Surviving the Impact of a White Collar Criminal Investigation/Prosecution

P R E F A C E / P R O L O G U E

I am a graduate of Harvard Law School who serves as a forward scout in the wilderness of the legal profession. As a lawyer, it is my goal to challenge and complicate the lives of the ambitious prosecutors who stalk the business community.

I dedicate this book to my clients – not one of whom has been prosecuted for or convicted of a felony. These people are nameless and shall remain nameless because they have followed my advice.

This book is about your survival; it is not a compendium of trial techniques. My business planning law practice – spanning nearly fifty years – has coincided with the emergence of America as a prosperous consumer society. The high-octane mixture of prosperity and unlimited opportunity for white-collar criminals has erupted into a conflagration of crime and prosecutions and imprisonments.

White-collar crimes are the great emphasis of this book. White-collar crime refers to financially motivated, nonviolent crimes committed by businesses and government professionals. This term was first defined by the sociologist Edwin Sutherland in 1939 as a crime

committed by a person of respectability and high social status in the course of his occupation.

Edwin H. Sutherland said in his article, **White-Collar Criminality**, 5 Am. Soc. Rev. 1 (1940), "This paper is . . . a comparison of crime in the upper or white-collar class, composed of respectable or at least respected business and professional men, and crime in the lower class, composed of persons of low socioeconomic status."

Insider Trading. If there is one white collar crime that nearly all traders on Wall Street have committed at least once during their careers (but would never admit), it is insider trading. Insider trading is the trading of a public company's stock or other securities based on material nonpublic information about the company.

In Chapter 22, I discuss Insider Trading, however, I do not attempt in this book to catalogue all of the instances of insider trading or probe the refinements of any of them. Most of us are survivors – we have lived through every panic, boom and bust during our professional careers without prosecutorial scrutiny.

We are, nonetheless, surrounded by prosecutorial scrutiny, and one of the most respected prosecutors is Preet Bharara (United States Attorney for the Southern District of New York, in office from August 13, 2009 to March 11, 2017). Mr. Bharara was interviewed by Jason M. Breslow, Digital Editor for PBS Frontline on January 7, 2014, and said:

> "The scope of the insider trading problem generally, I think we've discovered, has

> been quite broad and quite deep. Fair to say that insider trading has been for a while, on Wall Street and elsewhere, rampant."

My forthcoming book – which will be published subsequent to this book – takes a deep dive into this vital subject matter.

Culture. I use the term "culture" to mean the people who inhabit and make their living in any group or organization – for example, securities firms, political parties, corporations, governmental offices, NGOs, non profit organizations or partnerships.

Gender. My style of writing assumes that the pronoun "his" covers the waterfront and all of the rats. I am aware that the Merriam-Webster dictionary has recently re-defined the pronoun "they" as inclusive of all genders; however, I reject that option as confusing and gimmicky.

Interchangability. Read "the accused" and "the defendant" as meaning the same thing.

Law enforcement. State laws and state prosecutions will vary widely. However, I strive for uniformity by describing and discussing federal prosecutions which are presumably the same or substantially the same throughout the United States.

Introducing Jack Shame. Every business culture has at least one Jack Shame – an ambitious young executive in the culture who is plainly willing to destroy

everyone else in his company for the sake of achieving his own version of happiness and success. This book and my narrative seek to identify Jack Shame and repair the damage he has done. Jack Shame is more likely to be a stealthy character and less likely to be a smash-and-grab thief. Jack Shame is not easy to recognize because he is probably doing his mischief below the radar. Jack Shame's core value is that he and his culture can achieve business success without thinking about legal consequences and a moral price. If we do not identify and reprehend Jack Shame, he will eventually gravitate to the top of the culture. **Enron**, for example, comes prominently to mind.

Denial, Denial, Denial. You are taking a trip down the longest river in Egypt if you represent yourself. I will recommend more than once in this book that you should practice standing in front of a mirror and saying: "I am represented by counsel. Talk to my lawyer."

Situational Awareness. People who are prosecuted for White Collar Crimes can look back in most cases and recognize that a flight instructor could have predicted the defendant's errors of judgment as a failure of situational awareness. Pilots are trained to avoid aircraft disasters by paying attention to the current state and dynamics of the aircraft's systems. The pilot must constantly anticipate future changes and developments in the airplane's performance. One officer in the NTSB recommends: "When confronted with an emergency, just relax. Order a cup of coffee!"

"For a pilot, situational awareness means having a mental picture of the existing inter-relationship of location, flight conditions, configuration and energy state

of your aircraft as well as any other factors that could be about to affect its safety such as proximate terrain, obstructions, airspace reservations and weather systems." https://www.skybrary.aero/index.php/Situational_Awareness The pilot's mental picture of "what is happening" in an emergent situation is flawed if he perceives only a "piece of the problem" in a tunnel vision view of his environment. Communication with his co-pilot and with air traffic controller is essential to a successful resolution of the problem. Just as pilots need this "human factors" training, so too the decision makers in a business culture need the same cautionary guidance.

Experience versus Logic. This book emphasizes experience, and for that reason I mention the misfortunes of many of the people in the Trump administration whose careers have ended with a federal prosecution.

Oliver Wendell Holmes Jr., a United States Supreme Court Justice (from 1902 to 1931), is famous for saying that the life of the law has not been logic but rather experience. Stated otherwise, one page of experience is worth a volume of logic.

In addition to discussing strategy for avoiding federal prosecution, I also discuss attorney-client problems. How to structure the relationship with an attorney is explored. Challenging legal fees is also covered. Changing counsel in midstream is reviewed since it is a frequent problem. Hopefully, you are adequately protected when you hire a lawyer who has 25 years of experience; however, some lawyers with 25 years of experience really only have one year of experience – repeated 25 times over. A full exposition and elucidation of lawyers' competency needs to be addressed in another book devoted to that task.

Cruel and Unusual Punishment. I explore and suggest a tectonic shift in criminal jurisprudence – "Orange Rubber Cones are More Humane than Steel Prison Bars." I advocate that white-collar crimes can be adequately punished without confining people to prisons. I am confident that the corrections officers throughout our criminal justice system would agree – if they are honest – that the confinement of human beings in a prison is a gradual death sentence.

Best Practices. I do not offer solutions for all areas of risk, however, I do occasionally list what I shall characterize as "Best Practices."

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Brace! Brace! Brace!

Chp 1

Starting at the Beginning

A felony prosecution – or for that matter, the credible threat of a felony prosecution – will do more to test the delicate restraining membrane of your sanity than any other life experience.

A commercial airline pilot can tell you that the cockpit crew has a **checklist** that should be consulted – time permitting – before ditching an airplane. Think of this book as your checklist before ditching your career when you encounter an ambitious prosecutor who is hell-bent-for-election and hell-bent-for-leather.

The primary purpose of this book is to force you to think defensively and strategically. A secondary purpose is to make you appreciate the catastrophic loss, pain and collateral consequences that flow from a felony conviction.

If you live and work in the business world; if you work with a company whose stock is publicly traded; if you are responsible for financial statements; if you are a stock broker; if you are a certified financial planner; if you are a

politician; if you are a lobbyist; or if you render financial services to your clients, then this book is vital to your survival – these insights will help you protect your liberty, your livelihood, your reputation, and your accumulated net worth.

Your attorney is an advocate for your freedom and survival. If you are prosecuted at some point, he will help you navigate your way toward a two word verdict – **"Not Guilty!"**

Au contraire, if you chose to represent yourself, then you have a fool for a client.

If you meet your attorney for the first time in **"lock up"** after you have been arrested, then he will come to the jail and ask you to listen to this prophylactic statement:

> "Before you speak, I am not interested in hearing a confession – I have never represented a guilty person. Tell me the FBI's version of what happened. Tell me about the 'alleged' facts of the 'alleged' crime."

But if you are willing to keep a copy of this book on your desktop and consult it frequently, your prospects for survival are dramatically improved. Stay close to the guidelines in this book and stay alert. Never deviate from your moral compass.

Think carefully about this question – "How many times in the past twelve months have you thought that your financial conduct and financial decisions (including the conduct and decisions of people within your culture

with whom you share decision-making-authority) might have crossed the line, might have exposed you to a criminal investigation, might have exposed you to a criminal prosecution?" If this question strikes a resonant chord for you, then you need to consult with a competent corporate lawyer who is well informed about criminal law.

Prosecutors and legislators are only limited by their imaginations when seeking to cast their net as wide as possible. They demonstrate creativity and resourcefulness in investigating crimes and drafting and utilizing pleadings that are designed to convict you. The prosecutors have a formidable arsenal and have no reluctance to use it.

Once you have been caught in a prosecutor's cross-hairs, your name is likely to appear on an indictment/ information which contains sobering and terrifying language: "aiding and abetting" and "arising out of and connected with" and "a scheme, plan and artifice to defraud investors as to a material matter" and "bribes and kickbacks" and "conspiracy" and "conspiracy and racketeering" and "false and misleading" and "grand larceny" and "knowingly and willfully falsified, concealed, and covered up " and "insider trading" and "mail fraud" and "money laundering" and "inciting and soliciting" and "in furtherance of" and "with intent to injure and defraud." At this point in your career, you are one step closer to joining the **road kill** of the business community.

The people working with you and among you in your culture are frequently implicated, indicted and prosecuted sequentially. Your **presumption of innocence** is precious little consolation when these accusations, innuendos and shadows of corruption surround you. People who are summoned for jury duty are constantly reminded that

they have a duty to keep an open mind until all of the evidence has been offered and admitted by the trial court judge; however, they also have a tendency to believe that prosecutors don't go around prosecuting innocent people.

Even if your intuition tells you that you may have been guilty of exaggeration or puffery or that you had tolerated the corporate malfeasance of an overachieving colleague or lower echelon person, bear in mind that the Bill of Rights (the first ten Amendments to the United States Constitution) teaches us that guilty people have rights in American jurisprudence. Indeed, more than a century ago, Justice White delivered the opinion of the Supreme Court in Coffin v. U.S., 156 U.S. 432 (1895), and quoted a Roman jurist who had said that it is better to let the crime of a guilty person go unpunished than to condemn the innocent. If you are innocent or if the prosecutor fails to carry his burden of proof or if your constitutional rights have been violated, you shall prevail.

After an indictment has been filed and made public and after you have been released pending trial, the media will descend upon you like horde of locust. If you meet with the press at this point, you are your own worst enemy. The encounter with reporters might be an ambush interview or a driveway gaggle. Be advised that a skillful journalist is looking for an opportunity to characterize you as someone who plays fast and loose with the truth. An experienced journalist knows that guilty people – when confronted – attempt awkwardly to create distractions. Guilty people offer the media a bright shiny object in order to deflect attention. The print and broadcast media will be unrelenting in their efforts to inform their reading public that you are pulling out of your narrative hat the values that you have smuggled up your normative sleeve. The

prospective defendant who has read this book will simply smile and wave and say, “Sorry, No Comment!”

A brief word about **“Nuance”** — which is a popular word in business discourse these days. I am not interested in probing the “nuanced” stories of guilt. When I give legal advice to a client who is facing a crisis, I do not speak and do not think in terms of “gray areas” or “ambiguity” or “weasel words” or “wiggle room.” Permit me to use this analogy—when I buy a Cessna Skyhawk airplane, I am looking first and foremost to determine whether the damn thing is crash worthy. When I meet a client whose business career is descending into a crash landing, I am looking for a way to pull him out alive.

Judges and juries do not acquit criminal defendants based on “nuanced facts.” Judges and juries are looking for hard facts — clear, cogent and compelling – that will shake their faith in the defendant so that they feel good about returning a guilty verdict. So too, judges and juries are looking for indisputable facts that they can use to build an impenetrable wall – brick by brick – so that they can feel good about telling the prosecutor: “Sorry ... but ... you broke your pick this time. Better luck next time. We find this defendant – **Not Guilty!”**

Let us assume, therefore, that there is still time to save you. Facts are stubborn things. Let us assume that you will follow this advice: You must carefully collect and preserve the facts that your attorney needs to secure your acquittal. You must identify, document and memorialize the facts that will establish your innocence. Life is for the living – **Stay Alive!**

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The Felony: A Thumbnail Sketch

My Criminal Law instructor, Professor Livingston Hall at Harvard Law School, told me to define my terms. Hence, this thumbnail sketch of the felony process.

It's A Question of Punishment

A crime punishable by death or imprisonment for more than one year is called a felony. Misdemeanors are generally less serious and involve shorter sentences. Most felony prosecutors have more experience than the misdemeanor staff, and felony prosecutors have more resources than their colleagues who are getting their stripes prosecuting misdemeanors.

A federal prosecutor, called a United States Attorney, is working with law enforcement officers – FBI agents – and files a criminal complaint before a United States Magistrate. The criminal complaint contains facts, under oath, that are sufficient to support probable cause to believe that the defendant has committed a federal offense. The Magistrate nearly always accepts the complaint and issues a summons or arrest warrant for the defendant. At the same time, the Magistrate may issue a search warrant. If the defendant has already been arrested and is held in custody, then the defendant will appear before the Magistrate when the complaint is presented.

In many felony cases, the United States Attorney might have interviewed witnesses or victims jointly with the FBI special agents who are assigned to the cases. However, the statements gathered by the FBI are supplied to the prosecutor and are sufficient to form the basis of the criminal complaint.

The Arrest and the Initial Appearance

The arrest may be accompanied by serving a search warrant. A "**No Knock"** search warrant can be served in the middle of the night and supported by a heavily armed "swat team." This choice lies within the sound discretion of the United States Attorney and the FBI special agents.

Roger J. Stone, Jr. whose moniker in political circles is "Mr. Dirty Tricks" was arrested on the strength of a **No Knock** arrest and search warrant. Roger Stone had worked for Richard Nixon in past years and was a Trump political advisor most recently. On November 15, 2019, he was convicted of seven felonies for obstructing the congressional inquiry, lying to investigators under oath and trying to block the testimony of a witness whose account would have exposed his lies. Stone's conviction could carry a maximum prison term of 50 years.

The FBI will utilize the **"perp walk"** which Rudy Giuliani made famous in his Mafia prosecutions in the 1980's. The perp walk is obviously the parade of the perpetrator before the press who will have been notified in advance. Needless to say, the person arrested is handcuffed and physically searched for weapons and contraband. The perpetrator might also be supplied with a bullet-proof vest.

On the same day of arrest, the defendant will appear before a United States Magistrate. At this initial appearance, the defendant is informed of his rights and hears an explanation of the charges. The defendant is advised of his right to counsel, and the court can appoint a defense attorney. Finally, the court will decide upon the conditions of release pending the further prosecution of the case.

The court has the power to detain any defendant and deny bail. The court can also release a defendant and subsequently place him in custody if he violates the court's terms and conditions of his release. Typically, one condition of release is the admonition that he may not contact any of the witnesses. The court's chief concern is to make sure that the defendant will return for further appearances, hearings and the trial. To that end, the court can order the defendant to surrender his passport.

Preliminary Hearing

Guilt or innocence is not established at the **Preliminary Hearing**. The purpose of this hearing is to determine whether there is evidence to find probable cause to believe that the defendant has committed the crime in question. The United States Attorney has the burden to produce sufficient evidence to support this finding. He must present evidence to show that there is good reason to proceed with the charges against the defendant. The investigating FBI agent alone can give sufficient evidence that there is probable cause that the defendant has committed the offense.

The Grand Jury

A **Grand Jury**, consisting of 12 to 23 people, is a body that investigates criminal conduct. Federal, state and county prosecutors utilize grand juries to decide whether probable cause exists to move forward with a criminal prosecution.

The citizens who sit on a grand jury are summoned from the same judicial district as the trial jurors. The grand jury sits a few days per week and may remain impanelled for a week or a month or a year.

Anyone who receives a grand jury subpoena should ask his attorney to call the prosecutor and ask whether he is simply a witness, a subject (a person of interest) or a target of the investigation.

The accused has an opportunity – but he is not required by law – to testify. He is only questioned by the prosecutor. Defense attorneys cannot participate (hence, no cross examination of witnesses in this context) and do not address the jurors. The grand jurors can submit questions in writing to the prosecutor for further examination of any witnesses.

The right to invoke the privilege against self-incrimination under the Fifth Amendment is broader than most witnesses and some attornies realize. Bear this in mind: if a truthful answer to a grand jury question could incriminate the witness, he should invoke the privilege and refuse to answer. Also, the witness can be called back

to testify again before the grand jury, and the witness is not supplied with a copy of the transcript of his testimony so it is necessary to keep good notes in order to maintain consistency.

The proceedings and testimony of the grand jury are not made available to the public. Only an Assistant United States Attorney and a stenographer meet with the grand jurors and receive the testimony of the witnesses who are subpoenaed to give evidence.

Grand jury witnesses testify under oath. Their testimony is recorded and may later be used during the trial.

Grand jury charges against a defendant are called **indictments**. Occasionally, the grand jury will issue an indictment on the basis of an FBI agent's testimony alone. Thus, there is a low standard for an indictment. New York Judge Sol Wachtler once famously said that a grand jury would "indict a ham sandwich." The United States Attorneys usually admit that they will get their way with a grand jury. The Grand Jury recommends prosecution when they return a **"true bill."** If, on the other hand, the grand jury finds that the case should not be prosecuted, they will return a **"no true bill"** which means that no indictment will be issued.

Formal Arraignment and Pre-trial Motions

An **arraignment** is a court proceeding at which a criminal defendant is formally advised of the charges against him and is asked to enter a plea to the charges. The court may also decide at arraignment whether the defendant will be released pending trial. A trial date will be set at the formal arraignment.

Typically, a Magistrate Judge formally informs the defendant of the charges, which are contained in the indictment, and his or her bail conditions are reviewed. A plea is entered: guilty; not guilty, or no contest (nolo contendere).

If a defendant pleads no contest, he thereby acknowledges that the prosecutor has sufficient evidence to prove he committed a crime but does not admit guilt. For example, Vice President Spiro Agnew entered into plea bargain with the federal prosecutors when he was charged with receiving cash bribes from his days in Maryland politics which followed him and continued while he Vice President. In return for pleading **nolo contendere,** or no contest, to the tax charge and paying $160,000 in back taxes (with the help of a loan from Frank Sinatra), Agnew received a suspended sentence and a $10,000 fine. On October 10, 1973 his letter of resignation from the Vice Presidency was delivered to Secretary of State Henry Kissinger

After the arraignment and prior to the trial, the court may hear motions made by the defendant or the United States. These may include motions to suppress evidence, to compel discovery, or to resolve other legal questions. For example, a **Motion in Limine** (literally "on the thresh hold"), asks the court to rule upon the admissibility of evidence in advance of the actual trial. The purpose of the Motion in Limine is to exclude from the jury any evidence or testimony which is unfairly prejudicial. The court's ruling now becomes an **Order in Limine**, and any violation during the trial in the presence of the jury can result in a contempt citation or mistrial.

Professional Liability Insurance

One of the first tasks to accomplish is to notify your professional liability insurance carrier – which you are contractually required to do under most policies – since malpractice insurance usually pays your attorney's fee in an ethics complaint case. The notification to your insurance carrier should be written and signed by your attorney. Professional liability insurance frequently exists when the defendant is licensed (accountant, broker, lawyer, securities dealer). Ask in writing whether legal fees are covered in the case of a criminal prosecution. If you are facing criminal prosecution, do not explain. Remember that you have a right against self incrimination under the Fifth Amendment to the United States Constitution, and you can easily waive or give up that right if you attempt to explain the charges pending against you and why you should not be convicted at trial. As stated above, ask your attorney to write and sign the letter of notification to the insurance carrier.

The Trial

What should you expect in a jury trial in federal district court? You should expect the trial experience to be fascinating, intense, and endlessly unpredictable.

The **Speedy Trial Clause** of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy trial." The Clause protects the defendant from delay between the presentation of the indictment and the beginning of his trial. However, the criminal defendant

might benefit more from an endless series of continuances of his trial date. If memories fade and the prosecutor's case becomes stale, a more favorable result becomes somewhat more likely.

Several federal district courts are referred to as the rocket docket. A **rocket docket** refers to a court which has cultivated a reputation for its speedy disposition of cases by demanding strict adherence to the law as pertains to filing deadlines; marshaling evidence; and trying cases.

Federal district court judges are referred as **Article III judges**. Under Article III of the United States Constitution they have lifetime tenure, during good behavior – they are subject to impeachment. A federal judge can comment on the evidence unlike state court judges.

When the trial date has been set, witnesses are notified by a **subpoena** – a formal written order from the court to appear.

Trial schedules are always subject to change. For example, the defendant may plead guilty at the last minute, and the trial is therefore canceled. At other times, the defendant asks for and is granted a **continuance**. Sometimes the trial has to be postponed a day or more because earlier cases being heard by the court are not yet concluded.

Twelve people, and alternates, make up a criminal jury. A **unanimous decision** must be reached before a defendant is found "guilty." The prosecution has the burden of proof with respect to each element of the crime;

the jury is instructed that the prosecution must prove each element "**beyond a reasonable doubt**."

Before the trial begins, lawyers and judges select juries by a process known as "**voir dire**" which is Latin for "to speak the truth." In voir dire, the judge and attorneys ask potential jurors questions to explore their competency and their impartiality.

The government has 6 **peremptory challenges** and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year. A peremptory challenge is exercised without stating a reason; a **challenge for cause** requires the court to agree that there is good cause to excuse a prospective juror.

Jeopardy attaches in a jury trial when the jury is empaneled and sworn or in a bench trial when the court begins to hear evidence after the first witness is sworn or when a court accepts a defendant's plea unconditionally. **Double jeopardy** is a procedural defense given by the Fifth Amendment to the United States Constitution that prevents an accused person from being tried more than once for the same (or similar) charges and on the same facts following a valid acquittal or conviction.

The prosecution and the defense have an opportunity to make an **Opening Statement**, then the Assistant United States Attorney will present the case for the United States. Each witness that is called for the United States may be cross-examined by the defendant or the defendant's counsel. When the prosecution has rested its case, the defense then has an opportunity to present its side of the case. The United States may then cross-examine the

defendant's witnesses. When both sides have rested, the prosecution and the defense have an opportunity to argue the merits of the case to the judge or jury in a **Closing Argument**. The judge or the jury will then make findings and deliver a verdict of guilty or not guilty of the offense(s) charged.

After you have testified in court, you should not ask other witnesses about their testimony, and you should obviously not volunteer information about your own testimony.

Sentencing

In a criminal case, if the defendant is convicted, the judge will set a date for sentencing. The time between conviction and sentencing is most often used in the preparation of a **Pre-sentence Investigation Report**. This report is prepared by the United States Probation Office. At the time of sentencing, the judge will consider both favorable and unfavorable facts about the defendant before determining the appropriate sentence to impose.

Sentencing is exclusively within the domain of the judge. He has a wide range of alternatives to consider and may place the defendant on probation or place the defendant in jail for a specific period of time; he may impose a fine; or he may formulate a sentence involving a combination of these sanctions.

Rick Gates co-operated extensively with the federal prosecutors, and his sentence was 45 days of prison time (week end time in confinement) with three years of probation. Gates had been a member of the Trump campaign staff and had worked closely with Paul Manafort. Gates plead guilty in February 2018 to a broad financial conspiracy with Manafort, as well a separate

charge of lying to investigators. Gates' co-operation was valuable in getting the convictions of both Paul Manafort and Roger Stone.

The sentencing court will also consider requiring the defendant to make **restitution** to victims who have suffered physical or financial damage as a result of the crime. A Victim Impact Statement is prepared and submitted to the judge. The Statement is a written description of the physical, psychological, emotional, and financial injuries that occurred as a direct result of the crime.

Victims and witnesses may attend the sentencing proceedings and may also have the opportunity to address the court and address the defendant who has been convicted.

A good example of the unfettered independence of a federal trial judge is Michael Flynn's December 18, 2018 appearance before Judge Emmet Sullivan in a Washington, D.C. courtroom. The prosecutors had recommended leniency (because Flynn had plead guilty to lying to the FBI, had entered a co-operation agreement, and had served several decades in the military) so Flynn and his attorneys were clearly expecting a disposition with no jail time.

Judge Sullivan, gesturing to the American flag beside him, accused Michael Flynn, the former National Security Advisor, of selling out his country. The Judge pointed out that Michael Flynn had been working secretly for the Turkish government before entering the White House, and Judge Sullivan said that undermines everything the flag stands for. He asked the prosecutors whether they had

considered indicting General Flynn for treason – they had not.

"I am going to be frank with you, this crime is very serious," the judge said. "I can't hide my disgust, my disdain, at this criminal offence."

General Flynn and his counsel accepted the judge's offer to postpone the sentencing. However, President Donald Trump granted a full pardon on November 25, 2020 to Michael Flynn before he had been sentenced.

Lockup – Report for Your Prison Intake

Most defendants who have been convicted of white collar crimes will have an opportunity to settle their personal business affairs after conviction and self report to the designated prison. On your first day of school in kindergarten, you were greeted by a kind and compassionate teacher who reached out for your hand and said: "Show me your smile!" On your first day of Lockup you will be greeted by a stone sober corrections officer who demands in a baritone voice: "Bend over and spread your cheeks." From that time forward, you will be trembling in your boots. This is the true meaning of **"humiliation."**

Nota bene: Best Practices

The Theme of the Case. Trial lawyers are trained to plan a theme of the defense in every case that goes to trial. Discuss this point with your counsel. The theme of the case will be communicated to the jury in opening statement and closing argument and perhaps in dramatic cross examinations. It should be simple and capture the essence of your defense. Think of it as a **sketch** rather than a detailed portrait. The theme of the case will outlive

all of the complex testimony. For example, most people can match this theme to its famous case: **"If it does not fit, you must acquit!"**

The Judge – The Care and Feeding of Trial Court Judges. September 12, 2019 VIEW FROM THE BENCH, ABA Litigation News (Summer 2019, Volume 44, No. 4) In Federal Court, Never, Ever. Seven mistakes that lawyers should never make in federal court. Hon. Karen L. Stevenson has written an article for the ABA Litigation magazine and lists these seven Rules that should never be violated by trial lawyers:

The lawyer should never fail to read the local rules – "Ignore them at your peril." Never ignore the Judge's Standing Order – "sometimes referred to as the local local rules." Never bring a Motion to Compel Discovery Days Before the Discovery Cutoff – a late motion that is filed even before the discovery cutoff date may not allow enough time to resolve the discovery dispute before the cutoff date arrives. Never be late for Oral Argument – "There will not be an opportunity for Second Call after your case is called."Never interrupt the Judge – "if the court interrupts with a question, stop talking." Never pepper your brief with insult and personal attacks on opposing counsel – "We simply do not have time for personal insults and finger pointing." And never file a Surreply – "unless and until you have the court's permission." Many of these admotions will apply mainly to civil litigation, but the same judge will sit in the same seat to hear criminal and civil cases.

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Prosecutorial Choice
Prosecutorial Discretion

In a recent online article about reform published by the American Bar Association (ABA), the power of prosecutors is described as follows : "There are an estimated 2,400 prosecutors' offices across the country. Within those offices, a single prosecutor has the ability to keep more people out of prison than an entire department of public defenders — through their ability to control outcomes." [1]

The ABA article goes on to point out that prosecutors are uniquely empowered to put the brakes on any case by making a critical decision: Do I release? Do I divert? Charge? Offer a plea?

Given their staff limitations and overwhelming case loads, prosecutors cannot realistically take every case to trial.

According to the ABA article, 95 percent of felony convictions are the result of a plea deal, with a prosecutor determining initially what to charge, sentence length and terms of supervision. Prosecutors also decide when and what evidence to turn over to the defense in a criminal case. Significantly, defendants have **no right to discovery** in plea bargaining. So in order to avoid harsher sentences, they often take deals that result in criminal records without ever seeing the evidence against them.

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[1] Change Agents: A new wave of reform prosecutors upends the status quo. By Liane Jackson, June 1, 2019, 12:00 AM CDT, ABA on line Journal.

The ABA article insists: "Because so many decisions are made outside of the public eye, the prosecutor's office is often referred to as the black box of America's criminal justice system."[2]

The article goes on to say:

"Criminal law scholars are likely to ask whether prosecutors have a theory of deterrence. Law students learn that criminal law seeks to punish and to deter; however, experienced prosecutors will tell you that deterrence is a fool's errand. As long as opportunities exist, white collar criminals will always believe that they can outsmart the FBI and the U.S. Attorneys. White collar criminals are hopelessly committed to a strategy of **Persistent Engagement**."

[2] Ibid. Change Agents: A new wave of reform prosecutors upends the status quo. By Liane Jackson, June 1, 2019, 12:00 AM CDT, ABA on line Journal.

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The F.B.I. Investigation
The Interview

The potential threat of prosecution frequently starts with an F.B.I. interview: Anyone who lies to the F.B.I. has committed a felony which is punishable by five years in prison.

18 U.S.C. § 1001 generally prohibits knowingly and willfully making false or fraudulent statements, or concealing information, in "any matter within the jurisdiction" of the federal government of the United States, **even by merely denying guilt.** The prosecutor has the burden of proving that the statement or information is **material**.

Some of the people who have been convicted for running afoul of this statute are Martha Stewart, Rod Blagojevich, Michael Flynn, Rick Gates, Scooter Libby, Bernard Madoff and Jeffrey Skilling.

Martha Stewart could have declined to speak with the F.B.I., but she agreed to be interviewed. Stewart avoided a loss of $45,673 by selling all of her ImClone Systems stock on December 27, 2001 after receiving material, nonpublic information from Peter Bacanovic, her broker at Merrill Lynch. At the conclusion of a six-week jury trial, Stewart was found guilty in March 2004 of

felony charges for conspiracy, obstruction of a federal investigation and making false statements to the F.B.I.

Michael Flynn, President Trump's original National Security advisor, admitted to lying to investigators in early 2017 about his communications with Sergey Kislyak, the Russian ambassador to the United States. Flynn could have declined to speak to the F.B.I., but he agreed to be interviewed. The federal district court Judge (Emmet Sullivan) who would haved sentenced Flynn scolded Flynn in open court ("You sold out your country"). Donald Trump granted a full pardon to Michael Flynn on November 25, 2020 before the sentencing occurred.

F.B.I. interviews are a threat-multiplier which increase the risk of conviction exponentially. F.B.I. agents and prosecuting attorneys interview people who are either suspects or persons of interest. The F.B.I. interviews are recorded and witnessed. The F.B.I. agents who conduct interviews are thoroughly prepared and probably already know the answers to most of the questions they are asking.

Here is a valuable learning experience: Practice once again standing in front of a mirror and saying:
"I am represented by counsel. Please talk to my lawyer."
Let your lawyer do his job. Let your lawyer ask the F.B.I. whether you are a **suspect** or a **person of interest**. It is possible – but highly unlikely – that the F.B.I. is working under the impression that you are an innocent bystander. Remember that when you represent yourself, you have a fool for a client. Yes ... I am repeating myself, but one of my most brilliant law professors at Harvard preached that repetition is a valuable pedagogical tool.

Nota bene: Best Practices

Your counsel should ask many key questions on your behalf when speaking with the FBI.

First and foremost, your counsel should ask why the FBI is asking to interview you. Does the FBI consider you to be an innocent bystander or a person of interest or a target in this investigation?

What **evidence** underlies opening this investigation? "An articulable factual basis must support any FBI investigation," according to FBI policies. Has that standard been met in this investigation?

Your counsel should ask whether this investigation – for which your statement is now sought – arises out of or is connected with an **informant's** statement or testimony. Ask the FBI to identify the informant and to release his statement or a transcript of his testimony.

After every FBI interview, the FBI writes a **"302"** or summary of the interview. Your counsel should ask the FBI to agree before the statement to supply a copy of the 302 to you and to your counsel. The FBI should also agree to include your post-interview comments in his record of the 302.

Your counsel should ask the investigating FBI Special Agent to **"recuse"** himself from your case if the standard for recusal in Rippo v. Baker, 580 U. S. ____ (2017)(Per

Curiam) is met: Recusal is required when, "objectively speaking, the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." Your counsel should ask the FBI whether recusal has been discussed or decided in connection with or arising out of this investigation. The FBI has a hard and fast rule that **neither personal preference nor politics** should ever enter into a Special Agent's judgments in any case. Ask the FBI, "have you requested any advice from an **ethics officer** about possible recusal in this case?"

Your counsel should ask the FBI whether this investigation – involving you – arises out of a **SIM**, a sensitive investigation matter.

Your counsel should ask whether the **Hatch Act** has prompted any advice or guidance given to an FBI Spcial Agent in this case?

Has there been a **FISA** application in connection with or arising out of this investigation?

Is there any possibility that an **Independent Counsel** will be appointed as a result of this investigation?

If the FBI is unwilling or unable to answer even one of these questions, your counsel should advise you to exercise your Fifth Amendment rights and refuse to give a statement.

Chp 5

The Polygraph—Lie Detector Machine

Lie detector results are inadmissible in evidence in a court of law, and the use of lie detector tests as an investigatory tool is generally illegal under state law. Nonetheless, if a law enforcement officer proceeds with your consent, the lie detector test can be administered. Thereupon, the law enforcement officer can tell you that the results were inconclusive and press you to undergo a second or third lie detector session. Even though the tests have not incriminated you, they can be used to produce great anxiety and stimulate endless interrogation.

A polygraph, the lie detector machine, measures and records several physiological indicators such as blood pressure, pulse, respiration, and skin conductivity. These indicators supposedly demonstrate physiological responses during a controlled interrogation which reveal a dishonest response to a question. Problematically, however, polygraph examiners generally devise and insist upon using their own individual scoring formulae in order to make their individual interpretations defensible.

Nota bene: Best Practices

If an F.B.I. agent suggests a lie detector test, your defense attorney might decline and then hire his own polygraph examiner to run a private test – which may or may not be disclosed to the F.B.I. Turnabout is fair play, and now your attorney can use the favorable results of a private test to create anxiety in the minds of the F.B.I. agents.

If the FBI does ask for a polygraph examination, ask you attorney to put the following questions to the F.B.I. in writing, calling for a detailed written response:

1. Are you willing to video tape and audio tape the lie detector session?
2. Are you willing to instruct the camera man to video tape the face and voice of the interrogator?
3. Are you willing to place the interrogator under oath?
4. Are you willing to permit a cross-examination of the interrogator under oath following the lie detector session?
5. Are you willing to permit an examination of the interrogator concerning training, education and experience (and statistics about any previous lie detector session)?

Chp 6

The Dog Ate My Homework!
eDiscovery tools; Duties; Sanctions

Any criminal defense lawyer immediately asks the prosecutor for full disclosure of his "discovery" which includes electronic data.

Any data that is stored in an electronic form may be subject to production under common eDiscovery rules. This type of data has historically included email and office documents, but can also include photos, video, databases, file types and all other raw data. Electronic data includes, but is not limited to, all doc.files, pdf files, jpegs, and TIFFs.

Lawyers – both prosecutors and defense lawyers – have an ethical duty to preserve evidence and any destruction of evidence is spoilation of evidence for which the attorney will face disbarment or possible criminal prosecution. The offending lawyer cannot avoid bar sanctions by claiming "the dog ate my homework." Stated otherwise, the offending lawyer cannot avoid this serious evidentiary problem by delegating his duty to preserve evidence to sloppy clients or poorly trained support staff.

Of course, eDiscovery is a central issue in civil litigation where huge resources are devoted to pre-trial discovery (depositions, production requests, interrogatories, subpoenas of records which are relevant or reasonably calculated to lead to the discovery of relevant evidence). In both civil and criminal lawsuits, the lawyers are subject to the Bar Rules of Ethics and Technology which hold the lawyer to the standard of "competent representation," ABA Model Rule 1.1 The Bar

Rules are granular and specifically require lawyers to maintain requisite knowledge and skill "including the benefits and risks associated with relevant technology." Comment 8 to ABA Model Rule 1.1 To this date, 31 states have adopted this comment or a substantially identical version of this comment. ABA, Section of Litigation News, Volume 44, No.1 (Fall 2018) (Technology, Ethics and Avoiding Sanctions, by Julia Voss and David Simmons), page 2.

The courts hold the lawyers to a standard of "reasonableness" which probably means that lawyers should not only learn the technology, but also lawyers should joint venture with lawyers who have the requisite skills. The lawyer must act with diligence and reasonableness in collecting, culling, gathering and producing evidence in every case.

Chp 7

Habitual Offender Laws
The "Big Bitch" the "Little Bitch" and the "Dry Snitch"

Criminal Lawyers refer to the "three strikes and you're out" law as the habitual offender law -- which generally refers to three felonies yielding life in prison. Equally troubling are the misdemeanor habitual offender laws which yield drastically worse sentencing enhancements for three misdemeanor convictions. Taken together, these laws are sometimes referred to as "the Big Bitch" and "the Little Bitch." Obviously, these legal trip wires can yield excessive punishment.

An habitual offender is a repeat offender. The purpose of the habitual offender law is to keep the career criminal confined to prison.

If the jurisdiction where the criminal is prosecuted has an habitual offender law, the enhancement of the sentence is defined by a statutory scheme for repeat offenders. The habitual offender law may focus on types of crimes such as drug offenses or the nature and extent of violence in the commission of the crime. The length of time between convictions can make a difference. Sentencing may be mandatory and may involve minimum terms of confinement.

Anyone facing the possible application of habitual offender laws cannot survive without the assistane of an experienced criminal lawyer.

The Dry Snitch
John Gotti and Sammy the Bull

The FBI gets the credit for inventing the phrase "The Dry Snitch" which is a reference to the meetings between John Gotti and Sammy the Bull Gravano who ultimately testified against his Don, John Gotti.

Prior to the testimony of Sammy the Bull against John Gotti, the FBI had secretly recorded lengthy conversations between and among Gotti, Gravano and numerous other members of Gotti's crew. Gotti would refer occasionally to murders of Mafia figures who had fallen out of disfavor with Mr. Gotti. Each time John Gotti mentioned a murder or hit, he would cleverly add a comment, "that was one of Sammy the Bull's hit jobs." This practice was intended to shift the blame from Gotti to someone else and in this case the someone else was Sammy the Bull Gravano. John Gotti knew that the FBI was constantly attempting to record his conversations, so he used this practice "just in case" the FBI was listening.

In today's business world, the **dry snitch** is frequently used by higher echelon executives in the presence of lower echelon staff. It is important to recognize this technique and to appreciate its danger.

Nota bene: Best Practices

To be forewarned is to be forearmed! Speak up and make your record. Do not ignore the dry snitch when it is used against you.

Chp 8

The Rule of Law

The phrase "the rule of law" refers to a political situation, not to any specific legal rule. Stated simply: No Man is Above the Law.

It is a bedrock principle of our Constitutional Law that every person is subject to the law, including people who are lawmakers, law enforcement officials, elected officials of every description and judges.

However, money can buy freedom. Defendants who have little or no money frequently submit to unfavorable plea deals in our de facto dual justice system. People with money often escape punishment altogether or achieve leniency.

Abacus Federal Savings Bank is an American bank founded in December 1984 by a group of business leaders from the Chinese American community in New York City.

Abacus was the only U.S. bank prosecuted in relation to the 2008 financial crisis; it was exonerated of all charges following a jury trial in 2015. The aggressive prosecution of Abacus, in contrast to the relatively lenient treatment received by the large banks, was questioned and criticized by various media outlets.

A documentary about the prosecution and exoneration of Abacus, Abacus: Small Enough to Jail, was

nominated for the 2018 Academy Award for Best Documentary Feature.

When governments torture lawyers and dissidents, we realize that the promise of "equality" is purely aspirational. When governments only prosecute "little people" like the Abacus Federal Savings Bank to the exclusion of the large banks, the rule of law is a mockery.

Chp 9

Extradition
You Can Run But You Cannot Hide
(Unless You Are A Citizen of Sweden)

Extradition is a legal means by which a person accused of or convicted of a crime is arrested and returned to the jurisdiction where the crime was (allegedly) committed. Among the fifty states in the United States, extradition is certain. Frequently, extradition is waived.

International law[3], on the other hand, leaves nations considerable latitude to establish their legal standards for extradition. Between nations extradition is usually controlled by treaties between two nations. Requirements may vary significantly from one country to another because different traditions and legal standards between common law and civil law jurisdictions.

The nation seeking the surrender of a person must present a formal extradition petition, which must identify the wanted person and the offence imputed to him. The requesting nation is required to submit documentation in support of the petition. The kind and format of the evidence needed as well as the standard of proof applied by the petitioning nation may differ significantly from the requested nation. Pending the outcome of the extradition

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[3] The best recapitulation of these standards can be found at http://www.unhcr.org/protect. *See also*, https://en.wikipedia.org/wiki/Extradition

petition, the criminal may be arrested and held by the requested nation.

The offence in issue must be an extraditable offense in both jurisdictions, and the offence must be a criminal rather than a political offence.

Extradition might not be granted if a judgment was rendered in absentia or by a special court in proceedings during which guarantees of fair trial were not observed; the applicability of a statute of limitations; or the person sought to be extradited is an asylum seeker.

Human rights exceptions (e.g., the death penalty) can be a bar to extradition. Occasionally, the requested nation will only extradite if the petitioning nation agrees that it will not seek the death penalty.

A now famous white collar criminal who has escaped extradition is Tomo Razmilovic. He was the President and CEO of Symbol Technologies which created the first bar code scanner in 1980. His company had exceeded quarterly earnings projections for 31 consecutive quarters.

When a fraudulent earnings accounting fraud was revealed, thirteen of the company's executives were indicted, and Tomo Razmilovic flew to Sweden where he is a citizen. The United States Government considers him a fugitive, with the United States Postal Inspection Service offering a $100,000 reward for information leading to his arrest and conviction. Sweden will not give up Razmilovic for extradition because it does not turn over suspected white-collar criminals to a country not located in the European Union. See, https://en.wikipedia.org/wiki/Tomo_Razmilovi

Chp 10

Resignation -- A Thoughtful Guide for the Public Servant under Siege

To resign, or not to resign – that is the question. When there is blood in the water (scandal; conflict of interest; corruption; sexual indiscretion; perjury; and impropriety or the appearance of impropriety) the print and broadcast media and the public servant's constituents are quick to cry for resignation. The public servant must now agonize over the decision – whether to resign and at what point to resign.

Should the public servant offer his resignation to the prosecutor as a quid pro quo, and what concessions should the public servant expect to receive in the bargain? When impeachment (Richard Nixon; Bill Clinton) or criminal prosecution are on the horizon, then the prospect for spending a king's ransom on attorney's fees inevitably weighs heavily on the public servant's mind.

Occasionally the public servant has already been convicted (Adam Clayton Powell) or he has admitted guilt (Spiro Agnew – a nolo contendere plea). In those instances, voluntary resignation is moot because it is inevitable. The person who is still standing on the "presumption of innocence" will, however, benefit from the following advice.

Some public servants have demonstrated incredible courage and endurance – for example, Bill Clinton's success in refusing to resign and in defeating the Impeachment proceeding was amazing. I hasten to add, however, that Mr. Clinton could have gone down in history as a great President, but instead he spent his second term

defending himself in the midst of the scandals of Paula Jones, Monica Lewinsky, and in the face of a perjury charge. What Bill Clinton should have done is this – he should have said: "**I refuse to testify**." A sitting President can say quite correctly – Impeachment is the one and only remedy if you wish to prosecute me or punish me for any "alleged" misconduct or transgression.

As a sitting President, Mr. Clinton could have and should have refused to testify in the Paula Jones case (in which he allegedly perjured himself in a deposition in Little Rock, Arkansas). Indeed, he should never have agreed to testify in any deposition or proceeding. His refusal to testify would have earned him a citation for contempt of court, but that contempt of court citation would probably not rise to the dignity of "High Crimes and Misdemeanors" which is the U.S. Constitutional standard for Impeachment.

Congress would have looked ridiculous if they had voted a Bill of Impeachment for a **contempt of court** citation handed down by a federal district court judge in his hometown of Little Rock, Arkansas – whether civil or criminal contempt. Congress would not have had any realistic case of **obstruction of justice** for Clinton's refusal to testify because there would not have been an allegation of false testimony. After all, the standard for prosecution is different for a sitting United States President. Upshot: If Clinton had never raised his right hand and promised to testify truthfully under oath, his detractors would never have confronted him with false statements made under oath. Mr. Clinton might have salvaged some small portion of his reputation and would have saved his political capital for more worthy efforts! Any effort to impeach Clinton for his refusal to testify in a deposition or in a federal district court room would have been an exercise in political futility.

Nota bene: Best Practices

Be clear about this distinction – if there is **no testimony** under oath then there is **no perjury**.

Occasionally, the prosecutor will offer a nonprosecution agreement. The SEC (Securities and Exchange Commision) frequently makes this offer which requires the offending party to agree that he will:

(1) Pay a statutory fines.

(2) Waive the statute of limitations.

(3) Co-operate with the prosecutor on related cases.

(4) Admit specific wrongdoing.

(5) Fire the person within the culture accused of wrongdoing, and institute a program of robust compliance with independent monitoring.

But if the Accused Person Decides to Resign:

A **media frenzy** is nothing more than condemnation by a mob with its frontal lobes stripped away. The mob is willing to accept accusation as tantamount to guilt – thus, the accused person is overwhelmed by **GroupThink** which means that the accused person is screwed, glued and tattooed. When media frenzy has "gone viral" the public servant must think seriously about a quid pro quo – in other words, what are his essential points to be included in his offer to resign? The prosecutor will probably ask the public servant to stipulate to a felony conviction, make restitution, and pay a statutory fine. In return, the public servant should avoid jail time or at least walk away with "**time served**." It is, quite frankly, too late to worry about legacy, but it is never too late to bargain for freedom.

Prosecutors strive to equate the public servant's leadership role in his culture to a ratings-driven reality

show. Prosecutors insist that aberrant behavior always reaches a point of collapse.

Defense lawyers, on the other hand, assist the public servant in mapping out a decision tree while striving to persuade the prosecutors that a jury trial could be the public servant's salvation because any jury would recognize that "the score" is zero to zero in the ninth inning and that the bags are loaded.

Business Roundtable Headquarters
Washington, D.C.

If American capitalism shifted the investors' chief concern away from profit maximization and stock price, then accounting fraud would lose its appeal to the dishonest business leader.

DATELINE (MONDAY) AUGUST 19, 2019: The organization representing the nation's most powerful chief executives, including Jamie Dimon who is the Chairman and CEO of JPMorgan Chase, is reviewing how it views the purpose of a corporation. They are asking whether the traditional capitalistic mandate of protecting the shareholder should be reconsidered.

The Business Roundtable's statement speaks in terms of balancing the needs of the interested parties. The statement offers this suggestion at a time when our economy and global economies are faced with extreme income inequality and a growing demand for structural changes.

Said the statement, "Americans deserve an economy that allows each person to succeed through hard work and creativity and to lead a life of meaning and dignity." [4]

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[4] https://www.washingtonpost.com/business/2019/08/19/lobbying-group-powerful-ceos-is-rethinking-how-it-defines-corporations-purpose/?wpisrc=al_business__alert-politics--alert-economy&wpmk=1

The executives on the Business Roundtable emphasizes every corporation's obligation to protect all stakeholders – customers, employees, supplies and communities. Accordingly, "Each of our stakeholders is essential. "We commit to deliver value to all of them, for the future success of our companies, our communities and our country."[5]

The contest between "shareholder primacy" and "stakeholder primacy" is receiving more attention at this time. Today's socially conscious business leaders are striving to strike a balance between creating and incentivizing the creation of long term values while still keeping a vigilant eye on cost minimization and profit maximization.

It also bears noting that Klaus Schwab, the founder of the World Economic Forum, also generously used the term "stakeholder" in his various television comments at Davos in January of 2020.

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[5] Ibid.

Chp 12

Informed Consent
Plea Bargaining

I am very good at getting a client's consent, but I worry a great deal about whether I am truly getting **informed consent**. Indeed, informed consent is the gold standard in attorney-client relationships. Each client's case – his anxiety, his contradictions, his evolution, his growth, his success, his failure – is a unique human experience. The criminal lawyer must take care that he does not recast the flesh and blood of that experience into an abstract problem.

One species of a joint venture that the client and his criminal lawyer undertake, for example, is **plea bargaining**. The client will ask a thousand questions, and to each question, the lawyer is probably justified in offering the classical lawyer's answer –"It depends." The questions and answers that must be explored for each individual client, and the compassion that the lawyer must bring to bear, cannot be reduced to a template. The mark of a competent lawyer is his willingness to invest the time and energy that is essential to save the client's desire to survive. The competent criminal lawyer recognizes that the very bread you eat – once you are confined to a prison – will taste of hopelessness.

Bear in mind that a **plea bargain** is the waiver or giving up of a Constitutional right to a jury trial in a criminal case. As stated by the United States Supreme Court, a valid waiver is "the intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458 (1938). There is a wealth of

published articles and subsequent cases seeking to apply this standard to criminal cases.

Nota bene: Best Practices

Any prosecutor – whether state or federal – will admit that he has neither the staff nor the budget to take every case to trial. He keeps his trial calendar manageable by making plea bargains or plea agreements. In some cases, the prosecutor makes concessions when a defendant agrees to plead guilty to a lesser offense or to one of several charges. Another technique is to ask the defendant to plead guilty to the original charge in return for a more lenient sentence.

Situational Awareness

Airline pilots are trained to avoid disasters based on situational awareness.

Co-operation with the Prosecutor "Throwing Up Your Skirts"

Prosecutors are well aware that one of their most powerful tools for prosecution and conviction is co-operation. The slang expression among law enforcement people is "getting an equally guilty co-conspirator to throw up her skirts."

A **Co-operation Bargain** with the prosecutor will typically yield a less consequential criminal outcome (leniency in sentencing) for the co-operator who is required to make truthful disclosure and to testify against the target. Co-operation is rarely employed down – in other

words an equally guilty co-operator is more credible if his guilt is equal to that of the person against whom he will testify. Stated otherwise, someone facing a misdemeanor will probably not have much credibility if he is used to prosecute someone facing a felony.

Relatedly, 18 U.S.C. § 201(c)(2), a criminal statute prohibits the giving of things of value...for or because of [a witness's] testimony." The courts have consistently held, however, that granting leniency does not violate this statute.

Additional federal statutes authorize prosecutors to offer leniency in return for testimony. For example, the Sentencing Reform Act of 1984 contains three provisions authorizing sentencing reduction for co-operators who provide "substantial assistance in the investigation or prosecution of another" criminal . 18 U.S.C. § 3553(e) (reduction below minimum statutory sentence); 28 U.S.C. § 994(n) (requiring Sentencing Commission to allow guideline reductions); Fed R Crim. P. 35(b) (reduction for post-sentencing cooperation).

Congressman Mat Gaetz (Florida, Rep) was facing a likely co-operator, Mr. Gaetz's friend, Joel Greenberg, a former tax collector in Seminole County, Florida, in an alleged sex trafficking case. However, as stated in the Washington Post, September 23, 2022, on line: "Career prosecutors have recommended against charging Rep. Matt Gaetz (R-Fla.) in a long-running sex-trafficking investigation — telling Justice Department superiors that a conviction is unlikely in part because of credibility questions with the two central witnesses."

Chp 13

Jury Nullification

The trial lawyer's worst nightmare is the possibility in any case – civil or criminal – of jury nullification. Jury nullification occurs when a jury in a criminal case returns a verdict contrary to the weight of evidence – frequently based on the jurors' disagreement with the law (as given to the jury by the judge in written Jury Instructions).

The jury always has the potential power of nullification from its right to render a general verdict in criminal trials. Unlike civil courts in a civil trial, criminal courts do not have the opportunity to direct a verdict no matter how strong the evidence. Equally important is the Fifth Amendment's **Double Jeopardy Clause** in the United States Constitution; the Fifth Amendment prohibits any appeal from a trial court's acquittal of the defendant.

Thus, a rogue jury in the O.J. Simpson case resorted to Jury Nullification to kick over the tracings and return a verdict of "Not Guilty." Some scholars believe that the minority members of O.J.'s jury wanted to give "the Brother" a second chance since a primary witness for the prosecutor was Detective Fuhrman who was allegedly a racist.

Chp 14

Past Memories
Recovered Memories
[Christine Blasey Ford]

As a lawyer, the first three questions that come into my mind when I am told that past memories will play a part in any case are: First, if testimony is recovered with the assistance of a professional person (psychologist or psychiatrist or memory expert) and if the professional person's science becomes an issue, will the evidence of the memory meet the Daubert test (Junk Science)? Second, would the past memory be enough to justify a search warrant or arrest warrant (proof that a crime was committed based on probability)? Third, would the past memory be enough to convict the defendant at trial (proof beyond a reasonable doubt)?

Has the witness whose memory is now offered been altered or tainted by what the memory-witness read in the print and broadcast media?

Has the memory-witness been in therapy? Did the therapy restore or rehabilitate the memory that is now offered? Does the memory-witness claim to have suffered PTSD following the alleged memory incident(s)? What treatment was sought or received for this claim of PTSD?

Does the witness whose memory testimony is now offered claim that the memory is "indelible"? Referring to Bret Kavanaugh and his friend Mark Judge, Dr. Christine Blasey Ford insisted: "Indelible in the hippocampus is the laughter. The uproarious laughter between the two, and their having fun at my expense."

Is the memory supported by other forensic evidence: documents, videos, voice recordings, other witnesses' confirmation?

When all is said and done, has the memory been tampered with? Can you distinguish between an attack on credibility and a challenge on memory?

To what extent is the supporting evidence coming through the memory-witness himself or through the lawyer(s) representing the memory-witness?

Most experienced trial court judges would agree that merely "making an allegation" based on an old memory should not be enough to testify in court. Support or confirmation of some kind should be required for admissibility.

Mollie Heminway and Carrie Severino offer a thorough review and analysis of L'Affaire Christine Blasey Ford/Mr. Justice Kavanaugh, and my comments are informed by their excellent book.

Justice on Trial: The Kavanaugh Confirmation and the Future of the Supreme Court, Mollie Heminway and Carrie Severino (Regnery Publishing 2019)

Chp 15

The Jury is All Knowing and All Seeing

If you are a defendant in a criminal prosecution, your jury trial experience will most likely be limited to one case, one trial – your prosecution will most likely be your first, last, and only experience in court. By the time your case is over, you will learn that your Jury was all knowing and all seeing.

Your learning experience would obviously be enhanced if you could be a fly on the wall when your Jury retires to the privacy of the Jury Room. The trial court judge will have instructed the Jury – more than once – "Do not discuss the case unless and until all of the evidence has been received and all of the parties have made their closing arguments." Once the jury deliberations begin, an interesting phenomenon emerges in the Juror's discussions – taken as a whole and putting together all of the individual perceptions and recollections, **nothing has escaped the attention of the Jury.**

A famous trial lawyer loves to tell the story about his gold watch. On the first day of trial, he wore his gold Rolex all day. He had originally intended to err on the side of modesty and take off his gold watch for the trial. Once he recalled his original intention, he took off the gold watch and for the remainder of the trial, he wore his Timex. At the end of the trial, and after the Jury had returned its verdict, one of the Jurors asked the trial lawyer: "Why did you take off the gold watch?" If one juror notices something, you can assume that **all of the jurors will share** that point in their deliberations.

If a witness is called and is administered the oath, his posture while holding up his right hand will be noticed by at least one juror. If a witness is called and walks toward the witness box, his **pace and stride** will be noticed by at least once juror. If a witness demonstrates **anger** in his testimony, his temperament will be noticed. If a witness **exaggerates**, interrupts the prosecutor's questions, or looks at his wrist watch, his **demeanor will be noticed**. If a witness disrespects a victim, his insincerity will be noticed.

Some of the jurors will have remembered these details and some will not. In their deliberations, the jurors will remind each other or perhaps educate each other about every detail.

Perhaps the most professional courtroom witnesses are FBI agents who testify in court frequently and who practice testifying during their training at the academy in mock-up trials. An FBI agent at trial will listen patiently to each question, and then he will turn physically in his chair to the Jury and look at the jurors while answering.
Upshot: FBI agents are polite and persuasive, and their professionalism will be noticed.

Chp 16

Trading Punches/Insults
[Damn! I wish I had thought of that!]

Instead of trading insults with your adversaries or detractors, use the English language skillfully – after all, it is your native language. This chapter will educate you about the skillful use of the English language when you have only a fleeting moment to reply to an insult or sarcastic comment or sarcastic question. Of course, these communications occur daily in the work-a-day world prior to any criminal investigations.

When you are insulted, you should avoid resorting to **profanity** – you will live to regret the use of any profane or obscene words. There will always be a transcript or a witness or an audio tape or a video tape that you did not expect to capture your immature reaction. To your shame and embarrassment, your immature behavior will be brought to the attention of a judge or magistrate or a jury sooner rather than later.

Nota bene: Best Practices

Here is my battle-tested list of safe and witty "repartees" that will serve your well in any colloquy. Let me first remind you, however, that a simple and direct question or comment should be answered with a simple and direct and truthful answer.

A witty or sarcastic repartee is no substitute for a truthful answer which older and wiser lawyers call **plain speaking**.

What do you do when you are facing a wild adversary who is **slashing and stabbing**? When and if you perceive that you are suffering an insult or a sarcastic thrust, you are justified in resorting to verbal self-defense:

Think carefully about how to use these effective and subtle lines, and try to anticipate this response to your "repartee" – "Explain what you mean by that remark."

1. The gentleman [gentleperson] speaks without knowledge.

2. The first thing I do every morning is to call my attorney and ask whether we are in full compliance with the law. [Can you make that statement based on your consistent and actual practice?]

3. There are two sides to that story, and only one side has been told well.

4. It is the mother of all quagmires.

5. It is a delay or rope-a-dope strategy.

6. You said that ... I didn't say that. The record will bear me out. You said that ... I didn't say that.

7. Where did all of that anger come from? You go ballistic when someone disagrees with you.

8. I have never given you a reason to treat me that way. You go ballistic when someone disagrees with you.

9. (**Q.** "What were you thinking") **A.** Is that a question or an editorial comment?

10. It sounds like "Sour Grapes." We occasionally encounter overachieving critics who want to blame us for their headaches, heartaches, and every crop failure since the day they were born.

11. You are entitled to your own opinion but not to your own facts.

12. The difference between "A and B" is cosmetic.

13. The life of the law has not been logic, but rather it has been experience.

14. His performance has not lived up to his aspirations.

15. Low yield nuclear weapons do not make nuclear war more feasible.

16. I chose that policy because the risk of inaction was greater than the risk of action.

17. You're asking me to answer a hypothetical question – but I don't have a crystal ball.

18. You should demean yourself and conduct yourself with the dignity and decorum of a member of [the bar] [the board of directors] [the management committee] – if you are a member of [the bar] [the board of directors] [the management committee].

19. That is an empirical question, and an answer to that question should be based on scientific research and expressed in qualitative and quantitative terms.

20. One swallow does not make a summer.

21. I can't answer your question unless you give me the context – date, time,

place and circumstance. May I have the context, please?

22. It could be interpreted that way. Yes.

23. There were a lot of facts, a lot of people, and a lot of meetings – and I don't claim to be infallible – but I will do my best to give you accurate answers to your questions.

24. Your question is highly selective; you are cherry picking.

25. You are asking me to prove a negative … how does one prove that something does not exist?

[Caution – A witness should always answer a question with a "yes or no" if that is the truthful response; however, when clarity is lacking:]

26. You are asking me whether your quoted statement is true … You are asking me for a "**Yes** or **No**" answer … My answer is: "**Yes** -- That is a partially true statement." –or- "**Yes** to the macroeconomic dollars but **No** to the microeconomic dollars."

27. The record will bear me out.

28. If your question is based on a document, please show me the document.

29. That is not a "red flag" ... that is a Fourth of July Parade.

30. His approach to problem solving is one dimensional and anti-intellectual. This is a business where there are no easy answers.

31. **Q.** What do you mean by that remark?
A. It's a figure of speech! Think about it, and I know you will agree with me.

32. **Q.** What do you mean by that remark?
A. It's a literary reference! Think about it, and I know you will agree with me.

33. I prefer **not** to use the term **"liar"** ... but let me put it this way: 'he is obviously willing to say anything to support his case.'

34. That was a **"dodge"** ... but not an artful dodge.

35. When you say “now” ... it sounds like your use of the word “now” is rather elastic.

36. That was not simply urgent ... that was a five alarm fire.

37. That sounds like a circular firing squad.

38. You’re asking for trouble! You’re asking for trouble!

39. How fast? Warp speed?

40. He is a big personality, and sometimes he says things that are bigger than life.

41. Your question indicates to me that you have a cavalier attitude to this serious problem.

42. Yes. He said that. But at that time and in that context, I took it as a deflection from the subject of our conversation.

43. Well, thank you, but no thank you, for that personal insult; I’ve been called worse things by better people.

44. I hope that you are not one of those people who would say that nothing should ever be tried for the first time.

45. To that question, I would give the same response that lawyers use when confronting a complex question – **"It Depends!"**

46. Close doesn't count except in the case of horseshoes and hand grenades.

47. Yes; he had a duty to do that, but was it a nondelegable duty?

48. Yes. We do emphasize **due diligence,** but we also recognize that all of the hard work in the world won't do you any good if the hard work is misdirected.

49. One fundamental principle of making financial decisions (that is frequently overlooked) is the fundamental truth that your **early losses** are your most significant losses. Your early losses can indicate that it is time to get out of a bad investment.

50. Yes. There is some evidence of that but the evidence is razor thin.

51. The Truth? For most people, the Truth is a stream of consciousness, informed by memory and experience, and modulated by bias, interest and prejudice.

52. Everybody has a plan. Good planning is baked into our DNA. But most plans are never fully and finally executed – instead, they are a **"work in progress."**

53. His career is an object lesson in calamitous egotism.

54. It was [It is] a high decibel level of politics.

55. Ronald Reagan's line: Trust but Verify.

56. Your assumptions have grown threadbare.

57. You have missed the point – or should I say you have misconstrued the point.

58. Look: I am not a public servant; I am not running for election; four years from now, I will not be running for re-election; so, I feel no obligation to open up my private life and affairs to public scrutiny.

59. What you're really asking is whether this is a **moment** or a **movement**.

60. You are confusing **civility** with **conciliation**. Just because I stand my ground, you should not expect me to make a concession.

61. **Microagression**. Microagression is a celebration of victimhood.

62. **Define "_____"** Explain the demographics of Finland. **Answer: Define** "demographics."

63. **Sarcasm**. The purpose of a [trial] [deposition] is "getting at the Truth" and your sarcasm is not helpful.

64. **False Moral Equivalent**. You are attempting to make those two diversely different cases a false moral equivalent.

65. **Politics**. I am not going to wade into the politics surrounding that issue. I am not testifying as a politician.

66. **Model for Failure**. I am afraid that his business plan was a model for failure.

67. **Inertia of Bureaucracy**. Yes, it was too slow, but unfortunately, that is inertia of bureaucracy. Personally, I would have preferred a much more yeasty culture.

68. **Ambush Interview**. Yes, he was not well prepared for the encounter, but it was afterall an ambush interview. It was unannounced, unscheduled, uninvited, and unwelcome.

69. **Change**. It was a state of flux and ferment. People were ignoring the immutable laws of nature – what the scientists call physical constants.

70. **Holistic.** Sometimes people are answering a deep urging of their imaginations and calling it "holistic."

71. **Over the Horizon**. Coming from outside the model or landscape. Exogenous.

72. **Situational Awareness**. Situational paralysis. Airplane pilots in a crisis.

73. **Confirmation Bias**. The airplane pilot attemps to correct his flight path with his first assessment of the problem in mind, but his first assessment turns out to have been wrong. He continues to favor his earlier impressions and beliefs. He continues to interpret all of the signals and cues as confirmation of his bias instead of re-examining the situation with an open mind.

74. **Rank betrayal**. You are being charitable when you say “he was making mistakes” because his deviation was in fact a rank betrayal of the truth.

75. **The premise of your question**. I disagree with the premise of your question. May I explain?

76. **Death**. Death does not respect diagnostic boundries. Death is the

permanent cessation of all vital bodily functions.

77. **Death**. Ruminating about Death is easier than shouldering the Burdens of Life.

78. **Emotions**. The mind continues to function in the **flux and ferment** of human emotions.

79. **Time is short**. Even when we know that time is short, life continues to compete with death.

80. **Death on the installment plan**. Philosophers call it a death of a thousand cuts. Novelists call it Death on the installment plan.

81. **Stupidity**. Social scientists would call that structural and systemic stupidity.

82. **Winners and Losers**. Diplomats who negotiate settlements with adversaries realize that neither side should be made to feel humiliated. In a good resolution, there are no winners and no losers, but there is a settlement.

83. **Comparing Apples and Oranges.** Is there something wrong with fruit salad?

84. **Here is what we know ...**

85. **Can I say: "All of the above?"**

Nota bene: A Few Specific Examples

Q. And you did take that risk, and isn't it true that the risk you undertook resulted in great (cost?) (loss?)

A. Yes. However, there are no risk-free choices. We make choices that are well-informed, and we strive to reduce risk.

Q. Do you have a blind spot about issue "X"?

A. Well, if it is a blind spot, then by definition, you are not seeing it. However, to answer your question, I believe that our oversight is cautious and comprehensive.

Q. So, you are suggesting that the correct diagnosis would be either "A" or "B"?

A. No. "A" and "B" are two sides of the same coin. May I explain?

Q. Define "disease" as that term is used in medicine?

A. **"Disease" is a definite morbid process having a characteristic train of symptoms affecting the whole body or any of its parts, and its etiology, pathology and prognosis may be known or unknown.**

B. **"Death" by contrast is the permanent cessation of all vital bodily functions.**

Q. So, do you agree – please answer yes or no – that both "A" and "B" were underlying causes of the problem?

A. Well, No. You're asking a layered question which necessitates making some important distinctions.

Q. No! No! No! That's not what I asked you. I know I am interrupting, but that's not what I asked you!

A. Counsel, let the witness testify! Yes, you are interrupting me. Counsel, let the witness testify!

Chp 17

Federal District Court Judges
Mere Mortals and Seriously Flawed

Who are these men and women who wear black robes; who sit at polished and elevated wood benches; who speak authoritatively and flawlessly in their court rooms; and who do not enter their courtrooms until a bailiff standing at erect attention has announced with great flair to the people gathered in his courtroom:

"All rise!
The Honorable "Phineas T. Bluster, Presiding"
[Whereupon, His or Her Honor Emerges from a Mahogany Door Behind his Bench]

Sometimes these judicial figures are so self-absorbed that we think they are offering us a "revealed Truth." Should we worship and revere these dispensers of justice as if they are blocks of marble who think great thoughts when confronted with great issues? After all, these judges have lifetime tenure, during good behavior, and their judicial decisions are affirmed on appeal in 80% of all appeals taken to a Courts of Appeal. After all, these judges can award unlimited millions of dollars in damages in civil cases; can send a man to prison for a lifetime; and can condemn a man to death (after his judge or jury has complied with rigorous constitutional standards) with the stroke of a pen in a criminal case.

Federal district court judges are given lifetime appointments in order to immunize them from political influence. The founding fathers wanted to shield federal judges from the political storms of running for re-election.

Problematically, however, any **banana republic** can give lifetime tenure to its judges, but the ultimate goal of giving defendants a fair trial is not achieved if the trial court judge becomes a calcified and self-important potentate who dispenses justice according to his or her subjective view of reality.

Federal district court judges should only serve five year terms with no opportunity to be re-appointed. In the present scheme of things, the federal district court judge is at risk of developing the attitude over time that justice flows from his lips to God's ears. A term-limit reform is long overdue, and this reform (if we get around to convening another constitutional convention) will substantially improve the administration of criminal justice. A constitutional amendment could do equally well in addressing this problem.

The truth can be inconvenient and uncomfortable. Some federal district court judges are guilty of using their preening moral superiority as rationale for judging — rushing to judgment before all of the evidence has been received — the people who are prosecuted in their courtrooms. The judges need to be reminded that White Collar Crime defendants are neither war criminals nor cold war warriors. Most White Collar Crime defendants are MBA's or JD's who don't know the difference between a hand grenade and a pomegranate; and they are not espionage agents – they have neither a nom de plume nor a nom de guerre. These White Collar Criminals are mostly decent human beings who made a foolish concession to greed. The judges need to be reminded that their rulings are supposed to be based on ideals of justice and not a function of their personal point of view.

There is nothing more entertaining than watching a federal district court judge who takes pleasure in playing **Ducks and Drakes** with the witnesses or playing **Ducks and Drakes** with the lawyers in his or her courtroom – when these witnesses or lawyers are only trying to make a favorable impression. With lifetime appointments, federal judges see themselves as benevolent autocrats in the judiciary. Most lawyers respond to their "suggestions" with, "Yes sir, right away sir." What a better system of justice we could create by encouraging counsel to speak with civility but to remind His or Her Honor from time to time that the court's lack of patience is infringing upon the defendant's right to a fair trial.

I regret to say that life has taught me to view these judicial giants with apprehension. Some of them are guilty of mediocrity although they perceive themselves to be elegant and erudite. Truth be told, the less qualified judges surround themselves with law clerks who are far brighter and harder working than they are themselves. Some federal district court judges believe their written opinions are an intellectual Tour de Force. That self assessment can be delusional. Rest assured that these public servants are mere mortals like the rest of us and that their occasional self-mythologizing is not helpful.

Federal district court judges should be forced to re-enter the work force after a five year appointment – take them off the public payroll – and make a living as honest lawyers now with the benefit of a valuable experience. A wider array of lawyers in our communities would then acquire the valuable experience of sitting on the federal bench. The day would soon arrive when it would be common to meet a former federal judge at the annual bar convention. Not only would criminal justice be upgraded,

but also the quality of lawyers who are ascending to the federal bench as the five-year-judges step down would benefit immeasurably. Because federal district court judges would not be eligible to repeat their five year terms, there would be no risk of politics entering into re-election campaigns – thus answering the founding fathers' original concern about keeping federal judges out of the political storms.

Recusal
Judicial Disqualification

Recognizing that the criminal defendant is generally unpopular and vulnerable, U.S. Supreme Court Justice Scalia has written:

> "[Judges'] most significant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of that popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to prohibit swift and complete accomplishment of that popular will." Antonin Scalia, Essay, The Rule of Law as a Law of Rules, 56 U. CHI.L.REV. 1175 at 1180 (1989)

28 U.S.C. Section 144, captioned "Bias or prejudice of judge", provides that under circumstances, when a party to a case in a United States District Court files a "timely and sufficient motion that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party", the case shall be transferred to another judge.

The general rule is that, to warrant recusal, a judge's expression of an opinion about the merits of a case, or his familiarity with the facts or the parties, must have originated in a source outside the case itself. This is referred to in the United States as the "extra-judicial source rule" and was recognized as a general presumption, although not an invariable one, in the 1994 U.S. Supreme Court decision in Liteky v. United States.

At times justices or judges will recuse themselves sua sponte (on their own motion), recognizing that facts leading to their disqualification are present. However, where such facts exist, a party to the case may suggest recusal. Generally, each judge is his own or her own arbiter of a motion for the judge's recusal, which is addressed to the judge's conscience and discretion. However, where lower courts are concerned, an erroneous refusal to recuse in a clear case can be reviewed on appeal or, under extreme circumstances, by a petition for a writ of prohibition.

Racial Disparities in the Administration of Justice (ALI.org) American Law Institute.org

How Are Courts Addressing Racial Disparities in the Administration of Justice? The ALI deals with this question in a panel session.

Since the killings of George Floyd, Breonna Taylor, and Ahmaud Arbery, civil unrest has spread throughout the United States, causing many American citizens to question racial equality in every corner of our society. In this ALI episode, the panel discusses how our courts and judges are addressing the complex topic of racism and

racial disparities. The panel also explores racial education programs for federal judges, the disparities in sentencing for Black men in the U.S., and the obligation judges and justices have to provide a justice system that works fairly for all Americans.

This episode was produced jointly with the Bolch Judicial Institute at Duke Law School. Use your Google search function to find the panel discussion, if you are interested.

The following portion of a law review article appears on line at:
https://harvardjol.com
The Conservative Case for the Judiciary Accountability Act

Author
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Posted on
October 19, 2022

*Aliza Shatzman

I. INTRODUCTION

The judiciary is an unaccountable workplace where some judges abuse their positions of power, mistreat their employees with impunity, and act as if they are answerable to no one. More judges engage in misconduct, including gender discrimination, harassment, and retaliation, than the legal community cares to admit. Fueling this injustice, the Third Branch is exempt from Title VII of the Civil Rights Act of 1964, the landmark antidiscrimination law that protects employees

from gender discrimination, harassment, and retaliation in the workplace.[1] This exemption distinguishes the judiciary from Congress,[2] the Executive Branch,[3] and most private businesses, whose employees are all protected by antidiscrimination laws.[4]

This year, the House and Senate Judiciary Committees are considering a bill, the Judiciary Accountability Act (JAA) (H.R. 4827/S. 2553), that would finally extend Title VII protections to the judiciary.[5] Judicial accountability is, or should be, a bipartisan issue. Both Democratic[6] and Republican[7] judicial appointees mistreat their law clerks. Furthermore, both liberal and conservative clerks experience harassment and retaliation from the most powerful members of the legal profession—judges—with limited recourse available.[8] Troublingly, as of August 2022, the JAA currently has only one Republican co-sponsor in the House[9] and no Republican co-sponsors in the Senate.[10]

Chp 18

The United States Supreme Court

There are nine Justices on the Supreme Court, but the Constitution does not say how many Justices shall be on the Court. The prescribed number of Justices is contained in federal legislation. When the print and broadcast media talks about **court packing**, they are referring to a change in federal legislation — no Constitutional amendment would be necessary.

Judicial Review

Historically, Chief Justice John Marshall (September 24, 1755 – July 6, 1835) was clearly the greatest Supreme Court Justice. Article III of the United States Constitution does not say that the Court has the power to declare laws passed by Congress **unconstitutional**. Chief Justice John Marshall gave us that ruling in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Thus, Justice Marshall gave us the fundamental **principle of judicial review**. Thanks to the Marbury precedent our Supreme Court does have and does exercises the power to strike down laws, statutes, and frequent government actions that violate the United States Constitution so long as a majority of the Justices agree.

Justice Robert Jackson – a Twentieth Century Justice who also prosecuted the Nazis at Nuremburg following World War II – famously said: The United States Supreme Court is **not final** because it is infallible; it is infallible because it is **final**.

Chp. 19

Cross Examination

Great Cross examiners are not born, but rather they are trained. Professor Wigmore correctly observes that **Cross Examination is the Greatest Engine Ever Invented for the Discovery of the Truth.** Wigmore On Evidence (3rd ed, 1940)

Sometimes the most brilliant cross examination strategy is to say "**No questions for this witness, Your Honor.**" The most fundamental rule of cross examination is "Do not cross examine without a purpose." Equally important, "Do not ask a question unless you already know the answer." If, for example, you are cross-examining Ted Bundy's mother (after she has testified on direct examination that Ted used to sing in the church choir), you could ask: "Mrs. Bundy, do you love your son?" Problematically, however, you probably don't know what answer to expect. To be sure that she answers your question without surprising you, i.e., to ask a question to which you already know the answer, you should ask: "Mrs. Bundy, you are his mother?"

Lawyers attend many excellent seminars for the purpose of discussing and demonstrating cross-examination techniques. The most commonly repeated and stressed technique is to ask 'Yes' or 'No' questions in order to maintain control of the witness. Judges nearly always permit the counsel who is posing the question to interrupt a non responsive answer and to scold the witness: "That question should be answered with a 'Yes' or 'No.'

When a witness changes his testimony (before, after or during courtroom testimony), he can expect to face the wrath of a cross examiner who will ask "Were you lying then or are you lying now." Strictly speaking, this examination ploy is a subset of cross examination that lawyer's call **impeachment**. President Trump had allegedly used his office for personal gain in a July 25, 2019 phone call with Ukraine's President Zelensky to investigate both a political rival (Joe Biden) and a conspiracy theory related to the 2016 election. Mick Mulvaney, Donald Trump's Acting Chief of Staff, famously held a news conference and admitted to journalists that President Trump did indeed use a quid pro quo (witholding more than $391 million in military aid to Ukraine which had been authorized by Congress). Subsequently, Mick Mulvaney attempted to **"walk it back"** and deny the use of a quid pro quo. His detractors asked rehetorically on morning talk shows, "Were you lying then or are you lying now?

Nota bene: Best Practices

An experienced trial lawyer who is making a skillful impeachment with a deposition transcript (which the witness is now contradicting during his trial testimony) will **set up** the impeachment by asking: (1) Do you recall your deposition of [date]? (2) Were you under oath at your deposition? (3) Was your lawyer present with you at your deposition? (4) Do you recall testifying in your deposition at page [page number], line [line number] that [quote contradictory passage]? Later — in his closing argument — the trial lawyer will refer back to and hammer the impeachment of said witness.

Chp 20

Jack Shame

Jack Shame is the man whose fevered brain is an incubator for dishonesty. He is imbedded initially in middle management in every culture which is destined for prosecution. His illegal shenanigans will make your culture a target-rich environment for a diligent prosecutor. Every culture probably has one or more Jack Shames.

The criminal mind is easier to describe than to define. My objective is to educate clients who need to recognize the markers.

We must identify and reprehend Jack Shame. We must identify and remove Jack Shame before his dishonesty permeates the culture. However, discretion is the better part of valor – if Jack Shame is accused of dishonesty before overwhelming proof is established, he will sue for slander or libel or some other dignitary harm. **Proceed with caution!**

You will recognize Jack Shame by his **ambition**, **impulsivity** and his willingness to **punch through societal norms** – and societal norms are social customs which are the bases for criminal laws. Jack Shame will be a "rising star" in his culture and will probably have a MBA to back up his star potential. If he is pushing a medical or scientific innovation, he will go directly to the print and broadcast media without having the benefit of scientific **peer review**. Jack Shame uses an insensitive and self-serving vocabulary to explain his indiscretion:

“I was only tweaking.”

“Plausible Deniability”

“I was merely romantically wreckless.”

“What’s In It For Me?”

“Maybe it is reverse engineering, but look at the bottom line.”

“I don’t know whether it is true or not – just say it and make them deny it.”

“If it bleeds, it leads.”

“The Golden Rule – he who has the Gold, makes the rules

“Our competition is selling out while we are cashing in.”

“Everybody does the same thing.”

“Money is a great aphrodisiac!”

“Fake it until you make it”

“Rich is Better than Poor”

“Giving Orders is Better than Taking Orders”

“Success is Better than Failure”

“The cowards never started,
And the weak ones died along the way”

“Fake to the left, fake to the right, then drive down the middle”

You can’t make an omlette unless you are willing to break a few eggs”

He is uninhibited about airbrushing the culture’s metrics (e.g., manipulating the quarterly earnings reports) and if caught red-handed, he will claim to be an **action-oriented** executive. He will justify his aberrant behavior as innovation and leadership in an age when **“disruption”** is a highly valued short-cut to unconventional success. Early in his career, Jack Shame will be middle-management; later in his career, if he is unchecked in his rise through the culture, Jack Shame will be the CEO or CFO of his culture.

You will also recognize Jack Shame because when confronted about a controversial action he will say that he had an **ethical duty** to pursue his chosen course of action. He will insist, “I had no choice. I felt that any other course of action would have been unethical.” His modus operandi is Trump-esque: he condemns anyone who disagrees with him as **“unethical.”** He is quick to tar his critics with the same brush: they are all “wannabees” who are wishing they had gotten credit for **my success**. He is usually a walking and talking bundle of contradictions; he is a person who lacks empathy, but he most certainly needs empathy. If he is caught in a lie, i.e., if he trapped by clear, cogent and compelling proof, then he will excuse himself with a euphemism. For example, he will admit his sins,

errors and transgressions with the qualification that he was only guilty of the **exuberance of youth** or perhaps a cavalier and careless attitude to compliance with the law.

Do you have a Jack Shame in your culture? Can you recognize a Jack Shame when he is making a presentation at one of your firm meetings? Does he cast himself in the role of "the leader" among us?

Nota bene: Best Practices

If you suspect that one of your people who is a "mover and a shaker" might be a Jack Shame, you **should not accuse** him point blank of corruption when the evidence is purely circumstantial. Instead, ask him to compose and submit to you a **mission statement** with deep analysis of his core values. If he is suggesting that social media platforms should be used to weaponize the truth and if he advocating that the content put forward should be addictive and repetitive, then you have good reason to drill deep. If you are still not sure about Jack's dishonesty, you can save yourself a lot of grief by simply asking: "Is your moral compass askew?"

When Jack Shame raises the **"ethical duty"** justification for his actions, ask him to elaborate in a written and signed memo. What ethical code or standard or regulation does he claim to compel his controversial action? Who administers or enforces that code, and whose ethical opinion – if any – supports Jack's course of action? Whom did Jack consult – if anyone – in examining or researching the ethical dimensions of his chosen course of action. Did he reach out for a peer review?

Once Jack Shame is identified, you must nail down your supporting witnesses with sworn affidavits and video taped interviews. Witnesses must be vetted and thoroughly debriefed. Witnesses must also be cautioned against leaking; a covenant of nondisclosure supported by consideration should be used. When you are interviewing someone whom you believe to be a "supporting witness," it is unnecessary and unwise to state your own impression of Jack Shame's character. Instead, in an abundance of caution, you should ask questions rather than disclose your bias. Use gentle probing questions, e.g., "What is your impression of Jack's proposal?" or "How do you feel about Jack's approach to problem solving?" or "Do you feel comfortable with Jack's program?" or "Were you persuaded by Jack's proposal?" or "Are you aware of other people's opinions about Jack's plan?" and "What is Jack's reputation in our culture?"

Do not **slander** someone whom you suspect is a Jack Shame. Do not give this unfortunate "high functioning moron" the opportunity to file a civil lawsuit against you for false accusations. Instead, discuss your suspicions and formulate your plan with competent corporate counsel.

In his closing argument in a criminal prosecution case, i.e., a criminal prosecution of your organization, the prosecutor will tell the jury that Jack Shame harbored a mercurial mood; his decision making was impulsive; he exhibited a lack of focus; and that he had a reputation within the culture for resisting any information that did not harmonize with his views. This nightmare can be avoided – **Think Intervention!**

Chp 21

The U.S. Constitution – Cruel & Unusual Punishment

Orange Rubber Cones Are More Humane
than Steel Prison Bars

I shall propose a paradigm shift which is so controversial and startling that it could only be accomplished with a dramatic cultural transformation. **White collar crimes should not be punished by sentencing people to prison.** Prison sentences are poorly justified and wrongheaded. We are hard-wired to take punitive action against any member of our tribe who breaks the rules, but the partially evolved reptilian stems of our brains frequently motivates us to exact an excessive punishment. White collar criminals should not be treated like offenders who commit violent crimes. Instead, white collar criminals should be stripped of their ill gotten gains, corporate offices, and licenses. They should suffer the loss of many of their privileges and immunities in conformity with all other felony convictions, provided, however, they should not be forced to give up their **personal freedom**. A prison sentence is a gradual death sentence, and a prison sentence for a white collar crime is **cruel and unusual punishment**.

The history of prison life in America casts a long shadow over the United States Constitution and the Bill of Rights which were drafted by our founding fathers who were inspired by the Age of the Enlightenment.

One reason that I propose this tectonic shift in our jurisprudence stems from my belief that federal district

court judges should serve under a five year term limit. If they were subject to a five year term limit, our federal district court judges would learn some humility, and a larger number of lawyers in the community would have a chance to gain judicial experience serving on the federal bench. This upgrading of the federal judiciary could be accomplished if federal judges' terms expired within five years after their appointment. Because that beneficial reform would require a Constitutional Amendment, it will not happen in the foreseeable future. In the meantime, white collar criminals should not lose their freedom. The elimination of prison sentences could be accomplished by Congressional statutes.

All prison sentences handed down by federal district court judges to white collar criminals are arbitrary to the extent that they reduce the criminals' life expectancy. The damage done to human beings in prison is horrendous. The depth of psychic wounds as well as the exposure to the collapse of physical health are not justified by any legal theory of retribution or reform.

To be denied the "hale fellow well met" daily greeting of your former colleagues and to be shamed and shunned by your neighbors is **adequate punishment** if your ill gotten gains have been taken.

To be denied a daily walk in a park and the freedom to sleep and eat at times of your own choosing are beyond the pale of paying your debt to society. Personal freedom should only be denied to people who commit crimes of violence because their freedom poses a physical danger to society. If you are convicted of a white collar crime, you will be forever reminded of your failure by the averted glance of a former friend or loved-one who is profoundly

disgusted. You will not be invited to speak on Morning Talk Shows about your amazing business success. Instead, you will become a social pariah. Repeat offenders as evidenced by subsequent and new felony convictions – i.e., career criminals – could and should face reconsideration and possible prison sentences.

Legal scholars are well aware that the Death Penalty is frequently challenged these days based on the Eighth Amendment to the United States Constitution which prohibits **cruel and unusual punishment**. I stand by my position that white collar criminals should not be sentenced to prison because that punishment is a gradual death sentence.

The Eighth Amendment of the United States Constitution prohibits our federal government from imposing excessive bail, excessive fines, or cruel and unusual punishments. Sentencing white collar criminals to prison is cruel and unusual punishment because it is excessive — it reduces life expectancy. Although formal longitudinal studies may not exist, any prison doctor can confirm – based on his experience with convicts – that a prison sentence significantly reduces life expectancy.

Anticipating my opposition, I am well aware that policy makers who could adopt this change, or who could oppose this shift in our culture, will argue that **moral hazard** is a flaw in my model.

In economics, **moral hazard** occurs when someone increases their exposure to risk when insured, especially when a person takes more risks because someone else bears the cost of those risks. A moral hazard may occur where the actions of one party may change to the

detriment of another after a financial transaction has taken place.

A party makes a decision about how much risk to take, while another party bears the costs if things go badly, and the party isolated from risk behaves differently from how it would if it were fully exposed to the risk.

Moral hazard can occur under a type of information asymmetry where the risk-taking party to a transaction knows more about its intentions than the party paying the consequences of the risk. More broadly, moral hazard can occur when the party with more information about its actions or intentions has a tendency or incentive to behave inappropriately from the perspective of the party with less information.

The elimination of prison sentences does not, however, make a white collar crime risk-free. Deterrence is still served and retribution is still served by taking the criminal's ill gotten gain, stripping away his licenses, and forever staining his good name. In effect, white collar criminals could be placed immediately on parole when they are first convicted. Repeat offenses followed by new convictions could be dealt with more harshly.

[An excerpt from a recent scholarly article]
Professor Scott Galloway
NYU Stern School of Business
No Mercy/No Malice
"Incarcerated"
October 14, 2022

“Regardless of skin color, sexuality, or politics, young men are failing. They are falling behind academically, failing to attach to mates, and trading potential for addiction. Their less-evolved prefrontal cortex is especially susceptible to opportunities for quick dopa hits that have been engineered by firms whose profit incentives are in direct contrast to their economic and emotional well-being. Men make up just 40% of college enrollment and one third of college graduates. They are twice as likely to overdose and 3.5 times more likely to commit suicide than women. Women also face challenges in society, especially in the labor force. However, when we discuss the challenges facing women, we ask society to change. When young men struggle, we ask men to change.

“Young men in America failing,” should be rephrased as “America is failing its young men.” We over discipline, over medicate, and overexpose them to drugs, pornography, and gambling, then blame them for their mistakes. The ways we are failing young men are legion, so let’s focus on one problem: We put too many in prison.

“Locked Up

“Two foundational truths re **American imprisonment**: One, we are the global leader in locking up our own citizens, by a wide margin. We rank ahead of El Salvador, which has the world’s highest homicide rate, and Cuba, an authoritarian regime that imprisons people for “pre-criminal dangerousness.” There are nearly twice as many prisoners in the U.S. as there are lawyers. There are more Americans behind bars than serving in the military or working as full-time cops and firefighters. We have fewer citizens protecting our shores and neighborhoods than neighbors we believe need to be behind bars. [emphasis added]

“Second, mass imprisonment does not work — it doesn’t reduce crime. Our unrivaled incarceration rate is neither the result of a high number of crimes nor the cause of a low one.

“Our intuition tells us that incarceration reduces crime through incapacitation — taking criminals “off the street” prevents them from committing future crimes. However, the actual impact on crime rates is surprisingly small, and, at 2 million Americans in prisons and jails, we are deep into the diminishing returns. A 2014 assessment from the National Resource Council concluded that there was no reliable statistical evidence showing more than modest decreases in crime rate due to increased incapacitation. Simpler evidence? Despite imprisoning people at 10 times the rate of peer countries in Western Europe, we have a similar crime rate.

“There’s a host of reasons for the limited impact of incapacitation: Many crimes are one-offs; violent crime in particular decreases rapidly with age; and a small minority of criminals commit most crimes. At bottom, though, incapacitation theory rests on a misconception that criminality is a personality flaw, that there are “bad apples” we can remove from the barrel. But most crime flows from circumstance, from failures of socialization, reductions of opportunity, and mental health issues. Poverty and discrimination are crime volcanoes, and you don’t stop the volcano by addressing the lava. Drug-related crimes are particularly resistant to reduction due to incapacitation — drug rings have no trouble finding more disaffected young men to stand on corners.

“Identifying and imprisoning high-risk offenders reduces future crime, but warehousing hundreds of thousands of low-level offenders actually increases it. Dozens of studies have shown that imprisonment does not reduce an inmate’s

propensity to commit crimes, and there is growing evidence that imprisonment actually encourages future crime — due to decreased legal employment options for those with a record and the exposure to violence and criminality in prison itself. Q: What's a cause of crime? A: Prison.

"We see this at scale. Once the incarceration rate exceeds 325 per 100,000 residents, crime gets worse, not better. Reductions in state prison populations during the early 2000s were associated with reductions in crime rates. Prisoner releases due to Covid were again associated with decreases in crime rates.

"Longer prison sentences were sold to voters as a means of "deterrence" — scaring criminals straight. It doesn't work. Even the Department of Justice (which runs the federal prison system) has emphatically concluded that while the threat of being caught is a deterrent, the length of the resulting prison sentence is not. In 1994, California enacted one of the toughest sentencing laws in the nation, the highly publicized "3 strikes" law, which mandated a 25-year sentence for a third felony conviction. It was sold as a deterrent, a visible, public threat to criminals. Three decades later, it costs Californians over $3 billion per year, but its impact on crime in California has been measured at "negligible" to "small" and "not nearly as large as early projections estimated.

[***material omission from the quoted article***]

"We need to send less people to prison, and start letting people in … out. Diversion programs for drug offenders and the mentally ill are incredibly successful and should be more widespread. Just one example: In Miami, a program to divert mentally ill defendants into treatment rather than jail has cut the

county jail population in half, saved taxpayers $50 million per year, and cut recidivism among diverted defendants from 75% to 20%.

"Breaking our national addiction to incarceration will require a decade-long, massive prison release program. Which in turn will require a serious investment in true rehabilitation: mental health care, addiction treatment, job training, and re-entry programs. We need fathers (and mothers) back in homes and to stop holding millions hostage for political and financial gain. If we are serious about helping young men, we need to return more men to the community. The incarceration of the populations of Miami, Atlanta, Cincinnati, and Memphis combined has left a void that creates a downward spiral of despair and more incarceration for the boys in that community."

Chp 22

Insider Trading
and
The SEC Enforcment Actions

Insider trading is the trading of a public company's stock or other securities based on material nonpublic information about the company.

According to Noel J. Francisco, United States Solicitor General, in a 2016 Forbes Magazine Article:

“Like many federal criminal prohibitions, what constitutes “insider trading” is completely unclear and largely unknown. On the one hand, trading on the basis of all obtainable information is what savvy financial managers (like the person managing your retirement account) are supposed to do. On the other hand, trading on the basis of material, nonpublic information can open the door to a federal subpoena, a grand jury indictment, and potentially a long-term stay in federal prison. The difference between the legal and the criminal depends on a set of esoteric, generalized pronouncements that federal courts have devised and issued over the years.

“On Wednesday, the Supreme Court is going to give insider-trading law a fresh look in Salman v. United States, which raises the issue of whether

committing that crime requires that the person dispensing the inside information (the "tipper," in legal parlance) has received a concrete benefit from the person who receives the information (the "tippee"), as opposed to just gratuitously sharing the information. But as the Supreme Court reconsiders insider trading, it is worth asking how we got here—not just in this area of criminal law, but for the many sprawling and opaque federal criminal prohibitions that have spurred calls for reform by everyone from the ACLU to the Koch brothers. Most people think our federal criminal justice system is the fairest legal system in the world, but the reality is much different. Indeed, the federal criminal justice system is not even as fair as the civil one; it is often much easier to protect your money from a plaintiff than to defend your liberty from a prosecutor. One basic reason for that difference—and one reason why the law of insider trading is such a confused mess—is that federal judges often refuse to dismiss criminal charges that are based on an incorrect understanding of what the law actually prohibits."

[ON LINE NEWS ITEMS]

"Former United States Congressman (R.NY) was sentenced to serve 26 months in federal prison on January 17, 2020 for insider trading. Collins had been on

the board of directors of Innate Pharm when he saved his son nearly $800,000 in losses."

"A Manhattan federal court judge Friday sentenced disgraced former Congressman Chris Collins to 26 months in prison for insider trading."

"The 69-year-old upstate Republican pleaded guilty in October to charges of insider trading and lying to the FBI."

"He admitted to calling his son, Cameron, from the White House Rose Garden to share confidential information about an Australian biotech company, Innate Immunotherapeutics — a crime that was caught on camera by a CBS News crew."

"The younger Collins took his father's advice and dumped his shares, avoiding around $571,000 in losses."

"Judge Vernon Broderick described Collins' actions as a "crime that goes to the heart of our financial system" and creates a "perception that the market is rigged."

"The former Buffalo-area lawmaker addressed the courtroom before he received his sentence, offering a rambling set of remarks that were often unintelligible and punctuated with sobs."

[ON LINE NEWS ITEMS]
March 30, 2020 at 8:06 p.m. GMT+3

"The Justice Department is investigating stock trades made by at least one member of Congress as the United

States braced for the pandemic threat of coronavirus, according to a person familiar with the matter."

"The investigation is being coordinated with the Securities and Exchange Commission, and is looking at the trades of at least one lawmaker, Sen. Richard Burr (R-N.C.), the chairman of the Senate Intelligence Committee."

"As head of the powerful committee, Burr received frequent briefings and reports on the threat of the virus. He also sits on the Senate Health, Education, Labor and Pensions Committee, which received briefings on the pandemic."

"In mid-February, Burr sold 33 stocks held by him and his spouse, estimated to be worth between $628,033 and $1.7 million, Senate financial disclosures show. It was the largest number of stocks he had sold in one day since at least 2016, records show."

"A Justice Department spokeswoman declined to comment as did a spokesman for the SEC. The investigation was first reported by CNN."

"Burr's lawyer, Alice Fisher, said in a statement that the law allows any American, including a senator, to "participate in the stock market based on public information, as Senator Burr did. When this issue arose, Senator Burr immediately asked the Senate Ethics Committee to conduct a complete review, and he will cooperate with that review as well as any other appropriate inquiry. Senator Burr welcomes a thorough review of the facts in this matter, which will establish that his actions were appropriate."

"A law called the Stock Act prohibits members of Congress, their staffers and other federal officials from trading on insider information obtained from their government work. No one has been charged under the Stock Act since its passage in 2012, and some legal experts consider it a difficult statute under which to file criminal charges."

"The investigation is in its early stages, according to the person familiar with the matter, who spoke on the condition of anonymity to discuss a sensitive case. It was not immediately clear how many stock trades, or lawmakers, would come under scrutiny in the probe. Burr's stock sales included shares in some industries that were later hit hardest by the pandemic's rapid spread throughout the United States, including hotels, restaurants, shipping, drug manufacturing and health care, records show. The senator has said he relied specifically on "CNBC's daily health and science reporting out of its Asia bureaus" to inform his trades. "

"Sen. Kelly Loeffler (R-Ga.) has also come under fire for her recent stock trades. In the weeks after a closed Senate briefing, Loeffler sold holdings valued at somewhere between $1.25 million and $3.1 million in companies including ExxonMobil and AutoZone, which have seen their stock prices fall significantly. She also purchased shares in a company that sells teleworking software."

"Loeffler has said that sales by her and her husband, Jeffrey Sprecher, the chairman of the New York Stock Exchange, were made "at the decision of our investment managers" and that she learned of them only after they'd occurred. "Certainly I had no involvement," Loeffler told CNBC earlier this month."

Chp 23

M&A (Mergers & Acquisitions)
The Renaisance Lawyer

It is perhaps symptomatic of today's seriously tone deaf legal profession (whose members love to hear the sound of their own names and simultaneously who filter out the noise of constructive criticism) that most business oriented law firms have at least one partner who is designated as the "M&A" lawyer – translation: the Mergers and Acquisitions lawyer. Problematically, however, the prospective client never knows whether the M&A lawyer is handling acquisitions on the level of Joe's Bar & Grill, at the mundane end of the spectrum of his experience, or the merger of CVS Health Corp with Aetna Insurance Company at the less likely fabulous end of the spectrum of his experience. Within the corridors of his own law firm, the M&A lawyer is frequently exalted and lionized. When reviewed in his local bar association's Bar Journal or Bar News, he is praised as a veritable **Renaisance Lawyer**.

A healthy skepticism may serve you well in this situation.

Sooner or later, you will encounter or perhaps retain the services of one these M&A lawyers. Business entities grow and prosper (and temptations to manipulate stock prices increase dramatically) through mergers and acquisitions. Growth through M&A can be managed sensibly but is more likely to be chaotic. Was the explosive growth of **Enron** orderly or chaotic? Was the explosive growth of **World Com** orderly or chaotic? Hence, the need for this cautionary review.

Nota bene: Best Practices

This discussion of M&A should begin with a financial question: Does your M&A lawyer know what is a credit derivative? If not, resume your search for competent counsel.

At the irreducible minimum, the M&A lawyer should thoroughly review the following documents (**hard copies** and **digital records**) of the company to be acquired:

Basic Corporate Documentation (and digital records) including, but not limited to:

1. Articles of Incorporation and Proof of filing
2. Bylaws, Amendments, all Corporate Minutes
3. Stock authorized, issued
4. Stock sold or otherwise transferred.
5. Buy-Sell agreements, Shareholder agreements
6. Stock restriction agreements
7. Voting Trusts (voting trusts cum voting agreements, if any there be)

Asset Documentation (and digital records):

8. Real estate deeds (subordination agreements)
9. Legal descriptions of all real properties (occupied or owned)
10. Real property leases
11. Patent, trademark, service mark registrations
12. Description of patents, trademarks, copyrights
13. Description of intellectual property; software

Debt Structure Documentation (and digital records):

14. Deeds of Trust (subordination agreements)
15. Voting Trust Agreements

16. UCC-1 financing statements
17. Stock pledge agreements
18. Loan transactions with applications
19. Lines of credit agreements with applications
20. Guarantees and/or Hold Harmless agreements (company and personal)
21. Notices of default: demands for indemnification; subrogation liens
22. Oral agreements exceeding a threshold

Federal and State Licenses (and digital records):

23. City business licenses
24. State licenses
25. Federal licenses
26. Correspondences and emails to and from city, state or federal regulatory agencies

Documents (and digital records) of Commercial Transactions & Contracts:

27. Licensing agreements
28. Royalty agreements
29. Partnership agreements
30. Franchise agreements
31. Employee stock sale or purchase agreements

Documents with emails (and digital records) concerning litigation, past, present and anticipated:

32. Plaintiff lawsuits: pleadings, discovery
33. Defendant lawsuits: pleadings, discovery
34. Attorney opinion letters
35. Demand letters and threats of litigation
36. Pleadings concerning all litigation

Financial Statements (and digital records):

37. Eight (8) years prior state tax returns
38. Eight (8) years prior Federal tax returns
39. Franchise fee correspondence
40. Eight (8) years prior financial statements
41. Audit letters, including emails
42. Summary of all deposit accounts
43. Eight (8) years of all bank statements
44. General ledger books (including digital data)

Federal and State Securities:

45. State securities filings
46. State securities registrations
47. Federal securities registration, offering circulars, disclosure documents, correspondence, emails
48. Federal securities compliance documents (e.g.,10K, 10Q), correspondence, emails

Professional Documents (and digital records):

49. Attorney correspondence and retainers
50. Attorney opinion letters, if any there

The merger transaction may be an asset purchase or a stock purchase. It might start with a tender offer (with conditions precedent and subsequent) to acquire some or all of the target company's outstanding stock at a stated price. The "buyer"accepts not only the assets but also the liabilities of the acquired company. Both companies typically make representations accompanied by disclosures. The merger agreement includes covenants governing buyer indemnification, non-competition agreements, and the future operation of the surviving company including perhaps employment contracts.

Ch 24

Management & Leadership
Speech Act Theory
Firm Meetings

Managers who are expected to demonstrate leadership need an **"Elizabeth MacDonald Course"** in Speech Act Theory. Leadership requires that the speaker is precise, assertive, and clearly conveys commands. Think of it this way – Your speech must be an agent of change, and your speech must change the world – at least the world that you inhabit.

Words matter. Words are value-laden tools of communication. Clarity, recency and repetition help to reinforce an important message. Speaking with conviction is essential. Is it possible to employ a glass-cutting accent? If so, use that tool as well.

In a recent interview In Depth, BookTV.org (C-Span) author Elizabeth MacDonald said: As we communicate, there are 3 separate processes at play:

"What we say,
What we mean when we say it, and
What we accomplish by saying it "

Speech-Act philosopher, John Searle, gives the following classifications of speech acts:

- "**assertives** – the truth of the expressed proposition, e.g. reciting a creed

- "**directives** – speech acts that are to cause the hearer to take a particular action, e.g. requests, commands and advice
- "**commissives** – speech acts that commit a speaker to some future action, e.g. promises and oaths
- "**expressives** – speech acts that express the speaker's attitudes and emotions towards the proposition, e.g. congratulations, excuses and thanks
- "**declarations** – speech acts that change the reality in accord with the proposition of the declaration, e.g. baptisms, pronouncing someone guilty or pronouncing someone husband and wife."

Nota bene: Best Practices

When composing a speech for a firm meeting, think carefully about changing the world. Be clear in giving directions. Raising your voice at a firm meeting is rarely effective. Speaking slowly but decisively can be more powerful and persuasive. A good preface to a serious remark might be – "**Is the lowered voice audible?**"

Firm Meetings. Ask for feedback – questions, proposals and grievances. Listen to the feedback. Delegate asssignments to investigate problem areas.

Anticipate Litigation. Ask for feedback – but anticipate lawsuits down the road. If the firm is living through a crisis that could be the subject of future litigation, then the minutes and emails generated by the meeting would probably be discoverable in pre-trial lawsuit discovery proceedings.

Chp 25

Expungement

Expungement is a civil action in which the petitioner asks the court to expunge the court records of an earlier criminal conviction and make them unavailable in state and federal respositories. The petitioner is asking the court to destroy the criminal conviction file or to seal the file. It is also possible to expunge the record of an "arrest" which did not progress to a conviction.

Some states, for example New York, do not allow expungement. The standards vary among counties and states through out the United States. There is nearly always a waiting period after conviction; there will be a review of criminal history; and felonies about violent crimes, sex offenses, DUI, and domestic violence are not eligible.

Vacating a criminal conviction is a related civil action that might be available.

Chp. 26

Presidential Pardon
U.S. Constitution (Section 2, Clause 1)
"Pardon Me Mr. President"

The Presidential Pardon Power can be and should be interpreted to permit the United States President to pardon any offence under federal law and also simultaneously to pardon the same offence under state law when the pardon in question seeks to pardon a crime arising out of and connected with the exercise of instrumentalities of interstate commerce. That result is the only possible legal, moral and political result – after all, **partial justice is itself an injustice**.

The Presidential Pardon power is a "grant" of power and not a "limitation" of power. The founding fathers did not expressly prohibit the simultaneous pardon of federal and state law for the same violation of law in the Constitution so that the Presidential Pardon Power leaves open that result. If a Presidential Pardon were followed by a prosecution and conviction and a prison sentence in a state court, then that Presidential Pardon shall have been a meaningless gesture. Due process of law – i.e., fundamental fairness – requires a full pardon in solido across both federal and state law. Any other interpretation would render the Constitution a bundle of contradictions.

A Presidential Pardon includes the following: (1) the power to re-verse a conviction or avoid a prosecution, (2) the power to commute or reduce a sentence, (3) the power to reverse fines and forfeitures, (4) the power to postpone

punishment, and (5) the power to grant amnesty. It can be narrowly framed to confer a pardon or amnesty upon specific offenders, such as President Ford's pardon of President Nixon or pardon a class of offenders, e.g., President Carter's amnesty for Vietnam draft avoiders.

President Trump granted commutation, for example, to Illinois' former governor, Rod Blagojevich, who had been convicted in 2011 for attempting to sell Barack Obama's senate seat.

Dual Sovereignty - Article I - Presidential Pardon: Supreme Court Justice Felix Frankfurter put this issue in "states' rights" terms in Bartkus v. Illinois, 359 U.S. 121 (1959), writing "it would be in derogation of our federal system to displace the reserved power of the States over state offenses by reason of prosecution ... by federal authorities beyond the control of the states." That decision has been misapplied, misconstrued and misunderstood to mean that a President can **never** simultaneously pardon federal and state offences.

What follows here is a sample pardon which hypothetical President Goodfellow is granting to Jack Shame. This example presupposes that state law [hypothetically, **New York** law] and federal law both apply to the facts of Jack Shame's criminal conduct. Thus, the criminal conduct in question is an offence against the United States and an offence against New York. This approach to a Presidential Pardon has never been used:

The Wolfstone Pardon — Let Justice Be Full Justice!

"President Goodfellow hereby grants a full and unconditional pardon, *in solido* across the board, to Jack Shame, for any and all criminal actions, conduct or transactions which are proscribed by **federal law** and for any and all identical or similar or co-extensive criminal actions, criminal conduct or transactions which are proscribed by **state law**.

"This full and final pardon extends to and includes any and all criminal actions, conduct or transactions which arise out of or are connected with the exercise of any and all **instrumentalities of interstate commerce**, including but not limited to emails, faxes, wires, interstate travel, international travel, electronic voice or image or video communications within the United States or beyond the borders of the United States.

"Specifically, and without limiting the generality of the foregoing, this full and final pardon extends to and applies to all criminal laws of the State of [**New York**] and federal laws in the United States Code.

"The person who is pardoned by this document, Jack Shame, shall have the right, and is hereby granted the right, to remove any state court prosecution to a United States District Court for all

pre-trial and trial purposes and is ultimately guaranteed the right to have this pardon reviewed by the United States Supreme Court. Jurisdiction exists based on federal question jurisdiction.

“The person who is pardoned by this document shall have the Constitutional right to allow the trier of fact – whether judge or jury – to read and review this document before, after and during any investigation, grand jury proceedings and prosecution and appeals.

“The Union of States constituting the United States of America derives its existence from the social contract and legal instrument which we know as the United States Constitution. Each individual state derives its existence and authority to enact criminal laws, in turn, from the said Constitution which binds the Union of states. The separate sovereignty of the states doctrine is not absolute, and the separate sovereignty doctrine does not apply generally to pardons granted by the President of the United States and it does not apply specifically to Presidential pardons of conduct **arising out of or connected with the exercise of instrumentalities of interstate commerce.**”

Contrary to the conventional wisdom – i.e., the print and broadcast media wisdom which is commonly accepted uncritically without the benefit of analytical thinking – I submit that this **Wolfstone version** of a Presidential Pardon acknowledges that the Constitution provides and intends a "grant" of power and not a "limitation" of power. The founding fathers who drafted the U.S. Constitution did not include any express prohibition in our Constitution about pardoning "state law offences" so it is clear that they leave open the "possibility" that I am now offering as a "reality."

Obviously, if the first paragraph of the Wolfstone Pardon is included in any future Presidential Pardon in order to pardon simultaneously state and federal offences, then that Wolfstone Pardon would become a one-way ticket to the United States Supreme Court.

Prior to the Wolfstone Pardon, the U.S. Supreme Court would have undoubtedly analyzed the Presidential Pardon in the context of the Separate Sovereigns Doctrine which provides that where there are two sovereigns and two laws then there are two offences. In other words, the federal prosecutor and the state prosecutor would be described as operating in concurrent criminal jurisdictions so that the same act can constitute an offence against both. Thus, in adopting the Constitution, the states have "split the atom of sovereignty." See Gamble v. United States, 139 S.Ct. 1960 (2018)(Fifth Amendment – construing the Double Jeopardy Clause).

The legal theories, the line of cases, and the various dissenting opinions are all discussed in Volume 133, Harvard Law Review (November 2019) pages 312-321 pertaining to the Dual (or Separate) Sovereignty Doctrine.

I have no argument with federalism or the Separate Sovereignty Doctrine; however, those doctrines do not and should not apply to Presidential Pardons which pardon crimes arising out of the exercise of **instrumentalities of interstate commerce.** The Presidential Pardon Power included in the U.S. Constitution is a special case and should not be consigned to the scrap heap of history by allowing a misapplied and misconstrued version of federalism to deny a full legal pardon which expressly invokes and rests upon the Commerce Clause of the United States Constitution. **Partial justice is itself an injustice.**

Worth Noting: Justice John Marshall directed Justice Johnson to write a concurring opinion in **McCulloch v. Maryland** (and John Marshall either wrote the concurring opinion or influenced it) on the issue of Slavery, and the opinion states that **federal law would control over state law.** All state law would fall away. This point is made by law professor Joel Richard Paul in a book review interview at the Supreme Court Historical Society on April 29, 2021 (about his book, Precedent: Chief Justice John Marshall and his Times)**.** Granted, the McCulloch v. Maryland opinion (and concurring opinion) is not dealing with and does not mention Presidential Pardon Power; however, the point is that federal law, e.g., the Presidential Pardon Power, does positively prevail over any doctrine about separate sovereigns if the alleged criminal conduct sought to be pardoned arises out of or is connected with the exercise of **instrumentalities of interstate commerce**.

Steve Bannon's Pardon

[Breaking News: STEVE BANNON HAS ALSO BEEN SENTENCED TO PRISON FOR FOUR MONTHS ON FRIDAY, OCTOBER 21, 2022 FOR REFUSING TO COMPLY WITH JANUARY 6TH HEARING SUBPOENA — Contempt of Congress]

Washington Post Opinion
Opinion by John S. Martin and
Philip Allen Lacovara
Jan. 29, 2021

"Accepting the pardon may prove financially costly for Bannon. By implicitly admitting his complicity in bilking Trump supporters who thought that they were helping to fund the border wall, Bannon's acceptance of the pardon may be treated as a damning admission in lawsuits against him seeking to recoup the misdirected contributions. In addition, a presidential pardon only excuses federal crimes, but it does not protect Bannon from state prosecutors.

"It is uncertain how the case against Bannon will proceed. He will either accept the pardon and live with the consequences of admitting his guilt, or go to trial and face the possibility of being convicted and going to prison. In either event, like anyone offered a pardon, he will not be able to maintain his claim of innocence unless he opts to stand trial rather than accept the

pardon — and then only if a jury finds him 'not guilty.' Trump's offer of a pardon hardly wipes the slate clean."

United States Department of Justice
Pardon Power. Define. Limits.
[https://www.justice.gov/jm/jm-9-140000-pardon-attorney]

"Standards for Considering Pardon Petitions.

"In general, a pardon is granted on the basis of the petitioner's demonstrated good conduct for a substantial period of time after conviction and service of sentence. The Department's regulations require a petitioner to wait a period of at least five years after conviction or release from confinement (whichever is later) before filing a pardon application (28 CFR Section 1.2). The Department may grant a waiver of the five-year requirement. In determining whether a particular petitioner should be recommended for a pardon, the following are the principal factors taken into account.

"**Post-conviction conduct, character, and reputation.** An individual's demonstrated ability to lead a responsible and productive life for a significant period after conviction or release from confinement is strong evidence of rehabilitation and worthiness for pardon. The background investigation customarily conducted by the FBI in pardon cases focuses on the petitioner's financial and employment stability, responsibility toward family, reputation in the community, participation in community service, charitable or other meritorious activities and, if applicable, military record. The investigation also serves to verify the petitioner's responses in the pardon

application. In assessing post-conviction accomplishments, each petitioner's life circumstances are considered in their totality: it may not be appropriate or realistic to expect "extraordinary" post-conviction achievements from individuals who are less fortunately situated in terms of cultural, educational, or economic background.

“Seriousness and relative recentness of the offense. When an offense is very serious, (e.g., a violent crime, major drug trafficking, breach of public trust, or white collar fraud involving substantial sums of money), a suitable length of time should have elapsed in order to avoid denigrating the seriousness of the offense or undermining the deterrent effect of the conviction. In the case of a prominent individual or notorious crime, the likely effect of a pardon on law enforcement interests or upon the general public should be taken into account. Victim impact may also be a relevant consideration. When an offense is very old and relatively minor, the equities may weigh more heavily in favor of forgiveness, provided the petitioner is otherwise a suitable candidate for pardon.

“**Acceptance of responsibility, remorse, and atonement.** The extent to which a petitioner has accepted responsibility for his or her criminal conduct and made restitution to its victims are important considerations. A petitioner should be genuinely desirous of forgiveness rather than vindication. While the absence of expressions of remorse should not preclude favorable consideration, a petitioner's attempt to minimize or rationalize culpability does not advance the case for pardon. In this regard, statements made in mitigation (e.g., "everybody was doing it," or I didn't realize it was illegal") should be judged in context. Persons seeking a pardon on grounds of

innocence or miscarriage of justice bear a formidable burden of persuasion.

"**Need for Relief**. The purpose for which pardon is sought may influence disposition of the petition. A felony conviction may result in a wide variety of legal disabilities under state or federal law, some of which can provide persuasive grounds for recommending a pardon. For example, a specific employment-related need for pardon, such as removal of a bar to licensure or bonding, may make an otherwise marginal case sufficiently compelling to warrant a grant in aid of the individual's continuing rehabilitation. On the other hand, the absence of a specific need should not be held against an otherwise deserving applicant, who may understandably be motivated solely by a strong personal desire for a sign of forgiveness.

"**Official recommendations and reports.** The comments and recommendations of concerned and knowledgeable officials, particularly the United States Attorney or Assistant Attorney General whose office prosecuted the case and the sentencing judge, are carefully considered. The likely impact of favorable action in the district or nationally, particularly on current law enforcement priorities, will always be relevant to the President's decision. Apart from their significance to the individuals who seek them, pardons can play an important part in defining and furthering the rehabilitative goals of the criminal justice system."

Article I, Presidential Pardon
Dual Sovereignty Doctrine

As previously mentioned, Supreme Court Justice Felix Frankfurter interpreted this problem in "states'

rights" terms in a 1959 case called Bartkus v. Illinois, 359 U.S. 121 (1959), writing "it would be in derogation of our federal system to displace the reserved power of the States over state offenses by reason of prosecution ... by federal authorities beyond the control of the states."

In Gamble v. United States, 139 S. Ct. 1960 (2019) , Justice Alito writing for the court in a 7-2 decision, the Supreme Court upheld the dual-sovereignty doctrine and stated that the Double Jeopardy Clause protects individuals from being punished twice "for the same offence" — however, if an individual is tried by two sovereigns, those are two separate offences. Speaking eloquently, the decision says the people **split the atom** of sovereignty.

Au contraire! The Wolfstone Pardon is beyond the scope of the Dual Sovereign Doctrine because it is anchored in the Presidential Pardon Power — a unique Constitutional power — **and** is predicated on the fundamental truth that a Presidential Pardon would be an exercise in futility if it could be undercut by the Dual Sovereignty Doctrine when the crimes pardoned arise out of and are connected with **the exercise of instrumentalities of interstate commerce.** Thus, the Gamble case analysis does not apply to Presidential Pardons for offences arising out of the exercise of instrumentalities of interstate commerce.

For the sake of comprehensivity, it bears noting that Justice Gorsuch dissented in the Gamble decision arguing that federal and state governments were not separate sovereigns but rather "two expressions of a single and sovereign people." Justice Ginsberg also dissented.

Chp. 27

Retaining Counsel
Legal Fees
Changing Counsel

If you are retaining the services of a criminal lawyer for the first time, you will soon learn the basic truth that your relationship with your attorney is temporary, transactional and tactical. Simply put, your relationship with your counsel is based first and foremost on your legal fee.

The poorly informed consumer of legal services frequently believes that higher quality and higher price go together. Be advised, however, that you will not necessarily get more bang for your buck when you hire a pricey lawyer. You are wise to inquire into your prospective counsel's experience and track record. Listen carefully to his sales pitch and ask questions. Ask him for his opinion as worst-case-scenario. Ask him for his opinion as to best-case-scenario. Lawyers will always be more flexible when a celebrity defendant walks through the door of his office.

Changing counsel in mid-stream is rarely a good idea. Any defendant who changes counsel after trial has commenced is running the risk that the assigned judge will get the impression that a well meaning lawyer could no longer tolerate a sociopathic client.

Nota bene: Best Practices

Retaining legal counsel, the terms and conditions of representation, and legal fees charged should be reduced to a written agreement. The attorney whom you have engaged should **represent and warrant** in writing that he has the authority to bind the lawfirm. Billings should be itemized and detailed at regular and frequent intervals. Lawyers' fees and paralegals' fees should be separately stated. The name(s) of the lawyer(s) who are assigned to "do the work" should be agreed upon. If you meet with and retain a Partner in a respected law firm, you should confirm in writing that he will not delegate your case to one of his supposedly capable Associates or Junior Partners – the Partner whom you have hired should have primary participation and continuing responsibility in your case. Fee disputes, if any, should be arbitrated by the bar association (not by a private arbitration firm). Your local Bar Association will most certainly have a mechanism for resolving attorney fee disputes between any attorney and his client. Your written agreement should also state that there is no appeal from the Bar Association's decision about fee disputes.

What is a reasonable attorney fee? The ABA Code of Professional Responsibility, 1.5, sets forth the following criteria for determining whether the lawyer's fee is reasonable:

"(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

"(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

"(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

"(3) the fee customarily charged in the locality for similar legal services;

"(4) the amount involved and the results obtained;

"(5) the time limitations imposed by the client or by the circumstances;

"(6) the nature and length of the professional relationship with the client;

"7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

"(8) whether the fee is fixed or contingent.

Do not pay your attorney with **cash**. If you have the misfortune of facing a prosecution, the prosecutor will elicit testimony that you paid your legal fee in cash. Your choice to pay with cash might be perfectly innocent, but it is pregnant with implication. Moreover, payment by **check** gives you the opportunity to make the check payable to the law firm's trust account – thereby ensuring a carefully monitored paper trail since lawyers consider

the trust account to be more sensitive than a business checking account.

Legal fees that lawyers charge in Seattle will not match the higher fees of comparable lawyers in a major metropolis like Los Angeles or Chicago or New York City. If a fee dispute goes all the way to a hearing or trial, an expert witness (who can testify about reasonableness in your attorney's community) will be valuable.

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Selecting a Truly Competent Lawyer

In addition to looking at counsel's experience and track record, the prospective client should consider these insights and these markers of competency:

He Is Comfortable In His Own Skin

A competent criminal trial lawyer is someone who has made friends with his shadow and learned to like himself.

Permit me to use this analogy that William Shakespeare would have offered if he were included in our discussion. Actors and actresses (as well as trial lawyers) spend hundreds of hours learning their craft, but the most important advice they hear is this: "Know yourself, be yourself and project yourself."

Literary critics know that the successful play writer, screen writer and actor have this goal in common – they must suspend disbelief. Human nature has equipped us with a natural skepticism so that we generally notice holes in the writer's plot; we notice flimsy props in a stage production; we are aware that a complex scientific procedure has been over-simplified to keep the story moving; we are aware that the lead actor or actress convincingly played the part of a totally inconsistent character in a recent but unrelated performance. When disbelief has been suspended in the theater or in the film, the viewing audience is captivated; becomes fascinated with the story; and cares mainly about how the resolution of the plot impacts the lives of the characters. The brain

continues to function, but the heart takes command – the viewer is seduced by the story and is incredibly more forgiving. Just as the theater audience continues to applaud during the encore, so too the jury returns a verdict of "**Not Guilty**."

Trial lawyers also devote large blocks of their time to "continuing legal education" seminars which help to develop courtroom skills (notably the art of making opening statements, cross-examination and making closing arguments), but at the end of the day they are told "Know yourself, be yourself and project yourself!"

Trial lawyers can learn valuable lessons from accomplished practitioners whose records are impressive, but they cannot win cases by imitating the voices, gestures and personalities of successful lawyers. Try as you may, but you will never duplicate the emotions projected by Gregory Peck in To Kill A Mockingbird. The members of the jury are more likely to be persuaded and care about the quality of justice rendered by their verdict when the trial lawyer has learned to be himself.

The worst critique that film or theater reviews can utter is that: "He was over acting ... He never learned his craft."

The worst feedback that a jury can offer when the guilty verdict has been returned and the judge allows the lawyers to debrief the members of the jury is that: "The trial lawyer was not believable ... We were not persuaded because the trial lawyer comes across as insincere. He obviously does not believe what he is advocating."

His Word is His Bond
He Enjoys Presumptive Respect

The competent trial lawyer understands that a handshake is more binding than a written contract – his word is his bond. While it is true that your attorney-client relationship will always be reduced to writing – not only for your peace of mind but also to satisfy the bar association's ethical requirement of a written contract – the point is that you should achieve the comfort level of believing that your lawyer's word is his bond.

When a Certified Financial Planner is sued for securities fraud, for example, he might wait two years for a bench trial or four years for a jury trial to validate his integrity. The competent trial lawyer's integrity is validated at the moment when his promise is spoken. His word is his bond.

In some professions the codes of ethics are thousands of pages long, but occasionally the ethical standard can be stated in one sentence. The one-sentence Cadet Honor Code adopted by West Point and the Air Force Academy adequately covers the problem: "We will not lie, steal, or cheat, nor tolerate among us anyone who does." The competent trial lawyer enjoys a reputation for integrity. He makes commitments with a handshake. He enjoys the same presumptive respect that we give to a cadet at one of the service academies.

Pride Goeth Before the Fall – Heroic Assumptions

Do you agree that the legal profession rests upon these three heroic assumptions?

1. That all lawyers will co-operate to make the system work smoothly;

2. That all lawyers are competent;

3. That all lawyers are honest.

The cynic is likely to comment: "If you believe those heroic assumptions about the legal profession, then you will believe that thunder curdles milk."

The competent trial lawyer will tell you that those heroic assumptions are indeed correct if you select the right lawyer in whom you place your trust. Do not lose faith in your lawyer because he appears to co-operate with the prosecutor. Co-operation is called "civility." Do not doubt your lawyer's competency if he admits occasionally that he was wrong about something and wants to change course. It's called "fine tuning." Do not resist your lawyer's sincerity in the search for the truth. It's called "facing reality."

Chp. 29

The Corruption Perceptions Index (CPI)

If your corporation or governmental entity is doing business with foreign governments, then you should check and double-check **The Corruption Perceptions Index (CPI)**. The CPI is an index published annually by Transparency International since 1995 which ranks countries by their perceived levels of public sector corruption.

Corruption Perceptions Index - Wikipedia
https://en.wikipedia.org › wiki › Corruption_Perceptions_Ind

Chp. 30

A No-Brainer
Using Trust Funds to Operate a Strip Club

The Florida Supreme Court has disbarred a suspended lawyer who operated a strip club with money from his attorney trust account.

The court disbarred lawyer Brett Hartley based on a referee's report that found he misappropriated client funds and abruptly abandoned his law practice. The Daytona Beach News-Journal covered this item.

A bar audit found Hartley used his attorney trust account as a business operating account for an adult entertainment business in Jacksonville, Florida called Flash Dancers.

Hartley had testified that funds for the business were deposited into his trust account because he was unable to find a bank that would allow him to operate a business checking account for an adult nightclub.

Client funds were also used to support Hartley's drug addiction and pay personal expenses.

ABA On-Line Journal (www.abajournal.com/news)
February 11, 202

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The Alford Plea

The Alford plea is a plea of guilty “containing a protestation of innocence.” Yes, it is a guilty plea, but it does not admit specific elements of the crime. In the 2006 case before the United States Court of Appeals for the Fifth Circuit, Ballard v. Burton, Judge Carl E. Stewart writing for the Court held that an Alford guilty plea is a "variation of an ordinary guilty plea". In October 2008, the United States Department of Justice defined an Alford plea as: "the defendant maintains his or her innocence with respect to the charge to which he or she offers to plead guilty".

In March 2009, the Minnesota House of Representatives characterized the Alford plea as: "a form of a guilty plea in which the defendant asserts innocence but acknowledges on the record that the prosecutor could present enough evidence to prove guilt." The Minnesota Judicial Branch similarly states: "Alford Plea: A plea of guilty that may be accepted by a court even where the defendant does not admit guilt. In an Alford plea, defendant has to admit that he has reviewed the state's evidence, a reasonable jury could find him guilty, and he wants to take advantage of a plea offer that has been

made. Court has discretion as to whether to accept this type of plea."

The U.S. Attorneys' Manual states that in the federal system, Alford pleas "should be avoided except in the most unusual circumstances, even if no plea agreement is involved and the plea would cover all pending charges." U.S. Attorneys are required to obtain the approval of an Assistant Attorney General with supervisory responsibility over the subject matter before accepting such a plea.

Chp. 32

Computer Fraud and Abuse Crimes
Hacking and Unconsented Entry

North Korea's 2014 "Sony Cyberinvasion" was proof positive that hackers – especially professionally trained hackers – can wreak havoc within the most sophisticated intranets. Fortunately, one of Sony's experts eventually found the "kill switch" embedded within the invading malware. One of Sony's executives famously said: "There are two kinds of people in the world – those who have been hacked and those who are not aware that they are being hacked."

Most firms – large and small – have multiple computer programing geniuses in their employ, and occasionally Jack Shame will remind you that your resident genius can hack into the competition. In that event, the genius and the dullard who deputizes him to do the "hacking" will face a felony prosecution.

Here are some of the violations and the federal sentences associated with the specific transgressions:

Provisions of the Computer Fraud & Abuse Act
18 U.S.C. § 1030

Obtaining National Security Information
10 yrs (20)

Accessing a Computer and Obtaining Information
1 or 5 yrs (10)

Trespassing in a Government Computer
1 yr (10)

Accessing a Computer to Defraud and Obtain Value
5 yrs (10)

Intentionally Damaging by Knowing Transmission
1 or 10 yrs (20)

Recklessly Damaging by Intentional Access
1 or 5 yrs (20)

Negligently Causing Damage and Loss by Intentional Access
1 yr (10)

Trafficking in Passwords
1 yr (10)

Extortion Involving Computers
5 yrs (10)

Attempt and Conspiracy to Commit such an Offense
10 yrs for attempt

The maximum prison sentences for second convictions are noted in parentheses. The moral to this story is that honest business people have the least crises and make the most money. Otherwise stated, hacking is easy to do, but it aint worth it!

Chp 33

Second Opinions On Deviations from Generally Accepted Accounting Procedures

According to Dr. Matt Mc Carthy, M.D., as set forth in his recent book ("Superbugs: The Race to Stop An Epidemic"), the better hospitals have designated one doctor on their staff who serves as an **Antibiotic Steward**. This doctor must grant permission before any doctor in the hospital treats a patient with an expensive antibiotic (Dr. Mc Carthy explains that he is referring to any antibiotic other than the five basic ones). Thus, the overuse of supercharged antibiotics is reduced.

By analogy, each culture should designate one CPA as the **GAAP Steward** who must be consulted and who must concur before any deviation from a GAAP is allowed. If Jack Shame is advocating that a departure from a familiar GAAP is essential to his proposal, then a written opinion should be received from the GAAP Steward. Failing that, no deviation from this gold standard is permitted.

Nota bene: Best Practices

The GAAP Steward's written opinion should set forth: A brief recapitulation of the problem to which his letter is addressed. If Jack Shame is advocating the deviation from the norm, then he should be identified.

An explicit statement of the applicable GAAP which he believes applies to the subject transaction or subject matter must be stated in the opinion letter. An analytical

conclusion and discussion of his opinion which is circulated among all members and supervisory personnel who might be affected is included in the opinion letter. Failing that, no deviation from this gold standard is permitted.

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Changing Counsel Might Create Chaos

[Excerpts taken from
January 20, 2020, The Hill]

"President Trump's former national security adviser, Michael Flynn, asked a court to let him withdraw his guilty plea on charges of lying to the FBI just two weeks before he was set to be sentenced.

"Flynn's lawyers made the request in a motion filed with the U.S. District Court for the District of Columbia a week after federal prosecutors recommended that he be sentenced to up to six months in prison. They accused the Justice Department of violating its plea agreement with Flynn:

"The prosecution seeks to rewrite history and send Mr. Flynn to prison," the filing reads.

"Mr. Flynn will not plead guilty. Furthermore, he will not accede to the government's demand that he 'disavow' any statements made in his filings since he obtained new, unconflicted counsel," his lawyers wrote. "Michael T. Flynn is innocent. Mr. Flynn has cooperated with the government in good faith for two years. He gave the prosecution his full cooperation."

"Flynn had plead guilty to lying to the FBI about his contacts with Russia's ambassador to the U.S. during the Trump transition period.

“His lawyers asked the court to delay his sentencing for at least a month. Prosecutors said in a brief filing that they would not oppose that request.

“Flynn reached a plea agreement with the special counsel's office two years ago and promised his cooperation with its investigation into Russia's efforts to meddle in the 2016 election.

“In December 2018, prosecutors initially recommended leniency for Flynn, citing his cooperation and his military record.

“But the relationship between Flynn and the government soured last year. Over the summer, he fired his legal team from the prestigious law firm Covington & Burling and hired Sidney Powell, a combative right-wing firebrand, to represent him.

“Judge Emmet Sullivan dismissed Powell's accusations that the prosecutors and the FBI had acted improperly by engaging in a political scheme against Flynn aimed at coercing him into pleading guilty.”

The moral to the story is this: changing counsel can upset relationships with the prosecutors and the judge.

The prosecution in Flynn’s case then revoked its recommendation for leniency saying that the former three-star Army general had refused to cooperate in recent months.

> "The sentence should adequately deter the defendant from violating the law, and to promote respect for the law," the Justice Department wrote in a sentencing memo. "It is clear that the defendant has not learned

his lesson. He has behaved as though the law does not apply to him, and as if there are no consequences for his actions."

The Michael Flynn case came to conclusion on November 25, 2020 when President Donald Trump signed a full and unconditional pardon for Flynn.

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Lori Loughlin
When Defendants Attack the Prosecutor

[Excerpts Taken from DEADLINE]

"Just like they said they would, lawyers for Lori Loughlin and her husband Mossimo Giannulli officially sought to have the harsh college bribery scheme case against their clients dismissed.

"The extraordinary government misconduct presented in this case threatens grave harm to defendants and the integrity of this proceeding," the Full House star's Latham & Watkins attorneys proclaimed amidst accusations that the feds pressured scam charity boss William Singer to implicate the duo and their not quite above board efforts to get their daughters into top tier schools. "That misconduct cannot be ignored," the defense team added in their federal court filing."

[From https://en.wikipedia.org/wiki/Lori_Loughlin]

"Loughlin and her husband Giannulli were indicted by the FBI and U.S. Attorney's Office for fraud and bribery offenses on March 12, 2019, in a nationwide college bribery scandal.[29][30] The following day,

“Loughlin and her husband surrendered to federal authorities in Los Angeles.[31] On May 22, 2020, Loughlin pled guilty to one count of conspiracy to commit wire and mail fraud, and her husband pleaded guilty to one count of conspiracy to commit wire and mail fraud and honest services wire and mail fraud.[3]

“Sentencing took place on August 21, 2020. Loughlin was sentenced to two months in prison while her husband was sentenced to five months.[32] [33] She served her two-month prison sentence at FCI Dublin in Northern California from October 30, 2020[34] to December 28, 2020,[35] when given a two-year supervised release, which will expire in December 2022. In addition, she was fined $150,000 and ordered to complete 100 hours of community service upon her release.[36] Giannulli was sentenced to five months in prison, fined $250,000 and ordered to complete 250 hours of community service. Giannulli reported to prison on November 19, 2020.[37][38] On April 2, 2021, he was released to home confinement before completing his sentence on April 16, 2021.[39][40] Loughlin's daughters were able to remain enrolled at USC.[18]”

Chp 36

"Profiteering"
"Disgorgement"
Recession Playbook
Greater Opportunities for Criminal Minds

Whether it is a question of the 2008 mortgage derivative debacle or the coronavirus outbreak which we have designated as COVID-19, the meltdown of financial markets creates turmoil and raises the possibility of a deep global recession. This prospect can motivate corporate executives to search for creative approaches to an existential threat.

Business executives who are facing a recession are trained to examine and reduce all discretionary, nonessential spending. Other places where they can look to reduce costs, beginning with slowing the pace of capital projects, are renegotiating contract costs and terms with outside suppliers.

Disgorgement or Accounting for Profits?

In Liu v. SEC (June 22, 2020), the Supreme Court of the United States held, in an enforcement action by the Securities and Exchange Commission, that a **disgorgement** order that did not exceed a wrongdoer's net profits and was awarded for victims constituted "equitable relief" that was permissible under the Securities Exchange

Act of 1934, 15 U.S.C. § 78u(d)(5), rather than punitive sanctions, which were historically excluded from the definition of "equitable relief" under the Act.

Chp 37

The Chinese Wall
A Twisted and Tortured Concept
In Business Lawfirms

According to Wikipedia, "Chinese wall is a business term describing an information barrier within an organization that was erected to prevent exchanges or communication that could lead to conflicts of interest. For example, a Chinese wall may be erected to separate and isolate people who make investments from those who are privy to confidential information that could improperly influence the investment decisions. Firms are generally required by law to safeguard insider information and ensure that improper trading does not occur."

Law

Chinese walls may be used in law firms to address a conflict of interest, for example to separate one part of the firm representing a party on a deal or litigation from another part of the firm with contrary interests or with confidential information from an adverse party.

Also Wikipedia says: “A leading note on the subject published in 1980 in the University of Pennsylvania Law Review titled "The Chinese Wall Defense to Law-Firm Disqualification" perpetuated the use of the term.”

I am personally disappointed and surprised that trial court judges do occasionally accept and honor the Chinese Wall rationale. When two lawyers in the same firm have clients with conflicting interests, I feel strongly that this “conflict of interest” cannot be sanitized with a clever label like “the Chinese Wall.” Let’s be forthcoming and call a conflict of interest a conflict of interest. Partners in law firms are always “looking out for each other.” You are insulting my intelligence when you tell me that partners in law firms are automatically above reproach and suspicion like Caeser’s Wife.

Chp 38

Take a Lesson from Evolutionary Biology

Charles Darwin was not investigating and was not theorizing about defendants facing criminal prosecutions, but his words apply equally to all life experiences and all life forms:

"It is not the most intellectual
of the species that survives;
it is not the strongest that
survives; but the species that
survives is the one that is able
to **adapt** to and to **adjust** best
to the changing environment
in which it finds itself."
Origin of Species

Charles Darwin was, nonetheless, giving insight into our behaviour when faced with a felony prosecution — you must adapt and adjust. Let this book inspire you and guide you when you are looking for ways to adapt and adjust.

Chp 39

RICO (Since 1970)
Evolution from Mafia to White Collar
[from Wikipedia]

“RICO was enacted primarily to eradicate the organized crime that had perplexed U.S. law enforcement for decades and caused the loss of billions of dollars from the U.S. economy. Since RICO’s enactment in 1970, the statute has been used to combat the Mafia, the Latin Kings street gang, and many seemingly legitimate businesses engaged in illicit activities. Additionally, it has been used as a weapon against white collar crime and even political movements, such as anti-abortion enterprises who lack a financial motive, which is in stark contrast to RICO proceedings immediately after enactment.”

“In fact, in 1985, the Supreme Court in Sedima v. Imrex Co. stated that “[i]nstead of being used against mobsters and organized criminals, [RICO] has become a tool for everyday fraud cases brought against ‘respected and legitimate’ enterprises.”

Federal appeals judge critiques Show Off opinions

[Debra Cassens Weiss reports on November 3, 2022 — quoting Judge Stephanos Bibas, 3rd U.S. Circuit Court of Appeals at Philadelphia who spoke to a gathering of Harvard Law School Students]

Judges should avoid "show-off" opinions that contain distracting jargon, bad jokes and pop culture references, said Judge Stephanos Bibas of the 3rd U.S. Circuit Court of Appeals at Philadelphia. Reuters covered Judge Bibas speech to Harvard Law students.

"For the show-off, it seems to be all about the judge's musings, even the judge's ambitions to be noticed," Bibas said. "'Look at me, look at me, I'm so cool." That is not authoritative. It is even disrespectful."

Some judges appear to crave attention on social media, but "the kind of cheerleading you get from Twitter is really dangerous," he said.

Bibas, an appointee of former President Donald Trump, pointed to an opinion that he wrote in a 2020 election challenge as an example of writing with clarity.

Chp 41

Changing Standards of Morality
One of God's Little Jests!

There are many examples in law, literature, politics and theology – but my favorite example is the Catholic church's demonizing and proscription of F. Scott Fitzgerald's novels in his hometown of St. Paul, Minneasota. Today, however, The Great Gatsby is one of the most widely celebrated and studied novels on the American university campus.

Changes in standards of morality frequently reflect gradual shifts in societal norms, but there do remain certain a priori truths: the Ten Commandments are a lasting summation of bright line rules in Western Civilization. It is above and beyond the scope of this book to catalogue all of the permanent bright line rules or probe the refinement of any of them – that task is better left to the judiciary and philosophers of jurisprudence.

Nota bene: Best Practices

The point is this: **Do Not Stop Fighting for your Innocence!**

How much passion do you have? Do you cherish your freedom to the outer limits of your

heart? Do you cherish your freedom to the innermost depths of your soul? Do you believe that morality will catch up with you in the fullness of time? If so, **Do Not Stop Fighting for your Innocence**

Chp 42

FYI
For Your Information
Inmate Accounts
Federal Bureau of Prisons

Approximately 129,000 prisoners are held in federal prisons throughout the United States by the Federal Bureau of Prisons. Inmate accounts total more than $100 milion. Jason Wojdulo, a recent retiree from the United Sttes Marshall service has tried unsuccessfully for many years to change the Bureau's practices with respect to inmate accounts.

The source of these deposits can result from terminating a 401(k) retirement account or receiving payments from insurance companies.

Problematically, however, the money is apparently not reachable by crime victims and cannot be forced to make child support payments.

Devlin Barrett published an article on June 9, 2021 exclusive to the Washington Post entitled "Federal Prisoners hold $100 million in government run accounts, shielded from criminal scrutiny and debt collection.

“Inmates are using this banking system to shelter this money” because it is not subject to U.S. Treasury regulations or federal laws designed to prevent financial institutions from being exploited by criminals, said Jason Wojdylo, who recently retired from the U.S. Marshals Service after spending years trying unsuccessfully to persuade the Bureau of Prisons to change its practices. “We have actually discovered the source of deposits in some cases to be from ongoing criminal conduct, and we’ve opened up criminal investigations in some of these instances.”

“None of the inmates with the biggest government-account balances are household names. According to the individual familiar with the program, one of the biggest account holders is a disgraced former doctor with more than $250,000, while a former member of the military serving a life sentence for murder has more than $200,000.
Federal inmate accounts run by the Bureau of Prisons are not subject to the criminal and regulatory scrutiny that those of non-incarcerated Americans face. Under the Bank Secrecy Act, everyday account holders who move more than $10,000 in cash can be flagged with a suspicious activity report, potentially prompting an investigation, but that law does not apply to the Bureau of Prisons, because even with $100 million

in accounts, the agency is not considered a financial institution. The agency also does not run its bank transactions through a Treasury Department screening program meant to flag outstanding debts, officials said."

21 USC 853, 881 (Drug Forfeiture Statute)
18 USC 981 (Money Laundering)
18 USC 924(d) (Firearm Forfeiture)

Chp 43

Internet Security
"Bad Hygiene"

According to Cisco CEO, Chuck Robbins, many security breaches on the internet are bad hygiene. Obvious examples of Bad Hygiene are failure to change passwords periodically and failure to download security updates when offered by Apple and/or Microsoft.

See, https://www.usip.org/sites/default/files/MC1/MC1-Part2Section16.pdf

Confidentiality, integrity, computer data; forgery and fraud; child pornography; copyright infringement are four categories of crimes which include nine specific criminal offenses.

See also, https://www.justice.gov/criminal/file/442156/download

See also, **Provider Exception**
18 U.S.C. § 2511(2)(a)(i).

Epilogue
Pièce Justificative

When the guardians of Trust and the guarantors of Trust are not Trustworthy, the legal profession is corrupt.

Bar counsel's monitoring of Gary Wolfstone post discipline: **United States v. Jones**, 565 U.S. 400 (2012)

The office of bar counsel is the guardian of Trust and the guarantor of Trust, however, bar counsel in my case has demonstrated repeatedly (conflict of interest)(failure to disclose conflict of interest)(direct communication with an opposing party who is represented by counsel)(double publication of disciplinary action)(selective prosecution) that she is untrustworthy. Hence my loss of faith in the office of bar counsel.

One of my goals in writing this book is to lay the foundation for a tectonic shift in our jurisprudence – we should stop punishing white collar criminals with prison sentences. The only members of society who should be confined to prison are people who commit violent crimes. Ghandi said that if the law is based on "an eye for an eye" then pretty soon the whole world is blind. Hence, my discussion of the Eighth Amendment to the United States Constitution.

Suffice it to say that orange rubber cones are more humane than steel prison bars. A prison sentence is a gradual death sentence, and in the case of white collar crimes, the punishment does not fit the crime.

The First Step Act

According to the terms of the First Step Act, a compassionate release from prison is now possible. Bernie Madoff has served ten years of his 150 year sentence but now asks the court to grant a compassionate release because he is terminally ill.

Feb. 6, 2020, 2:13 AM EET (NBC News On Line)
By Pete Williams

"Bernie Madoff, who once ran the largest Ponzi investment scam in history, has a terminal illness and should be released from prison to live out the remaining months of his life, his lawyer told a federal judge Wednesday.

"The lawyer, Brandon Sample, said in a court filing that Madoff — who is 81 — is dying of kidney failure, has a host of other medical problems, and is confined to a wheelchair. "After over ten years of incarceration with less than 18 months to live, Madoff humbly asks this court for a modicum of compassion,"

"Madoff pleaded guilty in 2009 to running a massive investment fraud that cheated his clients out of billions of dollars. In imposing the maximum sentence of 150 years in prison, Federal District Court Judge Denny Chin called Madoff's scheme "extraordinarily evil."

"Court documents revealed Wednesday said Madoff sought compassionate release in September from the warden of the federal prison in Butner, North Carolina, but was turned down. "Mr. Madoff was accountable for a loss to investors of over $13 billion. Accordingly, in light of the

nature and circumstances of his offense, his release at this time would minimize the severity of his offense," the Bureau of Prisons said in denying the request

“In past years, that would have been the end of the matter, since federal courts were powerless to act on a request for compassionate release that was denied by prison officials. But Congress changed the law when it passed the First Step Act late in 2018. While aimed at reducing sentences for low-level drug offenders, the act also gave courts authority to grant release for health reasons.

"Madoff is an 81-year-old man facing significant health issues who has less than 18 months to live. His weakened and declining physical condition is such that he would pose no danger to anyone," Sample said in a motion presented to Judge Chin.”

... However ...

[From Google News:

“Madoff, the late Ponzi scheme king who ripped off thousands of people for billions of dollars, earned just $710 after almost 3,000 hours of work while serving 12 years in a North Carolina federal prison before **dying of kidney failure in April**, newly released records show.”]

What fascinates and terrifies us about the Roman Empire is not that it finally went smash but that it managed to last for four centuries without creativity, warmth or hope.
— W. H. Auden, 1952

Quoted by Ross Douthat,
"The Decadent Society"

... However ...

"The Administration of Criminal Law in the United States is a Disgrace to Civilization."

Said, William H. Taft, Chief Justice of the Supreme Court of the United States

As quoted in THE LAW AT HARVARD,
Arthur E. Sutherland, page 265,
The Belknap Press of
Harvard University Press (1967)
"A History of Ideas and Men"

Prosecutorial Discretion

http://lawreview.richmond.edu/files/2018/04/Chambers-523.pdf

"The pardon power consists of five powers: (1) the power to re- verse a conviction or eliminate the possibility of conviction, (2) the power to commute or shorten a sentence, (3) the power to reverse fines and forfeitures, (4) the power to grant a reprieve to postpone punishment, and (5) the power to grant amnesty to a class of po- tential offenders.[43] It can be used narrowly to provide individual relief to particular offenders, as with President Ford's pardon of President Nixon, or it can be exercised broadly to grant relief to a group of offenders, as with President Carter's amnesty for some classes of Vietnam draft avoiders.[44] Given the different ways the pardon power may be used, it reflects total prosecutorial discretion both at the granular level with respect to individual pardons and at the policy level with respect to group pardons. It also reflects the President's power to negate a prosecution post verdict or to obviate the need for a prosecution before a prosecution begins. "

Cryptocurrency
Proceed with Extreme Caution

Bad Actors (money laundering) use crypto and BitCoin. Subject to regulation? Volatility.

Steven Mnuchin, who served as Secretary of the Treasury under President Donald Trump, is critical. Question: how do you identify the person holding that coin? Mnuchin says BitCoin is volatile and based on thin air.

Dealers in digital currency are regulated as money services businesses. The U.S. Treasury classified bitcoin as a convertible decentralized virtual currency in 2013. The Commodity Futures Trading Commission, CFTC, classified bitcoin as a commodity in September 2015. Per IRS, bitcoin is taxed as a property.

North Korea has been subject to U.N. sanctions since 2006 over its nuclear and ballistic missile programs. Among other things, these sanctions oblige countries to prevent "financial transactions, technical training, advice, services or assistance," if it could contribute to the missile programs or help to evade sanctions.

SEC Investigations: Civil & Administrative
[From the United States SEC web site]

"U.S. SECURITIES AND EXCHANGE COMMISSION

"How Investigations Work

"The Enforcement Division assists the Commission in executing its law enforcement function by recommending the commencement of investigations of securities law violations, by recommending that the Commission bring civil actions in federal court or before an administrative law judge, and by prosecuting these cases on behalf of the Commission. As an adjunct to the SEC's civil enforcement authority, the Division works closely with law enforcement agencies in the U.S. and around the world to bring criminal cases when appropriate.
The Division obtains evidence of possible violations of the securities laws from many sources, including market surveillance activities, investor tips and complaints, other Divisions and Offices of the SEC, the self-regulatory organizations and other securities industry sources, and media reports.

"All SEC investigations are conducted privately. Facts are

developed to the fullest extent possible through informal inquiry, interviewing witnesses, examining brokerage records, reviewing trading data, and other methods. With a formal order of investigation, the Division's staff may compel witnesses by subpoena to testify and produce books, records, and other relevant documents. Following an investigation, SEC staff present their findings to the Commission for its review. The Commission can authorize the staff to file a case in federal court or bring an administrative action. In many cases, the Commission and the party charged decide to settle a matter without trial.

Common violations that may lead to SEC investigations include:

- Misrepresentation or omission of important information about securities
- Manipulating the market prices of securities
- Stealing customers' funds or securities
- Violating broker-dealers' responsibility to treat customers fairly
- Insider trading (violating a trust relationship by trading on material, non-public information about a security)

"Whether the Commission decides to bring a case in federal court or within the SEC before an administrative law judge may depend upon various factors. Often, when the misconduct warrants it, the Commission will bring both proceedings.

"**Civil action:** The Commission files a complaint with a U.S. District Court and asks the court for a sanction or remedy. Often the Commission asks for a court order, called an injunction, that prohibits any further acts or

practices that violate the law or Commission rules. An injunction can also require audits, accounting for frauds, or special supervisory arrangements. In addition, the SEC can seek civil monetary penalties, or the return of illegal profits (called disgorgement). The court may also bar or suspend an individual from serving as a corporate officer or director. A person who violates the court's order may be found in contempt and be subject to additional fines or imprisonment.

"**Administrative action:** The Commission can seek a variety of sanctions through the administrative proceeding process. Administrative proceedings differ from civil court actions in that they are heard by an administrative law judge (ALJ), who is independent of the Commission. The administrative law judge presides over a hearing and considers the evidence presented by the Division staff, as well as any evidence submitted by the subject of the proceeding. Following the hearing the ALJ issues an initial decision that includes findings of fact and legal conclusions. The initial decision also contains a recommended sanction. Both the Division staff and the defendant may appeal all or any portion of the initial decision to the Commission. The Commission may affirm the decision of the ALJ, reverse the decision, or remand it for additional hearings. Administrative sanctions include cease and desist orders, suspension or revocation of broker-dealer and investment advisor registrations, censures, bars from association with the securities industry, civil monetary penalties, and disgorgement."

Judge Dannenberg's Resignation Letter from US Supreme Court Bar

The Chief Justice of the United States

One First Street, N.E.

Washington, D.C. 20543

March 11, 2020

Dear Chief Justice Roberts:

I hereby resign my membership in the Supreme Court Bar.

This was not an easy decision. I have been a member of the Supreme Court Bar since 1972, far longer than you have, and appeared before the Court, both in person and on briefs, on several occasions as Deputy and First Deputy Attorney General of Hawaii before being appointed as a Hawaii District Court judge in 1986. I have a high regard for the work of the Federal Judiciary and taught the Federal Courts course at the University of Hawaii Richardson School of Law for a decade in the 1980s and 1990s. This due regard spanned the tenures of Chief Justices Warren, Burger, and Rehnquist before your appointment and confirmation in 2005. I have not always agreed with the Court's decisions, but until recently I have generally seen them as products of mainstream legal reasoning, whether liberal or conservative. The legal conservatism I have respected– that of, for example, Justice Lewis Powell, Alexander Bickel or Paul Bator– at a minimum enshrined the idea of stare decisis and eschewed the idea of radical change in legal doctrine for political ends.

I can no longer say that with any confidence. You are doing far more— and far worse– than "calling balls and strikes." You are allowing the Court to become an "errand boy" for an administration that has little respect for the rule of law.

The Court, under your leadership and with your votes, has wantonly flouted established precedent. Your "conservative" majority has cynically undermined basic freedoms by hypocritically weaponizing others. The ideas of free speech and religious liberty have been transmogrified to allow officially sanctioned bigotry and discrimination, as well as to elevate the grossest forms of political bribery beyond the ability of the federal government or states to rationally regulate it. More than a score of decisions during your tenure have overturned established precedents—some more than forty years old– and you voted with the majority in most. There is nothing "conservative" about this trend. This is radical "legal activism" at its worst.

Without trying to write a law review article, I believe that the Court majority, under your leadership, has become little more than a result-oriented extension of the right wing of the Republican Party, as vetted by the Federalist Society. Yes, politics has always been a factor in the Court's history, but not to today's extent. Even routine rules of statutory construction get subverted or ignored to achieve transparently political goals. The rationales of "textualism" and "originalism" are mere fig leaves masking right wing political goals; sheer casuistry.
Your public pronouncements suggest that you seem concerned about the legitimacy of the Court in today's polarized environment. We all should be. Yet your actions, despite a few bromides about objectivity, say otherwise.

It is clear to me that your Court is willfully hurtling back to the cruel days of Lochner and even Plessy. The only constitutional freedoms ultimately recognized may soon be limited to those useful to wealthy, Republican, White, straight, Christian, and armed males— and the corporations they control. This is wrong. Period. This is not America.

I predict that your legacy will ultimately be as diminished as that of Chief Justice Melville Fuller, who presided over both Plessy and Lochner. It still could become that of his revered fellow Justice John Harlan the elder, an honest conservative, but I doubt that it will. Feel free to prove me wrong.

The Supreme Court of the United States is respected when it wields authority and not mere power. As has often been said, you are infallible because you are final, but not the other way around.

I no longer have respect for you or your majority, and I have little hope for change. I can't vote you out of office because you have life tenure, but I can withdraw whatever insignificant support my Bar membership might seem to provide.

Please remove my name from the rolls. With deepest regret,

James Dannenberg

Washington Post Op Ed
By **Robert S. Mueller III**
JULY 11, 2020

Robert S. Mueller III served as special counsel for the Justice Department from 2017 to 2019.

The work of the special counsel's office — its report, indictments, guilty pleas and convictions — should speak for itself. But I feel compelled to respond both to broad claims that our investigation was illegitimate and our motives were improper, and to specific claims that Roger Stone was a victim of our office. The Russia investigation was of paramount importance. Stone was prosecuted and convicted because he committed federal crimes. He remains a convicted felon, and rightly so.

Russia's actions were a threat to America's democracy. It was critical that they be investigated and understood. By late 2016, the FBI had evidence that the Russians had signaled to a Trump campaign adviser that they could assist the campaign through the anonymous release of information damaging to the Democratic candidate. And the FBI knew that the Russians had done just that: Beginning in July 2016, WikiLeaks released emails stolen by Russian

military intelligence officers from the Clinton campaign. Other online personas using false names — fronts for Russian military intelligence — also released Clinton campaign emails.

Following FBI Director James B. Comey's termination in May 2017, the acting attorney general named me as special counsel and directed the special counsel's office to investigate Russian interference in the 2016 presidential election. The order specified lines of investigation for us to pursue, including any links or coordination between the Russian government and individuals associated with the Trump campaign. One of our cases involved Stone, an official on the campaign until mid-2015 and a supporter of the campaign throughout 2016. Stone became a central figure in our investigation for two key reasons: He communicated in 2016 with individuals known to us to be Russian intelligence officers, and he claimed advance knowledge of WikiLeaks' release of emails stolen by those Russian intelligence officers.

Subtitle Setting

We now have a detailed picture of Russia's interference in the 2016 presidential election. The special counsel's office identified two principal operations directed at our election: hacking and dumping Clinton campaign emails, and an online

social media campaign to disparage the Democratic candidate. We also identified numerous links between the Russian government and Trump campaign personnel — Stone among them. We did not establish that members of the Trump campaign conspired with the Russian government in its activities. The investigation did, however, establish that the Russian government perceived it would benefit from a Trump presidency and worked to secure that outcome. It also established that the campaign expected it would benefit electorally from information stolen and released through Russian efforts.

Uncovering and tracing Russian outreach and interference activities was a complex task. The investigation to understand these activities took two years and substantial effort. Based on our work, eight individuals pleaded guilty or were convicted at trial, and more than two dozen Russian individuals and entities, including senior Russian intelligence officers, were charged with federal crimes.

Congress also investigated and sought information from Stone. A jury later determined he lied repeatedly to members of Congress. He lied about the identity of his intermediary to WikiLeaks. He lied about the existence of written

communications with his intermediary. He lied by denying he had communicated with the Trump campaign about the timing of WikiLeaks' releases. He in fact updated senior campaign officials repeatedly about WikiLeaks. And he tampered with a witness, imploring him to stonewall Congress.

The jury ultimately convicted Stone of obstruction of a congressional investigation, five counts of making false statements to Congress and tampering with a witness. Because his sentence has been commuted, he will not go to prison. But his conviction stands.

Russian efforts to interfere in our political system, and the essential question of whether those efforts involved the Trump campaign, required investigation. In that investigation, it was critical for us (and, before us, the FBI) to obtain full and accurate information. Likewise, it was critical for Congress to obtain accurate information from its witnesses. When a subject lies to investigators, it strikes at the core of the government's efforts to find the truth and hold wrongdoers accountable. It may ultimately impede those efforts.

We made every decision in Stone's case, as in all our cases, based solely on the facts and the law and in accordance with the rule of law. The women

and men who conducted these investigations and prosecutions acted with the highest integrity. Claims to the contrary are false.

Corporate Investigations

Book review:

ABA Section of Litigation
INTERNAL INVESTIGATIONS Fourth Edition
By Brad D. Brian, F. McNeil, J. Demsky, Editors

The Scylla and Charybdis of Internal Corporate Investigations

”Litigators with substantial experience in internal corporate investigations explore the critical relevance of these investigations to everyday American life

By Kelso L. Anderson

”In his nineteenth century magnum opus, The Common Law, former U.S. Supreme Court Justice Oliver Wendell Holmes cogently observed that “the life of the law has not been logic; it has been experience.” The prescience of Holmes’s words and the collaborative spirit prodded by experience animate the most recent edition of Internal Corporate Investigation, Fourth Edition (Brad D. Brian, Barry F. McNeil, & Lisa J. Demsky eds., 2018). The editors are litigators with substantial experience in internal corporate investigations; and —if their experience in the subject matter was insufficient to please the cognoscenti—their résumés boast law degrees from Harvard and Yale,

federal appellate clerkships, and law review membership. Editorial credibility aside, the critical relevance of internal corporate investigations to everyday American life is signified throughout this volume.

”Tools and Personnel to Consider

”Much like a perfectly detailed law school outline, each of the 15 chapters in this edition has subheadings within each chapter that allow the reader to understand the subject of the chapter in granular detail. Each chapter is written by attorneys who provide in-the-trenches observations and guidance to those seeking particular information on specific issues in internal corporate investigations. In the foreword, Mary Jo White, former U.S. attorney in the Southern District of New York and former SEC chairman, recommends the book to all lawyers involved in internal corporate investigations. In Chairman White’s words, “[t]he use of internal investigation as a means for companies to deal with potential misconduct has become an essential tenet of corporate best practices in the past 20 years.”

”With Chairman White’s words in mind, the reader is then immersed into the substance of internal corporate investigations. Chapters 1 through 5 give an overview of the personnel, tools, and information

that are critical for a corporation, regulator, or government to consider when a corporate investigation is imminent or ongoing. Corporate investigations may be either proactive or reactive, we are told, and companies must identify key personnel responsible for aspects of the business who will serve as information resources in the event of an investigation by a regulator or government agency. On the other hand, regulators and government agencies have tools at their disposal that will facilitate corporate investigations, including, among others, non-prosecution agreements (NPAs), deferred prosecution agreements (DPAs), and whistleblower regulations. NPAs and DPAs allow the government to shape corporate behavior by "preventing wrongdoing and correcting improper behavior without the collateral consequences of an indictment or conviction." Whistleblower statutes provide substantial financial incentives to encourage employees or citizens with personal knowledge to provide critical information that a government or regulator could use to compel a corporation to settle an investigation or else face prosecution or other negative publicity.

"Issue Touchpoints in Internal Investigations

"The first volume of Internal Corporate Investigations was published in 1992, prior to the onset of DPAs, NPAs, and various Department of

Justice (DOJ) memoranda—including the Holder, Yates, Thompson, McNulty, and Filip Memoranda—that shaped corporate behavior by granting cooperation credit to a company that assisted government investigators once an investigation commenced. In addition, Sarbanes-Oxley (SOX) and the Dodd-Frank Act gave securities regulators additional tools that corporations had to be mindful of when drafting their own internal corporate policies and practices. This updated edition addresses each of the foregoing developments in depth.

"Throughout this volume, the editors make reference to Greek mythology to capture the manifold issues presented when a corporate investigation is commenced. For example, counsel representing a corporation in the event of a restatement of financials, we are told, may feel as if they are battling "the mythological hydra" because after one "beast's head is dealt a seemingly fatal blow, its other heads rear in their full terror." In parallel proceedings, the reader learns that courts have not been generous toward defendants stuck between the "Scylla of providing civil testimony and the Charybdis of invoking the Fifth Amendment."

"Counsel involved in internal investigations could thumb through Chapter 6 to learn the law and key considerations in perjury and obstruction of justice

charges. To avoid perjury and obstruction of justice charges, perhaps counsel could consult Chapter 7 to learn about what should be disclosed to regulators and the government by a proactive company that conducts its own internal investigation into allegations of corporate wrongdoing. The role of the special litigation committee in keeping internal investigations confidential so as not to alert potential wrongdoers is explored in Chapter 8. The deliverable from the special litigation committee—report of the investigation—is examined in Chapter 9.

”Coda to Corporate Investigations

”The final five chapters in the volume go into granular detail regarding the main areas of corporate investigations. Chapter 10 discusses internal investigations for government contractors, including False Claim Act and qui tam lawsuits brought by concerned citizens. Internal investigations into securities law is the hefty subject of Chapter 11. The unique challenges of health care internal investigations, including the various laws that must be considered in that context, are the subject of Chapter 12. The critical role of the Foreign Corrupt Practices Act from an in-house perspective is offered in Chapter 13. Antitrust investigation and its nuances are the subject of Chapter 14. Finally, Chapter 15 goes into

great detail on SOX and investigations prompted as result of that law and deserving of its own analysis."

Harvard Gazette

INCARCERATION

[Taken from the Harvard Gazette]

BY Colleen Walsh
Harvard Staff Writer
DATE April 2, 2020

https://news.harvard.edu/gazette/story/2020/04/harvard-professors-call-to-help-incarcerated-population/

"As the world scrambles to respond to the coronavirus pandemic, Harvard experts across the University are trying to help one of the most vulnerable populations survive the crisis.

"More than 75 faculty members from the Harvard T.H. Chan School of Public Health and Harvard Medical School sent a letter Tuesday to Massachusetts Gov. Charlie Baker urging him to reduce the state's incarcerated population, a group that could be particularly subject to the rapid spread of COVID-19

"The letter outlined 15 recommendations, including requiring correctional facility administrators

to make their plans for prevention and management of coronavirus outbreaks publicly available; expedited consideration of parole or release of inmates age 50 and older and those with chronic, potentially complicating conditions; and testing of inmates and corrections staff who become ill.
“This pandemic is shedding a bright light on the interconnection of all members of society. Jails, prisons, and other detention facilities are not separate; they are a part of our community,” the letter read. “As experts in public health and medicine, we believe these steps are essential to support the health of incarcerated individuals, who are some of the most vulnerable people in our society; the vital personnel who work in prisons and jail; and all people in the state of Massachusetts.”

“According to the federal Bureau of Justice Statistics, roughly 1.5 million people were in prison, and approximately 750,000 people were being held in county and city jails in 2017. Taken together, the figures make the U.S. the world’s leader in incarceration.

“The nation is also faced with an aging prison population, with many older inmates suffering from underlying conditions that put them at the greatest

risk for the severe complications associated with COVID-19. In recent weeks officials and advocates across the country have been calling for the release of those who are ill or elderly or those who have been convicted of nonviolent offenses as a way to slow the spread of the virus. On Tuesday, the Massachusetts Supreme Judicial Court heard arguments in a petition by the state's public defenders, various district attorneys, and the ACLU of Massachusetts, among others, seeking the release of vulnerable inmates and pretrial detainees.

"Add to those voices that of Tomiko Brown-Nagin, dean of the Radcliffe Institute for Advanced Study, who supports the release of certain inmates and says that the current crisis reflects the history of the nation's unfair treatment of those too long considered "outcasts."

"There was no sense that they needed to be treated humanely, no guarantee of safe, sanitary conditions, or adequate medical care under the law until the 1960s, in the context of Civil Rights and prisoners' rights movements," said Brown-Nagin, who is also the Daniel P.S. Paul Professor of Constitutional Law at Harvard Law School. "It was only in '60s that the Supreme Court and then the lower courts determined that prisoners do not lose

their constitutional rights when they enter these institutions.

“In recent weeks, officials in cities across the U.S. have been releasing some of their most vulnerable inmates to keep the virus from spreading. Health experts note that living in quarters so close that it is not possible to keep six feet from another person — the guideline recommended by the Centers for Disease Control and Prevention — means the virus can be transmitted easily to both inmates and those who work with them.

“In a recent New York Times op-ed piece, Mary Bassett, director of Harvard’s François-Xavier Bagnoud Center for Health and Human Rights and a former New York City health commissioner, along with Eric Gonzalez, the district attorney of Brooklyn, and Darren Walker, president of the Ford Foundation, praised New York Gov. Andrew Cuomo for releasing 1,000 people from the state’s jails and prisons, but they implored him to do more.

“Given the conditions in which incarcerated people live — limited access to soap and water; shared bathrooms, mess halls, and living quarters —

this population is especially vulnerable to the virus, and largely unable to prevent its spread. In New York, we've already begun to see the effects. Dozens of residents and correctional staff members have tested positive. More will follow … When officers and staff members who work in prisons get infected, they will bring the virus home to their families.

"In addition to making the case for compassionate release, Kaia Stern, a practitioner in residence at Radcliffe and executive director of the nonprofit Concord Prison Outreach, which offers inmate educational programs, has been urging those in charge of Massachusetts' prison population to increase emergency supplies and ease certain restrictions on items such as sanitizers with alcohol or bleach that are considered contraband.
"People who are incarcerated and the people work in jails and prisons need critical items such as masks and gloves," said Stern. "We know that people in jails and prisons have disproportionate communicable diseases such as tuberculosis, hepatitis C, HIV/AIDS, and that we are on the cusp of a public health and humanitarian crisis that's about to explode."

"For Brown-Nagin, prisons and jails are among the many segments of society reeling from the novel coronavirus, exposing deep social and economic

inequality in the process.

“I do think it’s an inflection point for all kinds of questions that we’ve been grappling with as a society for many years,” she said. “That was true of The Great Depression, which gave rise to any number of innovations, remedies at the state and especially the federal level, to address the crises in communities wrought by the economic downturn. Similarly, this crisis demands that we examine and address inequality across society.”

Navigating Disagreements

[Taken from Harvard Business School Publication]

Alison Wood Brooks
O'Brien Associate Professor of Business Administration,
Harvard Business School

"Navigating disagreements and differences in conversation, especially with the goal to persuade, is a difficult task. Some breakthrough recent research using natural language processing (NLP) of real disagreement conversations at scale reveals some elements that make conversations less likely to end in hostile blow-ups and more likely to end with changed minds and healthy ongoing relationships. These elements include using **respectful language** (e.g. no name-calling), actively acknowledging and clarifying **the other perspective** ("Am I right that you are saying…"), asking follow-up questions, highlighting areas of agreement no matter how small or obvious, **hedging your claims** ("I think…") rather than stating them as facts, phrasing arguments in positive versus negative terms ("It's helpful to…" versus "You should not…"), **avoiding explanatory words** like "becausand "therefore," and dividing yourself into multiple selves ("I agree, but part of me wonders if…")" [emphasis added]

Impeachment in Cross Examination
Showing document to witness before impeachment - Foundation

https://www.law.cornell.edu/rules/fre/rule_613

(See also, Charles Orenyo, Dickenson Law Review, 3 Dickenson Law review, vol 79)

Rule 613. Witness's Prior Statement

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1936; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 26, 2011, eff. Dec. 1, 2011.)

Notes of Advisory Committee on Proposed Rules

Subdivision (a). **The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness.** Abolished by statute in the country of its origin, the requirement nevertheless gained currency in the United States. The rule abolishes this useless impediment, to cross-examination. Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 246–247 (1967); McCormick §28; 4 Wigmore §§1259–1260. Both oral and written statements are included.

The provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 1002 relating to production of the original when the contents of a writing are sought to be proved. Nor does it defeat the application of Rule 26(b)(3) of the Rules of Civil Procedure, as revised, entitling a person on request to a copy of his own statement, though the operation of the latter may be suspended temporarily.

Subdivision (b). **The familiar foundation requirement that an impeaching statement first be shown to the witness before it can be proved by extrinsic evidence is preserved but with some modifications. See Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 247 (1967). The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine onstatement, with no specification of anypartar time or sequence. Under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement. See Comment to California Evidence Code §770. Also, dangers of oversight are reduced**