Jack B. Jacobs appointed Vice Chancellor • Walter K. Stapleton appointed to Third Circuit Court of Appeals • First woman (Jane R. Roth) appointed to United States District Court for the District of Delaware

1986: Supreme Court adopted mandatory continuing legal education rules

1987: First woman (Susan C. Del Pesco) appointed President of DSBA • Joseph R. Biden, Jr., became chair of U.S. Senate Judiciary Committee

1988: Susan C. Del Pesco became first woman appointed to Superior Court

1989: William B. Chandler, III appointed Vice Chancellor • First televised Delaware civil case: oral argument in *Paramount v. Time Warner*

1990: First African-American (Charles H. Toliver, IV) appointed to Superior Court • First African-American elected to row office position (Paulette Sullivan Moore — New Castle County Recorder of Deeds)

1991: Terry-Carey Inn of Court formed • Jane R. Roth appointed to Third Circuit Court of Appeals • Sue L. Robinson appointed to United States District Court for the District of Delaware

1992: First African-American woman (Haile L. Alford) appointed to Superior Court • Michael N. Castle elected to United States House of Representatives • First woman (Donna Lee Harpster Williams) elected Delaware Insurance Commissioner • First person executed in Delaware since 1946 (Stephen Pennell) • E. Norman Veasey appointed Chief Justice of Delaware Supreme Court • Vincent J. Poppiti appointed Chief Judge of Family Court • Wilmington courthouse renamed Daniel L. Herrmann Courthouse • First foreign-born person (Roderick R. McKelvie) appointed to United States District Court for the District of Delaware

1993: First woman magistrate (Patricia W. Griffin) appointed to Justice of Peace Court • Peter J. Walsh appointed Bankruptcy Judge

1994: First woman (Carolyn Berger) appointed to Delaware Supreme Court

1998: First African-American (Gregory M. Sleet) appointed to United States District Court for the District of Delaware

1999: Ground is broken for the new New Castle County Courthouse in Wilmington

IN THE YEAR 2025: A "SNEAK PREVIEW" OF THE FIRST STATE AND ITS LAWYERS

Vernon R. Proctor

About 30 years ago, some obscure rock group whose name I can't remember churned out a song called "In the Year 2525." The first three lines of that bleak ballad went as follows:

In the year 2525
If man is still alive
If woman can survive...

The banal lyrics from that point forward were, as I recall, progressively more pessimistic about the future of our species. Each new verse "skipped a millennium" to describe some new and threatening event in human technology or biology. Hardly the type of song that was likely to inspire confidence in a teenager who was about to be uprooted from a comfortable Philadelphia suburb into the wilds of Houston, Texas, with its shopping malls, crazy accents, Friday night football and bouffant hairdos.

Now, a generation later, I have been inspired to "stargaze" and to predict how the Delaware State Bar Association and its manifold components — court systems, law firms, attorneys and various hangers-on — might look in the year 2025. Having ruminated carefully on the matter over breakfast and coffee, I offer the following intrepid predictions. My editors told me that everything was fair game except sitting judges and dead relatives. I will take the liberty of speaking in the present tense.

1. In 2025, the ranks of the DSBA are more than 50% female. The result of this development is greater efficiency, enhanced collegiality, and a more sophisticated approach to complex legal issues. In short, a better world for all concerned, except for a few troglodytes who don't count for much.

2. Faced with a looming financial crisis, the DSBA makes a mint with its "down with civility" T-shirts. A two-word variation on this theme is marketed successfully in the 700 level of Veterans Stadium at Eagles games.

3. For the first time, a majority of the members of each Delaware constitutional court are alumni of a single firm. In decorous celebration, that firm's initials are cross-stitched onto the hem of each judge's robe.

4. While Delaware's unique judicial selection process survives unscathed, the nominations for individual judges and justices become increasingly competitive. Successful candidates are required to win a debate on talk radio.

5. Despite relentless poaching by Philadelphia firms anxious to "grow" their satellite offices, the state's top ten "native" law firms thrive and prosper, earning record profits in the traditionally strong fields of business law, litigation, bankruptcy and intellectual property. One well-traveled attorney sets a local record by hooking up with his tenth Philadelphia law firm in as many years. "Just one more sticker on the briefcase, so far as I'm concerned," he cracks. "And one more rollover on the 401K."

Continued on page 30

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