



# THE BULLETIN



*Justice Stevens with  
former law clerks  
Kathryn Watts and  
Lawrence Rosenthal*

## POWELL LECTURE: JUSTICE STEVENS REFLECTS ON YEARS WITH FRIEND

**College President Tongue Introduces Cubs Aficionado  
and Legal Scholar, Justice John Paul Stevens**

One of the initial privileges of his new College presidency found Thomas H. Tongue taking the podium to welcome and introduce retired United States Supreme Court Associate Justice  
continued p7 >>

## THE BULLETIN

Chancellor-Founder  
Hon. Emil Gumpert  
(1895-1982)

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# FROM THE EDITORIAL BOARD

This issue, reporting the College's Annual Meeting at La Quinta, California, includes the induction of United States Supreme Court Associate Justice Elena Kagan as an Honorary Fellow and a fireside chat among retired Associate Justice John Paul Stevens and two of his former law clerks, following the Justice's delivery of the Lewis F. Powell, Jr. Lecture. Other speakers' subjects ranged from those focused principally on law — the exoneration of accused criminals through the use of DNA evidence, ongoing difficulties in applying the rule of law in the face of widespread military engagements and neuroscience and the law — to broader subjects, such as lessons from the Madoff scandal, civility in public discourse, the role of symbolism in our democratic court system and Pixar animation in the film world.

One unusually engaging presentation at La Quinta was the first-person story of a young lawyer who recovered five major paintings confiscated in the 1930s from a Jewish family in Austria in litigation that took him all the way to the United States Supreme Court.

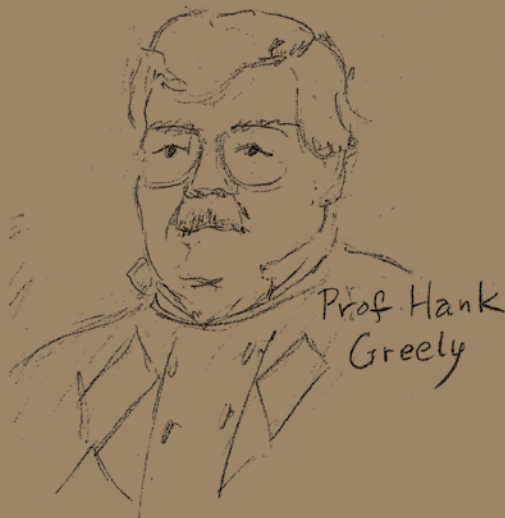
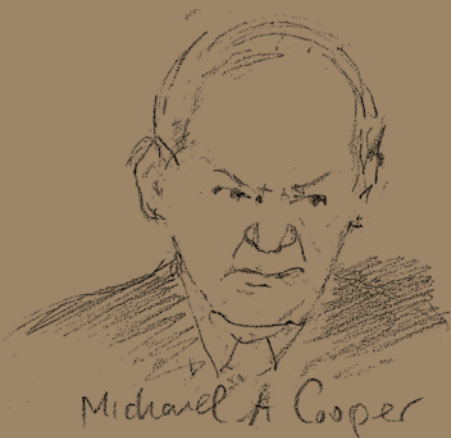
We hope you find this review of our most-recent Annual Meeting to be interesting.

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# 61st ANNUAL MEETING HONORS JUSTICES

The La Quinta Resort & Club was the warm-weather, Fellow-favorite location of the Annual Meeting in October 2011. An impressive array of honored speakers joined 810 registered guests, including 74 inductees, for three days in the unseasonably hot, hot, hot southern California desert. >>



J. Anello  
2011

Renderings courtesy of Julia B. Anello, wife of Robert J. Anello (FACTL), New York, New York.

Outgoing President Gregory P. Joseph and his wife, Barbara, with incoming President Thomas H. Tongue and his wife, Andrea



The presence of two United States Supreme Court Justices was a particular honor, with Associate Justice Elena Kagan inducted as an Honorary Fellow of the College. Retired Associate Justice John Paul Stevens, already an Honorary Fellow, was the distinguished Lewis F. Powell, Jr. Lecturer. Both Justices provided the guests with a view into their lives, interests and time on the Supreme Court bench.

Justice Kagan joined former District Judge and current Harvard Law Professor Nancy Gertner in an informal, conversational interview that covered a multitude of questions and answers. Peering into the wingchair conversation between two judicial females gave the audience a view of Justice Kagan's relaxed demeanor, sense of humor, enthusiastic astuteness and focused balance to the heady responsibilities confronting her.

The assembled guests also enjoyed the quick humor and keen intellect of retired Justice John Paul Stevens, who discussed his years on the Supreme Court bench with two of his former law clerks, Dean Kathryn Watts, incoming President Thomas H. Tongue's daughter, and Professor Lawrence Rosenthal. Kathryn Watts served as Justice Stevens' law clerk in 2002. She is currently Associate Dean for Research and Faculty Development at the University of Washington School of Law in Seattle. Professor Lawrence Rosenthal, Professor of Law at Chapman University School of Law in Orange, California, was the Justice's clerk in 1983. Details of their conversation are found elsewhere in this issue.

A recurring minor theme evolved as many speakers addressed issues of the brain, ranging from mental capacity and brain damage to DNA evidence, neuroscience and the law. Speakers touching on these issues included: General Peter W. Chiarelli, Vice Chief of Staff of the United States Army; Peter Neufeld, Co-Director of the

Innocence Project, Inc.; Professor Hank Greely, Dean and Professor of Law at Stanford Law School and The Honorable Jed S. Rakoff, United States Judge for the Southern District of New York.

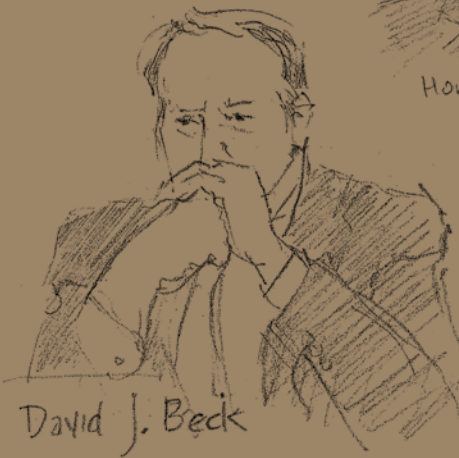
Other honored speakers included E. Randol Schoenberg, who spoke of the recovery of five Gustav Klimt paintings from Austria; Sally M. Rider, who spoke of the need for civil discourse in law and society; Travis Hathaway, who presented a look into the life and work of a Pixar animator; Diana Henriques, author of an intriguing account of the fall and scandal of Bernie Madoff and Professor Judith Resnik, who presented research conducted with her husband, Professor Dennis Curtis, about the history and iconography of democracy and justice.

The highest honor the College bestows on an organization is the Emil Gumpert Award, named in honor of the College's founder and Chancellor. The 2011 Emil Gumpert Award was presented to Southern Public Defender Training Center of Atlanta, Georgia, for its outstanding work tapping into an unserved need, that of training - and retraining - public defenders in the South, with a goal of replicating its program in other jurisdictions. Jonathan Rapping, Founder and CEO of Southern Public Defender Training Center, accepted the award and remarked on the Center's work and the impact of the College's award.

#### **ANNUAL BANQUET AND INDUCTION CEREMONY:**

Saturday night's annual black-tie banquet began with an invocation by retiring Regent Phillip R. Garrison of Springfield, Missouri. Repeating the poignant tradition of the Induction Ceremony, all attending Past Presidents faced the incoming Fellows as the Charge was delivered. This year, Past President Mikel L. Stout of Wichita, Kansas, invoked its warmth, seriousness and honor to the inductees.





Following the cheers of families, colleagues and guests (and not a few photos), Inductee Richard A. (Doc) Schneider of Atlanta, Georgia, gave the Response on Behalf of New Inductees. Sharing his wit, nervous anxiety, appreciation and a smattering of humility, Schneider told stories of “martinis, mermaids Tabasco and Opelika.” A copy of Schneider’s remarks may be found elsewhere in this issue.

New Fellows from 38 states and provinces, including Washington, D.C., then joined their new friends for a dinner of “California halibut in Seville orange emulsion and grilled filet of beef, tempranillo reduction with saffron-poached baby fennel, herb and olive rice medallion.”

Dinner was followed by the installation of new President Thomas H. Tongue, who graciously thanked outgoing President Gregory P. Joseph and his wife, Barbara, for their effort and dedication up to and including the past year, and for their outstanding service to the College.

President Tongue recognized and thanked former Regent and Judicial Fellow, the Honorable Garr M. (Mike) King for Judge King’s encouragement and support that led to Tongue’s involvement in the College; he acknowledged deceased Past President William H. Morrison for giving him his start as a trial lawyer; and he particularly thanked his wife of forty years, Andrea, for her ongoing support.

To the Fellows, President Tongue committed himself to furthering the work of the College. He shared his pride in representing “the best of the best” and said that he and Andrea look forward to visiting the states and provinces (and the single district and Commonwealth) that constitute the College.

The program was followed by dancing in the ballroom and a karaoke sing-along in the salon.

New friends and old, after enjoying fellowship and the professional program, began their departures on Sunday morning, with most of them promising to meet again at the Fairmont Scottsdale Princess for the 2012 Spring Meeting from March 8-11, 2012.

We hope you’ll be there too. ■

*“The College has become like a family to us, and we hope that the new inductees will have the same experience. We are packing our bags and looking forward to our travels for the College over the next year.”*

— President Thomas H. Tongue

John Paul Stevens. An Honorary Fellow of the College for more than thirty years, Justice Stevens accepted the invitation to present the Lewis F. Powell, Jr. Lecture in honor of Lewis F. Powell, Jr., a former President of the College, Associate Justice of the Supreme Court and friend to Justice Stevens. Past lecturers have included Retired Associate Justice Sandra Day O'Connor and Past President and Attorney General Griffin Bell. Justice Stevens shared twelve years of service on the Court with Justice Powell, and through the seniority system, they sat next to one another for all of those twelve years.

Any introduction of Justice Stevens would be incomplete without mentioning that he was born and raised in Chicago, and as a youngster, had the pleasure of witnessing the 1932 World Series Game at Wrigley

Field when Babe Ruth pointed to the centerfield scoreboard, and then hit a home run over it. A life-long, die-hard Cubs fan, Justice Stevens proudly shares the fact that he has thrown out the first pitch at Wrigley Field and may have been the first Supreme Court Justice to have done so. Justice Stevens' pitch was precisely over the center of the plate.

A 1941 graduate of the University of Chicago, Justice Stevens enlisted in the Navy the day before Pearl Harbor. Like Lewis Powell, Justice Stevens served as an intelligence officer in World War II. Justice Stevens served in the Pacific Theater; Justice Powell, in the European Theater. Justice Stevens received the Bronze Star. After the war, he attended and graduated from Northwestern University School of Law in Chicago, subsequently accepting a clerkship

with Justice Wiley Rutledge during the 1947-1948 term of the U.S. Supreme Court. Private practice in Chicago followed. His years of trial practice were interrupted in 1970 by an appointment by President Nixon to the Seventh Circuit Court of Appeals. In 1975, President [Gerald] Ford nominated Stevens to the United States Supreme Court to succeed Justice William O. Douglas, and he was confirmed by a 98-0 vote. It is noteworthy that Douglas was the only Justice to have served on the Court longer than Justice Stevens. Since his 2010 retirement, Justice Stevens has been an active speaker and writer. His recently published book, *Five Chiefs*, shares his story of the five Chief Justices he has known as law clerk, practitioner, Circuit Court justice and Supreme Court Justice. ■

## TEACHING TOOLS AVAILABLE

Members of the College's general committees have recently prepared several programs of interest to Fellows in all jurisdictions. The programs may be used to introduce the College to the judiciary, to conduct CLE sessions and seminars for groups of lawyers or to present to law schools and other appropriate groups in your area.

**CLE Teaching Syllabus to the Code of Pretrial and Trial Conduct:** Available on thumb drive, the video presents ethical and professionalism vignettes with various fact patterns and suggestions to stimulate discussion. Accompanying the video is a teaching syllabus with references to the applicable provisions of the American College of Trial Lawyers Code of Trial and Pretrial Conduct and the American Bar Association's Model Rules of Professional Conduct. Prepared by the Legal Ethics and Professionalism Committee, the video is available on the College website ([www.actl.com](http://www.actl.com)) or in hard copy form from the National Office.

**Mock Trial:** Also available on thumb drive, *NITA Housing Authority v. Ladonna Johnson*, presents a mock trial that may be used in whole or in part. The video offers excellent trial practice training for trial lawyers, particularly public interest

lawyers likely to handle cases similar to the one shown. This CLE presentation was prepared by the Teaching Trial and Appellate Advocacy Committee, with the assistance of Stetson University School of Law.

**Persuasive Advocacy through Effective Writing:** Prepared by the Teaching Trial and Appellate Advocacy Committee, this course, available on CD/DVD, includes supplementary documentation to accompany the video portion of the program. The course is designed to be used in its entirety or in parts.

**Judicial Vignettes:** This CLE program serves as an outstanding introduction of the College to the judiciary in your area. Two independent series of vignettes present issues frequently confronted by the courts, with suggested solutions to the various scenarios. The first series deals with in-court problems judges may encounter with lawyers. The second series deals with pre-trial problems judges may also confront. The program was prepared by the Federal Judicial Center and the College's Jury Committee.

For additional information about any of the above teaching tools, please contact the National Office (email, [nationaloffice@actl.com](mailto:nationaloffice@actl.com) or telephone, 949.752.1801. ■

# JUSTICE STEVENS SPEAKS OF SERVICE

To use a baseball analogy with Justice **John Paul Stevens** is to know his love of the Great American Pastime. To ask about the Cubs invites memories of the 30s, Wrigley Field and Babe Ruth. When President-Elect **Thomas H. Tongue** invited Justice Stevens to join two of Stevens' former clerks in a chat...“for pitching and catching,” without hesitation, the avid Cubs fan replied, “I’ll do the catching.”

Justice John Paul Stevens chose two former clerks to engage in an informal, intimate discussion in front of the packed crowd of almost 800 Fellows, spouses and guests. **Larry Rosenthal**, one of Stevens' 1983 clerks, joined **Kathryn Watts**, a 2002 clerk, who was notably identified as President-Elect Tongue's daughter. Rosenthal is a professor of Constitutional law at Chapman University in Orange, California, and Watts is Associate Dean at the University of Washington Law School. Prepared to throw a few curve balls, Rosenthal chose the first pitch. The sometimes humorous, amazingly candid, completely intriguing discussion is presented with minor editing to show Justice Stevens' razor-sharp memory in discussing the relevant case law and societal changes during his years on the Bench. >>





Professor Rosenthal went straight to the hard-core issue of the death penalty, asking Justice Stevens about his joint opinion with Justices Powell and Stewart in *Gregg v. Georgia*, which the press characterized as “the opinion that reinstated the death penalty.” Stating that Stevens subsequently indicated in *Baze against Rees* that the Court’s prior capital punishment jurisprudence was...[a] failed... mission to reconcile capital punishment with the Constitution,” Rosenthal slowly wound up to his question:

**PROFESSOR LAWRENCE ROSENTHAL:**

[W]hat’s your reaction to these kind of countervailing criticisms...as a road to nowhere...that you’ve surely seen?

**JUSTICE JOHN PAUL STEVENS:** Is there a limit on my time? No red lights out there. I suppose the answer’s a long answer, Larry.... I didn’t anticipate the question, but I hinted at the answer in my discussion of Justice Powell [Editor’s Note: See separate article about Lewis Powell Lecture Series, found elsewhere in this issue.] It’s true that I am now persuaded that the death penalty, as presently administered under the decisions of the Court, is excessive and violates the Eighth Amendment. And two or three strands to the process led me to that conclusion. One is that the premise on which Lewis [Powell], Potter [Stewart] and I wrote the opinion sustaining three of the capital punishment statutes, but not sustaining the two mandatory capital punishment statutes, was that the death penalty jurisprudence would be administered in a way that avoided what Potter characterized as being as ran-

dom as being struck by lightning. And we assume that the procedures would narrow the category and maintain a narrow category of defendants eligible for the death penalty. And instead of that, the development was just the opposite. [The Court], in effect, in *Emmett against Florida* and a couple of other cases basically held that even a felony murder can justify capital punishment. And they changed the procedures. I mentioned the *Payne against Tennessee* [case], which was upholding the use of victim-impact evidence contrary to Lewis’s earlier opinion, [which] basically, was treating death just like any other crime in terms of procedures, when, in fact, our theory was that death is different, and that the procedures had to be carefully supervised and should avoid the use of emotionally-tinged evidence that had no purpose except to increase the likelihood that the death penalty might be imposed.

And then the final change that dawned on me just a few years ago while John Roberts was the Chief Justice was the holding in the *Baze* case talking about the fact that the Constitution requires that the administration of the death penalty be painless to the defendant and avoid any unnecessary pain. And that is fundamentally inconsistent with the basic justification that most people assume the death penalty will serve, namely retribution and imposing on the defendant the same kind of suffering that the defendant has imposed on his victim. And when the Constitution has, in effect, eliminated the most acceptable justification for the death penalty, it seems to me that the better approach is to eliminate the death penalty entirely because for a variety of reasons it really does not, in my judgment, perform



a purpose that is any different from life without possibility of parole.

So that as the years went on, I did become persuaded that – I didn't say our original decision was wrong, but the subsequent Court decisions seem to me to undermine the basis for our original decision. And that's why I came out differently. And I think it is significant that the Constitutional provision that you mentioned, that it was recognized at one time as a permissible punishment, doesn't mean it's permissible in every case in every possible situation. But you are right, my thinking is basically the same as it was back then, but I think the world has changed in the interval."

**DEAN KATHRYN WATTS:** It's interesting that the first issue that we focused on and that Larry [Rosenthal] asked about is the death penalty. Because...I was thinking about the overlap between you and Justice Powell. [The death penalty was] one of three substantive areas where I think you started your career and when you sat on the bench with Justice Powell [in which the issue] arose, but then also [that] bookended your judicial career to the extent that the issues resurfaced in very important cases towards the end of your career. I think the other two areas that you could add to that list, besides the death penalty, are affirmative action and gay rights because both of those were significant cases early on and again towards the end of your career. I wondered if you could share with us your thoughts on those two areas, whether there was any shift in your own jurisprudence or if it was more others that changed.

**JUSTICE STEVENS:** Well, I am not conscious of a shift in my own jurisprudence. I remember that issue first arose on the first year I was on the Court. There was, as you know, a difference between cert petitions and jurisdictional statements. And when the Court rules on a jurisdictional statement and either affirms or dismisses for want of jurisdiction, that's a ruling on the merits. And we did have a case in 1975 or '76...out of Virginia, in which a defendant, who had been criminally prosecuted for sodomy... filed an appeal challenging the constitutionality of the Virginia Statute. And the Court voted six to three to affirm without oral argument. Bill Brennan and Thurgood Marshall and I voted. I'm not sure I knew what the answer was, but I certainly at that time thought that the question was sufficiently im-

portant to justify full review. But the Court, as I say, decided that case summarily. I think over the years, there hasn't been really that much of a change in my own thinking that I can remember, but I think society's reaction to that problem has changed dramatically. So I think now, society, in general, recognizes that there's nothing really exceptional about the problems that were then considered very serious.

**DEAN WATTS:** Can we shift gears away from some cases and talk about a few things that you mentioned in your new book, the *Five Chiefs*, that just came out. There were two things that I wanted to ask about. One is something that President Joseph noted last night, your theory about recess appointments. You have an interesting theory about judicial recess appointments, and them being unconstitutional. Can you share with us some of your thoughts on that?

**JUSTICE STEVENS:** Yes. And it's really something that happens often when you're writing an opinion or anything else, you learn about the subject matter that you are writing about. And I was writing about the appointment of Chief Justice Warren, and I learned for the first time that recess – I might have known it before, but it never struck me but it did occur to me if you look at the text of the Constitution, which I happen to have included in the appendix to the book, because I think people often don't pay enough attention to the text, I think it really speaks in terms - it contemplates recess appointments for people in the executive branch of the government with the inability of confirmation. It's quite inconsistent, it seems to me, to have a federal judge put on the bench and not having been guaranteed life tenure at the time and knowing what the confirmation process involves now. During the first several months of a judge's service, you would have to keep in mind the danger that the Senate might not confirm it. And I did, while working on the book, include that the recess appointment of Chief Justice Warren was probably nonvalid. He was then subsequently nominated a second time and then went through the hearing process and got less than the unanimous vote, as I remember.

**DEAN WATTS:** The confirmation process, though, really has changed. You were saying, as we think about the confirmation process now, in my father's introduction of you, mentioning it was 98-0 for your appoint-

ment. Powell, if I remember, was 89-1. And then, of course, some of the more recent confirmations, much more split. Do you have any views on how that confirmation process has evolved and whether it's problematic the way that it's played out today?

**JUSTICE STEVENS:** Well, it obviously has evolved. I guess, the critical change was after Bob Bork's nomination was not confirmed, and I think you may know, I thought the nomination should have been confirmed, because he was clearly qualified. But two of the changes that are rather obvious: One is it's televised now. And when I went through the process, the Attorney General may have spoke briefly. Senator Percy, Senator Stevenson, and the representative of the American Bar Association, basically said they felt I was qualified. And I think for all four of them, it took five minutes to do that, and then they started questioning me. And now, as you all know, the first day of the hearings consists of statements by the senators about how important the hearings are, which used to be understood without that, and there is much greater attention to the whole proceeding. And the other dramatic difference is that when I went through the process, no one from either the White House or the Department of Justice had any suggestions to me about how I should answer questions and get prepared. I remember Ed Levy basically saying, "If you are qualified for the job, you ought to be able to answer whatever the questions are." And I feel strongly that's absolutely right. I think there's a concern that the nominee will be asked questions that the nominee does not know the answers to. Well, that's really one of the beauties of the job of the independent judge, is you're not supposed to know the answers until you hear the arguments in the case and listen to both sides and then make up your mind. The business of judging is constantly a process of learning and trying to learn what the law requires in different situations. So I think both from the point of view of the executive and the preparations of the nominee and the members of the Senate committees, I think there has been a dramatic change in the practice. And I think - I have no doubt in the world at all that if Justice Kagan had just gone to start testifying without conferring with the friends in the Department of Justice, she would have been confirmed just as well as she was.

**DEAN WATTS:** You mentioned the cameras changing it. And as we sit here under the

lights with the TV screens up, it reminds me of the question that everybody is talking about now: How long is it going to be before we get cameras in the courtroom in the U.S. Supreme Court? Do you think we'll get there soon?

**JUSTICE STEVENS:** You're asking about the prediction on the timing. I would basically say "Don't hold your breath." And, of course, as I'm sure you are aware, there are arguments on both sides. On the one hand, television would contribute to better public understanding of the Court. And I think it actually would enhance a public respect for the Court because the public generally would be able to see how well prepared the members of the Court are during argument, and they do ask intelligent questions that show their mastery of the case. So that would be helpful to the Court. But the downside is that whenever you introduce television into a new area, you're never sure what unanticipated consequences might ensue. I have often referred to the fact that you go to a professional football game, and every now and then the players are just standing around for about a minute, you wonder what's going on. Is it a television commercial? Is that what you have to

*And now, as you all know, the first day of the hearings consists of statements by the senators about how important the hearings are, which used to be understood without that ...*

— Justice John Paul Stevens

wait for? So there are changes that the introduction of television might produce. And the system, basically, of oral argument is working very well as it is.

**PROF. ROSENTHAL:** Justice, one of the things I recall so well is that the highest compliment you would pay another judge or justice is to call that person a good lawyer. And since most of the people in the audience are lawyers, not judges, I wonder if I could get you to talk about the lawyering part of being on the Court. The other judge I clerked for, Prentice Marshall, used to tell me that the real oral arguments are what goes on back in the chambers, after the lawyers are finished. And, of course, you were a participant in those arguments. Were there

ever times where you felt it was appropriate or necessary to go into conference, as a lawyer, with an advocate's brief? How did you go about preparing for what you were going to say in conference?

**JUSTICE STEVENS:** Well, it's really very, very different from preparing for an oral argument. There were times, of course, where you give a lot of thought to points you want to stress during the debate, but you have a very sophisticated audience, all of whom are already very well prepared and familiar with the issues. So it's true, in a sense, you are an advocate, but you really are also participating in a joint decisional process in which you expect the comments by the other members of the Court will affect your own thinking, and you'll affect theirs. So I hadn't really thought of that particular analogy, but I think it is significantly different because you're participants in making a decision rather than advocates for a particular point of view. Very often when you

mun's notes, when it came to you at conference, Justice Powell had actually voted to strike down the statute on a very kind of tenuous ground, Justice Blackmun records in his notes, "Can this hold?"

**JUSTICE STEVENS:** He said what?

**PROF. ROSENTHAL:** He wrote down in the conference notes, about Justice Powell's vote, "[c] an this hold?" with a question mark. Apparently, he thought Justice Powell's position was sufficiently questionable that he didn't think Justice Powell was going to stick with his vote. And he didn't stick with his vote. And then he came to you. I think this is the most extraordinary thing I've ever read in any conference notes. At least according to Justice Blackmun, you said -

**JUSTICE STEVENS:** I think I know what you are going to say. That I detested gays or something like that?

**PROF. ROSENTHAL:** You said, according to Justice Blackmun, "I was raised prejudiced. We have to remember that that was how most of us were raised."

**JUSTICE STEVENS:** Well, Justice Blackmun's notes in that instance were inaccurate. I remember somebody wrote me a letter raising that, and I had no memory of what Harry had written down. You have to remember, as I do now, Harry had a hearing problem. So I asked [about the issue], when that was called to my attention, [because] I had never seen it before. I asked Justice [Sandra Day] O'Connor to look at her notes and asked [about] her memory, because she took very good notes. And she did [check her notes] for me. She came and said, "I have no recollection of that being said. It's not in my notes at all. I think Harry is wrong." And my memory was that what Harry put down in that particular case simply wasn't accurate. So I don't know how to answer the question other than to say that there are Justices, like everybody else, who make mistakes from time to time. And when you take notes, they are not necessarily 100 percent right.

**DEAN WATTS:** Another statement from that same

*I think there's a concern that the nominee will be asked questions that the nominee does not know the answers to. Well, that's really one of the beauties of the job of the independent judge, is you're not supposed to know the answers until you hear the arguments in the case and listen to both sides and then make up your mind. The business of judging is constantly a process of learning and trying to learn what the law requires in different situations.*

— Justice John Paul Stevens

go into conference, you are not totally convinced of one side or the other. You really want to listen to everybody else and see that you have the benefits of the full discussion.

**PROF. ROSENTHAL:** Let me follow up and ask the question in a slightly more pointed way. Justice [Harry A.] Blackmun's papers, as you know, have been public for some time. I, of course, was not at the conference I'm going to talk about. It was after I was law clerk. But it was the conference of *Bowers versus Hardwick*, which was the first time the Court dealt with the constitutionality of the anti-sodomy statute. And although I can't vouch for Justice Blackmun's notes, as far as I could tell, he was a pretty good note taker. And according to Justice Black-

case, from *Bowers versus Hardwick*, that's often quoted, relating to Justice Powell, is Justice Powell saying when the Court was deciding the case, that he'd never met someone who was gay. And in retrospect, as time has played out, it turns out that one of his clerks at the time was gay. And I wondered in thinking about issues of diversity of the Court among law clerks and justices and advocates who appear before the court, what, if anything, that anecdote might tell us about the limits of achieving diversity at the Court or the need for greater diversity among the members of the Court and those who work within the Court and appear before it?

**JUSTICE STEVENS:** I think that example illustrates what I said a little earlier that I think the world, in general, has become much more aware of the fact that there's not that big of a difference between people who are gay or people who are not gay. That knowledge is the product of knowing more about people who are not as well known or well recognized at the time. So I don't think that's a matter of legal change. It's a matter of social awareness of certain elementary facts of life.

**DEAN WATTS:** Do you think it's the same as to achieving gender equality at the Court? If we look at law clerks and statistics that I am aware of, when I was there in 2002, there were 13 females out of 35 law clerks, even though in law schools at the time it was about 50/50. A couple of years later, it dropped down to single digits of females that were there. The *New York Times* ran a piece, and you were at the high end in terms of diversity among your law clerks, but there were many others with much lower numbers. Do you have any sense as to what might explain that, why we're not seeing greater gender diversity and racial diversity among law clerks at the Court?

**JUSTICE STEVENS:** Well, there are two or three answers that occur to me on that. Larry, your boss, Prentice Marshall, gave a talk when I was still in practice at either the Legal Club or the Law Club in Chicago, and he was then, I think, teaching at Illinois. And most of the lawyers in the room were male at that time. And he said that before I retire,

half of the graduates will be female. And there's been a change in the whole profession that's during the period that I have been a lawyer and a judge that women have become an equally significant segment of the bar, but that's a process that took time. And another example, I recently read the biography of Billy Brennan. And he had a policy, for instance, he did not hire female law clerks for year after year after year. And, finally, one of his ex-law clerks wrote him a long letter and basically said, "[y]our practice violates the very principles you are advocating." But again, time had provided the most significant answer to that problem. But there's still a vestige of concern that's out there.

**DEAN WATTS:** So you think with time, we'll get there.

**JUSTICE STEVENS:** Yes.



**DEAN WATTS:** The first female law clerk, to put in a plug for my institution, came from the University of Washington School of Law, in 1944. Just a couple of years before you clerked. Lucille Lomen was her name.

**JUSTICE STEVENS:** Didn't Justice Douglas fire her?

**DEAN WATTS:** No. That was a later female clerk for Justice Douglas, who apparently liked to speak her mind, and I think that didn't go over very well, according to what I have read.

**PROF. ROSENTHAL:** Let me ask you about the issue of evolution, at the risk of bringing Justice Scalia onto the stage over and over again. Justice Scalia



is fond of saying, “[m]y Constitution isn’t living. My Constitution is dead.” And you’ve talked about law as an evolving institution. Justice Scalia would say, “[w]ell, that’s awfully dangerous when we let judges change what the framers put there.” So I wonder if you could share your views on that issue.

**JUSTICE STEVENS:** I just happen to have a Constitution. [Editor’s note: Justice Stevens pulled out a text of the Constitution from his coat pocket.] I thought I may need it. I thought I would look at the Preamble, which says that “[w]e, the people of the United States, in order to form a more perfect union, do ordain,” so forth and so on. I think the framers at the very beginning of the Constitution suggested that the union would become more perfect. There’s a little bit of grammatical tension between being perfect and more perfect. I think the Constitution itself anticipated development in the law. And so I think that the text sides with me on this issue.

**PROF. ROSENTHAL:** Do you think, for Justices like Justice Scalia and Justice Thomas, who come with a very strong theoretical approach to the Constitution, ...do you think that approach has virtue, ...or do you think that...you have not been inattentive to history in your own jurisprudence and the framers’ views? A few years ago in a case I watched closely involving the right to bear arms, you wrote a very lengthy dissenting opinion on what you regarded as your regional understanding of the right to bear arms.

So for a Justice who doesn’t elevate framing history over everything else, how do you think about the role of history and its original intent in approaching constitutional issues?

**JUSTICE STEVENS:** Well, I guess I have said this more than once. It seems to me that part of the job of a judge in every case, whether you are trying to figure out what a statute means or what the Constitution means, is to find out as much as you can about the intent of the authors. I think we have... both the statutes and the constitutional provision, but I think it’s a mistake to assume that what you learn will necessarily be the only basis for decision. A good many examples occur to me. For example, in the Equal Protection Clause, it’s quite clear, even though the Court had repeated arguments on the historical analysis of the Fourteenth Amendment and the history and the underpinnings, I think it’s highly unlikely that the actual draftsmen of the Fourteenth Amendment anticipated that they would put an end to segregated schools. But the principle that they adopted requires that result if it’s fairly applied requiring impartiality on the part of the government. Similarly in the religion clauses, it’s perfectly clear that Justice Story and others at the time did not intend to provide protection other than preventing preference for one Christian sect against another. It’s clear enough that the intent was not to protect the atheists or the Jew or the Muslim. They were excluded. But after the provision is adopted and the reasons why the constitution of protection is absolutely sound and consistent with the basic purposes of the Constitution, the law developed in a way that the framers did not either anticipate or intend. So that the intent, although always relevant, can’t be the only basis for decision, and the notion that it will prevent judges from using their own views rather than their understanding of the law, as a basis for decision, is really tremendously exaggerated because there’s too many areas of history where there are good arguments on both sides of the question. And you mentioned the Second Amendment, and I think a fair, impartial analysis of the drafting history of the Second Amendment strongly supports the view that the Court adopted for years and years that it was militia-related and they intended to give the states the authority to decide what would be an appropriate gun control policy, not to say the federal judges should be the last word on it. The Pennsylvania provision, among others, described

*Let me just mention one other little thing about what a nice person the present Chief Justice is. He presided...at the hanging of my portrait, and he found out that that day was an anniversary of two very significant occasions. One was, it happened to be the day my commission to the Court of Appeals had been issued. And the second, this is the real key to the point, it was the anniversary of the last day that the Cubs won a World Series. And that’s the kind of thoughtful man that the Chief Justice is.*

**Justice John Paul Stevens**

self-defense and hunting as purposes intended to be preserved by the state constitution. But when James Madison came to studying the question, considered those alternatives, he adopted a narrower view of the preamble to the Second Amendment that identifies a military purpose. So that, to me, is persuasive evidence that there was a military purpose behind the Second Amendment, rather than an open-ended provision that allows federal judges to decide the gun control policy. So that, I agree, the original intent is always important and something you should look for, but the notion that it's going to provide you with an impartial answer to all questions, that's quite wrong.

**DEAN WATTS:** As you think back on all of these issues that you have gotten to grapple with during your judicial career, all of these fascinating Constitutional questions, I wondered if you were able to single out or pick out one opinion that you are most proud of that you think represents best your judicial career.

**JUSTICE STEVENS:** Well, you know, it's funny, it varies from time to time, but I saw Paul Clement, former Solicitor General, at the recent proceeding at the Court when they hung my new portrait.

**DEAN WATTS:** The portrait, yes.

**JUSTICE STEVENS:** A very smart thing done in my own career, I had my portrait painted many years before they presented it. That's sort of deceptive in a way, but I also had a very good artist. He [Clement] made a comment in a discussion ... at Georgetown Law School about some of my opinions. And I told him that I thought that was the nicest comment that anybody made about my work during the sessions of that kind that I have had the pleasure of attending. And he identified a case that I, frankly, didn't recall, *United States against Potts*, in which I wrote a single dissent from a per curiam decision, which held that it was permissible - the majority held that it was permissible - to use conduct of which the defendant had been acquitted by the jury. [And that conduct] could be used by the judge if he thought there was proof beyond a preponderance of the evidence that the person really did engage in the conduct, and he

enhanced the sentence on the basis of acquitted conduct, which seemed to be quite inconsistent with the Sentencing Reform Act and so forth. And, as I say, I wrote a dissent in that case, which later on provided the basis for some of the reasoning in the *Friendly* case and some of the other sentencing cases. Because Paul identified that in a way that I thought was very complimentary to me, I'll select that as my favorite decision.

**DEAN WATTS:** If that's your favorite opinion ... I would be remiss if I didn't ask ... [about] your favorite day. If you were forced to pick between the day you became Justice of the United States Supreme Court or the day you threw out that first pitch at Wrigley Field, which would it be?

**JUSTICE STEVENS:** Well, that's a tough question. Because there is a difference in the audience. [And incidentally,] it really was not a strike. I should come clean. It was high and outside. And in order to be able to do that, I had practiced for a good many days. Because from when I first started to throw a baseball, I had forgotten how far away the plate is.

**DEAN WATTS:** You practiced with your law clerk in a park, I understand, right?

**JUSTICE STEVENS:** I practiced with my law clerk, and I also practiced on one occasion with my wife, and I managed to cause an injury to her shin that she still remembers. But I did learn, and I played on a baseball team, the Texaco Oilers in Lake Delton, Wisconsin, one summer. I was second baseman. I could throw, you know. I could throw. I could play baseball. But when I started to throw that ball, I threw it to the plate, and it went [only] about half-way.... And so, at the major occasion, I pretended that I was the right fielder trying to get somebody sliding in at home plate. And I got it over the plate. And the audience I was surrounded by included a number of grandchildren in Chicago, and that was probably the day where I was a real hero.

...

**DEAN WATTS:** Thank you so much, Justice, for joining us today.

**JUSTICE STEVENS:** Thank you. ■

# JUSTICE KAGAN INDUCTED AS HONORARY FELLOW

A highlight of the Annual Meeting in La Quinta was the induction of United States Supreme Court Associate Justice **Elena Kagan** as an Honorary Fellow. Rather than giving a traditional response, and in keeping with recent practice, Justice Kagan participated in an informal, on-stage conversation. Her interviewer was Fellow Nancy Gertner, currently Professor of Practice at Harvard Law School, and formerly a judge in the United States District Court in Massachusetts.

Past President **Michael A. Cooper** introduced Justice Elena Kagan and conferred Honorary Fellowship upon her. His lightly edited introductions of Justice Kagan and Professor Gertner follow. >>

Justice Kagan is a native New Yorker. She attended Princeton and Oxford and then Harvard Law School, following which she clerked first for Judge Abner Mikva on the D.C. Circuit, and then for Justice Thurgood Marshall, who is reported, and she confirms, to have referred to her affectionately as “Shorty.” After her clerkship, she had a brief stint at Williams and Connolly and then joined the faculty of Chicago Law School. From 1995 to 1999, she was in the Clinton Administration, first as an Associate Counsel to the President, and then as the Deputy Director of the Domestic Policy Council where she learned, or applied a lesson that she had previously learned, that principle and pragmatism are not necessarily antagonists.

In 1999 Justice Kagan joined the Harvard Law School Faculty where she gained tenure in 2001, and a scant two years later was appointed the 11th dean of the law school. I had the great pleasure of observing her leadership of Harvard Law School from two vantage points. One, that of an alumnus; and the other, as a member of the Overseers Visiting Committee to the school. It is really truly impossible to overstate the enormous strides that Harvard Law School took under her leadership. She improved the quality of student life by such small steps as providing free coffee. She added more than 40 faculty members during her tenure as dean, including some of the brightest lights in legal academia, whom she persuaded to leave the schools at which they were teaching and to come to Harvard. She reinvigorated the school’s support of public interest work. And she made significant changes in the first-year curriculum, including reducing the size of classes which had theretofore been famously, or infamously, quite large. She created a climate of mutual respect among the faculty, which had been divided over hiring and other issues. Elena





Kagan left Harvard Law School so much better in so many ways than she had found it as incoming dean.

President Obama nominated her to serve as the 45th Solicitor General, and she was confirmed as the government's principal appellate advocate in March 2009. Little more than a year later in May 2010, President Obama nominated her to be an Associate Justice of the Supreme Court to fill the vacancy created by the retirement of Justice John Paul Stevens, who has graced us with his presence at this meeting.

At the end of her first term, court watchers have described her opinions as clear and powerful, and also plain-spoken. I invite you to read her dissenting opinions in the two cases that came from the State of Arizona to the Supreme Court last term, one involving tuition tax credits; and the other, public financing of elections. Those two dissenting opinions are nothing short of compelling. Justice Kagan, as I've said, is, and as you know, the junior Justice in both years of service and age. The seat that she occupies has a tradition of longevity, having been occupied before her by Justice Stevens and before him by Justice Douglas. We all hope that [she] will continue that tradition of longevity.

Now, let me just say a few words about the other conversant participant in this fireside chat, former judge now Harvard Law School Professor, Nancy Gertner. Like Justice Kagan, she's a native New Yorker. She received her bachelor's degree from Barnard College and her law degree from Yale, following which she clerked on the Seventh Circuit for Judge Swygert. For the next 22 years, she practiced law in and around Boston and also taught at Boston University and Harvard Law School.

Wikipedia has the following to say about this period in

Nancy Gertner's life. I'm quoting: "She was notable for being a supporter of liberalism and feminist ideals, wearing red dresses in court, carrying her legal briefs in shopping bags, and keeping files on lawyers and judges she felt to be sexist." Apart from the shopping bag reference, the author might have been talking about our own Past Present Joan Lukey.

Nancy Gertner was nominated to the District Court for the District of Massachusetts in 1993 by President Clinton, and she ascended to the bench the following February. As I said earlier, she has recently retired from the judiciary to take a position of...Professor of Practice at Harvard Law School. Let me just mention three other achievements of Professor Gertner. In 2008 she became the second woman - the first being Justice Ruth Bader Ginsburg - to receive the Thurgood Marshall Award from the ABA Section of Individual Rights and Responsibilities. Second, she has just published her memoirs as a trial lawyer. The title is, *In Defense of Women: Memoirs of an Unrepentant Advocate*. Finally, according to that unimpeachable authority, Wikipedia, Nancy Gertner is to date the only Massachusetts judge to post to a personal blog.

*Justice Kagan and Professor Gertner settled comfortably on the stage for the informal one-on-one exchange which has become a popular format at recent College meetings.*

*Professor Gertner opened by asking Justice Kagan to comment on her preparation to become a Supreme Court Justice. They went on to discuss the similarities of teaching and judging, and Justice Kagan shared anecdotes from her first year on the Court. The lively conversation was candid and humorous, and Fellows and guests alike enjoyed the privilege of hearing a more-personal side of Justice Kagan. ■*

# RIGHTING WRONGS THROUGH FORENSICS

Tasked with the honor of introducing **Peter Neufeld**, Co-Director and Co-Founder of the Innocence Project, Past President **Michael E. Mone** noted that the death penalty is a proven fundamental flaw in the legal justice system, with The Innocence Project taking the lead not only in demonstrating the unfairness of the sentencing process, but also in saving the lives of scores of innocent individuals. Associated with the Benjamin Cardozo School of Law in New York, the Innocence Project under Neufeld and his partner, Barry Scheck, is dedicated to the vindication of Constitutional rights of individuals convicted of serious crimes and facing the death penalty. Neufeld's pro bono service to lawyers representing accused individuals in death penalty cases has earned him the admiration of lawyers all over the country. A frequent lecturer and expert on the intersection of science, criminal justice and forensics, Neufeld has chipped away at the United States death penalty system as one innocent person after another has been released from death row, and the public has learned of the problems associated with the death penalty. Neufeld co-founded the Innocence Project with his partner, Barry Scheck, more than twenty years ago. Peter Neufeld's remarks, lightly edited, follow: >>



The Innocence Project has been responsible for exonerating more than half of the 274 men and women who have been convicted, only subsequently to be cleared by DNA, perhaps serendipitously cleared. Those people, but for the DNA, would still be languishing in prison, and a significant number would, in fact, be executed. Our Innocence Project, a number of years ago, began to leverage those wrongful convictions, to deconstruct the cases, to work with social scientists to see if we could figure out the causes of wrongful convictions, and also come up with remedies and figure out ways of improving criminal justice, not just to reduce the danger of wrongful convictions, but also to enhance public safety. And, of course, one of the reasons why I think we have had some really good traction in recent years is that last factor, namely, public safety. We were able to argue convincingly to police chiefs, prosecutors, and legislators that every time you harass and arrest, prosecute, and convict an innocent man, the real perpetrator is out there committing other serious, violent crimes. In fact, we can show empirically that in many of our cases where we then went on to...identify and prosecute the real perpetrator, invariably that person, during that interim, committed other very, very serious crimes.

And so when we started thinking about causes and remedies, again, you probably know a lot of them. Obviously, the single biggest cause of wrongful convictions that we encounter is misidentifications, the suggestiveness of the proceeding, something the Supreme Court pointed out 40 years ago, but still lives. We wanted to come up with methods to improve the way that eyewitness-identification

procedures would be conducted, to reduce the level of cognitive bias, to reduce the degree of suggestiveness. And we've done so.

Another problem was false confessions, and the remedy we came up with for that was the mandatory recording of interrogations. And I'm happy to say that that item in our agenda has been pretty successful. As of today, we have sixteen states that have mandatory recording of interrogations. Now, when I say that, I mean the whole interrogation, not just the moment of climax when the guy says, "I did it," but the three or four hours before when the questions are going back and forth.

## SOLUTIONS?

In the area of forensic science, it's very sad to note that more than half of our wrongful convictions are people exonerated by DNA. In those cases, a crime lab person, a forensic scientist was called as the State's witness, and he offered unreliable testimony. In that regard, the fix, again, is pretty straightforward. We need an entity in this country that will finance basic research and applied research, like we do for clinical medicine, and we need national standards.

And, of course, you've already heard about how our cases have had some impact in terms of policy on the subject of the death penalty.

## GETTING IT RIGHT AT THE SOURCE:

Now, all of those fixes that we have been working on since we started this project 20 years ago are all



upstream fixes. We want to get it right at the police station, where they're doing the lineups, where they're doing the interrogations. We want to get it right in the crime laboratory where they're doing the testing. We don't want to wait until these cases get to court, because it's too late at that point....

We [have recently begun] to expand our agenda. We began to think about for the first time those doctrines of the U.S. Supreme Court, those sacred cows that have been around for two and three decades and [that] define criminal justice in this country, to determine whether or not, in fact, they continue to be supported by the science, whether or not they continue to be supported and corroborated by our own data set of the 274 men and women who have been exonerated.

So let me take you back to a blustery winter in Rochester, New York, a couple of days after a big blizzard, January third of 1993. A young civil rights activist in the community lives in a nice house in Rochester. Somebody broke in, somebody viciously murdered him, stabbed him. Body was found two days later. There were no eyewitnesses.

One of the original suspects in the case was a guy named Doug Warney. Doug Warney was someone who was somewhat mentally challenged, although he was functioning and working. And Doug Warney, in fact, called up the police and said he had heard some rumors about who may have been responsible when he saw the story reported on the TV news. So Doug was brought in for questioning. And after about two and a half hours of interrogation, Doug Warney signed a detailed confession saying, "I did it. I murdered him. I stabbed him." But he didn't just say that. What he did in that signed confession is, he offered in his narrative a number of extraordinary details. Details that the police refer to as "nonpublic details," "hold-back facts," details about the crime scene. He described how he picked up a fourteen-inch serrated knife and stabbed the individual fifteen times, which coincided with the approximate number of stab wounds he had. He talked about how the deceased was cooking chicken and sweet potatoes on the stove when he walked into the house. He talked about how after the struggle, he took some paper towels from the bathroom, used them to clean himself up and then threw them down on the floor right next to the body. And it went like that, detail after detail after detail.

Well, shortly after he was charged with the murder, based on the confession, he tried to disown it. And he

filed a motion to suppress. And it came out of the suppression hearing that it may not have been the perfect interrogation, but certainly he was smart enough to appreciate his warnings. And he was. There's no question about that. And the police did not engage in any of the traditional forms of coercion that we've heard about in movies and TV, and occasionally in a judicial opinion. There were no threats or promises. There was no violence. There was no twenty-hour interrogation. Like I said, it was a couple of hours. He wasn't denied food. He wasn't deprived of sleep. But he confessed, and then he provided a signed statement with all these details. So he lost his motion to suppress, and he was convicted at trial. And his conviction was affirmed on appeal. He attacked his lawyer, also, as being ineffective and filed a habeas corpus, and that was lost also.

But about thirteen years later, we got the case at the Innocence Project. And we finally got to do DNA testing on all the items of biological evidence. And since it was one of our cases, you know the outcome. The DNA excluded Doug Warney on every single piece of evidence. It all came back to a single man. That single man's identity was picked up through a national convicted-offender's database.

It turned out to be a drifter who had been responsible for a number of murders and attempted murders throughout upper New York State. He was brought in. He was currently serving time in prison for one of those murders. The district attorney interviewed him. And not only did he take credit for the crime, he explained that, when he did it, there was no one else in the house but the deceased. He never met or even heard of a guy named Doug Warney. They were of different races. They came from different communities. They would not have had any contact at all. And based on that, the district attorney moved to vacate. The conviction of Doug Warney and charges were dismissed, and the newspapers declared him innocent. Exonerated.

Shortly after that, Doug Warney decided he wanted to sue New York State, because New York was one of the very first states in the country to have a compensation statute where you didn't have to prove that anyone was at fault. You just had to prove you were innocent. But there was one catch: you also have to prove that you did not, by your own misconduct, bring about your conviction.

Well, he filed the suit, and the Attorney General of New York moved to dismiss on the grounds that, aha,

he gave a false confession, and that's what caused his conviction. And the law said if it was an un-coerced false confession, that would be an example of somebody causing their own conviction. Now, we know this one was un-coerced because the Courts had heard it at trial and on appeal, and they determined that it wasn't coerced. And, indeed, if you give the traditional definition of coercion and involuntariness, he doesn't meet those tests. And it wasn't coerced, and it wasn't involuntary in the classic sense of the word. We now knew to a scientific certainty that he'd given a false confession. And we also knew that that confession was, in fact, unreliable.

But the Attorney General had a benefit, a big advantage in making their argument, and that argument was judicial precedent. The precedent was that way back in 1936, there was a case that came out of the U.S. Supreme Court, called you may remember it, where three black tenant farmers were tortured into giving a confession as to the murder of a white man, and eventually the Supreme Court rejected that practice. But at that time, they felt that if you gave an involuntary confession, that it was likely to be unreliable. And so there's two different reasons why you would want to keep that confession away from the jury. Well, that understanding began to slip in the '40s and '50s and '60s, the '70s.

And finally in 1986, the U.S. Supreme Court held in a case called that even if a completely whacked-out, psychopathic, schizophrenic individual walks into a police station and unsolicited makes some type of inculpatory statement saying "It came from the voice of God," well, maybe it's not reliable. But who cares, as long as it's voluntary. And this one was voluntary. Under those criteria, it's admissible, and the rest goes to weight. And that was a turning point. And for the next twenty-five years, states all over the country began to follow the lead and began no longer to think about reliability. All they thought about was classic voluntariness and whether or not a person had waived his rights. And that was it. And it had been evolving that way until our cases came along.

And so when Mr. Warney filed his claim, he lost in the trial court. He lost unanimously in the intermediate Appellate Court. But the Innocence Project took his case to the Court of Appeals, which is the highest court in New York, last year. And when we argued it, we brought new data to the table. We brought twenty years of social science data explaining the phenomena of false confessions because most of us think it's completely counterintuitive, and it is counterintuitive.

But some of us, who are older, may remember that when the Lindbergh kid was kidnapped, dozens of people around the country readily confessed to commission of that kidnapping. And for those of you from Chicago, you may remember that when Senator Percy's daughter was abducted and murdered, more than two dozen people were brought in to police stations in Chicago who readily confessed to committing that crime. It turned out they were all innocent.

So police have been trained for a long time that they have to be wary of someone giving a false confession. Someone saying, "I did it," when, in fact, they didn't do it. And those same folks in Chicago, to remedy that problem, invented a tool for police to use all over the country and all over the world so they could distinguish between a legit confession and an unreliable confession.



And that tool, which was used with Mr. Warney, is called the "hold-back details," and you've all seen movies and TV shows or press conferences when the police chief or district attorney is asked a question about a crime scene, he says, "I'm sorry. I can't tell you those details, because it will compromise our investigation." What he means by that is he was trained that there will be certain unusual details in any crime scene that you don't share with the press, you don't get out to the community as rumors, and you certainly don't share them with any civilians or suspects. And the expectation and hope is that one day, if you get a suspect who says "Yep, I did it," then you can say, "Okay. What happened?" And if the suspect, on his own, volunteers some of those non-public details, then the officer can feel very, very confident, "I've got a reliable confession. I've a good confession."

And that's how they work. Well, maybe the person will say, "You know what, I shot him, and you can find the



gun. It's in the closet at my grandma's house in the basement." And lo and behold, they go there and they find the gun, and the ballistics match. Well, that officer can feel comfortable that he's got a great confession.

The problem is, in the Warney case, we now know that, to a moral certainty Mr. Warney had nothing to do with it. He wasn't there. None of these details appeared in the newspapers. None of them had been distributed out in the community. The only people who knew those details of Mr. Warney's confession were the real perpetrator and the police. So, clearly, those police officers fed those details to Mr. Warney. Did they do it intentionally? Probably not. Did they do it inadvertently? Probably.

And the reason is simple. That even the best officers, when they think they've got the right guy, but he's holding back, he's not giving them everything they want, may begin to ask him leading questions, which contain those nonpublic details. May try and help him along, help him remember. And lo and behold, after two or three rounds of that, you then have a narrative that sounds like all these nonpublic details originated from the suspect, which, of course, you would see if these interrogations were videotaped from start to finish. But they are not, and they haven't been.

So we had that evidence, and we brought that evidence to this Court of Appeals. They were very moved by it. And they were also very moved by the social science research, which explained why some people, who are not necessarily completely disabled intellectually, who were not completely mentally ill, may nevertheless be of a type who are suggestible, who are compliant, and will say, "I did it."

Okay. They understand that now. They understood this case. And the other piece of data we gave them was the following: that of all of our 274 DNA exonerations in all the cases where there were false confessions, when you deconstruct the cases, in ninety-five percent of those false confession cases, the police had contaminated the confession in this way. Hearing all that evidence, the Court of Appeals reversed the lower courts and ruled that Mr. Warney's action can go forward and, henceforth, it will now consider the contamination of the confession by police as undermining the reliability of that confession as a factor to be considered at a suppression hearing in criminal cases.

We decided to do the same thing on , and the doctrine that was articulated by the Court in 1977, that in a case where the police engaged in an unduly suggestive I.D. procedure, the Court should weigh five different factors in deciding whether the identification is nevertheless reliable. Well, we looked at thirty years of social science in a case called . My partner, Barry [Scheck], litigated that one up to the Supreme Court. A special master was appointed to take in all the new science, plus our data, where all these people had had hearings, had reliability hearings, and in each and every case, the Courts had determined that the I.D.s were reliable, in cases where we now know they were unreliable because they were completely innocent. They weren't there. And so the New Jersey Supreme Court issued this landmark decision just last month saying we're going to get rid of and we're going to have a much more-expanded definition of what's needed in a reliability hearing.

The last option we're going to take on, we haven't gotten there yet...is the doctrine that deals with lawyers challenging the efficacy of the counsel and representation they received at their criminal trial. And that doctrine was articulated by the Supreme Court in a case called . was a two-prong test. You had to show the lawyer was bad. And you even had to show that even if he was bad, that it prejudiced the outcome. Interestingly enough, of all of our exonerations, only four ever won a motion. And three of the four had the same lawyer who was disbarred in Chicago. Okay. The rest all lost.

And what's interesting, when you deconstruct the cases, they didn't lose. The Courts agreed that they met the first prong, that the lawyers had given an unreasonably poor representation of them. Instead, they were losing on the second prong. In other words, all these state judges, all these federal judges, all these appellate courts were finding that there was overwhelming evidence of guilt despite the poor performance by the lawyer, and, therefore, we won't set the conviction aside. Well, think about it, and I'll leave you with this thought. This is a rule that found in case after case after case, overwhelming evidence of guilt where it turns out these people were all factually innocent.

Maybe we need a new test. ■



# AMERICAN COLLEGE OF TRIAL LAWYERS CANADIAN FOUNDATION

Some time ago, the Honourable **Jack Major** of Calgary, Alberta, formerly a Judge of the Supreme Court of Canada, suggested that the College explore establishing a Canadian Foundation to facilitate contributions from Canadian Fellows to support College initiatives which enjoy a Canadian component. At the time, tax relief was unavailable for contributions made by Canadian Fellows to the College's existing Foundation, organized under United States law. This idea was pursued with the members of the Foundation Board, and it was agreed that this was an imaginative initiative that would serve to more effectively bind the commitment of both Canadian and United States Fellows to the work of the College.

Accordingly, as a result of the efforts of an *ad hoc* committee and the *pro bono* contributions of **Bernie Roach** of BLG Ottawa, a Canadian Foundation has been established. Its formal name is the American College of Trial Lawyers Canadian Foundation. It has been afforded charitable status in accordance with the Canadian Revenue Agency requirements.

In addition, Jack Major has graciously agreed to function as the Canadian Foundation's Honourary Chair. The Canadian Foundation has one representative from the United States, the current one being Past President **Ralph I. Lancaster, Jr.** of Portland, Maine. President of the Canadian Foundation, **J. Bruce Carr-Harris**, serves as the Canadian representative on the United States Foundation's Board.

The Canadian Foundation encourages the generosity of Canadian Fellows to continue to augment the funds advanced by the College and the existing Foundation for Canadian undertakings. For example, the Sopinka Cup, held in Ottawa, and the Gale Cup, held in Toronto, have been generously supported for several years by the College. It is anticipated that this support will continue, but to the extent possible, bearing in mind the Canadian Fellows' more modest numbers, the requirement for defraying the cost of Canadian activities may be reduced by way of funds available through the Canadian Foundation.

The Canadian Foundation's Board of Directors believes that this opportunity to make meaningful contributions to the work of the College will serve to underscore the importance of its membership and activities north of the border.

The members of the Canadian Foundation's Board of Directors for 2011-2012 are:

Hon. Jack Major, C.C., Q.C., S.C.C., Calgary, Alberta,  
Honourary Chair

J. Bruce Carr-Harris, Ottawa, Ontario, President

Brian A. Crane, Q.C., Ottawa, Ontario, Vice President

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David W. Scott, O.C., Q.C., Ottawa, Ontario

# POST-TRAUMATIC STRESS AND TRAUMATIC BRAIN INJURY IN COMBAT VETERANS

The United States is approaching the tenth year of the longest war which this country has ever been engaged. Past President **Robert B. Fiske, Jr.** introduced General **Peter Chiarelli**, who for the past three years has been Vice Chief of Staff of the United States Army. He spoke at the American College of Trial Lawyers Annual Meeting in La Quinta, California, about Post-traumatic Stress and Traumatic Brain Injury, two ailments which plague a number of military personnel who have been deployed during these years of war. He also discussed the strain that the country's economic troubles have placed on the Army's budget.

General Chiarelli has served his country for forty years in a variety of capacities that Past President Fiske described during his introduction. They include having served as a field commander from platoon to corps at various locations in the United States and around the world, combat in Iraq and leadership positions at Army Headquarters and in the Pentagon.

A recipient of the Bronze Star and the Defense Distinguished Service Medal, in 2005 General Chiarelli assumed combat responsibility for the entire Iraq War and later served as a principal military advisor to the Secretary of Defense, a position in which he coordinated the actions of the four military branches through the Chairman of the Joint Chiefs of Staff with the Secretary of Defense.

Past President Fiske noted that in recognition of General Chiarelli's efforts to address post-traumatic stress in combat veterans, he received the Steven Jackson Foundation Award for Excellence in Military Medical Affairs.

A lightly edited transcript of General Chiarelli's speech follows. >>





Something that has been my focus...since I first became Vice [Chief of Staff] almost two and a half years ago...is post-traumatic stress and traumatic brain injury, which I consider the signature wounds of this war. We really need your help in understanding this and helping to eliminate the stigma that is so critical that we, as a nation, get rid of when it comes to behavioral health issues.

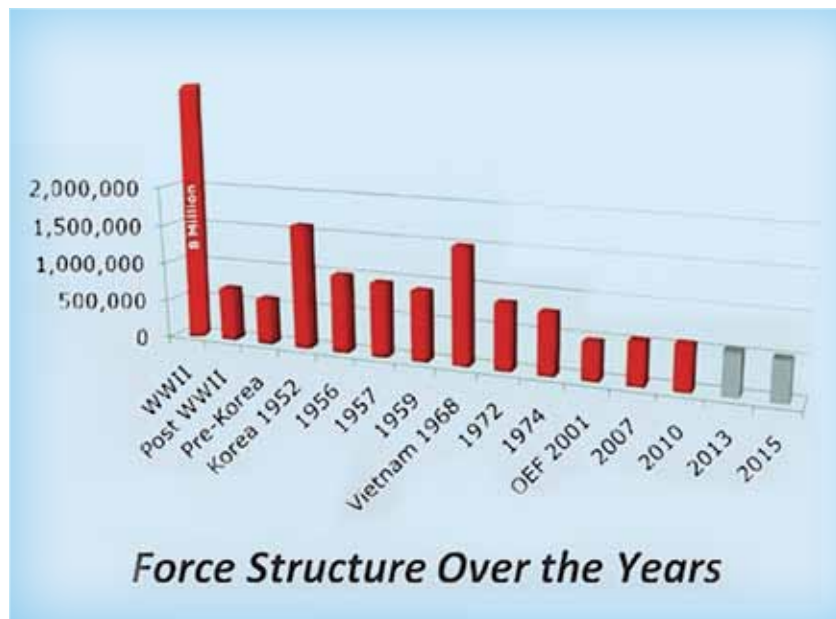
### REALITIES OF WAR TODAY

I want to talk to you a little bit about the reality of war today. It has changed. It is not *Private Ryan* and the kinds of things you see in movies. The reality of war today is that we have gone from what used to be a very linear fight to what is known as a nonlinear fight. Any man or woman who sets foot into Iraq or Afghanistan today sets foot into harm's way. It's as simple as that. And what they see in that 12- to 15-month rotation – yes, we've had soldiers deployed for as long as 15 months – what they see and what they experience in that time can have devastating effects.

War is a combination today of kinetic and non-kinetic events. The wars, or World War II that my father fought, were very kinetic in nature. There wasn't a lot of nation building going on. But 90% of the time our soldiers, sailors, airmen and Marines spend in Iraq and Afghanistan today, they're doing non-kinetic things, trying to help rebuild a country, and re-teach Afghans farming techniques that have been lost to generations because they have been at war for so long. It is really a combination of kinetic and non-kinetic events. We call it [a] "full-spectrum operation," and that's what we have been fighting in both countries.

[We are doing] much more nation building in Iraq. We see it much more kinetic in Afghanistan today with an enemy that will meet us on the battlefield and will fight, but at the same time, we see long periods of time when folks are involved in only non-kinetic things. But you never know when things are going to change. One minute you are fighting, the next minute you're handing out soccer balls. And that's what our folks have experienced over the last ten years...

### ARMY DOWNSIZING



We're talking about downsizing the Army at the same time we're fighting a fight. We'll move from 570 [thousand personnel] down to 520 [thousand personnel]. That was announced in the President's budget last year .... After World War II, the size of the Army



decreased significantly..., then as we moved into Korea we went over just 1.5 million folks to fight that three-year war. Again, we decreased in one of those troughs [see Force Structure chart], only to come again and fight in Vietnam.

But if you take a look at what we have done in the last ten years of war, we started with an Army of 482,000..., we built it up to 570,000..., and we have fought that for ten years with all volunteers. We have always had volunteers in our service before, but we've never ever fought a war with all volunteers, and we have never ever fought a war for ten years. Now, what does that mean? I've got soldiers that have been on five, six, seven deployments in the last 10 years. Deployments run from 12 to 15 months. My rotary aviators come home for 12 months and find themselves back down range on the very first day after 365 days at home in order to meet mission....

## WOUNDS OF WAR



Now, if you take a look at these three soldiers [see above photo], you'll see the one in the middle of a young woman wounded in an IED attack in Baghdad, Iraq. You see she is wearing a prosthesis. I invite you to go online, Google or whatever you want, and find a negative article [about] how we're handling or taking care of soldiers who have lost arms or legs or multiple wounds or limbs, and...you won't find a single one. The advances we have made in prosthetics have allowed us to return soldiers with these horrible wounds to life where they can do just about anything.

In Washington, D.C., I recently started the Army ten-miler where 65 wounded warriors, many...with prostheses, who were going to go out and run ten miles. It's not uncommon to see an individual who has lost both his legs run the Marine Corps marathon. [It's] absolutely amazing what we have been able to do. The picture on the left is a picture of a soldier with burns over 40% of his body. Forty-one operations later, we have been able to return his face and the rest of his body so that he, again, can be with his family and be in public and feel good about himself. Now, if you were to look at the soldier on the far right, the one in the uniform, you would probably say he's probably one of the lucky ones. One of the ones who has not been injured. I submit to you that may or may not be true. More often than not, we're finding that it's not true.

## POST-TRAUMATIC STRESS

Now, there [are] many folks who, when we talk post-traumatic stress, basically ask the question, "[W]hat is the matter with this generation?" There's nothing the matter with this generation. Post-traumatic stress has been part of warfare since warfare [began].... It's just been called different things.

An unbelievable documentary done by HBO last year called *Wartorn 1861-2010* went back and traced post-traumatic stress all the way back to the Civil War with a young private named [Angelo] Crapsey from Pennsylvania. [Crapsey] went down, full of vim and vigor, to fight for the Union, only to return two and a half years later, to be booted out of the Army, to be sent back home where he committed suicide six months later.... People back then communicated with letters. So they were able to document exactly what he went through, and there's no doubt he suffered from post-traumatic stress.

[At this point, General Chiarelli showed a video of interviews with World War II veterans describing their experiences of PTSD before it was diagnosed as such]

[This is] particularly poignant to me because my father served in World War II, and I tried my darndest to try to get him to sit down with a journal and write, in fact, what had happened. He wouldn't. He was a butcher before the war. He went off and fought for four years with Patton all through North Africa, Italy, and finally into Europe. And he just wouldn't do it.

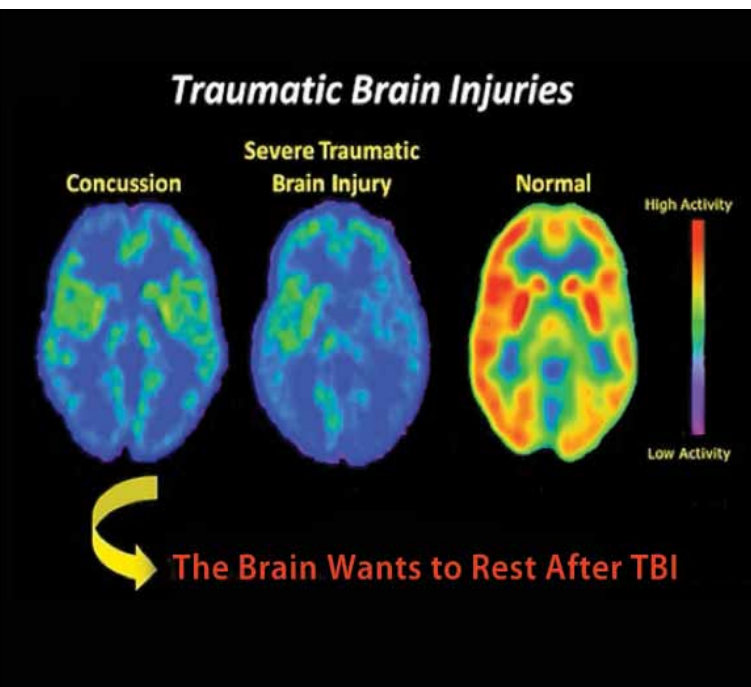
When I became Vice Chief of Staff of the Army, it was soon after the problem that we had at Walter Reed, and I was paying very, very close attention in those first few

weeks to the classification of the injuries that we had coming out of the war. At that time there were about 3,200 folks who were our most severely wounded with a single disqualifying injury of 30% or greater. That number has grown...to 9,144. This is like a survey. It's not the total problem. This is a number I can get a hold of. This is a number of over 9,000 folks who were severely wounded, and we can get a feel for how many of them are suffering from this.... Ten percent have lost arms or legs or multiple limbs. Two percent are like that soldier I showed you who was burned over 40% of his body. But 50% of them are suffering from post-traumatic stress, and 16% are suffering from traumatic brain injury.... [W]e're not criticized for how we're taking care of those who have lost arms and legs, [but] we are criticized [for] our inability to help this population. And I submit to you it is because we just don't know enough about the brain....

### TRAUMATIC BRAIN INJURY (TBI)

I think you all know a guy named Duerson. Played for the Chicago Bears. He recently committed suicide by shooting himself in the chest. Not the normal way men shoot themselves. They normally commit suicide, at least in the military, with a bullet to the head. But he did so so his brain could be looked at by a doctor in Boston, Massachusetts, named Ann McKee, who's looking into this idea of tau protein and mutation of tau protein and how it goes to the brain and can be the reason why we see so many folks with post-traumatic stress and with traumatic brain injury at times develop dementia.

TBI is something that is a little easier for us to get soldiers to understand because we can literally show them pictures like this:



Today if a soldier's in a concussive event, we hold him out of fight for 24 hours so we can determine whether or not he or she has a concussion.

I don't know what you know about the brain. The brain is about 2% of your body mass. It burns 20% of the energy created by your body. The brain you see on the right is a picture of a brain taken with a relatively new technology called "positron emission tomography." You pump somebody full of glucose, wait about 20 minutes, and you can see that's a normal brain functioning the way it's supposed to functioning.

The brain in the center is an individual who has been comatose for five days in a horrible car accident. Again, using positron emission tomography, we can take a picture of his brain, and see that it's shut down, it's repairing itself.

One of the problems with traumatic brain injury in concussion is what we tell people to do is to rest and take aspirin. We don't operate. We don't do any fancy things. The brain has to recover. We're not missing "down range" with those kids that go comatose. We're getting them to a Level III hospital, and we're taking care of them better than we've taken care of them in the history of the United States Army. The brain on the left is UCLA football player. Injured with two minutes and 47 seconds to go in the game, this particular football player was on a field 100 yards long, a little over 55 yards wide, [and] was, in fact, taken off the field. Doctors, camera angles, everybody looked at him, brought him in at halftime [and] said, "You're good. Go play the second half. Do good things." And he did.

As he was dressing out that night, one of the trainers came up to him and said, "[L]isten, if you display any of the following symptoms in the next 24 hours, I want you to produce yourself to the emergency room."

Well, you know the rest of the story. He did. He woke up the next day, he had those symptoms, he went into the hospital, and they took a picture of his brain using positron emission tomography. Now, you tell me the difference between the individual who has been comatose for five days and the individual who walks into the emergency room on his own volition, talks to the doctor, explains his symptoms and is treated. That's the problem we're having, and that's why [today] we hold everyone out of the fight for 24 hours, and that's why we have had tremendous success, but we've only done that for the last year and a half, because we just didn't know.



The problem we have with post-traumatic stress and traumatic brain injury – and I just mentioned that to you because it might be helpful – is this thing called co-morbidity, the sharing of symptoms. We know about post-traumatic stress, not from the study of soldiers who have gone through these events. We know it from the study of women who have been sexually assaulted. Between 72% and 74% of women who are sexually assaulted develop post-traumatic stress. But the problem we have is there are no biomarkers for concussion yet.

We think we're about a year and a half away before we'll be able to give a soldier a [device], something not unlike what you use to measure glucose in a diabetic. He's going to be able to go to a soldier after he's been in a concussive event, prick his finger and be able to tell within five minutes whether or not that individual has had a concussion. That will be huge, because we then can start to separate these two things and treat them for what they really are. So many times today our doctors think it's post-traumatic stress, try to treat post-traumatic stress, when in reality... this individual was in a concussive event and is suffering from traumatic brain injury...

We're better at educating and treating our force. We've instituted protocols down range. We're in the middle of a \$50 million study with the National Institute of Mental Health to understand suicide and how suicide works. It's the first-ever study of its kind. It will help the Services, but I promise you, it's going to help civilians, because all this is tied together.

An individual with PTS is six times more likely to commit suicide. An individual with PTS is three times more likely to participate in

partner aggression. And we are reestablishing policy and compliance in proof sharing of information between the Services. We're working this hard, but there's a long way to go.

## FUTURE PROGRESS

I will end by talking about what I think is one of the real beacons of hope out there. It's the National Intrepid Center of Excellence built by Arnold Fisher. The Fisher family is famous to all the Services in putting together Fisher Houses at all our hospitals. He built a wonderful center down in San Antonio to take care of our soldiers who've lost arms and legs, the Center for the Intrepid down in San Antonio... He's created this wonderful institution for us out at Bethesda and the new Walter Reed, in Washington, D.C. where we're doing cutting-edge research and seeing the families who were hurt the most by post-traumatic stress that the doctors just can't seem to help. They have imaging techniques. They have doctors who do this 24/7 and are really making some progress in this particular area in understanding the brain.

And, finally, I would end by saying I need you to be ambassadors, to use your position and to influence others about this critical challenge our nation is facing. I talked about 9,144. The number is far greater than that. We have got to promote the research so that we understand the brain. I'd ask you to help us eliminate the stigma. When you see somebody who returns from combat or was in a natural disaster that is exhibiting those kinds of symptoms, take the time to tell them and help them get the help that they need, because we can help them if we can get them to the doctor.... I thank you very, very much. Army strong. ■

*I'd never been east of Spokane, Washington, before I joined the Army, and I left with my bride. We drove across country. My dad had been to Chicago, and I had never been to Chicago. I wanted to go down to the Loop. That's the only thing I knew. And I just thought that once you got to Chicago, all the signs would say "Loop." We got out there during rush hour in 1972. You all remember Chicago in 1972? My wife was reading the map, and that's never a good thing. I didn't know where to get off, and I picked a street. It was called "Persian Boulevard." For those of you who are familiar with Chicago, in 1972, Persian Boulevard wasn't the best place to be. No one followed the traffic lights. I got off. Before too long, a Chicago policeman bumped the back of my car and asked me what in the heck was I doing in this part of town, at which time he led me down to the Loop.*

—General Peter Chiarelli

# NEW COLLEGE OFFICERS ELECTED TO 2011-2012 TERM

## Philip J. Kessler Elected Treasurer

Elected Treasurer of the College for the 2011-2012 term, Philip J. (Phil) Kessler, was inducted into the American College of Trial Lawyers at the 1996 Annual Meeting in San Diego, California. He served as Chair of the Award for Courageous Advocacy Committee (since renamed the Griffin Bell Award for Courageous Advocacy), followed by a term as Chair of the Michigan State Committee. He has served as a member of the Access to Justice and Legal Services Committee, as well as several ad hoc committees, including those addressing College committee structure, emeritus status and judicial independence. From 2005 to 2009, he was the Regent for the jurisdiction covering Kentucky, Michigan, Ohio and Tennessee. As Regent, he oversaw the work of the Special Problems in the Administration of Justice (U.S.), Sandra Day O'Connor Jurist Award, and the Canada-United States Committees.

Kessler's law practice is concentrated in the prosecution and defense of a wide variety of business disputes on behalf of individuals, partnerships, and private and public corporations. He has extensive experience before the federal and state courts including the United States Court of Appeals for the Sixth Circuit, the United States Tax Court, the Michigan Court of Appeals and the United States District Court for the Eastern and Western Districts of Michigan and has argued before the United States Supreme Court. He currently divides his time between offices in Bloomfield Hills, Michigan, and New York City. He is the current Secretary of the Supreme Court Historical Society. He is married to Mary Ray Brophy, who is also an attorney.



## Paul D. Bekman Elected Secretary

Paul D. Bekman of Baltimore, Maryland, was elected Secretary of the College for the 2011-2012 term. Inducted into the College at the 1993 Annual Meeting in Washington, D.C., he served as a member and chair of the Maryland State Committee before his 2006 election to Regent. He served as Regent until 2010, working with the state committees of Maryland and the District of Columbia, as well as the Technology and Attorney-Client Relationships Committees and the Ad Hoc Committee on the Discovery of Electronically Stored Information.

Mr. Bekman's law practice is devoted to personal injury law. He is certified as Civil Trial Specialist by the National Board of Trial Advocacy and certified by the American Board of Professional Liability Attorneys in the field of medical malpractice. He is also a Proctor in Admiralty. Former President of the Maryland State Bar Association, the Baltimore City Bar Association and the Maryland Trial Lawyers Association, Bekman chaired the University of Maryland School of Law Board of Visitors from 2002 to 2011, and received its Distinguished Alumni Award in 2010.

In reference to his election, Bekman commented, "It is a great honor to be a Fellow in the American College of Trial Lawyers. I am looking forward to assuming the responsibilities of Secretary of the College and following the outstanding Fellows who have served in that position before me, many of whom have been my mentors in the College." ■



# CIVIL DISCOURSE DISCUSSED

Past President **E. Osborne Ayscue, Jr.**, of Charlotte, North Carolina, had the honor of introducing **Sally M. Rider**, Founding Co-Director of the National Institute for Civil Discourse, located at the University of Arizona in Tucson.

*Only those who have no access to newspaper, television, the internet or talk radio can possibly be unaware of the growing lack of civility in our public discourse. Our next speaker is singularly qualified to define the underlying societal problem and to tell us about her organization and how it has undertaken to address that problem.*

*Sally Rider is Co-Director of the newly created National Institute for Civil Discourse at the University of Arizona's James E. Rogers College of Law. Its a nonpartisan center promoting civic engagement and civility in public discourse. Indeed, she wears two hats. She is also the director of the University of Arizona's nonpartisan William H. Rehnquist Center on the Constitutional Structures of Government, whose mission is to promote greater public understanding of the role of the*

*judicial branch in our system of government. The symbiotic relation between those two Institutes will be readily apparent to anyone who follows our current national dialogue.*

*In 2000, she became the Administrative Assistant to the Chief Justice of the United States serving as the Court's Chief of Staff, assisting the overall management of the court, and serving the Court and the Chief Justice in a number of collateral capacities. Then in 2006, she brought her extensive experience in all three branches of government and as an experienced trial and appellate lawyer to the University of Arizona's College of Law, where she has both taught and helped to create the two Institutes to which I have referred.*

*Despite the similarity of their names, she was not our first woman astronaut; but reading her resumé, one might reflect that had her life taken a different course, she could have.*

*A generation ago, the idea of addressing the issue of civility to a gathering of lawyers such as this would have been bordered on the demeaning. After all, the profession was ground-*



*ed on a tradition of collegiality and mutual respect that enabled lawyers to deal with one another in court and across the negotiating table in a way that served the clients' interests, the long-term interests of the profession and the system it serves. Civility was implicit in the culture of the profession. Sadly, that culture has been eroded in recent years. The explosion of the number of lawyers has left many of us, particularly our younger lawyers, practicing in a world of strangers. Pressures from the increasingly uncivil society in which we live threaten to eat away at our own professional values. And a profession that once prided itself in serving as a model for the rest of the society is, itself, at risk of compromising that role.*

*The programs of the College at national meetings have traditionally been focused on subjects that give the Fellows of the College and their guests food for thought that they can carry away with them and share with their colleagues and friends back home. What our next speaker has to say falls squarely within that tradition. >>*

Thank you very much for that kind introduction... [H]aving spent most of my career as a trial lawyer, it is an honor to be here among the best in our profession. I am going to talk about the National Institute for Civil Discourse. First, I am going to tell you how it came about, and then I will talk about what we are trying to do.

On January 8, 2011, there was a horrific shooting in Tucson that injured many and killed others, and it left the entire city reeling. Tucson is in many ways still a small town, and I think everybody in Tucson knew someone who was injured or killed that day. Our own Chief Federal Judge, John Roll, was one of those killed. The President came to Tucson for a memorial service a couple of days later, and he called on us to try to create something positive in the aftermath of the shootings. It was something that many members of our community were already trying to think how to do. The Provost of the University of Arizona and the Chair of the Board of Regents gathered a very small working group together, which is how the idea of creating a national institute to focus on civil discourse was born.

None of us were saying, "Oh, incivility caused these shootings," but it opened a space where a lot of people were talking about incivility. Gabby Giffords, who was a target on that day, on January 8, had just gone through a vitriolic campaign. I was asked at the working group to be the co-director of the Institute along with Brint Milward, a social scientist, who heads our School of Government and Public Policy. This was in early January, not too long after the shootings. The Institute is essentially run by



volunteers. We have one paid employee and a quarter-time employee. The rest of what our Institute is doing involves people who have stepped up and said, this is important, and we're willing to work on this. And people were unbelievably anxious to help. People from all over the country. Within less than a month, we had commitments from most of the people who are on our national board. Our chairs are the first President Bush and President Clinton, our co-chairs are Justice Sandra Day O'Connor and former Senate Majority Leader Tom Daschle. We have Katie Couric and Greta van Susteren. We have Colin Powell and Madeleine Albright. People were just anxious. "What can we do to help?"

We announced the creation of the Institute on February twenty-first, six weeks after the shootings. And within days, we heard from groups all over the country who said, "[O]h, we have been working on this for years. We have been working to improve civility and public dialogue and not gotten very far. We are so happy that there is a group that has these high-profile people involved and that you can actually get something done." So it has been and still is a big job just to get our hands around what other people are doing to try to improve civility.

## WHAT IS CIVIL DISCOURSE?

Then it dawned on us, if all of these groups had been working on this for years, what in the heck were we going to do? How are we going to be different? What is it that we could bring that would advance this notion of improving our civility and our public dialogue? For one thing, we have tried to be, as you noticed when I said who was on our board, we have tried to be relentlessly nonpartisan, because we all recognize this is not a partisan issue. And if we can't get people from across the political spectrum to agree that there is a problem that needs to be addressed, there will not be any success. Our goal is somehow to change the incentives so that civility pays off instead of incivility. And I think everyone would agree. You talk about civil discourse, and people agree that it is necessary in order for our democracy to function. You have to be able to discuss ideas. You have to be able to vigorously debate. But then you come to the idea, well, what is civil discourse? Can you define it? Is it like pornography, you know it when you see it? Is it toxic sound bites on cable TV?

We want vigorous debate consistent with the First Amendment, and we do not want people to feel like

we are asking them to abandon their principles and move to the middle. That is not what we are talking about at all. I think the best way of thinking about it that I have come up with in these months is that you don't question the legitimacy or the good faith or the motives of someone just because you disagree about something.

We have had a lot of people say, "[W]hy don't you come up with standards? Come up with some standard, you could measure conduct against the standard. You're a lawyer. Do that." And we said that we don't want to be the speech police. It's very hard to come up with a standard. The ABA recently adopted a resolution regarding civility, and that's just a great thing. But there's no definition in it, and there's no standard that you can measure conduct against. So, then, we thought, what about research? We're at the University of Arizona, one of the top research universities in the country. Is there something that can play to this strength? And so we decided, yes, there's a lot that we don't know; and as you are all aware, often what we think we know, we don't know. And I think that Peter Neufeld's presentation today drove that point home. [Editor's Note: See separate article about Mr. Neufeld's presentation, found elsewhere in this issue.]

So we said, okay. Let's develop a research agenda. We'll get empirical research into this issue, but use it to actually do things. Not just to write papers and have professors talk back and forth to one another. To use it in the way, again, that Peter Neufeld's group has used empirical research. But how can we develop a research agenda when we have such a broad topic? Civil discourse. Is that bullying in the schoolyard? Is it shouting heads on cable TV?

So we decided that our initial focus would be on political campaigns and public policy debate. It just seemed obvious. It's something that energizes people. The 2012 presidential campaign is already underway. So it's something, although it's large, it's small enough for us to start. This is where we're going to start. We're going to try to influence political campaigns. The Institute's research director, who is a Guggenheim Fellow named Robin Stryker – she teaches at the U of A – she decided to just go through and do some literature searches and figure out on very narrow topics what do we know about civil discourse and incivility. And I'm just going to talk about a couple of things



that came out of her research just because I found it interesting as a lawyer to listen to the social scientist.

They did a paper called “Rhetorical Traditions, Emotion and Modern Discourse.” And it points out that thinkers as far back as Aristotle realized the need to use emotion in order to persuade people. Trial lawyers all know that. Emotion’s going to help you persuade. But today’s research shows that if you hold a political view that’s based on emotion, the only way or the best way for someone to try to get you to change your mind isn’t to appeal to reason or education, but it’s to use emotion to engage you to then open your mind to listen to reason and education. And that made me think of a sign that my dad still has hanging in his office that says: “Don’t confuse me with the facts.” I think that explains that research in a sentence.

[Regarding online discourse,] everybody says, “[O]h, online. It’s horrible, these bloggers and comments people make on web posts and people go on the internet just to find like-thinking people and reinforce their opinions.” It turns out that online/offline, Americans tend to discuss politics with people with whom they agree. But if you are online seeking out those people who agree with you, you are much more likely to come across information that informs you in different ways. You are more likely to be better informed about different reasoning and different information. And regarding this anonymity and these bloggers or people on posts who post very negative things, the research shows that if you pick one person at random in a group of commenters [and ask that person to] go through these posts and rank them for civility, the instance of incivility in anonymous posts drops down dramatically. So that’s something very easy to do that I wouldn’t have thought about.

Some of you may be saying, “ah, research, research. It is going to go into a black hole and never going to accomplish anything.” And I think that is why the provost asked me, with a trial lawyer background, to be co-director of this Institute, to make sure we do not fall into doing research for research’s sake, but we actually find things that we can do to inform our action.

To give you an example that someone suggested, we might in the 2012 election, find two different congressional campaign districts that are similar in ways that can be measured empirically, and then we go into one of those campaigns and do some sort of advertising about civility. And then we do exit polls of vot-

ers in both districts and see whether that advertising changed attitudes at all. See whether it caused any changes in the way the candidates advertised. So there are things, I think, that we may be able to do that can inform our practical work.

So what have we done since we formed this board and launched this institute with our one employee and all volunteers? We have started a competition for research grants that we hope to bring nationwide to connect social scientists doing research on this and fund grants for people all over the country. Just in Arizona, we found thirty-five groups working on civil discourse. We brought them all together, and Brint Milward, who is the other person who was named as Co-Director of the Institute...does a lot of work for the Department of Defense. His area of expertise is networks, and he does work on terrorist networks, and he helps figure out where are the nodes in the network that really make the network work. And if you took out this node, it would do the most damage to the network. So he is applying that sort of science to the idea of building networks of groups working on improving our civil discourse and trying to maximize, making sure the sum is greater than the parts.

We also, about a month ago, held what we called an “executive briefing,” and we gathered about thirty people that, in Washington, they would say were wise heads. And we gathered them together to talk about what I have been talking about here. Can you come up with a definition of what incivility or civility is? Can you come up with a plan to try to improve civility? And we had people there -- we had Katie Couric and Greta Van Susteren. We had Donna Brazile, who ran Al Gore’s presidential campaign, Mark McKinnon, who ran John McCain’s Primary campaign. We had about 30 people, and we met in Washington, D.C. And I thought, “What greater place to meet than at the Supreme Court? People come to the Supreme Court for arguments, and they’re vigorous, and they’re questioned vigorously, but it’s at the height of civility. It’s an exchange of ideas, and there really is a pull and tug of ‘can you change my mind by answering these tough questions I have?’” So we met at the Supreme Court. Chief Justice Roberts was gracious enough to host us. And we talked about these things, and we came up with a few ideas which I think we’re going to push forward in the near future.

One of them is having a message campaign, a nationwide message campaign – sort of like the anti-littering



campaign – to get people from all different walks of life, especially politicians or former politicians, and do some sort of a message campaign and see if we can get some traction that way.

There was an idea for a national awards program to engage the next generation, to sponsor an essay contest for middle schoolers or high schoolers. “Here is the problem. What do you think we should do about it?” Pick a winner from every state and bring them to Washington.

Another idea that I thought was really a good one is to have some sort of shadow Congress where you bring former members of Congress together, and you pick the toughest issues – immigration, the debt, the toughest issues of the day – and you have them debate. And do it like it should be done and do it at the museum, which is part of the First Amendment Center in Washington, in order to sort of show our representatives what it is we expect of them.

You know, I worked for Mo Udall right out of law school, and he was sort of the exemplar of civility. Everybody liked Mo, and he liked everybody. And if you didn’t, he would just make a joke about it. You know he was, as he said, too funny to be president.

Our next event is going to be a conference later in the winter to bring together groups in Washington from all over the country who are working on improving

civil discourse, and it is almost like we are trying to create a social movement. And the research shows that the most successful social movements – Mothers Against Drunk Driving, Anti-Littering Campaign – involve getting people at the grassroots level working together with one message and having people at the top working together. So that’s what we are striving to do. They may say, “How are you doing this? How are you funded?” Obviously, you would think we are not funded very well since we are mostly volunteers and have one paid staff member. But, we have managed to raise over Two Million Dollars from, among others, Providence Service Corporation, which is headquartered in Tucson, and they have actually donated nice offices for us downtown. And then the Omidyar Network, which is a philanthropic foundation, recently funded.

What we want to do next and what I could use your help with, I think, is that we are going to hire an executive director to be the national face of the Institute. And we hope to find somebody who is nationally known, who is passionate, who is committed to the idea of improving civil discourse, who is comfortable taking academic research and translating that, being able to use it with a lay audience, and who is savvy with the media. So, if any of you fill that bill or if you know someone that does, you can find my email address on the University of Arizona website. Send me your ideas, because we want to cast a broad net to find somebody really good to do this. ■

*And then it dawned on us, if all of these groups had been working on this for years, what in the heck were we going to do? How are we going to be different?*

*We want vigorous debate consistent with the First Amendment, and we don’t want people to feel like we’re asking them to abandon their principles and just move to the middle.*

*I think the best way of thinking about it that I have come up with in these months is that you don’t question the legitimacy or the good faith or the motives of someone just because you disagree about something.*

*... thinkers as far back as Aristotle realized the need to use emotion in order to persuade people.*

*... today’s research shows that if you hold a political view that’s based on emotion, the only way or the best way for someone to try to get you to change your mind isn’t to appeal to reason or education, but it’s to use emotion to engage you to then open your mind to listen to reason and education.*

*People come to the Supreme Court for arguments, and they’re vigorous, and they’re questioned vigorously, but it’s at the height of civility.*

—Sally M. Rider

# Regent Paul S. Meyer at Friday's General Session

*We give thanks that we are privileged to gather again as Fellows of the American College of Trial Lawyers. Let us be reminded of our legacy and of our duty to uphold the sacred obligations of the Trial Bar. Here we renew our commitment to the dignity of our calling and to the sanctity of the rule of law. In these times of worldwide change and domestic challenge, may we be reminded daily that the rule of law is the bedrock of a civilized society. May we also take a moment of thanks to reflect on how we got here. We appreciate those who came before us, and those we are blessed to have with us now, who by example and inspiration encouraged us to dig deeper, to go farther, and to become better than we thought possible. And let us all take hope from the strength of the human spirit in the face of overwhelming adversity shining so brightly over this past year in countless acts of love and courage and humor. May that spirit continue to endure.*

# Regent Phillip R. Garrison at Induction Banquet

*We are grateful for the opportunity to come together this week, not only socially, but also in mutual respect for the professional ability and accomplishments of the Fellows of this College.*

*Help us to be ever mindful of our responsibilities as lawyers and citizens to protect and preserve the rule of law as an essential safeguard of our society.*

*Let us also be forever mindful that the practice of law is a privilege that carries with it not only the benefits but also the responsibility to see that the law is applied fairly to all, regardless of their station in life and with an abiding respect for human dignity.*

*As officers of the Court as well as representatives and protectors of our system, help us understand that with our successes comes the obligation to lead by example. In doing so, give us the determination and good judgment to live with civility, dignity, respect for others, and in such a way that we are seen as the standard bearers for the best of our profession.*

*Tonight we are inducting shining examples of the best of our profession. Help these inductees to be forever mindful that becoming Fellows of the College is not the end of their professional journey, but rather, the beginning of an obligation to represent the College and its Fellows, and in doing so, to live by its higher standards and ideals.*

*Finally, we pray for the safety of our armed forces and others serving our country and ask that you guide us and the world in such a way that future generations may experience freedom and a commitment to human rights.*

*Amen.*

**MEETING  
INVOCATIONS**

# LIES AT 24 FRAMES A SECOND

## Inside a Pixar Animation Studio Feature Film

Past President **Joan A. Lukey** introduced **Travis Hathaway**, Senior Animator at Pixar Studios, with a promise: *I promise, you are about to receive an inside look that very few people ever have the opportunity to do, a look into what may ultimately be judged as one of the late Steven Jobs' greatest legacies, the marriage of computers to animation, taking the animation as far away from cartoons as a high school film documentary is from a great epic film. Such movies as Finding Nemo, Toy Story, Cars and Up are beautiful stories with beautiful characters that reach out to us at all ages. Today we're very fortunate to have with us Travis Hathaway. >>*





With ten years' experience at Pixar Animation, Senior Animator Travis Hathaway was the ideal person to introduce the assembled guests to the process involved in putting together Pixar's tenth animated feature film, *Up*. Released in 2009, the computer-animated comedy-adventure film tells the story of a man who spends his entire life dreaming of exploring the globe and experiencing life to its fullest.

Hathaway began by explaining the rationale of his presentation's title, *Lies at 24 Frames a Second*. Documentary film maker Errol Morris is known to have quoted Godard, the master of French New Wave Cinema, when he said "[f]ilm is truth at 24 frames a second." In his own filmmaking, however, Morris was known to utilize an exact opposite method – that of advocating his own point through his characters, thereby leaving truth or reality at the door. Thinking about the methodology of these two filmmakers led Hathaway to theorize that he, and by extension, Pixar, convinces the audience to follow a story and fall in love with its characters. Pixar's audience benefits from the best of both worlds. The viewer is given the message that Pixar wants to get across, while retaining the viewer's involvement. Ergo, the audience may be experiencing "lies," that is, Pixar's reality as it enjoys a new environment, experiences the emotional highs and lows of the characters, and along the way, picks up a message that becomes the ultimate truth.

We were treated to a visual mini-tour of the Pixar work environment, developed by the late Steve Jobs to foster creativity and collaboration. Instead of "Dilbert-style" cubicles, the employees work in indi-

vidual, personalized pods. One animator hid a secret room behind his bookshelf, others added a bandstand and still others brought in garden sheds, customizing them with hardwood flooring, drywall and various personal décor. The building was designed with a large, central atrium where the employees inevitably and incidentally meet, communicate and share their creative ideas. Whether or not Pixar's creative setup encourages comfortable workers to work longer hours or to produce a more-creative product is anyone's guess.

Hathaway's theory of Pixar's intent: To tell great, entertaining stories, to achieve believability through authenticity, and to study reality through caricature. As an example, a reference photo used by artist Edward Hopper was juxtaposed against Hopper's finished painting, "Rooms by the Sea." The resource photo: a simple room, an open door and a grassy lawn leading to an expanse of water. Very simple. The open door allows a stream of sunshine to flood the room with light. This was the reality. The finished painting: a simple room, an open door dropping directly to the sea. The open door and a stronger light source beckon the viewer, as in a dream, to disappear into the sea. This was the "lie." The finished painting by Hopper was eerily similar to his resource photo. The difference was that the "lie" encouraged the viewer to step into the painting to the viewer's own reality. By going where Hopper leads us, each viewer experiences his own, unique and different reality. As Hathaway opined, the finished, surreal painting "makes the world a bit larger and more interesting."

Hathaway then proceeded to describe the process of creating an animated feature film.





*Rooms by the Sea* by Edward Hopper



His inspiration photo

### The Animated Feature Film in Steps:

**Storyboards:** The process of animating a feature film begins with storyboards which are idea sketches, rough comic book-looking drawings that allow the production team to quickly add and toss out ideas, as they present them visually in addition to through explanation. Even though crude, the storyboards are full of emotion and expressiveness. Storyboards are typically the first time the intent of the Story Department and the Director is seen by the team.

**Layout:** Although still very basic, the storyboard is now transferred to film as rendered by computer. The computer-modeled set is now projected with the characters inserted, and a virtual camera is placed inside the layout, providing the first sign of the finished product. It is during the layout process that rudimentary blocking of figures and scenes is accomplished. The animator now has the opportunity to begin to develop his or her own ideas and objectives.

**Animation:** Although the layout lost some of the character of the storyboards, the animator now puts expression back into the final product. The animator often develops additional footage with new ideas. Texture is added and artificial lights are set up inside the scenes. The animator puts his characters through virtual calisthenics to ensure the geometry of the

characters' movements work from all angles and the characters look consistent from frame to frame. Lastly, it is the animator who has the responsibility as to of how each character acts within each frame.

Although the basic steps of the animated film are Storyboard, Layout and Animation, the project involves many, many employees: Director, co-directors, production designers, heads of story, recorders of scratch dialogue, sculptors, editors, supervising animators, directing animators, musicians and researchers. These latter employees have the responsibility of locating and presenting real people, places and things, to be altered by the creatives into the "lies," now presented as the new reality.

In *Up*, emotion was paramount - initially for Carl, the protagonist, and later for the viewing public. As sad, lonely Carl tries to explore the world's rules, he hopes to make his life as complete as possible. Even the landscape of the film provides a purpose. Based on the Venezuelan *tepuis* - gigantic mesas in an isolated ecosystem - the flat tabletop mountains represent the desire to escape to another world. As the viewer is drawn into Carl's life, the viewer absorbs Pixar's message to live life to the fullest. Seize the day. Every minute counts.

Not a bad lesson for us all. ■

# AMERICAN COLLEGE OF TRIAL LAWYERS INDUCTION CHARGE

Every Fellow hears the College's induction charge at the time of his or her induction. It has been delivered at each induction ceremony for sixty years in its original form, subject only to one altered gender reference as the College inducted its first female member. Chancellor-Founder, Emil Gumpert worked on the induction ritual for nearly a year before settling on the language, and the Charge was first used at a July 1951 meeting of the College in San Francisco.

*[Tonight] today the portals of the American College of Trial Lawyers are again opened to receive into Fellowship a group of distinguished barristers. None who fails to justly merit that worthy title may enter here, for we recognize not only the distinction between the two branches of our profession, but the varying standards, as well, of the individuals within each.*

*You, whose names are freshly inscribed upon our rolls, have, by your mastery of the art of advocacy, by your high degree of personal integrity, your maturity in practice and your signal triumphs at the bar of justice, earned the honor about to be conferred upon you. By your ability, learning and character you have added luster to the legal and judicial annals of your state or province, and have helped to strengthen and to preserve the mighty fabric of our law.*

*We are confident that in the days to come, the lofty objects and purposes of this organization will be further advanced by the application of*

*those rare qualities and virtues which nature, fortune and laborious days have bestowed upon you.*

*We know that your attainment of the front ranks of the bar has not been without its costs, and we recognize that our specialty exacts much of those who win its favor. Truly, we are, in Lord Elden's words, the hermit and the horse.*

*And so, we like to look upon these gatherings, not only as regular meetings of the Fellows, striving to improve and to elevate the standards of trial practice, the administration of justice and the ethics of the trial branch of our profession, but also as meetings of regular fellows, where we may with utter freedom and equanimity, go from labor to repose. Here, we seek, for the moment, to obliterate the recollection of our distractions, our controversies and our trials, and to transport ourselves from the rush and tumult and uproar of our daily lives into the quiet fellowship and congenial society of our fellow leaders in the bar. In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships.*

*You have all met all of our qualifications and have been duly elected to membership in the College, and so we welcome you into our Fellowship and, with pride, we now address you as Fellows of the American College of Trial Lawyers - as sages of our craft.*

*Long and happy may be our years together!*

The Induction Charge, written by the late Emil Gumpert, Founder and Chancellor of the American College of Trial Lawyers ■

# THE (UNLIKELY) RECOVERY OF FIVE GUSTAV KLIMT PAINTINGS FROM AUSTRIA

Past President **David W. Scott** introduced **E. Randol Schoenberg**:

*It is my privilege to introduce E. Randol Schoenberg of Burris, Schoenberg and Walden of Los Angeles, our guest this morning. He will tell us something of the extraordinary story of his efforts on behalf of his client, Maria Altmann, in securing the return, against the wishes of the Government of Austria, of six famous paintings by Gustav Klimt, the property of Mrs. Altmann's Austrian family.*

*Two points of background before hearing from Mr. Schoenberg. The story of this and similar cases of Nazi-looted art remind us of the horrors of the Holocaust and the years of persecution of the Jewish communities in Europe, which preceded it. There can never be adequate reminders of an era preceding and during the Second World War, when man's capacity for obsessive cruelty was so vividly demonstrated. As a current reminder, may I recommend Erik Larson's new book, In the Garden of Beasts, an account of William E. Dodd's life in pre-war Berlin as the United States Ambassador to Germany. The inexorable escalation of Hitler's extermination plan for members of the German Jewish community, and the failure of the non-Jewish community in Germany and beyond to offer anything other than token resistance, is shrouded once again in a very compelling analysis of this dark period in history. In spite of the passage of time, object lessons continue to be learned.*

*The second point to have in mind in hearing Mr. Schoenberg's riveting account of his efforts in the Altmann case is an advocacy point. All of us as trial lawyers have at one time or another, and for the highly successful advocates, repeatedly faced what appeared to be insurmountable odds in achieving a just result for our client. In pursuit of what was right and just, Mrs. Altmann faced the relentless opposition of the government, both of the country of her birth and her adopted country, the uncertainties of fact and law relating to her claim and the isolation attendant from the assertion of a claim which was said by otherwise-responsible authorities to have absolutely no merit. Success depended upon the efforts of a skilled advocate unintimidated by the weight of the forces ranged against him, undeterred by the risk of failure, and determined only to achieve the just result to which his client was entitled. These are the characteristics of a great trial lawyer, and as the account of Mrs. Altmann's case will show, were possessed in no small measure by her counsel....*

Randol E. Schoenberg's remarkably inspiring story, which he illustrated with photographs of the art it involved, follows: >>





### A PLEASANT COINCIDENCE:

... [I]t's especially an honor to speak here in the same room as Justice Stevens, who...played an extremely important role in the story that I am about to tell.

### THE PARTIES AND THE PROBLEM:

So the story of Maria Altmann, my client, ... [who] passed away earlier this year, and I think this is my first speech since she passed away.... Maria was a very close family friend of my mother's parents, who knew me - I used to joke - since my mother was born. And she [Maria Altmann] called me in 1998 - I was 31 years old - and asked me to help her with the recovery of Klimt paintings that belonged to her family. And this is the story of those paintings.

Maria was born Maria Bloch-Bauer. The Bloch-Bauer family was a Jewish family living in Vienna. [There were] actually two boys named Bloch who married two girls named Bauer. Maria was the youngest of five children of Gustav and Teresa Bloch-Bauer. Her father was a lawyer. And they had - Gustave and Te-

resa had younger siblings who married, Ferdinand and Adele Bloch-Bauer. Whereas, Gustav and Teresa had five children, Ferdinand and Adele could not have children; and perhaps, as a result, they collected artwork instead. Ferdinand was, himself, a very wealthy sugar magnate or sugar baron. For those of you who have been to Vienna, you know how important sweets are to that society, and he made an absolute fortune in sugar at the turn of the 19th to 20th Century. And it allowed his wife, the young Adele, who was sort of a socialite but also very modern in her thinking and intellectual, to discover and invest in important artworks. And the Bloch-Bauers became one of three Jewish families who bought an enormous number of paintings by Gustav Klimt, at that the time the most famous artist in Austria.

### ADELE'S PORTRAITS:

This is the famous portrait of Adele Bloch-Bauer that [was] commissioned by the Bloch-Bauers and purchased for their home - the first gold portrait of Adele Bloch-Bauer:



*Adele Bloch-Bauer I, "The Gold Portrait," 1907*

They then purchased a second portrait of Adele five years later. She's the only person to have two full-length portraits by Klimt.



*Portrait of Adele Bloch-Bauer II, 1912*



Klimt was and still is a very famous artist, but he only painted about a hundred large-scale paintings. The Bloch-Bauers owned, as we'll see, seven of them.

### THE FOUR LANDSCAPES:

They also owned landscapes. This beautiful Beechwood:



*Beechwood Forest, 1903*

The Apple Tree, which was Maria's favorite:



*Apple Tree, 1911 or 1912*

The slightly unfinished Houses in Unterach am Attersee:



*Houses in Unterach am Attersee, around 1916*

And the beautiful Schloss Kammer am Attersee:



*Schloss Kammer am Attersee III, 1917*

Four landscapes...and the two portraits...and there's a seventh, which I'll talk about later.

### ADELE DIES WITH A REQUEST:

So what happened to the Bloch-Bauer family? Adele passed away, unfortunately, in 1925, at the age of just forty-three, and she left behind a very short will that she had written two years earlier when her mother passed away...

In her will...she asked her husband to leave...[m]y two portraits and the four landscapes to the Austrian Gallery upon his death." This was 1925 when she passed away. Her brother-in-law Gustav, Maria's father, was the lawyer for the family and submitted the will...to the court with the statement that the deceased, Adele, made certain requests to her husband, which do not have the binding character of a testament. This is in 1926 when he writes this. He says, "[B]ut her husband nevertheless agrees to fulfill her wishes." And he says, "[I]t should be noted that the paintings were his property, and not her property." Back in pre-war times, it was a more patriarchal structure,

and property was presumed to be the property of the husband, so these paintings were Ferdinand's property. His wife had died, asked him to donate them after his death to the museum, and he had agreed to do that. And that's where things stood in 1926.

Ferdinand actually did donate one of the paintings before he died. In 1936, he donated the Schloss Kammer am Attersee painting to the Austrian Gallery.

And he bought a seventh painting, a portrait of a friend of his, Amalie Zuckermandl.



*Portrait of Amalie Zuckermandl, 1917-1918*

So Ferdinand ended up having six paintings again.

### AND IN 1938, THE WORLD CHANGED ...

And in 1938, the world changed for Jewish families in Austria, as the Nazis invaded and annexed Austria in the famous Anschluss of March of that year.

The Bloch-Bauer family, of course, was greatly affected. Ferdinand fled immediately on the day of the Anschluss, first to his family home in Czechoslovakia and then to Zurich, where he remained through

the end of the war. As an aside, that home in Czechoslovakia was then used as the residence for Reinhardt Heydrich, the famous architect of the Final Solution, who was, before his assassination, the Reich's Protector of Bohemia and Moravia.

The nieces and nephews of Ferdinand fled, as well. Several of them to Canada, to Vancouver.

And Maria stayed in Vienna, first, with her husband, Fritz. She had been newly married, was 22 years old in March 1938.

Her husband, Fritz, was arrested and sent to Dachau and held as ransom, because his older brother, also a well-known art collector, but a sweater manufacturer [by trade] by the name of Bernhard Altmann, had fled and had asked all of his customers – he was a textile merchant – he asked his customers to send the money not to Vienna, but to him in London where he was building a new business. He was one of these guys you could drop him on a desert island on Friday, and on Monday, he'd be a millionaire. And he had managed to reinvent his business outside, repatriate the money back to Austria, and free his younger brother Fritz.

This allowed Maria and Fritz to escape with Bernard's help into England, and then over to the United States and ultimately to Los Angeles in 1942.

Maria had a sister who stayed behind in Yugoslavia, [who] managed to survive the war with her husband. But her husband, who was Jewish, was then executed by the communists for being a "capitalist" after the war. She also ultimately went to Canada.

## AND THE ARTWORK?

So what happened to the paintings? ...As I mentioned, there were two portraits of Adele Bloch-Bauer. Ferdinand Bloch-Bauer had this incredible art collection that included not just the Klimt paintings, but also an enormous porcelain collection, drawings [and] old master portraits from Austrian painters of years past. And these attracted the attention of all of the top Nazi officials. As you know, Hitler, himself, fancied [himself] to be an artist. He studied in Vienna. And he became an enormous collector, as did Hermann Goering. So they were interested in some of the Bloch-Bauer artworks, but not the Klimt paintings, [which were considered to be] too modern. These attracted the interest, instead, of the various museums in Vienna. The lawyer who was appointed to liquidate Ferdinand's estate, a man by the unfortunate name of Erich Führer, a big Nazi, managed to sell off and trade the paintings to various places.

So the gold portrait and the Apple Tree were then traded to the Austrian Gallery, and in return, he [Dr. Führer] received back the castle painting that Ferdinand had already donated to the museum. Führer ended up selling the painting to Gustav Ucicky, a famous Nazi film director, whose most famous film was called "Heimkehr" or "Returning Home," about the invasion of Poland. Ucicky was, in fact, one of 18 illegitimate children of Gustav Klimt. They say Klimt used to paint with a smock on and nothing underneath. So he sired a number of illegitimate children. And one of them was this Gustav Ucicky, who bought this one painting.

The second portrait of Adele was purchased by the Austrian Gallery.

## SO THEY [THE AUSTRIAN GALLERY] ENDED UP HAVING THREE OF THE BLOCH-BAUER PAINTINGS.

The Beech-trees went to the City Museum of Vienna. And Dr. Führer, himself, kept 12 of Ferdinand's paintings as compensation for such good work, including the houses in Unterach. And I think that covers them.

So what happened to these paintings?

## THE WAR ENDS AND FERDINAND DIES:

After the war, Ferdinand saw the end of war but died in November 1945.

It initially took me a while to understand why Ferdinand couldn't just go back and recover his paintings, his property. But [the situation was extremely chaotic] in Vienna after the war. You could not actually return to Vienna for several years as a civilian. Ferdinand died in November of 1945, not having recovered any of his property. He left behind a will that said – not that his paintings should go to the Austrian Gallery, but rather, that his estate should go to his two nieces and one nephew. And that's where things stood.

## PATRIMONY:

The family hired an attorney, and it wasn't until 1948, about three years after the war, that Jewish families were allowed to recover artworks. It was a complicated process because the paintings, for example, the other paintings that had been collected by Hermann



Goering and Adolf Hitler, were captured by the U.S. Government and brought to something called the Munich Art Collecting Point. [Y]ou couldn't, as an individual, just walk up to the Munich Art Collecting Point and ask for your paintings back. Rather, those paintings would only be returned to the countries of origin. So you had to apply to Austria to ask the Allies to return the paintings back to Vienna. And then, once they were in Vienna, you had to recover the paintings - and then hope to send them to your new home in the United States or Canada.

Well, this procedure presented the post-war Austrian Government with an opportunity for extortion. And what they did, not just with the Bloch-Bauers, but a number of Jewish families, the Rothschilds, Haiders and others, is, they said, if you want to export your property to your new home - many of these families obviously did not want to return to Austria - if you want to bring them to your new home, you'll have to make a deal, because these paintings are too important for Austrian patrimony, and we're going to apply our patrimony laws to prevent the export. So they forced these families, then, into a little bit of horse trading and "donations" to the Austrian museums in order to get other artworks out.

### **WE'LL KEEP OUR THREE. NOW GIVE US THE REST.**

So the lawyer hired by the family, Dr. Renish, knew about this procedure, and he asked the Austrian Gallery, "What's your position with regard to the Klimt paintings?" And the museum responded very aggressively, and said "[T]hese paintings don't belong

to the heirs. They belong to the museum. They were willed to the museum by Adele Bloch-Bauer in her will when she died in 1925. And, therefore, not only do we, the Austrian Gallery, get to keep the two portraits and the Apple Tree, but you, as heirs, are responsible for recovering the other three and delivering them to us."

And they actually prepared a lawsuit against the heirs. So the heirs' lawyer met with the government officials that dealt with exports and said, "[L]isten, we'll accept the will of Adele Bloch-Bauer and we'll leave these paintings in the Austrian Gallery. We'll help you recover the other three. And with that, we hope we'll be able to send out some of the porcelain and some of the other paintings that they had recovered from the collection." And this deal worked. They were successful in exporting a number of artworks.

### **WELL, OKAY, MAYBE WE'LL LET YOU HAVE A LITTLE SOMETHING FOR THE FAMILY:**

They had to donate some Klimt drawings and some porcelain, but, otherwise, they were able to recover quite a bit, just not the Klimt paintings.

And if you'd asked Maria Altmann until 1998 what had happened to her family's paintings, she would have said what she was told, which was that Adele had given them in her will to the museum.

### **LAW TO RECOVER CULTURAL OBJECTS FROM AUSTRIAN MUSEUMS IS ESTABLISHED:**

[But] this changed in 1998. There was a lawsuit in New York that reawakened interest in these types

of cases. And a journalist named Hubertus Czernin went and investigated what was the provenance of many of these artworks, famous now, artworks, in the Austrian museums. And he found out about this sort-of extortionate procedure, and this led the Austrians to enact a law. And the [new] law said that if artworks were donated in exchange for export permits, or if artworks were taken under the Nazi regime and never recovered properly, we will return them. We have the right to return them. But they didn't set up a law that had a right of action. It was really just a committee that they set up. Voluntarily, if they decided to return something, they would return something.

So this law was enacted in 1998, and that's when Maria Altmann contacted me. I was a young lawyer working at a big firm called Fried Frank in Los Angeles. And I said I would love to work on this and see if we could work with this commission that was being set up. Well, not surprisingly, given the value of the paintings at stake, the Austrians decided, when this commission met in 1999, not to return the paintings in the Bloch-Bauer collection. Rather, they said they were donated by Maria Altmann's aunt [Adele Altmann]. And I looked at the documents, and I said, "[T]his doesn't seem right." Even in 1926, when Maria's father, the lawyer, was looking at this for the first time, this will was seen as precatory, as something just as a request to her husband. And the husband had the right to fulfill the request or not, and he didn't for obvious reasons. And so, essentially, these paintings should have been recovered by the family, but were donated in exchange

for export permits for these other paintings. But the Austrians had decided the other way.

So what to do?

### TO SUE OR NOT TO SUE?

At first we looked at suing in Austria, right? The paintings were in Austria. It seemed to be the logical place. I found an attorney, Stefan Gouldner, who would prepare the lawsuit. Now, remember, the law didn't give a private right of action. So he [Gouldner] found some sort of equal protection type of argument that he could make, and he drafted a complaint. He said, "[W]ell, you know, to file a complaint in Austria, you have to pay court fees." I said, "[O]kay. We're used to that. We pay, what is it, a few hundred dollars?" He said, "[N]o. It's a percentage of the value at stake in the litigation." So in this case it would be anywhere from one to two million dollars. We applied, actually, to the court, then, to reduce the court fees to a manageable amount. And the court said, "[W]ell, yes, you are entitled to reduction. You do not have to pay more than everything you own. You just have to pay all of your assets."

Whereupon, the Austrian government appealed and said it should be higher. At that stage, I thought, "well, this is not something that Maria Altmann, my grandmother's friend, could ever afford to do. Let's look into whether we can sue in the United States."

### JURISDICTION AND NEXUS:

So very naively, I picked up the Federal Rules of Civil Procedure that all of us have in our offices, and I looked at the rules on suing

a foreign government. Obviously, I had never done this before. And I looked at the Foreign Sovereign Immunities Act of 1976, and there was a provision that said that if the case concerns property taken in violation of International Law, where that property is owned or operated by an agency or instrumentality of a foreign state, and that agency or instrumentality is doing business in the United States, you can sue the foreign state. It's a bizarre, very infrequently used provision of the Foreign Sovereign Immunities Act, but I thought, "we fit, right?" The paintings were taken in violation of International Law during the Nazi regime. They were owned or operated by this museum, and the museum arguably had contacts with the United States. They advertised. They sold tickets to people. They sold books in the United States. There was enough of a nexus and a little bit of precedent on that issue that I thought I could file the lawsuit. And so by that time, I had left the big firm. I went out on my own, opened up my own office, and I took the complaint I prepared and went down, physically, to court to the filing window and filed it.

And it didn't cost \$2 million. It cost \$250. And at the time, the goal was just to keep the case alive. And who knows? Who knew at the time where it would lead?

Well, what it led to, of course, was a motion to dismiss by Austria. And they'd hired a big firm, Proskauer, in Los Angeles, and they filed a motion to dismiss, citing numerous reasons why the case should be thrown out. We had a terrific judge named Florence-Marie Cooper, and she rejected

the motion to dismiss, much to everybody's surprise.

### CAN YOU HEAR ME NOW?

So the case went up to the Ninth Circuit. I argued for the first time in the Ninth Circuit. Again, no one thought that we could possibly win, but, surprisingly, we received a unanimous decision in our favor.

At this point, the case started attracting some attention.

The U.S. Government, the State Department, started receiving calls and letters from various countries saying "[W]hat's going on? How come these old claims, 70-year-old claims, are now resulting in cases against foreign countries going forward?" And so countries like Japan and Mexico that were facing similar types of historic claims from other lawyers were upset. The State Department, then, filed an amicus brief in favor of petition for rehearing in the Ninth Circuit, which, thankfully, the Ninth Circuit did not grant.

And so we waited for the *cert* petition to be decided. Now, when a foreign country petitions the Supreme Court, I gather it gets a little bit of higher scrutiny than the ordinary litigant. And when the U.S. Government is on the side of the foreign country, it, perhaps, made it an easier *cert* petition to grant than most of the others that I have been a party to. And so *cert* was granted.

### CERTIORARI:

And at that point, of course, all bets are off again. The Ninth Circuit gets reversed, you know, 150% of the time. So if you'd asked anybody, if we had come to any



group of lawyers or anybody following the case, what were Randy Schoenberg's chances arguing in the Supreme Court, they would have said "slim and none." And that was also my view as I went off to the Supreme Court.

I prepared the briefs, which I thought were decent. And my goal was really that we would just get one Justice to write our side of the story. That was really my only hope. I went in very relaxed. It was almost a gallows humor that I had, because there was no chance. And we argued. I actually got up to argue last at the Supreme Court, and I'd prepared by having a few moot courts. We did one at my alma mater at USC, and Santa Clara and Georgetown. So I thought I had heard most of the questions that might be asked. And, you know, at the Supreme Court, you don't prepare a speech. You get up to speak, and then immediately there are questions.

### **PARDON ME, SIR, MR. JUSTICE?**

So I had a vague outline of what I wanted to say, and I stood up and I said, "[T]here are four grounds for affirming the Ninth Circuit. Ground One is..." And, then, boom, immediately Justice Souter chimed in with a question. And he has this - for me, at least - a difficult-to-understand New England drawl, and he asked the question, "Da-da da-da da-da da-da da-da da-da da-da," like that, is what I heard. You can listen to it if you want. It's on Oyez.org.

I looked at him and I had not the slightest idea what he had just said, and everybody, of course, is waiting, clients, and everybody and family, everybody looking, and I didn't know what to say. So I said, "[U]m, ah, I'm sorry, Your Honor. I don't think I understood the question." And there were these gasps in the audience, but all the other Justices, Justice Stevens, especially, were so magnanimous. They all smiled at me as if to say "[O]h, don't worry, he does that all the time. We didn't understand it either," that type of thing. And it was such an honest moment, such a great ice breaker, the rest of the argument went like a conversation. Because I think the Justices realized, here I was, this kid representing my grandmother's friend in the United States Supreme Court, arguing that she should be able to sue Austria in Los Angeles to recover paintings that had been looted 70 years earlier and never left Vienna.

So it was just a conversation, and it went like a dream for about 30 minutes. And I sat down, and it was over.

### **WE WAIT:**

And I walked out. And my dad, who is a retired judge, never thought I had a chance, and he came to me and he said, "[W]ow, that went really well." And I said, "Yeah, I know. But do you think maybe it might go well?" We still had no idea, but we thought "[O]kay, it went pretty well."

I came back to Los Angeles. I opened up our legal newspaper,

the *L.A. Daily Journal*. It says, **COURT LIKELY TO REVERSE ALTMANN CASE**. It went on for a page, a full page, about all the reasons we were going to lose. So I called up the journalist, David Pike, and I said, "[H]ow can you say this? It seemed to go so well. At least I could have gotten a headline saying, you know, "Court Might Affirm." And he said, "No, no, no. I have been reporting on the Supreme Court for thirty years. You don't stand a chance. I could tell by the body language. Don't even think about it." So I said, "[O]kay. You're probably right. You'll find out first," because they don't announce to the lawyers beforehand when they're going to announce the case. The journalists hear it. I said, "[C]ould you do me a favor? When they do announce it, can you call me, can you give me a call." And so, sure enough, two and-a-half months later, I'm making breakfast for the kids, because it's earlier here in Los Angeles, and I get a call from this David Pike. He said, "[H]ello, this is Dave Pike." And I thought, "[W]ell, okay, give me the bad news." He said, "[N]o. Not bad news. You won. Six-to-three. Stevens wrote the opinion. Kennedy in dissent."

So needless to say, I was elated, and I tried to call Maria, but her phone was already off the hook. And I went over there, and we celebrated and we hugged. And then we thought, "Well, wait. what did we just win?"

### **WHAT DID WE WIN?**

We won the right to start the litigation.

It was just all about sovereign immunity and jurisdiction. And we had to begin the litigation. And so we went back, and I'm not as privileged as all of you to do so many trials, but we went back to Discovery Hell, which is my sort-of bread and butter for about a year and a half. And then in a mediation, Austria finally agreed to a proposal I had made at the very beginning, which was that we submit the case to arbitration in Austria and have this issue of the will decided by an Austrian tribunal, which it seemed to me would make sense. And I thought we had a chance of winning. And I talked to Maria when they made the proposal, and she said, "[A]re you crazy? Why would we want to go back to Austria? We have the Supreme Court on our side. We have Judge Cooper on our side. Why would we trust this to three Austrians?" I said, "Maria, if you want this case decided in your lifetime" - she was 89 years old at the time - "we need to take this chance. We can't go back into court and have this sort-of endless procedure and resulting in a possibly unenforceable judgment in the United States. Whereas, if we went to Austria, we could actually recover the paintings."

### BACK TO AUSTRIA:

So to her credit, she trusted me, and we went back to Austria. And I argued in an arbitration - in German - which wasn't so easy, in Vienna, before three Austrian judges. Actually two professors and a lawyer. And we waited. They were supposed to decide the case relatively quickly, but it dragged on and on for several months, and, again, press reports said we were going to lose.

And, finally, in January of 2006, I was returning home from a late-night poker game, it was about midnight, and I looked at my BlackBerry, and there was a message from the chief judge. And I couldn't read it on the BlackBerry, of course. I had to go to the computer. And I opened it, and, of course, it's in German and not easy to read, and so I had to look at it for a while and realized we had won. We had won unanimously. All three judges in Austria had ruled, much as I argued from the beginning, that this will was precatory, that the Bloch-Bauers owned these paintings before the war, that Ferdinand and his heirs should have been able to recover them, that, essentially, they were traded in exchange for export permits. And under this Austrian law, which didn't have any teeth until

we had the arbitration agreement, they would have to be returned.

### EPILOGUE:

And they were returned shortly thereafter. We brought them to Los Angeles for an exhibit at the L.A. County Museum, where Maria and her family, many of them for the first time, could see the pictures, and then the paintings went on to New York. And because there were a number of heirs, they were required to sell the paintings. One of them is still on display, the famous portrait of Adele Bloch-Bauer, the gold one, is on display at the Neue Galerie in New York. So if you are ever in New York, you could go and see one of these paintings.

### REFLECTION:

I always like to remember, in concluding the story of the case, that, of course, many worse things happened in World War II than the theft of artworks. And I think it's not surprising that, although there was a good deal of effort put into recovery of artworks after the war, it wasn't the first thing on everybody's mind. Nevertheless, it was very gratifying for me, as a person whose family also went through these horrible events, to take a small part in righting at least one of the wrongs of that era. ■

**CORRECTION:** Issue 67, the Fall 2011 edition of The Bulletin, misspelled the name of **Neal Keny-Guyer**, Chief Executive Officer of Mercy Corps, one of our distinguished speakers at the 2011 Spring Meeting in San Antonio. The editors wish to acknowledge the error, with apologies to Mr. Keny-Guyer.

# EMIL GUMPERT AWARD

## PRESENTED TO SOUTHERN PUBLIC DEFENDER TRAINING CENTER

In introducing the recipient of the 2011 Emil Gumpert Award, **Gary L. Bostwick**, Chair of the Emil Gumpert Award Committee, explained a bit of the background and process involved in selecting a worthy recipient of the College and Foundation's highest award. Bostwick explained that the Emil Gumpert Award was retooled in 2005, from an award to outstanding law schools to an award recognizing an organization "for excellence in improving the administration of justice."

The committee soon found itself going through anywhere from thirty-five to seventy applications submitted by extremely worthy programs in the United States and Canada. All have, in some fashion, advanced the administration of justice and passed along the ideals and principles of the College. With a first-place cash award of \$50,000 funded by the Foundation, the Emil Gumpert Award enables the existence of programs that would not exist but for the Emil Gumpert Award and the College. Bostwick introduced Executive Director and Founder **Jonathan Rapping** of the Southern Public Defender Training Center in Atlanta, Georgia, by stating that Rapping's center "is like Army boot camp and old-style religion all at once. [Rapping gives] public defenders the tools, the knowledge that they need, and then teaches that their clients are not ciphers, but are people. The training center supports its lawyers when support is most important - after they have received the training and are in the field." Bostwick's shared pride was evident as he advised the audience that "if Jonathan is up to his normal performance, as a committed teacher and reformer, when he's finished, you may be dancing in the aisles and speaking in tongues and putting something in the plate when it gets passed." Executive Director Rapping did not disappoint. His remarks about the Southern Public Defender Training Center and its mission, follow: >>





I really have to thank Gary Bostwick for chairing this committee and for his incredible support. I want to thank the Gumpert Award Committee, and I want to thank all of the Fellows here at the College. Words cannot express what this honor means, not just to the Southern Public Defender Training Center, but I believe to our mission to try to improve indigent defense across the South.

Regent [Paul] Meyer started this morning with his invocation stating that the rule of law is the bedrock of American society, and I think that what everyone in this room knows and understands is that that foundation is only as strong as the lawyers who are charged with supporting it. What the American College of Trial Lawyers is comprised of is lawyers all across this country who support the rule of law every single day for the clients that you represent.

It is certainly true that there are public defender offices in this country that are able to do the same thing. They are few and far between, but they exist. There are public defenders in this country who are able to give their clients the kind of representation that our Constitution guarantees. One of them I have to thank, Claudia Saari, who was our sponsor, a Fellow of the College, a public defender and a board member of the Southern Public Defender Training Center. She nominated us this year and last year and the year before. So persistence is an incredible quality for a public defender.

Unfortunately, [public defenders] see, far more often, the kinds of things that I started to see when I left my ten years as a public defender in one of those highly regarded offices in Washington, D.C., to move to Georgia. I met chief public defenders,

during a training course on basic motion practice, who told me they don't file motions. They don't file motions because it gets the judges angry. The judges don't like it. I started doing some work in Mississippi, and I met public defenders in Mississippi who never went to visit their clients, who didn't file motions, who didn't investigate because, quite frankly, they assumed their clients were guilty, and they didn't think the work was worth it.

And then I went to New Orleans in the wake of Hurricane Katrina, and I started working in the office there, the reform effort, to rebuild the public defender office. And I sat in courtrooms and I watched hearings where, during these hearings, dozens of people were processed with nothing that came close to resembling advocacy. And I started to wonder, "How could this be? How could this be the case?" And the more I worked, the more I understood the answer.

The reason is because we have a different system of justice for poor people than we have for people who can afford to hire attorneys. It is a system of justice that, unfortunately, many people have come to accept, including judges, unfortunately, sometimes, and prosecutors, unfortunately, sometimes. And, far too often, defenders. Defenders who come into these systems for the right reasons, very quickly learn that processing people is the name of the game. They very quickly come to understand that what they are expected to do is a different type of justice, [which is] actually not justice at all.

So the question is, then, what to do about it? And that's the issue that led to the formation of the Southern Public Defender Training Center. The





Past President John J. (Jack) Dalton (l) and Emil Gumpert Award Committee Chair Gary L. Bostwick (r), present \$50,000 Emil Gumpert Award to 1st place winner, Southern Public Defender Training Center CEO and Founder Jonathan Rapping (c) in Atlanta.

Southern Public Defender Training Center recruits, trains, and mentors young public defenders across the South, and the idea is that these young lawyers will be infused, not just with skills and knowledge, but with a set of values that have far too often been missing in the courtrooms where they practice. And they will go back to their jurisdictions, and they will bring that standard of representation to those jurisdictions and become change agents. And as a community, they will support each other while they do that. That's the philosophy behind the program.

### PROGRAM SUCCESS:

The program has had some success. We started in 2007 with two offices [and] sixteen lawyers. We now have had close to 200 lawyers go through our program across twelve different states [from] twenty-seven public defender offices. Those lawyers every year touch the lives of tens of thousands of poor people charged with crimes. [They also touch the lives of] their families and the people who love them.

The model is not just a model that is working in the South. Its replicability, I think, is evidenced by the fact that the Justice Department recently gave us a second year of funding to pilot this project beyond the South. In 2010, we graduated our first class and were at a crossroads, because we had young lawyers who, for three years, went through an intensive program where they had been supported, were doing great work, and were now leaving the program.

And the question then became, what happens to them then? I came to understand that if these young

lawyers, three years out [of law school], went back to the dysfunctional systems without support, they would either soon become the kind of lawyers I earlier talked about, or they would quit.

So we realized we had to build a program for our graduates. We realized that we needed a program that took our graduates and continued training and supporting them so they could become the mentors and the trainers and the supporters of the young lawyers coming in.

That is when we submitted our application for the Gumpert Award. And the Gumpert Award is giving us \$50,000 that is going to help us launch that program, a graduate program, for the lawyers coming out of the first three-year program.

And I am pleased to say that in January 2012, we will launch that graduate program largely with funding from the Gumpert Committee and the American College of Trial Lawyers. So, thank you very much for that. These are now young lawyers with options who can do all kinds of things, yet they decide to work in places where resources are limited, caseloads are great and the pay is not very good. But they come to these areas now because they're committed.

I am convinced that these young lawyers are going to close the gap between the kind of representation your clients receive every day and the representation that far too many people in the criminal justice system never receive.

I want to mention, before I close, that the American College of Trial Lawyers has actually been involved in the Southern Public Defender Training Center even before we received the Emil Gumpert Award. Four College Fellows serve on our board, and I am confident that the Gumpert Award will allow us to go out and tell the world that the most prestigious group of trial lawyers in the country understands and supports the importance of our mission.

Your support gives us a huge boost which allows us to build a community of change agents who will make the reality of *Gideon's* promise, that no person should receive justice based on the amount of money that they have.

And I want to thank you all for partnering with the Southern Public Defender Training Center and for your commitment to the principle of justice, not just for your clients, but all clients. ■

# Gideon v. Wainwright

372 US 335 (1963)

Conclusion

**Decision:** 9 votes for Gideon, 0 vote(s) against

**Legal provision:** Right to Counsel

In a unanimous opinion, the Court held that Gideon had a right to be represented by a court-appointed attorney and, in doing so, overruled its 1942 decision of *Betts v. Brady*. In this case the Court found that the Sixth Amendment's guarantee of counsel was a fundamental right, essential to a fair trial, which should be made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Justice Black called it an "obvious truth" that a fair trial for a poor defendant could not be guaranteed without the assistance of counsel. Those familiar with the American system of justice, commented Black, recognized that "lawyers in criminal courts are necessities, not luxuries." ■

## AWARDS & HONORS

Immediate Past President **Gregory P. Joseph** has been elected to a three-year term as President of the Supreme Court Historical Society. Joseph succeeds Fellow and Past President Ralph I. Lancaster, Jr.

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His Excellency the Right Honourable David Johnston, Governor General of Canada, recently announced the appointment of **David W. Scott, Q.C., O.C.**, as Officer of the Order of Canada for his contributions to the legal profession and for his charitable activities. A Past President of the College from 2003-2004, Scott has been invested into the Order, one of Canada's highest civilian honours.

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**Robert N. Stone**, of El Segundo, California, has been inducted as President of the American Board of Trial Advocates (ABOTA).

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**David C. Hilliard**, of Chicago, Illinois, has received the Justice John Paul Stevens Award.

.....

Past President **Stuart D. Shanor**, of Roswell, New Mexico, has received the New Mexico State Bar's President's Award for four decades of service to the legal profession and the public and has been inducted into its Roehl Circle of Honor for Trial Lawyers.



# NEUROSCIENCE AND THE LAW: PROMISES AND THREATS

## Part I: We're Not as Smart as We Thought We Were

Past President **David Beck** introduced **Hank Greely**, the Co-Director of the Law and Neuroscience Project, an organization seeking to help the legal system avoid the misuse of neuroscientific evidence. Greely is also the Director of the Center for Law and the Biosciences at Stanford University. He clerked for Supreme Court Justice Potter Stewart and Judge Minor Wisdom on the 5th Circuit Court of Appeals.

During his humorous and at times unsettling presentation, Greely discussed the current and possible uses of MRIs, CAT scans, functional MRIs and explored the various ethical implications of developments in neuroscience. His address was the first part of the CLE presentation entitled: *Neuroscience and the Law: Promises and Threats*. >>



I want you to look at my sweater. How many different colors are in it? Now listen to my voice. Am I a tenor? Am I a baritone? Am I a bass? Notice the feeling of the chair on your back and how it feels. Now I want you to wiggle the big toe on your left foot. Not the right foot. The big toe on your left foot. And, finally – I probably don't have to ask this one – I want you to wonder, what is your speaker doing with this introduction?

The answer, is everything you just felt, perceived, every action you just took is the result of the firing of some of the 100 billion neurons in your brain. The firing, meaning the movement of ions in and out of their membranes, and the release and the pickup of little packets of chemicals called neurotransmitters at the places where those neurons come together, the synapses. That creates our universe. It is that action that determines our own behaviors, our own thoughts, our own feelings, our own essence. That's kind of disconcerting.

I am a lawyer. My last biology class was in 10th grade when we didn't even know how to spell DNA. It took me a while to come around to the view of my neuroscience friends that that is where our mentality, our consciousness is, that it is caused by physical changes, chemical and electrical changes in the cells that are inside this skull .... That's important because a revolution in science – several revolutions, actually – is making it more and more possible to see what's going on inside the brains of healthy living people and leave them healthy living people. And as a result, we are beginning to be able, for the first time in any detail, to correlate those physical states of the brain with the mental states, with our

perceptions, with our actions, with our behaviors in ways that I think are going to revolutionize our society. And anything that revolutionizes society is going to revolutionize law.

So what I want to do in the very short time I have...is, first, give you the grossest of overviews of what's happening with neuroscience. But then, secondly, suggest at least five areas in which the law in particular is going to be significantly affected by changes in neuroscience...

## THE BRAIN

We all have brains. They are all about the same. Each one weighs about two and a half pounds or so, a little bit more than that. It makes up somewhere between one to two percent of our body weight, depending on what our body weight is. Our brains don't vary in size nearly as much as our body weight does, and everybody's brain is pretty much the same, just like everybody's face is pretty much the same. All healthy faces have two eyes, a nose, a mouth, two ears. If you're a male and lucky, a good moustache. All brains have a brain stem, a midbrain, a cerebrum, a cerebellum. The cerebrum has a left hemisphere and a right hemisphere. Each of those hemispheres has a frontal lobe, a parietal lobe, a temporal lobe, and an occipital lobe. All brains are the same, but all brains are as individual and as different as every face is individual and different.

## MRI, X-RAY, CAT SCAN

How many of you have been inside an MRI machine? Raise your hands. Wow. That looked like about 80 percent. Normally, I get about a two-thirds response to that, whether it's high school students or octogenarians, except when I'm overseas, where I get about a



one in ten response. Americans like MRI machines, apparently. As you know, those of you who have been in them, they're a strange, claustrophobic, enormous device that use an enormous magnetic field to make funny noises that surprise you and shock you when you're in the middle of them. They provide incredibly good images of soft tissue. This is the breakthrough.

X-rays have been around for over a hundred years, but X-rays only provide images of dense material. X-rays are the shadows cast by dense things, things that X-rays don't go through, like bone. No matter how slow somebody is, they don't actually have anything dense inside their brains. Our brains are, as one neurosurgeon friend of mine told me, the consistency of *crème brûlée*. There's a little bit of a crust at the top, and then it's like cutting through warm custard. There is nothing to cast shadows.

*I have a friend named Kent Kiehl, who studies psychopaths. Psychopaths don't always eat liver and drink chianti and fava beans, but they are people who don't have any regard for others, except as objects to be used to get what they want. It's thought that about one percent of adult Americans are psychopaths. It's also thought about 30 percent of American prisoners are psychopaths. We don't know what percent of American CEOs are psychopaths, or even American judges, let alone trial lawyers. My guess is the trial lawyers may be up there. I'm a former litigator, myself.*

*- Hank Greely*

Now, with CAT scans, for the first time, we were able with many, many high doses of X-rays and lots of computer power to see a little bit in the brain. But MRIs give us a gorgeous view of the brain. It turns out that not only are our individual brains different, but one individual's brain changes over time in ways that can be significant.

## LONDON CAB DRIVERS

How many of you have ever taken a cab in London? How many of you have taken a cab in London to get an MRI? So if you've been in a cab in London,... you've noticed two differences, certainly, between most American cab drivers I've experienced. One is, they all speak English, and the second is, they all

know where they're going. And they know where you are going, and that's not an accident.

To be a cab driver in London, you have to pass a test that cabbies typically study five or six years for. They have to learn...the location of every street, avenue, muse, alley, et cetera, in the 20-million-person greater London metropolitan area. They take written tests on it, and then the final exam...is an oral test.... There are three cab drivers who are examiners. They have an hour. They can ask you anything they want. And if they like your answers, you are a cab driver. And if they don't, you're not.

So, for example, last time I was in London, I was talking to my cabbie, who had been a mechanical engineer, but left it to become a cab driver because the pay was better and the status was higher. They asked him, "You've just picked up a passenger outside the House of Parliament. It's 8:15 Wednesday morning, December 14th. There's a light drizzle, and the temperature is 37 degrees. He wants to get to Heathrow. What's the fastest route?" You answer that. "Okay. Now, what's the cheapest route?" You answer that. If they like your answers, you are a cab driver.

## MEMORIZATION

Well, obviously, this takes a lot of memorization. And there's a part of your brain, called the hippocampus, that is crucial to making memories. It doesn't seem to be where memories are stored long term. That seems to happen all over the brain, but you need a hippocampus to make memories. We know this because of the unfortunate experiences of a man known as H.M. He died a few years ago and had that highest of all posthumous tributes: an obituary in *The Economist*, probably the first research subject ever to have an obituary in *The Economist*.

He had had terrible epilepsy in his youth, and as a result, he had had his hippocampi surgically removed. That stopped the epilepsy and kept him alive for another 55 years, but it meant that he could no longer make new memories. He could remember things before the operation at age 24. He couldn't remember the name of the person who came into his room to help him every day for the next 20 years. And this is a tragic side of it I hadn't thought about, but once or twice a week for those 50 years, he'd learn, he thought for the first time, that his parents had died. No hippocampus, no new memories.

Back to the cab drivers. Take the cab drivers, put them in the scanner. The cab drivers had bigger

hippocampuses than non-cab drivers, and the longer you had been a cab driver, the bigger the hippocampus was. Physical changes in the brain happen, and they mean things. Physical differences in the brain occur, and they can mean things, but that's not the most exciting technology.

## FMRI

The most exciting technology is something called Functional Magnetic Resonance Imaging, fMRI. It's the same machine, same MRI machine, but instead of looking at structure, it looks at blood flow. Specifically, it looks at the level of hemoglobin that has oxygen attached to it versus hemoglobin in your red blood cells that doesn't have oxygen attached to it. That doesn't sound very exciting, but it turns out to be, because your brain is the SUV of your body. Your brain is an energy hog.

Remember, your brain is one to two percent of your body mass. Right now when you are not engaged in serious physical exercise, I trust, your brain is using 18 percent of all your body's energy. All of those little ions going in and out are really expensive. So your brain gets quick and rapid supplies of oxygen and sugar, what it needs to work.

The idea behind fMRI, the wonderfully named "BOLD" hypothesis, Blood Oxygen Level Determination, is that if an area of your brain just worked, two to six seconds later, that area is flooded with fresh blood that has a higher percentage of oxygen in it than the rest of the brain.

So here's the classic experiment. This was actually done by a British scientist named Semir Zeki. He took 16 volunteers, who answered an ad, saying that they were madly and passionately, wildly, head over heels in love. Three quarters of them were women. I don't know whether that was significant or not. He had them bring in photos of their loved ones and similar photos of friends of the same sex as the loved one. They then looked at the photos of the friends.... They put these people in the scanners, and they showed them photos.

This is the classic fMRI experiment. You show somebody a photo for about four seconds, then four seconds of darkness. Four seconds of another photo. Four seconds of darkness. And this goes on and off for an hour in that clanking, claustrophobic environment of the fMRI. They have to pay these subjects. It's not dangerous, but it is pretty boring. And then they look to see, does blood flow differently when someone sees his loved one, than when someone sees his friend? The answer, which got published and made headlines, was

"yes." They had found the site in the brain of true love, or at least the passionate, wild, head-over-heels romance. Now, don't try this at home.

They had...only 16 subjects. They were all British. The result was an average result. Not everybody had the same result. On average, statistically significantly certain areas lit up, but not others. So if you put your partner in the scanner, and he or she doesn't light up the right way, it may not be because your best friend is the object of his or her affection. It may be that the science isn't yet that accurate, but that's the kind of experiment fMRI is doing...

fMRI is only one of many tools that's revolutionizing our understanding, because now you don't need to cut somebody up. You don't need to cause damage to their brains in order to see what part of their brain does what. You have them do something, whether it's look at a picture of a loved one or whether it is [to] do addition or listen to the Beatles or to Mozart. All these are published papers, by the way. There are now 5,000 papers a year being published on fMRI in the peer review literature....

Why should you care? Because these technologies are going to change law, I suggest, in five different ways. And I will suggest each of them very briefly.... They are: Prediction, Mind Reading, Responsibility, Treatment, and Enhancement.

## PREDICTION

I believe, and I think I have good scientific grounds for believing, that within the next five to ten years we'll be able to take somebody who is 60 or over, and tell him or her with a 90 percent plus probability of accuracy whether that person is going to be diagnosed with Alzheimer's Disease in the next 10 to 15 years.

How many of you want that test? Raise your hands. How many of you don't want that test? Which group of you is crazy?... Usually, it splits 50/50. This time far fewer of you were willing to say you wanted the test.

But assume the test is available. That has legal consequences. What happens with employment discrimination for those of us...who don't have tenure? What happens if...it's conferred by the President and the Congress or...it's conferred by the University? What happens if you want to buy long-term care insurance or health insurance or life insurance? What happens when your children decide it's time to take the



car keys away, and now they've got a brain scan that shows they've got good reason?

What happens when you go in to your elder lawyer? I have a friend in Palo Alto, who's a national specialist in elder law. He says his clients would love this because it helps them figure out whether they need to shield their assets, and how to shield their assets, so that when they spend 15 years in the nursing home there will be something left for their spouse and their children.

Those are all legal questions. I'm an academic. I live for the idea that knowledge is good, and the presumption is more knowledge is better. But that's not always true in individuals' lives. To the extent neuroscience will let us predict new things, it raises new knowledge that will have uncomfortable questions and consequences attached to it...

### Sentencing and Criminal Law

We're really interested in who is going to re-offend and who's not going to re-offend. There's statistical and demographical tests for that that are pretty good and getting better. There's also the judge's gut instincts, which turns out not to be very good and not to be getting better. What if neuroscience can improve upon those? Not replace them entirely, but move you from, say, 60 percent accuracy with the VRAG system to 80 percent accuracy.

...

What if we could tell who's a psychopath or not? Right now we do it with a pen-and-pencil test, but some psychopaths are smart. They lie. They lie quite well. Sometimes you can conceal whether you are a psychopath. What if we could do a brain scan? [My friend Kent] thinks he can.

He's scanned 500 prisoners in New Mexico and thinks he can tell who's a psychopath or who's not. Let's say we can do that. What do we do with that information? Let's say we can do that with a thousand 15-year-old boys and figure out which ten of them are going to be psychopaths. We can't do this today. We may never be able to do it, but we may be able to do it. With 99 percent accuracy? With 90 percent accuracy? With 70 percent accuracy? And all those issues, what do we do with that information?...

### MIND READING

I'm reading your minds now. We read minds all the time. I'm looking for those who look confused or asleep or bored or [are] checking their BlackBerrys or iPhones. We read minds all the time because it's

a crucial human survival trait. It's been a long time since lions and tigers and bears were the most important threat to our lives.

The most important threat to our lives is fellow humans. And knowing whether somebody is about to share food with you or hit you over the head is a big deal. If you can't read other people's minds, you are deeply disabled. People with autism have that problem. But we know we're not very good at reading minds or poker wouldn't exist, and romance would look a lot different.

What if we could read minds? Well, the answer is we can. Researchers are able to figure out what somebody is looking at based on looking at their brain scans. And, more relevant to the law, there are two companies that will take \$5,000 from you, put you in a scanner, ask you a series of questions, and then tell you whether or not they think you were telling the truth. If you like the answer, they'll write up a report and agree for additional money to testify in court. If you don't like the answer, they will forget they ever saw you, but they won't give you your money back.

One of them is called "Cephos". The other, scuzzier one, it's hard to believe this, it's actually named "No Lie MRI." They actually, on their website, think that dating uses are a major possible use for this technology.

In May 2010, two courts rejected Cephos reports, finding they didn't meet in one case the *Frye* standard and the other case *Daubert* standard. There are a lot of courts out there, and these companies really need and really want to be accepted. We will see this more. I don't think it should be used yet, but there are 30 peer-reviewed papers finding that this works.

What happens when everybody's convinced it works? How do we use it? When do we use it? Is the Fifth Amendment implicated? It's a physical test. Kind of like a breathalyzer... What will those issues look like? And what about non-governmental uses: employers, insurers, schools, parents and children? What will we do with that?...

### Pain

Pain is in your brain, and pain is an enormous legal issue. There are hundreds of thousands of controversies every year in the American legal system involving pain. It's not mainly personal injury cases. It's mainly social security disability determinations. We don't have good ways of figuring out whether somebody is in pain or not. But pain is in the brain. And there are scientists who think they have found the brain's signal for pain.



Interestingly, it seems to be a signal for emotional pain as well as physical pain. What does that mean for a court system that distinguishes between emotional pain and physical pain? Those are questions we'll have to answer. Can you force the other side to take a pain fMRI? If they introduce their own pain fMRI, can you force them to make themselves available for your pain fMRI? The legal system will have to answer these questions. Pain fMRI has been the subject of depositions in at least two cases I know of, both settled. The issue is coming.

## RESPONSIBILITY

I have neuroscience friends who think that, A, neuroscience will prove we have no free will; and so, therefore, Q.E.D., the criminal justice system will dry up and blow away. I do not have any law friends who believe this. The neuroscientists and philosophers tend to forget that the criminal justice system involves things other than punishment for wrongdoing. It involves deterrence – general and specific – incapacitation, even sometimes maybe rehabilitation.

So I don't think this is going to make criminal justice go away, in part because it has other purposes, in part because I don't think the rest of us are going to believe we don't have free will, no matter what the neuroscientists tell us. I'm not sure we have the free will to decide we don't have free will. And we certainly aren't going to believe the S.O.B. who mugged us didn't have free will, but there will be cases that will push us on that, and neuroscience will find more of them.

## Effects of a Brain Tumor

This case I'm about to mention isn't a neuroscience case. It's a neurology case, but it's an example of a class that I think will increase. A 40-year-old man, high school teacher in Virginia. Normal life. On his second marriage. Has a 12-year-old stepdaughter. Begins to get interested in pornography. Begins to get obsessed with pornography and then misbehaves with the 12-year-old stepdaughter. I think, reading between the lines, not grossly. She tells the mom. The mom tells the police.

He pleads guilty to the lowest level of child molestation. He's told if he goes successfully through a 12-Step Program, he will be put on probation. He has no past record. He desperately wants to avoid prison, which is very smart, because prisons are very bad places for pedophiles. Everyone hates them: guards, prisoners, et cetera. But he can't. He flunks out of the 12-step program grossly.

He's propositioning everybody and everything –

animal, mineral, and vegetable. He's told, "[Y]ou've flunked. On Wednesday you go to court, and you will be sentenced to prison." On Tuesday, he complains of a terrible headache. They think he's faking. He starts peeing all over himself. They think he's faking. He says he can't write anymore. They think he's faking, but they finally decide, "[W]ell, we better go take him into the ER." A CT scan shows a tumor the size of a chicken's egg in his left frontal lobe. They take the tumor out. He says "I don't have those urges." He passes the 12-Step Program. He's released on probation.

Ten months later, he goes to his probation officer and says, "I'm beginning to get those urges again." The probation officer doesn't take him back to court. He takes him back to the ER. The tumor had grown back. They take the tumor out a second time. Urges go away. For the three years for which we have follow-up, no criminal behavior.

Is he guilty of pedophilia, or is his tumor guilty? What do we do with a guy like that? Do we sentence his tu-

*The way we've had to find out about individual differences in brains in the past is to take them out of people's skulls and slice them up into little pieces and look at them. It's very hard after doing that to see what that person is going to be doing in the next two or three months. Actually, it's very easy to see what they're going to be doing in the next two or three months. It's just not very interesting.*

– Hank Greely

mor to death? Well, we tried. It didn't work. We won't see very many of these cases, but I think we will see some cases that will push our concepts of responsibility in ways that will make us uncomfortable.

## TREATMENT

This is really all about intervention. Researchers are not getting money in order to learn cool things, as much as my friends love learning cool things. They're getting money from the National Institutes of Health, not the National Institute of Justice, unfortunately,...and if they can cure or prevent nasty evil diseases like Parkinson's and Alzheimer's and schizophrenia, this is a wonderful thing. But by learning to

intervene better in the brain, they might be able to cure things that we're not quite so sure require brain surgery to be cured.

A Chinese group published an article in an English peer review publication about curing opiate addiction. They burnt out an area of some soldiers from the People's Liberation Army's brains called the nucleus accumbens and reported that after the nucleus accumbens were burned out, the soldiers no longer craved opium. The article did not discuss what else the soldiers may no longer have craved.

Egas Moniz, a Portuguese neurologist, won the Noble Prize in Medicine and Physiology in 1949, for the invention of the leucotomy. Twenty years later, we rejected this as barbaric. In between, 30,000 of our fellow citizens were lobotomized....I don't think anybody was ever sentenced to a lobotomy, but I am confident that sometimes the DA said to some parents, "[Y]ou know, your boy, we know he's just not right. If he goes through this operation, we won't charge him."

What happens if we can do this at a better level? What happens if we can surgically try to prevent recidivism? Do we force it on people? Do we allow them to choose it freely? "Mr. Defendant, you have the right to either go to prison for 30 years or to have this simple brain surgery, a free voluntary choice." If we can do this, what would we do with it? And what will we do about people who want to have their children or themselves or their loved ones operated on to cure them of a bad personality or the wrong political views or the wrong religious views or the wrong sexual views. Do we allow it? Do we disallow it? What will we do with those circumstances? These issues are coming.

## ENHANCEMENT

How many of you regularly use a cognitively enhancing drug? I see a few honest souls. The rest of you are lying. How many of you had a cup of coffee this morning? How many of you had a glass of wine or some other form of ethanol last night?...In some recent surveys, as much as 34 percent of students at a large school, University of Kentucky, had illegally used Adderall or Ritalin for study purposes during the course of their education. It's over a third. It's a crime to use somebody else's controlled substance without your own prescription.

They had done it, because they think it makes them study better. Interestingly, the stereotype on this is the A-student going for the A-plus. [At] the University of Kentucky, these were the C-minus students trying to avoid the D or the F and heavily, heavily from the fraternities. I don't recommend Adderall or Ritalin. There's no good evidence that it does anything other than keep

you awake, and it does have some health risks.

But what about the next generation? People are spending tens of billions of dollars looking for drugs that will help patients in the early stages of dementia or even patients like, I hope, me, who have, I hope, age-appropriate memory impairment. My memory is not as good as I remember my memory having been. And I'd ask for a show of hands of how many of you feel that, but I know the answer. There's no point. If there is a drug that can fix that, I want it.

What if it works for law students studying for the bar exam? Do we let them take it? Do we not let them take it? Does it matter how risky it is? Does it matter whether they keep the memory forever? God knows we wouldn't want them to forget the Rule against Perpetuities. Do we make them pee in a cup before the bar exam? Give your fingerprint, and here's a little cup, go into the bathroom. What will we do?

Enhancement is here. It's coming, and one important thing about almost everything I've talked about, these are side effects. The drive isn't neuroscience to affect law or to require the law to make decisions. The drive is neuroscience for medicine, but to get there, we learn things about how the brain works that can be used for other purposes. It's like Teflon and the Space Program or Tang. Actually, if it's on the good side, it's Teflon. If it's the bad side, it's Tang.

It is these unanticipated secondary uses of medically significant information that the law and clever lawyers will quickly decide ways to use, and we will have to figure out what to do with them.

Now, for some of these, I think they would be good things, if they were safe and effective. For others, I recoil in horror. But I haven't given any answers. I've just asked you questions. Part of that is because for some of these I don't have an answer. But most of it is because I think our societies, our judges, our legislators, our lawyers, our citizens, our jurors, we're going to have to work this out. And I do what I do in the faith, without a strong empirical basis, that the more we think about this in advance and the more people think about this in advance, the more likely we are...to avoid catastrophes. It's not a big hope, it's not a grand ambition [to] avoid catastrophes, but I'll settle for it.

So I charge you, pay attention to this stuff. Think about it. Read about it. See how it affects your work, because only if people with education and knowledge and skill pay attention and think about this will we have any hope of maximizing the benefits, minimizing the harms, or even just avoiding catastrophe. ■

# Actions Taken at Board Meeting

The Board of Regents met October 18-19, 2011 in La Quinta, California, and approved the following:

Publication of the Legal Ethics and Professionalism Committee's American College of Trial Lawyers Code of Pretrial and Trial Conduct Teaching Syllabus.

Publication of the Special Problems in the Administration of Justice (U.S.) Committee's American College of Trial Lawyers White Paper on Judicial Elections.

The Honorary Fellowship Committee's recommendation to offer Honorary Fellowship to Dikgang Moseneke of South Africa.

Past President John J. (Jack) Dalton's request that the Board continue to encourage attendance of public service Fellows at Regional, State and Province Meetings.

Support H.R. 966, the proposed Lawsuit Abuse Reduction Act.

Support of the proposed Sunshine in Litigation Act of 2011.

Presentation of Board Resolution to be presented to Lightfoot, Franklin & White, LLC and Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP for gratis services provided to the College in litigation without expectation of remuneration.

**BOARD OF  
REGENTS**

## Two Firms Honored in General Session

The College, like any other organization or individual, periodically needs legal assistance during its normal course of business. Over the years, it has increasingly relied on two firms that specialize in business litigation and trademark and copyright law. The College has been extremely fortunate to have access to two of the most outstanding legal teams available: Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP of Chicago and Lightfoot, Franklin and White of Birmingham, Alabama. Both provided protracted assistance, without anticipation of remuneration.

At the 2011 Annual Meeting in La Quinta, California, the Board of Regents honored these two outstanding firms with resolutions acknowledging their work. Accepting the resolution on behalf of Pattishall, McAuliffe, Newbury, Hilliard & Geraldson were **David C. Hilliard** (FACTL) and **Ashly Iacullo**.

The resolution to Lightfoot, Franklin and White was accepted by Regent **Samuel H. Franklin**. ■

# NEUROSCIENCE AND THE LAW: PROMISES AND THREATS

## Part II: Legal Ramifications

**Jed S. Rakoff**, a Fellow of the College, has been a federal judge in the United States District Court for the Southern District of New York since 1996. He holds a master's degree in Philosophy from Oxford and obtained his law degree at Harvard. He sits on the governing board of the Law and Neuroscience Project, a “systematic effort to bring together the worlds of law and science on questions of how courts should deal with recent breakthroughs in neuroscience as they relate to matters of assessing guilt, innocence, punishment, bias, truth-telling, and other issues.”

Judge Rakoff introduced his portion of the CLE presentation by cautioning the listeners to not rely too heavily in the legal system on modest scientific findings, that the correlation between brain activity and activity in the mind are only just being understood. A lightly edited transcript follows. >>



Supreme Court decisions are a matter of deep reason and careful logic, and...the correlations between brain activity and actual activity of the mind is still very uncertain, very much something that neuroscience is only just beginning to touch on, and we would be making a terrible mistake to take too many actions in the legal system based on the very modest, scientific findings that have occurred so far.

## PHRENOLOGY

I want to...describe some of the errors of the past. I'm precluded by judicial ethics from saying too much about matters that might come up in the future, but I think we can learn a lot by looking at the history of the law and brain science at large...

The very first area where brain science came into the legal system was in the 1820s, '30s and '40s with what was called phrenology. And we'll all laugh at phrenology now, but it was considered good science in those times. And it started with the proposition that certain areas of the brain have primary control over certain types of behavior and certain types of thinking. This is called localization, and it's still, with a great deal of qualifications and modifications, adhered to in large parts of neuroscience.

The further hypothesis of phrenology was that, if a particular part of the brain was enlarged, like the hippocampi of the cab drivers [*Editor's Note: see Neuroscience and the Law Part I*], it meant that you would have a particular mode of thought or a particular tendency to a greater extent than other average human beings. And the final hypothesis was that, if that particular section of the brain was enlarged, it might be so large that it would cause

a ridge or a bump or an unusual curvature in your scalp, because, of course, this was before X-rays, let alone fMRI. No one could look into the brain. No one could look into the head. So the phrenologist looked at the scalp, and they said, for example, that we have found that a particular bump that is associated with a good sense of humor.

More importantly, the phrenologists said that there were particular bumps and ridges that were associated with violence. And that was accepted by many American courts in the 1820s, '30s, and '40s. For example, there's a famous case by the Ohio Supreme Court called *Farrer v. State*, in which the conviction of a defendant charged with murder was upheld on the ground that, even though the evidence was otherwise insufficient, this particular person had a bump on her skull in just the right place that showed an uncontrollable violent impulse. That was phrenology, and it was accepted as good brain science, and people went to jail because of it.

## EUGENICS

Okay. You say, well, they didn't know much in the early 1800s. Let's fast forward to the 1920s and '30s. And the brain science that was in vogue at that time was eugenics, and this still has its corollary in modern neuroscience in what is called neurogenetics.

Eugenics postulated that if a particular mental capacity or trait was carried over to three successive generations, it probably meant that there was a dominant gene there that was overcoming all other possibilities, and that the next generation would have that trait, as well. And in response to this supposedly good neuroscience, a whole bunch legisla-



tures passed laws requiring forced sterilization of people who had, if you will, bad tendency, bad capacities over a period of three generations.

And in the famous case of *Buck v. Bell*, the Supreme Court of the United States upheld the sterilization of a woman on the allegation that she was imbecilic [because] one of her parents and one of her

*So the phrenologist looked at the scalp, and they said, for example, that we have found a particular bump that is associated with a good sense of humor. I might add that my wife has been looking on my scalp for years without finding that bump, but hope springs eternal.*

– Hon. Jed S. Rakoff (FACTL)

grandparents had been. And the Supreme Court held eight to one, in an opinion by Oliver Wendell Holmes, that this was fine, that in Holmes' phrase, "three generations of imbeciles are sufficient." And I've always thought Holmes' capacity for the great phrase covered up in that particular instance a great cruelty, and many, many people were ordered to forced sterilizations by the courts of the United States, all based on this supposed neuroscience of eugenics. And it wasn't really until it became embraced by Adolf Hitler and it was used by the Nazis that it became discredited.

Well, what happened next? We come to the 1940s, '50s, and '60s and...this was the period of lobotomies. And, as mentioned [by Professor Greely], Mr. Moniz won the Nobel Prize for Medicine for coming up with what was taken to be excellent science at the time, that if you had a person with violent tendencies or other unfortunate characteristics, if you can cut out the relevant portion of the brain, the right lobe, hence the term "lobotomy," you could cure that person. And, as Hank [Greely] mentioned, no fewer than 30,000 people were lobotomized in the United States during this period. Many of them became human vegetables, in effect. Some of you may know the story about Jack Kennedy's sister, who was one of the victims of this. It was a terrible thing resulting in awful outcomes, all done in the name of supposedly good and humane neuroscience.

## LIE DETECTION

Now, I want to give one more example to bring it down to date, and that's a kind of neuroscience that is not considered, perhaps, good science, but nevertheless has crept deeply into the American legal system, and that is the polygraph, the lie detector. And this is not the MRI lie detector, although, I would suggest the MRI lie detector has many of the same flaws. The traditional polygraph, which was developed in the early twentieth century, goes on the assumption that when you have a particular mental activity – namely, the activity of lying – it correlates very closely with increases in pulse rate, in sweating, things of that sort. And, therefore, if you measure those, you can determine whether a person is lying or not.

Now, the courts, with the exception of the courts of New Mexico, have not admitted polygraph testimony into evidence...on the grounds that it's not generally accepted in the scientific community. And the reason it's not generally accepted in the scientific community, among other things, is that it results in too many false positives. There are a lot of other reasons why, when you are taking a polygraph test, you might sweat more, your pulse rate might go up, et cetera. Maybe just nervousness of taking the test. Maybe just nervousness of that particular question in the test on which you know your freedom depends.

## THE CONSEQUENCES OF FALSE POSITIVES

So most serious studies of the polygraph have indicated there is at least a 30% chance of false positives. That has not stopped most of the law enforcement agencies in the United States from using this, quote, "neuroscience tool," ranging from the CIA down to your local law enforcement groups, and through them, it creeps into the legal system. And I will give you an example from a case that's now concluded that was in my own court.

Some of you may be familiar with the Millennium Hotel in New York, which is directly across the street from Ground Zero. And on 9/11, all the guests in the hotel were immediately evacuated, and many of them left their belongings behind. So a few months later, security guards from the Millennium Hotel were allowed back into the hotel to get those belongings to return to the guests, and one of the guards reported to the FBI that on the 50th floor, which is the next-to-highest floor of the hotel, he had found

in one of those little safes that guests use for storing valuables, a copy of the *Koran* and a pilot's radio. A pilot's radio is a device that's used to guide planes from the ground. And the room was rented at the time to a man named Abdallah Higazy, and the FBI did a little quick checking. They found that Mr. Higazy was a former member of the Egyptian Air Force.... He had just come to the United States a few days before 9/11 on a student visa, and he supposedly was going to be a student in a Brooklyn College. What was he doing in the Millennium Hotel?...

They began to formulate the hypothesis that he was someone who had helped guide the planes into the Twin Towers. Now, Mr. Higazy was still in the United States at the time, in Brooklyn, and so they went out, and they interviewed him. And he answered some of their questions, but when they asked him about the pilot's radio, he denied that he had a pilot's radio. And they were very suspicious about this, because they saw no motive for the security guard to have lied about this. So they arrested Mr. Higazy. They didn't have probable cause to arrest him for any crime. They arrested him on a material witness warrant. And they brought him before me and asked to detain him so he could testify in the grand jury. I indicated that I was a little skeptical of all this, but I agreed to let him be held for three days to testify in the grand jury that was investigating the 9/11 terrorist attacks.

And in my court, Mr. Higazy kept shouting out that it was not his pilot's radio, and he wanted to take a lie detector test to prove that it was not his radio and that he was telling the truth. And I explained to Mr. Higazy that this was not admissible in federal courts, but after he was taken away, he kept insisting, and he arranged through his lawyer for the FBI to give him a polygraph test the next day. So the next day, one of the main polygraph examiners from Washington came up [and] Mr. Higazy was brought into a room with the examiner and the polygraph machine. The examiner explained to Mr. Higazy and his lawyer that the lawyer would have to stay outside the room, because this very sensitive scientific instrument could be affected by interplay between Mr. Higazy and his lawyer, but if he wanted to talk to his lawyer at any time, he could go outside and talk to him.

And Mr. Higazy, then, started to be given questions, and whenever it came to a question about the pilot's radio, and he denied that it was his radio, the exam-

iner said, "The machine shows that you're lying." This went on for three hours, and towards the end of the time, Mr. Higazy finally - he was very rattled by that time - finally said, "Well, maybe it was my pilot's radio." At that point, the FBI agent stopped the music, went outside, told the lawyer, "Your client has confessed to lying to the FBI, and we're going to charge him."

And he was, then, brought back before me on a criminal complaint charging him with making false statements to the FBI in originally denying it was his pilot's radio. And it was very clear to me that the AUSA [Assistant United States Attorney] and the agent were already...of a mindset of believing that they could make a case against this fellow for being an adjunct to the terrorist attacks, which would have been a capital offense. Well, three days later, an American Airlines pilot walked into the offices of the Millennium Hotel, and he said, "I really appreciate your sending back my clothes that I left when I left the hotel, but what about my pilot's radio?" And at that point, the whole thing unraveled.

It turned out that the security guard had lied, as he later confessed, and he was prosecuted and convicted, because he was so incensed by 9/11 that he wanted to "get" anyone who was of Arabic ancestry. Mr. Higazy was released, and he sued the government. And I believe - although it was before a different judge - that he eventually recovered a substantial amount.... I asked the Inspector General's office to look into whether the polygraph machine had really shown that he had lied or whether the FBI agent had simply claimed that he had been lying in order to try to induce a confession. And the word came back, "Oh, yes. Yes, indeed, the polygraph machine had shown that he had lied when he denied it was his pilot's radio."

So I tell you this very unfortunate story,...this, in my view, quite troubling history of neuroscience and the law, not to say that there isn't tremendous promise in the neuroscience, the much harder science that Hank has described and that I have had the privilege of becoming familiar with as well, but that the legal system has so often in the past extrapolated from these little nuggets, these little germs of truth, well beyond what the science can really show, and they've done it, frankly, with a certain complicity from the scientists who were very eager to see their work bear fruit. And the result has been quite disastrous. ■

# TIMELESS LESSONS FROM THE MADOFF SCANDAL

In December 2008, investment giant, Bernie Madoff, was arrested on charges of fraud, and the scandal of his vast Ponzi scheme shocked the nation. **Diana Henriques**, a senior financial writer for *The New York Times*, was the first writer to be granted an exclusive prison interview with Bernie Madoff, and during her address to the attendees of the American College of Trials Lawyers Spring Meeting in Scottsdale, she recounted stories of her interviews with Madoff and her conclusions about his “wizardry.”

Past President **Stuart Shanor** introduced Ms. Henriques, and noted that her book, *The Wizard of Lies: Bernie Madoff and the Death of Trust*, “reveals a meticulous research to unearth little-known historical information about Madoff and those who were friends and victims of his fraud.” He commented that Henriques “demonstrates to her readers an exceptional knowledge of the intricacies and of various instruments and investment strategies, which she explains with great clarity.”

Ms. Henriques, he said, “has been at the forefront of reporting some of the most important happenings of our times.” Prior to her exclusive biography of Bernie Madoff, she had been recognized as a Pulitzer Prize finalist for her work on the Enron scandals, as well as a series of articles which exposed the financial exploitation of young soldiers buying insurance in investment companies.

A lightly edited transcript of Diana Henriques’ cautionary tale and the lessons it suggests follows. >>





As you know, I am not a lawyer. I am merely an amateur Wall Street historian with a special interest in that uniquely human form of misbehavior that produces so many clients for all of you and so many interesting cases for some of you here: financial fraud. And never in my 30-plus years of reporting have I ever encountered anything like the Bernie Madoff scandal.

It grabbed my attention immediately, because Madoff was a respected broker, who had been in my own Rolodex for more than 20 years. Within hours, it was clear that he was also the architect of history's first truly global Ponzi scheme, with victims who are scattered from Aspen to Abu Dhabi, from Palm Beach to Paris, and with losses that even he estimated initially, underestimated, at \$50 billion. It clearly was the largest Ponzi scheme on record. But by nightfall, we had also learned that Bernie Madoff had been turned in to the FBI, by his own sons and had been stealing from his family and closest friends for more than a dozen years, perhaps for decades.

With that, for me, the Madoff case stepped beyond the boundaries of finance and into the realm of timeless human drama, a Shakespearian betrayal of trust that cut to the core of what holds a family or a community or a civilized society together. Starting that night, I spent the next years of my life learning everything I could about Bernie Madoff and his fraud.

The first step, of course, was to learn all I could about Bernie Madoff, the man. Where did he come from? What shaped him into this paradoxical villain that he became? Well, I learned about his father's serial business failures, which were espe-

cially bitter against the backdrop of the rosy prosperity that the Madoffs' neighbors were enjoying in those postwar years. These were visible and public embarrassments. At one point, there was even a tax lien on the family home. Madoff himself recalled these as years of tension and financial anxiety. Perhaps those insecurities gave rise to his own nearly pathological inability to admit failure in his own life.

He was not a braggart, but he had a bottomless need to be seen everywhere by everyone as a polished success, not as the tarnished failure his father was. This need was so strong, in fact, that on my first interview with him in prison, he refused to even admit that his vast Ponzi scheme had ultimately failed. He insisted he could have kept it going. Despite the panic we all remember in the markets in late 2008, he said there were still people eager to invest with him. "No, no," he said. He didn't fail at his Ponzi scheme. He just got tired of the constant tap dance of raising new cash and decided to quit.

## HUMAN CONSEQUENCES

The human consequences of Madoff's hunger for admiration were devastating. Apart from the evaporation of nearly \$65 billion that his investors believed they had the day before he was arrested, and almost \$18 billion in cash that they had given him and never gotten back, at least two investors committed suicide soon after learning of their Madoff losses. Suicide also claimed Madoff's own son, crushed by the relentless, but I believe baseless, suspicion that fell on Madoff's wife and children. Now add in all the beloved family homes that had to be sold, the college years that were interrupted, the



pension plans that were emptied out, the shrunken or shuttered charities, the once-comfortable retirement, suddenly terminated, and the wreckage reached far and wide.

And one of the first casualties was trust.

As the world learned of the breadth and the depth of this betrayal, Bernie Madoff became the personification of an era of shameless greed and selfishness on Wall Street. Now, in a way, that's misleading, because Madoff's crime did not cause the bubble decade, and the bubble decade did not cause Madoff's crime. Ponzi schemes thrive in good times and bad, and, indeed, this specific Ponzi scheme had survived several recessions, market panics and the aftermath of the 9/11 Terrorist attacks. But among all the mystifying abstractions of 2008, (credit default swaps, collateralized debt obligations, mortgaged back securities), his vast, but essentially simple, crime made him the human face of the betrayal felt by an entire society.

### MADOFF'S RESPONSE

I tried to learn about Madoff's own emotional reactions to this catastrophe that he had created. Did he feel remorse? Was he truly sorry for what he had done? Well, it's hard to say. On the first of my two visits with him in prison, I could sense only self-deception and denial. Madoff is an extremely well-defended man. And he was almost obsessively focused on the arithmetic of the recovery effort: the size of the allegedly legitimate profits that his clients had received over the years and the secret settlements that banks might be making in Europe. He simply seemed unable to grasp that what he had broken could not possibly be put back together again with dollars and cents.

On my second visit, though, which was just two months after the suicide of his son, Mark, I saw a shrunken and shattered man, almost unrecognizable as the man I had talked with just six months earlier. As before, there were only a few words of remorse for his victims, but they seemed maybe more authentic. There's no doubt that Madoff deeply and profoundly regrets the catastrophe his crime has inflicted on his own loved ones. Whether he can ever stretch his remorse any further than that, I just don't know. But, my visits with him did allow me to learn firsthand about Bernie Madoff's peculiar magic as a Ponzi schemer.

### PONZI SCHEMER

Even with his vast criminal enterprise in shambles around him, Madoff had a gift for seduction unlike any I have ever seen. The classic Ponzi personality – you probably have met and represented some of them – the classic Ponzi personality is a charismatic *bon vivant*, eager to persuade you that he is the smartest person in the room – and I say “he” advisedly, because they almost always are men. But Madoff was a quiet, spoken, low-keyed reserved guy, who made you feel like you were the smartest person in the room.

When I interviewed him in prison, he definitely complimented my grasp of market history, the arcane investment strategies I understood. Why, quite clearly, I was the most intelligent, experienced, professional reporter he'd ever met! And I've got to tell you, for a minute or two, it felt great. So instead of trying to impress you, Madoff seemed so impressed by you, and what could be more seductive than that? And instead of being eager for your business, like the classic Ponzi schemer, he seemed utterly indifferent to whether you trusted him with your money. He didn't care. After all, he was only managing money as a favor to a few long-time friends and clients. He already had more people trying to invest with him than he wanted to bother with. So go ahead. Take your money and your nosy questions to someone else who needed the business. But, of course, you wouldn't, not in the face of that reassuring indifference.

It was a remarkable form of emotional jujitsu. One that defied all that we thought we knew about Ponzi schemers and the people who fall prey to them. People who probably would have been instantly suspicious of the traditional Ponzi personality fell for Madoff in a minute. And let's not fool ourselves: most likely, you and I would have, too.

He almost had me trusting him, even after he'd been locked up. He agreed to talk with me, in person, on the condition that the material be embargoed for my book. “Well, that's a two-way street, Bernie,” I said. In return, he assured me, repeatedly and in writing, that he would not talk to any other journalists until my book was published. Okay, it was a promise made by the world's biggest liar, but I knew that. I knew that. But it seemed so sincere, and it was so comforting. It was so much what I wanted to hear that sometimes when I dropped into bed at

night, after an exhausting day of research or writing, I actually reflected on his promise with a trace of relief. One less thing to worry about.

But, of course, he broke that promise early this year, exchanging emails and phone calls with a New York magazine writer months before my publication, and even entertaining visitors from the *Financial Times* three weeks before my book came out. Now, later he tried to persuade me in e-mails that he had been misled by these other journalists, that they had assured him that they would not publish his comments until after my book came out, and that they had not kept their word to him. Once such plaintive email started out, “Are you the only trustworthy journalist in the world?” Well, what was I going to do? Sue him? Fortunately, I learned about his betrayal in time to get my second interview with him onto the front page of *The New York Times* and avoid it being scooped by his other media visitors, but it was a remarkable firsthand example of the Madoff magic and the risk of falling under his spell.

## THE ILLUSION

Another thing I learned about Bernie Madoff was that he had put his distinctive stamp on a very old crime. Before Charlie Ponzi’s name was attached to this crime in the 1920s, as you know, this perennial form of fraud was called a Peter-to-Paul scheme, as in robbing Peter to pay Paul.

So the basic architecture of this crime had been around for centuries. What was unusual was the remarkable camouflage that Madoff used to conceal his Dr. Jekyll/Mr. Hyde existence for so long. His computers created the illusion that all the stocks and bonds he was supposed to have safely owned were stored in Wall Street’s central clearinghouse. He kept old letterhead stationery and an old Selectric typewriter...so that he could create convincing backdated documents to satisfy regulators’ questions. He told foreign auditors that he traded with U.S. banks, and he told U.S. regulators that he traded with foreign banks, knowing that the extra trouble involved in making those cross-border checks would make it less likely that there would be further investigation, and, unfortunately, he was right. He used customized mail-merge computer programs to allow a tiny band of conspirators to generate the acres of client statements that gave his investors such comfort. In fact, he was secretly automating

his Ponzi scheme at the same time that his legitimate brokerage house was openly helping to automate the over-the-counter stock market and foster the development of NASDAQ.

There was another way that Bernie Madoff changed the way we have to think about Ponzi schemes. Fraud analyst Pat Holliston, a careful student of the Madoff case, came up with a line that I wish I’d thought of. So I’m going to steal it with credit. He wrote, “If it sounds too good to be true, you are dealing with an amateur.” And Madoff was no amateur. He was a pro. One who would never have given himself away with the proverbial “too-good-to-be-true” sales pitch, whatever you may have heard to the contrary.

Regulators have long assumed, along with the rest of us perhaps, that anyone who gets caught in a Ponzi scheme is sucked in by the outlandish returns and the wild get-rich promises that the Ponzi schemer lays out. But in looking at Bernie Madoff and his victims, I saw that the conventional wisdom was dead wrong. In most cases, Madoff didn’t exploit people’s greed. He exploited their fear. He exploited their fear of a crazy, complicated marketplace that had become impossible to understand at the same time that it became more essential to our own personal retirement security.

For most years of the Madoff fraud, his typical investors could have made more money in the Fidelity Magellan Fund than they made investing with Bernie. His returns in the final year of the fraud were in the low single digits. What drew investors to Madoff was his remarkable consistency, his fluent mastery of this increasingly scary stock market, his cool confidence in the face of his investors’ bafflement and anxiety. Unlike most of us, Madoff realized that his regulators were from Mars and his investors from Venus. The regulators believed in full disclosure, fine print, transparency, and due diligence. His investors hungered for simplicity, comfort, and safety, and the nice, steady yield of about eight percent.

Now, you know as well as I do, that if regulators see a guy promising a high-yielding super-safe investment that never loses money, they want to take that guy to court, but investors want to take that guy to dinner. And a lot of investors wanted to take Bernie Madoff to dinner, because he made them feel secure. And that sense of security was so important to them,



that they were willing to pass up greater, but more volatile profit opportunities elsewhere. That is not the classic anatomy of a Ponzi scheme, but it is likely to become a more common form of this age-old crime, especially in today's market where it is difficult to earn a visible rate of return on your retirement savings, and every new hiccup from Europe or Washington sets off a panic.

But the most fundamental thing I learned about Bernie Madoff was that, as different as he was from other Ponzi schemers, he shared one essential characteristic with all of them: he could make you trust him. Indeed, that is the *sine qua non* of the successful Ponzi schemer. A shifty-eyed drifter in a cheap suit may commit any number of crimes, but a Ponzi scheme will never ever be one of them. And Bernie Madoff had that magic. He could win people's trust and keep it, even in the face of mounting piles of contradictory evidence. He could and did make people believe he was quite simply a wizard of Wall Street.

## LEARNING FROM BERNIE MADOFF

So those are some of the things I've learned about Madoff and his crime. Some answers I've gathered in two-plus years of research, but learning about Bernie Madoff takes us only so far. Learning from Bernie Madoff and his fraud is what really matters, and that is where we seem to be going astray. There was a wonderful cartoon in *The New Yorker* this summer. Maybe you saw it. It suggests to me a little bit about where we are. A small family is surrounded by dense jungle, and the father in his pith helmet is holding the map, and he says, "[O]kay. I admit it. We're lost. But the important thing to remain focused on is whose fault it is."

Well, while we've remained so focused on whose fault it is, we've lost sight of what this epic crime might teach us about how we got lost in the first place. I wonder: did we learn anything from Madoff and his crimes about the limits of deregulation? In the years that the eccentric whistleblower Harry Markopolos, that quirky quantitative analyst from Boston, was trying to educate the SEC about his suspicions of Madoff, the turnover rate at that agency was so high that it was the subject of no fewer than three alarming GAO reports, all warning that the agency turnover rate was threatening its capacity to fulfill its basic mission, but nothing was done.

So there wasn't enough money to improve salaries for experienced staffers or to give new staffers the training and the tools they needed to do their jobs. Indeed, it was no longer clear that theirs was a job anyone in Congress or in the country wanted them to do anymore. Red tape and regulation were out of fashion, remember?

Private litigation as a means to redress investors' abuses had also fallen out of political favor, so laws were passed to raise the bar, so to speak, on such lawsuits, laws that today are affecting the efforts by some Madoff investors to recover damages in the courts. Post-Madoff, new rules and substantial SEC budget increases were promised, but those promises may not be kept. And if they are, will the new tools be the right ones? That's far from clear. Indeed, it grows more unlikely every day that these promises will be met, as the political conversation shifts from investor protection to deficit reduction to, believe it or not, more financial deregulation. But, hey, as the cartoon father said, "[A]t least we can all remain focused on whose fault it is."

Should we have learned from the Madoff scandal how foolish it is to trust in some sort of Wall Street honor code, some noble commitment to neither lie, cheat, nor steal, nor tolerate those who do? Imagine how much differently this story would have turned out if all of the hedge fund managers and private bankers and industry consultants, all those smart people who came forward after Madoff's arrest [and said] they've always been suspicious about Bernie, they've always known. If [only] they had come forward before and shared those doubts with the SEC and the FBI years earlier. But they didn't. They just quietly escorted their clients out of this teetering house of cards and waited silently until the roof crashed down on the heads of someone else's clients.

So here's a post-Madoff question I think everyone in the financial and legal community needs to wrestle with: Are we our brother's keeper when our brother is wandering around Wall Street? What is it about the Wall Street world that caused so many smart, suspicious people to keep silent for so long? And is there some way to change that? Is there a way to create a climate in which reporting suspicious behavior will be seen as an honorable act, a sign of devotion to the common good, and not as the troublesome meddling of some eccentric stigmatized

whistleblowers who will likely never get another position of trust on The Street?

## HANDLING WIZARDS

Finally, did we learn anything about the human heart from the Madoff scandal? I know I certainly did. When I looked at all the smart, supposedly sophisticated people who thought Bernie Madoff was some kind of magical genius, I realized that what all of them needed, what all of us needed, was a crash course in what I call the detection and handling of wizards. You probably know a lot of wizards, even if you don't think about them that way. They're the people who seem a lot like us only better, far better, smarter, richer, more successful, more cultured, better dressed, better educated, better on the golf course. Just more and better than we are in every way. Their track record looks like the Yellow Brick Road leading straight to the Emerald City. With their astonishing mastery of their field, they seem to be operating far above the petty confusions and setbacks that the rest of us experienced. Indeed, their skills are so far above ours as to seem almost magical, and...sometimes the magic is real.

We can all rattle off the names of nature's extraordinary exceptions: the Einsteins, the Mozarts, the Hamiltons, the Jeffersons. Isaac Newton, Thomas Edison, Bill Gates, Steve Jobs. The great Wayne Gretsky of hockey? Nobody greater. The young Tiger Woods of golf: will anyone be greater? And then there are those inexplicably successful magicians of Wall Street, the real wizards, like George Soros, Peter Lynch of Fidelity, Warren Buffett.

Take it a step further. Add to this roster all those equally impressive wizards in your own world. The lawyers and judges, many of them here today, who are so consistently successful at what they do, who inspire such confidence in their integrity and their future success, that you are always willing to cut them some slack. You never worry about monitoring them as closely as you do other people. You always feel comfortable taking what they say on faith.

I can name some wizards in my own profession, journalists who were given more than the usual amount of latitude simply because they were so magically good at what they did. One or two were charlatans, who fell into shame and scandal, but most were the

real deal and went on to greatness and deserved glory. Clearly, not all of life's wizards are Ponzi schemers, but all of life's Ponzi schemers are wizards, at least in their victims' eyes. They were elected to that position with every vote of confidence we gave them over the years. And the great thing about being a wizard is nobody really expects you to play by the same playbook as the rest of us.

As I learn more about the art of Madoff's crime, it was clear that the benefits conferred by his membership in the wizard fraternity were essential to sustaining his fraud for as long as it went on. Regulators ignored warning signs that would have made them suspicious of a lesser genius. Due diligence lawyers at major banks and accountants at major CPA firms all around the world made exceptions for Madoff that they never would have granted to lesser money managers. Sophisticated institutional investors accepted less paperwork, less transparency, less cooperation from Madoff, because he seemed like such a wizard at making money for them and their clients. Even pension funds, trustees, fiduciaries invested with him despite his unorthodox methods. Allowances were made: "he's just a little prickly", "just a little peevish", "a little unconventional." In time, even outright impossibilities could be explained away. That's what happens when people trust you deep in their hearts and believe you are a wizard.

I also learned that we are most inclined to trust too much when we are driving beyond our headlights, when we are confronting complexities we are too busy or too confused or too overwhelmed to master on our own. You know Wall Street trading desks can always be counted on to find a joke in the bleakest of market turmoil, and one of the few good lines that the Wall Street joke machine produced about Madoff was a one-liner: That once and for all, the case proved that there was no such thing as a sophisticated investor.

Everyone, from hedge fund managers to retired school teachers,...invests primarily as a leap of faith, blind faith in someone we decide to trust for reasons that have nothing to do with the acres of fine print that our regulators think will keep us safe. If only we would read every word of them, which we never ever will do. I don't, and admit it, at least to yourself, you don't either.



Of course, it's easier to take things on faith, especially complicated things that we imperfectly understand; but beyond that, I think we are hardwired to trust one another. Professor Greely might back me up that there are some scientific studies that bear that out, and this trait, this capacity for trust, while perhaps helpful in the management of prehistoric hunting teams, leaves us vulnerable today to anyone willing to exploit our trust to steal from us.

I want to be clear about this: no matter how much we spend on regulation, the only sure vaccine against Ponzi schemes is clinical paranoia, a total lack of trust in anything or anybody. And while it is true that Ponzi schemes are impossible in a world utterly devoid of trust, that truly is a case where the cure is worse than the disease. Nobody wants to live in a world like that. In modern commerce, it's impossible [to live] in a world like that. So we've got to figure out a way to navigate, to regulate in a financial world that runs on trust or doesn't run at all.

What do we do? How do we operate safely in a world full of well-trusted wizards, some honest, some not. There are some clues in the stories I tell about people who did not fall prey to Bernie Madoff. In *The Wizard of Lies*, you'll meet a wealthy retired businessman who wanted to invest with Madoff but ultimately didn't. This man had a firm rule about how much he would entrust to a new money manager. And it was well below Madoff's *minimum du jour*, which he apparently made up on the spot, but which in this case was \$5 million. Now, this businessman could easily have written a check for \$5 million, but it would have violated rules that had served him well over the years. So he didn't do it. He exchanged a few more pleasantries, shook Madoff's hand, and walked away, disappointed but basically at peace with his decision.

Similarly, a charity was tempted to invest with Madoff. So many of its donors did, and they admired Bernie Madoff so much. But the charity had a rule that it only invested with money managers who used third-party custodians to hold the assets, and Madoff didn't. So rather than make an exception, it reluctantly passed up the chance to invest with this Wall Street wizard.

Now, did you notice? The charity and the businessman were spared, not because they suspected Madoff was a crook. Far from it. Like everyone else clamoring to invest with him, they thought he was a genius, but they had some sensible time-tested rules, and they stuck to them, even when they were sorely tempted to waive those rules so they could invest with Madoff, as so many others did to their eternal regret.

## REGULATION OR RESPONSIBILITY

The magic spell that keeps us safe from the occasional evil wizard is not suspicion. It's humility. We all make mistakes. We all have blind spots. We are all inclined to waive the rules for the wizards we trust, and once we trust them, we simply will not see the red flags warning us that we're in danger. We should all be instructed by that famous Harvard cognitive function test that's called The Invisible Gorilla. I know you all know it. The test-takers are focused on counting the number of passes in a short video clip of a basketball game. At the end they're asked, "Did you notice anything unusual during the game? No? Did you notice the gorilla?" Nearly half the test-takers would drop their jaw and say, "[A] gorilla? Are you crazy? If there had been a gorilla, I'd certainly have seen it. I didn't see a gorilla. So clearly there was no gorilla." There had been a gorilla. A student in a full-bodied gorilla suit who walked onto the court, beat her chest in front of the camera for dramatic effect and walked off in all of about six or seven seconds. The test-takers who never saw the gorilla simply could not believe they had missed it. They could have passed one of those polygraph tests, swearing there was no gorilla. After all, they saw her clear-as-day once they knew what to watch for. Yes, and we all saw all the red flags fluttering around Bernie Madoff, once we knew what to watch for.

So we all have the capacity to miss what seems to be right under our noses if we are not expecting it, if we are focused intently on something else, if we've let our trust in someone else blur our vision. But knowing that we have these weaknesses, that's the humble charm that can protect us. When it comes to assessing our ability to see through the next Bernie Madoff, humility is best. Arrogance is not only unattractive, it's downright dangerous.

At a recent talk I gave in New York, a smug gentleman expressed his disdain for Madoff's victims by invoking Mark Twain and crediting to him the assertion that, "You can't cheat an honest man." Well, most people attribute that line to comedian W.C. Fields, and I'm inclined to believe with them, because it's one of the most ridiculous bits of nonsense ever uttered about fraud and its victims. Honest people get cheated all the time, every day in ways too numerous and nefarious to mention. So if you think your own honesty will somehow protect you from being cheated by the next Bernie Madoff, consider another bit of vaudeville wisdom. "There's a sucker born every minute." In the universe of lies, the most dangerous ones are those we tell ourselves. So let's trade the wisecracks and self-deception for some wisdom. Recall the great Greek fable about the sea captain, Odysseus, who lashed himself to the mast and had his men put wax in their ears so they would not be lured onto the rocks by the songs of the sirens.

Well, if we know that we're susceptible to the siren songs of our everyday wizards, we can design rules of conduct that, in effect, will lash us to the mast, and like that businessman and like that charity will keep us from being lured onto the rocks, however tempted we are to make exceptions for those wizards we trust too much. But that ultimately is a personal remedy.

As a society, our post-Madoff dilemma, the question we haven't asked, much less answered, remains: How do we regulate a world in which people are inclined to trust too much, without creating a world in which people trust too little? A world so filled with suspicion that modern commerce, from online banking to online retail, is absolutely impossible?

For more than two years, I've listened to the regulatory debate about that topic with a growing sense that policymakers are drafting plans for some parallel universe, that universe in which regulatory fine print will always trump blind faith, that universe where all investment decisions are made by rational, educated people, who have carefully studied all the prospectuses and done all their due diligence on all the people involved right down to that last sub-custodian in the Cayman Islands. Memo to policymakers: We don't actually live in

that universe. Maybe we did once, when "investors" were defined as prudent, upper-class gentlemen from Boston, who managed family trust funds for a living, and "brokers" were defined as their former roommates from Harvard who felt a bit embarrassed to even charge them commissions.

But today's brokers are expected to generate big profits for their increasingly demanding firms, and today's investors are truck drivers and dental technicians and school teachers and, yes, journalists and lawyers. We don't manage our investments for a living. We make our living some other way, and we simply don't have time to learn what that prudent man from Boston probably learned at his trust officer's knee.

Sad as it makes me to admit it, I fear that the Madoff scandal exposed the massive fundamental flaw of our much-venerated "full-disclosure" approach to regulating markets with that bedrock belief in the fine print, and individual due diligence. We learn from Madoff that those protections are largely illusory when we apply them to a nation of amateur part-time investors, desperate but desperately unprepared to secure their own financial security.

Madoff showed us quite spectacularly what didn't work, but he didn't show us what would. So the question remains: What kind of rules will keep investors safe in this universe, the one that runs on trust, not due diligence, the world where personal chemistry is far more potent and persuasive than statistical analysis, the world that trusted a smoothly confident con artist like Bernie Madoff, but had its doubts about a socially awkward whistleblower like Harry Markopolos? That's our world, like it or not. And it looks to me like that world hasn't begun to face up to the lessons of the Madoff experience. Our situation is captured perfectly by that wonderful observation that I believe I can credit to Bertrand Russell, who said, "The trouble with the world is the stupid are cocksure, and the intelligent are full of doubt."

Being somewhat intelligent, I am increasingly full of doubt that we've learned anywhere near as much as we need to learn from the Madoff crime and its timeless lessons. I just hope that *The Wizard of Lies* will help change that a little bit, one reader at a time. ■

# COURT IMAGERY AND ICONOGRAPHY

**Judith Resnik**, a graduate of NYU Law School and current professor at Yale Law School, recently co-authored a book with her husband, Professor Emeritus at Yale Law, entitled *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*. Past President **Warren Lightfoot** described their book as a “stunning history of justice, how it evolved, and how its icons and architecture have illustrated that evolution.”

During her address, Resnik offered a taste of some of what was covered in the book, in particular a look at the imagery of blindness. >>

Resnik began by describing her book as an effort to look through the history and images of courts and “ask something about their durability and their change, and continuity and discontinuity.” She displayed a series of photos of court buildings from around the world, demonstrating common “repeated imagery” that leads people to think “law” or “court” when they see it. She noted, “It’s really remarkable that so many people on so many continents and so many places look at scales and sword and drapery, and say, ‘Oh, yes. That’s justice.’ And, of course, the question: Why and how did this come to be a shared vocabulary? And the answer requires us to move back in time a little bit.”

## SCALES

Using various images to support her narrative, Resnik described a Mesopotamian god, a lion with scales by its side. Ancient Egyptian imagery showed a heart weighed against an ostrich feather, where it was believed that if the heart was lighter than the feather, there was a better outcome. She went on to explain how historians believe that Coptic monks took the imagery of the scales to Ireland where they began to be associated with the image of St. Michael and a part of the theology of the Judgment Day. Even today, the International Criminal Court’s logo includes an image of justice which includes scales.

Resnik explained how medieval German law dictated that every courtroom must have an image of the Last Judgment,

and at the bottom of the image the words “Judge ye as ye shall be judged” was frequently inscribed. The image often portrayed the heavenly courts as similar in appearance to the court in which the image itself was displayed.

Resnik described the familiar Renaissance image of Lady Justice but pointed out the other women significant in this metaphoric style. A woman with a mirror was Prudence because she was thoughtful and looking forward, and Temperance was shown with a bridle to demonstrate restraint.

A scale, sword and blindfold have not always been the principal images of justice, Resnik noted. In the Vatican there is a justice with an ostrich. There were many explanations, she said, for why justices needed ostriches, including the fact that their feathers are of equal length. Christian theology at the time posited that the ostrich egg had something to do with the Immaculate Conception. Another explanation was that ostriches could digest anything, as could justices.

## BLINDFOLDED JUSTICE

An image from 1230 showed a female figure, Synagoga, who is bent, broken and blindfolded because she represented the Old Testament, and the Old Testament represented those blinded to the light of Christianity. In this case, being blindfolded was therefore negative. The same image portrayed another woman, representative of the New Testament, who had clear eyes to symbolize





light, vision and a state of omnipotence.

Once we arrived to the 1600s, 1700s and 1800s, Resnik said, “the complex relationship between sight, knowledge, wisdom, and judgment came into play as more and more people were going to laws of court seeking justice.” As worries about corruption increased, the idea developed that a “blind” justice would not judge in a manner “against reason or the stain of personal interest.”

“Furthermore,” she said, “as there were more judges around, there was an idea that distance might be good, and some independence came into play with the political theory of separation of powers...” If a blind man could see, philosophers wondered, what would he see, and what would he know.

## RACE

A more contemporary take on the issue of blindness is the question of whether the Constitution is “colorblind.” Langston Hughes’ 1923 poem “Justice” reads,

That Justice is a blind goddess  
Is a thing to which we black are wise:  
Her bandage hides two festering sores  
That once perhaps were eyes.”

Later, in the 1970s, an African American lawyers’ organization, called the National Bar Association, chose a logo depicting Lady Justice removing the blindfold which obscured the unequal treatment of poor and black people.

There is only one dark-skinned lady justice in the American territories, Resnik said, and she is a statue in St. Croix. The artist suggested sculpting an African Moko Jumbie, evoking vengeance, protection and spiritual justice as part of the slavery heritage of the island. But, in the end, it was decided that the subject of the sculpture would be a safe-looking, swordless and caregiving woman.

The increasing involvement of women in the courts has raised questions about their role in the face of such imagery.

## CHALLENGES TO THE COURTS

Resnik pointed out the parallel growth of the need for more court buildings starting in the 1800s as the demand on the federal justice system increased. She discussed how, at the state court level, “we see the idea that all courts shall be open...and every person has a remedy in due course of law.” Along with that goes the importance of judicial independence. In earlier times, she said, “judges were subservient to their rulers and had to give homage to them.”

With the huge demand for court services come huge challenges. Courts need money to meet those demands. A response to overcrowded courthouses is to increase funding. Another effort is to try to have fewer people in court, resulting in fewer trials. The decline in trials, Resnik suggested, can be partially attributed to contracts that push us into dispute resolution, such as with credit cards or cell phones.

“Courts are a place in democracy for a brief moment in time,” Resnik said, “in which you have equality of exchange ... Courts are, in themselves, an adjudication, a democratic process, and it is this iterative messy battle in ordinary courts, not just in the Supreme Court, where democracy in the United States is enacted in a regular way.... The third-party audience can agree or disagree about the rules and the regulations. So courts contribute to democracy.”

To conclude, Resnik said, “One, courts are at jeopardy because of all the risks, and the fact that they are old and enduring is a problem. Two, a democratic iconography of justice would look radically different... [T]he proto-democratic norms of old democracy and...adjudication means that if we’re going to show justices, we need to do a lot more than Justice itself. Temperance, Prudence and Fortitude, and a lot else, need to be the attributes of lawyers, judges and litigants.” ■

# FOUR NEW REGENTS



**William H. (Bill) Sandweg III**, Sandweg & Ager, P.C., Phoenix, Arizona

A former Air Force jet pilot, Sandweg has focused his practice primarily on plaintiff's medical malpractice. He previously served the College as Arizona State Chair and as a member of the Gumpert and Communications Committees. His region includes Arizona, Southern California and Hawaii, and he has been assigned as Regent Liaison to the Alternative Dispute Resolution and Communications Committees. He and his wife, Jeannie, reside in Phoenix and have four children.

Four regents of the College completed their four-year terms at the 2011 Annual Meeting in La Quinta. The Annual Meeting immediately followed Saturday's General Session, and President **Gregory P. Joseph** introduced the incoming officers. He then presented the President's Report and Treasurer **Chilton Davis Varner** presented the Treasurer's Report. The meeting concluded with the election of four Fellows to the Board of Regents.

Regent **Robert L. Byman** chaired the 2011 Regents Nominating Committee, composed of the following Fellows: **Andrew M. Coats; Michael A. Cooper; William J. Kayatta Jr.; Michael W. Smith; Lisa G. Arrowood; and Randal H. Sellers.**

Upon hearing the committee's recommendations, the candidates were unanimously elected by the attending Fellows. The new regents will serve until the conclusion of the Annual Meeting in 2015. >>



**James M. (Jim) Danielson,**  
Jeffers, Danielson, Sonn & Aylward,  
P.S., Wenatchee, Washington

Born and raised in Central Washington, Danielson has focused his practice on healthcare and civil litigation. A former Washington State Chair, he also served on the Legal Ethics and Professionalism Committee. His region consists of Alaska, Alberta, British Columbia, Idaho, Montana, Oregon and Washington. He also supports the Canada-United States and Samuel E. Gates Litigation Award committees. He and his wife, Carol, live in Wenatchee and have three children.



**Michael F. (Mike) Kinney,**  
Cassem, Tierney, Adams, Gotch &  
Douglas, Omaha, Nebraska

Kinney's general litigation practice includes the areas of aviation, insurance, legal malpractice, medical malpractice, personal injury, product liability, and commercial and business disputes. He has served as a member of the Access to Justice and Legal Services Committee and as Chair of the Nebraska State Committee. His region encompasses Iowa, Manitoba/Saskatchewan, Minnesota, Missouri, Nebraska, North Dakota and South Dakota. He serves as Regent Liaison to the Admission to Fellowship Committee. He and his wife, Rondi, live in Omaha and have four children.



**Rodney Acker,**  
Fulbright & Jaworski L.L.P.,  
Dallas, Texas

Experienced in all areas of civil commercial litigation, Acker specializes in securities litigation. He previously served the College as a member of the Texas State and Judiciary Committees and is the past Chair of the National Trial Competition (NTC) Committee. He now serves as Regent Liaison to the NTC and Legal Ethics and Professionalism Committees. His regional jurisdiction includes Arkansas, Louisiana, Mississippi and Texas. He and his wife, Judy, live in Dallas and have four children.



*In reporting on the new Regents, Chair Byman stated, "They are uniformly excellent. They must fill big shoes... but we believe...the College will be enriched by their tenures."*

*The four new Regents replaced retiring Regents, see photo, l to r: Paul S. Meyer, Costa Mesa, California; Paul T. Fortino, Portland, Oregon; Christy D. Jones, Ridgeland, Mississippi; Phillip R. Garrison, Springfield, Missouri. ■*



# College Inducts 74 at La Quinta Meeting

## ARKANSAS

John E. Tull, III  
*Little Rock*

## ARIZONA

Lawrence A. (Larry)  
Hammond  
Randy Papetti  
Thomas J. Shorall, Jr.  
K. Thomas Slack  
*Phoenix*

## CALIFORNIA-NORTHERN

Warren R. Paboojian  
*Fresno*  
Robert H. Zimmerman  
*Sacramento*

## CALIFORNIA-SOUTHERN

Terry Bridges  
*Riverside*  
David L. Schrader  
*Los Angeles*

## CONNECTICUT

Robert A. Richardson  
*New Haven*  
Hope C. Seeley  
*Hartford*

## DISTRICT OF COLUMBIA

Thomas G. Connolly  
Bernard S. Grimm  
Mark D. Hopson  
Michelle M. Peterson  
*Washington*

## GEORGIA

Richard A. Schneider  
*Atlanta*

## IOWA

Richard C. Garberson  
*Cedar Rapids*  
Karen Anne Lorenzen  
*Iowa City*  
Randall H. Stefani  
Mark E. Weinhardt  
*Des Moines*

## IDAHO

Theodore O. Creason  
*Lewiston*  
B. Newal Squyres  
*Boise*

## ILLINOIS-UPSTATE

Sean M. Berkowitz  
Michael P. Foradas  
Chris C. Gair  
Keith A. Hebeisen  
Larry R. Rogers, Sr.  
Mark L. Rotert  
*Chicago*

## INDIANA

Thomas M. Kimbrough  
*Fort Wayne*  
Michael S. Miller  
*Indianapolis*

## KENTUCKY

Scott C. Cox  
*Louisville*

## LOUISIANA

Adrienne Landry  
Baumgartner  
*Covington*  
C. Wm. Bradley, Jr.  
Edward J. Castaing, Jr.  
R. Patrick Vance  
*New Orleans*  
James P. Doré  
*Baton Rouge*

## MASSACHUSETTS

John G. Bagley  
*Springfield*  
Thomas M. Hoopes  
Edward F. Mahoney  
*Boston*

## MARYLAND

Charles P. Goodell, Jr.  
*Baltimore*

## MICHIGAN

Maurice G. Jenkins  
*Southfield*



**MINNESOTA**

Peter W. Carter  
Katherian D. Roe  
*Minneapolis*

**MISSISSIPPI**

Walter T. Johnson  
William Liston, III  
*Jackson*

**NORTH CAROLINA**

Richard S. Glaser, Jr.  
*Charlotte*

**NEW JERSEY**

Brian J. Molloy  
*Woodbridge*

**NEVADA**

Peter D. Durney  
*Reno*

**NEW YORK-DOWNSTATE**

Jonathan P. Bach

Peter E. Quijano

Richard M. Strassberg  
*New York*

**NEW YORK-UPSTATE**

James M. Mucklewee  
*Lancaster*

**OHIO**

William G. Porter  
*Columbus*

**OKLAHOMA**

Perry T. (Pete) Marrs, Jr.  
*Oklahoma City*

**PENNSYLVANIA**

Frederick B. Buck  
John C. Dodds  
Timothy R. Lawn  
Michael L. Levy  
Joseph E. O'Neil  
*Philadelphia*

James A. Doherty, Jr.  
*Scranton*

**SOUTH CAROLINA**

Mary Gordon Baker  
*Charleston*  
Perry D. Boulter  
*Spartanburg*  
Thomas W. Traxler  
*Greenville*

**TENNESSEE**

William A. Simms  
*Knoxville*

**UTAH**

Carlisle Christensen  
Tara L. Isaacson  
*Salt Lake City*

**VIRGINIA**

Claire G. Cardwell  
*Richmond*

**VERMONT**

E. William Leckerling, III  
*Burlington*

**WEST VIRGINIA**

John D. Wooton  
*Beckley*

**WYOMING**

Michael A. Blonigen  
*Casper*

**QUÉBEC**

Bernard Amyot, Ad. E.  
Robert-Jean Chénier  
Julie-Martine Loranger  
*Montréal*

**SASKATCHEWAN**

Robert W. Leurer, Q.C.  
*Regina*

# MERMAIDS, MARTINIS AND TABASCO SAUCE:

## AN INDUCTEE'S PATH TO THE COLLEGE

The response on behalf of the newly admitted Fellows of the College was delivered by **Richard A. (Doc) Schneider** of Atlanta, who represented his fellow inductees in a humorous and touching speech about his legal heroes. A lightly edited transcript follows. >>

I am thrilled to be a member of this class and humbled to speak on your behalf when I know good and well, given the talent assembled, that each and every one of my fellow inductees could hold forth with equal enthusiasm and then some.

But, my job tonight is to make a response on behalf of our class. My training teaches me that a response usually consists of many carefully phrased denials and affirmative defenses, including laches and the statute of frauds. But tonight, I abandon all of my training, and without hesitation, and on behalf of this class of inductees, I confess judgment and I admit on our behalf all the charges and commendations. If this convocation, if that "Magnificent Seven" group before us, says that we meet the requirements for induction, then so be it. We stipulate to it with gratitude and celebration.

To be invited to stand beside you as Fellows in the College is both daunting and inspiring, especially when I heard Jack Dalton's speech today and about how many levels we had to go through. I can't believe it. And for every one of us, it ranks at the top of the list of anything we could ever hope for. And we thank you...

I have been lucky enough to have spent my entire career working side by side with some of the most

iconic Fellows of the American College. From my very first day in the law, I fell under the energizing spell of Judge Griffin Bell, a friend to many, I'm sure, if not all of you in the room, a former President of the College; and Frank Jones, also a former President; and Chilton Varner, my friend and partner and now an officer of the College.

Indeed, I have had the opportunity to work with Fellows from Maine to California all across the country, and two things always stood out: they were excellent lawyers and fun people; and every one of them made me endlessly proud to be a lawyer.

You would hope that by rubbing shoulders with all these folks, that I might have spruced up a bit and learned a few things of importance. And I'm sure, looking at me now, you don't think I've learned as much as I should have. But, I did learn a few things, and I plan to share some of my most memorable lessons tonight.

As you will hear in a moment, my epiphanies in the law involve mermaids and martinis, Tabasco Sauce and omelets, and Opelika, Alabama. That may sound like a cookbook at a truck stop, but I assure you that it goes a long way in explaining how I came to be here tonight.



## CHOOSING LAW

But before we get there, I have to admit that this is an evening of joy, but also ongoing disbelief. To begin with, I suffer from a completely understandable case of the Woody Allen syndrome of being skeptical about any organization that might have me as a member. But I need to expand a little bit further on the “ongoing disbelief” part. I am accompanied here tonight by my beautiful wife, Helen, and we have been together on this journey for 34 years. We were married young. I was a Yankee from Long Island marrying a Southern Belle from Alabama. It was not quite F. Scott Fitzgerald and Zelda, but you get the idea.

It pains me to admit, and to do it so publicly, that Helen has been highly suspicious of me from the start, and remains so. Especially when I told her in my last quarter of my senior year in college that I had decided to go to law school – an impulsive decision based on reading Anthony Lewis’ book *Gideon’s Trumpet* and...I fell head over heels in love with case law. I kid you not. I fell in love with case law. I am over it now, but I did fall in love with case law.

I had no background in the law. Other than watching television and seeing *To Kill a Mockingbird*, I had never seen a lawyer in operation, [and] I had never met a lawyer. But I discovered in my waning days at Auburn University that law school was three years long, that I had three years left on the GI Bill, and something about the law beckoned me. What I lacked in a childhood upbringing in the law was soon to be remedied.

Helen asked me in 1978 what our life might be like if I followed through and actually became a lawyer. I promised her that one day I was going to be just like

Perry Mason. She has reminded me that the only thing that I have ever done that is even remotely close to Perry Mason, was to get as big as Raymond Burr. When Helen calls me “Ironsides,” it is not a compliment. I am so glad, however, that I made that impulsive decision to go to law school, and that I chose Mercer University, which propelled me on a great adventure in the law.

I suppose I should pause a moment to mention my partner, Dwight Davis, who is here with us tonight, a proud Fellow of the College, with his ever-dazzling wife, Brenda. Dwight and I went to Mercer Law School together, where he was a year behind me. And that was the last time he was behind me. We lived in married student housing together under the same stairwell. And after much reflection...we both came to the firm conclusion that that stairwell was a fertile crescent of legal talent, and we filed a joint petition with the National Register of Historic Places, but we have been hooted down. The last letter we got said, “please stop writing us.” But we are not giving up. We know a fertile staircase when we see one.

Over the course of the last day and a half, Helen and I have had the great pleasure of meeting so many...Fellows, and now our fellow inductees, [all] charming, engaging, polished and talented lawyers. Helen has frequently taken me aside and asked me in increasingly agitated whispers, “are you sure you are supposed to be here?” I have tried to assure her, and I have shown her several times the invitation letter from President Greg Joseph, and every time I show it to her, she holds it up to the light to see if it’s counterfeit....

My remarks tonight came with an instruction kit. President Greg Joseph sent me directions for my



speech – in iambic pentameter, no less, or something close to it. He said: “Don’t teach, don’t preach, don’t bore. Give them something to enjoy, not to endure.” Now, I sense some of you squirming, particularly from the King & Spalding table, you sense maybe I might violate every iambic foot of that command – or worse, that I have already done so.

But, with a nod to T. S. Eliot and, “seeing that it is a soft October night,” I want to be certain that my remarks here tonight do not “curl once about the room and put you all to sleep.”\* I promised you stories of mermaids and martinis, Tabasco and omelets, and Opelika, Alabama.

Oh, do not ask, “What is it?”  
Let us go and make our visit.\*

## MERMAIDS AND MARTINIS

Let’s begin with mermaids.

In 1829, Justice Joseph Story famously observed that “[the law] is a jealous mistress and requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage.” I confess that for at least the first decade or so of my life as a practicing lawyer, I swore silent allegiance to this old chestnut and did virtually nothing other than constant courtship and lavish homage. I was in bad need of a lesson in relaxation.

In 1983, I was working with the great Frank Jones on a case situated on the West Coast, involving running cigarette commercials before movies – a contract our client signed and thankfully cancelled. The case was complicated and bristling with facts.

I had never seen a lawyer like Frank Jones. Judge Bell said Frank was the best lawyer he’d ever seen, and he was right. Our clients revered him, the judge in the case deferred to him. His command of the facts and the law was amazing – and his ability to instill confidence and attract business was legendary.

We were taking a noon flight to Los Angeles.... I had planned a four-hour prep session – I was a second-year associate – for Frank on that plane. I had two big lawyer bags, full of notebooks, and in four hours of flying, I knew that I could go over every key aspect of that case and Frank would be ready for that deposition of the Hollywood folks we were going to take the next day.

\* Excerpt from *The Love Song of J. Alfred Prufrock*, a poem by T. S. Eliot

We were sitting in First Class in one of those big planes. We both boarded around noon and I began getting my big pile of notebooks ready, one for Frank and one for me. I was ready to share these impressive tomes, and go through them tab by tab. I was in a high state of excitement, [on] my first plane trip to California, and I wanted to show Frank all of my acquired knowledge of the byzantine facts of this case.

The plane took off in majestic fashion. I passed Frank one gigantic white notebook and I kept a matching one on my lap, ready to go over pages 1 to 500. Within minutes, a flight attendant appeared. She came up to Frank and she asked if he wanted anything to drink. I then heard him say he would have a vodka martini on the rocks.

I tried not to do a double-take. I was stunned. Surely Frank Jones was not going to have a martini for Sunday lunch when I had so many marvelous notebooks. But I was not fazed. I squirmed in my chair a bit and got ready for the ceremonial opening of the first tab. The flight attendant asked me if I wanted anything, and I said, “Not a chance.”

I turned to Frank Jones as he took his first sip of that crisp, cold martini – as you can see, I’ve learned to love a martini since then – and I began to form a word. At that moment, the big movie screen dropped down and announced the movie that would be shown on the flight. I was so deep in preparation that it had not occurred to me that they were going to kill the lights and show a doggone movie ....

The movie was *Splash*. You might remember it, with Tom Hanks from the small produce company and Darryl Hannah as a lovely mermaid. I was undaunted. As the credits rolled, I began to whisper, “Frank, if you turn to Tab 1.” Frank smiled at me and said, “Doc, let’s watch the movie. It looks good.” I was stunned. All my preparations lost to a mermaid and a martini. I put away the gigantic notebooks – they were just bubbling with delicious facts – and I called the flight attendant over. “Please bring me a vodka martini,” I said.

And as we watched Darryl Hannah in all her lovely mermaidness, and John Candy and Tom Hanks, it suddenly hit me. There was no way Frank Jones was flying from Atlanta to Los Angeles getting ready for his deposition during that period. He was already ready. And I knew that the next day when he devoured the witness entirely, and I learned [to] prepare



in advance. Don't save things for the last minute. And that will leave you time for mermaids and martini – and a little well-deserved relaxation.

## TABASCO SAUCE

Now let me turn to Tabasco Sauce for the moment. Tabasco Sauce was one of Judge Bell's favorite condiments. Of course, growing up in New York, I had never heard of Tabasco Sauce, but eventually I got trained in it. Judge Bell passed away at age ninety on January 5, 2009. You've heard the history of Judge Bell on the Fifth Circuit for fifteen years, he was Attorney General under President Carter. And then he launched a thirty-year second act as one of the premier lawyers in the country....

One day in the early '90s, I got a phone call from Judge Bell and he tells me to come around to his office, and I go around to his office and he tells me he's gotten me something. I wander down there and he presents me with a little tiny six-pack of these little Tabasco bottles. *[shows one to the audience]* [It was like a little beer six-pack, six of them to carry out of his office. He tells me how wonderful they will be to travel with. I was astonished that he found something like this, and that he bought us both a six-pack. I was amazed. I took the thing back to my office, took one of these little bottles, threw it in my briefcase, and it rattled around there for...three years.

Well, one day Judge Bell and I are traveling on a flight from Dallas on a breakfast flight and I was sitting one row behind him. Now, this is the good old days and they were actually serving an omelet, and he asks the flight attendant whether she has any Tabasco Sauce, if you can imagine. [Of course she said], "no", and I hear a little voice of distant memory [saying], *"Hey, I wonder if I've got that little bottle."* I go down there in my briefcase and the Post-its and paperclips and everything, and, dog-gone, there's this little bottle. It's sealed up tight, never been opened. And I tap Judge Bell [on the shoulder] and say, "Judge Bell, I've got a little Tabasco for you." And I hand it up to him.

But that's not the end of the story, because on that flight, there was a woman who was the niece of the former governor of Georgia, Governor Vandiver, who was Judge Bell's good friend. She witnessed this scene, and apparently she went back home and reported on it. She was getting married in a couple of weeks, and two weeks later Governor Vandiver saw Judge Bell at the wedding and said, "I hear that you

are so high powered that you've got lawyers that do nothing but carry around your condiments."

So I learned to be ever vigilant. You don't know who's looking. But I have no regrets. I'm glad that I was the one to give Judge Bell his Tabasco Sauce.

## OPELIKA

Let me turn to Opelika, Alabama. Opelika is a sleepy little town on the plains of Alabama, just outside of Auburn. Growing up on Long Island, I never heard of Opelika, and barely had heard of Alabama. I surely never anticipated that I would go there one day, and what an effect that town would have on my life.

My first encounter with Opelika was the Omelet Shoppe, perched at the top of one of the three exits in Opelika on your way to Auburn. For those of you who have never been to an Omelet Shoppe, it's like a Waffle House that went to finishing school.

I found that Omelet Shoppe in the fall of 1977, and I took a minimum-wage job there as a short-order cook. I had spent one year at Navy Prep and two years at Annapolis before listening to the call of my heart, and the suspicious one of Helen, [who] was then a freshman at Auburn. I left Annapolis with the same fortune, I believe, that David Copperfield had when he headed across the streets of England, shoeless, on his way to Betsy Trotwood. I spent half my fortune on a guitar, and the other half I don't even know what I spent it on, but I needed a job, and the Omelet Shoppe gave me that job. It was there, over that short-order grill, that I made an oath to do whatever it took not to have to make omelets for the rest of my life.

*Today when we found out that the ...  
[membership] plaque is subject to  
repossession, [my wife] suggested  
that I just leave it in the box.*

— Richard A. (Doc) Schneider

But Opelika is special for a far more important reason. For in that small town, a young girl, very much like Scout from *To Kill a Mockingbird*, grew up to be a lawyer, and I speak here of my friend, Chilton Varner. I have often said that if Scout grew up to be [like] Atticus Finch, she would be Chilton Varner. Somehow,

she carries the DNA of Atticus Finch, Scout, Harper Lee, Griffin Bell, Byron Attridge, Frank Jones and Eudora Welty. [She is] a wonderful, literate, terrific trial lawyer. Every one of us comes here tonight because one of our heroes took an interest in us. And my hero comes from Opelika. And I thank her.

But in the end, my overwhelming response tonight on behalf of our class is: thank you. Thank you to our parents, our families and our friends who inspired us and supported us as we worked every day to be the best lawyers that we could be. And a special thank you to all of our friends who have trekked across the country to this lovely oasis in the desert and made this spectacular weekend even more memorable.

And finally, to you Fellows and the College: We know from watching you what it is to be a lawyer who cares, who tries, every time out, to be excellent, who is ever conscious of the privilege and the power of being a lawyer. My friend, Ray Persons, speaks with great conviction of the impact that trial lawyers have had on our nation and the progress of our nation, and we stand with the very best of you today. Your new class of inductees is grateful to be lawyers and grateful to have had the opportunities and the challenges and the mentoring that brings us here today. Thank you again for the honor you bestow on us. We will spend the rest of our lives justifying the faith you have placed in us tonight. ■

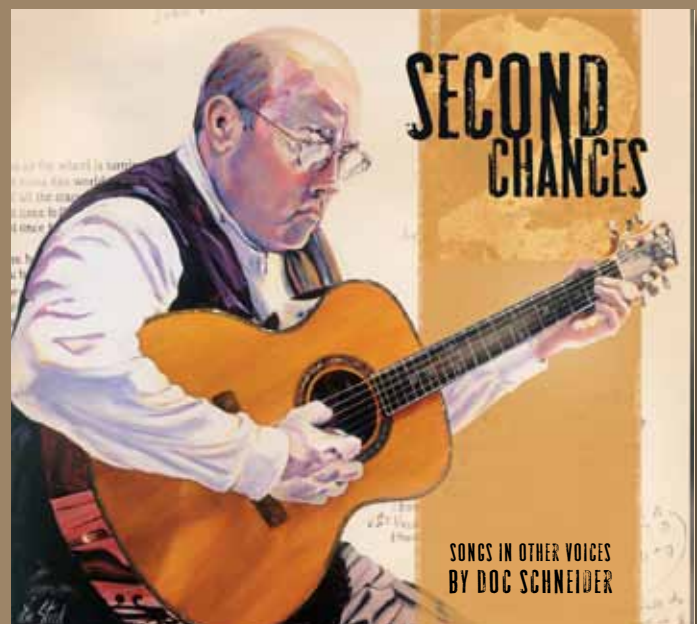
*If there was ever a lawyer larger than life, it was Griffin B. Bell. He loved this American College, and he was the most practical, the most effective, most charismatic lawyer I ever knew. And he was a funny guy. I once heard a lawyer ask him, "Judge, what would you do if I told you that everything I am as a lawyer, I owe to you?" And the Judge said, "I guess I would just have to live with it."*

— **Richard A. (Doc) Schneider**

Inductee Responder Doc Schneider, like so many Fellows, is not just a lawyer. In another life, he is a singer and songwriter with three albums to his name. Attendees at the Friday and Saturday General Sessions in La Quinta heard Doc Schneider's folk-style recordings from his *Second Chances* album before and after the program while people were entering and departing the meeting room.

One reviewer of Doc's music said he "...hits a home run with a combination of mature and memorable lyrics...[that]...are sweet, heartfelt, very personal, and haunting... . Doc Schneider often hints to...his current [career] as a lawyer and how this has affected his life and his music."

Doc's ability to approach his chosen career with a sense of humor endears him to listeners and other lawyers.



# FELLOWS TO REUNITE IN SCOTTSDALE FOR 2012 SPRING MEETING:

The Spring Meeting will be held March 8-11, 2012 at the Fairmont Princess Scottsdale in Scottsdale, Arizona

Confirmed speakers at the time this issue went to press include the following: **The Honorable Sandra Day O'Connor (ret)**, Associate Justice of the Supreme Court of the United States, will join Ralph Lancaster, Past President of the College serving as interlocutor, in an informal on-stage conversation about issues of common interest. **The Honourable Mr. Justice William Ian Corneil Binnie (ret)**, Justice of the Supreme Court of Canada, will highlight the different ways the Canadian and United States courts operate and what it means for the advocates who appear before them. **The Honorable Alice Hill**, Senior Counselor to the Secretary of Homeland Security, will present an overview of legal issues, including the recent United States v. Jones case involving privacy and the use of GPS monitoring, Fourth Amendment issues, border search cases and state immigration preemption cases. **Linda C. Cendales, MD**, Director of Emory University Transplant Center VCA Program, the nation's leading authority on limb transplants, will introduce a presentation entitled "The Interchangeable Body." **Melissa Fay Greene**, author of *No Biking in the House Without a Helmet*, mother of nine (count-em, 9!) children, including four from third-world nation orphanages and wife of Fellow Donald F. Samuel, will entertain us with her sense of humor, which remains intact, either because or in spite of it all. **Dan McGinn**, a communications expert who identifies and tracks societal trends, will discuss changing perspectives on risk. **Paul Root Wolpe, PhD**, Director of the Center for Ethics at Emory University, will present an engaging presentation, "Is My Mind Mine?" which promises to inform and entertain as he touches on ethical, social and legal complications in modern neuroscience. Author **Nicholas Schmidle** will share "what happened that night in Abbottabad," in a presentation based on his article in *The New Yorker*, "Getting Bin Laden."

A one-hour CLE program will be presented by James Boyle, Co-Founder, and Professor Jennifer Jenkins,

Director, of Center for the Study of the Public Domain at Duke University Law School. Boyle and Jenkins will discuss the history of "borrowing" music and the existing tension between content owners, music borrowers and intellectual property regulation in a presentation entitled "Theft: A History of Music."

Our speakers have suggested the following books for advance or follow-up reading:

*Lazy B.*, by Sandra Day O'Connor and H. Alan Day

*The Majesty of the Law: Reflections of a Supreme Court Justice*, by Sandra Day O'Connor

*No Biking in the House Without a Helmet*, by Melissa Fay Greene

*Praying for Sheetrock* by Melissa Fay Greene

*Morning Miracle: Inside the Washington Post A Great Newspaper Fights for its Life* by Dave Kindred

*To Live or to Perish Forever* by Nicholas Schmidle

*Steve Jobs* by Walter Isaacson

*Emerging Neurotechnologies for Lie Detection and the Fifth Amendment* by Paul Root Wolpe (article can be accessed online at [www.actl.com/scottsdale2012](http://www.actl.com/scottsdale2012))

*Is My Mind Mine? Neuroethics and Brain Imaging*, by Sarah E. Stoller and Paul Root Wolpe (article can be accessed online at [www.actl.com/scottsdale2012](http://www.actl.com/scottsdale2012))

*Bound by Law? (Tales from the Public Domain)*, by James Boyle and Jennifer Jenkins

*The Shakespeare Chronicles*, by James Boyle ■

# IN MEMORIAM

Recorded herein are the deaths of fifty-four remarkable Fellows of the College, each of whose date of induction follows his name. ♦ Two died in their fifties, five in their sixties, twelve in their seventies, twenty-one in their eighties, thirteen in their nineties and one at age one hundred. ♦ At least twenty-two had been married more than fifty years. ♦ One died at age ninety with his wife, who died less than twelve hours later, by his side. ♦ Twenty had served in World War II. ♦ Their obituaries echo names like Pearl Harbor, the Coral Sea, Midway, Saipan, Tinian, Okinawa, Iwo Jima, Guadalcanal, Normandy, the Rhine Crossing and the Ploesti Oil Fields and long-forgotten terms like U-boat, ball turret gunner and B-24 Liberator. ♦ One had been a prisoner of war. ♦ One undercover intelligence officer had worked as a New York Harbor longshoreman. ♦ One was among a handful of survivors of the original seventy-three officers in his regiment. ♦ Two came home with Purple Hearts. ♦ One chose to be buried in his Navy uniform. ♦ Two had been Presidents of ATLA and one of the Canadian Bar Association. ♦ Many had led their state and local Bars. One had been a College Regent. ♦ One had been escaped from Nazi Germany with his family at age three. One had entered college at age fifteen. ♦ One had tried a jury case and argued an appeal in his state's highest court before graduating from law school. ♦ Several were published authors, one of whom had won the ABA Silver Gavel Award. ♦ Their professional histories reflected names like Iran Contra, Andrea Doria, BCCI, Martha Stewart, Ralph Nader, H. L. Mencken and RJR-Nabisco. ♦ One had appeared in three landmark death penalty cases. ♦ One had won the ABA Pro Bono Publico Award. One was known as the Protector of the Everglades. ♦ The key role of one in the publication of Seymour M. Hersh's Pulitzer Prize-winning story of the My Lai Massacre became fully known only at his death. ♦ Their interests were remarkably broad. ♦ One ran a cattle-breeding farm. ♦ One was a prize-winning camellia grower. ♦ One had logged over 3,300 hours as an instrument-rated pilot. ♦ One was a nationally-known builder of model ships whose work is on display at the Smithsonian. ♦ One was a college basketball player, another, a rugby player. ♦ One was still teaching tennis to youngsters at age ninety-three. ♦ One worked out three times a week into his ninety-ninth year. ♦ They were not without humor. One had authored a college humor magazine that had been banned from the campus. Another had met his wife when she sat on a jury that decided a case against him. Another had brought a lawsuit for a noted author over a barking dog. ♦ Collectively, their lives are a tribute to their chosen profession.

— E. Osborne Ayscue, Jr., Past President

THE DATE FOLLOWING THE NAME OF EACH DECEASED FELLOW REPRESENTS  
THE DATE OF HIS OR HER INDUCTION INTO THE COLLEGE.

**Stuart E. Abrams** '08, a partner in the New York City firm Frankel & Abrams, died October 13, 2011 at age 58. A Phi Beta Kappa graduate of the University of Pennsylvania and of the Columbia Law School, where he was a Harland Fiske Stone Scholar, he began his practice at Kostelanetz & Ritzholz. For seven years beginning in 1982 he was Assistant United States Attorney for the Southern District of New York, serving as Chief Appellate Counsel and then as Chief of the Major Crimes Unit. He last served as Associate Independent Counsel for Iran-Contra Matters before returning to private practice. A prolific writer and lecturer, his obituary describes him as a historian, writer, pianist, cross-country skier and gardener. His survivors include his wife of 31 years, a daughter and a son.

**Robert Earl Aitken** '85, a Fellow Emeritus, retired from the Long Beach, California firm Ball, Hunt, Hart, Brown & Baerwitz (now Carlsmith Ball), where his partners had included College Past President Joseph A. Ball and former California Governor Pat Brown, died December 6, 2011 at age 80. A graduate of Wayne State University and of the University of Michigan Law School, he had practiced for two years in Detroit before moving to California. He had been an Associate Editor of the American Bar Association Litigation Section's publication, *Litigation*, and, with his wife, Marilyn, he had written *Law Makers, Law Breakers and Uncommon Trials*, a collection of twenty-five non-fiction stories of people whose actions helped form our legal system and our world. He himself was the subject of a chapter in Show More Show Less Joseph C. Goulden's *The Million Dollar Lawyers*. His survivors include his wife and a son, multimedia artist Doug Aitken.

**Francis Scott Baldwin** '76, a partner in Baldwin & Baldwin, Marshall, Texas, died August 23, 2011 at age 82, of cancer. A graduate of North Texas State University and of the University of Texas School of Law and a pioneer plaintiffs product liability lawyer, he was the author of four published books on various aspects of trial advocacy and a frequent lecturer at Harvard Law School. He had served as President of the Texas Trial Lawyers Association and the Association of Trial Lawyers of America (ATLA), one of whose signal awards was named in his honor, and the International Academy of Trial Lawyers. He was a member of the Inner Circle

of Advocates. His survivors include his wife of 58 years, two sons, who were his law partners, and a daughter.

**Walter Hull Beckham, Jr.** '72, a Fellow Emeritus, Of Counsel to Podhurst Orseck, Miami, Florida, died October 4, 2011 at his summer home in Asheville, North Carolina at age 91 following a decade-long bout with Lewy Body Dementia. A graduate of Emory University, where he was a student leader, upon graduation in 1941, on the eve of World War II, he enlisted in the United States Naval Reserve and served on the heavy cruiser *USS Portland*, participating in six major engagements, including the Battles of the Coral Sea, Midway, the Eastern Solomons, Santa Cruz and Guadalcanal. Discharged as a Lieutenant Commander, he remained in the Naval Reserve, ultimately retiring as a Captain. At his request, he was buried in his Navy uniform. After the war, he graduated *cum laude* from Harvard Law School, where he served as editor of the law review. After teaching for two years at the University of Miami School of Law, he practiced for seventeen years with a Miami firm, then returned to that law school, where he taught for fifteen more years while continuing to practice law, retiring as Professor Emeritus in 1982. In a long career, he served as President of the International Academy of Trial Lawyers and as Chairman of both The National Institute for Trial Advocacy (NITA), and the National Judicial College in Reno, Nevada, the only non-judicial chairman in its history, as well as chairing the Tort and Insurance Practice Section of the American Bar Association and the Aviation Law Section of the American Trial Lawyers Association. A charter member of the Florida Bar Association, he was long-time member of the American Bar Association House of Delegates and served for four years as Secretary of the ABA. In his later years, he had led People-To-People delegations to Russia and China. An avid hunter who had hunted all over the world, he was also active in his church and in many civic organizations. He had received the William M. Hoever Award from the University of Miami School of Law and the Legal Legends Award from the 11th Federal Circuit Historical Society. His survivors include his wife of 68 years, a daughter and two sons.

**Morris Brown** '86, a fifty-five year member of Wilentz, Goldman & Spitzer, PA, Woodbridge, New Jersey,



died August 10, 2011 at age 83. A graduate of Georgetown University and of the Harvard Law School, he had been President of the American Association for Justice (formerly ATLA) and had received numerous awards, including the Hon. Joseph Halpern Award for integrity, motivation, scholarship, compassion and advocacy. A civic leader, he was long-time trustee of the JFK Medical Center in Edison, New Jersey and a leader in his Temple. A widower whose wife of nearly 58 years preceded him in death by ten weeks, his survivors include a daughter and two sons.

**Melvyn L. Cantor** '90, a Fellow Emeritus, retired from the New York firm Simpson, Thacher & Bartlett, died May 14, 2011 at age 68. The head of that firm's banking law practice, he had participated in many high-profile bank-related and merger cases, including the Paramount-Time Warner case, the RJR/Nabisco leveraged buyout litigation and the fight between Seagram and DuPont for Conoco. In retirement, he was a lecturer at the Columbia University Law School until shortly before his death. A passionate cyclist, at age 61 he rode the 87-mile first leg of the 2003 Pan Mass Challenge. Through a volunteer program in the local public elementary school in Greenwich, where he lived, he had mentored three young men and had remained involved in their lives into their twenties. His survivors include his wife, a daughter and two sons.

**Phillip D. Chadsey, Sr.** '85, a Fellow Emeritus retired from Stoel Rives, LLP, Portland, Oregon, a former Oregon State Chair, died October 11, 2011 at age 75. A 1959 graduate of the University of Oregon, he had then served in the United States Air Force. While on active duty, he had met his future wife, a school-teacher from Michigan, in Casablanca, and they were married in Gibraltar. After graduating from Willamette University College of Law, he joined the firm with which he practiced until his retirement in 2004. He had headed the firm's litigation department and had served as Chair of the Oregon State Board of Bar Examiners and the Oregon Judicial Fitness Commission and had been a member of the Board of Governors of the Oregon State Bar. He had also chaired the Board of Trustees of his church. His major civic interest involved mental health. He had served on the Governor's Task Force to Realign the Mental Health System and played a major role in Oregon legislation requiring that health insurers provide the same cover-

age for mental illness that they provided for physical disorders that created the nation's most comprehensive parity law. A world traveler, he and his wife had visited over fifty countries. His survivors include his wife, a daughter and two sons.

**Albert S. Commette** '58, a Fellow Emeritus, retired to Port St. Lucie West, Florida, died October 20, 2011 at age 100. A graduate with honors of Manhattan College and of the Fordham University School of Law, he began his career as in-house defense counsel for Liberty Mutual Insurance Company in New York City. After twenty years, he left to become a partner in the New York City firm Budd, Quencer, Brown & Commette, which eventually became Commette, Quencer & Annunziato. He retired from over 50 of practice as Of Counsel to Heidell, Pittoni & Moran. A Proctor in Admiralty in the Maritime Lawyers Association, he participated in many high-profile cases, including one arising from the 1956 collision between the *Andrea Doria* and the *MS Stockholm*. Passionate about both sailing and tennis, he was still teaching tennis skills to youngsters at age 93. His survivors include his wife of 75 years, three daughters and two sons, fifteen grandchildren and twenty-four (!) great grandchildren.

**John M. (Jack) Costello** '72, a Fellow Emeritus, a former South Dakota State Chair, retired from Costello, Porter, Hill, Heisterkamp, Bushnell & Carpenter, LLP, Rapid City, South Dakota, died March 23, 2007 at age 83. A graduate of Creighton University, his undergraduate education had been interrupted by World War II service in the United States Navy in the Pacific Theater on the destroyer *USS Flusser*. A graduate of the University of South Dakota School of Law, he had spent his entire career in Rapid City. A widower, his survivors include two daughters and a son.

**James R. Crouch** '79, a Fellow Emeritus who had practiced in Las Cruces, New Mexico until his retirement to Lahaina, Hawaii, died January 8, 2011 at age 81. A graduate of New Mexico State University, where he played varsity basketball, he served as an officer in the United States Air Force during the Korean Conflict, then earned his law degree from the University of Kansas School of Law. He had served as President of the New Mexico Association of Defense Counsel, the New Mexico Bar Association and the Western States Bar Conference and was named the outstanding New Mexico Lawyer in 1977. A widower, his survivors include a daughter.

**William Brinkley Eley** '77, a Fellow Emeritus from Norfolk, Virginia, died September 1, 2011 at age 90. After three years at Princeton University, he had joined the United States Army Air Corps in World War II. A bomber pilot who participated in the raids on the Ploesti Oil Fields, his plane was shot down, and he was for six months a prisoner of war in Bucharest, Romania. Passing up his final year of undergraduate school, he entered and graduated from the University of Virginia School of Law. He began his career as an Assistant United States Attorney for the Eastern District of Virginia, then practiced maritime law with Vandeventer, Black, Meredith & Martin before forming his own firm, Eley, Rutherford & Leaf, which later merged with Wilcox & Savage. He had been President of the Norfolk and Portsmouth Bar Association and had served on a number of civic boards. His survivors include his wife of 65 years and three sons.

**James N. Esdaile, Jr.** '87, a Fellow Emeritus from Boston, Massachusetts, died November 29, 2011 at age 66 of cancer of the brain. A *cum laude* graduate of Harvard College, he received his law degree *cum laude* from Boston University School of Law, where he was Managing Editor of the Law Review. He had served in the United States Navy Judge Advocate General Corps before joining his father, a Fellow of the College, in Esdaile, Barrett & Esdaile, where he was also a partner of College Past President Michael E. Mone. He had served as a Trustee of Boston University and as President of the Boston University Law School Alumni Association. A dedicated conservationist and equestrian, his survivors include his wife of over 40 years and two sons.

**William E. Geary** '87, a Fellow Emeritus, of the Santa Rosa, California firm Geary, Shea, O'Donnell, Grattan & Mitchell, died August 31, 2011 at age 82. A graduate of Stanford University, where he played on the varsity rugby team, and of the Stanford University Law School, he had served as an officer in the United States Marine Corps in the Korean Conflict. A former board member of the Association of Defense Counsel and a member of the board of directors of a bank and a restaurant chain, he was an avid backpacker, fly-fisherman and outdoorsman. His survivors include his wife of 58 years, a daughter and three sons.

**Gerard T. Gelpi** '94, a Fellow Emeritus, retired from Gelpi, Sullivan Carroll & Laborde, New Orleans, Loui-

siana, died September 16, 2011 at age 76. A graduate of Tulane University and of the Tulane University Law School, he had served in the United States Marine Judge Advocate General Corps and had remained in the Marine Reserves, retiring with the rank of Captain. An admiralty lawyer, he practiced for seventeen years with Phelps, Dunbar, Marks, Claverie & Sims, before forming his own firm. He had served on the Executive Committee of the Maritime Law Association of the United States. His survivors include his wife of 53 years, a daughter and two sons.

**Edward F. Gerber** '83, a Fellow Emeritus from Syracuse, New York, died October 6, 2011 at age 78. He had volunteered for the United States Navy at age 17 and served for four years before entering college on the GI Bill. A graduate of Syracuse University and the Syracuse University College of Law, he was President of his graduating law class. After four years in private practice, he had served as an Assistant District Attorney, then returned to private practice for the rest of his career. He had been President of his County Bar Foundation and President of the Upstate Trial Lawyers Association. His survivors include his wife of 56 years, a daughter and two sons.

**Joseph F. Glass** '86, a Fellow Emeritus, retired from the Tulsa, Oklahoma firm Thomas, Glass & Atkinson, died in February 2011 at age 82. After two years at Tulsa University he had joined the United States Navy, serving on the carrier *USS Roosevelt* during the Korean Conflict. He then attended and graduated from the University of Oklahoma and from the University of Oklahoma College of Law. He had served on the Executive Board of the International Association of Defense Counsel and in retirement, served on the boards of several local civic organizations. His survivors include his wife, two daughters and a son.

**Charles E. Gray** '65, a Fellow Emeritus, retired from the St. Louis, Missouri firm Gray, Ritter & Graham, PC, died October 8, 2011. Born in 1919, one of nine children and raised on a farm, he had joined the United States Army and was on a troopship a few miles out of Honolulu, headed for the mainland, when the Japanese attacked Pearl Harbor. Serving for the duration of World War II as an officer, he entered the Washington University School of Law in St. Louis without an undergraduate degree. Under a special rule that applied to veterans, he had tried a jury case

and argued an appeal in the Missouri Supreme Court before he received his law degree. Upon his graduation from law school, he founded the firm in which he practiced until his retirement. During most of his life, he also operated a cattle-breeding farm. He had been the recipient of the Lawyers Association of St. Louis' Award of Honor. He and his wife established an endowed college scholarship fund. A widower, his survivors include four daughters.

**Westerdahl William Gudmundson** '78, a Fellow Emeritus, retired from the San Francisco firm Gudmundson, Siggins, Stone & Goff, died November 16, 2011 at age 93. A graduate of the University of California, his undergraduate education had been interrupted by service as an officer in the United States Army Coast Artillery Corps in World War II. After graduating from Boalt Hall of the University of California at Berkeley, he had practiced in the firm of Pelton, Gunther & Gudmundson before starting his own firm in 1964. He was a past president of the Merced County Bar and of the Association of Defense Counsel of Northern California. A widower, his survivors include three daughters and a son.

**Dennis C. Harrington** '77, a Fellow Emeritus retired from the McClelland Law Group, Pittsburgh, Pennsylvania, died May 9, 2009 after dealing for many years with various forms of cancer. Born in 1924, he was a graduate of Duquesne University and the University of Pittsburgh School of Law. A plaintiffs' attorney who at the time of his induction into the College was a partner in the Pittsburgh firm Harrington & Schweers, he had been a member of the faculty of the National College of Advocacy and President of his local Bar. The father of nine children all of whom, along with his wife, survived him, his son Kelly, the proprietor of a popular restaurant in nearby Bloomfield, died two days after his father's death.

**Wm. Bruce Hoff, Jr.** '79, a Fellow Emeritus and former Illinois State Chair and Regent of the College, died November 28, 2011 at age 79 from a cerebral aneurism. A graduate of the University of West Virginia and of Harvard Law School, he had practiced for thirty-six years in the Chicago firm Mayer, Brown & Platt before starting his own firm. In retirement, he became a nationally-known builder of museum-quality ship models built from scratch and constructed board by board, the way the actual ships were built. His models

are on display in the Smithsonian Museum, Chicago's Museum of Science and Industry and the Wisconsin Maritime Museum. His survivors include his wife of 57 years, a daughter and two sons.

**Joseph Michael Kerrigan** '77, a Fellow Emeritus from Nashua, New Hampshire and a former College New Hampshire State Chair, died November 29, 2011 at age 92. Entering the College of the Holy Cross at age fifteen, he had graduated with honors and entered Harvard Law School. His education interrupted by World War II, he had served in the United States Army Air Corps before returning to law school. Beginning his career as a staff attorney for Hartford Accident and Indemnity Company, he had joined Sullivan & Gregg in Nashua, later joining Hamblett, Morin & Hamblett, which later became Hamblett & Kerrigan, where he practiced until his retirement at age eighty-four. He had been President of his local Bar and of the New Hampshire Bar Association, the New Hampshire Bar Foundation, of which he was a founder, the New England Bar Association and the Northern New England Defense Counsel. He had received a Lifetime Achievement Award from his local Bar and the New Hampshire Bar Association's Professionalism Award. A leader in many local charitable and civic organizations, he had received the Nashua Charitable Foundation's first Humanitarian Award. A widower whose wife of 59 years had died, he had later remarried. His survivors include his wife, two daughters and three sons.

**Dennis E. Kinnaird** '81, a former Southern California State Chair, retired from Munger, Tolles & Olsen, died October 24, 2011 at age 75 of esophageal cancer. A veteran of the Korean Conflict, he was a graduate of San Diego State University and of the University of California's Boalt Hall, where he was a member of the Order of the Coif. Before joining Munger Tolles, he had been an Assistant United States Attorney, heading the Office of Special Prosecutions. His wife survives.

**Alfred H. Knight, III** '89, Nashville, Tennessee, died October 10, 2011 at age 74. A graduate of Cornell University and of the Vanderbilt University Law School, where he was a member of the Order of the Coif, he had been selected as a teaching fellow at the Harvard Law School. After completing his military service in the Air National Guard, he began his



practice in Nashville with Hooker, Hooker & Guard. He had been an Assistant United States Attorney and for fifteen years had taught as a visiting professor at the law school at Vanderbilt. A founding partner in Willis & Knight, he enjoyed a parallel career as a writer. One of his four published books, *The Life of the Law*, won the American Bar Association's Silver Gavel Award in 1997. A media lawyer, he had been honored with the Society of Professional Journalists First Amendment Award. Divorced and remarried, his second wife had died. His survivors include two sons and two step-daughters.

**Joseph M. Kortenhof '72**, a Fellow Emeritus from St. Louis, Missouri, died November 29, 2011 at age 84 of lung cancer. A veteran of the United States Army Air Force, he was a graduate of Lawrence College of Wisconsin, which he later served as a Trustee, and of the University of Michigan Law School, where he was a member of the law review. The firm he established ultimately became Kortgenhof McGlynn. He had been an adjunct professor at the Washington University School of Law and had received the Missouri Bar Foundation's Lon O. Hocker Trial Lawyer Award, named for a Past President of the College, an Award of Honor from the Lawyers' Association of St. Louis and the Ben Ely, Jr. Outstanding Missouri Civil Defense Lawyer Award. His survivors include his wife of 59 years, two daughters and a son.

**A. Broaddus Livingston '79**, a Fellow Emeritus, retired from the Tampa, Florida firm Carlton Fields, PA, died September 25, 2011 at age 80 after a long illness. A graduate of Vanderbilt University and of the University of Florida College of Law, he had been his firm's first summer law clerk and its tenth lawyer, ultimately serving as Chairman of the firm before his health prompted his retirement at age 73. He had been an Assistant City Attorney and President of the Florida Defense Lawyers Association. His survivors include his wife of 36 years, a daughter, two sons and two step-sons.

**Hon. Charles C. Locke, Q.C. '76**, a Fellow Emeritus from Vancouver, British Columbia, died October 1, 2011 at age 94. A graduate of the University of British Columbia, he served in the Canadian Army in World War II, participating in battles from Normandy through the Rhine Crossing into Germany. The son of a former Justice of the Supreme Court of Canada, he had articulated with his father, later joining the firm

of Ladner Downs. He was appointed Queen's Counsel in 1960. In the course of his career, he had served as a member of the Canadian Bar Association Council and as its Vice-President for British Columbia. A former Treasurer of the Law Society of British Columbia, which presented him with its Law Society Award in 2006, and a Life Bencher, he had also been President of the Federation of Law Societies of Canada. He had served on numerous Royal Commissions and Commissions of Inquiry. Appointed to the Supreme Court of British Columbia in 1978 and to the Court of Appeal in 1998, he retired in 1992 and returned to private practice at age 75. A widower who had remarried, his survivors include his wife, three sons and three daughters.

**William Francis Looney, Jr. '81**, a Fellow Emeritus, retired from Looney & Grossman, LLP, Boston, Massachusetts, died November 4, 2011 at age 80. A graduate of Harvard College and the Harvard Law School, he had served as an artillery officer in the United States Army. After serving as a law clerk for a Justice of the Massachusetts Supreme Judicial Court, he had begun his career at Goodwin Procter & Hoar, then served as an Assistant United States Attorney, Chief of the Civil Division, before founding the firm that bears his name. Active in the support of legal aid for the indigent, he had served as President of the Boston Bar Association and then as the founder and the first Chair of that Bar's Senior Lawyers Division. A graduate of Boston Latin School, he was a founder and the Chair of the Boston Latin School Association. A widower, his survivors include two daughters and two sons.

**George A. Lowe '74**, a Fellow Emeritus, a member of Lowe, Farmer, Baker & Roe, Olathe, Kansas and a former Kansas State Chair, died October 26, 2011 at age 86. A graduate of the University of Kansas and of its School of Law, he was a Past President of the Kansas University Law Alumni Board of Governors. In the course of his career, he had served as an Assistant County Attorney, as a member of the Kansas State Senate, a member of the Kansas Supreme Court Nominating Committee and has led his county Bar. His survivors include his wife, a daughter and three sons.

**John Francis Mahoney, Jr. '73**, a Fellow Emeritus from McLean, Virginia, died April 18, 2006 at age 79. After finishing high school, he had served in the armed forces in World War II before entering college. A graduate of Georgetown University and of the



Georgetown University Law Center, at the time of his induction in the College he was a partner in Pledger & Mahoney, Washington, District of Columbia.

**Arthur J. Maloney** '75, a Fellow Emeritus from Buffalo, New York, died November 16, 2011 at age 91. After two years at Canisius College, he entered the United States Army in World War II, serving as an artillery officer. He remained in the National Guard, retiring as a Lieutenant Colonel. Seeing action in the Battles of Saipan, Tinian and Okinawa, he was one of the few survivors from among his regiment's 73 original officers. He was a graduate of the University of Buffalo Law School, which, like many veterans, he was allowed to enter without an undergraduate degree. Sixty-six years after he had left Canisius for military service, it had awarded him an honorary degree. After retiring from active litigation, he continued as Counsel to Roach, Brown McCarthy & Gruber, specializing in legal medicine. For many years he had served as counsel to the local medical society. With his wife, he was a cofounder of the local chapter of the New York State Association for Children with Learning Disabilities, and he had served as President of the Western New York Branch of the English Speaking Union. His survivors include his wife of 63 years, a daughter and four sons.

**J. Grant McCabe, III** '70, a Fellow Emeritus, retired from the Philadelphia firm, Rawle & Henderson, founded in 1783, died December 14, 2011 at age 88 of pulmonary fibrosis. After graduating from Yale University, he served in the United States Navy in World War II. A graduate of the University of Pennsylvania Law School, he served as a legal officer on an attack transport during the Korean Conflict, later retiring as a Lieutenant Commander. A former Township Commissioner, he had been President of both the Philadelphia Association of Defense Lawyers and the Pennsylvania Defense Institute. Divorced and remarried, his survivors include his wife, a daughter, three sons, a stepdaughter and a stepson.

**Thomas F. McEvilly** '93, a Fellow Emeritus, the former managing partner of McEvilly & Curley, Leominster, Massachusetts, died February 8, 2011 at age 77 after a lengthy illness. After graduating from Brandeis University, he served as an officer in the United States Army in Korea before entering and graduating from Suffolk University Law School. He had been a trial attorney in the Massachusetts Defenders Commission

and then a county District Attorney before entering private practice. His survivors include his wife of 54 years, a daughter and four sons.

**E. Neil McKelvey, O.C., Q.C.** '75, a Fellow Emeritus from St. John, New Brunswick, a former Province Chair, Counsel to Stewart McKelvey Stirling Scales, Canada's largest law firm, died September 10, 2011 at age 86. He had attended Dalhousie University before World War II, served in the Royal Canadian Artillery in that war and then earned his law degree from Dalhousie University School of Law. He remained involved in the military and had been named an Honorary Lieutenant Colonel of the 3rd Field Artillery Regiment of the Royal Canadian Artillery. Queen's Counsel and an Officer of the Order of Canada, he had been President of the Saint John Law Society, President of the Canadian Bar Association and President of the International Bar Association. He had also served in leadership positions in many civic and charitable institutions. He was a delegate to the College's first Canada-United States Legal Exchange. The McKelvey Cup, awarded to the winning team from the Atlantic Trial Competition that selects regional finalists to compete for the Sopinka Cup, was named in his honor. His survivors include his wife of 63 years and two sons.

**Joseph T. McLaughlin** '91, New York, New York, died January 9, 2012 at age 67. He was a graduate with honors from Boston College, where he won numerous national competitions as a debater. The college's debating society had created the Joseph T. McLaughlin Award for Public Debate in his honor. After graduating from Cornell Law School and clerking for the Chief Justice of the Massachusetts Supreme Judicial Court, in a varied career, he had first joined the New York firm Shearman & Sterling, where he was the head of its litigation department. He left to become Executive Vice President, Legal and Regulatory Affairs, at Credit Suisse First Boston and then was managing partner of the New York office of Heller Ehrman. He then became Of Counsel to Bingham McCutchen, LLP and later became a full-time mediator and arbitrator with JAMS. He had taught international arbitration at the law schools of Fordham University and Cornell University. Early in his career, he had participated successfully, either as counsel for the petitioner or through *amicus curiae* briefs, in three landmark death penalty cases, *Cabana v. Bullock*, *Thompson v. Oklahoma* and *Roper v. Simmons*, in the United States Supreme Court. He had been a member of the Board of

Directors of the CPR Institute and a Trustee of International House. His survivors include his wife, two daughters and a son.

**Robert Guy Morvillo** '90, former Downstate New York Committee Chair and founder of the New York firm Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, PC, died December 24, 2011 at age 73 from complications following gall bladder surgery. A pioneer white-collar defense lawyer, one of whose most famous clients was Martha Stewart, he was a graduate of Colgate University and of the Columbia Law School, where he was a Harlan Fiske Stone Scholar and a law review editor. After a clerkship with a Federal District Judge, he joined the staff of the United States Attorney for the Southern District of New York, where he became Chief Trial Lawyer in charge of the Fraud Unit and then Chair of the Criminal Division. A writer and lecturer, he had taught at the Columbia Law School and was a Trustee of the Federal Bar Foundation and President of the New York Council of Defense Lawyers, which had awarded him its Norman Ostrow Award. His survivors include his wife of 48 years and four sons, all of whom had practiced with him in his firm.

**Cecil E. Munn** '76, a Fellow Emeritus, Of Counsel to the Forth Worth, Texas firm, Cantey & Hanger, died November 11, 2011 at age 88. A graduate of the University of Oklahoma and a graduate *cum laude* of Harvard Law School, he had begun his practice in Enid, Oklahoma. He later joined the law department of Champlin Petroleum, becoming Vice-President and General Counsel and a Director of the corporation. He then joined the Forth Worth firm where he practiced until his retirement. A former Chair of the American Bar Association National Resources Section, his county Bar had awarded him its Blackstone Award for representing "the highest attributes of the legal profession." His survivors include his wife of 63 years, a daughter and a son.

**Hon. Thomas G. Nelson** '86, a Judicial Fellow from Boise, Idaho, retired from the United States Court of Appeals for the Ninth Circuit, died May 4, 2011 at age 74 after a period of declining health. A graduate of the University of Idaho and the University of Idaho College of Law, he had served as Assistant Idaho Attorney General for Criminal Affairs, served on the Twin Falls City Council and was a JAG officer in the Idaho National Guard and the United States Army Reserve.

A Past President of the Idaho State Bar, at the time of his elevation to the bench in 1990, he was a partner in Nelson, Rosholt, Robertson, Tollman & Tucker. He had taken senior status in 2003 and had retired in 2009. Divorced and remarried, his survivors include his wife of 30 years, two sons, a stepdaughter and a stepson.

**Michael Nussbaum** '82, a Fellow Emeritus from Washington, District of Columbia, Senior Counsel to Bonner, Kiernan, Treback & Crociata, LLP, died October 5, 2011 at age 76 of lung cancer. Born in 1935 in Nazi Germany to Jewish intellectual parents who had fled to the United States when he was three years old, he had overcome a birth defect that left him with a shortened right arm with no forearm and one finger to become an excellent athlete. He had begun his college education at Dartmouth College, then graduated from Hofstra University and from the University of Chicago, where he earned both a law degree and a Masters in Comparative Law. He had practiced in several Washington firms, and after retiring from Ropes & Gray in 2003, he had continued to practice with Bonner, Kiernan. His practice over the years ranged from complex litigation, representing Lloyds of London and the liquidators of Bank of Credit & Commerce (BCCI), to counseling conscientious objectors during the Vietnam War era, representing consumer activist Ralph Nader and defending high-profile media clients, including historian Doris Kearns Goodwin. He was an experienced mediator and arbitrator who had lectured or been an adjunct professor at four law schools, including those of Harvard and Georgetown. Only at his death did the details of his role in what was perhaps his most famous representation emerge. In 1969, at the height of the Vietnam War, he had been approached for advice by a former classmate, a freelance writer, who had a story that no major newspaper would touch, but who had finally found a willing publisher. Under Nussbaum's careful guidance, the writer vetted the story to nail down the facts, including confirming that his confidential source would not contradict its contents. The client was investigative journalist Seymour M. Hersh, the confidential source, Lt. William L. Calley, Jr. and the story, one of the darker chapters in our recent history, the My Lai Massacre. In the October 11 issue of *The New Yorker*, six days after Nussbaum's death, Hersh, who won a Pulitzer Prize for the My Lai story,



paid tribute to Nussbaum, fully describing his role. The tribute ended, “We Americans like to make fun of lawyers, and everyone has a lawyer joke or two, it seems. I don’t.” Divorced and remarried, Nussbaum’s survivors include his wife of 23 years and two stepdaughters.

**David Rogers Owen** ’66, a Fellow Emeritus, retired from the Baltimore, Maryland firm Semmes, Bowen & Semmes, died November 4, 2011 at age 97. Graduating in three years from the University of Virginia, where he was elected to Phi Beta Kappa, he had then earned both a masters degree in economics and a law degree from that University, where he was a member of the Order of the Coif. Serving in the United States Navy in World War II, first as an intelligence officer and then as the Executive Officer of a destroyer in both the Atlantic and Pacific Theaters, he had participated in the sinking of a German U-boat off the coast of Nova Scotia and in the daring rescue of seventeen of its crew in rough seas. He had remained in the Naval Reserve for 33 years, retiring with the rank of Captain. Although principally a maritime lawyer, he enjoyed a wide practice, once bringing a lawsuit for the legendary H. L. Mencken, the “Sage of Baltimore,” against Mencken’s neighbor, whose barking dog had disturbed the writer. Twice President of the Maritime Law Association of the United States, he had retired in 1983, remaining as Of Counsel to the firm through the 1990s. His survivors include his wife of 40 years, a son, a stepson and two stepdaughters.

**Robert J. Parrish** ’71, a Fellow Emeritus, retired from the Fort Wayne, Indiana firm Parrish & Knight, died January 3, 2012 at age 95. A graduate *cum laude* of the University of Indiana and of the University of Indiana School of Law, where he was a member of the law journal, he had practiced with his father and brother and had retired in 1997. A former county prosecuting attorney, he had been President of his county Bar and President of the local legal aid organization. His wife of 42 years had preceded him in death.

**Hon. Robert H. Perry** ’97, Reno, Nevada, a Judge of the Second Judicial District Court, died December 20, 2011 at age 68 of heart disease. Enlisting in the United States Marine Corps after high school, he had received an appointment to the United States Naval Academy, was honorably discharged after three years there and completed his undergraduate education and his legal

education at the University of Kansas. After practicing with several law firms in Elko, Nevada, he was appointed to the bench in 2005. The preceding year he had been named the Nevada Trial Lawyer of the Year. His survivors include a daughter and a son.

**Tom Fore Phillips** ’79, retired from the Baton Rouge, Louisiana firm Taylor, Porter, Brooks & Phillips, died December 3, 2011 at age 83 after a long illness. The son of a longtime Sheriff of Sabine County, he was a graduate of Northwestern State University in Natchitoches and of Louisiana State University Paul M. Hebert School of Law. His obituary described him as a “lawyer, cattleman, old wood aficionado and teller of tales.” Indeed, his published obituary was so filled with levity that one might suspect that he had a hand in writing it. Editor of his college yearbook, he delighted in having also published the college humor magazine, *Pandemonium*, which his obituary discloses the school had banned from publication on campus. He had served in the United States Army Judge Advocate General Corps in Japan during the Korean Conflict. His undergraduate college had named him a Distinguished Alumni, and his law school had made him an honorary member of the Order of the Coif. His survivors include his wife of 59 years and two sons.

**Elliott Lee Pratt** ’84, a Fellow Emeritus, retired from the Salt Lake City, Utah firm Clyde, Pratt & Snow, died November 11, 2100 at age 90. A graduate of the University of Utah and of the University of Idaho College of Law, he had earned an LLM from the University of Michigan Law School. An officer in the 10th Mountain Division Ski Troops in World War II, he had fought in Germany and among his decorations was a Purple Heart. Married for 65 years, his survivors include two daughters.

**Dale Reesman** ’88, a Fellow Emeritus, retired from the Boonville, Missouri firm Williams, Reesman & Tate, died September 6, 2011 at age 80. A graduate of the University of Missouri and of its School of Law, where he was an editor of the law review, he served in the United States Army in Germany during the Korean Conflict. He had served as a Special Assistant Attorney General of Missouri and had served on the steering committee for Missourians for Equal Justice and the Missouri Supreme Court’s Task Force on Gender and Justice. A founder of the Farmers’ Legal Action Group, St. Paul, Minnesota, he had represented farmers in litigation in eleven different states. He

had been awarded the American Bar Association's *Pro Bono Publico Award*, the Missouri Bar Association's Pro Bono Award, the Missouri Bar Foundation Spurgeon Simpson Award and the Legal Services of Eastern Missouri's Special Meritorious Award for Service to the Poor of Missouri and the Nation. He had led the local board of education and was a member of the boards of numerous other business and civic organizations. A deacon and an elder in his church, he had taught a Sunday school class for 45 years. His survivors include his wife and two daughters.

**Veryl L. Riddle** '76, former Missouri State Chair, a member of the St. Louis, Missouri firm Bryan Cave LLP, died December 5, 2011, one day short of his ninetyeth birthday. A graduate of the University of Buffalo, and of the Washington University School of Law, he had served in the United States Army in World War II as a Military Intelligence Officer, working as an undercover longshoreman in New York Harbor, gathering intelligence about enemy agents. A long-time county prosecuting attorney, he had then served as United States Attorney for the Eastern District of Missouri. He had endowed the Veryl L. Riddle Distinguished History Lecture at Southeast Missouri State University. His survivors include his wife of 36 years, three daughters and a son.

**Kenneth Rigby** '94, a Fellow Emeritus retired from the Shreveport, Louisiana firm Love, Rigby, Dehan & McDaniel, died October 13, 2011 at age 85. A *magna cum laude* graduate of Louisiana State University, where he was a member of Omicron Delta Kappa, he was the valedictorian of his class at Louisiana State University Paul M. Hebert School of Law, graduating *cum laude*, and a member of the Order of the Coif. He had served in the United States Army Air Corps in World War II as a ball turret gunner on a B-24 Liberator bomber. He had been President of his local Bar and had received its Professionalism Award. He was named to the LSU Law School Hall of Fame, and he had served on the Board of Governors of the Louisiana State Bar Association. A Fellow of the Academy of Matrimonial Lawyers, he was the author of many papers, including ten law review articles, and had been an adjunct professor at the LSU Law School. He had chaired the boards of three different Methodist churches and has held office in a variety of religious organizations. An instrument-rated pilot, he had flown back and forth from Shreveport to Baton

Rouge to teach at LSU and had logged in over 3,300 flying hours. His survivors include his wife of 60 years, one daughter and two sons.

**Joseph W. Rogers** '74, a Fellow Emeritus, a founding partner of the San Francisco firm Rogers Joseph O'Donnell, died November 25, 2011 after a brief illness at age 90. After graduating from San Diego State University he had volunteered for the United States Marine Corps and saw action in the Pacific Theater, including participating in the invasion of Iwo Jima, where he was wounded. After graduating from the Stanford Law School, he was an Assistant District Attorney before entering private practice. He had been named the California Trial Lawyer of the Year in 1980 and had won the Don E. Bailey Civility and Professionalism Award in 2002. He had served as President of the Association of Defense Counsel of Northern California and had taught trial advocacy at Hastings College of Law and co-founded the Hastings Center for Trial and Appellate Advocacy. Divorced, he had met his second wife when she served on a jury that rendered a verdict against his client. After the trial, she had told him why he had lost the case and that the verdict should have been higher. At the time of his death, they had been married for 40 years. His survivors also include a daughter and a son from his first marriage.

**E. Thom Rumberger** '83, a Fellow Emeritus, a founding member of the Tallahassee, Florida firm Rumberger, Kirk & Caldwell, PC, died September 7, 2011 at age 79 of complications from diabetes. A graduate with honors of the University of Florida and of its College of Law, where he was an Associate Editor of the law review, he had served in the United States Marine Corps. In a varied career, he had been a County Solicitor, a Special Assistant State Attorney, a County Attorney, an Acting County Sheriff and, for a year, a Circuit Judge, at the time the youngest in modern Florida history. Active in Republican politics, he had been an unsuccessful candidate for Florida Attorney General and had chaired the Florida presidential campaigns of George H. W. Bush and Bob Dole. He had served on several state task forces and study committees, on the Board of Visitors of Florida State College of Law and the Board of Trustees of the Law Center of the University of Florida and had been Chair of the Collins Center for Public Policy. He was best known as a tireless protector of the

Florida Everglades. His survivors include his wife, three daughters and four sons.

**James H. Scheper** '04, a Fellow Emeritus from Liberty Township, Ohio, died August 27, 2011 at age 69. A graduate of Xavier University and of the Salmon P. Chase College of Law, he had practiced in a number of Ohio communities and at the time of his induction was practicing with Shea & Associates in Cincinnati. His survivors include his wife, two daughters and a son.

**Norborne C. Stone, Jr.** '77, a Fellow Emeritus, a founding member of Stone, Granade & Crosby, PA, Bay Minette, Alabama, died August 27, 2011 at age 89. He had attended the Citadel, Spring Hill College and the University of Alabama and then served in the United States Army Air Corps in World War II. A graduate of the University of Alabama School of Law, he had been President of the Alabama State Bar and a founding Director of the Attorneys Insurance Mutual of the South, Inc. He had served his law school in several capacities and was the recipient of his local Bar's Howell T. Heflin Honor & Integrity Award. He had also served on the Vestry of his church. He and his wife had been named Citizens of the Year by the local Chamber of Commerce. His survivors include his wife of 63 years, five daughters and a son.

**Edgar Allen Strause** '72, a Fellow Emeritus retired from Vorys, Sater, Seymour & Pease, Columbus, Ohio, where he practiced for 53 years, died October 14, 2011 at age 84. A Staff Sergeant in the United States Army in World War II, he was a graduate of the University of Iowa and of the University of Michigan Law School, where he was a law review editor. His survivors include his wife of 50 years and two sons.

**John Dickerson (J.D.) Todd, Jr.** '76, a Fellow Emeritus, former South Carolina State Chair and retired partner in Leatherwood, Walker, Todd & Mann, Greenville, South Carolina, died December 29, 2011 at age 99. In his 99th year, he was still working out three times a week in a gym. He had attended Virginia Military Institute and was a graduate of the University of Georgia School of Law. Enlisting in the United States Army as a private in World War II, he had been honorably discharged as a Major in the Judge Advocate General Corps. He had been President of his local Bar and of the South Carolina Bar Association, Chair of the South Carolina Board of Bar Examiners and a Judge of the local Recorders

Court. He had been honored with the Durant Public Service Award. A former Chair of the Board of Deacons of his Baptist Church, he had taught Sunday School for over 50 years. His wife of 67 years had predeceased him. His survivors include a daughter.

**Thomas J. Walsh, Sr.** '82, a Fellow Emeritus from Omaha, Nebraska, died October 6, 2011 at age 84. A graduate of Creighton University and of its School of Law, he had been a law clerk for a Judge of the United States Court of Appeals and a Deputy County Public Defender. A member of the House of Delegates of the Nebraska State Bar, he had participated in creating a funding process for legal services organizations. A staunch supporter of women's rights, he had been President of Omaha Planned Parenthood. His survivors include his wife of 61 years, two daughters and five sons.

**G. Stuart Watson** '84, a Fellow Emeritus, retired from Watson Spence, Albany, Georgia, died December 15, 2011 at age 90 in an assisted living center with his wife of 62 years, who died less than 12 hours later, by his side. A graduate of Emory University and of Emory University School of Law, his legal education had been interrupted by World War II, in which he served in the United States Army Air Corps in the Pacific Theater. He had been the attorney for the local school board and a solicitor of the local city court, chaired the local Democratic Executive Committee, had served in the Georgia State Legislature and had chaired the Georgia State Board of Bar Examiners. He had served in leadership roles in a number of local charitable and civic organizations and had taught Sunday School for over 50 years. A grower of prize-winning camellias, he was a Past President of the American Camellia Society. His survivors include a son and a daughter.

**Jere Field White, Jr.** '98, a founding partner of Lightfoot, Franklin & White, LLC, Birmingham, Alabama, which he founded with Past President Warren B. Lightfoot and current Regent Samuel H. Franklin, died October 3, 2011 at age 56 of cancer. A *cum laude* graduate of the University of Georgia and a *cum laude* graduate of the Cumberland School of Law at Samford University, he had been a Trustee of Hampden-Sydney College and a member of the Board of Advisors of the Cumberland School of Law. He was also an Elder in his Presbyterian church. His survivors include his wife, a daughter and two sons. ■

[Editor's note: In honoring departed Fellows of the College, we read many inspiring, and frequently touching, stories. As we were going to press, we recognized the following account of the death of **G. Stuart Watson**, whose passing is noted in this issue. Widely distributed in local talk, television and print media and on the Internet, it is the account of WCNC-TV reporter Stuart Watson, Charlotte, North Carolina, of his parents' deaths. We have chosen to share parts of it with you.]

## DEATH DIDN'T PART PARENTS FOR LONG

My parents both died of Alzheimer's the same December morning, 10 days before Christmas, in the same room, side by side.

Some people say that's romantic. Some people say it's religious. Some people say it's spiritual. I just say they were inextricably connected. Their wedding vows said, "Till death do us part." But even death didn't part them for very long.

Nell and Stuart Watson were married for almost 63 years. Until the last six months of their lives when we moved them here to an assisted living center, they spent that whole time in the same town, Albany, Ga., more than half a century at the brick home they built on Hilltop Drive. I don't think they ever spent more than a week apart. They died less than 12 hours apart. My dad was 90, and my mom was 84.

Before Alzheimer's took away their memories, I insisted that they sit down on camera and tell me about how they met (at a wedding reception) and how they got engaged (he never proposed - they just agreed) and where they honeymooned (Gatlinburg, then an unspoiled mountain village). . . .

Ever the good investigative reporter, I discovered my mom noted her wedding expenses in a farmer's pocket notebook on a page intended for planning livestock breeding. She laughed. "See it wasn't written for posterity, Stuart," she told me. My parents adopted me and my sister Liz when we were just babies. I asked my mom where we came from, and she said, "Heaven." (I suspect she revised that estimate downward when we became teenagers.) . . .

[N]one of us ever minded talking about death. Mom asked me and my sister to divvy up tables, chairs and whatnot before she died, because she wanted no squabbling. She took me around the walled family

graveyard near Leesburg, Ga. . . . and explained that she wanted it kept up after her death. So when their deaths came, I knew what to do. I knew because they told me. They told me in conversations. They told me because I asked. And they finally told me in a legal document called an "advance health care directive."

It was one of the most thoughtful things they ever did in a life filled with consideration for others. [I]t meant my sister and I didn't have to worry or fuss or debate or wonder what Mom and Dad wanted. They had spelled it out. She wanted to be cremated. . . . He left it up to me as his legal designee. I talked it over with my sister, and we placed their cremated remains in the same double urn, separate chambers.

My mother was proud Scots-Irish. She could pinch a penny with the best of them. . . . [T]he last thing she would have wanted was a big expensive send-off. They wrote their own obituaries, beginning decades ago, typing on onion-skin paper and making edits in pencil until the crinkly paper tore. Four, no six, no seven grandchildren. They included things I would have left out . . . and left out things I would have included (he picked up a few bucks one night ushering at the [1939] premiere of "Gone With The Wind!") But it wasn't my obituary to edit. . . .

My job was to honor my father and mother by following instructions. I did my best. They had one funeral, one grave, and they'll have one headstone. For better or for worse, they gave up their individual identities to each other, and the two became as one.

My dad raised prize-winning camellias in a greenhouse behind our home. We cut some of his blooms and tossed them in the grave. My dad told me he had no regrets. "I've had a good life," he said. "The Lord's been good to me. Nell's looked after me well."

If you've got to die, you might as well go with no regrets. ■

# THE BULLETIN

## American College of Trial Lawyers

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“In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships.”

— Hon. Emil Gumpert,  
*Chancellor-Founder, ACTL*

## Statement of Purpose

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.