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TABLES OF CONTENTS

Volume 6 • Number 1 • 2016

• JOURNAL OF IN-CHAMBERS PRACTICE •

• GREEN BAGATELLE •

• ALMANAC EXCERPTS •

OPENING REMARKS

DEBATE AND SWITCH

WILLIAM HOWARD TAFT ON LAW AS A VOCATION

Ross E. Davies[†]

While he was President of the United States (1909-13), William Howard Taft struggled, as many presidents do, to advance his policy agenda. Who was to blame? Lawyers, at least when the subject was regulation of the justice system. So said Taft in 1909. Congress – the President's chief national policymaking competitor in those days – had too many lawyer members, he argued. And those lawyers were abusing their authority to line the profession's pockets:

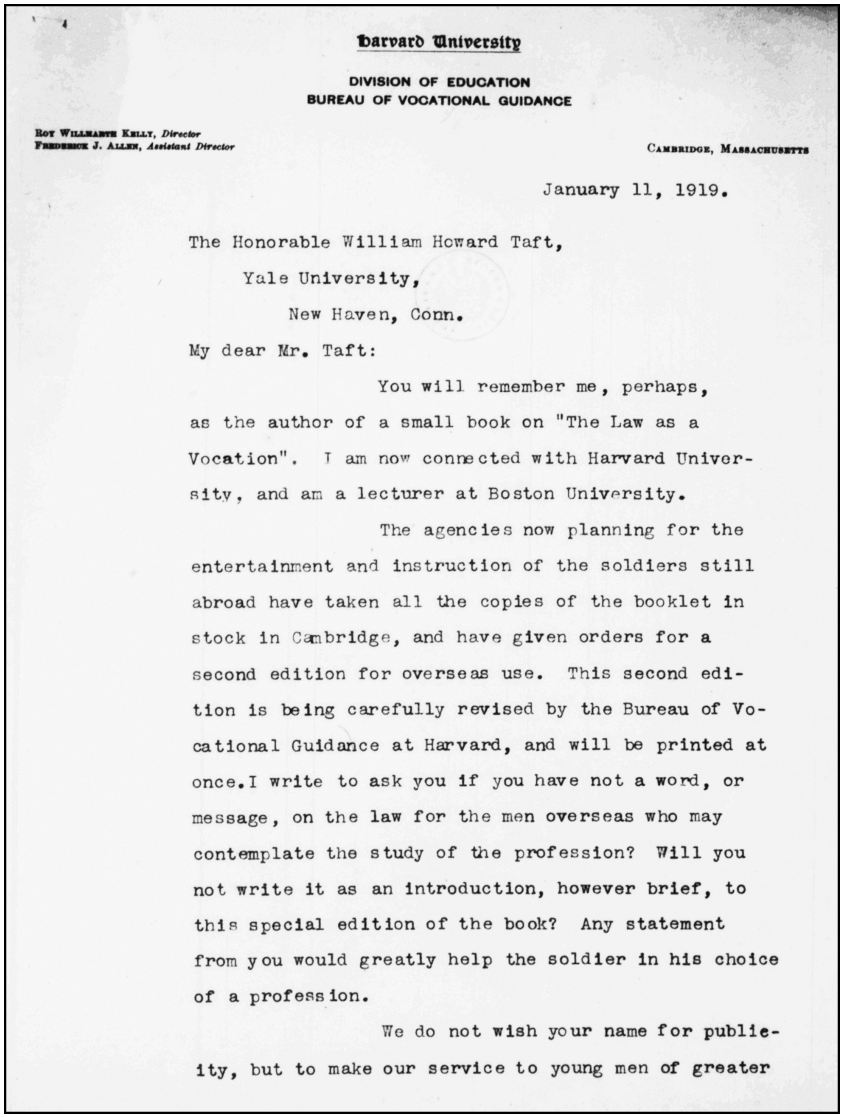
> I am a lawyer and admire my profession, but I must admit that we have had too many lawyers in legislating on legal procedure, and they have been prone to think that litigants were made for the purpose of furnishing business to courts and lawyers, and not courts and lawyers for the benefit of the people and litigants.[1]

In other words, President Taft – himself the most powerful lawyer in the land – could do more good in the lawmaking arena if he had fewer lawyers to compete with in Congress. Get those #*%$ lawyers out of the way and We The People can really get some good work done. Taft was not the only prominent figure making that argument at that time,[2] but as President he certainly had the bulliest pulpit.

[†] Professor of law, Antonin Scalia Law School at GMU; editor-in-chief, the *Green Bag*.

[1] *Taft Gives Word to Lend Labor Aid*, CHI. TRIB., Sept. 17, 1909, at 1, 2 (quoting Sept. 16 speech).

[2] *See, e.g., Michigan Is for Taft*, WASH. POST, May 18, 1911, at 3 (quoting Governor Chase Osborn: "[T]here are too many lawyers in Congress and public life. I say this with due respect for the legal profession, but it is time for business men to be more active in politics. It will be better for the country when we have fewer lawyers in Congress and more business men. We have had a majority of lawyers simply because they had the time to seek political honors and were not opposed.").



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DIVISION OF EDUCATION
BUREAU OF VOCATIONAL GUIDANCE

ROY WILLIAMS KELLY, *Director*
FREDERICK J. ALLEN, *Assistant Director*

CAMBRIDGE, MASSACHUSETTS

January 11, 1919.

The Honorable William Howard Taft,
Yale University,
New Haven, Conn.

My dear Mr. Taft:

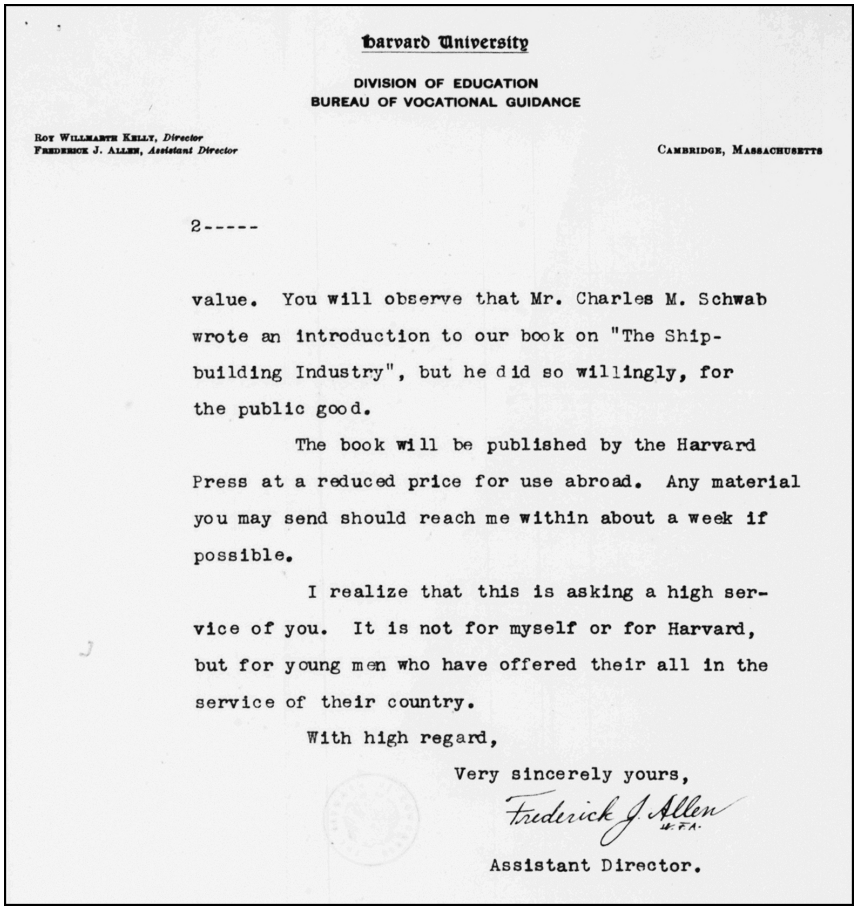
You will remember me, perhaps, as the author of a small book on "The Law as a Vocation". I am now connected with Harvard University, and am a lecturer at Boston University.

The agencies now planning for the entertainment and instruction of the soldiers still abroad have taken all the copies of the booklet in stock in Cambridge, and have given orders for a second edition for overseas use. This second edition is being carefully revised by the Bureau of Vocational Guidance at Harvard, and will be printed at once. I write to ask you if you have not a word, or message, on the law for the men overseas who may contemplate the study of the profession? Will you not write it as an introduction, however brief, to this special edition of the book? Any statement from you would greatly help the soldier in his choice of a profession.

We do not wish your name for publicity, but to make our service to young men of greater

Later on, Taft lost a different kind of competition to a fellow lawyer-politician when Woodrow Wilson won the presidential election in 1912.

In need of a job, Taft settled on being a professor at Yale Law School (1913-21). He was now in the business of producing lawyers, rather than competing with them. (That is what law schools do, mostly: supply lawyers, and law review articles, to the world.) While a professor at Yale, Taft



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2-----

value. You will observe that Mr. Charles M. Schwab wrote an introduction to our book on "The Ship-building Industry", but he did so willingly, for the public good.

The book will be published by the Harvard Press at a reduced price for use abroad. Any material you may send should reach me within about a week if possible.

I realize that this is asking a high service of you. It is not for myself or for Harvard, but for young men who have offered their all in the service of their country.

With high regard,

Very sincerely yours,

Frederick J. Allen
M.F.A.

Assistant Director.

adopted a view of lawyers that was at odds with the one he had expressed as President. Lawyers now belonged in the driver's seat when it came to the development and implementation of public policy.

His most eloquent expression of this new view appeared in print in 1919. In response to a solicitation from Frederick J. Allen of Harvard's Bureau of Vocational Guidance (see the letter on the facing page and this page),[3] Taft wrote this short essay that became the introduction to the second edition of Allen's book, *Law as a Vocation*[4]:

[3] John M. Brewer, *Describes Work of Vocation Guidance Bureau*, HARV. CRIMSON, June 11, 1921.

[4] LAW AS A VOCATION vii-viii (2d ed. 1919); Letter from William H. Taft to Frederick J. Allen, Jan. 14, 1919, in William H. Taft Papers, Library of Congress, Manuscript Division, reel 553 ("I send you herewith a statement which perhaps will serve your purpose.").

INTRODUCTION

THE importance of the law as a profession has not been reduced but is greatly increased by the new era which is to follow this war. The formulation into a practical advance of the new ideals must be the work of lawyers. Lawyers in their profession are synthetic and constructive. Many a man can deliver an oration, painting in beautiful colors the principles which should guide and the purposes which should be achieved, but the number of men who can draft the statutes and prepare the machinery by which the principles can be sustained and the ideals realized is limited. The study of the profession of the law giving, as it does, familiarity with the actual operation of statutes, the difficulty of their enforcement growing out of the defects of human nature in those whose compliance with the law is necessary, and a knowledge of the administration of justice — all fit lawyers to lead in the real progress of a nation. More than this, in the progress likely to take place, the nice balance between private right and public necessity must be preserved in order that individual initiative and the spur of the advance of all by the advance of each shall not be lost. It is lawyers who are to defend this private right. It is lawyers who are to assert the necessity of the public weal. It is lawyers on the bench who

are to hold the balance even between the two. Never in the history of the world is the profession of the law to play a greater part than in the century to follow this great upheaval of fundamental elements of society.

WILLIAM H. TAFT.

WASHINGTON, D.C.
January 14, 1919.

After reading this inspiring introduction by the professorial ex-President, a reader would never guess that the book being introduced was pretty close to pessimistic about the professional prospects of young lawyers.[5]

Then, in late middle age, Taft received the invitation every law professor dreams of: The President (then Warren G. Harding) asked him to be the next Chief Justice of the United States. Taft spent most of the rest of his life in that job (1921-30). While on the Court, he adopted a view of lawyers that was at odds with the one he had expressed as a law professor, but consistent with the one he had expressed when he was President. There were, again, too many lawyers.

In 1922, at a conference on legal education held by the National Conference of Bar Associations, Chief Justice Taft gave a speech in favor of tightening requirements for admission to the bar. In the course of bemoaning the incompetence of under-educated lawyers and extolling the virtues of a formal legal education, he said:

> the country already has too many lawyers, and I cannot feel there is going to be a dearth of them, no matter how thorough the preparation insisted upon.[6]

In an amusing piece of carefully lawyered reporting, the editors of the *ABA Journal* quoted extensively from Taft's speech, but when they got to the passage quoted above, they shifted from quoting to paraphrasing. Here is the result:

> The country had all the lawyers it needed now and there was no likelihood of a dearth of them, however thorough the preparation insisted upon.[7]

Indeed. Others paraphrased him differently. For example, the International Brotherhood of Papermakers reported, with obvious irony (Taft being no great friend of organized labor), "Lawyers' Closed Shop Urged by Justice Taft."[8]

But was it really that simple? Were Taft's shifting views on the proper

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[5] *See, e.g.,* LAW AS A VOCATION at 66 ("One of the important tendencies of the present time is to increase rather than diminish the overcrowding of the legal profession, mentioned in Chapter III.").
[6] *College Term Debated by Bar Association*, BALT. SUN, Feb. 24, 1922, at 2 (quoting Feb. 23 speech).
[7] *Conference on Legal Education*, ABA J., Mar. 1922, at 137, 141 (paraphrasing Feb. 23 speech); *see also* SPECIAL SESSION ON LEGAL EDUCATION OF THE CONFERENCE OF BAR ASSOCIATION DELEGATES 27 (n.d.) (treating the *ABA Journal*'s paraphrasing of Taft's speech as quotation from that speech).
[8] THE PAPER MAKERS' J., Mar. 1922, at 47.

roles and supply of lawyers really just manifestations of crass professional self-interest? Did President Taft talk trash about lawyers in Congress to get a leg up on policy competitors without regard to the collateral effects of America's most powerful lawyer impugning the integrity of a whole category of other powerful lawyers? Did Professor Taft write enthusiastically about careers in law to a generation of young Americans serving their country in World War I knowing full well – at least according to himself just three years later – that back home the nation was already oversupplied with lawyers? (A ploy known to a later generation as a law school scam.) And did Chief Justice Taft demean as incompetent and unnecessary many members of the bar – those who lacked a college education, at a time when access to higher education was far more limited than it is today – in order to prop up the profession for those who already had (or would be able to get) a college degree?

Or, instead, was Taft getting wiser with age? Or were his views shifting in keeping with changing times? Or did someone or some new idea trigger a shift? Reasonable minds can differ about the answers, but Taft himself could have made it easy. He could have explained himself – why he was reversing, or at least refining, his thinking. Or how circumstances had changed while his thinking had not. Isn't that what good leaders[9] (and scholars[10] and judges[11]) do?

• • •

I should disclose what some might judge to be a conflict of interest. The *Green Bag* published an unsigned and very positive review of the first edition of Allen's *Law as a Vocation*.[12] In addition, the editor of the *Green Bag* at that time, Arthur W. Spencer, was thanked by Allen in *Law as a Vocation* "for helpful suggestions on legal publications."[13] Spencer also produced an enthusiastic endorsement that made its way into promotional materials for the book.[14] I have done my best not to channel Spencer.

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[9] *See, e.g.,* GEORGE W. NORRIS, FIGHTING LIBERAL 373-74 (1945; 1992 prtg.); ALPHEUS THOMAS MASON, HARLAN FISKE STONE 198-99, 572-73 (1956); 87 CONG. REC. 5618-19 (1941).

[10] *See, e.g.,* Richard A. Epstein, *Waste and the Dormant Commerce Clause – A Reprise*, 3 GREEN BAG 2D 363 (2000).

[11] *See, e.g., State Oil v. Khan*, 522 U.S. 3 (1997).

[12] *The Law as a Vocation: Advice to Young Men*, 26 GREEN BAG 164 (1914).

[13] LAW AS A VOCATION at iv.

[14] *See* "An early circular" in William H. Taft Papers, reel 203.

THE JOURNAL OF IN-CHAMBERS PRACTICE

INCLUDING RAPP'S REPORTS

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INTRODUCTION

THE CURRENT STATE OF IN-CHAMBERS PRACTICE

Ira Brad Matetsky[†]

With this issue of *The Journal of Law,* the editors continue publishing the *In Chambers Opinions by the Justices of the Supreme Court of the United States.* The original three volumes of *In Chambers Opinions* were compiled by Supreme Court Deputy Clerk Cynthia Rapp in 2001, and made accessible in an edition issued by the Green Bag Press under Professor Ross E. Davies in 2004. Previous supplements, each of which included in-chambers opinions (or "ICOs") published after Ms. Rapp completed her original compilation and additional opinions located by the editors and others, were published in 2004, 2005, 2006, 2007, 2010, and 2011. The complete contents of these volumes – comprising the opinions themselves as well as editorial material including notes, historical articles,[1] and indexes – are accessible via the *Green Bag*'s website,[2] and hard copies can be found at major law libraries.

In Chambers Opinions represented the first published compilation of Supreme Court Justices' opinions on matters resolved by individual justices acting as Circuit Justice, rather than the Court as a whole. The initial three volumes comprised 418 ICOs written between 1926 and 1998, some of which had never been previously published, and the six supplements added

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[†] Partner, Ganfer & Shore, LLP, New York, N.Y.

[1] *See* Cynthia Rapp, *Introduction*, 1 Rapp v (2004) (discussing the nature and history of in-chambers opinions and the history of oral arguments on applications); Stephen M. Shapiro & Miriam R. Nemetz, *An Introduction to In-Chambers Opinions*, 2 Rapp ix (2004) (discussing the emergency applications process and types of applications including stays, injunctions, stays of execution, extensions of time, and bail); Craig Joyce, *The Torch Is Passed: In-Chambers Opinions and the Reporter of Decisions in Historical Perspective*, 3 Rapp vii (2004) (discussing the history of Supreme Court Reporters of Decisions); Ira Brad Matetsky, *The Publication and Location of In-Chambers Opinions*, 4 Rapp Part 2 at vi (2005) (discussing historical practices concerning publication of in-chambers opinions and where copies of the opinions have been located in case reports, court records, and manuscript libraries).

[2] www.greenbag.org/green_bag_press/in-chambers%20opinions/in-chambers%20opinions.html.

another 103 opinions, expanding the temporal coverage of the set to the years 1852 through 2010. Because the justices' in-chambers opinions and actions continue to interest both practitioners[3] and academics,[4] future issues of *In Chambers Opinions* will continue to appear periodically in the *Journal of Law* for so long as the justices continue writing new ICOs and the editors and readers continue locating older ones.[5]

RECENT DEVELOPMENTS IN IN-CHAMBERS PRACTICE

Although applications to individual justices continue to be filed with regularity, the justices continue to be sparing in authoring opinions when they rule on the applications. Over the ten completed terms of the Roberts Court, the number of ICOs each term has ranged from none (October Terms 2007 and 2014) to three (October Term 2009). Within this admittedly small sample size, there is notable variation in the justices' authorship of in-chambers opinions. Chief Justice John G. Roberts, Jr. has written seven of the twelve ICOs published since he joined the Court in 2005, while Justices Clarence Thomas, Samuel A. Alito, Jr., and Elena Kagan have not yet published any.

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[3] *See generally* Stephen M. Shapiro *et al.*, SUPREME COURT PRACTICE, ch. 17 (10th ed. 2013) (discussing rules and procedures governing in-chambers practice on stay, injunction, and bail applications); *id.* §§ 6.5-6.8 (discussing applications to circuit justices for extensions of time to petition for certiorari).

[4] *See, e.g.,* Lumin N. Mulligan, *Essay: Did the Madisonian Compromise Survive Detention at Guantanamo?*, 85 N.Y.U. L. Rev. 535 (2010) (discussing whether individual Supreme Court Justices can effectively exercise habeas corpus jurisdiction); Daniel Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. Cin. L. Rev. 1159 (2008) (comprehensive analysis of jurisdiction of individual justices); *see also* Sebastian Bates, *Riding Circuit: How Supreme Court Justices Can Act Alone*, Penn. Undergrad. L.J. (Mar. 17, 2015), *available at* www.pulj.org/the-roundtable/-riding-circuit-how-supreme-court-justices-can-act-alone.

[5] For discussion of the places in which opinions have been and continue to be located, see Matetsky, *supra* note 1, at xv-xix. The editors are taking a relatively liberal approach in determining which writings by the justices on in-chambers matters are sufficiently detailed to constitute "opinions" and be included in these volumes. In this, they are following the guidance of Frederick Bernays Wiener, one of the first people to propose the comprehensive publication of ICOs, who opined: "The opinion stating reasons presents no difficulty, even when short; of course it should go in. The order or decree, even when it is long and contains elaborate recitals, seems more doubtful. Perhaps when the order sets forth reasons why it was made, inclusion would be appropriate, and the same is true of brief memoranda." Frederick Bernays Wiener, *Opinions of Justices Sitting in Chambers*, 49 L. Lib. Rev. 2, 5-6 (1956); *see also* Frank Felleman & John C. Wright, *The Powers of a Supreme Court Justice Sitting in an Individual Capacity*, 112 U. Pa. L. Rev. 981, 987-88 (1964).

Although the justices rarely explain why they do or do not write an ICO in a given case, their reasons for deciding not to write on most applications probably include the press of other business and the fact that no written explanation for granting or denying an application is usually expected of them.[6] Moreover, with respect to applications for stays and injunctions, the standards that individual justices (and the Court as a whole) employ in granting or denying such relief are relatively well-established, so that the justices may believe that opinions regarding most applications would merely explain the application of the familiar standard to particular facts, without providing broader guidance to the Bar.[7] Further, under current practices, the justices frequently refer applications for stays or injunctions to the full Court for disposition; where this is done, an ICO necessarily will not result. Finally, the most frequent type of single-justice applications, which are for additional time within which to petition for a writ of certiorari, are even more infrequently the subject of opinions.

Even less common than in-chambers opinions, under the Roberts Court and the Rehnquist Court before it, have been oral arguments on in-chambers applications. Oral arguments before individual justices on applications were held with some frequency, in chambers or at other locations, until the 1970s. (In earlier years the justices sometimes even received applicants or counsel *ex parte*; the Rules of the Court permitted applications to be presented to the justices in person until the 1950s, and this seems to have

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[6] As a general matter, the Court and its members rarely offer public justifications for their decisions other than in cases decided on the merits after briefing and argument. It is unusual for the full Court, any more than its individual members, to provide an opinion or reasoned order in cases in which the Court grants or (mre commonly) denies a stay, bail, an extraordinary writ, or other relief, and of course the Court does not explain its reasons for denying certiorari in more than 95% of the cases brought before it. *Cf.* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. of Law & Liberty 1 (2015) (criticizing the Court's handling of stay and injunction applications and summary reversals).

[7] *But see* Richard Re, *What Standard of Review Did the Court Apply in* Wheaton College*?*, Re's Judicata (July 5, 2014), *available at* richardresjudicata.wordpress.com/2014/07/05/what-standard-of-review-did-the-court-apply-in-wheaton-college/ (asking whether a different standard of review is applied to stay applications considered by the full Court rather than a circuit justice); Baude, at 12 n.36. However, in a *per curiam* opinion denying a stay application in *Indiana State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960 (2009) (per curiam), the Court cited *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) as setting forth the standard of review on a stay application, suggesting that there is no difference. *See* Tony Mauro, *In-Chambers Opinions: A Footnote to the Chrysler Case*, Legal Times (June 19, 2009), *available at* legaltimes.typepad.com/blt/2009/06/inchambers-opinions-a-footnote-to-the-chrysler-case.html.

been a common practice, especially when the Court was not in session.) But oral arguments on in-chambers applications seem to have disappeared forever. The last known oral argument in chambers took place more than 35 years ago, in 1980, and none of the current justices seem interested in reviving the tradition.

On the other hand, although the Justices are rarely explaining their in-chambers dispositions in writing, and never orally, the rulings themselves are now readily accessible from the time of their issuance. In 2003, the Court began including its computerized docket records, including those relating to in-chambers applications, on its website. The docket, updated daily, places the fact that a Justice had granted or denied an application on the public record, although it typically does not include any comments that the Justice might have made in connection with the decision.[8]

Beginning with October Term 2014, the Court made a further change. Since that time,

> if an individual Justice takes an action – for example, on a request to postpone a lower court ruling – and actually creates an order, that will appear on the orders section on the Court's website as an order by an individual Justice, by name. Such orders already have been entered on the docket, and that will continue along with the website entry.[9]

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[8] A rare exception occurred in *Clarett v. National Football League*, a 2004 case in which football prospect Maurice Clarett challenged the NFL's determination that Clarett was ineligible to enter that year's draft. The Second Circuit had stayed a District Court injunction allowing Clarett to enter the draft. Clarett asked Justice Ruth Bader Ginsburg to vacate the stay. The online docket sets forth Ginsburg's decision, which might be termed a speaking order or an unofficial, mini in-chambers opinion: "Finding no cause to disturb the Court of Appeals' assessment of the relevant criteria, and noting the National Football League's commitment promptly to conduct a supplemental draft in the event that the District Court's judgment is affirmed, the application to vacate the stay is denied." Order, *Clarett v. National Football League*, No. 03A870 (Apr. 22, 2004) (Ginsburg, J., in chambers), *available at* www.supremecourt.gov/search.aspx?filename=/docketfiles/03a870.htm. (Clarett ultimately lost the litigation, and never played a down in the NFL. For the unfortunate aftermath, see en.wikipedia.org/wiki/Maurice_Clarett.)

[9] Lyle Denniston, Court To Show More Actions, SCOTUSblog (Oct. 3, 2014), *available at* www.scotusblog.com/2014/10/court-to-show-more-*actions*. To date, the Court has actually listed the single-Justice orders on the same website pages as orders by the full Court. Single-justice orders, with or without opinions, still do not appear in the *Journal of the Supreme Court of the United States*.

MCDONNELL V. UNITED STATES: A REVIVAL OF SUPREME COURT BAIL PRACTICE?

The most noteworthy such single-justice order posted to date was probably Chief Justice Roberts' in-chambers order staying the mandate of the U.S. Court of Appeals for the Fourth Circuit in *McDonnell v. United States*, and thereby effectively continuing a criminal defendant's release on bond pending the Court's consideration of his certiorari petition.

For several decades, applications for the release of convicted criminal defendants – most often federal defendants, but including state defendants as well – on bail pending consideration of their certiorari petitions or appeals represented a significant portion of the in-chambers docket. There are dozens of ICOs reported in *In Chambers Opinions* addressing defendants' applications for bail pending Supreme Court review, and in myriad more cases, the justices granted or denied bail without writing an ICO. Indeed, the very first decision reported in the chronologically arranged *In Chambers Opinions* was a lengthy 1926 opinion by Justice Pierce Butler granting bail to ten defendants who were challenging their convictions under the National Prohibition Act.[10] Two years later, Justice George Sutherland similarly granted bail to a group of defendants in *Olmstead v. United States*,[11] another Prohibition case that is remembered today for its subsequently overruled decision on the merits on the subject of wiretapping, although he did not write an ICO.

Bail applications to Justices continued to be regularly made, and sometimes granted, until the 1980s. In 1984, Congress adopted a Bail Reform Act that "made bail less available (particularly after conviction) and regularized appellate review of bail determinations. . . ."[12] Following the enactment of that statute, the leading commentators on Supreme Court procedure observed that "bail practice before individual Circuit Justices has become largely obsolete" and that "there is not a single published in-chambers opinion under the Bail Reform Act of 1984 granting bail. Nor does there appear to be any significant practice of Circuit Justices granting bail under

[10] *Motlow v. United States*, 10 F.2d 657, 1 Rapp 1 (1926) (Butler, J., in chambers).

[11] Order, *Olmstead v. United States*, Nos. 493, 522 & 533, O.T. 1927 (Jan. 24, 1928) (Sutherland, J., in chambers).

[12] Shapiro *et al.*, *supra* note 3, § 17.15, at 911.

that Act without opinion."[13] Indeed, the justices' former practice of giving serious consideration to bail applications appears to have been virtually forgotten.

One case in which a Justice did grant bail was *Chambers v. Mississippi*, in which Justice Lewis F. Powell, Jr. entered an order granting bail to a petitioner who had allegedly murdered a police officer and had been convicted of first-degree murder in Mississippi state court. Powell then denied the State's motion for reconsideration of his order, leaving Chambers free on $15,000 bail until his case was resolved. Powell published an ICO explaining his decision.[14]

A knowledgeable scholarly commentator on *Chambers v. Mississippi* construed a convicted defendant's bail application to the circuit justice as "virtually unheard of" and a "novelty," and Powell's decision to grant the application as "something remarkable."[15] Indeed, Chambers' counsel on the bail application once speculated that Powell's judicial inexperience at the time – he was in his first month on the Court when Chambers' application came before him – may have contributed to his granting the application, although the strong facts of the case and other considerations also played a role.[16] In reality, a justice's granting bail to a criminal defendant with a potentially meritorious certiorari petition, while not commonplace, was not outlandish in 1972. Of course, such relief would not typically have been granted to a defendant convicted in state (rather than federal) court, nor to one whose conviction was for murdering a police officer, but the facts in *Chambers* were unusually sympathetic.[17]

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[13] *Id.*; *see also* Shapiro & Nemitz, *supra* note 1, at xvi-xvii.

[14] 405 U.S. 1205, 2 Rapp 525 (1972) (Powell, J., in chambers).

[15] Stephan Landsman, Chambers v. Mississippi: *A New Justice Meets an Old Style Southern Verdict,* in EVIDENCE STORIES 359, 368-70 (2006).

[16] *Id*. at 370 (discussing views of Chambers' counsel, Professor Peter Weston). *See also* Emily Prifogle, *Law and Local Activism: Uncovering the Civil Rights History of* Chambers v. Mississippi, 101 Cal. L. Rev. 445, 510-11 & n. 463 (2013).

[17] *See id.* These facts included that Chambers had been free on bond for 15 months between his arrest and trial without incident, that he was an ordained minister, that he had nine children and strong community ties, and that his certiorari petition presented significant constitutional issues and depicted a trial that could be categorized as fundamentally unfair. In granting the bail application, Powell followed the recommendation of his law clerk, Lawrence A. Hammond, who recommended that bail be granted because the case presented two important legal issues and also because "it appears that this Pet[itione]r may well be innocent, making this a compelling case to take a good look at state procedural requirements which may, in this case at least, operate to deny an accused the basic substance of a fair trial." Memorandum from "LAH" (Lawrence A. Hammond) to "Judge" (Powell),

Powell's chambers file in *Chambers,* contained in the Powell Papers archived at Washington & Lee Law School, provides additional insight on the justice's decision-making. Interestingly, the file includes a memorandum by Powell stating that after he received Mississippi's motion to reconsider his order granting bail, which suggested that Chambers' re-entry into the community might lead to violence, "this matter has concerned me and accordingly I conferred with Mr. Justice Stewart [who had been on the Court since 1958]. He was good enough to review the papers (as well as have one of his clerks do so). He concurs in my view that the application to reconsider my order of February 1 should be denied."[18]

The Court subsequently granted Chambers' certiorari petition and reversed his conviction, holding in an opinion by Powell that Mississippi could not enforce its rules of evidence in a way that prevented a murder defendant from presenting evidence helping to establish that another man had confessed to the crime.[19] Chambers' conviction was reversed, and Mississippi never sought to re-try him. It is submitted that history should look kindly on Powell's decision to grant bail to a seemingly innocent man with highly colorable constitutional claims – but it is very unlikely that a justice would take such an action today.

"Unlikely," however, no longer means "impossible," as at least one exception now exists to the statement that the justices no longer grant bail pending consideration and disposition of cases brought before them on certiorari. In 2014, Robert McDonnell, the former governor of Virginia, was convicted of official misconduct charges in the Eastern District of Virginia, and sentenced to two years in prison. The Fourth Circuit affirmed McDonnell's conviction, and denied his motion to stay the mandate (and thereby hold his prison sentence in abeyance) pending his petitioning the Supreme Court for certiorari.[20] McDonnell filed his cert. petition, and simultaneously applied for a single-Justice stay of the mandate pending

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at 2 (Jan. 31, 1972), *Chambers v. Mississippi* case file, Lewis F. Powell, Jr. Papers, Washington L Lee Law School, Lexington, Va. The *Chambers* case file can be found online at scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1513&context=casefiles. I thank John Jacob of Washington and Lee University School of Law for uploading this file and making it readily accessible in response to my request for it.

[18] Memorandum re No. 71-5908, *Chambers v. Mississippi*, at 2 (Feb. 14, 1972), *in* Chambers case file.

[19] *Chambers v. Mississippi*, 410 U.S. 284 (1973).

[20] Order, *United States v. McDonnell*, No. 15-4019 (4th Cir. Aug. 20, 2015).

appeal, or in the alternative, release on bail.[21] In his application, McDonnell argued that he met the requirements for the relief he sought, including irreparable harm and a likelihood that certiorari would be granted, whether his application was considered as a stay application under 28 U.S.C. § 2101(f) or as a bail application under 18 U.S.C. § 3143(b).

McDonnell's application for a stay or bail was presented to Chief Justice John G. Roberts, Jr., the Circuit Justice for the Fourth Circuit. Had the Court been in session, Roberts might well have referred the application for consideration by the full Court. Perhaps because the Members of the Court were scattered for the summer recess, Roberts initially addressed the application himself. He did not author an in-chambers opinion, but on August 24, 2015, he entered a temporary stay order, which read:

> UPON CONSIDERATION of the application of counsel for the applicant,
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> IT IS ORDERED that a response to the application be filed on or before Wednesday, August 26, 2015, by 4 p.m. It is further ordered that the issuance of the mandate of the United States Court of Appeals for the Fourth Circuit in case No. 15-4019 is hereby stayed pending consideration of the response and further order of the undersigned or of the Court.[22]

After McDonnell's application was fully briefed, Roberts referred the matter to the full Court, which, surprising some observers,[23] continued the stay of the mandate pending consideration of McDonnell's certiorari petition and, if certiorari were to be granted, pending the Court's disposition of the case.[24] Thereafter, the Court granted certiorari, heard the case, and on June 27, 2016, unanimously reversed McDonell's conviction and remanded for further proceedings.[25] Although further proceedings will take place on

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[21] A copy of McDonnell's "Emergency Application to Stay Mandate, or in the Alternative for Release on Bail, Pending Disposition of Certiorari Petition" is available at www.scribd.com/doc/275357151/McDonnell-Stay-Petition.

[22] Order, *McDonnell v. United States*, No. 15A218 (Aug. 24, 2015) (Roberts, C.J., in chambers), *available at* www.supremecourt.gov/orders/courtorders/082415zr_g2bh.pdf.

[23] *See, e.g.*, Frank Green, Odds Long for Former Gov. Bob McDonnell To Win Bail, *Richmond Times-Dispatch*, Aug. 30, 2015, *available at* www.richmond.com/news/local/crime/article_019ab027-1671-5a4d-b80d-12a7a1112833.html

[24] Order, *McDonnell v. United States*, No. 15A218 (Aug. 31, 2015), *available at* www.supremecourt.gov/orders/courtorders/083115zr_q861.pdf

[25] *McDonnell v. United States*, 136 S.Ct. 2355 (2016).

remand, if McDonnell is successful in avoiding retrial and another conviction, his "hail Mary" application to stay the mandate requiring him to report to prison will have saved him from serving almost a year in prison for a crime that he may not, according to the Court's analysis, have committed.

It remains to be seen whether *McDonnell* presages a return to a more liberal practice in the justices' consideration of bail applications, or stay applications having the same effect. If the circuit justices set forth their reasoning for granting or denying any such applications, or any other types of applications, or if we learn that any of their predecessors did the same, their opinions will be reported in these pages.

THE HISTORY OF PUBLICATION OF U.S. SUPREME COURT JUSTICES' IN-CHAMBERS OPINIONS

Ira Brad Matetsky[†]

By publishing *In Chambers Opinions by the Justices of the Supreme Court of the United States*, Cynthia Rapp and Ross Davies made many of these opinions readily available to the public for the first time. Just as two eminent practitioners once described the Court's belated decision to begin publishing in-chambers opinions in the *United States Reports* in 1969 as a "most welcome change" that represented "a long-overdue convenience for both the Court and the Bar,[1] the same was rightly said about the publication of *In Chambers Opinions*. But the compilation raised a pair of important historical questions: How did legal documents as significant as official judicial opinions of United States Supreme Court Justices escape reporting to begin with, and why was the Court's publication policy eventually changed so that a present-day in-chambers opinion is now readily available, at least when an authoring Justice wants it to be?

A look back through the history of Supreme Court publication practices provides the answers. From the earliest days of the Supreme Court, the Justices were authorized to dispose of certain types of applications individually. During the nineteenth century, single-Justice matters included petitions for writs of error or appeal, applications for stays and supersedeas, and habeas corpus petitions. Then as now, the Justices did not write opinions

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[1] Bennett Boskey and Eugene Gressman, *The 1970 Changes in the Supreme Court's Rules*, 49 F.R.D. 679, 695 (1970).

when they routinely disposed of such matters; a typical petition for leave to appeal, for example, might simply be endorsed "granted" (or sometimes "denied") and signed. In the unusual case in which a Justice wrote an opinion on an application, the opinion was never published in the nominate reports that became the *United States Reports*, which printed opinions only in cases decided by the full Court. Rather, the opinion would be captioned in a United States Circuit Court and published, if at all, in a reporter containing decisions of those courts, whose membership often included a Supreme Court Justice "riding circuit."[2]

To modern readers of a single-Justice nineteenth-century opinion, it may be unclear whether a Justice was acting as a Supreme Court Justice or as a Circuit Court Judge in granting a stay or supersedeas while "at chambers," even if the procedural posture is detailed in the opinion.[3] This confusion was alleviated only in the late 1800s, when circuit-riding disappeared, soon to be followed by the Circuit Courts themselves.

The situation was even more muddled in habeas corpus cases. For much of the nineteenth century, the Great Writ could be granted by the Supreme Court, the Circuit Court, the District Court, *or* by a Justice or Judge of any of them acting individually.[4] Therefore, when a Justice presided over a habeas corpus matter, it may have made little difference to anyone whether he was sitting "as" a Supreme Court Justice or a Circuit Court Judge (and hence whether he was issuing a Supreme Court "in-chambers" opinion by the standards of today).[5] What is clear is that when these opinions were oc-

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[2] Any historical work on the Court will contain some discussion of the circuit-riding era. A detailed history is found in Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 Cardozo L. Rev. 1753 (2003). For discussion of the historical role of Circuit Justices, see Sandra Day O'Connor, *Foreword: The Changing Role of the Circuit Justice*, 17 U. Tol. L. Rev. 521 (1986).

[3] *See, e.g., Muscatine v. Mississippi & M.R. Co.*, 1 Dill. 536, 17 F. Cas. 1067, 1068 (C.C.D. Iowa 1870) (No. 9971) (from the statement of the case: "[A]pplication at chambers was made to Mr. Justice MILLER, one of the judges of the circuit court of the United States"; from the opinion: "These are applications to me as a judge of the supreme court and of the circuit court of the United States . . . for injunctions. . . ."); *Butchers' Ass'n v. Slaughter House Co.*, 1 Woods 50, 4 F. Cas. 891 (C.C.D. La. 1870) (No. 2234) ("application … to Mr. Justice Bradley of the supreme court of the United States, at chambers" to increase amount of the bond required on an appeal from state court).

[4] *See generally* Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. Rev. 251, 271-73 (2005); George F. Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407 (1972) (reprinting various versions of the habeas corpus statutes).

[5] Once in awhile it did matter. For example, it appears that Chief Justice Taney felt quite strongly that he was sitting as a Supreme Court Justice rather than exercising his Circuit Court responsibilities

casionally published, they too usually were captioned in the Circuit Court, not the Supreme Court, and were published in Circuit Court reports, not in the *United States Reports* or in unofficial Supreme Court reporters.[6]

During the first part of the twentieth century, in-chambers opinions were still omitted from both the Supreme Court's official and unofficial reports. A few opinions continued to appear in lower court reports – by now, the *Federal Reporter* or *Federal Supplement* – and by the 1940s an occasional in-chambers opinion began to be published in the *Supreme Court Reporter*. Once in awhile, by design or chance, an in-published opinion was printed elsewhere, and still more occasionally an unpublished in-chambers opinion would somehow come to be cited in a treatise or law review article, even though the typical practitioner would have no idea how to locate such an opinion.[7]

For the most part, however, any effort by a Justice to draft an in-chambers opinion or reasoned order on an application before him would go entirely unnoticed except by the lawyers and litigants in the case before him. Indeed, the Justices' knowledge that these opinions would not be published may have deterred them from continuing to prepare such opinions, even in important cases. For example, there are no known in-chambers opinions by Justice Wiley B. Rutledge, but Rutledge's papers at

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when he granted the writ of habeas corpus in *Ex parte Merryman,* Taney 246, 17 F. Cas. 144, 4 Rapp 1400 (1862). *See* Hartnett, at 279-81 & n.126; Jonathan W. White, *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman* 38-42 & 133-35 nn. 42-54.

[6] *See, e.g., United States v. Patterson,* 29 Fed. 775 (C.C.D.N.J. 1887) (Bradley, J.); *Ex parte Geisler*, 4 Woods 381, 50 Fed. 411 (C.C.N.D. Tex. 1882) (Woods, J.); *Ex parte Kaine*, Betts Scr. Bk. 261, 14 F. Cas. 82 (C.C.S.D.N.Y. 1852) (No. 7597A) (Nelson, J.), *dismissed,* 55 U.S. (14 How.) 103 (1852), *later opinion*, 3 Blatchf. 1, 14 F. Cas. 78, 4 Rapp 1393 (C.C.S.D.N.Y. 1853) (Nelson, J.). A seeming counterexample – *Ex parte Clark*, 9 S. Ct. 2 (Harlan, Circuit Justice 1888), a one-paragraph 1888 habeas corpus opinion by Justice John Marshall Harlan – is the exception that proves the rule: The *United States Reports* did not include the opinion, but the *Supreme Court Reporter* published this opinion under the mistaken impression that it was a decision of the full Court. Evidence that this aspect of *Clark* was heard by Justice Harlan individually includes (i) the date of the decision – August 7, 1888 – although the Court was in recess from May to October 1888 and no other opinions are dated in June, July, August, or September; (ii) Justice Harlan's repeated use of the pronoun "I" to refer to the author of the opinion; and (iii) the headnote in the *Supreme Court Reporter,* which states that "Clark presented to Mr. Justice HARLAN, of the Supreme Court of the United States, at chambers, a petition praying for a writ of habeas corpus. . . ."

[7] For one example, Justice Stanley Reed's two 1943 opinions in *Ex parte Seals*, 4 Rapp 1466 and 1468, were cited in the first edition of the Hart & Wechsler treatise, *The Federal Courts and the Federal System* (1953), and the citations were then carried forward as late as the Fourth Edition (1996), although virtually no readers of the treatise would have been able to find them.

the Library of Congress contain four memoranda explaining his rulings on important applications to him as Circuit Justice for the Eighth and Tenth Circuits.[8] These memoranda read precisely like draft in-chambers opinions, setting forth the facts and explaining the Justice's reasons for his rulings on each application. But Rutledge never finalized the opinions, they never left his chambers, and they are not filed with the Court's records in the cases. In fact, when the lower-court judge, whose denial of bail to a series of defendants had been overturned by Rutledge, wrote to the Clerk of the Supreme Court requesting a copy of the opinion for his guidance in future cases, he was told that none had been written.[9] There is no way to know whether Rutledge concluded that there was no point in drafting formal in-chambers opinions if no one would see them but the litigants in the particular case before him and their lawyers. However, at about the same time period was deciding these in-chambers applications, one of his law clerks asked the Supreme Court's Reporter whether in-chambers opinions could be published, only to receive the response was that such opinions were never published in the *United States Reports*.[10] If this non-publication was the reason Rutledge did not prepare and disseminate in-chambers opinions, then the non-publication practice caused at least four potentially significant opinions to be lost to contemporary judges, lawyers, and litigants, and also lost to history for more than 50 years.

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[8] *See* Memorandum in *Bisignano v. Municipal Court of Des Moines* (October 1946), Wiley Rutledge Papers, Manuscript Division, Library of Congress ("Rutledge Papers"), Box 154; Memorandum in *Ex parte Standard Oil Co.* ("dictated March 18, 1947"), Rutledge Papers, Box 154; Memorandum in *Rogers v. United States* and two related cases, Rutledge Papers, Box 176 (Oct. 20, 1948); Memorandum in *Bary v. United States* and a related case, Rutledge Papers, Box 176 (Nov. 3, 1948). *Rogers* and *Bary* were important bail rulings, on cases that later came before the full Court, arising from contempt convictions of Communist Party figures who refused to testify before a Colorado grand jury, and Justice Rutledge expended considerable time on these cases. *See* John M. Ferrin, *Salt of the Earth, Conscience of the Court* 406 (2004) (citing letter from Justice Rutledge to W. Howard Mann, March 1, 1949, Rutledge Papers, Box 32).

[9] Letter from Judge J. Foster Symes to Charles Elmore Cropley, Clerk of the Supreme Court, November 16, 1948, and letter from Mr. Cropley, by E.P. Cullinan, Assistant Clerk, to Judge Symes, November 18, 1948, in case file, *Rogers v. United States,* O.T. 1950 No. 20, National Archives Supreme Court case files.

[10] Letter from Walter Wyatt, Reporter, to Chief Justice Vinson, Aug. 27, 1951, Walter Wyatt Papers, Manuscript Group 10278-b, Albert & Shirley Smalls Special Collection Library, University of Virginia, Charlottesville, Va. ("Wyatt Papers"), Box 119. This memorandum is discussed in more detail below. *See infra* note 28 and accompanying text. The memorandum is reprinted in full in Matetsky, *supra* note *, at xx-xxiii.

Even though Rutledge never finalized and published any in-chambers opinions, by the late 1940s or early 1950s, several other Justices had started to do so. As of 1951, four sitting Justices (Douglas, Frankfurter, Jackson, and Reed) had published at least one opinion in a West Publishing Company reporter (the *Supreme Court Reporter*, *Federal Reporter*, or *Federal Supplement*). Increased ease of publication may have resulted from the fact that in 1946, the Supreme Court's private printer retired, and the Government Printing Office established a branch print operation in the basement of the Supreme Court Building itself. Soon after the print shop moved on-site, the Justices began utilizing it not only for their draft and final opinions for the Court, but also to print internal "Memoranda to the Conference" (or "Memoranda to the Brethren" as they were sometimes captioned before 1981). It was a short step for Justices to start having their in-chambers opinions reproduced in the in-house print shop as well. *Williamson v. United States* by Justice Robert Jackson in 1950 may have been the first in-chambers opinion to be set in type, rather than typewritten or handwritten. By the early 1950s, several Justices were having occasional in-chambers opinions set in type and circulated to their fellow Justices for their information. This ready ability to print and distribute multiple copies of in-chambers opinions surely facilitated disseminating them to the legal publishers as well.[11]

Before *Supreme Court Practice* by Robert Stern and Eugene Gressman and their successors preempted the field, a leading guide to practice in the U.S. Supreme Court was *Jurisdiction of the Supreme Court of the United States* by Reynolds Robertson and Francis R. Kirkham, which was reissued in a 1951 edition edited by Richard Wolfson and Philip Kurland. This edition contained an Appendix B headed "Opinions of Supreme Court Justices Not in the United States Reports". The appendix addressed the fact that "[a]lthough today . . . all opinions delivered when the Court acts as a body are published in the United States Reports, there are other opinions of the Justices which are either not published or are to be found only by knowledge of their likely source or by diligent search into unlikely sources."[12]

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[11] *See, e.g.,* unsigned letter to Justice Reed, apparently from a law clerk, July 25, 1951, concerning his opinion in *Field v. United States,* 193 F.2d 86, 1 Rapp 158 (Reed, Circuit Justice 1951): "Your special letter containing your Field opinion came in last evening, so I got down early this morning and went to work on it. At the request of the Clerk's office I made several copies and am having Buck run off 150 more." Stanley F. Reed Papers, University of Kentucky, Box 133.

[12] Reynolds Robertson & Francis R. Kirkham, *Jurisdiction of the Supreme Court of the United States* 943-

Most of this Appendix addressed applications to a Supreme Court Justice acting individually – such as applications for bail, stays, or extensions of time to petition for certiorari.[13] Wolfson and Kurland observed that "[o]f course, it is rare for a Supreme Court Justice to write a full opinion upon the various applications to come before him," and that (then as now) most of these applications are denied without opinion or with only a brief memorandum. The authors surveyed some significant opinions and dispositions by single Justices in then-recent years, observed that "[o]pinions of Supreme Court Justices, acting on their wide individual authority, generally are not available at all," and provided citations to the known instances where such opinions had been reported. They concluded that "[f]or the scholar and the practicing lawyer, the failure of any publisher or of the Supreme Court Reporter to collect the published and unpublished opinions of the Justices so that they may be easily found and read is a great handicap."[14]

In March 1951, Justice Felix Frankfurter – who, in addition to being one of the first twentieth-century Justices to publish some in-chambers writings, had recently asked the Clerk to forward an in-chambers order to the *American Bar Association Journal* for publication[15] – read this Appendix and discussed it with Walter Wyatt, the Supreme Court's Reporter of Decisions.[16] Wyatt prepared a memorandum, apparently for his own use, concerning the possibility of publishing the Justices' in-chambers opinions in the *United States Reports*.[17] Wyatt also promised Frankfurter that he would raise the question at an upcoming meeting with Chief Justice Fred Vinson.[18] In advance of that

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47 (Richard F. Wolfson & Philip B. Kurland rev. ed. 1951).

[13] The Appendix also discussed occasional situations in which a Justice sat with a panel of a Court of Appeals or as a member of a three-judge district court. As Wolfson and Kurland noted, these situations are quite distinguishable from those giving rise to in-chambers opinions. *See id.* at 943-44.

[14] *Id.* at 947.

[15] *McHugh v. Massachusetts*, 36 A.B.A.J. 899 (Nov. 1950). The opinion was published together with an article headed "Considerations Involved in Granting Extensions for Applying for *Certiorari*," which the editors "published here with the thought that it will serve both the Court and the Bar through the distribution of information regarding the [Supreme Court's] practice [concerning extensions] which is not to be found in the reports of Supreme Court proceedings."

[16] There is no evidence that any of Wyatt's predecessors as Reporter ever considered this issue. For example, no reference to in-chambers opinions was located in the papers of Ernest Knaebel, who served as Reporter from 1916 to 1944. Knaebel Family Papers, Accession No. 9963, American Heritage Center, University of Wyoming, boxes 12-15.

[17] "Opinions of Supreme Court Justices not in the United States Reports", Mar. 30, 1951, Wyatt Papers, Box 121.

[18] *See id.* at 4. It is unsurprising that Frankfurter would raise an issue such as the Court's publication

meeting, Wyatt prepared a handwritten list of "Questions to Be Discussed with The Chief Justice" at their meeting,[19] which included the entry: "Publishing opinions of individual Justices, 'Orders in Chambers.'" Vinson apparently suggested at the meeting that Wyatt prepare a memorandum on this subject.

Wyatt then reworked his earlier memorandum into a more formal letter memorandum to the Chief Justice.[20] The substance of this letter was that it was unclear to Wyatt whether the applicable statutes authorized him to include individual Justices' opinions in the *United States Reports*, but that Wyatt would gladly include them if the Court or the Chief Justice directed him to. At the same time, Wyatt noted that copies of past in-chambers opinions had never been assembled anywhere, so that putting together a set of such opinions for publications could be an expensive and time-consuming project. He offered a series of suggestions for including the opinions in the *Reports,* if the Court so decided, either beginning with current and future opinions or retrospectively.

Unfortunately, Wyatt's analysis does not appear to have received Vinson's attention.[21] Several years later, after Earl Warren had succeeded Vinson as Chief Justice, Wyatt observed that he had "never been informed of a decision [on the subject of his memo] and do not know whether it ever was considered by the Court."[22]

The *United States Reports* thus continued to omit virtually all in-chambers opinions of individual Justices, although the number of such opinions continued to grow. Some of the Justices continued sending their

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policy for in-chambers opinions. *See generally* Dennis J. Hutchinson, *Mr. Justice Frankfurter and the Business of the Supreme Court, 1949-1961*, 1980 *Supreme Court Review* 143 (discussing Frankfurter's role in attempting to lead the Court on numerous procedural matters).

[19] Wyatt Papers, Box 119.

[20] Letter from Walter Wyatt to Chief Justice Vinson, *supra* note 10, *reprinted in* 4 Rapp supp. 2 at xx-xxiii.

[21] No copy of Wyatt's letter memorandum to the Chief Justice or any other documents concerning in-chambers opinions was located in the file of Vinson's correspondence with the Reporter of Decisions in the generally comprehensive Vinson Papers at the University of Kentucky, although the file contains correspondence on several other issues concerning the contents of the *United States Reports*. *See* Fred M. Vinson Papers, University of Kentucky, Louisville, Ky., Box 223, folder 5. Copies of the memorandum were, however, located in papers of some other Justices (typically annexed to later correspondence on this same issue).

[22] Draft letter ("not sent") from Walter Wyatt to Chief Justice Warren, Jan. 17, 1955, Wyatt Papers, Box 121.

in-chambers opinions to the private publishers of the *Supreme Court Reporter* and the *Lawyer's Edition*, which gladly printed them.[23] For example, in 1954, Wyatt forwarded Frankfurter's in-chambers opinion in *Albanese v. United States* to the publisher of the *Lawyer's Edition*, with the observation that the *United States Reports* did not include such opinions but that "I know of no reason why you should not report this opinion in your Reports, if you consider it advisable to do so."[24]

In January 1955, Frankfurter again told Wyatt that he believed the *United States Reports* should include in-chambers opinions. Wyatt prepared a draft letter intended to bring new Chief Justice Earl Warren up-to-date on the issue.[25] While much of this draft simply recapitulated his submission to Vinson in 1951, Wyatt updated his thoughts with the new observation that:

> When [the 1951] memorandum was written, the undersigned had received the impression from Mr. Cropley, then Clerk of the Court, that there probably were a large number of memoranda and opinions of this character buried in the files of the Court and that an attempt to collect and publish all of those previously filed would be a hurculean [*sic*] task, involving an exhaustive search of the original papers in all cases previously filed in the Court, because no separate index or list of such individual opinions had been maintained. . . .
>
> An attempt to search the original papers in all cases previously filed in the Court in an effort to find and publish all such memoranda and opinions previously filed would be impractical; but a recent conversation with Mr. Willey indicates that it would not be necessary. He advises that the practice of filing memoranda and opinions of this character is of recent origin, and he has maintained a loose-leaf file of such memoranda and opinions, though it may not be complete. His file contains 35 memoranda and opinions of this character aggregating 114 pages.

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[23] At the same time, the practice of occasionally publishing such opinions in the reports of lower courts, such as the *Federal Reporter* or *Federal Supplement*, was discontinued. However, occasionally an opinion or order of a Justice acting in chambers, not found in any Supreme Court reporter, would be printed in another periodical, whether at the instance of the authoring Justice or otherwise. *See, e.g.*, *United States ex rel. Knauff v. McGrath*, 96 Cong. Rep. A3751, 1 Rapp 36 (Jackson, Circuit Justice 1950); *McHugh v. Massachusetts,* 36 A.B.A.J. 899 (Frankfurter, Circuit Justice 1950); *In re Wykoff*, 6 Race Rel. L. Rev. 794 (Black, Circuit Justice 1961).

[24] Letter from Walter Wyatt to Ernest H. Schopler, Dec. 14, 1954, Wyatt Papers, Box 117.

[25] Draft letter ("not sent"), *supra* note 22.

> Since this question was raised in 1951, this office also has been compiling a file of such memoranda and opinions sent to it by the authors, the Clerk, and the printers. It contains 12 memoranda and opinions aggregating 36 pages.[26]

Ultimately Wyatt did not send his letter to Warren. Instead, he suggested that Frankfurter should address his proposal for publishing in-chambers opinions in the *United States Reports* directly with his fellow Justices.[27] Whether Frankfurter did so is unknown. If he did, the suggestion was rejected.

Around this time, Frederick Bernays Wiener entered the fray.[28] Wiener was well-known to the Supreme Court, both as an advocate and as the author of numerous publications including his recent treatise, *Effective Appellate Advocacy*, and had served as Reporter for a committee that had recently drafted revised Rules for the Court. Wiener had been credited by Wolfson and Kurland with some of the citations they used in their 1951 Appendix, and Wyatt later described him as having "shown more interest in the United States Reports than any other practicing lawyer that I know."[29] In 1956, Wiener published "Opinions of Justices Sitting in Chambers" in the *Law Library Journal*.[30] This article began by noting that since 1951, when the Kurland and Wolfson appendix had been published, "there has been a marked increase in the number of opinions rendered by the Justices sitting in chambers."[31] He found it unfortunate that in-chambers opinions and orders were never reported officially, and that many of them were not available from any source at all. Noting that in-chambers applications frequently dealt with important matters, such as bail and stays, Wiener opined:

> [A]ction on the various matters submitted to individual Justices in chambers has been accompanied by an increasing number of opinions written in connection therewith. The importance of such ap-

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[26] *Id.* at 2-3.

[27] Letter from Justice Frankfurter to Walter Wyatt, Jan. 17, 1955, Wyatt Papers, Box 121; Letter from Wyatt to Frankfurter, Jan. 19, 1955, Wyatt Papers, Box 121.

[28] Professor Paul R. Baier is preparing a biography of Colonel Wiener. Pending its appearance, for background on Wiener, see, *e.g.*, Paul Baier, *Frederick the Incomparable*, 4 A.B.A. Journal e-Report No. 21 (May 27, 2005); William Pannill, *Appeals: The Classic Guide,* 25 Litigation No. 2 at 6 (1999).

[29] Letter from Walter Wyatt to Chief Justice Warren, Mar. 1, 1963, at 2, Wyatt Papers, Box 122 (suggesting Wiener as one of four potential successors to Wyatt, who was about to retire from his position as Reporter).

[30] 49 Law Lib. J. 2 (1956).

[31] *Id.* at 2.

> plications to counsel and to individual litigants – literally often of life-or-death significance to the latter – suggests that it would be helpful, at the very least, to have collected somewhere a complete list of such opinions.[32]

Wiener then appended a listing of 58 in-chambers opinions known to him, "start[ing] with Kurland and Wolfson's compilation, but [also] based in large measure on the collection maintained by Harold B. Willey, Esq., Clerk of the Supreme Court."[33] Of these 58 opinions (which actually ranged from full-fledged opinions to brief comments in handwritten dispositions), some 25 were unreported. Although the Wiener article attained some attention within the Court – Frankfurter, in particular, is known to have read it in manuscript[34] – it too did not lead to any change in the Court's publication practices.

The suggestion that in-chambers opinions should be officially reported next arose within the Court in 1960. This time, it was Justice William O. Douglas who requested that his in-chambers opinion in *Bandy v. United States* be printed in the *United States Reports*. Wyatt (who had apparently overcome his earlier agnosticism on whether in-chambers opinions should be published) wrote to Douglas that he would be "delighted" to include *Bandy* and all other in-chambers opinions in his *Reports*, but that he could do so only if he received the Court's authorization. Wyatt added that he was "unhappy about the existing situation, especially since such opinions are now being reported in the Lawyer's Edition and the Supreme Court Reporter, and failure to include them makes the United States Reports less complete than those unofficial reports."[35]

Douglas then "sounded out the opinion around the building." He found "so much feeling against the [proposed] change in the practice that I thought I would not bring it up to Conference" and instead simply asked

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[32] *Id*. at 4.

[33] *Id*. at 6.

[34] A manuscript of Colonel Wiener's article, with the notation "Read by F.F. 9/25/55," is contained in Frankfurter's archived papers. Felix Frankfurter Papers, Manuscript Division, Library of Congress, microfilm reel 67.

[35] Letter from Walter Wyatt to Justice Douglas, Nov. 22, 1960, William O. Douglas Papers, Manuscript Division, Library of Congress ("Douglas Papers"), Box 1133, also located in Earl Warren Papers, Manuscript Division, Library of Congress ("Warren Papers"), Box 417, and Wyatt Papers, Box 121.

Wyatt to send his opinion to West Publishing Company.[36] Wyatt promised to send the opinion to West Publishing but indicated that the Clerk's Office already sent such opinions to the publishers automatically, suggesting that by this time, a Justice could readily have an in-chambers opinion published, albeit unofficially, whenever he chose to. Douglas did not disclose any reasons that other Justices might have provided for opposing the publication of in-chambers opinions in the *United States Reports*. However, when Wyatt forwarded his correspondence with Douglas to Warren, indicating that he would make no change in procedure unless the Court so instructed him,[37] the Chief Justice promptly "agree[d] that changes of this character should not be made by the Reporter without Conference authorization."[38]

There matters rested for another eight years,[39] through Wyatt's retirement as Reporter of Decisions at the end of 1963. In 1964, a law-review survey of Supreme Court in-chambers practice observed:

> Having decided a bail or stay application, a Justice will often add a sentence or two, in his own handwriting, explaining his reasons or recommending further procedures to the applicant. Such scribblings are not officially reported. In the last decade, however, most "opinions" and "memoranda" filed by Justices on these matters have been reported in the Supreme Court Reporter and the Lawyers Edition. Otherwise, short memoranda and information on action taken on these applications are available to the lawyer only through the clerk's files in Washington. It would seem, unless the Justice indicates to the contrary, that all such memoranda should be printed in the official Supreme Court Reports. . . .[40]

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[36] Letter from Justice Douglas to Walter Wyatt, Nov. 25, 1960, Douglas Papers, Box 1133, Wyatt Papers, Box 121; Letter from Walter Wyatt to Justice Douglas, Nov. 30, 1960, Douglas Papers, Box 1133, Wyatt Papers, Box 121. As Douglas had requested, the *Bandy* opinion was duly published in the unofficial reporters (and, atypically for the time, in the *United States Law Week* as well).

[37] Letter from Walter Wyatt to Chief Justice Warren, Nov. 22, 1960, Warren Papers, Box 417, Wyatt Papers, Box 121.

[38] Letter from Chief Justice Warren to Walter Wyatt, Nov. 22, 1960, Warren Papers, Box 417, Wyatt Papers, Box 121.

[39] *See also* Letter from Walter Wyatt to Judge Simon E. Sobeloff, May 29, 1961, Wyatt Papers, Box 121 (explaining that in-chambers opinions were never published in the *United States Reports* and that "[d]uring the 15 years that I have been with the Court, the question whether such opinions of individual Justices 'in chambers' should be reported in the United States Report[s] has been raised formally or informally two or three times and I have never been authorized to report them in the United States Reports").

[40] Frank Felleman & John C. Wright, Note, *The Powers of a Supreme Court Justice Acting in an Individual*

On May 2, 1968, the Clerk of the Supreme Court, John F. Davis, and the Reporter of Decisions, Henry Putzel, Jr., addressed a memorandum to Warren concerning "several aspects of their respective procedures relating to the issuance and publications of opinions, orders and judgments of the Court."[41] The first recommendation contained in this memorandum was headed "United States Reports – In-Chambers Opinions" and read:

> At the present time, in-chambers opinions by individual Justices are not printed in the United States Reports. Many of them are published in the Supreme Court Reporter and in the Lawyers Edition. It has been suggested that consideration be given to printing in the back of the preliminary prints and bound volumes such of these in-chambers opinions as have precedential value. Sometimes orders on extensions of time, bail, and stays are accompanied by short notations, most frequently handwritten, which ordinarily would not be of sufficient importance to justify publication. Probably all in-chambers opinions which are set in type would fall in the category of such opinions which would appear in the United States Reports. In addition, there will probably be others which a Justice will wish to have published.[42]

In July 1968, Warren circulated this memorandum to the Conference for discussion during the new Term,[43] but the issue was not immediately resolved. The question recurred in 1969, when Justice Douglas requested publication of his opinion in *Levy v. Parker*, a bail case involving a soldier who had spoken out against the American involvement in Vietnam. Justice Douglas suggested that Putzel discuss the Conference's consideration of publishing in-chambers opinions with Justice William Brennan. Brennan did not recall the Conference's having decided whether such opinions should be published, although "Mr. Justice Brennan authorized [Putzel] to say that he feels strongly that these opinions should be published in the official Reports."[44]

Capacity, 112 U. Pa. L. Rev. 981, 987-88 (1964).

[41] Memorandum to the Chief Justice, May 2, 1968, Warren Papers, Box 417. In addition to the reporting of in-chambers opinions, the memorandum addressed matters such as the reporting of *per curiam* opinions, the effectuation of changes made in opinions after their initial publication, and the content of the Supreme Court's *Journal*.

[42] *Id.* at 1.

[43] "Memorandum for the Brethren" from Chief Justice Warren, July 9, 1968, Warren Papers, Box 417.

[44] Letter from Henry Putzel, Jr. to Justice Douglas, Sept. 18, 1969, Douglas Papers, Box 1133.

Douglas's and Brennan's view that in-chambers opinions should appear in the *United States Reports* soon carried the day. On December 1, 1969, Putzel wrote to new Chief Justice Warren E. Burger to confirm "your advice that the Court in Conference has approved publication in the United States Reports of in-chambers opinions of individual Justices."[45] To be included in the Reports were "[a]ll in-chambers opinions . . . that are printed in the Court's Print Shop unless the author advises me of his desire not to have a given opinion published," as well as any other opinions that the authoring Justice requested be published.[46] Accordingly, volume 396 of the *United States Reports* included the twelve in-chambers opinions that had been printed in the Court's Print Shop since the end of October Term 1968, and such opinions have been a regular feature of the reports ever since.

Wyatt and outside commentators had sometimes suggested that the United States Code, which directs the Reporter of Decisions to print opinions *of the Court* in the *United States Reports*, precluded including in-chambers opinions in the Reports.[47] The Code sections that concerned them have never been amended, but no one has questioned the Reporter's authority to publish these opinions in the *Reports* at the Court's direction. On the other hand, neither have the compilers or publishers of *In Chambers Opinion* been able to secure a "special appropriation" from Congress to facilitate locating and printing the backlog of in-chambers opinions, as Reporter of Decisions Wyatt also once suggested.[48] This too remains a task for future researchers.

• • •

Walter Wyatt opined more than 60 years ago that searching for and publishing all of the Justices' in-chambers opinions through that time "would necessitate a search of the huge mass of original papers, . . . would take years and would be costly; but the result might be worth what it would cost."[49] The editors think it has been worth the efforts we have expended in doing it.

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[45] Letter from Henry Putzel, Jr. to Chief Justice Burger, Dec. 1, 1969, Douglas Papers, Box 1133.
[46] *Id.* It is unknown whether any Justice has ever exercised the privilege of requesting that a "printed" in-chambers opinion not appear in the *United States Reports.*
[47] Letter from Walter Wyatt to Chief Vinson, *supra* note 10, at 2, 4 Rapp. supp. 2 at xx-xxi (citing 28 U.S.C. §§ 411(a) and 673(c)); Stern & Gressman, *Supreme Court Practice* 538-39 & n.4 (4th ed. 1969).
[48] Letter from Walter Wyatt to Chief Justice Vinson, *supra* note 10, at 6, 4 Rapp supp. 2 at xxii.
[49] *Id.* at 7.

The Recent Past and Near Future of Reporting In-Chambers

Ross E. Davies[†]

Compiling in-chambers opinions in traditional books of cases was a good idea in 2001 – when Cynthia J. Rapp created the first three volumes of *A Collection of In Chambers Opinions by the Justices of the Supreme Court of the United States* (aka *Rapp's Reports*) – and 2004 – when the *Green Bag* published them. Now the time has come to make some changes. *The Journal of In-Chambers Practice* – Ira Brad Matetsky's new periodical, the first issue of which you are now reading – is where those changes will take place. Here are the basics:

Final Publication of *4 Rapp*

Since 2004, Rapp, Matetsky, and I have been collecting and annotating in-chambers opinions for a fourth volume of *Rapp's Reports*. The *Green Bag* has been publishing those opinions in a series of preliminary pamphlet installments. The cover of each of those *4 Rapp* preliminary prints features this appeal:

> NOTICE: This supplement is subject to revision before the complete, bound edition of *4 Rapp* is published sometime in the next few years. Please notify the *Green Bag* (editors@greenbag.org) of any errors you find, so that we can fix them now.

Later this year, we will combine those preliminary prints (with corrections) into the final book version of *4 Rapp*. So, if you catch an error in any of those preliminary prints – all of which you can read for free by visiting

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[†] Professor of law, Antonin Scalia Law School at GMU; editor-in-chief, the *Green Bag*.

www.greenbag.org and clicking on the "In Chambers Opinions" button – please let us know before September 30, 2016.

The final bound version of *4 Rapp* should be in print by December 2016. It will, in all likelihood, be the last traditional opinion-compilation volume in the *Rapp's Reports* series.

But it most certainly will not be the end of *Rapp's Reports*. Print publication will continue in *The Journal of In-Chambers Practice* – see, for example, pages 38-43 in this issue. In addition, *The Journal of In-Chambers Practice* will be available electronically on Westlaw and HeinOnline, on the websites of the *Journal of Law* and the *Green Bag*, and probably in other online resources as well.

IN-CHAMBERS OPINION REPORTING IN *THE JOURNAL OF IN-CHAMBERS PRACTICE*

New in-chambers opinions, and newly discovered old ones (which we keep finding in various archives and libraries), will be published in the "Rapp's Reports" section at the back of *The Journal of In-Chambers Practice*. There will be a half-dozen notable differences between this new format and the old format used in *1 Rapp* through *4 Rapp*:

1. Headnote: In *1 Rapp* through *4 Rapp*, some opinions have explanatory headnotes and some do not, and headnote content varies pretty widely. From now on, each opinion will be introduced by a signed editorial headnote which will include, at least: (a) a citation to the original source of the opinion (for example, a record in an archive or library, or a page in a book, or the name of an individual collector); (b) the name of the author of the opinion and the basis for that identification; (c) the date the opinion was issued and the basis for that judgment; and (d) the recommended citation for the opinion. See, for example, pages 38-43 in this issue.

2. Opinion formats: In *1 Rapp* through *4 Rapp*, we attempted – sometimes with limited success – to mimic the widely varied and sometimes very informal formatting of in-chambers opinions in their original formats. For *Rapp's Reports* in *The Journal of In-Chambers Practice* we are abandoning that well-intentioned but practically useless approach in favor of a more nearly (but not absolutely) consistent format that preserves the content of the opinions while making them easier to read, and to look at.

3. Cumulative Tables and Indexes: In *1 Rapp* and *4 Rapp*, there are some excellent reference tools. As wonderful as they are, we are going to stop updating them because, with in-chambers opinions searchable online, the cost-benefit ratio strikes us as too high. Maintaining those tables and indexes requires a lot of work, and publishing them requires a lot of pages.

4. Complementary primary content: Because we modeled *1 Rapp* through *4 Rapp* on traditional case-reporter volumes, it was inappropriate to include too much material other than reference resources connected to the opinion themselves – that is, the cumulative tables and indexes. We were limited, or at least felt limited, to a preface and, sometimes, an introductory essay. By housing *Rapp's Reports* in a scholarly and practical law journal, we are now free to include as much additional material as the editor-in-chief, Matetsky, sees fit to allow. So, now the sky – or at least the ceiling in-chambers – is the limit.

5. Mistakes: One other benefit of moving from the traditional case-reporter format to the journal format is that we will be able to publish reporting errors in the "Errata" section of this journal (wherever that might turn out to be), where the errors will be searchable online. In a case-reporter system, errata are traditionally not so accessible.

6. Volume 5: For purposes of citation – and just in case we decide to produce another compilation volume someday – the in-chambers opinions section of *The Journal of In-Chambers Practice* will be labeled "Rapp's Reports, Volume 5," and the opinions themselves will be numbered sequentially by their appearance in the journal.

There will, I expect, be other improvements and innovations in in-chambers opinion reporting under Matetsky's leadership. The ones I've listed here make for a good start, though.

Rapp's Reports

Volume 5

in The Journal of In-Chambers Practice

5 Rapp no. 1 (1934)

KNAUER V. HUGHES

HEADNOTE

by Ross E. Davies

Source: RG 267, Entry 30, Box 1, Records of the Supreme Court of the United States, National Archives and Records Administration, Washington, DC.

Opinion by: Owen J. Roberts (noted in source).

Opinion date: June 27, 1934 (noted in source).

Citation: Knauer v. Hughes, 5 Rapp no. 1 (1934) (Roberts, J., in chambers), 1 J. In-Chambers Practice 38 (2016).

Additional information: This opinion, issued in response to an application for a writ of habeas corpus, is in letter form, typed on Supreme Court stationery. It appears to have been written at Justice Roberts's home in Kimberton, Pennsylvania.

OPINION

Kimberton, Pa.,
June 27, 1934.

A. Bert Polonsky, Esq.,
9 East Forty-First Street,
New York, N.Y.

My dear Sir:

I acknowledge receipt of your letter of June 23. I have reconsidered the Knauer application in the light of the correspondence you submit. I am still of the opinion that the issuance of a writ is not justified.

If I were of a different view as respects the merits of the application, I would still feel compelled to refuse a writ as I understand Knauer's term will expire in September. The writ would be returnable at the session of the Court in October and at that time the question would be moot.

You are of course at liberty to apply to any of the Justices of the court as my action in declining to issue a writ is in no sense an adjudication.

Yours sincerely,
/s/ Owen J. Roberts

5 Rapp no. 2 (1950)

McHugh v. Massachusetts

Headnote

by Ross E. Davies

Source: Considerations Involved in Granting Extensions for Applying for Certiorari, ABA J., Nov. 1950, at 899.

Opinion by: Felix Frankfurter (noted in source).

Opinion date: September 30, 1950 (noted in source).

Citation: McHugh v. Massachusetts, 5 Rapp no. 2 (1950) (Frankfurter, J., in chambers), 1 J. In-Chambers Practice 40 (2016).

Additional information: This opinion was published in the ABA Journal in an article without a byline, with an introduction that reads in part:

> Title 28, United States Code, Section 2101(c), delimits the time within which an application for writ of certiorari to the Supreme Court, in a vast majority of cases, may be made. It also provides for an extentsion of that time by the Court or a Justice thereof when a request based upon substantial grounds is submitted prior to the expiration of the basic time limit fixed by the statute. . . .
>
> A recent order entered by a Justice of the Supreme Court is expository of the considerations counsel should keep in mind in applying for extension of time under the statute. Charles Elmore Cropley, the Clerk of the Court, has sent a copy of this order to the JOURNAL, and it is published here with the thought that it will serve both the Court and the Bar through the distribution of information respecting the practice which is not to be found in the reports of Supreme Court proceedings.

Opinion

Patrick J. McHugh, et al., Petitioners,

vs.

Commonwealth of Massachusetts,

Whereas the most effective petitions for certiorari are those which state with brief clarity the federal questions that were duly raised in a deci-

sion sought to be reviewed so as to make apparent the substantiality of such federal questions; and

Whereas the ninety days within which such a petition must be filed is of a length which takes into account other professional engagements of counsel; and

Whereas it is to the public interest that litigation be disposed of as expeditiously as possible; and

Whereas the issues in this case, as set forth in this application, claimed to be such as to warrant the granting of a petition for a writ of certiorari, do not need much elaboration of what is set forth in the application for an extension of time,

Upon consideration of the application of counsel for petitioners,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 15, 1950, provided that notice of this extension is given to opposing counsel forthwith.

Felix Frankfurter
Associate Justice of the Supreme Court of the United States
Dated this 30th day of September, 1950.

5 Rapp no. 3 (1951)

TERRA V. NEW YORK

HEADNOTE

by Ross E. Davies

Source: Papers of Robert Houghwout Jackson, Box 171, Manuscript Division, Library of Congress, Washington, DC

Opinion by: Robert H. Jackson (collection in which source was found).

Opinion date: September 30, 1950 (noted in source).

Citation: Terra v. New York, 5 Rapp no. 3 (1951) (Jackson, J., in chambers), 1 J. In-Chambers Practice 42 (2016).

Additional information: This opinion was typed on a sheet of plain paper, with no signature on the signature line at the bottom. See also Terra v. New York, 342 U.S. 938 (1952).

OPINION

William Terra and Joseph Terra,

v.

The People of the State of New York.

I grant this appeal, as is my custom when a case is technically appealable, in order that the decision as to whether it has substance may be made by the full Court.

I deny a stay and bail pending action by this Court, because, while appealable on the ground that it presents a federal question, I think the case does not present a substantial one. The opinion of the Court of Appeals, in my view, is so clearly right, under our authorities, that I would favor dismissal of the appeal for want of a substantial federal question. Therefore, I should not grant bail. If the Court disagrees and notes probable jurisdiction, application for bail may be renewed to the full Court.

Associate Justice of the Supreme
Court of the United States
December 15, 1951.

5 Rapp no. 4 (1954)

Breslin v. New York

Headnote

by Ross E. Davies

Source: Papers of Robert Houghwout Jackson, Box 188, Manuscript Division, Library of Congress, Washington, DC

Opinion by: Robert H. Jackson (noted in source).

Opinion date: June 28, 1954 (noted in source).

Citation: Breslin v. New York, 5 Rapp no. 4 (1954) (Jackson, J., in chambers), 1 J. In-Chambers Practice 43 (2016).

Additional information: This opinion was typed on a sheet of plain paper.

Opinion

On Application for Stay.

James J. Breslin, Petitioner,
v.
The People of the State of New York.

The application herein is denied. Examination of the petition for rehearing does not indicate any intervening event or consideration that was not before the Court at the time of denial of the petition for certiorari. I am unable to say, in view of the denial by the full Court, that a substantial question exists for review by this Court.

I am unable to grant the request for oral argument, as I am leaving the city. This denial is therefore without prejudice to a renewal of the application before any other Justice of this Court.

/s/ Robert H. Jackson

Associate Justice, Supreme Court
of the United States
June 28, 1954

The Green Bagatelle

EST. 1889 • RE-EST. 1997 OCCASIONAL ODDS & ENDS FROM THE GREEN BAG

Numbers 1 & 2

January 20 & March 8, 2016

The Green Bagatelle operates on the same terms as the *Journal of Law*. Questions? Please visit the *Green Bag*'s website at www.greenbag.org or write to editors@greenbag.org. ISSN 2157-9067 (print) and 2157-9075 (online).

Exemplary Nominees and a Colorful Puzzle

Previewing the 2016 Almanac & Reader

Green Bagatelle #1 (January 20, 2016)

The "Exemplary Legal Writing" ballots are in the mail. During 2015, judges and other legal scholars nominated judicial opinions and law review articles for our annual collection of exemplary legal writing. Those nominators are now voting for what they believe to be the most especially exemplary of those nominees. In a few weeks we will tally the votes and then publish the top vote-getters in the 2016 *Green Bag Almanac & Reader*. We had planned to honor exemplary writing in four categories, but we ended up with just three, for a reason that will become obvious if you keep reading.

Here is a complete list of the exemplary legal writing on the ballot:

I. Opinions for the Court

Cecilia Maria Altonaga, *In re Denture Cream Products Liability Litigation*, 2015 WL 392021 (S.D. Fla. Jan. 28, 2015)

Charles R. Breyer, *In re Hewlett-Packard Company Shareholder Derivative Litigation*, No. 3:12-cv-06003-CR (N.D. Cal. July 28, 2015)

The Court, *In re Hong Yen Chang*, 344 P.3d 288 (Cal. 2015)

Frank H. Easterbrook, *Iqbal v. Patel*, 780 F.3d 728 (7th Cir. 2015)

Judith L. French, *In re Complaint of Pilkington North America, Inc.*, 2015 WL 7485933 (Ohio 2015)

Elena Kagan, *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645 (2015)

Cornelia T.L. Pillard, *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015)

Jed S. Rakoff, *In re Petrobras Securities Litigation*, 104 F.Supp.3d 618 (S.D.N.Y. 2015)

Antonin Scalia, *Johnson v. U.S.*, 135 S. Ct. 2551 (2015)

Amul R. Thapar, *Wagner v. Sherwin-Williams Co.*, 2015 WL 5174130 (E.D. Ky. 2015)

William G. Young, *In Re Nexium (Esomeprazole) Antitrust Litigation*, 309 F.R.D. 107 (D. Mass. 2015)

II. CONCURRENCES, DISSENTS & OTHER OPINIONS

Carlos T. Bea, *John Doe I v. Nestle USA, Inc.*, 788 F.3d 946 (9th Cir. 2015)

Frank H. Easterbrook, *Thomas v. Clements*, 797 F.3d 445 (7th Cir. 2015)

Jennifer Walker Elrod, *Trent v. Wade*, 801 F.3d 494 (5th Cir. 2015)

Alex Kozinski, *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015)

Goodwin Liu, *People v. Grimes*, 340 P.3d 293 (Cal. 2015)

Jill A. Pryor, *In re Rivero*, 797 F.3d 986 (11th Cir. 2015)

John G. Roberts, Jr., *McFadden v. U.S.*, 135 S.Ct. 2298 (2015)

Ojetta R. Thompson, *Sanchez v. Roden*, 2015 WL 8057132 (1st Cir. 2015)

Don R. Willett, *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015)

III. LAW REVIEW ARTICLES PUBLISHED 50 YEARS AGO

David L. Bazelon, *Law, Morality, and Civil Liberties*, 12 UCLA Law Review 13 (1964-1965)

John R. Brown, *The Trumpet Sounds: Gideon — A First Call to the Law School*, 43 Texas Law Review 312 (1965)

Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 Harvard Law Review 713 (1965)

Paul Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harvard Law Review 56 (1965)

Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 Stanford Law Review 567 (1965)

Arthur E. Sutherland, Jr., *Crime and Confession*, 79 Harvard Law Review 21 (1965)

Herbert Wechsler, *The Courts and the Constitution*, 65 Columbia Law Review 1001 (1965)

IV. U.S. SUPREME COURT BRIEFS

Interestingly, our voters have nothing to vote for in this category because we received zero nominations. We wonder why.


The World.
EVENING EDITION
"Circulation Books Open to All."
"Circulation Books Open to All."
NEW YORK, SATURDAY, JUNE 10, 1905.

Like every *Green Bag Almanac & Reader*, this year's will have — in addition to the "Exemplary Legal Writing" honorees — our perennially popular annual reviews:

Bryan Garner's *The Year in Language & Writing*

Greg Jacob and Rakesh Kilaru's *The Year in Law*

Tony Mauro's *A Term in the Life of the Supreme Court*

and

Kevin Underhill's *A Year of Lowering the Bar*

We will also have our customary thematic "useful and entertaining tidbits." Like last year's *Almanac & Reader*, this year's will have a Sherlock Holmes/John Watson theme. This time we will focus on two stories: "The Reigate Puzzle" (one of the classics) and "The Field Bazaar" (a somewhat obscure and controversial vignette).

Unfortunately, there are limits to what we can do in the *Almanac & Reader*, mostly because it is a small book (6 inches wide by 9 inches tall) and it is printed in plain, relatively inexpensive black and white. That's too bad. Some of the most appealing of the old printings of the Sherlock Holmes stories are from large-format newspapers and magazines, with colorful illustrations.

For example, as Ira Brad Matetsky explained in the 2015 *Almanac & Reader*, the last complete set of the *New York World* was almost lost to the world. Heroics by crusading ink-on-paper lover Nicholson Baker saved the last complete set of that historically significant newspaper:

> Owned by Joseph Pulitzer from 1883 until his death in 1911, the paper acquired a reputation for sensationalism and the original "yellow journalism." In 1896, it became the first newspaper with a four-color press, of which it took robust advantage during the ensuing years. It published O. Henry and Mark Twain and A.J. Liebling and later Dor-

> othy Parker; it featured the first comic strip ("Hogan's Alley," aka "The Yellow Kid") and the first crossword puzzle.[1]

Today, those old *World*s are in the care of Duke University's David M. Rubenstein Rare Book and Manuscript Library.

Duke's collection includes a colorful 1905 edition of "The Reigate Puzzle."[2] We cannot faithfully reproduce it in our plain, cellulose-based *Almanac & Reader*, but we can in this, our snazzy, web-based *Green Bagatelle*. And so, with the generous assistance and permission of the kind people at the Rubenstein Library, we present the *World*'s "Reigate Puzzle" here. But first, the *World*'s Saturday (June 10, 1905) cliffhanger introduction to the full Sunday (June 11) version of the story . . .[3]

— *Ross E. Davies*

[1] Ira Brad Matetsky, *The Adventure of the New York World*, 2015 GREEN BAG ALM. 465, 467.
[2] Arthur Conan Doyle, *The Reigate Puzzle*, N.Y. WORLD, June 11, 1905, Sunday Edition, Magazine Section, at 7-8, David M. Rubenstein Rare Book & Manuscript Library, Duke University.
[3] Arthur Conan Doyle, *The Reigate Puzzle*, N.Y. WORLD, June 10, 1905, Evening Edition, Story Supp., at 3 (via *Chronicling America*, Library of Congress, chroniclingamerica.loc.gov.

Exemplary Writing from 2015 & Rules for 2016

Green Bagatelle #2 (March 8, 2016)

Here is a list of our "exemplary legal writing" honorees for 2015. Most can be found on the web. *Green Bag* subscribers will find all of them (except the books) in the 2016 *Almanac & Reader*, which will be in mailboxes worldwide later this month. Congratulations to all:

Opinions for the Court

Charles R. Breyer, *In re Hewlett-Packard Company Shareholder Derivative Litigation* (N.D. Cal. July 28, 2015)

Elena Kagan, *Mach Mining v. EEOC*, 135 S.Ct. 1645 (2015)

Cornelia T.L. Pillard, *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015)

Amul R. Thapar, *Wagner v. Sherwin-Williams Co.*, 2015 WL 5174130 (E.D. Ky. 2015)

Concurrences, Dissents, Etc.

Carlos T. Bea, *Doe v. Nestle*, 788 F.3d 946 (9th Cir. 2015)

Frank H. Easterbrook, *Thomas v. Clements*, 797 F.3d 445 (7th Cir. 2015)

O. Rogeriee Thompson, *Sanchez v. Roden*, 808 F.3d 85 (1st Cir. 2015)

Don R. Willett, *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015)

Law Review Articles from 50 Years Ago

Guido Calabresi, *The Decision for Accidents*, 78 Harvard Law Review 713 (1965)

Herbert Wechsler, *The Courts and the Constitution*, 65 Columbia Law Review 1001 (1965)

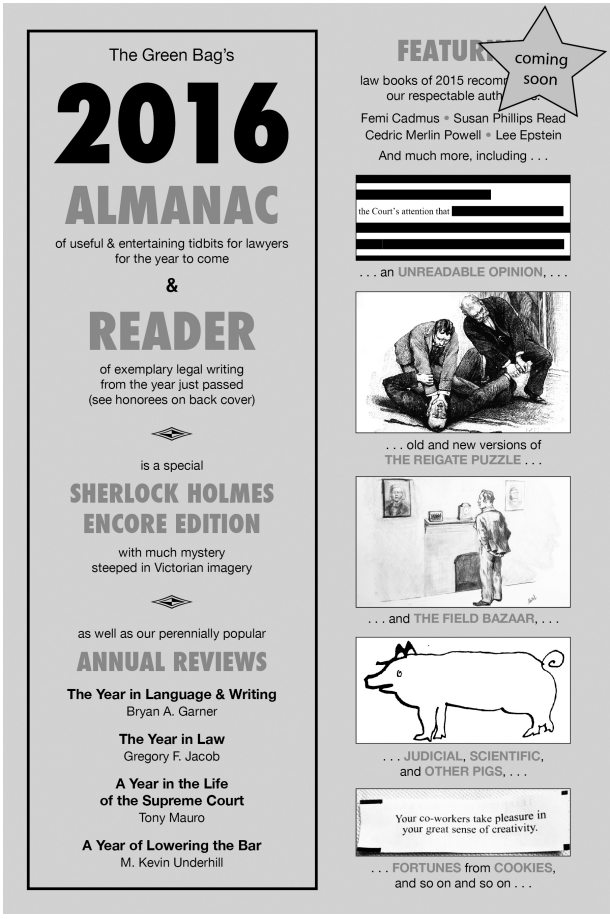
Books

Recommended by our respectable authorities — Femi Cadmus, Lee Epstein, Cedric Merlin Powell, and Susan Phillips Read:

Akhil Reed Amar, *The Law of the Land* (Yale)

Adam Benforado, *Unfair* (Crown)

Ellen Berrey, *The Enigma of Diversity* (Chicago)



Stephen Breyer, *The Court and the World* (Knopf)

John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Happiness and the Law* (Chicago)

Irin Carmon & Shana Knizhnik, *Notorious RBG* (HarperCollins)

Ta-Nehisi Coates, *Between the World and Me* (Spiegel & Grau)

John C. Coffee, Jr., *Entrepreneurial Litigation* (Harvard)

Alan M. Dershowitz, *Abraham* (Schocken)

Nancy E. Dowd (ed.), *A New Juvenile Justice System* (NYU)

Jeffrey A. Engel (ed.), *The Four Freedoms* (Oxford)

Nuno Garoupa & Tom Ginsburg, *Judicial Reputation* (Chicago)

Gunnar Grendstad, William R. Shaffer & Eric Waltenburg, *Policy Making in an Independent Judiciary* (ECPR)

Wil Haygood, *Showdown* (Knopf)

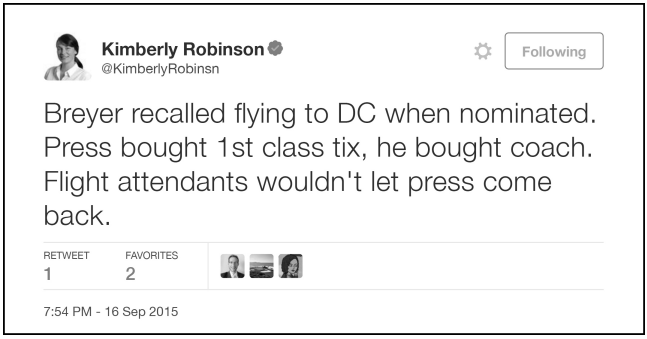
Dan Jones, *Magna Carta* (Viking)

Burt Neuborne, *Madison's Music* (New)

Richard A. Posner, *Divergent Paths* (Harvard)

Cass R. Sunstein, *Constitutional Personae* (Oxford)

Michael A. Zilis, *The Limits of Legitimacy* (Michigan)



In related business, here are some new and perhaps improved rules for selection of our "exemplary legal writing" honorees for 2016.

FORM

First, all nominations must be sent to editors@greenbag.org and must include the following in the body of the email: (a) an accurate citation or functional link to the nominated work, (b) the nominator's real name, and (c) an email address and a snail-mail address for the nominator (for Category #5 — see below — also include a Twitter handle).

CONTENT

Second, we have tinkered with some categories, given up on one, and added two new ones:

Category #1: Judicial Opinions — We are expanding the pool of nominators. Any judge in active service in 2016 on a state or federal court may nominate one or two signed opinions issued in 2016.

Category #2: State Supreme Court Briefs — We are ditching "U.S. Su-

preme Court Briefs." We had zero nominees in 2015. It is easy to imagine reasons for this, and none of the likely ones involves conditions over which the *Green Bag* has much influence. So, we are moving on to another field where good litigators write. Category #2 is now "State Supreme Court Briefs." Anyone listed as counsel on a brief filed in a state supreme court in 2015 or 2016 may nominate a brief filed in that court in 2016.

Category #3: Law Review Articles — We are pretty happy with this category, so the only changes are the qualifying years for nominators and nominees. Anyone who (a) wrote something with a 2015 publication date in any law review at a U.S. law school, and (b) was not a law student at the time, may nominate in this category any article with a 1991 publication date in any law review at a U.S. law school. This is, as it was last year, a test of durability and timeliness: What scholarship published 25 years ago is the most readable and worth reading today?

Category #4: Books — We are happy with this as well. We hope all four of our respectable authorities return for 2016. We might add one or two.

Category #5: Tweets — This is a new category. Anyone with a Twitter account may nominate an exemplary law-related tweet by sending us a link. Hashtags, likes, and retweets are irrelevant in this context. We will have no stuffing of ballot boxes at the *Green Bag*, if we can avoid it. To get you thinking about excellence in tweeting we've included one by Kimberly Robinson that we think is mighty good: compact, articulate, and interesting, with a point and an edge but no barb.

PROCESS

Third, we have done a little bit of tinkering with the voting qualifications, just to make them line up with the other changes we've made:

Who can vote? Anyone who sends a valid nomination in any category gets to vote in all categories.

What will they actually vote on? A ballot of finalists winnowed from the pools of nominees. It will be mostly a popularity-and-persuasion contest — works receiving the most nominations are most likely to make the ballot. A few others whose nominations are accompanied by especially persuasive explanations of their sterling qualities are likely to make it too.

And, finally, there is the nomination deadline: January 1, 2017.

— *Ross E. Davies*

Almanac Excerpts

The Green Bag's

2016

ALMANAC

of useful & entertaining tidbits for lawyers for the year to come

&

READER

of exemplary legal writing from the year just passed (see honorees on back cover)

is a special

SHERLOCK HOLMES ENCORE EDITION

with much mystery steeped in Victorian imagery

as well as our perennially popular

ANNUAL REVIEWS

The Year in Language & Writing
Bryan A. Garner

The Year in Law
Gregory F. Jacob

A Year in the Life of the Supreme Court
Tony Mauro

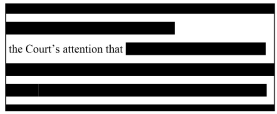
A Year of Lowering the Bar
M. Kevin Underhill

FEATURING

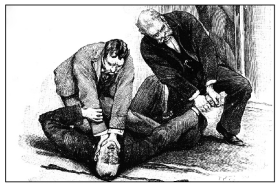
law books of 2015 recommended by our respectable authorities:

Femi Cadmus • Susan Phillips Read
Cedric Merlin Powell • Lee Epstein

And much more, including . . .

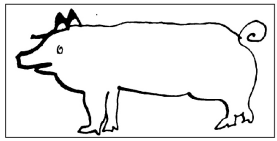


. . . an **UNREADABLE OPINION**, . . .

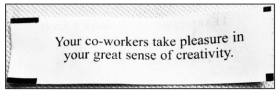


. . . old and new versions of **THE REIGATE PUZZLE** . . .

. . . and **THE FIELD BAZAAR**, . . .



. . . **JUDICIAL**, **SCIENTIFIC**, and **OTHER PIGS**, . . .



. . . **FORTUNES** from **COOKIES**, and so on and so on . . .

Selected original works from the latest edition of the *Green Bag Almanac of Useful and Entertaining Tidbits for Lawyers and Reader of Exemplary Legal Writing from the Year Just Passed*

Almanac Excerpts

Selected original works from the latest edition of the
Green Bag Almanac of Useful and Entertaining Tidbits for Lawyers and Reader of Exemplary Legal Writing from the Year Just Passed

Editor's note: Unbracketed page number references in the text of the articles published here are to pages in the original printed edition of the *Almanac*.

ISSN 2157-9067 (print) and 2157-9075 (online).

Preface

[parallel citation: 2016 Green Bag Alm. 1]

This is the eleventh *Green Bag Almanac & Reader*. For an explanation of why we at the *Green Bag* think the world is a better place with the *Almanac & Reader* than without it, read the "Preface" to the 2006 edition. It is available on our website (www.greenbag.org).

Exemplary Legal Writing

I. Our Diligent Electorate

Our selection process for "Exemplary Legal Writing of 2015" was, like past years', not your typical invitation to competitive self-promotion by authors and their publishers and friends. We did not solicit (or accept) entries from contestants, charge them entry fees, or hand out blue, red, and white ribbons. Rather, we merely sought to:

> (a) organize a moderately vigilant watch for good legal writing, conducted by people who know it when they see it and bring it to our attention;
>
> (b) coordinate the winnowing of nominators' favorites over the course of the selection season, with an eye to harvesting a crop of good legal writing consisting of those works for which there was the most substantial support (our "Recommended Reading" list);
>
> (c) poll the people who nominated works during the year to identify the cream of that already creamy crop; and then
>
> (d) present the results to you in a useful and entertaining format — this book.

Unlike past years' processes, however, this one did not limit the pool of nominators to our hand-picked advisers. Instead, we opened things up.

II. The New System

A. Categories and Nominators

For 2015 we went with four categories, each with its own nominators and all with the same deadline: January 1, 2016. I expect that in the next few years we will refine our current categories, add new ones (legal jour-

nalism? student writing?), add new vintages for scholarly writing, and so on. Suggestions are welcome. Please send them to editors@greenbag.org. And please spread the word.

• Category #1: Judicial Opinions •

Who could nominate? Any judge who issued a signed opinion in 2014 that was available in WestlawNext's "Cases" or "Trial Court Orders" database. *What could they nominate?* One or two signed judicial opinions issued in 2015 that were available in either one of those databases.

• Category #2: U.S. Supreme Court Briefs •

Who could nominate? Any member of the Supreme Court bar whose name was on the cover of a merits-stage brief — filed on behalf of a party or an amicus curiae — in a case decided by the Court on the merits in 2014. Also, any member of the Court's press corps. *What could they nominate?* One or two briefs in cases decided by the Court on the merits in 2015.

• Category #3: Law Review Articles •

Who could nominate? Anyone who (a) authored a work with a 2014 publication date that is available in WestlawNext's "Law Reviews & Journals" database, and (b) was not a law student at the time. *What could they nominate?* One work with a 1965 publication date in any law review at a U.S. law school. This is a test of durability and timeliness: What legal scholarship published 50 years ago is the most readable and worth reading today?

• Category #4: Books •

Who could nominate? We enlisted a few respectable authorities to give us lists of their five favorite new law books — with short explanations, which we have published, with the listers' bylines, in this *Almanac*. *What could they nominate?* This time around, any books about law with 2015 publication dates. We will treat other types of writing this way in the future — news reporting, scripts, and poetry seem like good candidates — but for this year we started simple.

B. Winnowing and Voting

Voting on opinions, briefs, and articles was conducted in January (books are simply listed by recommender in the *Almanac & Reader*).

Who could vote? Anyone who (a) sent a valid nomination in any category to rdavies@greenbag.org, and (b) provided a snailmail address with the nomination (so we could send a ballot) got to vote in all categories.

What did they actually vote on? A ballot of finalists winnowed from the pools of nominees. It was mostly a popularity-and-persuasion contest — opinions, briefs, and articles receiving the most nominations made the ballot. So did a few others whose nominations were accompanied by especially persuasive explanations of their sterling qualities. We divided the "Judicial Opinions" nominees into two categories — "Opinions for the Court" and "Dissents, Concurrences, Etc."

C. Confidentiality & Publication

These are areas where nothing has changed. Confidentiality of nominator-nominee and voter-nominee connections was and is complete. And this year, as ever, we are publishing as many of the top vote-getters as we can.

III. CHANGES FOR 2016

For 2016 we are making a few changes — for the better, we hope.

First, all nominations must be sent to editors@greenbag.org and must include the following in the body of the email: (a) an accurate citation or functional link to the nominated work, (b) the nominator's real name, and (c) an email address and a snailmail address for the nominator (for Category #5, also include a Twitter handle).

Second, we have tinkered with some categories, given up on one, and added two new ones:

• Category #1: Judicial Opinions •

We are expanding the pool of nominators for this category. Any judge in active service in 2016 on a state or federal court may nominate one or two signed judicial opinions issued in 2016.

• Category #2: State Supreme Court Briefs •

We are ditching "U.S. Supreme Court Briefs" as a category. We had zero nominees in 2015. It is easy to imagine reasons for this failure, and none of the most likely involves conditions the *Green Bag* is in a position to influence. So, we are declaring defeat and moving on. Instead, for 2016, Category #2 is "State Supreme Court Briefs." Anyone listed as counsel on

a brief filed in a state supreme court in 2015 or 2016 may nominate a brief filed in that court in 2016.

• Category #3: Law Review Articles •

We are pretty happy with this category, so the only changes are the qualifying years for nominators and nominees. Anyone who (a) wrote something with a 2015 publication date in any law review at a U.S. law school, and (b) was not a law student at the time, may nominate in this category any article with a 1991 publication date in any law review at a U.S. law school. This is, as it was last year, a test of durability and timeliness: What legal scholarship published 25 years ago is the most readable and worth reading today?

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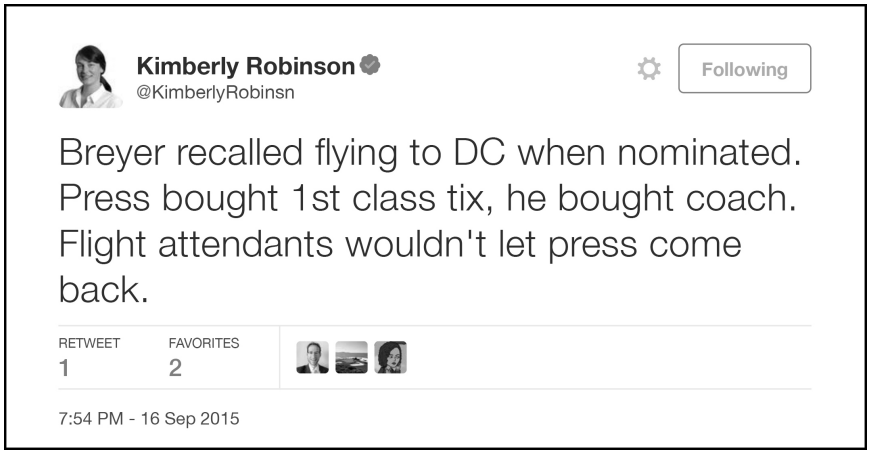
We are happy with this category as well. We hope that all four of this year's respectable authorities return for 2016. We might add one or two.



• Category #5: Tweets •

This is a new category. Anyone with a Twitter account may nominate an exemplary law-related tweet by sending a link to editors@greenbag.org (along with the information specified at the top of page 5 above). Hashtags, likes, and retweets are irrelevant in this context. We will have no stuffing of ballot boxes at the *Green Bag*, or at least we will resist as best we can. To get you thinking about excellence in tweeting we've in-

cluded a tweet by Kimberly Robinson (of Bloomberg BNA) that we think is mighty good — compact, articulate, and interesting, with a point and an edge but no barb. There might be one or two other examples elsewhere in this *Almanac*.

Third, we have tinkered slightly with the voting qualifications, just to make them line up with the other changes we've made:

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What will they actually vote on? A ballot of finalists winnowed from the pools of nominees. It will be mostly a popularity-and-persuasion contest — opinions, briefs, articles, and tweets receiving the most nominations are most likely to make the ballot. A few others whose nominations are accompanied by especially persuasive explanations of their sterling qualities are likely to make it too. We will probably divide the "Judicial Opinions" nominees into two categories — "Opinions for the Court" and "Dissents, Concurrences, Etc." — again. And we might end up doing similar things in other categories, depending on how the nominations look overall.

And, finally, there is the nomination deadline: January 1, 2017.

• • • •

THIS YEAR'S THEME

I. ANOTHER SHERLOCK HOLMES PUZZLER

The theme of this year's *Almanac* is, as it was last year, the world of Sherlock Holmes and John Watson. This time around the centerpiece is "The Reigate Puzzle," a Holmes-and-Watson story set in Reigate in 1887 and first published in 1893.

You will find here, among many other interesting and entertaining items, several versions of the "The Reigate Puzzle" (sometimes with that title and sometimes under one of its aliases, "The Adventure of the Reigate Squire" or "The Adventure of the Reigate Squires"), including a lawyerly annotated edition with contributions by several leading Holmes scholars and an introduction by Catherine Cooke of the Sherlock Holmes Society of London. Those other Sherlockian items include:

- an early "Hound of the Baskervilles" quiz (1904),
- copyright records relating to the work of renowned cartographer Julian Wolff (1940),[1]
- the first (to the best of our knowledge) republication in its entirety of the rare issue of Edinburgh University's *The Student* magazine in which Arthur Conan Doyle's first Sherlock Holmes pastiche — "The Field Bazaar" — appeared in 1896,

and a good deal more.

II. SHERLOCK'S ALMANAC

This time around we are also paying attention to the fact that Sherlock Holmes was himself an almanac user.

More than a century ago, in *The Valley of Fear*, Holmes and his friend John Watson searched for a book in common use that could have been the basis for a coded message:

> HOLMES: There are difficulties, Watson. The vocabulary of Bradshaw[2] is nervous and terse, but limited. The selection of words would hardly lend itself to the sending of general messages. We will eliminate Bradshaw. The dictionary is, I fear, inadmissible for the same reason. What, then, is left?
>
> WATSON: An almanack!
>
> HOLMES: Excellent, Watson! I am very much mistaken if you have not touched the spot. An almanack! Let us consider the claims of *Whitaker's Almanack*.[3] It is in common use. It has the requisite number of pages. It is in double columns. Though reserved in its earlier vocabulary, it becomes, if I remember right, quite garrulous towards the end. . . . [cont'd on page 536]

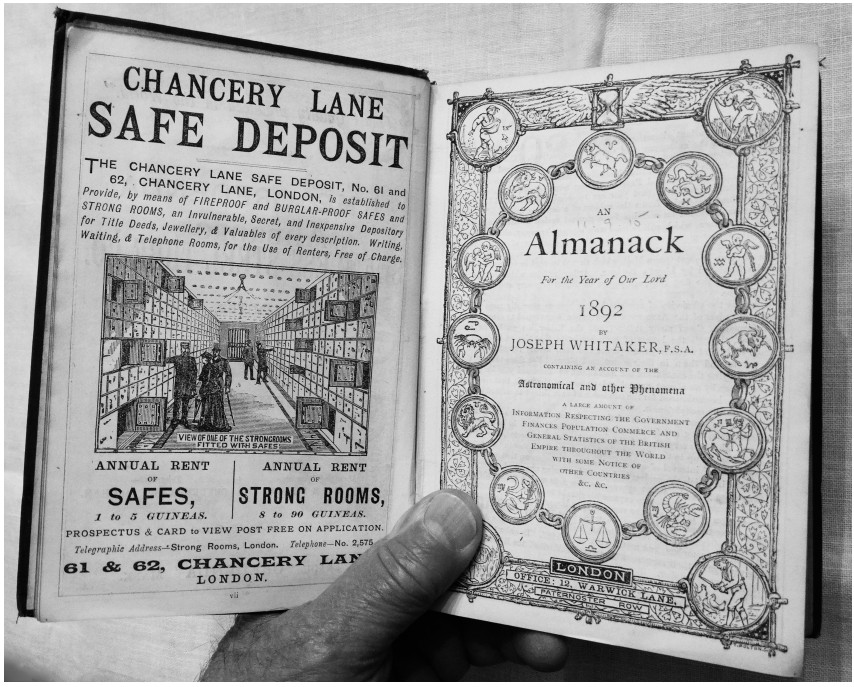
This year — 2016 — is a leap year that began on a Friday. So was 1892. So, we have taken a page (actually, 12 of them) from Holmes and Watson.

---

[1] *See Preface*, 2015 GREEN BAG ALM. 9-13.

[2] "[T]he most complete of the numerous British railway guides, published monthly." JACK TRACY, THE ENCYCLOPEDIA SHERLOCKIANA 44 (1977); *see also* ARTHUR CONAN DOYLE, THE VALLEY OF FEAR 7 & n.24 (1914-15; Sherlock Holmes Reference Library ed. 1999) (Leslie S. Klinger, ed. & annot.).

[3] "[T]he most popular and best known of British almanacks." TRACY, ENCYCLOPEDIA SHERLOCKIANA at 394; *see also* CONAN DOYLE, THE VALLEY OF FEAR at 8 & nn.26-27 (Klinger).



Whitaker's Almanack (1892). Thumb courtesy of Richard A. Davies, BSEE, MIT, 1958.

We have taken the monthly calendars from the 1892 edition of *Whitaker's Almanack* and made them our own for this year's *Almanac & Reader*.[4]

In addition, each month of this year's *Almanac & Reader* begins with a calendrically appropriate passage from a Sherlock Holmes story. The first 17 readers who fill out the form on page 11 with correct citations for all 12 passages (plus one) will receive a congratulatory gift.

OTHER BUSINESS

I. HOMER KEEPS NODDING . . .

We continue to struggle, and fail, to produce a flawless big fat book in a hurry. Fortunately, we have attentive and communicative readers who help us straighten things out. This year we have the following admirably thorough and correct message from Joseph N. Mazzara (Captain, USMC),

---

[4] *See* pages 86, 104, 172, 196, 250, 272, 288, 302, 438, 458, 476 & 522 below.

who has tactfully improved upon and corrected the work of one of our own much-less-than-perfect editors.

> Almanac & Reader 2014, pages 121-22: I was preparing for class recently, and the materials for the first day included an excerpt from Ross E. Davies, *Breakfast with the Justices: Networking in the Nineteenth Century*, 2014 GREEN BAG ALM. 109. On page 121 of the *2014 Almanac*, Davies quotes from the autobiography of Samuel W. Pennypacker, sometime-Governor of Pennsylvania. In the quote Pennypacker describes the circumstances under which he was admitted to the Supreme Court Bar, and mentions that he sought admission because he had three cases going to the Supreme Court. Davies' footnote for the quotation states, "PENNYPACKER, THE AUTOBIOGRAPHY OF A PENNSYLVANIAN at 134-35. I found only two of his three cases, *Sheeder v. Bicking* and *Sheeder v. Shannon*, 131 U.S. 447 (1888)."
>
> Seeing this footnote as something like a challenge — and out of what will likely end as a vain hope for a bobblehead — I started looking for the third case. I eventually found it hiding in the 154th volume of the *U.S. Reports*. The third case is *Ashenfelter v. Territory of New Mexico ex rel. Wade*, 154 U.S. 493 (1893), a case about one Singleton M. Ashenfelter and his refusal to depart the office of the United States District Attorney for the Territory of New Mexico.
>
> The 1893 date of *Ashenfelter* does create the possibility that this was a fourth or later case of Pennypacker's, and not his third. This possibility is answered by the date of the filing of the record from *Territory of New Mexico ex rel. Wade v. Ashenfelter*, 4 N.M. 93 (S.Ct. 1887) with the Supreme Court: 5 Sept 1887. This filing date roughly corresponds with the timeline given by Pennypacker in his autobiography as quoted by Davies.
>
> Of further concern were the facts that the *U.S. Reports* lists "S.W. Pennypacker" as counsel for the appellant (Ashenfelter) and not Samuel W. Pennypacker, the case came out of New Mexico while Pennypacker resided and practiced in Pennsylvania, and Pennypacker is not listed anywhere in the record or on the briefs. These details raise the question, is the S.W. Pennypacker residing on page 493 of *U.S. Reports* volume 154 the same Governor Samuel Whitaker Pennypacker who wrote the autobiography quoted by Ross E. Davies in 2014?
>
> Pennypacker himself answers this question in his book, *The Autobiography of a Pennsylvanian*, at 68-69: "Another boy, Singleton M. Ashenfelter, a little in the rough, but with vital energies and good-hearted, afterwards the United States District Attorney for New Mexico, became my closest associate."

> P.S. Page 135 of Pennypacker's *Autobiography*, as quoted on page 121 of the *2014 Almanac*, says: "He turned that eye on *my* a little athwart . . . ." The original says: "He turned that eye on *me* a little athwart . . ." (emphasis added).

Blessed as we are with such intelligent and generous readers, we are confident that all our errors will eventually be brought to our attention, and thence to yours.

II. Our Goals

Our goals remain the same: to present a fine, even inspiring, year's worth of exemplary legal writing — and to accompany that fine work with a useful and entertaining potpourri of distracting oddments. Like the law itself, the 2015 exemplars in this volume are wide-ranging in subject, form, and style. With any luck we'll deliver some reading pleasure, a few role models, and some reassurance that the nasty things some people say about legal writing are not entirely accurate.

III. Thanks

Finally, the *Green Bag* thanks you, our readers. Your continuing kind remarks about the *Almanac* are inspiring. We also thank the thoughtful judges and other scholars who nominated and selected the exemplary legal writing honored here; O'Melveny & Myers LLP (especially Nadine Bynum and Greg Jacob); the George Mason University School of Law (especially Ashley Charles); Susan Davies and her eye for quality and accuracy; Frances MacRae of the Corstorphine Trust; Guzman Gonzalez of the Surrey History Centre; the many kind members of the Sherlockian community who pitched in to make this *Almanac* much better than it might otherwise have been; and Albert M. Rosenblatt, longtime *Green Bag* author and friend, who has been from the start an inspiration and a source of wisdom on all things Sherlock Holmes.

Ross E. Davies
February 1, 2016

Recommended Reading

[parallel citation: 2016 Green Bag Alm. 12]

We have tallied the ballots and printed the top vote-getters in this book. They are the ones listed in the Table of Contents above and marked in the list below by a little ✯. There were plenty of other good works on the ballot. We list them here. Congratulations to all.

Opinions for the Court

Cecilia Maria Altonaga, *In re Denture Cream Products Liability Litigation*, 2015 WL 392021 (S.D. Fla. Jan. 28, 2015)

✯ Charles R. Breyer, *In re Hewlett-Packard Company Shareholder Derivative Litigation*, No. 3:12-cv-06003-CR (N.D. Cal. July 28, 2015)

The Court, *In re Hong Yen Chang*, 344 P.3d 288 (Cal. 2015)

Frank H. Easterbrook, *Iqbal v. Patel*, 780 F.3d 728 (7th Cir. 2015)

Judith L. French, *In re Complaint of Pilkington North America, Inc.*, 2015 WL 7485933 (Ohio 2015)

✯ Elena Kagan, *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645 (2015)

✯ Cornelia T.L. Pillard, *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015)

Jed S. Rakoff, *In re Petrobras Securities Litigation*, 104 F.Supp.3d 618 (S.D.N.Y. 2015)

Antonin Scalia, *Johnson v. United States*, 135 S. Ct. 2551 (2015)

✯ Amul R. Thapar, *Wagner v. Sherwin-Williams Co.*, Civil No. 14-178-ART (E.D. Ky. Apr. 29, 2015)

William G. Young, *In Re Nexium (Esomeprazole) Antitrust Litigation*, 309 F.R.D. 107 (D. Mass. 2015)

Concurrences, Dissents, etc.

✯ Carlos T. Bea, *John Doe I v. Nestle USA, Inc.*, 788 F.3d 946 (9th Cir. 2015)

✯ Frank H. Easterbrook, *Thomas v. Clements*, 797 F.3d 445 (7th Cir. 2015)

Jennifer Walker Elrod, *Trent v. Wade*, 801 F.3d 494 (5th Cir. 2015)

Alex Kozinski, *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015)

Goodwin Liu, *People v. Grimes*, 340 P.3d 293 (Cal. 2015)

Jill A. Pryor, *In re Rivero*, 797 F.3d 986 (11th Cir. 2015)

John G. Roberts, Jr., *McFadden v. United States*, 135 S.Ct. 2298 (2015)

✯ O. Rogeriee Thompson, *Sanchez v. Roden*, 808 F.3d 85 (1st Cir. 2015)

✯ Don R. Willett, *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015)

U.S. Supreme Court Briefs

Interestingly, there was nothing to vote for in this category because we received zero nominations. We wonder why.

Law Review Articles Published 50 Years Ago

David L. Bazelon, *Law, Morality, and Civil Liberties*, 12 UCLA Law Review 13 (1964-1965)

John R. Brown, *The Trumpet Sounds: Gideon — A First Call to the Law School*, 43 Texas Law Review 312 (1965)

✯ Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 Harvard Law Review 713 (1965)

Paul Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harvard Law Review 56 (1965)

Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 Stanford Law Review 567 (1965)

Arthur E. Sutherland, Jr., *Crime and Confession*, 79 Harvard Law Review 21 (1965)

✯ Herbert Wechsler, *The Courts and the Constitution*, 65 Columbia Law Review 1001 (1965)

Books

Recommendations by our respectable authorities appear throughout this *Almanac*: Femi Cadmus (page 105), Lee Epstein (page 439), Cedric Merlin Powell (page 303), and Susan Phillips Read (page 173). Here is a list of all our recommended books:

Akhil Reed Amar, *The Law of the Land: A Grand Tour of Our Constitutional Republic* (Yale University Press 2015)

Adam Benforado, *Unfair: The New Science of Criminal Injustice* (Crown 2015)

Ellen Berrey, *The Enigma of Diversity: The Language of Race and the Limits of Race Justice* (University of Chicago Press 2015)

Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Alfred A. Knopf 2015)

John Bronsteen, Christopher Buccafusco, and Jonathan S. Masur, *Happiness and the Law* (University of Chicago Press 2015)

Irin Carmon and Shana Knizhnik, *Notorious RBG: The Life and Times of Ruth Bader Ginsburg* (HarperCollins 2015)

Ta-Nehisi Coates, *Between the World and Me* (Spiegel & Grau 2015)

John C. Coffee, Jr., *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Harvard University Press 2015)

Alan M. Dershowitz, *Abraham: The World's First (But Certainly Not Last) Jewish Lawyer* (Schocken Books 2015)

Nancy E. Dowd (editor) *A New Juvenile Justice System: Total Reform for a Broken System* (NYU Press 2015)

Jeffrey A. Engel (editor), *The Four Freedoms: Franklin D. Roosevelt and the Evolution of an American Idea* (Oxford University Press 2016)

Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press 2015)

Gunnar Grendstad, William R. Shaffer, and Eric Waltenburg, *Policy Making in an Independent Judiciary: The Norwegian Supreme Court* (ECPR Press 2015)

Wil Haygood, *Showdown: Thurgood Marshall and the Supreme Court Nomination that Changed America* (Alfred A. Knopf 2015)

Dan Jones, *Magna Carta: The Birth of Liberty* (Viking 2015)

Burt Neuborne, *Madison's Music: On Reading the First Amendment* (New Press 2015)

Richard A. Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press 2016)

Cass R. Sunstein, *Constitutional Personae* (Oxford University Press 2015)

Michael A. Zilis, *The Limits of Legitimacy: Dissenting Opinions, Media Coverage, and Public Responses to Supreme Court Decisions* (University of Michigan Press 2015)

The Year 2015 in Grammar, Language, and Writing

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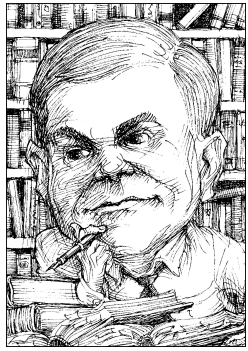

Bryan A. Garner[†]

January

A pricey typo (one plural *-s*) cost a 124-year-old Welsh company its future and the British Government a small fortune. In 2009, the U.K. Department of Business incorrectly recorded that the Cardiff engineering firm Taylor & Sons Ltd. had been wound up. In fact, it was the wholly unrelated Taylor & Son (singular) Ltd. that had dissolved. Taylor & Sons discovered the mistake only after its clients and suppliers, based on information sold by the government to credit-reference agencies, insisted that the company was in liquidation. The error cost the company its credibility, and two months later it was forced to close its doors. The English High Court found the Department of Business liable for £9 million ($17 million). • In a lexicographic kerfuffle, Margaret Atwood and other authors objected to the *Oxford Junior Dictionary*'s replacement of some 50 nature-related

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[†] Bryan A. Garner is the author of more than a dozen books about words and their uses, including *Garner's Dictionary of Legal Usage* (Oxford, 3d ed. 2011) and *Garner's Modern English Usage* (Oxford, 4th ed. 2016). He is editor in chief of *Black's Law Dictionary* (West, 10th ed. 2014) and the author of the chapter on grammar and usage in the *Chicago Manual of Style* (Chicago, 16th ed. 2010). He has coauthored two books with Justice Antonin Scalia: *Making Your Case* (2008) and *Reading Law* (2012).

words such as *hamster*, *chestnut*, and *lobster* with tech terms such as *analogue*, *broadband*, and *cut-and-paste*. Warning in an open letter that "there is a shocking, proven connection between the decline in natural play and the decline in children's well-being," Atwood and her 27 cosignatories implored Oxford University Press to reinstate the nature words in the next edition of the children's dictionary. "As a symptom of a widely acknowledged problem that is ruining lives, this omission becomes a major issue." • Tired of having fellow students mock his pronunciation of *Cool Whip*, Princeton University freshman Newby Parton decried such "microaggressions" in a column for *The Daily Princetonian*. In 2013, Princeton had launched a site to publish student reports of microaggressions, which it refers to as "papercuts of oppression." Parton, who hails from a part of Tennessee where natives commonly pronounce their *wh-* sounds as /hw/, found this pronunciation a source of ridicule upon reaching New Jersey. "Making fun of regional speech is a microaggression," he wrote. "Microaggressions aren't harmless — there's research to show that they cause anxiety and binge drinking." It wasn't clear whether that last bit was a public confession. • CNN reported that a $500 typo netted $9,650 for charity. The Pinellas County Sheriff's Office of Florida ordered a rug that contained the phrase "In God We Trust." When it arrived they found the word *God* replaced with *Dog*. The Sheriff's profitable idea? Don't return the rug, but instead auction it off for charity. Proceeds went to a local animal-rescue group. • In a decision issued by the Second District Court of Appeal in Florida, an extra comma led to the reversal of an aggravated-battery conviction. The case hinged on a jury charge stating that the defendant "had the right to stand his ground and meet force with force, *including deadly force, if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or to prevent the commission of a forcible felony*." The court concluded that the comma after *deadly force* was erroneous, leading to the mistaken notion by the jury that nondeadly force could be used only to prevent death, great bodily harm, or the commission of a felony. The charge was remanded for further proceedings. • Marking the first time a Twitter hashtag has been given such an honor, *#blacklivesmatter* was named the American Dialect Society's 2014 Word of the Year. "Language scholars are paying attention to the innovative linguistic force of hashtags, and *#blacklivesmatter* was certainly a forceful example of this in 2014," said the chair of the New Words Committee. The "word" handily won over other terms such as *manspreading* (for a man

to sit with his legs spread wide on public transit) and *bae* (a sweetheart or romantic partner). ● Ysenda Maxtone Graham of *The Spectator* (U.K.) lamented the breathless sentences of today's texters, who commonly perpetrate comma splices. For example: "Thanks so much for helping out yesterday, Jamie had a great time with you all, thanks also for bringing his games kit home, let me know if you need help tomorrow…xx". Graham speculated that the fear of the period subconsciously stems from the juggling act of our multitasking lives or perhaps from a desire never to reach finality. ● According to AL.com, many if not most Americans recite the Pledge of Allegiance incorrectly. Although the pledge was written in 1892, the words "under God" weren't added until 1954. Many people recite the pledge as "one nation (pause) under God," but Alabama state senator John Valentine insisted that a pause is unwarranted because there's no comma before *under*. The problem has been much noted since the insertion of the unmetrical phrase in 1954. ● *The Guardian* (U.K.) reported that British Lord Chancellor Michael Gove had cracked down on faulty grammar and word usage by the country's civil servants. Gove ordered the Ministry of Justice staff to stop using *impact* as a verb, to stop using contractions altogether, to stop hyphenating phrasal adjectives except in *best-placed* and *high-quality*, to cease beginning sentences with *Yet*, and to change all instances of *ensure* to *make sure*. Yet Gove was much derided in the press for his idiosyncratic crotchets: "We want to ensure that a government minister can't impact us with ill-considered linguistic fiats," said a waggish source.

FEBRUARY

Fabulous news: as reported by Sci-News.com, a group of scientists led by Dr. Peter Dodds from the University of Vermont applied a big-data approach to the Pollyanna Hypothesis — the idea that all human languages skew toward the use of happy, positive words. This hypothesis was originally proposed in 1969 by Dr. Jerry Boucher and Dr. Charles E. Osgood of the University of Illinois. Dodds and his team gathered billions of words from 10 languages using 24 types of sources including books, news outlets, social media, websites, television, movies, and song lyrics. They added another 100 billion or so words written in Tweets. The current research confirmed the hypothesis: people use more positive words than negative ones. The findings showed variation among languages and sources. English-language song lyrics are among the most morose. Only

Korean movie subtitles and Chinese books contained more misery than English-language song lyrics. Spanish was found to be the happiest of languages. • *The Telegraph* (U.K.) reported on a Wikipedia editor's tireless campaign to extirpate a single solecism from the site. Since 2007, Bryan Henderson, a 51-year-old software engineer, has edited over 47,000 instances of the poor phrasing *comprised of*. By 2010, he had removed them all and had designed a software program to track down new instances of the offending phrase. While many have lauded Henderson's efforts, he is not without his detractors. In a 6,000-word defense of his project, he explains his motivation: "[*Comprised of*] triggers the same 'what an idiot' neurons in us as 'could of' and 'could care less.' If I can spare any readers that discomfort without hurting anyone else, why wouldn't I?" • According to *The Washington Times*, the University of Michigan has spent $16,000 on an "Inclusive Language Campaign." The program is aimed at getting students to remove from their vocabulary words that could be offensive to others, such as *crazy*, *insane*, *retarded*, and *gay*. The university has defended the program against those who object to it on free-speech and fiscal grounds. • The *Daily News and Analysis* (India) reported that an Australian schoolteacher had disallowed the use of *awesome* by her students in an effort to build their vocabularies — not necessarily to counteract the Pollyanna Hypothesis. According to one student, the teacher said that the word didn't mean much and that students should instead use words such as *fantastic* and *wonderful*. Not helping the teacher's crusade is the recent release of the children's film *The Lego Movie*, the theme song of which is "Everything Is Awesome." • *The Scotsman* announced that a rare first-edition *Edinburgh Dictionary* (1763), the first dictionary to be published in Scotland, surfaced at auction. Only three copies of the first edition are known to exist in the United Kingdom. Four more reside in the United States at Columbia University, Indiana State University, Trinity College, and Yale University. • Recording artist Drake had his fans up in arms over missing punctuation, according to the *Metro*. In a message posted to his 20.7 million Twitter followers, Drake announced the release of his new album, *If Youre Reading This Its Too Late*. Drake's fans rebelled en masse at the missing apostrophes. An editor at *The Washington Post* found the title unprintable and inserted apostrophes in an article about the album's release, declaring "It's never too late!"

MARCH

The Telegraph (U.K.) reported that France's culture minister wants France to end its age-old blockade of the English language. Although laws dating back to 1635 have been intended to squash the English invasion, a 1994 law specifically mandates that all public advertising be in French and that English words sneaking into the language should be replaced with home-grown Gallicisms. Calling the attempt to stop the adoption of foreign words absurd, French linguists hailed the new retrenchment. • A typo by jail officials left an Albuquerque family in fear for their safety, according to KOB 4 News. A man was in jail on $150,000 bond for threatening to kill his parents, carjacking, and then crashing into another vehicle at a busy intersection. Jail officials accidentally entered the bond amount at $15,000, meaning he could be released for just $1,500. Jail officials hastily rectified the mistake before the detainee could leave. • In Quito, Ecuador, United Press International reported that grammar-minded vigilantes have been patrolling the streets using red paint to add correct punctuation in every errant graffito they can find. The group, called Quito Orthographic Action, calls their work orthographic vandalism. One vigilante emphasized the agitation caused by mispunctuated graffiti: "Grammatical errors cause stress . . . we are promoting the correct use of language, [and] it is also an excuse for a bit of fun." • *The Boston Globe* reported on a research study by a Boston College marketing professor finding that punctuation in advertisements affects how buyers perceive products. One example is the battle between the period in "Just do it." and the question mark in "Got milk?" The study found that statements (with periods) work best in intense environments where potential buyers are bombarded with loud music and multiple images. Question marks, however, were found to be more effective in calmer situations in which consumers are more contemplative.

APRIL

The Daily Express (U.K.) reported that the BBC committed a boner when covering the restart of the Large Hadron Collider. A news graphic included this innuendo: Large Hardon Collider Restart. Twitter users quickly mocked the priapic typo, which lasted less than four hours. • The least literate football fans are apparently those of the Washington Redskins, and the most literate are those of the Detroit Lions, according

to a study by *The Wall Street Journal*'s sports blog, The Count. The blog used the algorithms at Grammarly — which claims to detect up to 400 different kinds of spelling, grammar, and punctuation errors — to sift through comments on team websites. Fans of the Redskins had an average of 16.5 mistakes per 100 words, while Lions fans had only 4.2 errors per 100 words. Redskins fans had around 30% more errors than fans of the New Orleans Saints — the second-most blunder-prone fan base. • Police finally arrested and charged a man suspected of being the "Good Grammar Bandit," who robbed a string of banks in 2014 around Brighton, Colorado. Once listed as one of the FBI's top 10 bank thieves along the Front Range of Colorado, the robber received his moniker because of the impeccable spelling, punctuation, and grammar in his demand notes. • *The Economist* noted that April 15 marked the 260th anniversary of the publication of Samuel Johnson's great *Dictionary of the English Language* (1755). Celebrated as a seminal work of scholarship, Johnson's *Dictionary* included several definitions noted for their wit: a *lexicographer* is "a harmless drudge" and *oats* is a type of grain that "in England is generally given to the horses, but in Scotland supports the people." • According to CBS Minnesota, Governor Mark Dayton issued an executive order to restore the umlaut — two small dots above an *o* — on all road signs outside Lindström, a city northeast of the Twin Cities. Known as "America's Little Sweden," Lindström has been frustrated by vanishing umlauts. Changes in federal guidance for signage caused the removal. The Governor said he instructed the Department of Transportation to replace the signs — adding that if necessary, he would grab a can of white paint and apply the dots himself.

MAY

Bigthink.com reported on a new smartphone application inspired by Noam Chomsky, the famous American linguist. *Sleep Furiously* challenges players to create wildly nonsensical sentences that are grammatically correct. The name comes from the sentence that Chomsky wrote to demonstrate that concept 60 years ago: *Colorless green ideas sleep furiously*. The app's silently stentorian sales inched frenetically. • For the second year in a row, the Scripps National Spelling Bee ended in a tie, with two eighth-graders as cochampions. Vanya Shivashankar, 13, of Olathe, Kansas, and Gokul Venkatachalam, 14, of Chesterfield, Missouri, shared the trophy after the 25-word championship round. Shivashankar's winning word was *sche-*

renschnitte (= the art of cutting paper into decorative designs); Venkatachalam's was *nunatak* (= a hill or mountain completely surrounded by glacial ice). For Vanya, it's becoming a family tradition: her sister, Kavya, was the 2009 champion. ● *Slate*'s Culturebox investigated why Indian-American students are so dominant at the Scripps National Spelling Bee — having won top honors now for eight straight years. It turns out that they have their own bush leagues. An Indian-American educational foundation's 75 chapters host scholarship-fundraising competitions in many academic fields, including spelling. So successful are they that Indian-Americans students, just 1% of the U.S. student population, make up 11% of the Spelling Bee competitors. ● The *Daily Mail* (U.K.) reported that the English language is changing more rapidly because mobile phones and social media are causing new generational barriers to emerge. Professor emeritus John Sutherland at University College London found that a stunning 86% of parents don't understand the terms their children use. Society is now moving toward a more pictographic form of communication through the use of emoticons, which, Professor Sutherland comments, "hark back to a caveman-form of communication where a single picture can convey a full range of messages." ● Snoots have gained a higher profile in pop culture, according to *Vanity Fair*. The TV shows *Mad Men* and *Game of Thrones* have each introduced characters who correct others' grammar. *Mad Men* character Don Draper corrected a con-man's statement "You don't have to work no more?" to "anymore," and Stannis Baratheon on *Game of Thrones* insisted on the distinction between *less* and *fewer*. What's depressing is that this was thought noteworthy. ● The once-prevalent middle class is quickly vanishing — at least from the vocabulary of potential 2016 presidential candidates, *The New York Times* reported. Candidates such as Hillary Clinton and Rand Paul have dropped the term in favor of phrases such as "everyday Americans" and "people who work for the people who own businesses." The shift in rhetoric is said to demonstrate the economic setback that people experienced during the recession: middle-class status is now viewed as unachievable for more and more Americans. ● The lexicographer Adam Kilgarriff died on May 16, 2015, at the age of 55. His notable contributions to the field of lexicography include Word Sketches, which are one-page summaries of a word's combinatorial behavior, and the software program Sketch Engine, which became the de facto standard software for developing dictionaries through corpus linguistics. ● PBS

reported that the *Oxford English Dictionary* is considering adding "Mx." as a gender-neutral alternative to "Mr.," "Mrs.," and "Ms." Pronounced "mux" or "mix," the honorific provides an option for those who don't consider themselves a specific gender. Some banks and universities in the United Kingdom have already adopted the term. • *Time* reported that an architect pursuing a doctoral degree at the University of British Columbia wrote a 149-page, 52,438-word dissertation without any periods, commas, or other punctuation. Examiners at the university unanimously accepted his work. The student, Patrick Stewart, belongs to the Nisga'a, an indigenous group of people in British Columbia. He claimed his dissertation "Indigenous Architecture Through Indigenous Knowledge," was designed to raise awareness about "the blind acceptance of English-language conventions in academia" and to make a statement about aboriginal culture and colonialism.

JUNE

The Associated Press reported that Taco Bell executives are learning a new term every week to stay in touch with the company's main client base — Millennials. Developed by younger employees in their 20s, the "Millennial Word of the Week" has contained recent trendy terms such as *lit* and *throwing shade*. The words are distributed via e-mail and featured around the office in Irvine, California. Whatevs. • In his spare time, Russian Alexei Pavlovsky became a local coordinator at Total Dictation, a Russian grammar school. His mission was to teach Russians to track down and eradicate errors of spelling, grammar, and usage. One day, investigators from the Kremlin contacted Pavlovsky after a period of surveillance. According to *The Wall Street Journal*, they asked what he knew about "grammar nazis," and "what feelings he had toward people who make grammatical mistakes and whether he had a desire to destroy them." In what was apparently a simple misunderstanding of the Western phrase *grammar nazi*, Kremlin authorities didn't file formal charges. • Justice Antonin Scalia deployed four delicious turns of phrase in his dissent to the Supreme Court's decision upholding the subsidy portion of the Affordable Care Act. 1. *Jiggery-pokery*: "The Court's next bit of interpretive jiggery-pokery involves other parts of the Act that purportedly presuppose the availability of tax credits on both federal and state Exchanges." 2. *Pure applesauce*: "Otherwise, the Court says, there would be no qualified individuals on federal Exchanges, contradicting . . . the provision requiring

every Exchange to take 'interests of qualified individuals' into account when selecting health plans. Pure applesauce." 3. *SCOTUScare*: "We should start calling this law SCOTUScare." 4. *Impossible possibility*: "Impossible possibility, thy name is an opinion on the Affordable Care Act!" • The Associated Press reported that the definition of the word *twerking* (= dancing in a sexually provocative manner, using thrusting movements of the bottom and hips while in a low, squatting stance) has been revised in the *Oxford English Dictionary*. Popularized globally by Miley Cyrus, the word had previously been defined as a mere twisting or jerking movement. Lexicographers say its origin goes back almost 200 years to the noun *twirk*. It became a verb in 1848, and the spelling changed to *twerk* in 1901. The dance move itself changed in the 21st century — doubtless in ways that would shock those alive in 1848 or 1901.

JULY

A "bias-free language guide" plunged the University of New Hampshire into a state of paralytic periphrasis, according to *The Guardian* (U.K.). The guide, written in 2013, was intended to "encourage critical thinking about terms commonly used in conversation and writing." Appearing on the university's website, the guide recommends such circumlocutions as "person of material wealth" instead of *rich* and "persons of advanced age" over *elders* or *seniors*. Showcased on a conservative website, it caught the attention of a Republican state senator who suggested that the university might try to change the New Hampshire state motto from "Live Free or Die" to "Live Free but Upset No One." • According to CNN, a study of the vocabulary used in popular music purports to show that rappers have the largest vocabularies of all popular musicians. The study, put together by the site MusixMatch, determined that the four artists who used the most unusual words were rappers. Keep an eye out for a new subgenre: "Sesquipedalian Rap." • Linguistic researchers in Virginia and West Virginia have been trying to understand and reverse the stigma often associated with heavy Appalachian dialects. *The Columbus Dispatch* (Ohio) reported on a wave of scholars publishing books seeking to reverse negative perceptions of how Appalachians speak. • *Time* reported evidence that the popular Southern contraction for *you all* — namely *y'all* — was used much earlier than previously thought. The *Oxford English Dictionary* currently lists the earliest use of the word as 1856 in the Alfred Arrington

novel *Life Among the Lawless*. But with the help of online databases, researchers found that the first known use of *y'all* was 225 years earlier, in William Lisle's *The Faire Ethiopian* (1631). • BBC News reported that people are getting tattoos of semicolons to highlight mental-health issues. The semicolon is most commonly used where a sentence could come to an end but instead continues. This movement, Project Semicolon, has appropriated the punctuation mark as a metaphor for the moment when a person contemplating suicide decides to live on instead.

AUGUST

CBS News reported on a survey by Dictionary.com purporting to answer the question: "Which generation is most annoyed by bad grammar?" In a Harris poll of 2,052 people, 74% of respondents aged 18 to 34 said they were bothered by spelling mistakes on social media — more than any other age group. As the *Los Angeles Times* headline put it: "Millennials are annoyed when your grammar's not on fleek." Despite growing up with technology and even inventing much "textspeak," Millennials are said to have higher standards. This may be because, as the Pew Research Center found, the under-30 set is more likely to read books than their Generation X or Baby Boomer counterparts. But could the results be skewed because Millennials use social media more than any other age group? Across all age groups, 59% said improper grammar is their biggest annoyance with language. Women (75%) notice grammar and spelling mistakes more than men (66%). • Facebook released data from a study it conducted on the forms of "laughter" used during a random week of posts. Some 15% of posts or comments used some expression of laughter. Young people and women prefer to use emojis; men prefer to use *hehe*. A bit more than half the laughter posts used *haha*, while the once-prevalent *lol* was used only 1.9% of the time. • *Amnesty* was the most "relevant" word in the first GOP presidential debate, according to Vocabulary.com, a website that compiles lists of unusually high incidences of words in given contexts. The site searches a given text for words that are used more often than one would expect when compared to language use as a whole. The site also compiled lists of the most relevant words by particular candidates, notable results being *destabilize* for Donald Trump, *tithe* for Ben Carson, and *eviscerate* for Marco Rubio. • The Philadelphia Spanish news organization *Al Dia* published a piece calling for English news media to adopt more diacritical

marks — especially the tilde. In Spanish, *Ñ* is a letter in its own right, which (among some readers) may cause confusion when printed without the tilde. Names such as "Michael Peña" and Mexican President "Enrique Peña Nieto" reportedly become confusing and get "mispronounced" in English.

SEPTEMBER

Highlighting the vastness of the body of synonyms, *The Scotsman* (U.K.) reported that researchers at the University of Glasgow have identified an avalanche of 421 words in the Scots language meaning "snow." The study was done as a project to compile the first *Historical Thesaurus of Scots*. • *Entertainment Weekly* reported that snoots in the audience of the band One Direction swooned when the singer of the band, Harry Styles, stopped a concert to fix a fan's grammar. The singer spotted what seemed like an emergency when he saw a sign in the audience that read "Hi Harry, your so nice." Styles used a marker to add the apostrophe and *-e* to correct the grammar, he autographed the sign, and then the show went on. • *New York Magazine* published the results of a study by a group of Dutch researchers who discovered that the word *huh* might have a universal meaning. Although the team didn't set out to track the word, it consistently appeared in their research. "Everywhere they went, there was a word that sounded pretty much the same: 'a simple syllable with a low-front central vowel, glottal onset consonant if any, and questioning intonation.'" The team recorded conversations in French, Spanish, English, Icelandic, and even obscure languages such as Cha'palaa (a minority language in Ecuador) and an Australian Aboriginal language. • In an interview with Stephen Colbert, *Time* reported that when the comedian was a child, his father let him pick the way his last name would be pronounced. The family name, it turns out, was originally pronounced /**kohl**-buhrt/. But thinking it had a more satirical ring, Mr. Colbert opted for the Frenchified /kohl-**bair**/. • BBC celebrated the great lexicographer Francis Grose on the 230th anniversary of the publication of his famous dictionary, *A Classical Dictionary of the Vulgar Tongue* (1785). Grose was the first to record phrases like *fly-by-night* and *birds of a feather*. He was the first lexicographer to collect slang words from all corners of society, not just pickpockets and bandits. He claims to have overheard the terms included in his *Classical Dictionary of the Vulgar Tongue* from "soldiers on the long march, seamen at the capstern, ladies disposing of their fish, and the colloquies of Gravesend boat."

OCTOBER

The Wall Street Journal reported on a survey by the online dating service Match, which asked 5,000 single people what criteria they used most when sizing up their dates. Second only to personal hygiene was grammar. An error-free message "definitely adds hotness points," dater Grace Gold told the paper. Grammarly analyzed messages on eHarmony and found that just two spelling errors can make the sender 14% less likely to get a good response. • *The Guardian* (U.K.) reported that a J.R.R. Tolkien-annotated map of his fictional land, Middle-earth, was discovered in a book acquired by Blackwell's Rare Books. The copy was owned by the renowned illustrator Pauline Baynes, to be used for reference as she worked on a color map for a later version of the book. Tolkien (1892–1973), a professor at Oxford University, provided corrections to place names, new names, and suggestions for flora and fauna in his handwritten annotations. Though the map was referred to in correspondence between the two, few others had seen it until now. Blackwell's is selling the map together with other of Baynes's works. • *The Telegraph* (U.K.) reported that supporters of Republican presidential candidate Donald Trump have the worst grammar and spelling. The proofreading-software company Grammarly looked at the Facebook profiles of supporters of 19 presidential candidates. Their results showed that supporters of Republican candidates made twice as many mistakes as their Democratic counterparts. Democrats are said to have a broader vocabulary than Republicans. On the individual side, supporters of candidate Lincoln Chafee made the fewest errors, while backers of Trump made the most. • *Texas Monthly* released an article about how the word *texas* means *crazy* in Norwegian. The word is said to stem from the association of the "wild west" and all the related thrills and chaos associated with the State of Texas. The Norwegian phrase is not used to describe a person but instead a condition — as in "That game last night was totally texas!" • *The Globe and Mail* reported that the Canadian news media company Transcontinental had decided to close its last two English-only newspapers in Quebec because the companies were no longer profitable. Although some 65% of all Canadians say that English is the primary language at home, the number falls to about 10% for Quebecers. • The Center for Immigration Studies announced that a whopping 21% of Americans don't speak English as their primary language at home. According to *The Washington Post*, while many of those

homes are bilingual, as many as 25 million residents assessed themselves as less than "very good" in English-language proficiency. The issue spilled over into the Republican presidential race when former Florida Governor Jeb Bush responded to a question in Spanish. Donald Trump criticized Bush by saying that using English is how we in America help Mexicans assimilate. Bush responded by saying "Muchas gracias," adding that he would continue to use Spanish whenever he thought it appropriate. • *The Guardian* (U.K.) reported that a Cambridge academic identified one of the earliest uses of ellipsis dots in a 1588 edition of the Roman Terence's play, *Andria*. Hyphens, rather than dots, mark incomplete utterances by the play's characters. Although there are instances of ellipsis dots in letters around the same time, this is the earliest printed version found. • *Politico* reported on the National Press Club's "Politicians vs. Press" spelling bee, in which Rep. Don Beyer (R-Va.) defeated *The Washington Post*'s Karoun Demirjian to give pols the title. The first such Bee was held in 1913, when President Woodrow Wilson attended. That event was reprised 100 years later. Scripps National Spelling Bee cosponsored the event, with the bell wielded by this year's cochampions, Gokul Venkatachalam and Vanya Shivashankar.

NOVEMBER

The *Oxford English Dictionary* chose an emoji — not a word — as its "Word of the Year." As reported in *Time*, the "Face with Tears of Joy" emoji was determined by SwiftKey (a keyboard-app company) to be the most popular emoji in the world (accounting for nearly 20% of all emoji use in the U.S. and U.K.). Casper Grathwohl, president of Oxford Dictionaries, explained that emoji are becoming "an increasingly rich form of communication, one that transcends linguistic borders." He added that the choice for the word of the year embodies the "playfulness and intimacy" of our emoji-using culture. ;-) • According to the *Daily Mail* (U.K.), the Supreme Court of the United Kingdom called for the Home Office to lower its English-language standards for immigrants or else face possible charges of human-rights violations. The rules, instituted by Home Secretary Theresa May five years ago, require that the wife, husband, or partner of someone living in Britain who comes from a non-English-speaking country pass a proficiency test before entry. The guidance issued with the rules allegedly violates the European Convention on Human Rights. • The

Daily Mail (U.K.) cited "semiliterate" teachers as holding students back. The National Literacy Trust surveyed 2,326 teachers from primary and secondary schools about the requirements in the national curriculum. More than 20% responded that they don't have the knowledge to teach the curriculum. • A research team at Binghamton University discovered that the placement of a period at the end of a text message can change the recipient's interpretation. In a paper published in *Computers in Human Behavior*, the team reported that college students feel that text messages without a period at the end are more sincere than those with one. The team found that this perception existed in text messages but not handwritten notes. "Our claim is not so much that the period is used to convey a lack of sincerity in text messages," the team wrote, "but that punctuation is one of the cues used by senders, and understood by receivers, to convey pragmatic and social information." • A British woman was sentenced to 15 years in prison after a failed attempt to poison her husband. The woman was apprehended by police after a forged nonresuscitation note, purporting to be from her husband, contained a misspelling of the word *dignity*. When police asked the woman to spell the word, she misspelled it, just as the note had. • Members of the Missouri Student Bar Association published a new social-media policy requiring students at the University of Missouri School of Law to communicate in a "respectful and friendly manner" and avoid commenting "despairingly [read *disparagingly*] on others." This ungrammatical (and probably unconstitutional) provision was said by one commentator to reflect the "weaponization of political correctness." • The U.S. Census Bureau released a list indicating that Hawaii has a new official language: Pidgin English. Joining an official list of over 100 languages — indicating the linguistic and cultural diversity of the Hawaiian islands — Pidgin is a combination of words and phrases recognizable to those who speak it. To nonspeakers, though, it sounds like a linguistic mishmash. • Dictionary.com officially recognized several slang words, including *fleek* (= flawlessly styled, groomed, etc.), *feels* (= strong, often positive feelings), and *yaaas* (used as a strong expression of excitement, approval, agreement, etc.). The online dictionary also updated the meaning of previously defined words to match their modified usage, including *random* (= unknown, unidentified, or suspiciously out of place).

DECEMBER

Washington Post style czar Bill Walsh announced that the paper's copy desk would allow the singular *they* (and its cousins *them* and *their*) to pass so that everyone can have their (not *his or her*) way. Walsh called it "the only sensible solution to English's lack of a gender-neutral third-person singular personal pronoun." Like the honorific *Mx.* (see May), the singular *they* also provides a comfortable solution when the person referred to doesn't identify himself or herself (you see the awkwardness?) as being of a particular gender. Walsh said that after some initial resistance from readers, "I suspect that the singular *they* will go largely unnoticed even by those who oppose it on principle." ● The *Chicago Tribune* reported on a recently published usage guide: *A Field Guide to the F Word*. Written by a 94-year-old Navy veteran, it urges "trusting the serviceman's instincts rather than the grammarian's rules." "The Word," as it is often referred to in the book, is never spelled out: it maintains its omnipresence in the form of illustrations of the letter *F* in various fonts. ● The U.S. Court of Appeals for the Federal Circuit struck down part of a federal law that prohibited trademarks on offensive or disparaging terms. The Court cited the First Amendment in deciding that the ban was unconstitutional. "Whatever our personal feelings about the mark at issue here, or other disparaging marks, the First Amendment forbids government regulators to deny registration because they find the speech likely to offend others," Judge Kimberly Moore wrote for the nine-judge majority. ● The terrorist organization known by the acronym "ISIS" captured news headlines throughout the year for its atrocities against humanity and filmed beheadings of Western journalists. "ISIS" stands for the Islamic State of Iraq and Syria. But President Obama has insisted on using the acronym "ISIL," standing for Islamic State of Iraq and the Levant. *The Levant* refers to the region east of the Mediterranean between Egypt and Turkey. Rather than suggest that the threat of the extremist organization is limited to two countries, President Obama reportedly hopes to emphasize the geographically unlimited goals of the terrorist group. ● *The Detroit News* reported that the word *yooper* (= a native or inhabitant of the Michigan Upper Peninsula) was finally included in the *Merriam-Webster Collegiate Dictionary* after 12 years of cajoling by Steve Parks, then county prosecutor and now a district judge. His blandishments included each year sending Merriam-Webster a parcel containing a keychain, magnet, and chocolate bar, all

bearing the word *Yooper*. Parks's campaign for inclusion began when he tried unsuccessfully to use the word in a game of Scrabble. • During his presidential campaign, Donald Trump commented that the Democratic frontrunner and former first lady, Hillary Clinton, "got schlonged" in her 2008 primary run. The verb *to schlong* is not in any dictionary, and the meaning was hotly debated. One linguist thought Trump's use of the word may have been a malapropism in which he tried to use a Yiddish word for "defeat." Others argued that Trump was making a verb out of the indecent Yiddishism *schlong* (a reference to the male member). Verbing nouns, a common type of functional shift, is not new to the English language. In a 1789 letter to a lexicographer, Benjamin Franklin complained about "awkward and abominable" nouns-as-verbs: "If you should happen to be of my Opinion with respect to these Innovations you will use your Authority in reprobating them." Trump's indiscretion seemed for the short term not to matter: in the end, he seemed not to have schmeckeled himself.

THE DOZEN BIGGEST LINGUISTIC GAFFES IN 2015 LAW JOURNALS

1. "There was little contact between *she* [read *her*] and her children." W. Dudley McCarter, *Trial Court Erred* [etc.], 71 J. Mo. B. 296, 297 (Nov.-Dec. 2015).
2. "Originators *could care less* [read *could not care less*] about the long-term performance of these loans." June Rhee, *Getting Residential Mortgage-Backed Securities Right*, 20 Stan. J.L. Bus. & Fin. 273, 302 (2015).
3. "Google has made it a policy to send notices to content owners *anyways* [read *anyway*], citing transparency concerns." Ravi Antani, *The Resistance of Memory*, 30 Berkeley Tech. L.J. 1173, 1208 (2015) (with extra credit for using the dialectal *anyways* three times within the article).
4. "The court held that . . . the NYPD procedure was facially neutral *in regards to* [read *in regard to*] ethnicity." Shaunak Shah, *An Impaired State of the Law*, 80 Brook. L. Rev. 1611, 1623 (2015) (with extra credit for employing this nonstandard phrasing five times within the piece).

5. "The new FSMA inspection rules take a more *preventative* [read *preventive*] approach." Alexia Brunet Marks, *The Risks We Are Willing to Eat*, 52 Harv. J. Legis. 125, 142 (2015) (with extra credit for using the epenthetic term eight times).
6. "If they *would have* [read *had*] thought of that outcome, they could have taken steps . . . ." Eric J. Shinabarger, *Back to the Future*, 90 Chi.-Kent L. Rev. 335, 344 (2015).
7. "Individuals are naturally willing to do the right thing for the greatest *amount* [read *number*] of people . . . ." Luigi Russi & John D. Haskell, *Heterodox Challenges to Consumption-Oriented Models of Legislation*, 9 Harv. J. Legal Left 13, 58 (2015).
8. "These individuals would have an elastic labor supply curve with *less people* [read *fewer people*] willing to enter or remain in the workforce." Kevin M. Walsh, *The Marriage Penalty*, 39 Seton Hall Legis. J. 83, 91 (2015) (with extra credit for not hyphenating the phrasal adjective).
9. "Criminal penalties include up to *30 days* [read *30 days'*] imprisonment." Tyler T. Hendry & Allison Zullo Gottlieb, *Labor and Employment Law*, 65 Syracuse L. Rev. 831, 839 (2015).
10. "The key is for a franchisor to engage in discussion . . . and then make decisions that work for them, their brand, and *where they are at* [delete *at*] in the growth and evolution of their franchise system . . . ." Brian B. Schnell & Ronald K. Gardner Jr., *Battle Over the Franchisor Business Judgment Rule and the Path to Peace*, 35 Franchise L.J. 167, 205 (2015) (with extra credit for the singular *them* and *their*).
11. "Plaintiffs filed a complaint against Defendants *in personum* [read *in personam*]." Reid Miller & Lynette Komar, *Survey: Recent Maritime Decisions Within the Ninth Circuit Region*, 27 U.S.F. Mar. L.J. 267, 271 (2014-2015) (with extra credit for *Ninth Circuit Region* instead of the simpler *Ninth Circuit*).
12. "This 'redefinition' heightens the evidentiary burden for plaintiffs to make out their prima facie cases while simultaneously recasting the prima facie case as *'de minimus'* [read *'de minimis'*]." Richard J. Perry Jr., *Fisher and James Hijack the McDonnell Douglas Paradigm* [etc.], 33 Buff. Pub. Int. L.J. 87, 89 (2014-2015) (with extra credit for dividing 4-3 between the misspelling and the correct spelling).

The Year in Law 2014-2015

[parallel citation: 2016 Green Bag Alm. 33]

Gregory F. Jacob[†]

A review of some highlights of law in America (with a few overseas detours) during the past twelve months or so.

November 2014

November 3: The Supreme Court hears argument in *Zivotovsky v. Kerry*, which presents the question whether Congress can allow U.S. citizens born in Jerusalem to list "Israel" as their birthplace on their passports, notwithstanding the Executive Branch's long-held position of neutrality on sovereignty over Jerusalem. • The State of Maine reaches a settlement with Kaci Hickox, a nurse who treated Ebola patients in West Africa and refused to comply with a state-ordered quarantine. Under the settlement, Hickox is allowed to move freely in public, but must submit to health monitoring and notify health officials if she develops any Ebola symptoms.

November 4: The U.S. Court of Appeals for the D.C. Circuit hears oral argument in *Klayman v. Obama*, a challenge to the NSA's bulk phone-surveillance program. The ruling under review was issued by U.S. Dis-

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trict Judge Richard Leon, and declared that the NSA's program "almost certainly" violates the Constitution.

November 5: Kansas voters choose to retain Kansas Supreme Court Justices Eric Rosen and Lee Johnson, despite a campaign to oust them based on their decision to overturn the death sentences of two brothers convicted of murder. To date, no Kansas Supreme Court justice has ever lost in a retention election. ● The Department of Justice discloses emails in which Attorney General Eric Holder displays contempt for Rep. Darrell Issa, who is conducting an investigation into a gun-tracking operation run by ATF. In the emails, Holder asserts that "Issa and his idiot cronies" are attempting to "cripple ATF and suck up to the gun lobby." ● The Federal Circuit reprimands Edward Reines, a patent litigator, for attempting to solicit clients by publicizing an email sent to him by former Chief Judge Randall Rader praising Reines's advocacy. The disclosure of the email had led to Judge Rader's resigning from the bench. ● The Supreme Court hears oral argument in *Yates v. United States*, which presents the question whether undersized red grouper count as "tangible objects" under a provision of federal law criminalizing the destruction of "any record, document, or tangible object" with the intent to obstruct an investigation. ● Chief Justice John Roberts gives a speech praising the 800-year-old Magna Carta, but cautioning litigants not to cite it in briefs or at argument because "[w]e like our authorities a little more current."

November 6: U.S. District Judge Douglas P. Woodcock delays the sentencing of two former college friends of Dzhokhar Tsarnaev, the alleged Boston Marathon bomber, based on the Supreme Court's consideration of *Yates v. United States* (the undersized red grouper case). The two friends were charged under the statutory provision at issue in *Yates* based on their obstruction of the investigation into Tsarnaev. ● In a divided decision, the U.S. Court of Appeals for the Sixth Circuit issues an opinion upholding prohibitions on same-sex marriage in Kentucky, Michigan, Ohio, and Tennessee. The Supreme Court will later grant certiorari in these cases and reverse, finding that the Constitution guarantees marriage equality (see June 26 entry).

November 7: The White House announces that the President will be nominating Loretta Lynch, the U.S. Attorney for the Eastern District of New York, to be the next Attorney General. ● U.S. Bankruptcy Judge

Steven Rhodes issues an opinion upholding the City of Detroit's municipal bankruptcy plan. • The Supreme Court grants certiorari in *King v. Burwell*, which addresses whether consumers can receive premium tax credits under the Affordable Care Act to help defray the costs of insurance purchased through a federal insurance exchange. The case is viewed as a major challenge to the continued implementation of the Affordable Care Act. • New York judge Robert Stolz refuses to dismiss a criminal accounting fraud case brought against former employees of the law firm Dewey & LeBoeuf.

November 12: The family of Thomas Eric Duncan, the first Ebola patient in the U.S., reaches a settlement with the Texas hospital that initially treated him by giving him antibiotics and then releasing him. Duncan returned to the hospital days later, much sicker, and eventually passed away. • An advocacy group launches an advertising campaign called "Fix the Court," which criticizes the Supreme Court as the "most powerful" and "least accountable" institution in the U.S. government.

November 13: Don Blankenship, the former CEO of Massey Energy Company, is indicted in federal court on charges that he conspired to violate federal mine safety laws prior to a mine explosion that killed 29 coal miners in 2010.

November 14: The U.S. Court of Appeals for the D.C. Circuit upholds the accommodation process that allows nonprofit religious employers to opt out of the Affordable Care Act's contraceptive mandate. The court concludes that the accommodation process does not violate the Religious Freedom Restoration Act both because it does not substantially burden the employers' religious beliefs and because it is the least restrictive means of satisfying the government's compelling interest in ensuring that women have access to contraceptive coverage.

November 17: The Herald Fund SPC and Primeo Fund agree to return $497 million that they received from investing with Bernard Madoff, bringing Madoff's investors' recovery above $10 billion. Madoff is currently serving a 150-year prison sentence. • In an interview with the *New York Times*, Attorney General Eric Holder predicts that a jurisdiction in the U.S. will one day execute an innocent person, if that has not already happened.

November 18: Speaker of the House John Boehner announces that the House has retained George Washington University law professor Jonathan

Turley to represent the House in its upcoming suit against President Obama for allegedly overstepping his authority in implementing the Affordable Care Act. Turley is the third lawyer retained by the House, after previous attorneys withdrew from the case.

November 19: The Department of Justice announces it collected nearly $25 billion in criminal and civil penalties in the previous budget year. The amount is more than triple the amount collected the previous year.

November 20: President Obama announces an executive action (entitled "Deferred Action for Parents of Americans and Lawful Permanent Residents," or "DAPA") directing the non-enforcement of certain immigration laws, that will allow more than four million immigrants who are not lawfully present in the U.S. to remain in the country and receive an opportunity to apply for work permits.

November 21: The House of Representatives files *House v. Burwell*, a lawsuit challenging the Administration's implementation of the Affordable Care Act. The suit challenges the Administration's decisions to delay implementation of the employer mandate and to make certain advance payments of federal financial assistance to individuals purchasing health coverage on the insurance exchanges.

November 24: St. Louis County prosecuting attorney Robert McCulloch announces that a grand jury found no probable cause to charge Ferguson, Missouri police officer Darren Wilson in connection with the shooting death of Michael Brown. Shortly following the announcement, violent protests break out in Ferguson.

November 26: Justice Ruth Bader Ginsburg undergoes heart surgery to address a blockage found in her right coronary artery. She returns to court days later for oral argument.

DECEMBER 2014

December 1: The Supreme Court (with Justice Ginsburg) hears oral argument in *Elonis v. United States*, a constitutional challenge to Anthony Elonis's 2011 conviction for threatening his estranged wife on Facebook. • President Obama pledges support for a nationwide conversation about race and police enforcement after participating in several meetings relating to events in Ferguson (see November 24 entry).

December 3: A Staten Island grand jury declines to indict officer Daniel Pantaleo in connection with the death of Eric Garner. Garner died of a heart attack after being placed in a chokehold by Pantaleo. The decision not to indict touches off a wave of protests nationwide. • Texas and 16 other states file a lawsuit challenging President Obama's executive actions on immigration (see November 20 entry), claiming they "trample[] the U.S. Constitution's Take Care Clause and federal law."

December 4: The Department of Justice announces that its probe of the Cleveland Division of Police has revealed that the Division has a pattern and practice of using excessive force, both in firing weapons and in using non-lethal force. • Assistant Attorney General Leslie Caldwell announces that the Department of Justice is creating a dedicated cybersecurity unit to ensure that electronic surveillance tools are properly used. • A New York appeals court declines to grant habeas corpus to "Tommy," a chimpanzee being held in a cage at a business in upstate New York. The court concludes that "a chimpanzee is not a 'person' entitled to the rights and protections afforded by the writ of habeas corpus."

December 5: The Supreme Court grants review in *Walker v. Texas Division, Sons of Confederate Veterans*, which presents the question whether a state can refuse to issue a specialty license plate because the message on the plate may be offensive.

December 8: Columbia Law School announces that it will allow students to reschedule final exams if they feel traumatized by the grand jury decisions in the Eric Garner and Michael Brown cases (see entries for November 24 and December 3). • The Supreme Court declines to grant review in BP's challenge to its class action settlement in connection with the Deepwater Horizon oil rig explosion. • Portland, Oregon announces that it has sued Uber, a popular ride-hailing application, seeking to halt the company's operations in the city.

December 9: Senate Democrats issue a report concluding that interrogation techniques employed by the CIA after the September 11, 2011 attacks were ineffective, that the management of the interrogation program was flawed, and that the program was "far more brutal" than previously acknowledged. Former CIA officials release an op-ed in response, calling the report a "one-sided study marred by errors of fact and interpretation."

December 10: The U.S. Court of Appeals for the Second Circuit issues an opinion overturning the convictions of hedge fund managers Anthony Chiasson and Todd Newman. The opinion is widely viewed as a setback for U.S. Attorney Preet Bharara, who had secured dozens of convictions in a multiyear crackdown on insider trading on Wall Street.

December 16: U.S. District Judge Arthur Schwab rules that President Obama's executive actions on immigration (see November 20 entry) are unconstitutional, concluding that the President's "unilateral legislative action violates the separation of powers provided for in the United States Constitution as well as the Take Care Clause." ● Justices Antonin Scalia and Elena Kagan are pictured together at a hunting lodge, along with retired U.S. District Judge Charles Pickering and Mississippi Secretary of State Delbert Hosemann.

December 17: The Supreme Court declines an emergency request by Arizona officials seeking to prohibit the issuance of state driver's licenses for young immigrants who are allowed to remain in the country in light of President Obama's executive actions on immigration (see November 20 entry). ● President Obama announces that the U.S. will begin discussions to reestablish diplomatic relations with Cuba, will review Cuba's designation as a State Sponsor of Terrorism, and will take steps to increase travel, commerce, and the flow of information to and from Cuba.

December 18: The Federal Communications Commission renews the license of a radio station owned by Washington Redskins owner Daniel Snyder, dismissing a petition urging the agency not to renew the license because it repeatedly uses the team's name on-air, which (according to the petition) is a racial slur. ● The U.S. Court of Appeals for the Sixth Circuit invalidates a federal law prohibiting gun ownership for anyone "adjudicated as a mental defective or who has been committed to a mental institution," concluding that the law violates the Second Amendment. ● A report released by the Death Penalty Information Center reveals that America executed 35 prisoners in 2014, representing the lowest number of executions in 20 years. The report also shows that only 72 people were sentenced to death in 2014, which is the lowest number in 40 years. ● The Indiana Supreme Court upholds the state's public intoxication law, which imposes a criminal penalty on someone who "harasses, annoys, or alarms another person" while intoxicated in public. The court decides to

"read a reasonableness standard into" the statute "when analyzing the term 'annoys.'" • Nebraska and Oklahoma file an original action in the Supreme Court challenging Colorado's decision to legalize marijuana use. The states claim that Colorado's actions violate the Supremacy Clause and create negative externalities in neighboring states.

December 22: Sony Pictures Entertainment sends a letter to Twitter, Inc. asking it to suspend the account of an indie songwriter who posted Sony documents stolen in a cyberattack and leaked online.

December 23: The Food and Drug Administration ends its lifetime ban on blood donations from gay and bisexual men, announcing a new policy allowing donations from men if they have not had sex with men in more than a year.

December 24: The Brookings Institution reports that President Obama's judicial confirmation rate over the first six years of his presidency was 92%, outpacing the 84% confirmation rate for President George W. Bush and the 89% rate for President Bill Clinton. The report also shows that President Obama has had 307 judicial nominations confirmed, compared to 324 during George W. Bush's term in office. • U.S. District Judge Beryl Howell dismisses a lawsuit filed by Maricopa County Sheriff Joe Arpaio challenging President Obama's executive actions on immigration (see November 20 entry). The opinion concludes that Sheriff Arpaio lacks standing to challenge the actions, disagreeing with a previous opinion issued by a district court in Pennsylvania (see December 16 entry).

December 26: The Dublin High Court rules that removing life support from a 26-year-old woman who is both clinically brain-dead and pregnant does not violate the country's constitutional ban on abortion.

December 29: A criminal defense lawyer in Colorado announces that he will offer a $1,000 college scholarship to a high school senior who provides a detailed account of a situation in which he or she drove while intoxicated, and outlines the concrete steps the student will take to ensure that he or she will not drive while intoxicated in the future.

December 31: Chief Justice John Roberts issues his year-end report on the federal judiciary, in which he announces that all Court filings will be placed online starting in 2016. • Maryland Governor Martin O'Malley announces that he will commute the capital sentences of the state's final four inmates on death row. The state abolished the death penalty in 2013.

JANUARY 2015

January 5: A member of the Ferguson grand jury (see November 24 entry) files suit challenging a lifetime gag order placed on the grand jury proceedings. • Nazih Abdul-Hamed al-Ruqai, an alleged al-Qaeda operative accused of planning 1998 bombings of U.S. embassies in Kenya and Tanzania, dies 10 days before the scheduled start date of his trial in a federal district court in Manhattan. • The trial of Dzhokhar Tsarnaev, the Boston Marathon bomber, begins in federal district court in Massachusetts.

January 6: U.S. District Judge James R. Spencer sentences former Virginia Governor Bob McDonnell to two years in prison for his convictions of conspiracy and fraud for accepting loans and lavish gifts in exchange for helping a donor's business.

January 7: U.N. Secretary-General Ban Ki-moon announces that Palestine will have a seat at the International Criminal Court starting in April.

January 8: The Connecticut Supreme Court rules that a 17-year-old girl suffering from a treatable form of cancer must undergo chemotherapy against her will and the wishes of her mother. The state had taken the girl into custody after the girl and her mother objected to treatment.

January 9: The Supreme Court dismisses *Chen v. Mayor and City Council of Baltimore*, a case it had granted for review, based on Chen's failure to file a merits brief. Chen had disappeared after his case had been granted. • Ohio announces it will no longer use midazolam in its lethal injection protocol, and will instead resume using sodium thiopental and pentobarbital. In June, the Supreme Court will issue an opinion upholding Oklahoma's use of midazolam (see June 29 entry).

January 12: President Obama announces a package of legislative proposals aimed at safeguarding data privacy in education, energy, and the tech sector.

January 14: U.S. District Judge George O'Toole refuses to suspend jury selection in the trial of Dzhokhar Tsarnaev, the Boston Marathon bomber, in light of terrorist attacks at the Charlie Hebdo offices in Paris.

January 14: The U.S. Court of Appeals for the Ninth Circuit upholds baseball's exemption from the antitrust laws, labeling it "one of federal law's most enduring anomalies," but one that only Congress or the Supreme Court can fix.

January 16: The Supreme Court grants review in *Obergefell v. Hodges* and three other cases from the Sixth Circuit (see November 6 entry) addressing whether the Constitution guarantees same-sex couples the right to marry.

January 20: The Supreme Court issues its opinion in *Holt v. Hobbs*, concluding that federal law permits a Muslim inmate to grow a half-inch beard. The Court rejects the prison's argument that the beard ban is necessary to prevent inmates from hiding contraband in their facial hair, noting that the prison permits quarter-inch beards, and that more than 40 other prisons permit half-inch beards. • A New York woman reaches a $134,000 settlement with the U.S. and a DEA agent based on the agent's impersonating her on Facebook without her permission. The woman's phone had been seized during her arrest for participation in a cocaine distribution ring, and the DEA agent then created a Facebook profile in an effort to lure the woman's criminal associates.

January 21: Individuals protesting the Supreme Court's *Citizen United* ruling disrupt oral arguments at the Supreme Court. The protest marks the group's second successful protest effort in the past year.

January 23: The Supreme Court grants review in *Glossip v. Gross*, a challenge to Oklahoma's use of midazolam in its three-drug lethal injection protocol (see January 9 entry). Days later, the Oklahoma Attorney General asks the Supreme Court to postpone three pending executions in light of its consideration of Oklahoma's protocol. • The NFL hires Ted Wells to issue a report on "Deflategate," the controversy over whether the New England Patriots altered footballs during the AFC Championship Game against the Indianapolis Colts.

January 28: The Senate Judiciary Committee holds a hearing on Loretta Lynch's nomination to serve as Attorney General. • U.S. District Judge Jed Rakoff resigns from the Justice Department's National Commission on Forensic Science in protest, after being told that the Commission will not examine how scientific evidence is shared in the discovery phase of trial preparation. Two days later, Judge Rakoff returns to the Commission after DOJ agrees to allow panel members to raise questions about discovery.

January 29: The Obama Administration announces that it has no intention of giving the Guantanamo Bay naval base back to Cuba, even though the Administration remains of the view that the prison at the base should be closed.

FEBRUARY 2015

February 2: Justice Elena Kagan states that she is "conflicted" about whether the Supreme Court should allow cameras in the courtroom, noting that "[t]here's some reason to be a little bit careful about going down this road." ● The White House proposes a 5% rise in the budget for the Department of Justice, to $28.7 billion.

February 3: The House of Representatives holds its 56th vote to repeal the Affordable Care Act. ● The British House of Commons votes to legalize "three-parent babies," or in vitro fertilization procedures in which fertility labs use genetic material from a mother, father, and another donor.

February 4: California Attorney General Kamala Harris appeals a district court decision overturning the state's two-year ban on sales of foie gras. ● Senators Lamar Alexander and Mike Lee introduce a resolution that would allow the Senate to confirm Supreme Court justices with a simple majority. ● A jury in Manhattan convicts Ross Ulbricht of seven criminal charges in connection with his role in Silk Road, an online drug bazaar that accepted payment in Bitcoin. ● The FCC announces a new net neutrality proposal, which would treat mobile and fixed broadband providers like utilities. ● Bobby Chen, whose Supreme Court case was dismissed based on his failure to file a merits brief (see November 9 entry), resurfaces by filing a rehearing petition in his case.

February 9: Residents of Ferguson, Missouri file a federal lawsuit claiming that the city is violating the Constitution by jailing individuals in unsanitary conditions based on their inability to pay outstanding fines for misdemeanors. ● Alabama Chief Justice Roy Moore orders probate judges to refuse to issue marriage licenses to same-sex couples, claiming that judges in the state are not bound by a federal district court ruling invalidating the state's ban on same-sex marriages. The Supreme Court had previously issued an order permitting the district court ruling to take effect. ● In an interview with Vox, President Obama calls on the Senate to eliminate routine use of the filibuster.

February 11: The trial of Eddie Ray Routh, the man accused of killing "American Sniper" Chris Kyle, begins in Texas court. ● In an interview with Buzzfeed, President Obama pushes back on the claim that he had concealed his true position on same-sex marriage during the 2008 cam-

paign. David Axelrod, the President's former top political strategist, had recently published a book stating otherwise. • The Obama Administration awards the Medal of Valor to law-enforcement officials who worked on the Boston Marathon bombing case, as well as first responders on the scene of a 2012 shooting at a Wisconsin Sikh temple.

February 12: FBI Director James Comey states that all Americans carry various biases with them, and that some law enforcement officials become jaded due to their dealings with criminals.

February 17: U.S. District Judge Andrew Hanen issues a ruling temporarily blocking the implementation of President Obama's executive actions on immigration, granting Texas's request for a temporary injunction (see November 20 entry).

February 19: U.S. District Judge Virginia Kendall rules that the Chicago Cubs may continue to install large outfield signs near Wrigley Field, rejecting a request to halt the construction filed by owners of rooftop clubs near the ballpark that sell tickets to fans to allow them to watch Cubs games from across the street.

February 23: A federal jury finds the Palestinian Authority and the Palestine Liberation Organization liable for supporting six terrorist attacks in Israel in the early 2000s, and orders the groups to pay $218.5 million to the victims' families. • The Supreme Court denies Bobby Chen's rehearing petition, which sought to reopen his case, which had been dismissed based on his failure to file a merits brief (see November 9 entry).

February 24: Attorney General Eric Holder announces that the Justice Department will not bring federal criminal charges against George Zimmerman for his involvement in the 2012 shooting death of Trayvon Martin.

February 25: The Supreme Court, per Justice Ginsburg, issues its 5-4 opinion in *Yates v. United States*, concluding that undersized red grouper are not "tangible objects" under federal criminal law. Justice Kagan's dissent notes that a law criminalizing the destruction of undersized red grouper may be foolish, but judges "are not entitled to replace the statute Congress enacted with an alternative of our own design."

February 26: The Senate Judiciary committee votes, 12-8, to advance to the Senate floor the nomination of Loretta Lynch to be Attorney General.

MARCH 2015

March 3: David Petraeus, the former director of the CIA, pleads guilty to a misdemeanor charge of mishandling classified information.

March 4: The Justice Department issues a report finding that the Ferguson, Missouri police department routinely violated the constitutional rights of the city's African-American residents. The report includes a sample of emails from within the police department, which include a depiction of President Obama as a chimpanzee and others playing on racial stereotypes. The same report concludes that there was no indication that Officer Darren Wilson violated Michael Brown's civil rights or committed any prosecutable violation when he fatally shot Brown. • The Supreme Court hears oral argument in *King v. Burwell*, the challenge to the Administration's provision of premium tax credits to individuals purchasing health insurance on federal insurance exchanges.

March 5: The State Department announces that it will review and possibly release Hillary Clinton's emails from her time at the agency, but also indicates that the review process will take some time.

March 6: In an interview, Edward Snowden asserts that the U.S. government will not guarantee him a fair trial, precluding him from returning to the country. • A report issued by the Brookings Institution finds that ISIS supporters used at least 46,000 Twitter accounts in late 2014.

March 10: The Wikimedia Foundation, the organization that runs Wikipedia, sues the National Security Agency challenging its use of mass surveillance programs.

March 13: The FCC announces that it will place on hold its review of the mergers between Comcast Corporation and Time Warner Cable and between AT&T and DirecTV, pending a court decision regarding access to video-programming contracts between the merging companies and television channel owners.

March 17: The U.S. Court of Appeals for the Ninth Circuit hears oral argument on whether collegiate athletes should receive a share of the revenue generated from the use of their names, images, and likenesses.

March 18: Tairod Nathan Webster Pugh, a U.S. Air Force veteran, pleads not guilty to terrorism charges based on his alleged attempts to join ISIS

in Syria. ● The United Kingdom announces that it plans to apply anti-money laundering regulations to digital currency exchanges, like Bitcoin.

March 25: The Army charges Sergeant Bowe Bergdahl with misbehavior before the enemy and desertion for leaving his base in Afghanistan in 2009. Less than a year earlier, Bergdahl had been freed from Taliban captivity in a prisoner exchange.

March 26: U.S. District Judge William Pauley issues a ruling criticizing the parties in a pending case for "choking the docket" with "behemoth pleadings." Judge Pauley notes that "[a] troubling trend toward prolixity in pleading is infecting court dockets in this district and elsewhere."

March 27: A federal jury concludes that venture-capital firm Kleiner Perkins did not discriminate against Ellen Pao because she is a woman. The trial had attracted a great deal of publicity over possible sexism in Silicon Valley. ● Italy's top court reverses the murder conviction of Amanda Knox, who had been convicted twice and acquitted twice of killing a British student in the apartment they shared.

March 31: President Obama commutes the sentences of 22 drug offenders, including eight individuals serving life sentences, and writes letters to the commutation recipients urging them to "make the most of this opportunity."

APRIL 2015

April 1: In an unexpected development, the Supreme Court issues an order granting immediate briefing and argument in the "Deflategate" matter (see January 23 entry), asking the parties to address whether NFL Commissioner Roger Goodell's decision to suspend Tom Brady for alleged interference with the balls used in the AFC Championship game constituted a usurpation of Congress's Article I power to define "offenses against the law of nations."*

April 3: The Alabama Department of Human Resources concludes that Harper Lee was not the victim of elder abuse when she agreed to publish her new book, "Go Set a Watchman." ● The Federal government charges Keonna Thomas of attempting to join ISIS based on intercepted communications between her and an overseas fighter. ● A Georgia jury finds

* April Fools!

Chrysler responsible in the death of a four-year-old Georgia boy in a fiery Jeep crash. The jury also imposes a $150 million judgment against the company.

April 6: Manhattan Supreme Court Justice Matthew Cooper issues a ruling permitting lawyers to serve divorce papers through a Facebook message. The court notes that "the next frontier in the developing law of the service of process over the internet is the use of social media sites as forums through which a summons can be delivered."

April 7: The jury begins deliberating in the Boston Marathon bombing trial. The next day, the jury convicts Dzhokhar Tsarnaev of carrying out the bombings.

April 8: U.S. District Judge Andrew Hanen refuses to lift his injunction blocking President Obama's immigration actions (see February 17 entry). The court also accuses the Administration of misleading the court regarding the rollout of the program, and suggests that sanctions may be proper. ● The Arizona Supreme Court rules that convicted felons with valid medical marijuana cards can smoke medical marijuana while on probation.

April 9: The U.S. Sentencing Commission adopts a new framework for fraud cases that gives more weight to an offender's intent and role within a scheme. The new guidelines also shift emphasis from punishing those who caused a large group of victims to lose money to those who cause "substantial" financial harm to any number of victims. ● Arkansas Governor Asa Hutchinson signs a bill instructing the state to erect a privately funded Ten Commandments monument on the State Capitol grounds. The ACLU of Arkansas announces that it will consider filing a constitutional challenge to the monument.

April 13: U.S. District Judge Royce Lamberth imposes lengthy prison sentences on four former Blackwater guards for their role in a shooting incident in Baghdad in 2007 that left multiple Iraqis dead and wounded. One of the guards receives a life sentence, and the other three receive 30-year sentences.

April 16: The Virginia Supreme Court rules that the online rating site Yelp does not have to disclose the identities of online users accused of posting fraudulent negative reviews about a carpet-cleaning company.

April 17: The U.S. Court of Appeals for the Third Circuit rules that the U.S. Mint must return 10 "Double Eagle" gold coins to a Philadelphia coin dealer. The court concludes that the government improperly confiscated the coins in 2004.

April 19: 25-year old Freddie Gray dies in police custody in Baltimore, after sustaining serious spinal cord injuries several days earlier while being transported in a van to a detention facility in what is alleged to have been a deliberately "rough ride" (see May 3 entry).

April 20: U.S. District Judge Andrew Gordon rules that FBI agents violated the Fourth Amendment when they disrupted a guest's Internet service, posed as repairmen, and then tricked a butler into letting them into the luxury suite occupied by the guest, who was suspected of running an illegal gambling ring from inside the suite.

April 22: The U.S. Court of Appeals for the Ninth Circuit overturns former baseball player Barry Bonds's obstruction of justice conviction, concluding that his answer to a grand jury in 2003 was not material to the government's steroid distribution investigation.

April 23: The Senate confirms Loretta Lynch as Attorney General by a 56-43 vote. • A report issued by the Law School Admissions Council indicates that law school applications are down 2.6% compared to the previous year, 4.7% compared to 2014, and 40% compared to 2005.

April 28: The Supreme Court hears oral argument in *Obergefell v. Hodges*, the same-sex marriage cases.

April 29: The Supreme Court submits proposed amendments to the Federal Rules of Civil Procedure to Congress, which will take effect in December 2015 absent congressional action. The rules changes primarily deal with discovery and early case management, and provide greater specificity in Rule 37(e) concerning how courts should handle lost electronically stored information (ESI).

April 30: The Ohio Supreme Court strikes down Cleveland's "jock tax," which calculates a professional athlete's taxable income based on how many games the athlete plays in the city. The plaintiffs are football players who challenged Cleveland's decision to tax 1/20th of their income because they participated in one game a year in the city over a 20-game season.

MAY 2015

May 1: The U.S. Court of Appeals for the D.C. Circuit invalidates portions of the EPA's 2013 rule regulating backup generators and emergency engines, which typically use diesel fuel. Delaware and other challengers contended that the EPA's blanket exemption for the first 100 hours of usage was insufficiently protective of the environment.

May 3: The National Guard withdraws from Baltimore, and Gov. Larry Hogan lifts city curfews, following rioting that began on April 25 related to the death of Freddie Gray in police custody. The riots are estimated to have caused $9 billion in property damage, including the incineration of 144 vehicles and 15 buildings (see April 19 entry).

May 4: Law 360 reports that 7,964 Fair Labor Standards Act (FLSA) cases were filed in federal court in 2014, a 3% increase from the year before, continuing a growth trend. Florida and New York are the two biggest FLSA hotspots.

May 6: The U.S. Court of Appeals for the Second Circuit rules that under a 1940s antitrust decree, music publishers Sony and Universal cannot withdraw just their Internet streaming rights from their blanket ASCAP licenses, but rather must be all-in or all-out with ASCAP, handing Pandora Media a significant victory.

May 14: Norton Rose Fulbright LLP's annual litigation survey shows that corporate general counsels' greatest liability concern is the increasingly tough regulatory/investigation environment. Of pending litigation against responding companies, the dockets are dominated by contract (38%) and labor and employment (37%) disputes.

May 18: The Connecticut Supreme Court upholds a ruling that IBM's 2007 loss of 130 tapes containing personal information of IBM employees out of the back of a van driving on the highway, which caused IBM to implement more than $6 million in remedial measures, did not constitute a covered "personal injury" within the meaning of IBM's insurance policy because the lost information was never "published."

May 21: A Baltimore grand jury indicts six police officers for their involvement in the death of Freddie Gray, including a charge of second-degree murder for the driver of the van in which Gray was transported (see May 3 entry).

May 26: The Supreme Court notes probable jurisdiction in *Evenwel v. Abbott*, which raises the question whether states must equalize actual voters in drawing legislative districts, or can instead equalize total numbers of citizens. • The U.S. Court of Appeals for the Fifth Circuit declines to lift Judge Andrew Hanen's order enjoining implementation of DAPA (see April 8 entry).

May 27: Seven current FIFA officials are arrested in Zürich, Switzerland for extradition to the U.S. on suspicion of receiving (along with two other indicted FIFA officials) over $150 million in bribes.

JUNE 2015

June 1: The Supreme Court issues its decision in *Elonis v. United States*. The Chief Justice, joined by six other Justices, reverses Anthony Elonis's 2011 conviction for threatening his estranged wife on Facebook (see December 1 entry). The Court concludes that the statute requires some level of knowledge by the defendant that his communication would be viewed as a threat, but remands the case to the lower court to determine whether a mental state of recklessness suffices under the statute. Justice Alito concurs in part and dissents in part, contending that the Court should declare that recklessness suffices. Justice Thomas dissents. • The Supreme Court issues its decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*, holding that Title VII of the Civil Rights Act of 1964 prohibits an employer from refusing to hire a job applicant to avoid accommodating a religious practice even where the applicant did not inform the employer of the need for an accommodation.

June 5: Arrests by Baltimore's police force have dropped sharply in the wake of the Freddie Gray riots (see May 3 entry), from 3,801 in May 2014 to 1,177 in May 2015. At the same time, murders in Baltimore have risen to their highest level since 1972, with significant accompanying spikes in other forms of violent crime.

June 8: The Supreme Court issues its opinion in *Zivotovsky v. Kerry*, concluding, in an opinion by Justice Kennedy, that the President has the exclusive power to recognize foreign governments, and invalidating a statute requiring the Secretary of State to issue (upon request) passports listing "Israel" as the birthplace for individuals born in Jerusalem. Justices Breyer and Thomas issue concurring opinions. The Chief Justice, joined

by Justice Alito, dissents, concluding that the Constitution does not grant recognition power exclusively to the Executive, and that the statute does not involve recognition, but simply the content of passports. Justice Scalia, joined by the Chief Justice and Justice Alito, also dissents, echoing similar themes.

June 9: The New Jersey Supreme Court rules 5-2 that Gov. Chris Christie cannot be required to pay $1.57 billion in contributions into the state's underfunded public employee pension system, stating that provisions in New Jersey's 2011 pension overhaul law that promised the payment would be made were not "legally binding, enforceable obligation[s]." ● In *Murray Energy Corp. v. EPA*, a panel of the U.S. Court of Appeals for the D.C. Circuit (consisting of Judges Kavanaugh, Griffith and Henderson) declines to halt, before issuance, a final rule to EPA's rulemaking to restrict carbon dioxide emissions from existing power plants.

June 12: The FCC's "net neutrality" rule goes into effect, after the U.S. Court of Appeals for the D.C. Circuit refused the day before to grant a stay.

June 17: 21-year-old Dylann Roof kills nine worshipers, including the senior pastor and a state senator, at the Emmanuel African Methodist Episcopal Church in Charleston, South Carolina. Arrested the next day, Roof states he committed the shooting in the hopes it would start a race war (see June 19 entry).

June 18: The Supreme Court issues its decision in *Walter v. Texas Division, Sons of Confederate Veterans*, concluding that Texas did not violate the First Amendment when it declined to issue specialty license plates featuring a Confederate battle flag. The Court, per Justice Breyer, concludes that Texas's specialty license plates convey government speech, even though private parties participate in the design of potential plates. Justice Alito, joined by the Chief Justice and Justices Scalia and Kennedy, dissents, arguing that private messages conveyed on the many specialty plates issued by Texas convey the messages of motorists, not the State. Justice Alito's dissent asks, "If a car with a plate that says 'Rather Be Golfing" passed by at 8:30 am on a Monday morning, would you think: 'This is the official policy of the State — better to golf than to work?'" ● The U.S. Court of Appeals for the Federal Circuit holds that Sequenom Inc.'s patent on a test that detects fetal DNA in a pregnant woman's blood is invalid because the DNA's presence in the blood is a naturally occurring phe-

nomenon. ● The U.S. Court of Appeals for the Ninth Circuit revives a RICO suit against Foley & Lardner LLP for allegedly helping a client operate a scheme to conceal documents and undervalue property during a 2000 eminent domain dispute.

June 19: Charged with nine counts of murder in a South Carolina court, Dylann Roof receives forgiveness from one impacted family member after another. Says one family member: "I forgive you. I will never talk to her ever again, never be able to hold her again. I forgive you and have mercy on your soul. You hurt me, you hurt a lot of people, but I forgive you." Says another: "My grandfather and the other victims died at the hands of hate. Everyone's plea for your soul is proof that they lived in love and their legacies live in love."

June 24: Boston Marathon bomber Dzhokhar Tsarnaev is formally sentenced to death. In a seven-minute address, he admits his role in the bombing, apologizes to his victims, and thanks Allah. ● Nine California students represented by appellate power lawyers Ted Olson and Ted Boutros, Jr. file their respondents' brief in the California Court of Appeal in *Vergara v. California*, defending a lower court decision that struck down California's teacher tenure system as unconstitutional on the grounds that it leads to grossly ineffective teaching. Oral argument is scheduled for early 2016.

June 25: Chief Justice John Roberts issues a 6-3 opinion for the Court in *King v. Burwell*, concluding that premium tax credits under the Affordable Care Act are available to individuals purchasing health insurance on both state and federal insurance exchanges. The Chief Justice's opinion concludes, "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible we must interpret the Act in a way that is consistent with the former, and avoids the latter." Justice Scalia, joined by Justices Thomas and Alito, dissents, calling the majority's analysis "quite absurd," accusing the majority of "interpretive jiggery-pokery," and suggesting that "We should start calling this law SCOTUScare." ● Justice Kennedy announces the Supreme Court's 5-4 opinion in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, holding that disparate impact liability claims are cognizable under the Fair Housing Act. Justice Thomas authors the principal dissent.

June 26: The Supreme Court issues a 5-4 opinion in *Obergefell v. Hodges*, concluding "[t]he Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." Justice Kennedy's opinion for the Court notes that the petitioners "ask for equal dignity in the eyes of the law," and that "[t]he Constitution grants them that right." The Chief Justice, joined by Justices Scalia and Thomas, dissents, arguing that the issue should be left to the democratic process. Justice Scalia, joined by Justice Thomas, issues a separate dissent, decrying "this Court's threat to American democracy" and accusing the majority opinion of containing "mummeries and straining-to-be-memorable passages" and being written "in a style that is as pretentious as its content is egotistic." Justice Thomas and Justice Alito also issue separate dissents. • The Supreme Court, per Justice Scalia, rules in *Johnson v. United States* that the Armed Career Criminal Act's residual clause is unconstitutionally vague. Justice Thomas concurs in the judgment, contending that the case should have been decided on statutory, not constitutional, grounds. Justice Alito also dissents.

June 29: The Supreme Court, per Justice Alito, issues a 5-4 opinion in *Glossip v. Gross*, upholding Oklahoma's use of midazolam in its three-judge lethal injection protocol. Justice Breyer, joined by Justice Ginsburg, dissents, suggesting that the Court should ask for full briefing on whether the death penalty violates the Constitution. Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, also dissents, contending that the majority's analysis "leaves petitioners exposed to what may well be the chemical equivalent of being burned at the stake." • Justice Ginsburg issues the opinion for the Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, upholding Arizona voters' decision to turn over the redistricting process to an independent commission. The Chief Justice dissents, joined by Justices Scalia, Thomas, and Alito, and Justices Scalia and Thomas also issue separate dissenting opinions. • The Supreme Court grants review in *Fisher v. University of Texas*, deciding to evaluate for the second time whether the University of Texas's use of race in college admissions violates the Constitution. • President Obama signs into law renewed trade promotion authority, which narrowly passed the Senate with just 60 votes on June 24 over substantial Democratic opposition. The legislative package is viewed as essential to the administration's completion of a Trans-Pacific Partnership trade deal.

June 30: The Supreme Court grants review in *Friedrichs v. California Teachers Association*, which addresses whether the Court should overrule its decision in *Abood v. Detroit Board of Education* and prohibit public-sector "agency shop" arrangements under the First Amendment. • A split panel of the U.S. Court of Appeals for the Second Circuit upholds a lower court ruling that Apple violated the antitrust laws by orchestrating a horizontal conspiracy among e-book publishers to hike the price of e-books.

JULY 2015

July 1: The Export-Import Bank's charter expires, lapsing for the first time since the bank was created in 1934. • NPR reports recent significant spikes in shootings and murders in large cities such as New York, Baltimore, Chicago, and Los Angeles, bringing to an end more than two decades of steady violent crime decreases.

July 6: In an access lawsuit filed by The Associated Press, U.S. District Court Judge Eduardo C. Robreno of the Eastern District of Pennsylvania unseals 2005 court documents relating to Andrea Constand's civil lawsuit against Bill Cosby. Judge Robreno explains that Cosby has a diminished right to privacy because he "donned the mantle of public moralist." The documents contain a deposition quote in which Cosby admits to purchasing Quaaludes in the 1970s "for young women that [he] wanted to have sex with" (see July 18 entry). • For the second time, former Goldman Sachs programmer Sergey Aleynikov's criminal conviction for stealing Goldman's computer code for high-frequency trading is overturned.

July 7: The U.S. House of Representatives adopts a late-night amendment to the Interior Department funding bill by voice vote that would ban the display of Confederate flags at federal cemeteries. Two days later, House leadership cancels a vote on the bill.

July 10: Following a public outcry, Michigan Family Court Judge Lisa Gorcyca releases three children (ages 9, 10, and 15) from juvenile detention, one month after she found them in contempt of court for refusing to have lunch with their father, despite the oldest's explanation that "I have a reason for that and that's because he's violent and I saw him hit my mom and I'm not going to talk to him." When Gorcyca held the children in contempt in June, she told them they were "mentally messed up" while making "crazy" circles at her temple with her finger, and threatened

them that in juvenile detention they would be forced to go to the bathroom in front of other people. Michigan's Judicial Tenure Commission would file charges against Gorcyca in December 2015, and Gorcyca would recuse herself from the case. • The Confederate battle flag is removed from the South Carolina Statehouse, where it has flown since 1962. Gov. Nikki Haley proclaims "it's a great day," and says "no one should drive by the Statehouse and feel like they don't belong."

July 16: The Wisconsin Supreme Court rules that Gov. Scott Walker and a coalition of conservative groups did not violate campaign-finance laws in 2012, and orders prosecutors investigating them to "cease all activities related to the investigation" and "return all property seized."

July 18: The *New York Times* obtains the complete Bill Cosby deposition transcript that contains his admission about Quaaludes (see July 6 entry). The paper explains it was able to obtain the transcript without a leak because the court reporter had the deposition transcript all along, and willingly provided it, believing it was a publicly available document.

July 24: A Texas appeals court rules that charges against former Gov. Rick Perry for coercing a public servant violate the First Amendment and must be dismissed, but that it is too early to determine the constitutionality of charges against him for abuse of official capacity.

July 28: The U.S. Court of Appeals for the D.C. Circuit invalidates portions of the EPA's 2011 Cross-State Air Pollution Rule, holding that the rule's cost thresholds for upwind states are unnecessarily stringent.

July 29: NFL Commissioner Roger Goodell upholds a four-game suspension of New England Patriots quarterback Tom Brady for allegedly conspiring to deflate footballs below league limits, and for destroying evidence relating to his role in the alleged conspiracy during the course of the investigation.

July 31: Harry Potter author J.K. Rowling turns 50. To commemorate the event, Foley Hoag publishes a piece on its intellectual property blog subtitled "Expecto Subpoenas!" that reports on the many lawsuits related to Rowling's works. Reports the blog: "[I]t appears that Ms. Rowling and her works pop up in court more than any author since Charles Dickens — and that's saying something considering that Dickens, unlike Rowling, wrote books about lawyers."

AUGUST 2015

August 4: Justice Kagan grants the state of Illinois an additional month to seek a writ of certiorari relating to the Illinois Supreme Court's unanimous decision invalidating 2013 state pension legislation on the ground that the 1970 state constitution does not allow pension benefits to be "diminished or impaired." Illinois Attorney General Lisa Madigan ultimately decides not to seek Supreme Court review. • The U.S. Court of Appeals for the Federal Circuit reduces to $278 million Carnegie Mellon University's record $1.54 billion patent infringement award against Marvell Technology Group for infringing a disk drive patent, with a new trial ordered to determine any additional amounts owed.

August 10: Twenty-year-old Nader Saadeh is charged in U.S. District Court in New Jersey with conspiring to provide material support to the Islamic State, principally by attempting to provide it with personnel and services. His brother, Alaa Saddeh, age 23, was taken into custody on similar charges in June. In the past year, federal authorities have charged 58 individuals, mostly males in their early 20s, with supporting ISIS.

August 11: Fannie Mae General Counsel Brian Brooks says in an interview with Bloomberg that the BigLaw profit model, which depends heavily on leverage, is broken, because while companies are willing to pay high rates for the best partners at big firms, "the rates of mid-level lawyers and associates have gone up and up and up, even faster than the rates of the senior partners, and their value add isn't the same. . . . [At those rates,] I'd rather have 100% of the partner's time, and none of the associate's time."

August 13: According to a study published by Lex Machina, "porn troller" Malibu Media, owner of the website X Art, has filed 4,332 copyright lawsuits since 2009, more than any other copyright plaintiff in that period.

August 17: The NLRB dismisses a petition by Northwestern University football players seeking to unionize, stating that "asserting jurisdiction in this case would not serve to promote stability in labor relations," but declining to say that student-athletes do not qualify as employees under the NLRA.

August 19: Subway spokesman Jared Fogel pleads guilty to charges of receiving child pornography and crossing state lines to pay for sex with

minors, with a recommended sentence between five and 13 years in prison. (He would later be sentenced to 15 years 8 months.) He also agrees to pay $100,000 in restitution to each of the 14 victims who was secretly photographed in the images he possessed, or whom he paid for sex.

August 20: During a hearing on Judicial Watch's FOIA lawsuit seeking access to e-mails former Secretary of State Hillary Clinton kept on a private server, U.S. District Judge Emmet Sullivan notes that, "We wouldn't be here today if this employee had followed government policy." Sullivan had ordered in July that Clinton, together with aides Huma Abedin and Cheryl Mills, confirm under penalty of perjury that they have turned all responsive records over to the State Department.

August 21: U.S. District Judge Dolly Gee of the Southern District of California orders the Department of Homeland Security to release all children held at federal family detention facilities for having no discernible legal status within 72 hours of their apprehension, unless they are a significant flight risk or a danger to themselves or others.

August 25: A split panel of the U.S. Court of Appeals for the Third Circuit strikes down a New Jersey law permitting sports gambling at casinos and racetracks for violating the federal Professional and Amateur Sports Protection Act of 1992.

August 26: Former Akron Mayor Don Plusquellic, who resigned his office in May after serving for 28 years, receives a warning citation for urinating next to a tree in a parking lot at the University of Akron. He tells the officers he knows they really don't do much, so he figured he would give them something to do on a slow night.

August 28: Seventeen-year-old Ali Shukri Amin is sentenced to 136 months in prison for providing material support to the Islamic State, primarily through thousands of Twitter posts. • A split panel of the U.S. Court of Appeals for the D.C. Circuit overturns a lower court injunction prohibiting the NSA from engaging in bulk collection of phone metadata. The program would nonetheless cease to operate in November pursuant to the USA Freedom Act, which requires a targeted warrant or court order to engage in such collection.

August 31: The U.S. Court of Appeals for the Second Circuit reverses a lower court decision allowing holders of bonds issued by Argentina to

seek to collect amounts owed from the country's central bank, holding that the bondholders had not established that the bank acted as the country's alter ego.

SEPTEMBER 2015

September 1: Illinois police Lieut. Joseph Gliniewicz, a "hero" cop nicknamed "G.I. Joe," is shot and killed, apparently in the line of duty. It later turns out that his death is a carefully staged suicide, executed by Gliniewicz because he is on the verge of being outed for years of criminal activity, including embezzling money from a youth program that he purportedly championed.

September 3: U.S. District Judge Richard Berman throws out the NFL's four-game suspension of Patriots quarterback Tom Brady for his alleged role in the "deflategate" conspiracy (see July 29 entry). • Rowan County, Kentucky Clerk Kim Davis is held in contempt of court and sent to jail for refusing to issue marriage licenses to same-sex couples in the wake of the Supreme Court's *Obergefell* decision (see June 26 entry). • U.S. District Judge Lucy Koh of the Northern District of California approves a $415 million settlement by Apple, Google, Intel, and Adobe for conspiring not to hire one another's software engineering talent. However, Koh halves the attorneys' fee award from $81.1 million to $40 million.

September 8: The *New York Times* reports that a review by the CIA and National-Geospatial Intelligence Agency has endorsed an earlier finding by those agencies' Inspector General that former Secretary of State Hillary Clinton's private e-mail server contained emails with highly classified information (see August 20 entry).

September 9: A class-action lawsuit is filed against the Illinois lottery after it fails to pay out more than $288 million in prizes because of the state's ongoing budget crisis.

September 10: The Senate fails to pass a resolution of disapproval of President Obama's Iran nuclear deal, mustering only 58 of the 60 votes needed to break a filibuster. The resolution's failure paves the way for implementation of the agreement. • Maryland's highest court hears oral argument in *McClanahan v. Dept. of Social Services*, a case in which the state found that a protective mother committed mental injury child abuse by taking her daughter for medical examinations on each of several occasions when her daughter disclosed sexual abuse and had accompanying medi-

cal symptoms, and accordingly added her to the state's register of child abusers. The court would overturn McClanahan's child abuser designation in December in a 5-2 ruling, holding that recklessness, not strict liability, is the appropriate standard for child abuse findings.

September 17: The U.S. Court of Appeals for the Ninth Circuit enters a stay prohibiting District Judge William Orrick from converting into a preliminary injunction a July 31 temporary restraining order prohibiting the Center for Medical Progress (CMP) from releasing further covert videos relating to Planned Parenthood's fetal tissue selling practices. The court rescinds the stay a week later, opining that the National Abortion Federation is entitled to discovery into CMP's video recording methods and organizational supporters.

September 18: U.S. District Judge Robert G. Doumar of the Eastern District of Virginia denies a preliminary injunction to a transgender 16-year-old student who was born female but is seeking access to the boys' restroom. Doumar explains that the school board was appropriately protecting other students' constitutional right to bodily privacy with its policy requiring that students use single-stall private restrooms or restrooms associated with their physical sex.

September 21: The Pennsylvania Supreme Court suspends the law license of Pennsylvania Attorney General Kathleen Kane, following charges that Kane leaked grand jury information and then lied about it.

September 22: U.S. District Judge Emmet Sullivan orders the State Department to speed up its review of former Secretary of State Hillary Clinton's private server e-mails for production in a Citizens United FOIA lawsuit, one of about 30 such pending lawsuits. "How long does it take to conduct a computer search?" queries Sullivan. "You push a button" (see August 20 entry).

September 23: The U.S. Court of Appeals for the Second Circuit rules that several banks must turn over Sudanese assets to satisfy a $315 million default judgment in favor of victims of the 2000 bombing of the USS Cole. The court rules that Sudan was properly served at its D.C. embassy, and that process did not need to be mailed to Sudan at its capital of Khartoum.

September 25: Swiss Attorney General Michael Lauber charges FIFA President Sepp Blatter with criminal mismanagement and misappropriation (see May 27 entry).

September 28: Sgt. First Class Charles Martland, a Green Beret, speaks out after being involuntarily discharged from the U.S. Army for beating up a well-connected Afghan police commander in 2011 who was brutally raping a small boy. Martland claims he was ordered to look the other way, and writes: "While I understand that a military lawyer can say that I was legally wrong, we felt a moral obligation to act."

September 29: The U.S. House Oversight Committee holds hearings at which Planned Parenthood President Cecile Richards is questioned about the circumstances under which her organization received reimbursement from researchers for fetal organs left over from abortions.

September 30: In *O'Bannon v. NCAA*, the U.S. Court of Appeals for the Ninth Circuit rules that the NCAA's grant-in-aid cap for amateur athletes, which the NCAA set below the cost of school attendance, is not a reasonable restraint on trade because it does not serve any of the NCAA's pro-competitive purposes to deny athletes full compensation for their educational expenses. But it invalidates a district court order requiring the NCAA to allow schools to pay student-athletes up to $5,000 in cash without regard to their educational costs, saying that "the district court ignored that not paying student-athletes is precisely what makes them amateurs."

OCTOBER 2015

October 2: An Arkansas court enters a preliminary injunction preventing the state from implementing an order of Gov. Asa Hutchinson that would suspend the state's Medicaid payments to Planned Parenthood.

October 5: The Supreme Court begins its 2015 Term by hearing oral argument in *Hawkins v. Community Bank of Raymore* (a case about the Equal Credit Opportunity Act) and *OBB Personenverkehr AG v. Sachs* (a case regarding the commercial activity exception to the Foreign Sovereign Immunities Act).

October 7: Los Angeles Superior Court Judge Craig D. Karlan denies Bill Cosby's motion to dismiss a civil suit filed against him by Judith Huth, in which she alleges Cosby molested her more than 40 years ago at the Playboy Mansion, when she was 15.

October 8: Republican Majority Leader Kevin McCarthy abruptly withdraws from the race to replace John Boehner as Speaker of the House.

October 9: The U.S. Court of Appeals for the Ninth Circuit holds that Bikram yoga poses are not copyrightable. • A split panel of the U.S. Court of Appeals for the Sixth Circuit imposes a nationwide stay on a Clean Water Act rule purporting to extend federal jurisdiction beyond navigable waters to include tributaries, adjacent waters, and waters having a significant nexus to navigable waters.

October 12: Zimbabwe announces that it will not bring charges against dentist Walter Palmer, who shot Cecil the Lion on a safari hunting trip in July. Palmer's hunting papers were in order, and it appears his guides improperly lured Cecil off a preserve without Palmer's knowledge.

October 13: Chief Justice Patricia Breckenridge of the Missouri Supreme Court announces the establishment of a Commission on Racial and Ethnic Fairness to examine the U.S. Department of Justice's findings of regular civil rights violations in Missouri law enforcement (see March 4 entry). • After 20 minutes of deliberations, a Connecticut jury rules against Jennifer Connell in a lawsuit she brought against her 12-year-old nephew for injuring her with an overly enthusiastic hug at his 8-years-old birthday party in 2011. Roundly castigated in the media, Connell explains that she loves her nephew, but the lawsuit was the only way she could get a payout for her injury from homeowners insurance.

October 19: The fraud case against Dewey & LeBoeuf's former leaders ends in a mistrial after 22 days of jury deliberations. The jury acquits the leaders of 58 charges of falsifying books and records, and deadlocks on the 93 remaining charges.

October 21: Facing calls for her impeachment after having her license to practice suspended, Pennsylvania Attorney General Kathleen Kane claims she can continue to do her job just fine (despite the Pennsylvania Constitution's requirement that the Attorney General be licensed) because it is 98% administrative or ministerial.

October 26: Sixty-two House Republicans team up with 142 House Democrats to buck Republican leadership by supporting a discharge petition that sets up a vote to revive the Export-Import Bank charter, which expired in July (see July 1 entry).

October 28: Former Speaker of the House Dennis Hastert pleads guilty to one count of hiding money transactions, after paying $3.5 million in hush money to a former student he allegedly sexually abused while he was a wrestling coach and teacher in Yorkville, Illinois.

October 29: Paul Ryan is elected Speaker of the House, succeeding John Boehner. Minority Leader Nancy Pelosi dubs Boehner "the personification of the American dream."

NOVEMBER 2015

November 2: The Supreme Court hears oral argument in *Spokeo v. Robins*, which presents the question whether Congress can confer Article III standing upon a plaintiff. The Supreme Court had granted review on a similar question during October Term 2011, but the case was dismissed as improvidently granted on the last day of the Term.

November 3: BNA reports that many BigLaw firms are considering following in the footsteps of Debevoise & Plimpton by cutting health-care benefits to avoid the Affordable Care Act's 40% "Cadillac" tax.

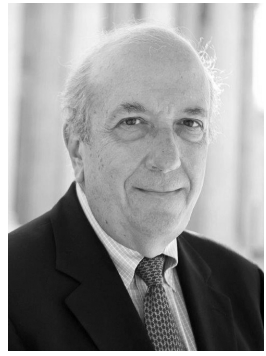
November 6: The Supreme Court grants review in *Zubik v. Burwell* and five other cases involving challenges to the accommodation process designed to allow religious non-profit organizations to opt out of the ACA's contraceptive mandate.

November 9: The U.S. Court of Appeals for the Fifth Circuit affirms a district court preliminary injunction preventing the Obama administration from implementing DAPA, holding that Texas and the 25 other states challenging the executive action have standing and are likely to succeed on the merits of their APA claim (see May 26 entry).

November 13: Coordinated terror attacks in Paris conducted by agents of the Islamic State kill 130 people and injure 368. • The Supreme Court grants review in *Whole Woman's Health v. Cole*, a challenge to Texas laws requiring abortion providers to obtain admitting privileges at a local hospital and abortion facilities to be certified as ambulatory surgical centers.

A Year in the Life of the Supreme Court

[parallel citation: 2016 Green Bag Alm. 62]



Tony Mauro[†]

A summary of developments involving the Supreme Court of the United States in 2015 that are not likely to be memorialized in the United States Reports.

January 21: Protesters disrupted a Supreme Court session, rising one after another to shout criticism of the Court's *Citizens United* campaign finance ruling on its fifth anniversary. "I rise on behalf of democracy," one demonstrator shouted. "Money is not speech," said another. The group 99Rise took credit. A year earlier Kai Newkirk, a leader of 99Rise, which opposes the domination of big money in politics, was arrested for a similar outburst. The dramatic scene unfolded as the court's session was beginning at 10 a.m. It was clearly a coordinated effort by a group of spectators who sat in the back row of the public seating inside the court. As soon as the first person rose to speak out, Supreme Court police moved quickly to remove him. But then, another rose from a different seat at the other end of the row, and police pounced on that person. After the first shouter, Chief Justice John Roberts Jr. tried to make light of it by saying, "Our second order of business is . . . ."

[†] Tony Mauro is Supreme Court correspondent for *The National Law Journal*, *Supreme Court Brief*, *Legal Times*, and *The American Lawyer*. In 2015, his book *Landmark Cases* was published as a companion to the C-SPAN Series on 12 historic Supreme Court decisions. Photograph copyright 2016 by Diego Radzinschi.

February: Philip Alito, son of Justice Samuel Alito Jr., left Gibson, Dunn & Crutcher to become a staff counsel to Republicans on a Senate investigative subcommittee. The younger Alito, who clerked for Judge Brett Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit in 2012 and 2013, began working as an associate at Gibson Dunn in 2013. Alito, a Duke Law School graduate, was a summer associate in 2011 at Gibson Dunn, where another son of a justice, Eugene Scalia, also practices. Alito's move drew criticism from American Enterprise Institute scholar Norman Ornstein, who follows Congress and U.S. politics. "For a court that is struggling for tangible reasons not to be viewed as partisan like every other institution in Washington, I wish it was not so," Ornstein said.

March 23: Two Justices firmly rejected proposals that would increase court transparency: allowing cameras to broadcast proceedings and requiring justices to reveal their reasons for recusal. Speaking at the court's annual budget hearing before a House appropriations subcommittee, Justices Anthony Kennedy and Stephen Breyer were asked why the court is not bound by the code of ethics that covers lower courts. Both said the court abides by the code in practice, and the fact that they are not legally bound is "just words," as Breyer put it. As for making a justice's reasons for recusal public, that "should never be discussed," Kennedy said without hesitation. As an example, he said he might recuse because his son is employed by a company that is a party in a case. "The case is very important for my son," Kennedy continued. "Why should I say that? That's almost like lobbying." Breyer said that revealing his reasons for recusal would make it "logically conceivable" that in future cases a lawyer might include an issue that would force a justice to recuse for the purpose of creating a "more favorable" eight-justice court to rule in his or her favor.

March 23: The Supreme Court rarely offers practice pointers to the advocates who appear before it. But it did just that when it admonished members of the bar to use "plain terms" when they write briefs. The advice came in an order that brought an end to an extraordinary proposed disciplinary action against Foley & Lardner partner Howard Shipley. The court in December 2014 ordered Shipley to show cause why he should not be sanctioned for submitting a jargon-filled petition in a patent case. The petition turned out to have been written mainly by the client, a German business executive who does not speak English as his first language. Former solicitor general Paul Clement, hired by Shipley to defend the

petition, acknowledged the petition was "unorthodox" and said it was filed on behalf of a client who "insisted on retaining primary control" over its content. The high court's reply was itself a model of brevity and plain language: "A response having been filed, the Order to Show Cause, dated Dec. 8, 2014, is discharged. All Members of the Bar are reminded, however, that they are responsible — as Officers of the Court — for compliance with the requirement of Supreme Court Rule 14.3 that petitions for certiorari be stated 'in plain terms,' and may not delegate that responsibility to the client." In August, Shipley left Foley & Lardner for another firm, Gordon & Rees.

April 6: Chief Justice Roberts's offhand 2011 criticism of law review articles has stung legal academics ever since. Nearly four years later, his comment finally met its match in the form of a law review article. "Someone had to do it," said George Washington University Law School professor Orin Kerr, the author of the piece. What Kerr did was the first, and probably the last, examination of the influence of German philosopher Immanuel Kant on the law of evidence in 18th-century Bulgaria. That stunningly obscure topic begged to be addressed when Roberts said at a conference of the U.S. Court of Appeals for the Fourth Circuit in June 2011: "Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar." Kerr decided to write a response while he was a scholar-in-residence at the Law Library of Congress from 2012 to 2014. With help from the library's global legal research center, Kerr found that Kant's influence did not spread to Bulgaria until the second half of the 19th century, and even then had little impact on its legal system. The first reference to Kant in a Bulgarian text came in 1859 and said his work was "obscure and awkward." Kerr concluded in the article published by *The Green Bag* that "Kant had no influence on evidentiary approaches in 18th century Bulgaria."

May 15: Retired Supreme Court Justice John Paul Stevens criticized Major League Baseball's antitrust exemption in a speech that came as the high court prepared to review a challenge to the immunity. "It simply makes no sense to treat organized baseball differently from other professional sports under the antitrust laws," Stevens said on May 15 before the Sports

Lawyers Association in Baltimore. The city of San Jose filed a petition with the Supreme Court in April challenging the exemption and claiming that Major League Baseball violated antitrust laws by preventing the Oakland Athletics from moving to San Jose, thereby protecting the San Francisco Giants from competition. The court denied review on October 5.

June 15: Justice Antonin Scalia apologized from the bench after he accidentally called his longtime friend and colleague Ruth Bader Ginsburg "Justice Goldberg." Scalia was announcing his opinion in the immigration case *Kerry v. Din*, and Ginsburg was in dissent. At the end of his summary of the case, Scalia said, "Justice Breyer filed an opinion dissenting, which Justices Goldberg, Sotomayor and Kagan joined." Chief Justice Roberts leaned over to tell Scalia what he had said. "What did I say?" Scalia asked incredulously. When he finally understood, he said: "Goldberg's gone!" and added, "Sorry about that, Ruth." At first it seemed that Scalia was channeling Justice Arthur Goldberg, who served on the high court from 1962 to 1965. But in fact, Scalia may have had another Goldberg in mind. The *Din* decision Scalia was announcing involved the due process rights of a woman, a naturalized citizen of the U.S., whose husband, an Afghan citizen, was not allowed to enter the U.S. A key Supreme Court precedent in due process cases is the landmark 1970 decision in *Goldberg v. Kelly*. The appellant in that case was Jack Goldberg, then the New York state commissioner of social services.

June 24: Sixteen members of Congress, including Senate Judiciary Committee chairman Chuck Grassley (R-Iowa), asked the Supreme Court to allow live broadcast of opinion announcements in the historic pending cases on same-sex marriage, the Affordable Care Act, capital punishment and housing discrimination. Rep. Mike Quigley (D-Illinois), said in a statement, "Allowing live audio coverage will give more Americans the ability to closely follow the proceedings as they occur." The court did not agree to the request. Release of opinion announcements is an especially prickly issue with the justices. The announcements are summaries written by the justice who wrote the majority, and the other justices in the majority don't sign off on the wording. Current and former justices have said they are sometimes surprised to hear the announcement, which may overstate or oversimplify the holding in ways they don't approve. As a result, some justices don't want the opinion announcements to be featured in the news media as an accurate representation of court decisions.

June 30: An autobiography titled *A Time for Truth*, by presidential candidate Sen. R. Ted Cruz (R-Texas), included numerous anecdotes about his time as a law clerk to the late Chief Justice William Rehnquist and as an advocate before the court. Justice Ginsburg has the "prim demeanor . . . of a legal librarian," Cruz wrote. And for his first argument in 2003, *Frew v. Hawkins*, in his role as solicitor general of Texas, he reluctantly set aside his lucky black ostrich "argument boots." He had worn them for all arguments in lower courts, but he knew that then-Chief Justice Rehnquist was a "stickler for wardrobe." But after John Roberts Jr. became Chief Justice in 2005, Cruz said he asked Roberts if it was acceptable to wear boots during oral argument. "Ted, when representing the state of Texas, they are not only appropriate, but required," Roberts responded.

July 11: The much-anticipated comic opera about Supreme Court justices Ginsburg and Scalia made its debut at the Castleton Festival in Rappahannock County, Virginia. The opera titled *Scalia/Ginsburg* was composed by Derrick Wang while he was a student at the University of Maryland Francis King Carey School of Law. Wang graduated from law school in 2013. The Castleton Festival described the opera as a "valentine to law and opera." Both justices had seen parts of the opera performed for them, and Ginsburg attended the debut. Before the debut, Ginsburg said it was delightful, though she said, "my feminist friends" asked her why Scalia's name was first in the name of the opera, not Ginsburg's. She explained, "In the court, we do everything by seniority."

July 20: In a rare interview, Justice Alito criticized the court's June 26 ruling declaring a right to same-sex marriage, warning that "we are at sea" in defining the limits of constitutional protections of liberty. The court majority, Alito said, has adopted a "post-modern" concept of liberty protected by the 14th Amendment's due process clause. Alito described that concept as: "It's the freedom to define your understanding of the meaning of life. It's the right to self-expression." With that broad understanding of liberty, Alito said, a future libertarian justice could attack minimum wage and zoning laws, and a socialist justice could argue in favor of a guaranteed annual income or free college education for all. "There's no limit," he told conservative commentator Bill Kristol.

July 30: After an especially contentious term at the Court, Justice Ginsburg said that it is still "the most collegial" place she has ever worked. "If there is momentary distress, you just have to get over it," Ginsburg

said, speaking in Washington before an audience of Duke University students and alumni. The justices' practice of often having lunch together helps promote collegiality, she said, noting that in the early days of the court, justices lived together in the same boarding house. Still, Ginsburg said the term just ended felt like the longest of her 22-year tenure, and she longed for the days when the court was rarely in the spotlight. "Every year I keep waiting for when we will be out of the headlines. It hasn't happened yet," she said.

September: Often a nonissue in presidential campaigns, the Supreme Court emerged as a point of conflict in the run-up to the 2016 election. Candidates from both parties attacked justices and pledged to use once-taboo "litmus tests" to ensure ideological discipline in their future nominees. "We have an out-of-control court," Sen. Cruz said. Former Florida Gov. Jeb Bush said, "The history in the recent past is to appoint people that have no experience so that you can't get attacked." For their part, Democratic candidates have also embraced "litmus tests" — often viewed in the past as a distasteful practice that undermines judicial independence. "I will do everything I can do to appoint Supreme Court justices who will protect the right to vote and not the right of billionaires to buy elections," former Secretary of State Hillary Clinton said in May. Sen. Bernie Sanders (I-Vermont) also pledged that his nominees "will say that we are going to overturn this disastrous Supreme Court decision on *Citizens United* because that decision is undermining American democracy."

September 14: Justice Breyer appeared on late-night television to promote his new book, but he ended up answering questions about cameras in the court and the collegiality of the justices. Stephen Colbert, host of the *CBS Late Show*, introduced Breyer as the least known justice on the court. Polls show that only three per cent of the public could name him, Colbert said, joking that the other 97 percent "think he's Mr. Burns," Homer Simpson's boss on *The Simpsons*. About a minute into the interview, Colbert asked Breyer why the court is "the last place where I couldn't bring my camera crew" to let the public see what is happening. Breyer's first answer was along the lines that justices are not supposed to be personalities while on the bench. "I'm in a job where we wear black robes, in part because we're speaking for the law," Breyer said. The public is not and should not be concerned about "the Constitution according to Breyer" or any other justice, he added. "They want to know the answer."

September 23: Pope Francis made an unscheduled visit to the Little Sisters of the Poor with the aim of showing support for the group's battle against the Affordable Care Act's contraceptive mandate before the Court. "This is a sign, obviously, of support for them [in their court case]," Father Federico Lombardi, the head of the Holy See press office, said after the visit, according to a Vatican news site. The Little Sisters have been persistent challengers of the law, arguing that it requires them to provide health insurance that offers contraceptive services to employees in violation of their Catholic faith. The sisters operate nursing homes nationwide. On September 24, the pope addressed a joint session of Congress on a range of issues including the death penalty and immigration. Chief Justice Roberts and Justices Kennedy, Ginsburg, and Sotomayor attended — all Catholics except for Ginsburg.

October 5: The court announced policy changes concerning secret changes to the justices' decisions, hiring "line-standers" for high-profile oral arguments, and "link rot" in the court's rulings. The announcement came on the first day of the court's fall term. For the first time, changes or "edits" made to court opinions after they are handed down will be made apparent on the court's web site. The announcement also addressed a sore point for many members of the Supreme Court bar who show up at the crack of dawn, hoping to get a seat inside the courtroom for high-profile arguments. Instead they find themselves in the back of the bar line because a "line stander" — often highly paid — is holding another member's place. Under the new procedure, only bar members who plan to attend arguments will be allowed in the line for the bar section, both inside and outside of the court building. The court also announced new procedures to confront "link rot," the phenomenon where web-based links that are included in court opinions disappear or become broken, making it difficult for scholars and others to recover materials that were pertinent to court decisions. Web-based content included in court opinions beginning with the 2005 term forward will be made available on the court's website, with copies preserved in the court clerk's office.

November 2: Ten Supreme Court law clerks from October Term 2014 joined Jones Day as associates, the firm announced, topping its record-breaking number of seven clerk hires the previous year. Beth Heifetz, who heads Jones Day's issues and appeals practice and clerk hiring, confirmed that the firm "pays the market" in hiring bonuses for former clerks, which

is now $300,000 or more — meaning at least $3 million in bonuses alone for the new associates. The 10 hires represent about one-fourth of the 39 law clerks hired by sitting and retired justices last term. The new associates will work in Jones Day's issues and appeals practice. "We're pleased that so many more of these best-and-brightest are coming to Jones Day," said Heifetz, a former clerk to Justice Harry Blackmun. Some court watchers said the large number of clerks arriving at Jones Day raises concern about the firm's strategy and dominance. "Ten Supreme Court clerks from one term going to a single law firm is unquestionably a stunningly large number," Harvard Law School professor Richard Lazarus said.

November 9: Neal Katyal's 26th argument before the Supreme Court, given in an otherwise routine case, marked a major milestone: He has appeared at the lectern more times than any other male minority lawyer except for Thurgood Marshall. "It is not, frankly, about me as much as it is recognition of the fact that the [legal] profession is changing," Katyal said before his argument. With his 26th appearance, Katyal has passed former Solicitors General Wade McCree and Drew Days III, and now-judge Sri Srinivasan, each of whom argued 25 cases before the high court. Marshall, the late civil rights lawyer and Supreme Court justice, argued 32 times before the high court. Marshall, McCree, and Days are African-Americans, and Srinivasan was born in India.

December 31: In his annual year-end report, Chief Justice Roberts urged federal judges and lawyers to redouble their efforts to make civil litigation more just and efficient, admonishing them to change the legal culture and narrow the scope of discovery. Roberts highlighted new revisions in the Federal Rules of Civil Procedure that took effect on Dec. 1. "They mark significant change, for both lawyers and judges, in the future conduct of civil trials," Roberts wrote. The new rules added language that expressly states the obligation of judges and parties to make civil litigation move more quickly and efficiently. Another provision requires discovery requests to be relevant and "proportional" to the needs of the case, weighing whether "the burden or expense of the proposed discovery outweighs its likely benefit." Judges need to take an early and active stewardship role in managing cases, Roberts said, rather than deferring to the parties about the scope of discovery and the pace of the litigation. "A well-timed scowl from a trial judge can go a long way in moving things along crisply," Roberts wrote.

A Year of Lowering the Bar

[parallel citation: 2016 Green Bag Alm. 70]

M. Kevin Underhill[†]

October 2014

October 31: The clown ban in Vendargues, France, takes effect and will last through the end of November, according to the town's mayor. The ban follows reports from elsewhere in France of people dressed as "scary clowns" scaring and/or assaulting others. It is not entirely clear whether the scary-French-clown plague is real or being exaggerated on Facebook by groups said to be "tracking clown sightings across the country," but the mayor has clearly decided not to take any chances.

November 2014

November 4: Frank Conaway resigns from his day job after the *Baltimore Sun* calls attention to his self-published books on bizarre topics. For example, Conaway has supported "raising the Brazen Serpent upon the pole of the spine using the Gnostic cypher key in relation to the book of

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[†] Kevin Underhill is a partner with the law firm of Shook, Hardy & Bacon LLP, depending on who you ask. Millions of people who apparently have nothing better to do read his legal-humor blog *Lowering the Bar* (www.loweringthebar.net), from which this is adapted. Kevin's writing has also previously appeared in the *Green Bag*, *Forbes*, the *Washington Post*, a couple of ransom notes, and a draft screenplay in which Harry Potter and his friends are eaten by talking dinosaurs.

the Apocalypse," as explained in his book *Baptist Gnostic Christian Eubonic Kundalinion Spiritual Ki Do Hermeneutic Metaphysics*, available on Amazon. He also believes that the tax burden in Maryland is too high, which is why he is keeping his part-time job in the state's General Assembly.

November 5: A Utah teacher pleads no contest to discharging a firearm in a prohibited area, namely a bathroom stall at the elementary school where she worked. It is legal in Utah to carry handguns on school grounds as long as you have a permit, as the teacher did. No one was injured except for the teacher, who was apparently cut by porcelain shards after the hollow-point bullet destroyed the toilet.

November 9: The *Sydney Morning Herald* reports that a judge has dismissed a lawsuit because of the plaintiff's frequent interruptions to insult the judge ("Woman, remove yourself out of my sight"), and his insistence on singing in the courtroom. "It should be acknowledged that the singing was quite beautiful," she wrote in her opinion, "but it was preventing me from hearing the evidence."

November 10: In Italy, an appellate court reverses the convictions of several seismologists sentenced to jail for manslaughter in 2012 after failing to predict a massive earthquake. It affirms, however, that the one seismologist who actually made public statements about the potential risk of a quake can be held responsible for citizens' failure to leave town.

November 14: The Kansas Supreme Court votes unanimously to disbar Dennis Hawver for his incompetent representation of a defendant in a capital case. Hawver had argued, among other things, that "the real killer" *should* be executed for his crime, an argument he conceded did not help his client since he made it during the penalty phase. The court apparently was not swayed by Hawver's decision to dress up as Thomas Jefferson for the disbarment hearing.

November 15: The *Billings Gazette* reports that more than 800 permits for the salvage of vehicle-killed wildlife — sometimes known as "taking home roadkill" — have been issued in Montana during the year since the practice was legalized. "There are a lot of animals that probably still aren't salvageable," an official said, "but people are trying."

November 23: A 27-year-old Colorado man is charged with "felony menacing" after pointing a banana at two deputies. One states in an affi-

davit that the man "knowingly placed" the deputies "in imminent fear by use of an article fashioned in [a] manner to cause us to reasonably believe it was a deadly weapon," although it was in fact a banana. "I have seen handguns in many shapes and colors and perceived this [banana] to be a handgun," writes Deputy Bunch.

November 24: An Australian labor commissioner reinstates an employee who was dismissed after being accused of harassment. "One major aspect of the reasons for dismissal, which involved a finding that the applicant performed the 'chicken dance' as an intentional act to intimidate, harass or otherwise harm another employee, was simply fanciful and did not represent a valid reason for dismissal," the commissioner writes. "Even unpleasant people are entitled to justice."

December 2014

December 2: The House of Representatives votes unanimously to stop paying Social Security benefits to former Nazis. This follows an AP report that the U.S. is still paying at least four such persons as a result of an understanding by which they left the country voluntarily rather than being expelled. Not only did all 435 representatives vote to stop paying the Nazis, 433 of them signed on to sponsor the bill.

December 5: Anybody who wants their own airport-security scanner can get one for $7,995, according to eBay listings posted by a government-surplus seller. This is a pretty good deal considering that the TSA paid $113,000 each for the Rapiscan backscatter scanners, but a really bad deal considering that the things never worked in the first place. • In Beloit, Wisconsin, the police department announces a "voluntary search" program under which citizens can volunteer to have police come over and search their home for weapons (or whatever else they might come across).

December 9: In Beloit, Wisconsin, the police department cancels its "voluntary search" program due to the public's complete lack of interest. The chief tells Wisconsin Public Radio he didn't expect "the phone to be ringing off the hook with invitations," but citizens were apparently even less interested than he expected.

December 10: An associate professor at Harvard Business School, who is also an attorney, apologizes for emails threatening legal action against a local Chinese restaurant. The restaurant allegedly overcharged him $1

for each of the four items he ordered. But he demands $12, not $4, which he says "reflects the approach provided under the Massachusetts consumer protection statute, wherein consumers broadly receive triple damages for certain intentional violations." The apology comes the day after the *Boston Globe* reprinted the e-mail exchange.

December 12: The *New York Times* reports that a Texas judge will decide who owns Lee Harvey Oswald's coffin. Oswald was exhumed in 1981 to put an end to questions about who was buried in his grave (it was he), and was reburied in a new coffin. In 2010, Oswald's brother Robert learned that the funeral home's owner, having kept the original in a closet for 31 years, had put it up for auction. He sued to block the sale.

December 13: How does a guy wearing a Santa Claus outfit successfully flee a bank robbery? When he robs a bank on the same day as SantaCon, an event in which thousands of drunken revelers roam the streets of San Francisco dressed as Santa Claus. The robber merges into the Santa crowd and disappears.

December 15: In India, a panel of the High Court of Punjab and Harayana stays all proceedings in the case of His Holiness Shri Ashutosh Maharaj Ji, suspending a lower court's finding that the guru is dead and should be cremated. The guru's followers insist he is not dead, but rather "in deep meditation," explaining that conditions in the freezer where they are keeping him are similar to those in the Himalayas, where he has been known to meditate in the past. The fact that there are significant assets in dispute likely has nothing to do with this argument.

December 23: Rep. Michael Grimm (R-N.J.) pleads guilty to one count of felony tax fraud, but insists he will not resign. Experts agree that the Constitution does not preclude a convicted felon from serving in Congress, but speculate it may be difficult for Grimm to do that while he is actually in prison. Grimm previously made news in January 2014 when he threatened to throw a reporter off a balcony after the State of the Union address.

JANUARY 2015

January 3: Angry about an unflattering article, Kirby Delauter, a county councilman in Maryland, threatens to sue the *Frederick News-Post* if it uses his name or otherwise "reference[s] [him] in an unauthorized form in the future" without his permission. "Use my name again unauthor-

ized [sic] and you'll be paying for an attorney," Delauter writes. "Your rights stop where mine start."

January 5: Two police officers sue in Louisiana, claiming they were demoted because of their agreement to swap wives. (The wives also agreed to swap husbands, but are not parties to the lawsuit.) Plaintiffs allege the department took action after it learned of the swap, which apparently took place before the respective divorces were final. Surprisingly, unmarried co-habitation is not even technically illegal in Louisiana. Plaintiffs claim the employment action violated their civil rights.

January 6: The *Frederick News-Post* publishes an editorial entitled "Kirby Delauter, Kirby Delauter, Kirby Delauter," in which it explains at length that Kirby Delauter has no legal basis for demanding it not use the name "Kirby Delauter" without the express permission of Kirby Delauter.

January 11: The *Boston Herald* says a former MIT professor has admitted he robbed a bank on New Year's Eve but argues he did so only as research for a film project. He did film the robbery, but he also left with about $1,000 of someone else's money. In 1977 the same man walked out of a museum with a painting, later sending the painting back but holding the frame for ransom.

January 14: The complaint in *Alfred v. Walt Disney Co.* is "remarkable," writes a Delaware judge. "It is in my experience a unique example of the pleader's art. It cites to the epic of Gilgamesh, Woody Guthrie, the Declaration of Independence, Noah and the Great Flood, *Game of Thrones*, *Star Wars Episode V: The Empire Strikes Back*, *Star Trek*, President Obama, and Euclid's proof of the infinity of primes, among other references. It is well-written and compelling. In fact, it can be faulted only for a single — but significant — shortcoming: it fails to state a claim on which relief could be granted."

January 21: The U.S. government agrees to pay Nicholas George $25,000 to settle claims that he was illegally detained in 2009 after TSA agents noticed he was carrying Arabic-language flashcards. As part of the settlement, the city of Philadelphia agrees to remind its airport police that reasonable suspicion doesn't necessarily exist just because a TSA agent says it does. • After deliberating for only 61 minutes, a jury in Syracuse, New York, finds that Vicki Calcagno has not proven her claim that singer Rick Springfield knocked her down with his butt during a concert. A

previous effort ended in a mistrial after Calcagno announced she had located new witnesses. But those witnesses did not show up to support Calcagno in the retrial, nor did any others.

January 28: In an article entitled "Ashutosh Maharaj completes year in freezer," the *Indian Express* reports that the high court has postponed the previously scheduled hearing at which it will take up the issue of whether he is dead or meditating.

January 29: Workers at the courthouse in Sevier County, Arkansas, report finding about 500 Brazilian free-tailed bats in the elevator shaft. An increased bat presence was suspected after a deputy trying to dislodge one from a courtroom speaker ended up disturbing several, which flew around the room causing attendees to run for cover. "We've seen a bat or two fly through the courthouse," a judge said, "but we've never seen this many in here before."

January 30: In Texas, the *Odessa American* reports that a fourth-grader has been suspended for allegedly "making a terroristic threat" against another student. The boy, who had seen the final "Hobbit" movie a few days before, brought a "magic ring" to school and told another boy it could "make him disappear" — which, of course, Sauron's Ring could do without (immediately) harming the wearer. The school's principal allegedly told the boy's father that "whether magical or not," threats would not be tolerated. • The judge considering the dispute over Lee Harvey Oswald's coffin rules in favor of Oswald's brother, rejecting the funeral-home owner's arguments that nobody had ever asked for it back and so he could do what he wanted with it. • A Montana judge compares two unsuccessful litigants to the Black Knight in *Monty Python and the Holy Grail*, who remained belligerent despite being soundly defeated. "Like the Black Knight," the judge writes, they "have run out of legal arms and legs to chop off, yet they continue to bleed and bite. . . . Enough is enough."

FEBRUARY 2015

February 3: Struggling to interpret a federal statute in *U.S. v. Rentz*, the Tenth Circuit is forced to diagram the critical sentence in 18 U.S.C. § 924(c)(1)(A) in order to determine what it means to "use" a firearm "during and in relation to" a drug-trafficking offense. Ultimately it concludes that the statute is "enigmatic" enough that the rule of lenity should apply, and interprets it in the defendant's favor.

February 6: Sevier County Judge Greg Ray says that the bat population has returned to manageable levels, after a bat-removal expert rigged up a device that allows bats to leave a building but not re-enter. "Right now," he says, "I doubt there's more than 10 or 20 bats in the building. I'm really hoping that's the last we hear of them."

February 15: The Utah Court of Appeals holds that a decedent's heir and his estate representative can both sue the driver who caused his death. Boring, except that in *Bagley v. Bagley* those were all the same person. Bagley caused an accident that killed her husband, and was then appointed as estate representative. Bagley the representative sued Bagley the driver, and so did Bagley the heir because Bagley had a claim to the insurance proceeds Bagley might collect if Bagley was found liable to Bagley. There's an insurance company in there somewhere too, but that makes it boring again.

February 16: Sources report that Cho Hyun-ah has been sentenced to a year in jail for "forcing an aircraft to deviate from its planned route," which she sort of did by demanding a Korean Air Lines jet go back to the terminal because she was offered macadamia nuts in a bag instead of on a dish. Cho was vice-president of the company at the time.

February 25: The Supreme Court of South Carolina announces it has updated the eligibility requirements for those who would like to be magistrate judges in that state. Among other things, applicants must now take and pass the Wonderlic Personnel Test. The court notes that doing this will require "at least a sixth-grade reading level" as well as "knowledge of basic mathematics, how to tell time, days of the week and months of the year," and a basic understanding of what the U.S. uses for money.

MARCH 2015

March 2: Opposing a medical-marijuana bill in Utah, DEA Special Agent Matt Fairbanks testifies that pot cultivation has serious environmental consequences, including negative effects on wild animals. At one site, he claims to have seen "rabbits that had cultivated a taste for the marijuana . . . . One of them refused to leave us, and we took all the marijuana around him, but his natural instincts to run were somehow gone." The bill later fails by one vote, but not because anybody believed this nonsense about the stoned rabbit.

March 4: Whole Oats Enterprises sues Early Bird Foods in New York, alleging trademark infringement. The former is the business entity representing the musical duo Hall & Oates, and the latter sells oatmeal using the mark "Haulin' Oats." While one could argue that consumers are unlikely to confuse the respective products, it turns out that Hall & Oates *already own* the right to "Haulin' Oats" because of a previous dispute with a Tennessee food company, which is bad news for Early Bird.

March 5: According to the *Wall Street Journal*, the Brazilian judge who formerly presided over the trial of accused fraudster Eike Batista has been suspended by the court of appeals. The judge was removed from the case because after he ordered the seizure of Batista's assets, including a white Porsche Cayenne, reporters noticed the judge driving around town in a white Porsche Cayenne. The judge said he had taken the car only "to look after it," which he could do more easily if it were in his covered parking space at home.

March 7: The *Ottawa Citizen* reports that a criminal defendant angry about his sentence took out his prosthetic eye and threw it at his lawyer. "That's the thing about this business," the lawyer comments, "there's always something new that happens." The article notes that the lawyer caught the eye on the first bounce.

March 12: In California, Stephen Siringoringo is disbarred for unethical conduct after stipulating to 29 violations arising from 14 separate mortgage-loan matters. The stipulation spares everyone the effort needed to resolve the other 796 complaints then pending against him. Siringoringo was suspended in 2013 for doing basically the same thing, but the court reinstated him after finding he had shown there was "no evidence that transferring respondent to active status will create a substantial threat of harm to his clients or the public."

March 17: The city commission for South Miami, Florida, votes 3-2 in favor of splitting Florida into two states. The concern is that due to global warming, southern Florida will soon be underwater and northern Florida has not shown itself to be especially concerned about that.

March 20: Federal officials say that Rep. Aaron Schock's sudden decision to resign will not end an ongoing investigation into his alleged misuse of campaign funds. Schock famously spent about $40,000 to decorate his

office so it looked like a *Downton Abbey* set, which is nice but not something you're supposed to do with campaign funds. Schock also claimed reimbursement for driving 170,000 miles in his Chevy Tahoe, a claim not entirely consistent with the actual mileage of 80,000.

March 23: The U.S. Supreme Court decides not to sanction the lawyer who filed the petition in *Sigram Schindler Beteiligungsgesellschaft MBH v. Lee*, even though the title was the most comprehensible part. The petition argues, among other things, that "[f]or SPL testing a CI, the FSTP-Test hence needs TT.0s of CI their compound inventive concepts and their elementary inventive concepts," and so forth. The lawyer says that his client insisted on drafting the petition, but the Court responds that compliance with Rule 14.3 (which requires the use of "plain terms") cannot be delegated. • Describing the parties' pleadings as (among other things) "sprawling," "behemoth," "surplusage," "voluminous," "breathtaking," "madness," "intended to overwhelm," "choking the docket," and exhibiting a "labyrinthian prolixity of unrelated and vituperative charges that defy comprehension," Judge William Pauley cautions them not to do that again. Combined, the complaint and answer spanned about 1,700 pages.

April 2015

April 2: Federal officials say that a 28-year-old man will face federal charges for taking an owl on a joyride. This came to light after the man and a friend posted a video on Facebook showing themselves driving with the owl in their car. This was a federal crime because the bird was a Great Horned Owl (*Bubo virginianus*), and so messing with it violated the Migratory Bird Treaty Act of 1918.

April 20: The Federal Circuit dismisses an appeal by Pi-Net International and Dr. Lakshmi Arunachalam on the ground that they are not even close to complying with the 14,000-word limit on briefs. The court notes that in appellants' first two briefs, they tried to reduce the number of "words" by taking out spaces, arguing for example that "Thorner.v.SonyCompute rEntm'tAm.LLC,669F3d1362,1365(Fed.Cir.2012)" was one word instead of fourteen. In their third effort, appellants instead used a series of cryptic abbreviations that the court says rendered the brief not only deficient but "nearly incomprehensible."

MAY 2015

May 1: Sylvia Ann Driskell, purporting to act as "Ambassador for Plaintiffs God and His Son Jesus Christ," files a federal lawsuit in Nebraska against all homosexuals. It appears that she is asking the court to hold that homosexuality is a sin, though it is not entirely clear what if any other relief she is seeking.

May 3: An Israeli newspaper reports on the indictment of a man whose *modus operandi* was to walk into a bank, explain to the teller that he was not armed and did not intend to hurt anyone, and ask for money. In at least eight separate incidents, tellers handed over money and the man quietly left. Officials say he collected about $28,000 using what the indictment called "a very effective method that has proven itself." That is certainly true, although it isn't entirely clear that this "method" is illegal.

May 6: A judge dismisses Sylvia Driskell's lawsuit against all homosexuals, noting among other things that a federal court does not have jurisdiction to determine what is sinful, and also that simply naming "all homosexuals" fails to identify any particular defendant specifically enough to allow service of process.

May 15: The Sixth Circuit rules in favor of three activists who were convicted of "willfully injuring national-defense premises" with the "intent to injure, interfere, or obstruct the national defense." The activists, including an 85-year-old nun, basically walked into the Oak Ridge nuclear weapons complex and put up a banner on a building containing weapons-grade uranium — all without being noticed — but did not really damage anything. The panel holds that "to show some injury or interference with the national defense, it is not enough for the government to speak in terms of cut fences or delayed shipments or pens stolen from the Pentagon." The government had also argued the defendants "intended to interfere with the national defense" by trying to create "bad publicity."

May 19: The city council of Richmond, California, votes 5-2 to call for a ban on space-based weapons. The council expresses support for the Space Preservation Treaty (which does not exist) and the Space Preservation Act (which did, but never made it out of committee). According to the council, these measures would be "a safeguard for targeted individuals who claim to be under assault from weaponry that should be outlawed by the Space Preservation Act," apparently a reference to one of

the sponsor's constituents.

May 20: Responding to a copyright-infringement complaint, the surviving members of Led Zeppelin deny almost all of the allegations with one notable exception. "Answering paragraph 11 of the First Amended Complaint," the answer states, "Defendants admit that Led Zeppelin has been called one of the greatest bands in history and its members were and are exceptionally talented." Defendants "otherwise deny each and every allegation contained in paragraph 11 of the First Amended Complaint."

May 25: The High Court of Punjab and Harayana again postpones hearing the matter of Shri Ashutosh Maharaj Ji, who remains on ice.

JUNE 2015

June 1: ABC News reports that TSA agents successfully detected explosives or weapons parts in three tests conducted by undercover DHS investigators. Unfortunately, there were 70 such tests, meaning the TSA failed 95.7% of the time.

June 2: Calling the development an "unusual twist" in the trial of a man charged with fraudulently using a credit card, the *San Francisco Chronicle* reports that the man's defense attorney has been arrested for doing the same thing.

June 4: Another DHS report says investigators found the TSA had not properly vetted aviation workers, resulting in a number of individuals who had been designated "with terrorism-related category codes" having access to secured areas. That number: 73. The report also notes that TSA cleared over 1,500 individuals despite lacking certain information necessary to check their names against the Consolidated Terrorist Watchlist. That information: their full names.

June 9: According to the BBC, a court has affirmed Stephen Gough's conviction for violating an anti-social-behavior order. The ASBO precludes Gough from appearing naked in public, as he has done almost continuously during the last decade except when serving time in prison for doing it. He was appealing a conviction, in fact, for walking nude out of the prison in which he had served time for his previous violation. Gough was also nude during the appellate proceedings, although he appeared only on video and was screened by a strategically placed table.

June 27: *Ars Technica* reports that a California judge has ruled against a man who told his son to shoot down a neighbor's homemade drone. The parties disputed the drone's location at the time of the incident; the defendant claimed it was over his property, while the plaintiff claimed that the drone's GPS data showed otherwise. The judge rules that regardless of where the drone was, the defendant acted unreasonably in resolving the dispute with live ammunition.

JULY 2015

July 10: After assembly member Darren Millar asks the Welsh government to confirm or deny whether any unidentified flying objects have intruded into local airspace, he receives a response written in Klingon. The response is "*jang vIDa je due luq.'ach ghotvam'e' QI'yaH-devolved qaS*," which reportedly means something like "we'll get back to you." The government later says that the message was a joke by a press officer to a local journalist, not its official response.

July 11: The *Arizona Daily Star* reports that of the 3,772 civil cases filed in the District of Arizona's Tucson division in 2014, Dale Maisano filed 2,955 of them. Maisano, who as you have probably guessed is an inmate, apparently started filing lawsuits in 2012 (66 of the court's 983 cases that year), but didn't really get going until 2013 (667 of 1,509). His 2014 output represented an average of one case about every three hours.

July 28: The *Wall Street Journal* reports that a Louisiana toddler has received birthday gifts bearing pictures of Morris Bart, a plaintiffs' attorney who advertises heavily in the state. Bart sent some of the gifts after being contacted by the boy's parents, who explained that he had "always been very drawn to Morris Bart commercials" and enjoyed watching them when they came on TV. The parents provided, among other things, a life-size cardboard cutout of the attorney and a cake with his face on it.

July 29: Writing on his blog, *True to You*, the singer Morrissey accuses TSA agents in San Francisco of "sexually assaulting" him as he was trying to catch a flight to London. "In the interests of imperishable bureaucracy my submitted complaint against this 'officer' will obviously be either unread or ignored because, as we all know, on matters of officialism it is not possible to be pleasantly surprised by anything at all," says the perpetually maudlin singer, who on this one is almost certainly right.

August 2015

August 5: Officials at Norway's Bastøy prison discover that one of its inmates has escaped, which is less difficult than you might think because the "cells" in Bastøy are not locked. But escapes are also rarer than you might think, which might be because the island facility features activities like horseback riding, fishing, and tennis, and has a beach, a sauna, and a chef. Officials believe that the inmate who escaped (for whatever reason) used a toy sand shovel to paddle himself to the mainland on a surfboard.

August 14: Upset that the military is considering moving Guantánamo prisoners to the prison at Fort Leavenworth, Kansas Sen. Pat Roberts warns that doing so is risky because the prisoners might escape. Leavenworth is a particularly dangerous location, Roberts argues, because it "lies right on the Missouri River, providing terrorists with the possibility of covert travel underwater and attempting access to the detention facility." He does not explain how terrorists might do this, or why that would be worse than if they just approached on land.

August 25: According to the *Columbia Daily Tribune*, the city council's attempt to gerrymander a downtown business-improvement district has failed because the borders it drew did not exclude all qualified voters. Specifically, it missed one: Jen Henderson, a 23-year-old University of Missouri student, who as the single qualified voter in the district would have the sole power to decide on a related sales-tax measure. Henderson says the council asked her to withdraw her registration so that business owners could decide, but she didn't plan to do that.

August 31: The Ninth Circuit rules that "Big Mountain Jesus," a 12-foot-tall statue on the grounds of the Whitefish Mountain Ski Resort in Montana, need not be moved from federal property. The Freedom From Religion Foundation sued to have it removed, but the panel holds 2-1 that the statue has a predominantly secular purpose. The majority notes, among other things, that "the flippant interactions of locals and tourists with the statue suggest secular perceptions and uses: decorating it in Mardi Gras beads, . . . high-fiving it as they ski by, and posing [with it] in Facebook pictures." The court also notes that the statue is generally wearing a ski helmet.

SEPTEMBER 2015

September 4: According to CBC News, the privacy and information commissioner in Saskatchewan has issued a report criticizing an assisted-living facility's approach to disposing of confidential patient records. Specifically, an investigation found that the facility "had signed a deal with an undisclosed chicken farm" to do the job. "I recommend that Spruce Manor Special Care Home no longer use a chicken farm to destroy records," the commissioner wrote, a recommendation the home said it would accept.

September 10: In a ruling that surprises no one, or possibly just one person, the Nevada Supreme Court again rejects an appeal by Orenthal James Simpson. Simpson, who won the Heisman Trophy and was a pro football star before not murdering his wife and another person, was convicted of some nonsense involving sports memorabilia and has been in jail ever since.

September 17: The Sixth Circuit reinstates a lawsuit by Insane Clown Posse and some of the group's fans (known as "Juggalos") that challenged the FBI's classification of Juggalos as a "loosely organized non-traditional hybrid gang subset." The district court held that the Juggalos had not adequately alleged that the classification caused them sufficient injury to confer standing, but the Sixth Circuit rules they have met that burden. Violent J and Shaggy 2 Dope of ICP thank their legal team and the ACLU of Michigan for their work on behalf of Juggalo rights. "MUCH CLOWN LOVE!" they say in a statement. "WHOOP WHOOP!"

September 25: A California judge rules that Warner Music has not shown that it has a copyright interest in the song "Happy Birthday to You," for which it has been charging royalties for quite some time.

OCTOBER 2015

October 1: The *Washington Post* reports that the D.C. Council is planning to make the Hay's Spring amphipod the official amphipod of the District of Columbia. Amphipods are tiny little crustaceans, and at least 13 kinds have been found in the D.C. area, according to the report. The Hay's Spring amphipod is an endangered species found only in a few places entirely within Rock Creek Park.

October 14: Resolving a dispute arising out of a love triangle at the London Zoo, a judge holds that the zoo's former meerkat expert must compensate a monkey handler she injured in a fight over a llama keeper. The meerkat expert claimed that the monkey handler attacked her first, but the judge finds otherwise.

October 16: *The Guardian* reports that the city council of Brentonico, Italy, has voted to seek a new trial for Maria Bertoletti Toldini, which is nice because a previous council had ordered her burned at the stake. In 1715, Toldini was arrested and convicted of witchcraft, destruction of property, blasphemy, heresy, and throwing a five-year-old boy into a pot of boiling cheese. The local minister advocating a new trial acknowledged that some think the symbolic trial is not worth the cost and effort, but says, "I told them 'F you,' as we say in Italy."

October 23: In an article headlined, "Man sprayed rival's door with fake snow before attacking him while armed with horse-riding stirrups," *Wales Online* reports that the man was convicted and sentenced to one year for assault with a deadly weapon. The defense attorney argued that his client was just holding the stirrups in his hand and any contact between the stirrups and the victim was accidental. "The stirrups may well have struck [the victim]," he argues, but he was not beaten *with* the stirrups." The judge finds the distinction irrelevant.

October 24: A 69-year-old man is arrested in Branson, Missouri, after starting a fight at the Ozark Mountain Monopoly Tournament. The man was reportedly angry that he was not being allowed to participate on the ground that he had been accused of "unsportsmanlike conduct" at the tournament the year before.

October 31: In a decision that really should have been issued on Halloween, and so is being given that date here, the California Court of Appeal holds that under the "primary assumption of risk" doctrine, a "haunted house" attraction is not liable if frightened patrons injure themselves. The plaintiff alleged he fell while running away from a "chainsaw-wielding maniac," but the court held his harm was caused by a fear he not only expected but paid for. The plaintiff tried to distinguish between that "fun fear" and a fear of "the real, actual danger of physical injury," but the court did not see a material difference between "fun fear" and what it called "scary fear."

Exemplary Law Books of 2015

Five Recommendations

[parallel citation: 2016 Green Bag Alm. 105]

Femi Cadmus[†]

Wil Haygood,
Showdown: Thurgood Marshall and the Supreme Court Nomination that Changed America
(Alfred A. Knopf 2015)

A vivid biography of Thurgood Marshall set against the backdrop of volatile race relations in the 1950s and '60s, *Showdown* by Wil Haywood brings to life the historical significance of the first African American nominated to the Supreme Court of the United States. The narrative weaves through the challenges President Lyndon Johnson faced in the nomination process, the rancorous hearings, and the astute political maneuvering behind the successful confirmation. Particularly moving is the story of Thurgood Marshall's humble beginnings in Baltimore, his early in life, becoming a lawyer, his time at the NAACP, and his successes in shaping American jurisprudence with groundbreaking cases such as *Brown v. Board of Education*.

[†] Edward Cornell Law Librarian, Associate Dean for Library Services, and Senior Lecturer in Law, Cornell Law School.

John Bronsteen, Christopher Buccafusco, and Jonathan S. Masur,
Happiness and the Law
(University of Chicago Press 2015)

At first glance, happiness and the law might appear to be two strange bedfellows. In this book, the authors explain how moving beyond a traditional economic analysis to a focus on the role of happiness provides a better understanding of law and legal policy. The authors assert that new studies of happiness through hedonic psychology provide compelling data that more accurately measure what truly makes people happy. When applied in a criminal law context, hedonic psychology provides a better understanding of how rewards and punishment affect individuals, and in civil lawsuits it shines a light on the adaptability of individuals to injuries, providing a more accurate lens to view behavior in settlements. The authors use "well being analysis" (WBA) as a means of analyzing how law or policy could have a positive or negative impact on the lives of people. They argue that WBA should replace or supplement CBA (cost benefit analysis) as a measure by lawmakers of policies, laws, and regulations that would increase or decrease happiness.

Irin Carmon and Shana Knizhnik,
Notorious RBG: The Life and Times of Ruth Bader Ginsburg
(HarperCollins 2015)

A serious, lively, and sometimes irreverent retelling of the life story of Ruth Bader Ginsburg (RBG) by the authors, a lawyer and creator of her famous Internet meme and an award-winning journalist. Tracing RBG's birth, education, and professional ascent in an era when women played more traditional roles and typically took the backseat, the narrative highlights how she overcame the daunting obstacles of her time to become the first tenured female law professor at Columbia and an advocate for women's rights, garnering victories during her time at the ACLU and the ultimate victory — her nomination and confirmation to the highest court of the land. The book includes excerpts from her Supreme Court briefs with annotations by legal scholars, a photographic narrative of her life, and an appendix filled with interesting items such as "How to be RBG," an RBG recipe, and photos of memes.

Stephen Breyer,
The Court and the World: American Law and the New Global Realities
(Alfred A. Knopf 2015)

Globalization and the Internet, with a corresponding porosity of international borders have raised new complexities and questions about the statutory reach of American law. Justice Breyer provides a detailed overview from his personal

experiences on the bench of the impact of globalization on the work of the courts. He highlights the increased need for global collaboration and cooperation between courts in an increasingly interconnected digital world in order to enforce the rule of law. He begins with a discussion of the balance of civil liberties and national security, tracing the courts' deferential posture before World War II and a more assertive stance in modern times, curtailing the President's authority post 9/11. The account turns to international commerce, the globalization of the marketplace, and the importance of a more in-depth understanding by the courts of international business practices. He also examines the impact of international agreements and treaty interpretation in the arenas of child custody and investment treaties. Justice Breyer reiterates how more than ever it has become essential for judges to possess an understanding of foreign law and legal practices of other nations and in his words "to show that our system far from being a hindrance, or worse, in the face of new realities, is perfectly well equipped to meet them."

Alan M. Dershowitz,
Abraham: The World's First (But Certainly Not Last) Jewish Lawyer
(Schocken Books 2015)

A portrayal of the historical Bible figure Abraham as the first Jew and Jewish lawyer, pleading for the sinful condemned of Sodom and Gomorrah. In Abraham's strident plea negotiation, he asks that the lives of the few innocents not be taken with those of the many guilty. The author draws many parallels to the modern-day legal context and the practice of law, surmising that in this case "our current capital punishment processes threaten to sweep too many innocents with the guilty." Abraham is also portrayed as the savvy real estate lawyer who contracts to purchase a burial cave for his wife, rather than accepting a gift from the landowner, a transaction that cements his family's ownership for generations to come. The second part of the book examines the trials of Jews in history, highlighting the trial of Jesus, who demonstrated "lawyerly skills." The author also focuses on modern-day Jewish lawyers, including Louis Brandeis, Max Hirschberg, Rene Cassin, and Ruth Bader Ginsburg.

The Reigate Puzzle

A Lawyerly Annotated Edition

[parallel citation: 2016 Green Bag Alm. 109]

A. Conan Doyle[†]

introduction by Catherine Cooke[‡]

annotations by Cattleya M. Concepcion,[1] *Joshua Cumby,*[2] *Ross E. Davies,*[3] *A. Charles Dean,*[4] *Clifford S. Goldfarb,*[5] *Peter H. Jacoby,*[6] *Jon Lellenberg,*[7] *Lou Lewis,*[8] *Joyce Malcolm,*[9] *Guy Marriott,*[10] *Ira Brad Matetsky,*[11] *Hartley R. Nathan*[12] *& Ronald J. Wainz*[13]

Editors' Preface

Annotating "The Adventure of the Norwood Builder" for the 2015 edition of the *Green Bag Almanac & Reader* was quite fun — enough fun that even before it was in print we'd decided to annotate another Sherlock Holmes story for this, the 2016 edition. We settled on one of the

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† Arthur Conan Doyle made a living as a physician for a few years, but worked most of his adult life as a professional writer.

‡ Catherine Cooke* ("The Book of Life," BSI) is a librarian and curator of the Sherlock Holmes Collection of Westminster Libraries, London.

1 Cattleya M. Concepcion is a librarian at the George Mason University School of Law.

2 Joshua Cumby is an intellectual property and litigation associate at Venable LLP.

3 Ross Davies is a George Mason University law professor and *Green Bag* editor.

4 Ash Dean is a partner in the law firm of Gross & Romanick, P.C., in Fairfax, Virginia.

5 Clifford S. Goldfarb* ("Fordham, the Horsham Lawyer," BSI) is a lawyer with the Toronto firm of Gardiner Roberts LLP. He specializes in charitable and non-profit organizations.

6 Peter H. Jacoby,* a retired lawyer, lives in Philadelphia and is a longtime member of several Sherlockian scion societies in the mid-Atlantic states.

7 Jon Lellenberg ("Rodger Prescott," BSI) is a retired Pentagon strategist and the historian of the Baker Street Irregulars.

8 Lou Lewis ("William Whyte," BSI) is a partner in the law firm of Lewis & Greer, P.C., where he specializes in litigation and in tax certiorari, construction, and surety law.

9 Joyce Malcolm is a professor of law at the George Mason University School of Law.

10 Guy Marriott* ("The Hotel du Louvre," BSI) is a retired English Solicitor and the President of The Sherlock Holmes Society of London.

11 Ira Brad Matetsky is a litigation partner in the firm of Ganfer & Shore, LLP in New York.

12 Hartley R. Nathan* ("The Penang Lawyer," BSI) is a partner in the Toronto law firm of Minden Gross LLP where he practices corporate law, and a Queen's Counsel (1982).

13 Ronald J. Wainz is a physician in Toledo, Ohio, specializing in pulmonary, critical care, and sleep medicine.

earlier stories, "The Reigate Puzzle" (aka "The Reigate Squire" and "The Reigate Squires"). And then we enlisted (as we did last year) an eminent Sherlockian to introduce the story and a gratifyingly diverse congregation of others to annotate it.

What we present in the following pages is not, of course, the last word on anything about "The Reigate Puzzle." Indeed, one of the joys of Sherlockian studies (like legal studies) is that no one ever gets the last word, just the latest.[14] We would like to think, however, that we have collected quite a few interesting and entertaining additions to Sherlockian scholarship — including several relating to the law and legal culture — and at least as many eloquent yet compact restatements of some of the best of preexisting scholarship.

As we said in last year's preface to "Norwood Builder," for anyone interested in fully appreciating that story — or, we now add, any Sherlock Holmes story published under the byline of Arthur Conan Doyle — two books are essential resources. First, there is *The New Annotated Sherlock Holmes* (2005), by Leslie S. Klinger. Volume 1 of that work includes "The Reigate Puzzle" (under the name "The Reigate Squires"). Klinger's notes there are flagged here with citations to "LSK, 1 New Ann. p. _, note _." Second, there is *The Sherlock Holmes Reference Library*, also by Klinger. The volume in that series covering *The Memoirs of Sherlock Holmes* (1999) includes "The Reigate Puzzle" (again as "The Reigate Squires"). Klinger's notes there are flagged here with citations to "LSK, Ref.: Memoirs, p. _, note _." If you want to know what his notes say (and you should), you will need to get his books (which you should).

This year, exhibiting the traditional legal-academic tendency toward ever-expanding annotation, we have added references to Owen Dudley Edwards's excellent *The Oxford Sherlock Holmes* (1993). The volume in that series covering *The Memoirs of Sherlock Holmes* includes "The Reigate Puzzle" (under the name "The Reigate Squire"). Christopher Roden's notes there are flagged here with citations to "OSH: Memoirs, p. _."[15]

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[14] *Compare, e.g.,* Bernard Davies, *Introducton*, in THE SHERLOCK HOLMES REFERENCE LIBRARY: THE SIGN OF FOUR xi, xii (2004) (Leslie S. Klinger, ed.), and Edgar W. Smith, SHERLOCK HOLMES: THE WRITINGS OF JOHN H. WATSON, M.D. 118-19 (1962), with Richard M. Re, *On "A Ticket Good for One Day Only,"* 16 GREEN BAG 2D 155 (2013), and *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) ("We are not final because we are infallible, but we are infallible only because we are final.").

[15] "The Reigate Puzzle" being a subject of interest to Sherlockians, other interesting and

The text of "The Reigate Puzzle" presented here (including reproductions of the handwritten incriminating note) is from the first U.S. version — published by *Harper's Weekly* in 1893 — which has its quirks, as does every version.[16] The picture of Sherlock Holmes on page 108 above is from a 1905 newspaper republication of the story.[17]

INTRODUCTION

THE PUZZLE OF "THE REIGATE SQUIRES"

Catherine Cooke

One of the joys of the Sherlockian Game is being able to visit the actual scenes of Holmes's investigations. One can travel on the train lines he did, stand where he stood and walk in his footsteps. Well, almost. Britain's train network was sadly depleted in the middle of the last century with the advent of the motor car, but many lines survive and even if some of the local stations have disappeared, their sites often remain. It has to be conceded that one does require imagination to see what Holmes would have seen — much has changed. One also requires Holmes's deductive skills to find many of the places from the clues in the stories. Plus there's the added bonus of discovering out-of-the-way little snippets of history along the way. The discipline is in many ways an easier one than the discipline of dating the stories. You usually only have the data in one story to deal with — there are fewer awkward clashes with other stories to worry about. It is a somewhat duplicitous activity, however. Are we talking about stories written at one date by Sir Arthur Conan Doyle, or true accounts of cases at a totally different date written up by Dr. John H. Watson? Often, the former can provide vital evidence and "The Reigate Squires" (I am English!) is a case in point.

The story was first published in *The Strand Magazine* for June 1893. Most American editions use the title "The Reigate Puzzle." This may be

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entertaining scholarly works about it, or at least touching on it, abound. They are too numerous to list and too various to summarize. Conveniently and not surprisingly, a good starting point for exploration of other scholarship is Klinger. *See* Leslie S. Klinger, *Sifting the Writings upon the Writings*, 52 BAKER STREET J. 47 (Summer 2002), www.bakerstreetjournal.com/images/Klinger%20edited.pdf.

[16] A. Conan Doyle, *The Reigate Puzzle*, HARPER'S WEEKLY, June 17, 1893, at 574.

[17] A. Conan Doyle, *The Original Sherlock Holmes Stories: The Reigate Puzzle*, WASHINGTON TIMES, May 14, 1905, section 4, at 2.

for fear of offending the republican sympathies of American readers, or may be simply because the early editors felt the term "Squires" would not mean much to their readers. In fact, the term does give us a salient piece of evidence about the houses we are seeking, so bears definition. The Oxford English Dictionary defines a squire as, "[a] country gentleman or landed proprietor, *esp.* one who is the principal landowner in a village or district."[18] The internal date of the story is unusually unanimously accepted as April 1887, with most commentators agreeing on the 25th or 26th of the month, though a couple plump for the 4th or 14th.[19]

The general location of the story is, obviously, Reigate, a historic town in Surrey, some 20 miles south of London, dating back to at least the Bronze Age. It had a mediaeval castle and market and is a parliamentary borough.[20] But before we can start looking for the exact location of the story, we must look at the textual evidence — exactly what are we seeking? The points were admirably summarised by Bernard Davies in his papers,[21] starting with Colonel Hayter's house:

- The establishment is a bachelor one. The house, while not necessarily part of a large estate, was in itself fairly commodious. There was no problem about guest-rooms. It had a library and a gun-room. A smoking-room is also referred to, though this might have been the gun-room used as a smoking-room
- The Colonel had a butler, so he must have had a moderate staff. Though only an ex-soldier, he could afford to live very comfortably indeed
- His neighbour Cunningham Senior was "our leading squire around here" according to the Colonel. This indicates there were a number of substantial landowners around district — "far the largest about here". Cunningham is also a J.P.
- Holmes speaks of burglar gang "operating in the country". While he could mean "outside London" it also suggests probably NOT in the town of Reigate itself
- "If it's a local villain there should not be much difficulty" remarks Holmes. Again, suggests a lightly populated, countrified area
- Insp. Forrester's "step across" to Holmes indicates the scene of Cunningham's robbery is only a very short distance away. Forrester also

[18] www.oed.com/view/Entry/188426?rskey=oh84Sr&result=1&isAdvanced=false#eid.
[19] Andrew Jay Peck and Leslie S. Klinger, THE DATE BEING . . . ? (1996).
[20] en.wikipedia.org/wiki/Reigate.
[21] Private collection.

remarks that if the burglar is a stranger "we shall soon find him out"

- "The field outside" confirms relatively rural situation of Hayter's place.
- The Cunningham home is only a few minutes' walk away from Hayter's and is in fact quite close to the road leading to it which must be a "high road" — i.e. either a main road or a principal subsidiary or side-road. The place was not isolated therefore
- It was surrounded by hedge, not a wall, railways or farms. At least on main approach road side
- Lodge (with gates?) is "pretty cottage" — "oak-lined avenue" to Cunningham residence — reasonable length, not necessarily *very* long. Only a few minutes' walk. Both the lodge and avenue are essential
- Queen Anne mansion — date of Malplaquet (1709) above the door
- Round one side is a "side-gate" — "separated by a stretch of garden from the hedge which lines the road." Near the "kitchen door". Here the Staircase (plain, wooden) which features is Backstairs. From a landing a more ornamental flight of main stairs leads to hall. Upstairs drawing-room and several bedrooms, all first floor
- Cunningham's side gate must be internal gate leading from gardens into park or rest of property. It cannot be on the public road or it makes nonsense of the separation from the hedge by a "strip of garden". Both the hedge and the road could be seen from (a) inside back (kitchen) hall, (b) from one of old C's bedroom windows
- Absence of powder blackening
- Ditch — No evidence for an outside intruder. Absence of footprints in muddy ditch at boundary shows Cunningham's story false
- Very sizeable estate, since — along with Acton's place — "far the largest about here" and some of it subject of a long running and expensive lawsuit. (Note the emphasis on their greater size, which shows (a) a considerable gap in acreage between them and the rest; which is larger of two is irrelevant (b) their size would preclude then from being within Reigate town limits proper)
- Holmes refers to the "county police" (Surrey Constabulary, not a Borough Force)
- "Old Acton" is referred to as "one of our country magnates" by Colonel Hayter. He is not called a J.P., but could have been
- Hayter proposes to take pistol up to bed, "we've had a scare in these parts lately" he says, referring to burglary at Acton's place, which cannot therefore be far away.

Now this is a lot of detail. You could argue too much — over 120 years later it will be impossible to satisfy every point. Bernard's stated method, written across the top of his notes, was, as Holmes says in the story, "Now I make a point of never having any prejudices and of following docilely wherever fate may lead me, ..." In fact, relatively few scholars have looked into the location of the houses. Michael Harrison gave his views when he considered Surrey.[22] He felt Colonel Hayter's house was "a smallish villa," or there would have been more servants. He made no attempt, however, to pinpoint any specific houses. Charles Merriman, one of the first Sherlockians actively to seek the locations of Holmes's cases, is reported as identifying The Priory as the Cunningham house, "a building of note — in the Vale of Holmesdale."[23]

David Hammer did, of course, cover the area in his travel guide to the England of Sherlock Holmes.[24] He states that two houses have been proposed: Gatton Hall near Reigate and the Priory, actually in Reigate. Gatton Hall was for about 50 years the seat of Sir Jeremiah Colman, but was all but destroyed by fire in 1936, leaving only a colonnade standing. The property was rebuilt on a much smaller scale than the original house. It is now the Royal Alexandra and Abbey School. The Priory still exists, now The Priory Middle School, Bell Street, having been transferred to public ownership in 1922. Hammer duly visited The Priory and found it in a park, with a tree-lined avenue leading to it. He thought it was in Queen Anne style, with two storeys and built on an H plan. It was, however, grey with corner quoins rather than red. There was a coat of arms above the door. Hammer was happy to accept The Priory as the Cunningham residence. The problem is, of course, that he did not investigate the alternatives, which we must do before we can be definitive.

Davies followed his usual method, taking his lead from Holmes, who, it will be remembered, sent down to Stanford's for the Ordnance map of Dartmoor when beginning his investigation in *The Hound of the Baskervilles*. Bernard obtained the Reigate Ordnance map published in 1816, the map surveyed in 1866-71, published 1878 and the 1901 revision, published 1904. He identified a number of possible candidates:

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[22] Michael Harrison, IN THE FOOTSTEPS OF SHERLOCK HOLMES (revised edition 1971).
[23] Arthur Conan Doyle, THE MEMOIRS OF SHERLOCK HOLMES (1999) (Leslie S. Klinger, ed.).
[24] David L. Hammer, THE GAME IS AFOOT (1983).

1. Reigate Lodge — house on Reigate Road
2. Great Doods to the east — about the same size — house on Croydon Road near railway

   Both are below Redhill Road and the railway and divided by Croydon Road
3. The Priory (with site of ancient priory) A quarter of a mile away — south of town. A bit larger than these, but not a lot. *Unless* Reigate Park is added to it — in which case it would be much larger. Priory Road overlaps both and as the Park is actually woodland and the grounds elsewhere parkland, "this could be the solution 2=1?"

These three properties do form a distinct group — the houses are roughly comparable in size; The Priory is possibly marginally bigger. Of the two easternmost properties, Reigate Lodge and Great Doods, both remained as shown in OS 6" 2nd sheet of 1898 (rev. 1895) up until at least that date. However, the more easterly of the two (Great Doods) was radically redeveloped before 1901, when the 1" sheet of Reigate was re-surveyed (pub. 1904). This shows the area cut up by a diagonal road across it, and new buildings. The other (Reigate Lodge) while it shows some rebuilding by or before 1901 is not so radically changed. At the date of the story, both would look more like they did in 1878 1" sheet — 9 years earlier.

Other good sized properties for Hayter's (but not big estates) were

1. Rookwood (N)
2. Clairville (NE) alongside railway. It did have field adjacent to it, across road to west and across the road to the south

There was, even then, continuous building along both the road and the railway joining Reigate to Redhill. The relevant maps are now easily available on the National Library of Scotland's website. If we look at the 2nd edition 1898 Surrey Sheet XXVI S.E.[25] We can see that all three had Lodges.

Bernard was nothing if not thorough in his researches. He did check for other possible candidates:

[25] maps.nls.uk/view/101437216.

1816	1866 1878
1. Flanchford Place 1 mile SW	Farm
2. Hartswood 1 mile S	OK
3. Samuel House 1 mile SSE	= Salmons Cross [sic]
4. Earlswood 1.25 miles SE	Farm
5. High Trees 1 mile E	OK
6. Mutton Hall 0.5 mile NE	Not marked
7. Wray Court / Park (later)	OK
8. Kew Lodge 1 mile NE	
~~9. Nutwood Lodge 1.5 miles NNE~~ [sic]	
10. Reigate Manor N	Hotel
11. Underhill Park	Not marked

1816 only 1 park in this section, not 2
Also Clay Hall — Farm
White Hall (nr centre) not marked later editions S of Reigate Park in South Park Area
Gatton Park 2 miles NE was really big estate. Gatton Hall still there (96)
? Buckland Court 3000 yards W or 1.75 miles W

Quite a number of these are farms, which is not what we are seeking for Colonel Hayter's house. Some are rather a long way out — probably too far to "step over" from Cunningham's.

He also looked at the lists of magistrates, of whom there were a number, and the local police:

Surrey (1887)

Country Magistrates around Reigate — Petty Sessions Division of Reigate
After 4 titles persons with "seats" are listed for Reigate

Edward Brocklehurst	Kinnersley Manor 5 miles S
Col. A. A. Croll	Beechwood
NW over Reigate Hill	2 miles N
Henry Lainson	Colley Manor
Jas Ness	The Wilderness NE edge of town
Frederick Charles Pawle	Northcote
Alfred Waterlow	Great Doods [?]

Borough Magistrates

Henry Lainson	(+) Colley Manor
Geo. E. Pym	Doods
Edwin Horne	Park House
Constantine Holman	The Barons

+ 2 in West Street in Redhill etc.

Reigate Police

Borough Police Station, High Street
Geo Rogers Ch. Constable
4 sergeants and 10 constables
A station of Surrey County Constabulary
Royal West Surrey Regt. Volunteer Dept. Any 1 Inspector rank?

So we have four possible houses for the Cunningham house: Gatton Hall, The Priory, Great Doods and Reigate Lodge, and two good candidates for Hayter's — Rookwood and Clairville.

Bernard felt that Gatton Hall was too large and in the wrong position — it is much closer to Merstham than to Reigate. Furthermore, Gatton Hall was purchased in 1888 by Sir Jeremiah Colman whose family had established the Colman's mustard food brand in the early 19th century, not quite the sort of owner we are concerned with.[26]

The Priory is a Grade I listed building set in 65 acres of open parkland, with gardens, lake and waterfowl, and good recreational facilities. It was originally founded in the early 13th century by William de Warenne, the sixth Earl of Surrey, for the Augustinian Canons who worshipped and worked here for 300 years. It was converted to a mansion following the Dissolution of the Monasteries. In June 1541, while Catherine Howard was Queen, the Priory was granted by King Henry VIII to Lord William Howard, her uncle. Richard Ireland, a cheesemonger, paid £4,000 for the mansion and its 76 acres of parkland at auction in the mid-18th century. A devastating fire badly damaged the west wing and significant changes were made to the Priory building, shortening the east wing and refacing the south front in its present Georgian style.[27] The house is rather too grand. In 1883 Lady Henry Somerset (née Somers) inherited the estate from Charles Somers. The house was extensively altered and new garden areas were developed, including the Sunken Garden and Monks Walk. On occasions the Priory was let to socialite Mrs Ronnie Greville, becoming a social destination for elite society. Mrs Greville later went on to purchase Polesden Lacey in 1906.[28] While The Priory might be a bit too far from the likely location of Hayter's house, ne-

[26] en.wikipedia.org/wiki/Gatton_Park.

[27] www.reigatehistory.co.uk/prioryhistory.htm and reigatepriorymuseum.org.uk/priory.html.

[28] www.reigatehistory.co.uk/prioryhistory.htm.

cessitating passing along both Church Street and the High Street to reach the lodge entrance, it is the only one of the five houses still standing today.

Great Doods was an impressive, 18-bedroom house, with a large greenhouse, extensive wooded grounds, and a pond and fountain which belonged to Sir Edward Thurland (1607-1683), its first resident. Deerings Road was built across its grounds around the turn of the century. An 1897 document shows the estate sold for development when Reigate was expanding. Great Doods itself stood until about 1906, when it was demolished to make way for new houses.[29] Given the dates of that first owner, who presumably built the house, it predates the Battle of Malplaquet by several decades. The drive from the lodge to the front of Great Doods appears to pass across the east front of the house. Since the Cunningham's house had a small gate on the east side near the kitchen, this would argue against Great Doods being the house. It might, however, be Old Acton's house. He had some claim on the Cunningham estate, which would make sense if they were next to each other.

Finally, Reigate Lodge was a large, 18th-century house, which might fit with Malplaquet. Little of its history seems to be readily available, but one interesting point is that it was where, on 11th December 1882, Sir Thomas Watson died. He was Professor of Medicine at Kings College, London and later President of the Royal College of Physicians. He had been appointed physician extraordinary to the Queen in 1859, and as such, attended Prince Albert in his final illness, along with Sir William Jenner and Sir Henry Holland. He was created a baronet in 1866, and was appointed physician in ordinary to the Queen in 1870.[30] The estate had been bought by Reigate Council by 1912 and a competition was held for a development scheme, which was won by a Redhill architect, Vincent Hooper.[31] The proposal included setting aside eight acres for a new grammar school.[32] By September 1914 the estate was being used to billet soldiers.[33] It was demolished in the 1930s and the land used for what is now Reigate College and for housing, for example along Rushworth

[29] www.redhillandreigatelife.co.uk/news/heritage/515191.Rediscover_the_Great_Doods/.
[30] www.paulfrecker.com/pictureDetails.cfm?pagetype=library&typeID=21&ID=4994.
[31] SURREY MIRROR, Aug. 23, 1912.
[32] www.worthpoint.com/worthopedia/reigate-lodge-proposed-layout-estate-512250342.
[33] www.reigatehistory.co.uk/1stWW.html.

Road. The surrounding walls and shrubbery survived.[34] The drive from the lodge to Reigate Lodge approached to the west of the house, which works rather better for the Cunningham house.

So what of the candidates for Colonel Hayter's house, Rookwood and, a bit to the east, Clairville? Both were reasonably sized houses and there seems little to distinguish them from the available evidence. According to the 1911 census, Rookwood was large enough to accommodate a John Arthur Warwick aged 71, his wife Florence, 66, and their single daughter Lilian, with a staff consisting of a medical nurse, a parlourmaid, a housemaid, a cook, and a groom in the stables. If we accept Reigate Lodge as the Cunningham property, then Rookwood with its neighbouring field, being slightly closer than Clairville, makes a suitable candidate.

The story does not, however, end there. In 2010 a new theory was put forward by John Weber.[35] Weber, noting the requirement for a field next to Hayter's house, immediately discounts both Great Doods and Reigate Lodge as the area is too built up. (Both these houses are too large for Hayter's, which is more likely to be Rookwood or Clairville and, as we saw above, there was a field the other side of Wray Common Road.) Weber therefore feels the likely area is to the north of the railway, in Wray Park. Looking for a sizeable estate with both a lodge and side gate to the east, he highlights a house called Northcote. The drive is from the west, there is a footpath to the east, and it is fairly isolated. This is his candidate for the Cunningham's house. One has to say, against this, that the OS map cited above shows no named lodge, which is essential, though there is a small building which could be, and the modern 6 Gatton Road does appear to have been, the former lodge of Northcote.[36] The map Weber reproduces does show this building as the lodge. It is also small compared with other lodges nearby — so quite likely to be called a "pretty cottage." Wraylands opposite does have one, but it is a much smaller property. Northcote is also much smaller than the likes of Reigate Lodge and Great Doods, let

[34] www.geograph.org.uk/tagged/Reigate+Lodge.

[35] John E. Weber, UNDER THE DARKLING SKY (2010).

[36] www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0CDgQFjAEahUKEwiSupqGmd7IAhXHSBQKHSmfDBg&url=http%3A%2F%2Fwww.reigate-banstead.gov.uk%2Fdownload%2Fdownloads%2Fid%2F380%2Fview_the_list_of_buildings_of_architectural_and_historic_interest&usg=AFQjCNERg1Lo_Gt06aEuB87UOKGyTKCs3A.

alone The Priory. Given his preference for Northcote as the Cunningham's property, he chooses Birdhurst, just to the south-west, as Hayter's, citing a footpath past Wray Farm as the field. He did not consider a house for Old Acton.

Weber has another string to his bow — or at least, one of those spooky co-incidences. He checked both houses in *Kelly's Post Office Directory* (no date given) and Colonel John Philip Fearon lived at Birdhurst, and Frederick Charles Pawle, J.P. at Northcote. Further, the nearby house The Oaks was lived in by one Mrs. Morrison. In fact, it gets even more interesting: Colonel John Philip Fearon was commissioned to be Deputy Lord Lieutenant of Surrey in 1913.[37] This was the very post Sir Arthur Conan Doyle was appointed to in 1902. This is mere co-incidence — both dates are well in the future compared with the dates of the story. Pawle, noted by Bernard Davies in his list of magistrates, was a stock broker and art collector who actively promoted cultural activities in Surrey.[38]

Checking the census record, both were there in 1891 and both kept reasonably sized houses. Fearon, a wine and spirits merchant, lived with his wife, a cook/domestic servant, a parlourmaid, a nurse (children's) and a midwife, who may only have been there on the census night. By 1901 his family had extended to a 15-year-old daughter and two sons, aged 10 and 4. While the Colonel coincidence is interesting, this does not sound like Colonel Hayter's household. Fearon died on 22nd June 1919 leaving £23,781 18s 5d to his widow, his son John (the middle child, the elder of the 2 sons) and a Norman Charles Barraclough. One can only speculate that the younger son died in the war.

Frederick Pawle was 73 in 1901 and living on his own means, employing a butler, a footman, a lady's maid, a head housemaid and two under housemaids, a cook and a kitchen/scullery maid. He died on 3rd March 1915 leaving £116,893 5s 8d to his two sons, Lewis S. and Ernest D., and a James Harper Chaldecott, stock broker.

While the name Morrison at the Oaks interested Weber, sadly there was no Annie there. The house was lived in by George Carter Morrison,

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[37] www.thegazette.co.uk/London/issue/28737/page/5061/data.pdf.

[38] books.google.co.uk/books?id=H8UrSW3kXeIC&pg=PA36&lpg=PA36&dq=Frederick+Charles+Pawle&source=bl&ots=GfqcNd3MyN&sig=zAFdMsMXs10XGan2l_rWdTIqhE4&hl=en&sa=X&ved=0CCwQ6AEwA2oVChMIwdP2z53eyAIVhG0UCh1iuA5b#v=onepage&q=Frederick%20Charles%20Pawle&f=false.

his wife Emily, their daughters Elizabeth T., Mary E., and Mabel C., and 4 sons.

The fact is that Reigate was a well-to-do area, the sort of area that would attract the well-off, such as stockbrokers and ex-Army men, who would be the sort of men to become JPs. It is very probable that Sir Arthur Conan Doyle knew the town. On 6th August 1885 he had married Louise (Touie) Hawkins. By 1893, the date the story was published, they had a house in South Norwood, but were in Switzerland, Touie having been diagnosed with tuberculosis. While their parents travelled, the children Mary and Kingsley went to stay with their maternal grandmother Emily Hawkins, who was then living in Reigate with her eldest son Jeremiah. He died on 6th June 1895 at their home, St. Ives Cottage, Chart Road, Reigate.[39] He was buried in St. Mary's churchyard in Reigate. The house was rented, so it is difficult to be certain of Emily Hawkins' exact whereabouts at any specific time, but her will was drawn up at St. Ives Cottage in November 1895. She may well have left shortly after to live with her older sister at Easebourne, near Midhurst in Sussex, until her death in 1897. Emily died in her cottage in Hindhead on 25th December 1905 aged very nearly 80. She was buried in the plot in St. Mary's churchyard in Reigate alongside her son and her sister. Touie died in July 1906. Conan Doyle remarried on 18th September 1907 and moved to Hampshire. It does seem very likely that Conan Doyle and his wife visited her mother in Reigate, possibly around the time he was conceiving the story. Chart Lane runs south along the western side of St. Mary's churchyard. Its northern end is opposite the southwest corner of the Great Doods estate, and the southeast corner of that of Reigate Lodge.

"Circumstantial evidence is a very tricky thing," answered Holmes thoughtfully. "It may seem to point very straight to one thing, but if you shift your own point of view a little, you may find it pointing in an equally uncompromising manner to something entirely different."[40] Therefore with due caution, it does seem that the following fits the case:

Old Acton's — Great Doods
Cunningham's — Reigate Lodge
Colonel Hayter's — Rookwood

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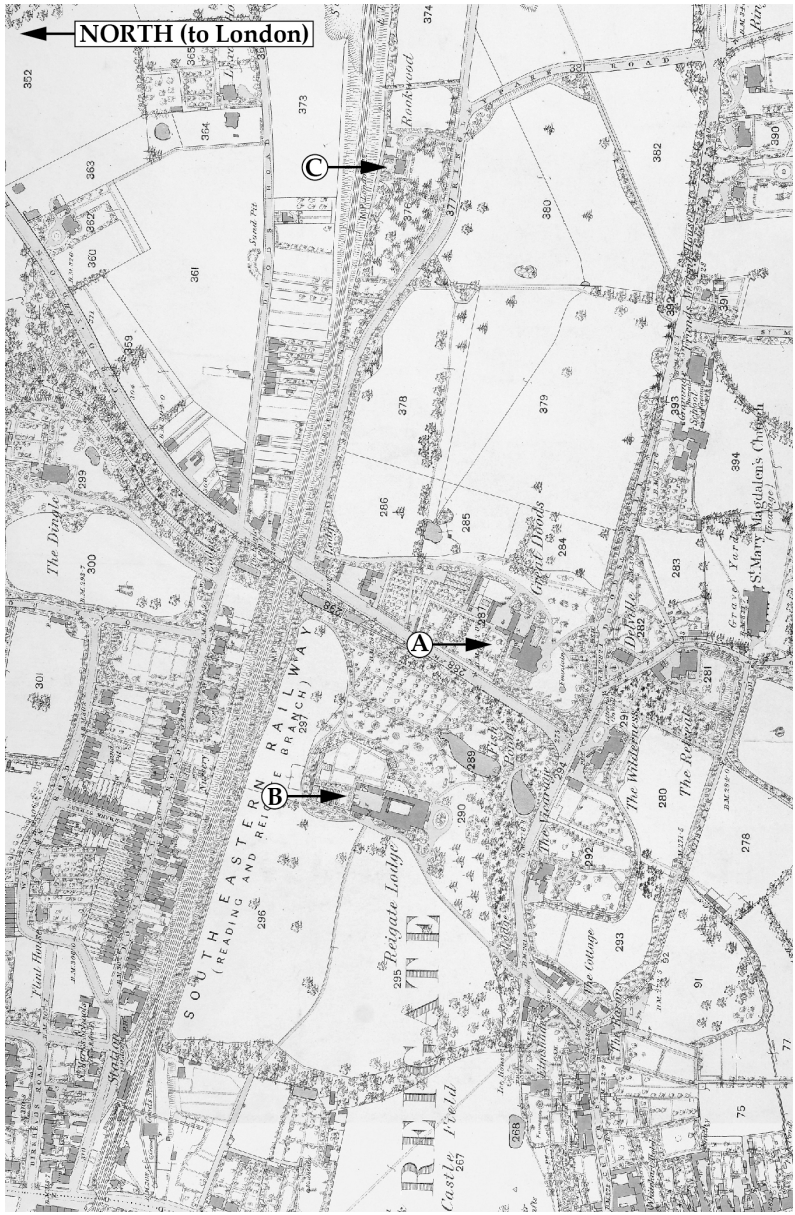
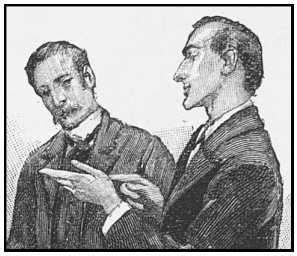
[39] Georgina Doyle, OUT OF THE SHADOWS 94 (2004).

[40] *The Boscombe Valley Mystery* (1891).

MAP OF THE EAST SIDE OF REIGATE



The arrows attached to the circled "A" and "B" and "C" in the map above indicate the likely homes of: (A) Old Acton (Great Doods), (B) the Cunninghams (Reigate Lodge), and (C) Colonel Hayter (Rookwood). Map courtesy of the Surrey History Centre.



THE REIGATE PUZZLE[†]

Arthur Conan Doyle

It was some time before the health of my friend Mr. Sherlock Holmes recovered from the strain caused by his immense exertions in the spring of '87.[41] The whole question of the Netherland-Sumatra Company and of the colossal schemes of Baron Maupertuis[42] is too recent in the minds of the public and is too intimately concerned with politics and finance to be a fitting subject for this series of sketches. It led, however, in an indirect fashion to a singular and complex problem which gave my friend an opportunity of demonstrating the value of a fresh weapon among the many with which he waged his life-long battle against crime.

[†] ROSS E. DAVIES: We have opted for "The Reigate Puzzle" — rather than "The Reigate Squire" or "The Reigate Squires" — because I have a nervous editorial mind that cannot let go of the thought that some narrow-minded and intolerant reader might be put off by a reference to aristocratic "Squires" (or even just one of them) in, of all places, the (ahem) title of this story. *Cf.* Edgar W. Smith, *Notes on the Collation*, in Sir Arthur Conan Doyle, THE ADVENTURES OF SHERLOCK HOLMES xxi (Limited Editions Club 1950). Besides, it appears pretty likely this was the original title of the story. *See* Richard Lancelyn Green, *"The Reigate Squires,"* in THE BAKER STREET DOZEN 289, 290 (1987) (Pj Doyle & E.W. McDiarmid, eds.) ("Although the manuscript's whereabouts is not known, it seems that the story was originally called 'The Reigate Puzzle.' This was the name used by Sidney Paget in his account book in March 1893."). We do not, however, "fear[] that the word 'Squires' would be . . . incomprehensible to the Sons of the Free"! *Contra* D. Martin Dakin, A SHERLOCK HOLMES COMMENTARY 117 (1972); *cf.* PHILA. INQUIRER, Jan. 10, 1892 (publishing "The Adventure of the Blue Carbuncle" under the title "The Christmas Goose that Swallowed the Diamond"); DONALD A. REDMOND, SHERLOCK HOLMES AMONG THE PIRATES: COPYRIGHT AND CONAN DOYLE IN AMERICA 1890-1930, at 18 (1990) (listing other retitlings). *See also* LSK, Ref.: Memoirs, p. 137, n. 1; LSK, 1 New Ann., p. 557, n. 1; OSH: Memoirs, p. 300.

[41] LSK, Ref.: Memoirs, p. 137, n. 2.

[42] LSK, Ref.: Memoirs, p. 137, n. 3; OSH: Memoirs, p. 300.

On referring to my notes I see that it was upon the 14th of April that I received a telegram from Lyons[43] which informed me that Holmes was lying ill in the Hôtel Dulong.[44] Within twenty-four hours I was in his

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[43] GUY MARRIOTT: To clear up one issue at once, the French spell the city Lyon (without the final "s") and that is increasingly the usage in English-speaking countries, although traditionally the city in English was spelled Lyons (with a final "s") and that is the style in "The Reigate Puzzle." Whether Lyon or Lyons, the city is south of Paris in the valley of the River Rhone, and is today France's third city, with a population of almost 500,000 people (Paris and Marseilles are larger). *See* OSH: Memoirs, p. 300.

[44] ROSS E. DAVIES: The location of Holmes's sick-room in the "Hôtel Dulong" may well be a bit of French-English pseudo-phonetic wordplay by the author. Trickery of this sort is a hallmark of the Canon. *See, e.g., The Adventure of the Veiled Lodger* (1927) ("I have made a slight change of name and place, but otherwise the facts are as stated."); David L. Hammer, THE GAME IS AFOOT 218 (1983) ("Watson, with his customary zeal for geographical obfuscation, furnishes specific information which leads nowhere."); Dr. Karl Krejci-Graf, *Contracted Stories*, 16 BAKER STREET J. 150 (Sept. 1966); John Dardess, M.D., *On Dating of "The Valley of Fear,"* 3 BAKER STREET J. 481, 482 (Oct. 1948).

Arthur Conan Doyle had a very good handle on French, as a leading French biographer has noted, and John Watson must have had at least a working competence in French in order to perform missions for or with Holmes in France and Switzerland. *See* Pierre Nordon, CONAN DOYLE: A BIOGRAPHY 22-23 (1964; English edition 1966; U.S. prtg. 1967); *see, e.g., The Adventure of the Final Problem* (1893); *The Disappearance of Lady Frances Carfax* (1911). But many less-worldly readers of this story would have lacked that kind of easy familiarity with what was then the leading language of international relations.

To the unpracticed English (or American, or Australian, or etc.) ear, "Hôtel-Dieu, Lyon" could easily have sounded like "Hôtel Dulong." But the Hôtel Dulong did not exist in Lyon. The Hôtel-Dieu, however, did. Indeed, the Hôtel-Dieu was the most famous hospital in Lyon and one of the great institutions of health care in Europe. *See, e.g.,* W.S. Pratt, *Report on the Eighth Congress of the "Association Francaise de Chirurgie,"* in ARMY MEDICAL DEPARTMENT REPORT FOR THE YEAR 1893 at 325, 326 (1895) ("This grand hospital, with upwards of 1,000 beds, . . . was built for the use of the sick poor and for sick travellers, and up to the present day still opens its doors to the sick and wounded of all countries irrespective of nationality or place of residence."); *see also, e.g.,* Brief for Amicus Curiae American Hospital Association, *Simon v. EKWRO*, 426 U.S. 26 (1976), 1975 WL 173686, at *38 n.54 ("The oldest known hospital in Western Europe was the Hotel Dieu, ...").

So, in Lyon, anyone who came upon a "broken down" Sherlock Holmes — a sick traveller, decrepit in body and mind — would almost certainly have taken him to the appropriate hospital: the Hôtel-Dieu. Once the hospital staff identified their illustrious charge, they would have gotten word of his location and condition to Watson either directly or via the the British Vice-Consul in Lyon. *See* BAEDEKER'S SOUTHERN FRANCE 212 (1891). They probably also would have given their celebrity patient what little privacy they could by hanging a curtain around his bed. As a result, there would have been very little open floor space over which to distribute whatever congratulatory telegrams reached him at the Hôtel-Dieu, which might explain how they piled up to ankle-depth. *Cf.* Carol P. Woods, *The Curious Matter of the Congratulatory Telegrams*, 42 BAKER STREET J. 16 (Mar. 1992). *See also* LSK, Ref.:

sick-room, [45] and was relieved to find that there was nothing formidable in his symptoms. Even his iron constitution, however, had broken down under the strain of an investigation which had extended over two months, during which period he had never worked less than fifteen hours a day, and had more than once, as he assured me, kept to his task for five days at a stretch. Even the triumphant issue of his labors could not save him from reaction after so terrible an exertion, and at a time

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Memoirs, p. 138, n. 4; LSK, 1 New Ann., p. 557, n. 2.

[45] GUY MARRIOTT: We will assume for the purpose of this annotation that the story is set in April 1887, the date given by Watson. Watson tells us that he has received (presumably in London) a telegram from the French city of Lyons and that within 24 hours of its receipt, he is in Lyons, in Holmes's hotel room. Further, three days later, Holmes and Watson are back in London, at their rooms in Baker Street.

In 1887 your only option for rapid travel was by train, the journey from London to Lyons being by train from London to one of the ports of the English Channel, then by steamer to one of the French ports, and then by train from that French port to Lyons (possibly requiring a change of train in Paris, although this is not stated). The shortest ferry crossing is from Dover to Calais. The distance in a direct line from central London to Dover is some 70 miles, from Dover to Calais by ferry is nearly 27 miles, and from Calais to Lyons, via Paris, is nearly 400 miles. The distances by train are longer than the direct-line distances.

London and Dover were connected by rail by the South Eastern Railway in 1844, and by the London, Chatham and Dover Railway in 1862. Each of these companies ran its own cross-channel steamers. By the time of "The Reigate Puzzle," the South Eastern Railway trains left from Charing Cross station in London for Dover, and the London, Chatham and Dover trains left from London's Victoria station to Dover. Across the Channel, Calais was connected to Paris by rail from 1848 via Lille, and from 1867 by a faster route via Boulogne and Amiens. Paris and Lyons were connected by rail from 1854.

Until 1886 any rail journey from Calais to Lyons required a change of train in Paris, and a journey by horse cab between the Gare du Nord, where the trains from Calais arrived, and the Gare de Lyon, where the trains for Lyons departed. But commencing with the 1886/1887 winter railway timetable a through train from Calais via Paris to Lyons, Marseilles and the Côte d'Azur was introduced. This was the Calais-Méditerranée Express, which in later years came to be called the *Train Bleu*, or *Blue Train*, and continued to run until 2003.

From the story, it is clear that Dr Watson made his way to Lyons as quickly as possible, so we may assume he used the fastest train, which was the Calais-Méditerranée Express. In the 1892 timetable, leaving either Charing Cross or Victoria by train at 3:00 p.m., crossing from Dover in a steamer to Calais, and then catching the Calais-Méditerranée Express, you were at Paris Gare du Nord at 10:47 p.m. The train then slowly travelled round the Paris inner suburbs to the Gare de Lyon from where it left at 11:40 p.m., arriving in Lyons at 8:49 a.m. the following morning. Your overnight journey would be in one of the sleeping cars of the Compagnie Internationale des Wagon-Lits, which were painted blue, and gave the train its name. A journey easily accomplished within 24 hours between receipt by Watson of the telegram, and his arrival in Holmes's hotel room.

In the foreground: A Lyon street scene into which a "broken down" Holmes might have staggered. In the background: The Hôtel-Dieu, to which the ailing traveller would have been carried. See note 44. Photo courtesy of Ross E. Davies.

when Europe was ringing with his name, and when his room was literally ankle-deep with congratulatory telegrams,[46] I found him a prey to the blackest depression.[47] Even the knowledge that he had succeeded where

[46] LSK, Ref.: Memoirs, p. 138, n. 5; LSK, 1 New Ann., p. 558, n. 3.

[47] RONALD J. WAINZ: A reading of the opening passages of any of the first three Sherlock Holmes presentations to be published — *A Study in Scarlet* (1887), *The Sign of Four* (1890), *A Scandal in Bohemia* (1891) — offers medically educated readers clues that Holmes quite possibly suffers from a depressive or other mental illness. Holmes, in *A Study in Scarlet*, admits within minutes of meeting Watson some of his own personal shortcomings: "I get in the dumps at times, and don't open my mouth for days on end. You must not think I am sulky when I do that. Just let me alone, and I'll soon be right." The opening paragraph of *The Sign of Four* observes Holmes injecting himself with cocaine and mentions his forearm "all dotted and scarred with innumerable puncture-marks," with Watson estimating he had witnessed similar behavior "three times a day for many months." In *A Scandal in Bohemia*, Holmes is described in the second paragraph of the story as "alternating from week to week between cocaine and ambition, the drowsiness of the drug, and the fierce energy of his own keen spirit."

A pronounced association between depression and substance abuse disorders has been accepted in psychiatric circles, and those readers with a modicum of insight into psychiatric illness would automatically consider that Holmes might suffer from a mental illness based upon the cocaine use described. Supporting this statement is an epidemiologic review published in the *Journal of the American Medical Association* in 1990, whose authors, in a review

of greater than twenty thousand patients, calculated that 53% of those abusing drugs other than alcohol met criteria for diagnosis of mental illness. Darrel A. Regier et al., *Comorbidity of Mental Disorders With Alcohol and Other Drug Abuse: Results From the Epidemiologic Catchment Area (ECA) Study*, 264 JAMA 2511 (Nov. 21, 1990). Similarly, a meta-analysis of depression and cocaine abuse published in 2008 found a 57% concordance between the two entities. Kenneth R. Conner et al., *Meta-analysis of depression and substance use and impairment among cocaine users*, 98 DRUG & ALCOHOL DEPENDENCE 13 (Nov. 2008).

The cyclical episodes of Holmes's behavior with alternating periods of prolonged hyperactivity and lethargy described in *The Reigate Puzzle* (1893, date of activity 1887) and other stories have led some to propose that Holmes might suffer from manic-depressive disorder, first presented in 1854 as a precise and separate illness to the French Imperial Academy of Medicine by Jules Baillarger as "la folie à double forme" or "dual insanity, " and a few weeks later to the same body by Jean Pierre Falret as "folie circulaire" or "circular insanity." P. Pichot, *Circular insanity, 150 years on*, 188 BULLETIN DE L'ACADÉMIE NATIONALE DE MÉDECINE 275 (2004). References to Holmes's tendency towards spells of prolonged expansive behavior and focus that might suggest manic behavior are not uncommon. Holmes is described by Watson in *The Musgrave Ritual* (1893, date of activity 1879) as having "outbursts of passionate energy when he performed the remarkable feats with which his name is associated" followed by "reactions of lethargy, during which he would lie about with his violin and books, hardly moving." In *The Missing Three-Quarter* (1904, date of activity 1896), Watson references Holmes's brain was "so abnormally active that it was dangerous to leave it without material upon which to work." In the same story, he states that he previously "had gradually weaned Holmes from that drug mania which had threatened once to check his remarkable career," and the 1896 date of the story is thought to herald the final year of Holmes's cocaine use.

In a letter to the editor in the *Journal of the American Medical Association*, Boris Astrachan and Sandra Boltax, while defending Holmes from David Musto's suggestion of a diagnosis of paranoia, argue that Holmes likely did meet criteria for a diagnosis of manic-depressive illness, and cite the following quotation from *A Study in Scarlet*: "Nothing could exceed his energy when the working fit was upon him; but now and again a reaction would seize him, and for days on end he would lie upon the sofa in the sitting-room, hardly uttering a word or lifting a muscle from day to night." *The Cyclical Disorder Of Sherlock Holmes*, 196 JAMA 1094 (June 20, 1966) (commenting on David F. Musto, *Sherlock Holmes and Heredity*, 196 JAMA 45 (Apr. 4, 1966)).

A major criticism of the suggestion that Holmes has bipolar or manic-depressive disorder is his prolonged cocaine use. Standard diagnostic DSM-V criteria for a manic episode specifically excludes the use of a mood altering substance that might cause elevated behavior. Baring-Gould, whose dates I have used above, calculates less than a third of the sixty Holmes's adventures can be judged to occur after 1896 (THE ANNOTATED SHERLOCK HOLMES (1967)), and one can argue persuasively that the majority of the incidents that lead others to conclude that Holmes demonstrates manic tendencies therefore occurred during the years where his cocaine use could not be excluded. As such, any declaration or finding that Holmes was bipolar is of questionable authority. (Holmes is actually only described explicitly as using cocaine in five of the stories: *The Sign of Four*, *A Scandal in Bohemia*, *The Five Orange Pips*, *The Adventure of the Yellow Face*, and *The Man with the Twisted Lip*.)

the police of three countries had failed, and that he had outmaneuvered at every point the most accomplished swindler in Europe, was insufficient to rouse him from his nervous prostration.

Three days later we were back in Baker Street together,[48] but it was

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The use of cocaine by Holmes in Victorian England would not have been illegal. Some have suggested that Conan Doyle's creation of a Holmes with a predisposition to use the drug was influenced by Sigmund Freud, whose 1884 treatise "Uber Coca" described the effects of cocaine ingestion as consisting of "exhilaration and lasting euphoria, which does not differ in any way from the normal euphoria of a healthy person." Freud suggested that cocaine was not addictive and could be useful as treatment for a variety of disorders, including those affecting digestion, anemia, and long-lasting febrile illnesses, and also as a remedy to counter morphine addiction. *Über Coca*, 2 CENTRALBLATT FÜR DIE GES THERAPIE 289 (1884). Reports at the time also suggested that cocaine might be valuable as a treatment for melancholia (D.N. Pearce, *Sherlock Holmes, Conan Doyle and cocaine*, 3 J. HIST. NEUROSCIENCES 227 (1994)), and one wonders if Holmes's use of cocaine would have been an obvious and acceptable mechanism to counter the spells of obvious depression which were assigned to him by Conan Doyle. No contemporary discussion of the possibility that Holmes meets clinically diagnostic criteria for a psychiatric or medical disorder can be complete without considering that Holmes might have an Autism Spectrum Disorder (which, by 2013 DSM-V definition, includes Asberger's Syndrome). There are many, but perhaps none have more eloquently made this argument than Dr. Lisa Sanders of the Yale School of Medicine. One notes that the number of those supporting this proposition has grown exponentially with increasing attention and exposure to the television and film portrayals of Holmes over the past few decades, in which actors seem to depict Holmes in such ways as to lead the audience to consider the presence of these types of diagnoses. Whether or not these proffered syndromes are justified by Conan Doyle's written words alone is subject to question, and sometimes frenzied debate. *See, e.g.,* Lisa Sanders, *Hidden Clues*, N.Y. TIMES, Dec. 6, 2009; Sonya Freeman Loftis, *The Autistic Detective: Sherlock Holmes and his Legacy*, 34 DISABILITY STUDIES Q. no. 4 (2014); *Lisa Sanders on Sherlock Holmes and Asperger Syndrome*, I HEAR OF SHERLOCK EVERYWHERE (Jan. 2012), www.ihearofsherlock.com.

[48] GUY MARRIOTT: For the return journey, we can consider more options. Holmes was ill, and Watson tells us it was three days before they were back in London. I suggest, therefore, that the day of Watson's arrival in Lyons was taken up by him assessing his patient's condition and making the necessary travel arrangements. Perhaps railway compartments for their sole use were engaged in each train for the return journey? In any event, they left Lyons on the morning after Watson's arrival, and I suggest they spent two nights in Paris, allowing Holmes to rest and continue the improvement in his health, before returning to London on the third day. In this way, the invalid could avoid the inconvenience of trying to sleep in a noisy, swaying railway sleeping car.

By way of example, and from a slightly later timetable than that quoted above, our travellers could leave Lyons at 9:26 a.m. and arrive in Paris at 6:14 p.m. Staying two nights in a hotel, they could leave Paris at 9:00 a.m. in the morning and arrive in Calais at 12:54 p.m. By steamer they would then arrive at Dover at 2:30 p.m., and the trains left at 3:05 p.m. – the South Eastern Railway's train arriving at Charing Cross at 4:55 p.m. and the London, Chatham and Dover company's train arriving at Victoria at 4:50 p.m., in each case a horse

evident that my friend would be much the better for a change, and the thought of a week of spring-time in the country was full of attractions to me also. My old friend Colonel Hayter,[49] who had come under my professional care in Afghanistan,[50] had now taken[51] a house near Reigate[52] in Surrey,[53] and had frequently asked me to come down to him upon a visit. On the last occasion he had remarked that if my friend would only come with me he would be glad to extend his hospitality to him also.[54] A little

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cab ride and they arrive at Baker Street once more.

It only remains to consider the hotels. There is no Hotel Dulong in Lyons, and, so far as anyone can discover, never has been, although there is a Hotel Dubost, which is very close to the main Lyons railway station. Perhaps Watson changed the name for an unknown reason, or perhaps the printer could not read Watson's handwriting? Curiously, there is a rue Dulong in Paris, although not in Lyons. For their Paris hotel, there is no mention in any Sherlock Holmes story of Holmes staying in a Paris hotel. I think that after their journey from Lyons, Watson decided that it would be best to take a hotel close to the Gare du Nord, so that when they re-commenced their journey to London, they had only a short walk to the station. In that case, the Hotel du Chemin de Fer du Nord might have suited? Opposite the Gare du Nord station, with 100 rooms, a restaurant and a reading room with "Paris and Foreign Newspapers" it would be a very suitable hotel for Holmes and Watson to rest for two nights to break their return journey.

[49] LSK, Ref.: Memoirs, p. 138, n. 6.

[50] LSK, Ref.: Memoirs, p. 138, n. 7.

[51] IRA BRAD MATETSKY: In British usage, the words "had taken a house" indicate that Colonel Hayter leased, rather than purchased, the house. Watson's statement that Hayter had "frequently" invited him to visit suggests that Hayter leased the house either for a term of years, rather than for a shorter period, or for an indefinite term. If the term of the residential lease was indefinite, then either the landlord or Hayter would be required to give six months' notice before terminating it, unless expressly agreed otherwise. The annual rent would be payable in four installments on the English "quarter days" of Lady Day (Mar. 25), Midsummer Day (June 24), Michaelmas (Sept. 29), and Christmas (Dec. 25). *See generally* J.A. Morgan, THE RIGHTS AND LIABILITIES OF LANDLORDS, TENANTS AND LODGERS (1895) (survey of Victorian landlord-tenant law).

[52] THE EDITORS: Peter Blau pointed out to us that Reigate makes an appearance in another Arthur Conan Doyle work. *See* SIR NIGEL ch. 13 (1906) ("They were passing from Guildford Castle to Reigate Castle, where they were in garrison." and "They had left Boxhill and Headley Heath upon the left, and the towers of Reigate were rising amid the trees in front of them . . . ."). *See also* LSK, Ref.: Memoirs, p. 138, n. 8; OSH: Memoirs, p. 300.

[53] Most likely Rookwood, Reigate. *See* Catherine Cooke, *Introduction: The Puzzle of "The Reigate Squires,"* page 111 above.

[54] PETER H. JACOBY: The possibility of a "third man" who collaborated with the Cunninghams *père et fils* in the events at Reigate has been suggested by a few commentators. However, none of the prior scholars fully explored the abundant evidence pointing to the inescapable conclusion that the pivotal additional participant in the crimes there was Holmes's and Watson's own host at Reigate, Colonel Hayter himself. Hayter's role was so cleverly con-

diplomacy was needed, but when Holmes understood that the establishment was a bachelor one, and that he would be allowed the fullest freedom, he fell in with my plans, and a week after our return from Lyons we were under the Colonel's roof. Hayter was a fine old soldier who had seen much of the world, and he soon found, as I had expected, that Holmes and he had much in common.[55]

On the evening of our arrival we were sitting in the Colonel's gun-room after dinner, Holmes stretched upon the sofa, while Hayter and I looked over his little armory of Eastern weapons.[56]

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cealed that it was overlooked by almost all commentators; thus, D. Martin Dakin wrote that Hayter "has the curious distinction of being the only colonel, among those who crossed Holmes's path, who was respectable." *See* A SHERLOCK HOLMES COMMENTARY 117 (1972). But, as shown below, Hayter was every bit as evil as other Canonical holders of that rank, *i.e.*, Colonels Moran ("The Adventure of the Empty House"), Barclay ("The Adventure of the Crooked Man"), Walter ("The Adventure of the Bruce-Partington Plans") and Carruthers ("The Adventure of Wisteria Lodge"). THE EDITORS: Mr. Jacoby is the author of a superb article about "The Reigate Puzzle." His note here and others that appear throughout are drawn from and expand on that work. *See* Peter H. Jacoby, *The "Third Man" Problem in Reigate*, in THE NORWEGIAN EXPLORERS OF MINNESOTA CHRISTMAS ANNUAL 2014, at 16-25.

[55] JON LELLENBERG: As a long-time denizen of the Pentagon, it's interesting to me to see how Dr. Watson's military experience is reenergized by time spent with an old comrade from the Second Afghan War. The account of this case, he says, will illuminate "a fresh weapon among the many with which [Sherlock Holmes] waged his lifelong battle against crime." He inspects his friend's collection of weapons from his and Watson's campaigns ("Hayter and I looked over his little armory of Eastern weapons"). At one point he has Holmes saying that "the inspector and I have made quite a little reconnaissance together," a term more likely to come from a former army officer like Watson than from a consulting detective in London. Watson also notes that the Cunninghams' house bears the date of the battle of Malplaquet upon the lintel — that's to say, the lintel bore the date 1709, which translated automatically in Watson's mind to a battle in France of the War of the Spanish Succession. These terms, not to be found in every Sherlock Holmes story narrated by Watson, are a minor matter, but a reminder to readers that Watson was not simply a doctor, but a military veteran who'd seen service and combat before ever meeting Mr. Sherlock Holmes at the Criterion bar in London.

[56] JOYCE MALCOLM: During the heyday of Holmes and Watson almost the only group in England barred from carrying firearms were the professional police or "bobbies." Possession of personal firearms was considered an individual right and virtually unregulated. Indeed, Holmes frequently asked Watson to bring his service revolver along on dangerous assignments and armed subjects were often called upon by the police as they chased fleeing suspects. Colonel Hayter's gun-room, with its "little armory of Eastern weapons," would have contained examples of the colorful and distinctive guns produced in India and Afghanistan at the time. The colonel had come into contact with these firearms while in service in Afghanistan. Such a collection would not have been unusual. However, the Indian Arms Act

"By-the-way," said he, suddenly, "I think I'll take one of these pistols up stairs with me, in case we have an alarm."[57]

"An alarm?" said I.

"Yes; we've had a scare in this part lately. Old Acton, who is one of our county magnates, had his house broken into last Monday.[58] No great damage done, but the fellows are still at large."

"No clew?" asked Holmes, cocking his eye at the Colonel[.]

"None as yet. But the affair is a petty one — one of our little country crimes — which must seem too small for your attention, Mr. Holmes, after this great international affair."[59]

Holmes waved away the compliment, though his smile showed that it had pleased him.

"Was there any feature of interest?"

"I fancy not. The thieves ransacked the library and got very little for their pains. The whole place was turned upside down, drawers burst open and presses[60] ransacked, with the result that an odd[61] volume of Pope's[62] Homer,[63] two plated candlesticks, an ivory letter-weight, a small

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of 1878 (Parliament's response to the Indian Rebellion of 1857), regulating the manufacture, sale, and carriage of these weapons had banned their possession by nearly all Indian people. These restrictions surely made the guns more affordable for Colonel Hayter and fellow British collectors. In 1918, Ghandi labelled the Indian Arms Act "among the many misdeeds of the British rule in India," predicting that "history will look upon the Act depriving a whole nation of arms as the blackest." Today, ironically, it is the British people who are deprived of firearms by their government, and service veterans like Watson and Colonel Hayter face prison terms if they keep, let alone carry, a service revolver. *See also* LSK, Ref.: Memoirs, p. 139, n. 9; LSK, 1 New Ann., p. 559, n. 4.

[57] PETER H. JACOBY: As Tom Stix Sr. has noted, Hayter's actions were those of "a strange host." *See* Thomas L. Stix, *The Reigate Puzzler*, 13 BAKER STREET J. 93 (June 1963). If Hayter actually had been concerned about burglars, why had he not armed himself in the week since the Acton break-in, and why did he not offer similar protection to Holmes and Watson? Hayter's conduct smacks strongly of a ploy to present the details of the then-week-old Acton burglary to Holmes, despite the fact that Hayter knew he was on a medical rest holiday. *See also* LSK, Ref.: Memoirs, p. 139, n. 10.

[58] Most likely Great Doods, Reigate. *See* Catherine Cooke, *Introduction: The Puzzle of "The Reigate Squires,"* page 111 above.

[59] PETER H. JACOBY: If the Acton burglary was such a petty affair, how did Hayter display such encyclopedic recall of the spoils fully a week after the break-in? This action was highly suspicious on his part.

[60] LSK, Ref.: Memoirs, p. 139, n. 11; LSK, 1 New Ann., p. 559, n. 5.

[61] LSK, Ref.: Memoirs, p. 139, n. 12.

[62] LSK, Ref.: Memoirs, p. 139, n. 13.

oak barometer, and a ball of twine are all that have vanished."

"What an extraordinary assortment!" I exclaimed[.][64]

"Oh, the fellows evidently grabbed hold of everything they could get."

Holmes grunted from the sofa. "The county police ought to make something of that," said he. "Why, it is surely obvious that —"

But I held up a warning finger. "You are here for a rest, my dear fellow. For Heaven's sake don't get started on a new problem when your nerves are all in shreds."

Holmes shrugged his shoulders with a glance of comic resignation towards the Colonel, and the talk drifted away into less dangerous channels.

It was destined, however, that all my professional caution should be wasted, for next morning the problem obtruded itself upon us in such a way that it was impossible to ignore it, and our country visit took a turn which neither of us could have anticipated. We were at breakfast, when the Colonel's butler[65] rushed in, with all his propriety shaken out of him.

"Have you heard the news, sir?" he gasped[.] "At the Cunningham's, sir?"[66]

"Burglary?" cried the Colonel, with his coffee-cup in midair.

"Murder!"[67]

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[63] LSK, 1 New Ann., p. 559, n. 6; OSH: Memoirs, p. 300.

[64] PETER H. JACOBY: Is it likely that someone not involved as a direct participant in the allegedly unimportant crime would have a command of so many minutiae about the spoils as Hayter did? Moreover, the absence of any monetary value to the loot seems to absolve the butler of such a direct role, because he would surely have taken away items of greater value. Indeed, the very oddity of the assortment suggests that the items were deliberately selected by Hayter to pique the curiosity of Holmes, whom he knew would be visiting Reigate imminently.

[65] JOSHUA CUMBY: Colonel Hayter's butler is one of 11 anonymous butlers to appear in the Holmes canon. Eight other butlers are named in three of the novels and five of the short stories. A name is no indication of significance, however; butlers are often named but not noteworthy. *See* "The Sign of the Four" (Lal Rao); "The Dying Detective" (Staples); "The Blanched Soldier" (Ralph); "Shoscombe Old Place" (Stephens). But the remaining four named butlers are noteworthy, indeed. Both John Barrymore, the butler of Baskerville Hall, and his wife the housekeeper are important players in "The Hound of the Baskervilles," as is Ames, the butler of the Manor House in "The Valley of Fear," and Brunton, the butler of Hurlstone in "The Musgrave Ritual." And like one-time coachman Reuben Hayes in "The Priory School," see note 69, below, Mr. Hilton Soames's servant Bannister, a former butler, is a critical character in "The Three Students" (because he was formerly a butler, in fact). In none of the Holmes stories did the butler "do it." *But see* "The Musgrave Ritual."

[66] Most likely Reigate Lodge, Reigate. *See* Catherine Cooke, *Introduction: The Puzzle of "The Reigate Squires,"* page 111 above.

[67] PETER H. JACOBY: How had the butler learned so speedily of events at the Cunninghams' only hours before? Surely the squire and his son would not have spoken with anyone of

The Colonel whistled. "By Jove!" said he. "Who's killed, then? The J.P.[68] or his son?"

"Neither, sir. It was William the coachman.[69] Shot through the heart, sir, and never spoke again."

"Who shot him, then?"

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such low station, and the police did not arrive at Hayter's home until after the butler had delivered his account. Does this point to some deeper involvement of this servant in the crime, either as a principal or a co-conspirator? Is this a case where truly "the butler did it," as James Chase speculated in *Did Holmes Get It Wrong in "The Reigate Squires"*? *See* kspot.org/holmes/reigate.htm.

[68] LSK, Ref.: Memoirs, p. 140, n. 14; OSH: Memoirs, p. 301.

[69] JOSHUA CUMBY: Given their setting in a time when most folks did most of their traveling by foot, rail, or horse-drawn conveyance, it is not surprising that a "coachman" appears in two of the four Holmes novels (*The Sign of the Four* and *The Hound of the Baskervilles*) and 12 of the 56 short stories. But what is a "coachman"? A private driver, like William Kirwan; a driver-for-hire, like a "cabby"; or both? In "A Scandal in Bohemia," Miss Irene Adler's "coachman," a member of her household named John, hastily drives her to St. Monica's for her wedding to Mr. Godfrey Norton. Holmes follows, but he is driven by a man he hails in the street and that he calls both a "driver" and a "cabby." But in "The Final Problem," a disguised Mycroft Holmes spirits Dr. Watson from Lowther Arcade to Victoria Station in a brougham to meet his brother Sherlock, who is also traveling incognito to elude Professor Moriarty. When Sherlock asks Watson, "Did you recognize your coachman?", he is not suggesting that Mycroft is his servant, particularly given his statement that Mycroft's confederacy provides him an "advantage to get about in such a case without taking a mercenary into [his] confidence." So, we can deduce that "coachman" is a flexible term. And that flexibility extends to the kinds of coaches they man. *See, e.g.*, "The Sign of the Four" (a four-wheeler); "A Scandal in Bohemia" (a landau); "The Illustrious Client" (a brougham); "Shoscombe Old Place" (a carriage).

In most instances, "coachmen" are either purely functional or simply acknowledged to exist. *See, e.g.*, "The Silver Blaze" ("Drive on, coachman!"); "The Greek Interpreter" ("The poor girl, however, was herself a prisoner, for there was no one about the house except the man who acted as coachman, and his wife, both of whom were tools of the conspirators."); "The Illustrious Client" ("A brougham was waiting for him. He sprang in, gave a hurried order to the cockaded coachman, and drove swiftly away."); "Shoscombe Old Place" ("'Drive on! Drive on!' shrieked a harsh voice. The coachman lashed the horses, and we were left standing in the roadway.").

William is the only "coachman" to meet his end in a Holmes story and one of the few Conan Doyle bothered to name: as mentioned above, in "A Scandal in Bohemia," the coachman's name is John, and in "The Creeping Man," the coachman who sleeps over the stables at the inn called Chequers in the university town of Camford is named Macphail. And apart from William, the only other prominent canonical "coachmen" are the unnamed coachman in "The Crooked Man," a key witness and player in that drama, and Reuben Hayes, one-time head coachman to the Duke of Holdernesse and an important character in "The Priory School."

Reigate Lodge, the likely home of Alec Cunningham and his father. *See* Catherine Cooke, *The Puzzle of "The Reigate Squires,"* page 111 above. Photo copyright and courtesy of the Surrey History Centre.

"The burglar, sir. He was off like a shot and got clean away. He'd just broke in at the pantry window, when William came on him, and met his end in saving his master's property."[70]

"What time?"

"It was last night, sir, somewhere about twelve."

"Ah, then we'll step over afterwards," said the Colonel, coolly settling down to his breakfast again.[71] "It's a baddish business," he added, when the butler had gone. "He's our leading man[72] about here, is old Cunningham, and a very decent fellow too. He'll be cut up over this, for the man

[70] PETER H. JACOBY: Clearly, the butler was not an eyewitness to Kirwan's murder, because otherwise he would not have misidentified the location where the body was found as the pantry window, rather than at the rear door. And Holmes never questioned this glaring discrepancy in the butler's account.

[71] PETER H. JACOBY: Hayter's cool demeanor over breakfast following the butler's narrative of burglary and murder stands in notable contrast to his alleged — and undoubtedly feigned — anxiety over the mere possibility of a break-in that he expressed to Holmes and Watson only the previous evening.

[72] LSK, Ref.: Memoirs, p. 140, n. 15; LSK, 1 New Ann., p. 561, n. 7.

has been in his service for years, and was a good servant. It's evidently the same villains who broke into Acton's."[73]

"And stole that very singular collection," said Holmes, thoughtfully.

"Precisely."

"Hum! It may prove the simplest matter in the world, but all the same at first glance this is just a little curious, is it not? A gang of burglars acting in the country might be expected to vary the scene of their operations, and not to crack two cribs[74] in the same district within a few days. When you spoke last night of taking precautions I remember that it passed through my mind that this was probably the last parish in England to which the thief or thieves would be likely to turn their attention — which shows that I have still much to learn."[75]

"I fancy it's some local practitioner," said the Colonel. "In that case, of course, Acton's and Cunningham's are just the places he would go for, since they are far the largest about here."

"And richest?"

"Well, they ought to be, but they've had a lawsuit for some years, which has sucked the blood out of both of them, I fancy. Old Acton has

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[73] PETER H. JACOBY: Hayter's use of the plural, when the butler had identified only a single burglar, is notable. Hayter was aware that both Cunninghams were complicit in the murder, but his telling slip of the tongue was overlooked by Holmes.

[74] OSH: Memoirs, p. 301.

[75] IRA BRAD MATETSKY: Holmes appears to use the word "parish" here as an informal reference to the Reigate area, rather than in a more precisely defined way. In 1887 (the year of the story), as in 1893 (the year of publication), "parish" as used in English government had two distinct legal senses, civil and ecclesiastical. Historically, parish boundaries were originally derived from manorial ones. By the seventeenth century, parish authorities had some governmental responsibilities including authority to levy a "rate" (tax) for the support of the poor, but during the nineteenth century, some of their powers were diverted to other governing units. The Poor Law Amendment of 1866 (29 & 30 Vict., c. 113, § 18) designated all geographical areas that levied a separate poor-rate as civil parishes, no longer coextensive with Church of England parishes, now designated as "ecclesiastical parishes." As of 1893, there were 13,775 ecclesiastical parishes and nearly 15,000 civil parishes in the 62 counties of England and Wales. Soon after the events of "The Reigate Puzzle," the system of parishes was rationalized by the Local Government Act 1894 (56 & 57 Vict., c. 73), which realigned parish boundaries so they did not cross district lines, established elected parish councils in rural areas, and granted the parishes additional responsibilities. Today, the local governmental district of Reigate and Bansted, into which the Reigate Municipal Borough was merged in 1974, is designated as an unparished area, with local government responsibilities handled at the district and county levels. *See generally* en.wikipedia.org/wiki/Civil_parishes_in_England and en.wikipedia.org/wiki/Local_Government_Act_1894.

some claim on half Cunningham's estate, and the lawyers have been at it with both hands."[76]

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[76] HARTLEY R. NATHAN: We know that Doyle used names of acquaintances and events he might have seen in some newspaper story or book he might have read. The names "Acton" and "Cunningham" warrant some comment. While we are not told father Cunningham's first name, the son's name is "Alec." Donald Redmond refers to a "Sir Alexander Cunningham" who died in 1893. However, he discounts him as a source for the name as there was no immediate connection with Doyle.

Redmond identified the "Cunninghams" as graduates of Edinburgh University and possible acquaintances of Doyle. He points out in fact they achieved medical degrees in 1878 and 1886. This makes it likely Doyle would have known them or about them. Doyle entered Edinburgh University Medical School in 1876 and graduated in 1881. SHERLOCK HOLMES, A STUDY IN SOURCES (1982). Another possibility is one William Cunningham (1849-1919), Scottish economist born in Edinburgh and educated at Edinburgh University and Cambridge. He was the author of the *Pioneering Growth of English Industry and Commerce* (1882). There does not appear to be any reference to him in any biographies of Doyle.

As for "Acton," Redmond says it was from Lord Acton (1832-1902). He was an English Catholic historian and politician and a contemporary of Doyle. He is best remembered today for his quotation: "Power tends to corrupt and absolute power corrupts absolutely." But I have another thought in this regard. In *A Study in Scarlet*, Watson says of Holmes: "He appears to know every detail of every horror perpetrated in the century."

There is one such horror called "*The Acton Atrocity, 1880."* Twenty-nine-year-old George Pavey was sentenced to death by Mr. Justice Hawkins at the Old Bailey for the murder of 10-year-old Ada Shepherd in Acton, a London suburb. The young girl's father had left her alone in the house with Pavey while he went out. When he returned he found the child dead with her throat cut. She had also been violently raped. Pavey disappeared but was later arrested in Hendon, also a London suburb, in a workhouse, wearing bloodstained clothing. His plea of not guilty was unsuccessful and he was hanged at Newgate in December 1880. At the trial, the forensic specialist, Dr. Thomas Bond, testified for the prosecution that the bloodstains on the accused's clothing came from "mammal blood." Compare this to Sherlock Holmes in the lab at St. Barts referring to the fact that there was no reliable test for human versus other mammalian blood even as of 1887 when the story was set or even 1893 when the story was published in *The Strand*. *See* Hartley R. Nathan, WHO WAS JACK THE RIPPER? 27 & 75 (2011). Doyle could relate to the evidence in the Pavey case. The case could well have been the inspiration for Doyle's use of "Acton" as a name.

As to the *Acton v. Cunningham Estates* case itself, we hear no more about the substance of the case until Holmes accuses the Cunninghams of staging a break-in at Acton's. Acton says he has the "clearest claim" upon half their present estate. The Cunninghams attempted to recover a single paper "which would have crippled our case." It seems most likely to be a land claim.

In 1887 such a lawsuit would have been conducted in the Chancery Division of the High Court of Justice. Judicature Act 1873 (36 and 37 Vict c. 66) § 1.1. (A diligent review of British cases from 1800 to 1892 does not disclose any such case. Incidentally, a case in Chancery still took a long time to get to Court notwithstanding the reforms brought about by the Act. In 1887 there were only five trial judges in the Chancery Division in the whole country.)

What case, if any, was Doyle likely to be thinking about when he describes the action? One's first instinct is to consider *Jarndyce v. Jarndyce* in Dickens' *Bleak House*, his fictional case in Chancery. *Bleak House* was written in 1852-3 and set in 1827. William S. Holdsworth, CHARLES DICKENS AS A LEGAL HISTORIAN (1928). *Jarndyce v. Jarndyce* concerns the fate of a large inheritance. The case had dragged on for many generations, so that, when it is resolved late in the narrative, legal costs have devoured the whole estate. Dickens used it to attack the Chancery Court system as being near totally worthless. Here is how it has been described:

> Chancery was outdated, ramshackle, complacent and parasitical in the number of legal functionaries of all levels living upon the delays, obscurities and costs of litigation; by a slow and cruel process it destroyed the souls and bodies of those who became involved (often through no more active intent than by being named as beneficiaries in contested wills) in its machinery.

Angus Wilson, THE WORLD OF CHARLES DICKENS 231 (1970). *Jarndyce v. Jarndyce* has been referred to in at least 25 Canadian legal cases and in several Australian legal cases. *See* Leslie Katz, *Bleak House in Australian Reasons for Judgment* (Oct. 3, 2015), papers.ssrn.com/sol3/papers.cfm?abstract_id=1337347. One such case was that of *Tyler v. Custom Credit Corp. Ltd. and Ors.* 2000 QCA 178; *see also DPP (SA) v. B*. (1998) 194 CLR 566, and other cases cited by Katz, *ibid.* Atkinson J. stated in the decision:

> Unnecessary delay in proceedings has a tendency to bring the legal system into disrepute and to decrease the chance of there being a fair and just result. The futility of self-perpetuating nature of some litigation was viciously satirised by Charles Dickens in *Bleak House*.

There is no doubt Doyle had read Dickens, especially *Bleak House*. *See* R. Miller, THE ADVENTURES OF ARTHUR CONAN DOYLE 108-9 (2009). It is accepted by most, if not all, commentators that Doyle was influenced by Dickens' Inspector Bucket, Poe's Dupin, Gaboriau (Lecoq), Collins (Sergeant Cuff) and others. His letters are replete with references to Dickens. *See* Jon Lellenberg, Daniel Stashower and Charles Foley, ARTHUR CONAN DOYLE: A LIFE IN LETTERS 95, 101, 143, etc. (2007).

So a compelling argument can be made that *Jarndyce v. Jarndyce* was the role model for *Acton v. Cunningham's Estate*.

Other writers have suggested cases that could be considered as possible models for *Acton v. Cunningham's Estate*: William Jennens died a fabulously wealthy man in England in 1798. His death led to the litigation which in turn has been cited as the model for *Jarndyce v. Jarndyce*. *See* Patnel Polden, *Stranger than Fiction? The Jennens Inheritance in Fact and Fiction*, 32 COMMON LAW WORLD REV. 211 (2003). He was also known as "The Miser of Acton." *Ibid.* His obituary is interesting, especially the reference to "Acton Place." It reads:

> Died, 19 June, in his 97th year, Wm. Jennens, of Acton Place, near Long Melford, in the county of Suffolk, and of Grosvenor Square, Esq. He was baptized in September 1701, and was the son of Robert Jennens, Esq., Aide-de-Camp to great Duke of Marborough (by Anne, his wife, and daughter of Carew Guidott, Esq., lineally descended from Sir Anthony Guidott, Knight, a noble Florentine, employed on sundry embassies by King Edward VI), grandson of Humphrey Jennens of Edington Hall, in the county of Warwick, Esq., Lord of the Manor of Nether Whitacre in that county in 1680 and an eminent ironmaster of Birmingham. King William III was godfather to late Mr. Jennens.

"If it's a local villain there should not be much difficulty in running him down," said Holmes, with a yawn. "All right, Watson, I don't intend to meddle."

"Inspector Forrester, sir," said the butler, throwing open the door.

The official, a smart, keen-faced young fellow, stepped into the room. "Good-morning, Colonel," said he. "I hope I don't intrude, but we hear that Mr. Holmes of Baker Street is here."[77]

The Colonel waved his hand towards my friend, and the Inspector bowed.

"We thought that perhaps you would care to step across, Mr. Holmes."

"The fates[78] are against you, Watson," said he, laughing. "We were chatting about the matter when you came in, Inspector. Perhaps you can let us have a few details." As he leaned back in his chair in the familiar attitude I knew that the case was hopeless.

"We had no clew in the Acton affair. But here we have plenty to go on, and there's no doubt it is the same party in each case. The man was seen."

"Ah!"

"Yes, sir. But he was off like a deer, after the shot that killed poor William Kirwan was fired. Mr. Cunningham saw him from the bedroom window, and Mr. Alec Cunningham saw him from the back passage.[79] It was quarter to twelve when the alarm broke out. Mr. Cunningham had just got into bed, and Mr. Alec was smoking a pipe in his dressing-gown[.] They both heard William the coachman calling for help, and Mr. Alec he ran down to see what was the matter. The back door was open, and as he came to the foot of the stairs he saw two men wrestling together outside.

See en.wikipedia.org/wiki/William_Jennens (referring to Jennens being known as "The Miser of Acton"). There is yet another case, namely *Willis v. Earl Howe*, which has also been referred to as a model for *Acton . Cunningham Estates*. 43 *The Law Times Reports* 375 (Ch.) (1881); *see also* Katz, *supra* (referring to Atkinson J.'s judgment in the *Tyler* case, where she mentions this in a footnote). It was a spinoff of the Jennen case. I can see no reason why Doyle would have known about either of these cases.

Whatever was the real model for the case of *Acton v. Cunningham Estates*, the oft-used phrase "this case is another *Jarndyce v. Jarndyce*" will be hard to displace.

[77] PETER H. JACOBY: Holmes never inquired how Forrester became aware of his presence in Reigate, although he and Watson had arrived only the previous day. Watson, who wanted Holmes to have complete rest, would scarcely have left word of their whereabouts. But Hayter, anticipating the Kirwan murder, could easily have been the source of Forrester's information.

[78] LSK, Ref.: Memoirs, p. 141, n. 16.

[79] OSH: Memoirs, p. 301.

One of them fired a shot, the other dropped, and the murderer rushed across the garden and over the hedge. Mr. Cunningham, looking out of his bedroom window, saw the fellow as he gained the road, but lost sight of him at once, Mr. Alec stopped to see if he could help the dying man, and so the villain got clean away. Beyond the fact that he was a middle-sized man and dressed in some dark stuff we have no personal clew, but we are making energetic inquiries, and if he is a stranger we shall soon find him out."

"What was this William doing there? Did he say anything before he died?"

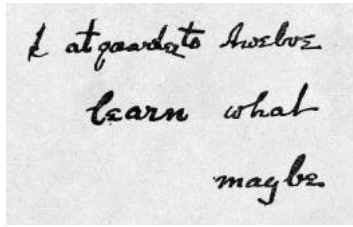
"Not a word. He lives at the lodge with his mother, and as he was a very faithful fellow, we imagine that he walked up to the house with the intention of seeing that all was right there. Of course this Acton business has put every one on his guard. The robber must have just burst open the door — the lock has been forced — then William came upon him."

"Did William say anything to his mother before going out?"

"She is very old and deaf, and we can get no information from her. The shock has made her half-witted, but I understand that she was never very bright. There is one very important circumstance, however. Look at this!"

He took a small piece of torn paper from a note book and spread it out upon his knee. "This was found between the finger and thumb of the dead man. It appears to be a fragment torn from a larger sheet. You will observe that the hour mentioned upon it is the very time at which the poor fellow met his fate. You see that his murderer might have torn the rest of the sheet from him, or he might have taken this fragment from the murderer. It reads almost as though it were an appointment."

Holmes took up the scrap of paper, a fac-simile of which is here reproduced:



"Presuming that it is an appointment," continued the Inspector, "it is of course a conceivable theory that this William Kirwan — though he had

the reputation of being an honest man, may have been in league with the thief. He may have met him there, may even have helped him to break in the door, and then they may have fallen out between themselves."

"This writing is of extraordinary interest," said Holmes, who had been examining it with intense concentration. "These are much deeper waters than I had thought." He sank his head upon his hands, while the Inspector smiled at the effect which his case had had upon the famous London specialist.

"Your last remark," said Holmes, presently, "as to the possibility of there being an understanding between the burglar and the servant, and this being a note of appointment from one to the other, is an ingenious and not entirely impossible supposition. But this writing opens up —" He sank his head into his hands again, and remained for some minutes in the deepest thought. When he raised his face again I was surprised to see that his cheek was tinged with color, and his eyes as bright as before his illness. He sprang to his feet with all his old energy.

"I'll tell you what," said he, "I should like to have a quiet little glance into the details of this case. There is something in it which fascinates me extremely. If you will permit me, Colonel, I will leave my friend Watson and you, and I will step round with the Inspector to test the truth of one or two little fancies of mine. I will be with you again in half an hour."

An hour and a half had elapsed before the Inspector returned alone.

"Mr. Holmes is walking up and down in the field outside," said he. "He wants us all four to go up to the house together."

"To Mr. Cunningham's?"

"Yes, sir."

"What for?"

The Inspector shrugged his shoulders. "I don't quite know, air. Between ourselves I think Mr. Holmes has not quite got over his illness yet. He's been behaving very queerly, and he is very much excited."

"I don't think you need alarm yourself," said I. "I have usually found that there was method in his madness."[80]

"Some folk might say there was madness in his method," muttered the Inspector. "But he's all on fire to start, Colonel, so we had best go out, if you are ready."

We found Holmes pacing up and down in the field, his chin sunk up-

[80] LSK, 1 New Ann., p. 565, n. 8; OSH: Memoirs, p. 301.

on his breast, and his hands thrust into his trousers pockets.

"The matter grows in interest," said he. "Watson, your country trip has been a distinct success. I have had a charming morning."

"You have been up to the scene of the crime, I understand," said the Colonel.

"Yes. The Inspector and I have made quite a little reconnoissance [*sic*] together."

"Any success?"

"Well, we have seen some very interesting things. I'll tell you what we did as we walk. First of all we saw the body of this unfortunate man. He certainly died from a revolver wound, as reported."

"Had you doubted it, then?"

"Oh, it is as well to test everything. Our inspection was not wasted. We then had an interview with Mr. Cunningham and his son, who were able to point out the exact spot where the murderer had broken through the garden hedge in his flight. That was of great interest."

"Naturally."

"Then we had a look at this poor fellow's mother. We could get no information from her, however, as she is very old and feeble."

"And what is the result of your investigations?"

"The conviction that the crime is a very peculiar one. Perhaps our visit now may do something to make it less obscure. I think that we are both agreed, Inspector, that the fragment of paper in the dead man's hand, bearing, as it does, the very hour of his death written upon it, is of extreme importance."

"It should give a clew, Mr. Holmes."

"It *does* give a clew. Whoever wrote that note was the man who brought William Kirwan out of his bed at that hour. But where is the rest of that sheet of paper?"

"I examined the ground carefully in the hope of finding it," said the Inspector.

"It was torn out of the dead man's hand. Why was some one so anxious to get possession of it? Because it incriminated him. And what would he do with it? Thrust it into his pocket most likely, never noticing that a corner of it had been left in the grip of the corpse. If we could get the rest of that sheet it is obvious that we should have gone a long way towards solving the mystery."

"Yes; but how can we get at the criminal's pocket before we catch the criminal?"

"Well, well, it was worth thinking over. Then there is another obvious point. The note was sent to William. The man who wrote it could not have taken it; otherwise, of course, he might have delivered his own message by word of mouth. Who brought the note, then? Or did it come through the post?"

"I have made inquiries," said the Inspector. "William received a letter by the afternoon post yesterday. The envelope was destroyed by him."[81]

"Excellent!" cried Holmes, clapping the Inspector on the back. "You've seen the postman. It is a pleasure to work with you. Well, here is the lodge, and if you will come up, Colonel, I will show you the scene of the crime."

We passed the pretty cottage where the murdered man had lived, and walked up an oak-lined avenue to the fine old Queen Anne house,[82] which bears the date of Malplaquet[83] upon the lintel of the door. Holmes and the Inspector led us round it until we came to the side gate, which is separated by a stretch of garden from the hedge which lines the road. A constable was standing at the kitchen door.

"Throw the door open, officer," said Holmes.[84] "Now it was on those stairs that young Mr. Cunningham stood and saw the two men struggling just where we are.[85] Old Mr. Cunningham was at that window — the

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[81] CATTLEYA M. CONCEPCION: The letter that William received was one of 3.4 letters delivered on average to each person in the United Kingdom during the month of April 1887. THIRTY-FOURTH REPORT OF THE POSTMASTER GENERAL ON THE POST OFFICE 1 (1888). The letter was at most 18 x 9 inches, the maximum length and height allowed by the Post Office. POST OFFICE GUIDE, No. 102, at 2 (October 1881); POST OFFICE GUIDE, No. 162, at 3 (October 1896). Like letters today in the United Kingdom, the postage stamp would have been placed on the front of the envelope in the upper right corner above the address. POST OFFICE GUIDE, No. 102, at 12; POST OFFICE GUIDE, No. 162, at 9. To address a letter in 1887, the sender would have given the name of the post town as the last part of the address. So, William's letter would have ended with "Reigate" to complete the address. POST OFFICE GUIDE, No. 102, at 16, 53; POST OFFICE GUIDE, No. 162, at 41, 181. If William had not destroyed the envelope, it might have led directly to his murderer, as letters were supposed to include the sender's address in case of non-delivery. POST OFFICE GUIDE, No. 102, at 16; POST OFFICE GUIDE, No. 162, at 35.

[82] LSK, Ref.: Memoirs, p. 144, n. 17.

[83] LSK, Ref.: Memoirs, p. 144, n. 18; LSK, 1 New Ann., p. 566, n. 9; OSH: Memoirs, p. 301.

[84] LSK, Ref.: Memoirs, p. 144, n. 19.

[85] PETER H. JACOBY: "Just where we are" — at the kitchen door — and not at the pantry window, where Hayter's butler had said the break-in occurred. Holmes seems to take no notice of this discrepancy.

Great Doods, Reigate, the likely home of Mr. Acton. *See* Catherine Cooke, *The Puzzle of "The Reigate Squires,"* page 111 above. Photo courtesy of Keith Jaggers.

second on the left — and he saw the fellow get away just to the left of that bush. So did the son. They are both sure of it on account of the bush. Then Mr. Alec ran out and knelt beside the wounded man. The ground is very hard, you see, and there are no marks to guide us."

As he spoke, two men came down the garden path from round the angle of the house. The one was an elderly man with a strong, deep-lined, heavy-eyed face, the other a dashing young fellow whose bright smiling expression and showy dress were in strange contrast with the business which had brought us there.

"Still at it, then?" said he to Holmes. "I thought you Londoners were never at fault. You don't seem to be so very quick, after all."

"Ah, you must give us a little time," said Holmes, good-humoredly.

"You'll want it," said young Alec Cunningham. "Why, I don't see that we have any clew at all."

"There's only one," answered the Inspector. "We thought that if we could only find — Good heavens, Mr. Holmes, what is the matter?"

My poor friend's face had suddenly assumed the most dreadful expression. His eyes rolled upwards, his features writhed in agony, and with

a suppressed groan he dropped on his face upon the ground.[86] Horrified at the suddenness and severity of the attack, we carried him into the kitchen, where he lay back in a large chair and breathed heavily for some minutes. Finally, with a shamefaced apology for his weakness, he rose once more.

"Watson would tell you that I have only just recovered from a severe illness," he explained. "I am liable to these sudden nervous attacks."

"Shall I send you home in my trap?" asked old Cunningham.

"Well, since I am here, there is one point on which I should like to feel sure. We can very easily verify it."

"What is it?"

"Well, it seems to me that it is just possible that the arrival of this poor fellow, William, was not before but after the entrance of the burglar

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[86] RONALD J. WAINZ: For that legion whose goal is to assign Holmes a medical diagnosis, this spell, as described by Doyle, is suggestive of the symptoms of cataplexy, which is associated with the diagnosis of narcolepsy. Cataplexy is defined as the sudden uncontrollable onset of skeletal muscle paralysis or weakness during wakefulness that usually follows a strong emotional stimulus, such as elation, surprise, or anger. Yves Dauvilliers et al., *Cataplexy—clinical aspects, pathophysiology and management strategy*, 10 NATURE REVIEWS NEUROLOGY 386 (July 2014). The behavior of cataplexy is involuntary to the afflicted. Narcolepsy is a disorder of excessive sleepiness. Common findings in narcolepsy are sleep paralysis (the feeling that one is awake but paralyzed, which usually occurs at either sleep onset or sleep awakening), and hypnogognic hallucinations (dreamlike and often vivid hallucinations that occur at the boundary between wake and sleep, which can be visual or auditory or olfactory in nature). The primary symptom of narcolepsy is excessive daytime sleepiness, and it is fairly common, affecting one in two thousand of the population. Christian R. Burgess & Thomas E. Scammell, *Narcolepsy: Neural Mechanisms of Sleepiness and Cataplexy*, 32 J. NEUROSCIENCE 12305 (Sept. 5, 2012).

Certain genetic markers (HLA DQB1*0602) and low levels in spinal fluid of the neurochemical hypocretin have been linked to the diagnosis of narcolepsy, which is confirmed with a diagnostic overnight sleep study (polysomnogram) followed by a next-day series of five napping episodes with measurement of time to sleep onset (multiple sleep latency test). Patients diagnosed with narcolepsy generally have normal overnight sleep, and their nap studies demonstrate quick onset of sleep (i.e., they are excessively sleepy) in association with rapid eye movement (REM) in two of the five twenty minute naps (also known as sleep onset REM). These findings of REM sleep (the stage of sleep in which dreaming occurs) during these naps are consistent with the disrupted boundaries between sleep and wakefulness and dreaming that are thematic in the presence of narcolepsy. Gbolagade Sunmaila Akintomide & Hugh Rickards, *Narcolepsy: a review*, 7 NEUROPSYCHIATRIC DISEASE & TREATMENT 507 (2011). Patients presenting for evaluation of sleepiness often undergo drug testing during their sleep studies to exclude the possibility that use of sedating or stimulant medication is influencing the outcome of the diagnostic evaluation of hypersomnolence.

into the house. You appear to take it for granted that although the door was forced, the robber never got in."

"I fancy that is quite obvious," said Mr. Cunningham, gravely. "Why, my son Alec had not gone to bed, and he would certainly have heard any one moving about."

"Where was he sitting?"

"I was smoking in my dressing-room."

"Which window is that?"

"The last on the left, next my father's."

"Both of your lamps were lit, of course?"

"Undoubtedly."

"There are some very singular points here," said Holmes, smiling. "Is it not extraordinary that a burglar — and a burglar who had had some previous experience — should deliberately break into a house at a time when he could see from the lights that two of the family were still afoot?"

"He must have been a cool hand."

"Well, of course, if the case were not an odd one we should not have been driven to ask you for an explanation," said young Mr. Alec. "But as to your idea that the man had robbed the house before William tackled him, I think it a most absurd notion. Wouldn't we have found the place disarranged and missed the things which he had taken?"

"It depends on what the things were," said Holmes. "You must remember that we are dealing with a burglar who is a very peculiar fellow, and who appears to work on lines of his own. Look, for example, at the queer lot of things which he took from Acton's — what was it? — a ball of string, a letter-weight, and I don't know what other odds and ends."

"Well, we are quite in your hands, Mr. Holmes," said old Cunningham. "Anything which you or the Inspector may suggest will most certainly be done."

"In the first place," said Holmes. "I should like you to offer a reward — coming from yourself; for the officials may take a little time before they would agree upon the sum, and these things cannot be done too promptly. I have jotted down the form here, if you would not mind signing it. Fifty pound was quite enough, I thought."

"I would willingly give five hundred," said the J.P., taking the slip of paper and the pencil which Holmes handed to him. "This is not quite correct, however," he added, glancing over the document.

"I wrote it rather hurriedly."

"You see you begin: 'Whereas, at about a quarter to one on Tuesday morning an attempt was made,' and so on. It was at a quarter to twelve as a matter of fact."

I was pained at the mistake, for I knew how keenly Holmes would feel any slip of the kind. It was his speciality to be accurate as to fact, but his recent illness had shaken him, and this one little incident was enough to show me that he was still far from being himself. He was obviously embarrassed for an instant, while the Inspector raised his eyebrows, and Alec Cunningham burst into a laugh. The old gentleman corrected the mistake, however, and handed the paper back to Holmes.

"Get it printed as soon as possible," he said. "I think your idea is an excellent one."

Holmes put the slip of paper carefully away into his pocket-book.[87]

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[87] LOU LEWIS: The hyphen appearing between the words "pocket" and "book" immediately suggests something other than a conventional pocketbook — such as those leather products typically carried in the 20th century by members of the fair sex. "From the 17th century to the late 19th century, most women had at least one pair of pockets, which served a similar purpose as a handbag does today." *A history of pockets*, www.vam.ac.uk/content/articles/a/history-of-pockets/. They were cloth bags usually worn underneath their petticoats. A doll displayed at the Victoria and Albert Museum, dressed in the clothes of the 1690s, wears two layers of undergarments beneath her petticoat — a shift then an under-petticoat. Her pocket is tied round her waist, in between her under-petticoat and petticoat. It was accessed by an opening in the petticoat. Women kept a wide variety of objects in their pockets. In the days when people often shared bedrooms and household furniture, a pocket was sometimes the only private, safe place for small personal possessions. Eventually, the "pocket" came out and was carried as a bag on the wrist. *See id*. In a blog entry by Luanne von Schneidemesser at *Separated by a Common Language*, we find an analysis of the word *purse* and its synonyms in a 1980 piece for *American Speech*. *See* separatedbyacommonlanguage.blogspot.com/2006/09/purses-and-bags.html. Here we learn that a "Pocket-book was originally a small book that could be carried in the pocket."

Men didn't wear separate pockets, as theirs were sewn into the linings of their coats, waistcoats and breeches. For a more elaborate examination of men's clothing of the period see Ruth Goodman, HOW TO BE A VICTORIAN (A DAWN-TO-DUSK GUIDE TO VICTORIAN LIFE) 29 et seq. It is significant that "By 1876 a gentlemen's coat and trousers had become straight; almost tube-like in their fit." *Id*. 47 fig. 14.

The *Oxford English Dictionary* shows that by 1685, a pocket-book was understood to be a "book for notes, memoranda, etc. intended to be carried in the pocket; a notebook; also a book-like case of leather having compartments for papers, bank-notes, bills, etc." (Note the re-emergence of the hyphen.) Clearly this was a book of a size conveniently carried in a pocket. The OED also notes "pocketbook" as *chiefly US*. Perhaps Holmes's pocket-book also contained "a trifling monograph" on some arcane subject. *The Adventure of the Dancing Men*.

"And now," said he, "it really would be a good thing that we should all go over the house together and make certain that this rather erratic burglar did not, after all, carry anything away with him."

Before entering, Holmes made an examination of the door which had been forced. It was evident that a chisel or strong knife had been thrust in and the lock forced back with it.[88] We could see the marks in the wood where it had been pushed in.

"You don't use bars, then?" he asked.

"We have never found it necessary."

"You don't keep a dog?"

"Yes, but he is chained on the other side of the house."[89]

In any event it was certainly a far superior place for keeping notes than scribbling on one's cuff. *The Hound of the Baskervilles*.

[88] JOSHUA CUMBY: By 1887, "ingenious tools to pick locks, loosen fastenings, open shutters and doors, and rob safes" were available to burglars, including various chisels. *See, e.g., On Burglars' Tools*, THE MANUFACTURER AND BUILDER, May 1874, at 108; *see also id., A "Kit" of Burglars' Tools* figs. 4, 5. The "Kit" is reproduced in its entirety on page 150 below. *See also* LSK, 1 New Ann., p. 571.

[89] CLIFFORD S. GOLDFARB: Holmes is thinking that any dog would have barked at an intruder. If the dog had been close enough its failure to bark might have pointed to an "inside job." The "Reigate Puzzle" was published only a few months after "The Adventure of Silver Blaze" (Dec. 1892), in which the actions of a dog led him to the solution of a mystery. Conan Doyle was later to write another story in which a barking dog played a significant part, "The Adventure of Shoscombe Old Place" (Apr. 1927). In each case, a fortune is riding on the winner of a horse race, and in each case it is possible that the favourite will not be able to start the race. Each story features the mysterious death of someone connected to the favourite, and each mystery is solved because Holmes observes the unusual behavior of a dog. Moreover, in each case, Holmes utters a remarkable epigram — of the type that Monsignor Ronald Knox famously categorized as a "Sherlockismus," that is: "Any of several kinds of memorable quotations or turns of phrase attributed to, or characteristic of, Sherlock Holmes." The proposed definition was offered by Jon Lellenberg in *And Now, a Word from Arthur Conan Doyle*, www.bsiarchivalhistory.org/BSI_Archival_History/ACD_Word.html. Lellenberg attributed the term's origin to Ronald Knox: "There is a special kind of epigram, known as the Sherlockismus, of which the indefatigable Ratzegger has collected no less than one hundred and seventy-three instances." Ronald A. Knox, *Studies in the Literature of Sherlock Holmes*, in ESSAYS IN SATIRE 175 (1928). John Dickson Carr defined it as an "enigmatic clue": "Call this Sherlockismus; call it any fancy name; the fact remains that it is a clue, and a thundering good clue at that . . . . The creator of Sherlock Holmes invented it; and nobody . . . has ever done it half so well." THE LIFE OF SIR ARTHUR CONAN DOYLE 234-5 (1949). In "Silver Blaze," Inspector Gregory of Scotland Yard triggers the remarkable epigram:

> "Is there any other point to which you would wish to draw my attention?"
>
> "To the curious incident of the dog in the night-time."

"The dog did nothing in the night-time."

"That was the curious incident," remarked Sherlock Holmes.

Holmes has deduced from the dog's failure to bark that the abduction of the horse was an inside job. (According to Karen Murdoch, the second and third lines constitute an epistrophe — "repetition of the same word or group of words at the ends of successive clauses." *Figures of Speech found in the Sherlock Holmes Canon*, www.sherlocktron.com/figures.pdf (Feb. 2011).)

In "Shoscombe Old Place," Holmes twice makes comments reminiscent of the "curious incident" of the dog. The first time parallels the remark in "Silver Blaze":

"Let us consider our data. The brother no longer visits the beloved invalid sister. He gives away her favourite dog. Her *dog*, Watson! Does that suggest nothing to you?"

"Nothing but the brother's spite."

"Well, it might be so. Or — well, there is an alternative."

Not quite so memorable. But a few paragraphs later comes something a bit more worthy. The dog, a renowned Shoscombe spaniel, expecting to see its mistress, Lady Beatrice Falder, in the passing carriage, barks agitatedly, leading Holmes to the conclusion that the person in the carriage is an impostor: "Dogs don't make mistakes." (The stable dog in "Silver Blaze" is apparently a mutt or mongrel. *See* Harald Curjel, *Some Thoughts on the Case of "Silver Blaze,"* 13 SHERLOCK HOLMES J. 36 (Summer 1977).)

David Galerstein suggests that the true curious incident in "Silver Blaze" is the failure of the dog to bark in excitement and affection at the unexpected visit of its friend — concluding that the dog, too, must have been drugged. David Galerstein, *Why the Dog Did Nothing in the Nighttime*, in A SINGULAR SET OF PEOPLE (1990) (Marlene Aig and David Galerstein eds.). If he is correct, then of course Holmes's whole chain of reasoning in the case is wrong, and he solves the case more or less by chance. Curjel concluded that "the dog did not bark . . . because it was just that sort of a dog." In fact, both are wrong — later in the story Holmes corrects his earlier statement that the dog did nothing:

"Before deciding that question I had grasped the significance of the silence of the dog . . . a dog was kept in the stables, and yet, though some one had been in and had fetched out a horse, *he had not barked enough* to arouse the two lads in the loft." [emphasis mine]

Alvin E. Rodin and Jack D. Key picked up on this point in *Sherlock Holmes's Use of Imagination and the Case of the Unperturbed Dog*, 13 CANADIAN HOLMES 3 (Summer 1990). Of course, the Sherlockismus would have lost a great deal of its charm if, instead of saying "The dog did nothing in the night-time," Inspector Gregory had prompted Holmes with "The dog didn't bark particularly loudly in the night-time."

It is always tricky to try to track down the possible inspiration of one of Arthur Conan Doyle's "Sherlockismuses." While many may be original, Conan Doyle read widely and had an unusually retentive memory, so the influence on a "new" phrase of something read even decades earlier cannot be discounted. Did the curious incident spring full-blown from Conan Doyle's fertile mind? Or was the source already lodged in his memory from his lifetime of reading? In "The Curious Incident: or From Homer to Holmes," C. Russell Small points to a scene from *The Odyssey* where Odysseus, disguised and hiding in the swineherd Eumaios's hut, observes: "Eumaios, here is one of your crew come back, or maybe another friend: the dogs are out there snuffling belly down; not one has even growled." C. Russell

"When do the servants go to bed?"

"About ten."

"I understand that William was usually in bed also at that hour."

"Yes."

"It is singular that on this particular night he should have been up. Now, I should be very glad if you would have the kindness to show us over the house, Mr. Cunningham."

A stone-flagged passage, with the kitchens branching away from it, led by a wooden staircase directly to the first floor of the house. It came

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Small, "The Curious Incident: or From Homer to Holmes," *Baker Street Journal* 2, no. 4 (Oct. 1952); Homer, THE ODYSSEY, Book 16, *Father and Son*, ll. 1-12 (Robert Fitzgerald tr.).

The curious incident has had a curious afterlife in the law.

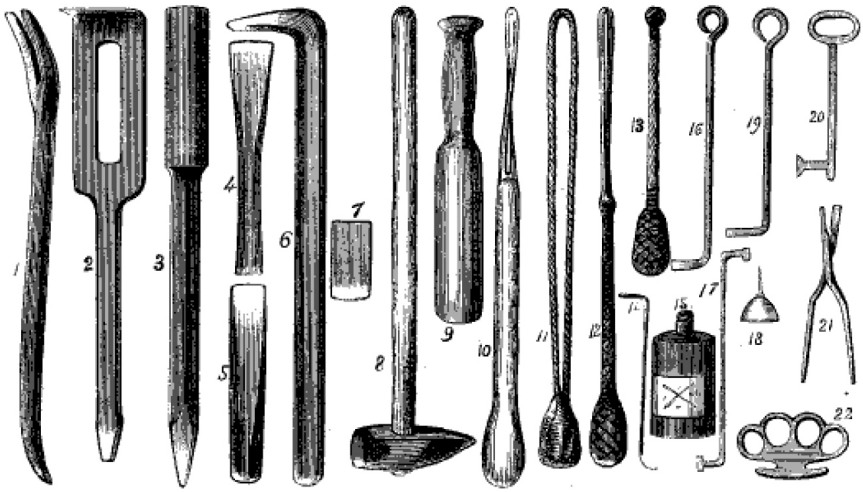
Leslie Katz, a retired Australian judge and Sherlockian scholar, discusses the use of "curious incident," with a passing reference to "dogs don't make mistakes," in "Sherlock Holmes in Australian Reasons for Judgment or Decision." In one of the cases that Katz discusses, "a person had been able to effect a night-time entry to a closed business that had a functioning burglar alarm and yet that alarm had not gone off; therefore, the person must've been someone whom the burglar alarm knew well." Obviously the burglar knew the alarm code. Leslie Katz, *Sherlock Holmes in Australian Reasons for Judgment or Decision*, May 3, 2012, papers.ssrn.com/sol3/papers.cfm?abstract_id=1337347.

Walter P. Armstrong Jr. pointed out that "the curious incident of the dog in the nighttime" has been used by two U.S. Supreme Court justices to support two directly opposing rules:

> In the opinion in *Harrison v. PPG Industries, Inc.,* 446 U.S. 587, 592 (1980), Justice Potter Stewart says: In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark. . . . Justice Stevens . . . . said in a footnote to his concurring opinion in *Jenkins v. Anderson,* 447 U.S. 231, 245 (1980): A dog's failure to bark may be probative whether or not he has been trained as a watch dog. Cf. A. Conan Doyle, Silver Blaze.

Armstrong points out that the Court at that time was evenly divided (four to four) on the applicability of this principle, and that "Justice Powell remains inscrutable." Walter P. Armstrong, *The U.S. Supreme Court and the Non-Barking Dog*, 41 Baker Street Miscellanea 39-40 (Spring 1985); *Harrison v. PPG Industries, Inc.* is actually 446 U.S. 578. Observation of this disagreement between Justice Stewart and Justice Stevens had been made earlier by Linda Greenhouse in *How the Supreme Court Reads Congress's Mind*, N.Y. TIMES, June 14, 1981, s. iv, p. 3. I have not conducted any research to determine if either side has since prevailed. Ira Brad Matetsky (personal communication October 29, 2015) found a note from Justice Powell to Justice Stewart in Stewart's Papers at Yale University in which Powell noted that he had written to Armstrong in response to his article, "I note that I have remained inscrutable."

THE EDITORS: Oy! These Sherlockian dogs! They seem never to speak up when they would be most helpful, or unhelpful. *See* Clifford S. Goldfarb, *Some Musings on Dogs That Do and Dogs That Don't (Bark)*, in SARATOGA: AT THE RAIL 19 (2015) (Candace J. Lewis and Roger Donway eds.).



A "KIT" OF BURGLARS' TOOLS.

From *On Burglars' Tools*, THE MANUFACTURER AND BUILDER, May 1874, at 108. Just in case you need some help identifying a particular tool: 1 = "a claw-jimmy, very useful for prying between doors and shutters" and "indispensable to withdraw heavy nails, break screw-heads, nuts, springing shutters, etc."; 2 = "another form of jimmy, used for digging walls and turning bolts"; 3 & 6 = "other forms of jimmies"; 4 & 5 = "heavy chisels, used with the sledge-hammer [8], for different purposes, as opening doors by breaking the hinges, etc."; 7 = "in the professional language, . . . the little alderman . . . a short, small wedge of steel, very thin at one end, and very useful in opening safe doors"; 9 = a "loaded club"; 10 = a "sand-bag"; 11, 12 & 13 = "various styles of slung-shots"; 15 = a "powder-can"; 16, 19 & 20 = "specimens of skeleton keys, but the form at present manufactured in New York is double, having a key at each end, and is represented in [14 & 17]"; 18 = an "oil-can"; 21 = "nippers for turning the inner keys of bedrooms in hotels from the outside"; 22 = "brass knuckles." *See also* LSK, 1 New Ann., p. 571.

out upon the landing opposite to a second more ornamental stair, which came up from the front hall. Out of this landing opened the drawing-room and several bedrooms, including those of Mr. Cunningham and his son. Holmes walked slowly, taking keen note of the architecture of the house. I could tell from his expression that he was on a hot scent; and yet I could not in the least imagine in what direction his inferences were leading him.

"My good sir," said Mr. Cunningham, with some impatience, "this is surely very unnecessary. That is my room at the end of the stairs, and my

son's is the one beyond it. I leave it to your judgment whether it was possible for the thief to have come up here without disturbing us."

"You must try round and get on a fresh scent, I fancy," said the son, with a rather malicious smile.

"Still, I must ask you to humor me a little further. I should like, for example, to see how far the windows of the bedrooms command the front. This, I understand, is your son's room" (he pushed open the door); "and that, I presume, is the dressing-room, in which he sat smoking when the alarm was given. Where does the window of that look out to?" He stepped across the bedroom, pushed open the door, and glanced round the other chamber.

"I hope that you are satisfied now," said Mr. Cunningham, tartly.

"Thank you; I think I have seen all that I wished."

"Then, if it is really necessary, we can go into my room."

"If it is not too much trouble."

The J.P. shrugged his shoulders and led the way into his own chamber, which was a plainly furnished and commonplace room. As we moved across it in the direction of the window, Holmes fell back, until he and I were the last of the group. Near the foot of the bed stood a dish of oranges and a carafe of water. As we passed it, Holmes, to my unutterable astonishment, leaned over in front of me and deliberately knocked the whole thing over. The glass smashed into a thousand pieces, and the fruit rolled about into every corner of the room.

"You've done it now, Watson," said he, coolly. "A pretty mess you've made of the carpet!"

I stopped in some confusion and began to pick up the fruit, understanding for some reason my companion desired me to take the blame upon myself. The others did the same, and set the table on its legs again.

"Hullo!" cried the Inspector; "where's he got to?"

Holmes had disappeared.

"Wait here an instant," said young Alec Cunningham. "The fellow is off his head, in my opinion. Come with me, father, and see where he has got to."

They rushed out of the room, leaving the Inspector, the Colonel, and me staring at each other.

"'Pon my word, I am inclined to agree with Master Alec," said the official. "It may be the effect of this illness, but it seems to me that —"

His words were cut short by a sudden scream of "Help! Help! Murder!"

With a thrill I recognized the voice as that of my friend. I rushed madly from the room on to the landing. The cries, which had sunk down into a hoarse, inarticulate shouting, came from the room which we had first visited. I dashed in, and on into the dressing-room beyond. The two Cunninghams were bending over the prostrate figure of Sherlock Holmes, the younger clutching his throat with both hands, while the elder seemed to be twisting one of his wrists. In an instant the three of us had torn them away from him, and Holmes staggered to his feet, very pale and evidently greatly exhausted.

"Arrest these men, Inspector," he gasped.

"On what charge?"

"That of murdering their coachman, William Kirwan."

The Inspector stared about him in bewilderment. "Oh, come, now, Mr. Holmes," said he at last. "I'm sure you don't really mean to —"

"Tut, man; look at their faces!" cried Holmes, curtly.

Never certainly have I seen a plainer confession of guilt upon human countenances. The older man seemed numbed and dazed, with a heavy, sullen expression upon his strongly marked face. The son, on the other hand, had dropped all that jaunty, dashing style which had characterized him, and the ferocity of a dangerous wild beast gleamed in his dark eyes and distorted his handsome features.

The Inspector said nothing, but, stepping to the door, he blew his whistle. Two of his constables came at the call.

"I have no alternative, Mr. Cunningham," said he. "I trust that this may all prove to be an absurd mistake; but you can see that — Ah, would you? Drop it!"

He struck out with his hand, and a revolver which the younger man was in the act of cocking clattered down upon the floor.

"Keep that," said Holmes, quietly putting his foot upon it. "You will find it useful at the trial.[90] But this is what we really wanted." He held up

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[90] A. CHARLES DEAN: Holmes had good reason to believe the weapon would be useful. Consider the example of Charles Peace, who was tried and convicted on February 2, 1879 of the murder of a civil engineer named Arthur Dyson. The revolver that was on Peace's person when he was arrested in 1878 was introduced into evidence, and it was shown that the rifling of the bullet in Dyson's head matched that of the revolver. Following his conviction and before his execution, Peace made a full confession to the earlier murder (in 1876) of a police officer named Constable Cock. *See* N. Kynaston Gaskell, THE ROMANTIC CAREER OF A GREAT CRIMINAL: A MEMOIR OF CHARLES PEACE (1906); Charles Whibley, A BOOK OF SCOUNDRELS

a little crumpled piece of paper.

"The remainder of the sheet!" cried the Inspector.

"Precisely."

"And where was it?"

"Where I was sure it must be. I'll make the whole matter clear to you presently. I think, Colonel, that you and Watson might return now, and I will be with you again in an hour at the furthest. The Inspector and I must have a word with the prisoners, but you will certainly see me back at luncheon-time."[91]

(2006). The individual who had been convicted of the murder of Constable Cock, William Habron, was exonerated. Peace had attended the trial and watched as Habron was convicted and sentenced to death (commuted to life at penal servitude before Peace confessed). James Rush, *Victorian Britain's Most Wanted Man*, DAILY MAIL, May 23, 2013, www.dailymail.co.uk/news/article-2327472/Victorian-Britains-wanted-man-Incredible-life-crime-Charles-Peace-killed-neighbour-police-officer-scourge-homeowners-country.html. The ultimate release of Habron serves as a classic example of the dangers of circumstantial evidence in a criminal trial. *See Commonwealth v. Woong Knee New*, 354 Pa. 188 (1946).

Holmes would certainly have known of Peace's exploits, as Holmes himself considered Peace to have the complex mind necessary to all great criminals, citing Peace's talent on the violin. *See The Adventure of the Illustrious Client* (1924). Mark Twain refers to Peace in his *Captain Stormfield's Visit to Heaven*.

Upon his execution, Peace uttered his now infamous last words: "What is a scaffold? A shortcut to heaven." Laura Ward, FAMOUS LAST WORDS: THE ULTIMATE COLLECTION OF FINALES AND FAREWELLS 64 (2004); *see also Sherlock Holmes* (2009) (Guy Ritchie, dir.) (Mark Strong (as Lord Henry Blackwood): "Death is only the beginning.").

[91] IRA BRAD MATETSKY: It may seem surprising that Holmes, with his "good practical knowledge of British law" (*A Study in Scarlet*, ch. 2), would presume that Inspector Forrester and he could have a substantive conversation with the Cunninghams, whom Forrester has just arrested on a well-founded capital charge. After all, Inspector Lestrade of Scotland Yard, in arresting John Hector McFarlane for the willful murder of Jonas Oldacre of Lower Norwood just a few years later, is "bound to warm him that anything he may say will appear in evidence against him." But as Geoffrey B. Fehling has observed, the "actual use [of *Miranda*-like warnings] in England during this time is less than clear." *The Adventure of the Norwood Builder: A Lawyerly Annotated Edition*, 2015 GREEN BAG ALM. 116, 136 n.54.

A Victorian statute required that before a *magistrate* questioned a suspect, he must warn the suspect that "[y]ou are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial." Administration of Justice Act, 11 & 12 Vict., c. 42, § 18 (1848). While this statute addresses only questioning by magistrates, a series of nineteenth-century British cases treated a police officer's questioning as equivalent to a magistrate's questioning when testing the voluntariness of a prisoner's confession or admissions. *See Bram v. United States*, 195 U.S. 532, 551-58 (1897) (discussing these cases). But this rule did not necessarily incorporate the requirement of administering a formal caution before questioning began; and it is

Sherlock Holmes was as good as his word, for about one o'clock he rejoined us in the Colonel's smoking-room. He was accompanied by a little elderly gentleman, who was introduced to me as the Mr. Acton whose house had been the scene of the original burglary.

"I wished Mr. Acton to be present while I demonstrated this small matter to you," said Holmes, "for it is natural that he should take a keen interest in the details. I am afraid, my dear Colonel, that you must regret the hour that you took in such a stormy petrel[92] as I am."

"On the contrary," answered the Colonel, warmly. "I consider it the greatest privilege to have been permitted to study your methods of working. I confess that they quite surpass my expectations, and that I am utterly unable to account for your result. I have not yet seen the vestige of a clew."

"I am afraid that my explanation may disillusion you, but it has always been my habit to hide none of my methods, either from my friend Watson or from any one who might take an intelligent interest in them. But first, as I am rather shaken by the knocking about which I had in the dressing-room, I think that I shall help myself to a dash of your brandy, Colonel. My strength has been rather tried of late."

"I trust you had no more of those nervous attacks?"

Sherlock Holmes laughed heartily. "We will come to that in its turn," said he. "I will lay an account of the case before you in its due order, showing you the various points which guided me in my decision. Pray interrupt me if there is any inference which is not perfectly clear to you.

"It is of the highest importance in the art of detection to be able to recognize, out of a number of facts, which are incidental and which vital.[93] Otherwise your energy and attention must be dissipated instead of being concentrated. Now in this case there was not the slightest doubt in my

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unclear whether procedures observed by Scotland Yarders like Inspectors Lestrade in "The Norwood Builder" and Athelney Jones in *The Sign of the Four* were also followed by the Surrey County Police.

Here, we later learn that Holmes has spoken with the Cunninghams and that the elder Cunningham has confessed to the crime. It is unclear from the text whether Forrester remained with Holmes during their interview (though it would be surprising if he did not) or whether any caution was administered. It is thus uncertain whether Cunningham's admissions will be admissible in evidence at his trial, but given that the man spoke only "when he saw that the case against him was so strong" already, the point may be academic.

[92] LSK, Ref.: Memoirs, p. 148, n. 20; LSK, 1 New Ann., p. 574, n. 10; OSH: Memoirs, p. 301.

[93] LSK, Ref.: Memoirs, p. 148, n. 21.

mind from the first that the key of the whole matter must be looked for in the scrap of paper in the dead man's hand.[94]

"Before going into this, I would draw your attention to the fact that if Alec Cunningham's narrative was correct, and if the assailant, after shooting William Kirwan, had instantly fled, then it obviously could not be he who tore the paper from the dead man's hand. But if it was not he it must have been Alec Cunningham himself, for by the time that the old man had descended several servants were upon the scene. The point is a simple one, but the Inspector had overlooked it because he had started with the supposition that these country magnates had had nothing to do with the matter. Now I make a point of never having any prejudices, and of following docilely wherever fact may lead me,[95] and so in the very first stage of the investigation I found myself looking a little askance at the part which had been played by Mr. Alec Cunningham.

"And now I made a very careful examination of the corner of paper which the Inspector had submitted to us. It was at once clear to me that it formed part of a very remarkable document.[96] Here it is. Do you not now observe something very suggestive about it?"

"It has a very irregular look," said the Colonel.

"My dear sir," cried Holmes, "there cannot be the least doubt in the world that it has been written by two persons doing alternate words. When I draw your attention to the strong t's of 'at' and 'to' and ask you to compare them with the weak ones of 'quarter' and 'twelve,'[97] you will instantly recognize the fact.[98] A very brief analysis of these four words would

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[94] PETER H. JACOBY: Holmes's reasoning appears flawed at best. Alec Cunningham had said that the two men were "wrestling together." The sheet of paper could therefore have been snatched at any time in their struggle before the shot. *See* Chase, note 67 above. Thus, although his suspicion proved to be correct, there was a rather slim basis for Holmes to suspect Alec Cunningham *ab initio*.

[95] LSK, Ref.: Memoirs, p. 149, n. 22.

[96] THE EDITORS: Was Holmes already at work on "a trifling monograph upon the subject [of] . . . ciphers," and making himself "fairly familiar with all forms of secret writings"? *The Adventure of the Dancing Men* (1903). If so, he would have been especially attuned to secret writing of even this type, at this time.

[97] LSK, Ref.: Memoirs, p. 149, n. 23; LSK, 1 New Ann., p. 576, n. 11.

[98] PETER H. JACOBY: Leon S. Holstein — based on his own examination of the handwritten "twelve" in the note fragment with the same handwritten word in a partial manuscript of "The Adventure of the Crooked Man" presumably penned by Watson — concluded that *Watson* was the scribe of the portion of the note to Kirwan that Holmes attributed to Cun-

enable you to say with the utmost confidence that the 'learn' and the 'maybe' are written in the stronger hand, and the 'what' in the weaker."[99]

"By Jove, it's as clear as day!" cried the Colonel. "Why on earth should two men write a letter in such a fashion?"

"Obviously the business was a bad one, and one of the men, who distrusted the other, was determined that, whatever was done, each should have an equal hand in it. Now of the two men it is clear that the one who wrote the 'at' and 'to' was the ringleader."

"How do you get at that?"

"We might deduce it from the mere character of the one hand as compared with the other. But we have more assured reasons than that for supposing it. If you examine this scrap with attention you will come to the conclusion that the man with the stronger hand wrote all his words first, leaving blanks for the other to fill up. These blanks were not always sufficient, and you can see that the second man had a squeeze to fit his 'quarter' in between the 'at' and the 'to,' showing that the latter were already written. The man who wrote all his words first is undoubtedly the man who planned the affair."

"Excellent!" cried Mr. Acton.

"But very superficial," said Holmes. "We come now, however, to a point which is of importance. You may not be aware that the deduction of a man's age from his writing is one which has been brought to considerable accuracy by experts.[100] In normal cases one can place a man in his

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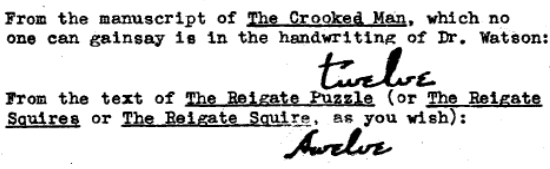
ningham *père*. *See* L.S. Holstein, *The Puzzle of Reigate*, 2 BAKER STREET J. 221 (Oct. 1952).

Holstein failed, however, to explain how Watson, who had only just arrived at Reigate on April 25, could have co-written a letter delivered that very afternoon. Moreover, his handwriting comparison was less than fully persuasive. While there are some similarities between the two exemplars (nicely juxtaposed by Holstein), the reader will immediately note that the letter "t" in the two documents is markedly different:



The first exemplar is created from a single vertical stroke and has a pronounced horizontal crossbar, while the second is created from two vertical strokes.

[99] LSK, 1 New Ann., p. 576, n. 12.

[100] LSK, Ref.: Memoirs, p. 149, n. 24; OSH: Memoirs, p. 301.

true decade with tolerable confidence.[101] I say normal cases, because ill health and physical weakness reproduce the signs of old age even when the invalid is a youth. In this case, looking at the bold strong hand of the one and the rather broken-backed appearance of the other, which still retains its legibility, although the t's have begun to lose their crossing, we can say that the one was a young man and the other was advanced in years, without being positively decrepit."

"Excellent!" cried Mr. Acton again.

"There is a further point, however, which is subtler and of greater interest. There is something in common between these hands. They belong to men who are blood-relatives. It may be most obvious to you in the Greek e's,[102] but to me there are many small points which indicate the same thing. I have no doubt at all that a family mannerism can be traced in these two specimens of writing. I am only, of course, giving you the leading results now of my examinations, which would be of more interest to experts[103] than to you. They all tended to deepen the impression upon my mind that the Cunninghams had written this letter.

"Having got so far, my next step was, of course, to examine into the details of the crime and to see how far they would help us. I went up to the house with the Inspector and saw all that was to be seen. The wound upon the dead man was, as I was able to determine with absolute confidence, fired from a revolver at the distance of something over four yards. There was no powder-blackening on the clothes. Evidently, therefore, Alec Cunningham had lied when he said that the two men were struggling when the shot was fired. Again, both father and son agreed as to the place where the man escaped into the road. At that point, however, as it happens, there is a broadish ditch, moist at the bottom. As there were no indications of boot-marks about this ditch, I was absolutely sure not only that the Cunninghams had again lied, but that there had never been any unknown man upon the scene at all.

"And now I had to consider the motive of this singular crime. To get at this I endeavored first of all to solve the reason of the original burglary at Mr. Acton's. I understood from something which the Colonel told us that a lawsuit had been going on between you, Mr. Acton, and the Cunning-

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[101] LSK, Ref.: Memoirs, p. 150, n. 25.
[102] LSK, Ref.: Memoirs, p. 150, n. 26.
[103] LSK, Ref.: Memoirs, p. 150, n. 27; LSK, 1 New Ann., p. 578, n. 13.

hams. Of course it instantly occurred to me that they had broken into your library with the intention of getting at some document which might be of importance in the case."

"Precisely so," said Mr. Acton. "There can be no possible doubt as to their intentions. I have the clearest claim upon half of their present estate, and if they could have found a single paper[104] — which fortunately was in the strongbox of my solicitors[105] — they would undoubtedly have crippled our case."

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[104] OSH: Memoirs, p. 303.

[105] ROSS E. DAVIES: The solicitors' strongbox could have been nearly anything lockable, from a flat little portable dispatch box to a massive wardrobe-sized safe. *See, e.g., The Adventure of the Second Stain* (1904); *strongbox, n.*, in OXFORD ENGLISH DICTIONARY (Dec. 28, 2015) ("A strongly made or lockable chest, box, or safe for money, documents, or other valuables."); *see also, e.g.,* OLIVER & BOYD'S EDINBURGH ALMANAC AND NATIONAL REPOSITORY FOR THE YEAR 1887 at 61 (1887) (Chubb & Son advertisement reproduced on page 159 below). There are at least a couple of reasons, however, to suppose that whatever its size or shape, that strongbox was a product of the renowned firm of Chubb & Son, which specialized in the design and manufacture of locks and safes. *See* ALEXANDER HAY JAPP, INDUSTRIAL CURIOSITIES 266-92 (new ed. 1882). First, Chubb products had been and would be featured in other Sherlock Holmes cases, including one in which a lawyer figured prominently. *See A Scandal in Bohemia* (1891) (Sherlock Holmes: "Chubb lock to the door" and "an English lawyer named Norton"); *The Adventure of the Golden Pince-Nez* (1904) (Sherlock Holmes: "Is it a simple key?" Mrs. Marker: "No, sir; it is a Chubb's key."). Second, Chubb products had long been marketed to solicitors. *See, e.g.,* THE LAW TIMES, Oct. 14, 1848 (advertisement: "To Barristers and Solicitors. . . . Chubb's Patent Fire-Proof Safes, Book-cases, Chests, &c. made entirely of strong wrought-iron, so as effectually to resist the falling of brick-work, timbers, &c. in case of Fire, and are also perfectly secure from the attacks of the most skilful Burglars. Chubb's Cash and Deed boxes fitted with the Detector Locks. . . ."); THE LAW TIMES, Oct. 29, 1853 (advertisement with testimonials); *see also, e.g.,* THE JURIST, Jan. 20 and June 15, 1844; THE LAW TIMES, May 25, 1861, Dec. 13, 1862, Oct. 31, 1863, Nov. 8, 1879; Apr. 24, 1880, and Dec. 30, 1899; *and see* THE ILLUSTRATED LONDON NEWS, July 23, 1887 and Nov. 5, 1887; 14 THE LAW MAGAZINE; OR, QUARTERLY REVIEW OF JURISPRUDENCE 125 (1851) (noting "A really interesting and graphic account of locks and keys" by John Chubb); THE SOLICITORS' J., Oct. 30, 1897. Moreover, Chubb products do appear to have been used by solicitors. *See, e.g.,* 48 SOLICITORS' J. & REP. 76 (Nov. 28, 1903); BOARD OF TRADE J., Dec. 16, 1915, advertisements section at iv (British Commercial Gas Association describing a "solicitors' office [in which] you will find installed a . . . burglar-proof safe . . . , with the guarantee of Chubb's boldly displayed on the centre of each door"; reproduced on page 442 below). In addition, it is also quite possible that the strongbox of Mr. Acton's solicitors was itself stored at a "Fire-proof and Burglar proof" secure offsite location. *See, e.g.,* WHITAKER'S ALMANACK FOR THE YEAR OF OUR LORD 1887, advertisement section at 19 (1887) (Chancery Land Safe Deposit offering "Solicitors', Bankers', and Merchants' strong rooms"; reproduced on page 160 below).

CHUBB & SON,

Lock and Safe Makers by Special Appointment to Her Majesty the Queen.

SOLE AGENTS—

GEO. STEWART & CO.,

STATIONERS,

92 GEORGE STREET, EDINBURGH.

GOLD MEDAL: International Exhibition, Edinburgh, 1886.

Eight Gold Medals in Three Years.

CHUBB'S **New Patent Fire and Thief Resisting Safes and Strong Rooms.** These celebrated Safes can now be had fitted with the DALTON PERMUTATION KEYLESS LOCKS and TIME LOCKS.

CHUBB'S **Patent Strong Rooms, Bullion Vaults, Steel Doors, and Treasure Safes** are perfectly secure against Fire and Thieves.

CHUBB'S **Jewel and Boudoir Safes** for Domestic use.

CHUBB'S **New Series of Cheap Safes are Cheaper than many Second-hand Safes, and perfectly Fireproof.**

CHUBB'S **Patent Detector Locks,** with SIX TUMBLERS (except in very small sizes) and TWO KEYS EACH.

CHUBB'S **Deed Security and Cash Boxes,** with PATENT DETECTOR LOCKS.

CHUBB'S **Despatch Boxes, Key Boxes, Writing Desks, &c.,** with DETECTOR LOCKS.

Chubb's Illustrated Price Lists sent on Application.

Oliver & Boyd's Edinburgh Almanac and National Repository for the Year 1887, advertisement section, at 61.

Whitaker's Almanack For the Year of Our Lord 1887, advertisement section, at 19.

"There you are," said Holmes, smiling. "It was a dangerous, reckless attempt in which I seem to trace the influence of young Alec. Having found nothing, they tried to divert suspicion by making it appear to be an ordinary burglary, to which end they carried off whatever they could lay their hands upon. That is all clear enough, but there was much that was still obscure. What I wanted, above all, was to get the missing part of that note. I was certain that Alec had torn it out of the dead man's hand, and almost certain that he must have thrust it into the pocket of his dressing-gown. Where else could he have put it? The only question was whether it was still there.[106] It was worth an effort to find out, and for that object we all went up to the house.

"The Cunninghams joined us, as you doubtless remember, outside the kitchen door. It was, of course, of the very first importance that they should not be reminded of the existence of this paper; otherwise they would naturally destroy it without delay. The Inspector was about to tell them the importance which we attached to it, when by the luckiest chance in the world I tumbled down in a sort of fit, and so changed the conversation."

"Good heavens!" cried the Colonel, laughing. "Do you mean to say all our sympathy was wasted, and your fit an imposture?"[107]

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[106] LSK, Ref.: Memoirs, p. 151, n. 28.

[107] RONALD J. WAINZ: Naturally, since the aforementioned spell was voluntary (*see* note 86 above), the possibility of cataplexy and the diagnosis of narcolepsy are excluded. What can one make of Watson's reaction, then, to the chicanery of Holmes insofar as the spell in question is concerned? And what does it say about the doctor-patient relationship between the two, and in general? We should note that Holmes's behavior in misleading Watson by feigning illness (or worse) is not unique to *The Reigate Puzzle*. In *The Adventure of the Dying Detective* (1913, date of activity 1887), for example, Holmes convinces Watson (untruthfully) that he has been stricken with a disease from Sumatra that is "infallibly deadly" and "horribly contagious."

Holmes's deception of Watson in *The Reigate Puzzle* cannot be viewed as a breach of the doctor-patient relationship. Much like those ethical obligations of Catholic priests that apply only to the sanctity of the confessional, the ethical obligations of the doctor-patient relationship do not apply to all interactions between physicians and patients. Watson's response to Holmes's fakery in *The Reigate Puzzle* is one of admiration and amazement. He declares that Holmes's bogus spell was "admirably done," as he looks "in amazement at this man who was forever confounding me with some new phase of his astuteness." Holmes, during the episode in question, was acting as a player on a stage, and was not under Watson's professional care at the time. The behavior occurred over the course of perhaps a few minutes, and there was no intent by Holmes to mislead Watson to a misdiagnosis, as the sequence played out quickly. In *The Adventure of the Dying Detective*, the action occurs over the course of a few hours, but again, Holmes's behavior is not sufficiently prolonged to be offensive to Watson. His reaction upon realizing Holmes was well is not

"Speaking professionally, it was admirably done," cried I, looking in amazement at this man, who was forever confounding me with some new phase of his astuteness.

"It is an art which is often useful,"[108] said he. "When I recovered I managed by a device, which had perhaps some little merit of ingenuity, to get old Cunningham to write the word 'twelve,' so that I might compare it with the 'twelve' upon the paper."

"Oh, what an ass I have been!" I exclaimed.

"I could see that you were commiserating with me over my weakness," said Holmes, laughing. "I was sorry to cause you the sympathetic pain which I knew that you felt. We then went up stairs together, and having entered the room and seen the dressing-gown hanging up behind the door, I contrived by upsetting a table to engage their attention for the

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one of betrayal but rather, "I nearly called out in my joy and my amazement."

Can and should physicians treat family or friends? The *American College of Physicians Ethics Manual (sixth edition)* states that, "A physician asked to provide medical care to a person with whom the physician has a prior social or emotional relationship should first consider alternatives" and "physicians should usually not enter into the dual relationship of physician-family member or physician-friend." Mentioned as a specific concern is the possibility of the lack of "clinical objectivity" when dealing with close associates and family members. Ultimately, the recommendation of the College is not that such relationships are prohibited, but rather that they only be undertaken "with the same comprehensive diligence and careful documentation as exercised with other patients." 156 ANNALS OF INTERNAL MEDICINE 73, 81 (2012).

The clear risk of treating friends and family members is the possibility of the physician's lack of detached or dispassionate objectivity, which is generally accepted as a major tenet of the physician-patient relationship. Watson is unquestionably Holmes's closest and dearest friend and confidante, and does appear to be lacking some detachment in his relationship with Holmes. For example, in a phrase of unquestioned admiration, Watson, thinking Holmes dead, describes him as "the best and wisest man whom I have ever known" in the last line of *The Final Problem*. This ethical landscape of appropriate behavior for physicians is fluid and, to some extent, institutional, as more medical practitioners are now employed. More recently, a draft policy prepared in response to a request from the Office of Clinical Affairs of the University of Michigan Health System (UMHS) advised that, "health providers avoid medical evaluation or treatment of immediate family members other than in emergency situations or urgent settings when no other provider is immediately available." Katherine J. Gold et al., *No Appointment Necessary? Ethical Challenges in Treating Friends and Family*, 371 NEW ENGLAND J. MEDICINE 1254, 1257 (Sept. 25, 2014). The gist of that advice is now part of a policy recently adopted by the UMHS. *See Treatment of Self, Family Members and Members of the Same Household*, UMHHC Policy 04-06-069 (Feb. 2015) ("privileged providers and clinical program trainees should not establish a therapeutic relationship with immediate family members, or provide formal medical care for themselves.").

[108] LSK, Ref.: Memoirs, p. 152, n. 29; LSK, 1 New Ann., p. 580, n. 14.

moment, and slipped back to examine the pockets. I had hardly got the paper, however, which was, as I had expected, in one of them, when the two Cunninghams were on me, and would, I verily believe, have murdered me then and there but for your prompt and friendly aid. As it is, I feel that young man's grip on my throat now, and the father has twisted my wrist round in the effort to get the paper out of my hand. They saw that I must know all about it, you see, and the sudden change from absolute security to complete despair made them perfectly desperate.

"I had a little talk with old Cunningham afterwards as to the motive of the crime. He was tractable enough, though his son was a perfect demon, ready to blow out his own or anybody else's brains if he could have got to his revolver. When Cunningham saw that the case against him was so strong he lost all heart and made a clean breast of everything.[109] It seems that William had secretly followed his two masters on the night when they made their raid upon Mr. Acton's, and having thus got them into his power, proceeded, under threats of exposure, to levy blackmail upon them.[110] Mr. Alec, however, was a dangerous man to

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[109] PETER H. JACOBY: Perhaps not everything; no mention was made of Hayter's role both in the Acton burglary and in at least condoning, if not indeed planning, the murder of Kirwan. The Cunninghams could easily have "peached" on Hayter and implicated him in their plot, but doing so would not have aided them and arguably would have seriously harmed their interests. Conspiracy to murder was a separate capital offense under section 4 of the Offenses Against the Person Act of 1861, 24 & 25 Vict. c. 100. Allying themselves with Hayter to conceal their crime would have magnified the Cunninghams' guilt and assured they would hang for Kirwan's murder; by instead staying silent about Hayter, they might have induced an English jury to bring in a verdict of manslaughter based on the mitigating circumstance of having been blackmailed by their servant.

[110] CLIFFORD S. GOLDFARB: "Blackmail" originally came into the English language as a "tribute levied on farmers in Scotland and the border counties of England by freebooting Scottish chiefs in return for protection or immunity from plunder." In its modern, more general, sense it is a verb meaning, "Originally: to extort money from (a person, etc.) by intimidation, by the unscrupulous use of an official or social position, or of political influence or vote. Now chiefly: to extort money from [a person, etc.] by threatening to reveal a damaging or incriminating secret; (also) to use threats or moral pressure against." OXFORD ENGLISH DICTIONARY (online version, accessed Sept. 20, 2015).

In *Edsall v. Brooks*, Judge Monell stated:

> In common parlance, and in general acceptation, [blackmail] is equivalent to, and synonymous with, extortion — the exaction of money, either for the performance of a duty, the prevention of an injury, or the exercise of an influence. . . . Not unfrequently it is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose, the weaknesses, the follies,

> or the crimes of the victim. . . . It cannot be doubted, I think, that the term "blackmailing" is invariably regarded as an unlawful act; and though, from its indefiniteness and comprehensiveness, the offence is not classified as a distinct crime, nevertheless, it is believed to be criminal, and to charge a man with "blackmailing", is equivalent to charging him with a crime.

17 Abb. P.R. (N.Y.) [1864] at 226, quoted in *Macdonald v. World Newspaper Co.* (1894), 16 P.R. 324 at 325 (Ontario H.C.) (Meredith, C.J.O.).

In *R. v. Carey* a former brokerage employee was sentenced to five years in prison for sending a threatening letter to his ex-employer, Ashton. Wills J. said that "he and all Her Majesty's Judges looked upon offences of this nature as the most serious known to the law, inasmuch as persons with weaker temperaments than Mr. Ashton had been known to commit suicide in consequence of unfounded charges . . . being made against them." THE TIMES, Nov. 19, 1885.

Blackmail, or extortion, was a crime at common law and later under various English statutes. It was an offence to publish or threaten to publish or abstain from publishing a defamatory libel in order to extort money, even if the libel was untrue. HALSBURY'S LAWS OF ENGLAND (2d ed. 1933), vol. IX, *Criminal Law and Procedure*, s. 921 ("HALSBURY'S"). It was similarly an offence to threaten to go to the police with an accusation that the victim had committed a crime, even if the accusation was untrue. HALSBURY'S, ss. 917-920. These offences are currently codified in England and Wales in the Theft Act 1968 (c. 60, s. 21); in Canada in sections 302 and 346 of the Criminal Code (RSC 1985, c. C-46), and in the U.S. in title 18 of the U.S. Code (ch. 41 — Extortion and Threats, primarily § 873 — Blackmail). There is another category of extortion, not relevant to this annotation, in which a government official wrongfully demands a payment in exchange for performing an official duty. HALSBURY'S, ss. 523-530.

In "Charles Augustus Milverton," Holmes describes to Watson how the villain went about squeezing his victims for money in order to prevent the publication of a letter implicating them in some nefarious or scandalous activity:

> "But surely," said I, "the fellow must be within the grasp of the law?"
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> "Technically, no doubt, but practically not. What would it profit a woman, for example, to get him a few months' imprisonment if her own ruin must immediately follow? His victims dare not hit back. If ever he blackmailed an innocent person, then, indeed, we should have him, but he is as cunning as the Evil One. No, no; we must find other ways to fight him."

In "The Reigate Puzzle," William Kirwan was attempting to extract money from the Cunninghams, father and son, by threatening to go to the police to disclose that they had committed the crime of burglary. This was his fatal mistake — his intended victims preferred to take justice into their own hands, rather than expose themselves to prosecution by reporting Kirwan to the police. See the discussion of self-justice in "Charles Augustus Milverton" in Ross E. Davies, *Holmes, Coase & Blackmail*, 18 GREEN BAG 2D 93 (2014). An extensive list of the crimes committed by Holmes and others in the Milverton case is found in Irving M. Fenton, *An Analysis Of The Crimes And Near-Crimes At Appledore Towers in the Light of the English Criminal Law*, 6 BAKER STREET J., no. 2 (April 1956).

Judge S. Tupper Bigelow has written extensively on the crime of "misprision of felony," in which the culprit "in concealing his knowledge, converted it into a source of emolument for himself." S. Tupper Bigelow, *Misprision of Felony and Sherlock Holmes*, 5 SHERLOCK HOLMES J., no. 3 (Winter 1961); *Sherlock Holmes and Misprision of Felony*, 8 BAKER STREET J.,

no. 3 (July 1958). Bigelow points out that a blackmailer who knows of a crime and fails to report it is committing misprision of felony. However, the blackmailer is also guilty of extortion. J.B. Mackenzie accuses Holmes of numerous crimes: "Nor does he scruple when carrying out his design so impatient is he of control to lay himself open to the charge of being an accessory after the fact or of being concerned in misprision of felony." He quotes from the 5th to 8th editions of *Russell on Crime*, which states:

> Misprision of felony closely resembles the offence of being accessory after the fact to felony. It consists of concealing or procuring the concealment of a felony known to have been committed, whether it be felony by the common law or by statute. . . . It is the duty of a man to discover the felony of another to a magistrate . . . . The law does not allow private persons the right to forego a prosecution. There must be mere knowledge without assent, for any assent or participation will make the man a principal or an accessory . . . . Misprision of felony is distinct from compounding a felony.

Sherlock Holmes Plots and Strategy, 14 GREEN BAG 402 (1904), reprinted in 2015 GREEN BAG ALM. 350, 352. Kirwan would therefore be guilty of two crimes — misprision of felony, for not going to the police to report the burglary, and extortion, for attempting to enrich himself by threatening to expose the crime of the Cunninghams.

There are several other references to blackmail in the Canon. In "Black Peter," Peter Carey, captain of the *Sea Unicorn*, killed John Hopley Nelligan's father and stole a tin box full of securities. Patrick Cairns, a harpoonist, witnessed the killing. Cairns attempted to blackmail Carey. Carey attacked him and Cairns killed Carey in self-defence. Martin Dakin suggests that self-defence would not prevent Cairns from being convicted of "manslaughter, as Cairns was engaged in the criminal activity of blackmail at the time." A SHERLOCK HOLMES COMMENTARY 178 (1972, reprint 2002) ("HOLMES COMMENTARY"). Of course Cairns would also be guilty of misprision of felony.

In "The Gloria Scott," Victor Trevor's father was being blackmailed by Hudson, a sailor who knew that Trevor had been part of the murderous takeover of a transport ship full of criminals and was complicit in the death of the captain and other crew members. When Trevor received a letter from one of his co-conspirators informing him that Hudson was going to the police, he died of a stroke.

In "A Scandal in Bohemia," a sceptical Holmes questioned the King of Bohemia about the reason for his concern about what Irene Adler might do to prevent his forthcoming marriage to Clotilde Lothman von Saxe-Meningen, second daughter of the King of Scandinavia ("If this young person should produce her letters for blackmailing or other purposes . . . ?"). Dakin is critical of Holmes's almost frivolous attitude towards blackmail:

> If this estimate of the seriousness of letters and other documents used for blackmail were a correct one, then few of its victims would have anything to fear and blackmail would cease to be a paying proposition. Why could not the distressed ladies pursued by the 'worst man in London', the notorious Charles Augustus Milverton, laugh in his face and, when he flourished his incriminating epistles, say 'Pooh, pooh! Forgery'?

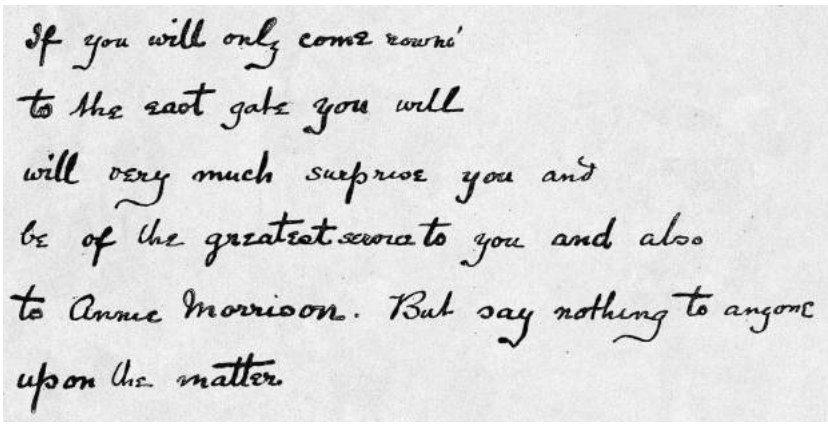
HOLMES COMMENTARY 51. In *The Hound of the Baskervilles*, Sherlock Holmes explained to Watson why he couldn't leave London and why Watson must accompany Sir Henry to Baskerville Hall: "At the present instant one of the most revered names in England is being besmirched by a blackmailer, and only I can stop a disastrous scandal."

Finally, in "The Yellow Face," Holmes, theorizing before he has sufficient data, concludes

play games of that sort with. It was a stroke of positive genius on his part to see in the burglary scare which was convulsing the country-side an opportunity of plausibly getting rid of the man whom he feared. William was decoyed up and shot; and had they only got the whole of the note, and paid a little more attention to detail in their accessories, it is very possible that suspicion might never have been aroused."

"And the note?" I asked.

Sherlock Holmes placed the subjoined paper before us:



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that Grant Munro's wife has a guilty secret: "There's blackmail in it, or I am much mistaken." Of course, Holmes was mistaken.

Conan Doyle prefers to use the word "blackmail." "Extort" and "extortion" do not appear in the Canon, although he uses "extortion" in his other fiction and non-fiction writing, in the sense of extracting money by use of threats of exposure:

> The unfortunate Mrs. Harris had already found occasion to regret the steps which she had taken, for Pugh, who appears to have been a most hardened young scoundrel, had already begun to *extort* money out of her on the strength of his knowledge.

Arthur Conan Doyle, *The Bravoes of Market-Drayton*, 6 CHAMBERS J. 540-2 (Aug. 24, 1889) (emphasis added). And also in its whimsical sense of attaining public admiration for his meritorious character:

> He was known in the Gulch as the Reverend Elias B. Hopkins, but it was generally understood that the title was an honorary one, *extorted* by his many eminent qualities, and not borne out by any legal claim which he could adduce.

Arthur Conan Doyle, *The Parson of Jackman's Gulch*, LONDON SOCIETY 33-44 (Christmas number 1885), collected in MYSTERIES AND ADVENTURES: THE GULLY OF BLUEMANSDYKE AND OTHER STORIES (1889) (emphasis added).

"It is very much the sort of thing that I expected," said he[.] "Of course we do not yet know what the relations may have been between Alec Cunningham, William Kirwan, and Annie Morrison.[111] The result shows that the trap was skillfully baited. I am sure that you cannot fail to be delighted with the traces of heredity shown in the p's and in the tails of the g's. The absence of the "i" dots in the old man's writing is also most characteristic. Watson, I think our quiet rest in the country has been a distinct success, and I shall certainly return much invigorated to Baker Street tomorrow."[112]

> The first thing we ever wrote together was published in a legal textbook. While we enjoyed writing it, we can't say that it left us with much of a sense that a lasting impression had been made on our colleagues. Neither of us can remember being cornered at bar association meetings by a breathless young lawyer, wanting to tell us how much he or she enjoyed our article on the use of trusts in business transactions. However, having survived all of the possible strains that writing jointly can put on a personal and professional relationship (one that has now comfortably exceeded 40 years), we decided to try something together in a Sherlockian vein.
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> Clifford S. Goldfarb, *Foreword*, in
> HARTLEY R. NATHAN & CLIFFORD S. GOLDFARB,
> INVESTIGATING SHERLOCK HOLMES vii (2014)

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[111] LSK, Ref.: Memoirs, p. 153, n. 30; LSK, 1 New Ann., p. 581, n. 15.

[112] PETER H. JACOBY: Undoubtedly due to his still incomplete recovery from his exertions on the Continent in the pursuit of Baron Maupertuis, Holmes's "energy and attention" were not all that they should have been. As shown above, he had failed to recognize numerous oddities and discrepancies in the accounts of others and in events leading up to the *denouement* of the story. See note 54 above. And for the reasons I have given above, Holmes's stay at Reigate had been less than the "distinct success" for which he congratulated himself.

Exemplary Law Books of 2015

Five Recommendations

[parallel citation: 2016 Green Bag Alm. 173]

Susan Phillips Read[†]

Akhil Reed Amar,
The Law of the Land: A Grand Tour of Our Constitutional Republic
(Yale University Press 2015)

The Law of the Land looks at the Constitution from a geographic perspective. This (very) loose organizing principle merely sets the stage for 12 essentially self-contained chapters in each of which Professor Akhil Reed Amar explores some aspect of the Constitution or the Supreme Court through a person, case, idea, or event associated with a particular state. In the chapter dedicated to New York, for example, he focuses on the revered jurist Robert Jackson, a native New Yorker who ascended to the Supreme Court relatively late in life after a distinguished career in the federal executive branch. Professor Amar contrasts Jackson's non-judicial route to our highest Court with the present-day "judicialization of the judiciary," and considers the causes and effects of the absence of any former politicians on the Supreme Court. How much any of this has to do with Justice Jackson's New York origins is not entirely clear, but Professor Amar's constitutional musings, here and throughout the book, are uniformly intriguing and insightful.

[†] Associate Judge (ret.), New York Court of Appeals.

John C. Coffee, Jr.,
Entrepreneurial Litigation: Its Rise, Fall, and Future
(Harvard University Press 2015)

Professor John C. Coffee, Jr. traces the evolution of the class action from origins influenced by 19th-century American legal phenomena (specifically, contingency fees, the American rule, and the assessment of legal fees from a common fund) through its transformation in the 1960s into an efficient vehicle to remedy racial discrimination to its current incarnations in securities, merger and acquisition, antitrust, employment discrimination, and mass tort litigation. Along the way, he assesses the merits and shortcomings of this peculiarly American mode of "entrepreneurial litigation," and proposes measures to enhance its deterrence of bad corporate behavior and reduce incentives for attorney abuse. Whether or not the reader agrees with Professor Coffee's appraisals or prescriptions for reform, he presents a thorough and evenhanded account of an important topic too often clouded by ideology and anecdote.

Dan Jones,
Magna Carta: The Birth of Liberty
(Viking 2015)

While numerous celebrations of Magna Carta were published in 2015, the Great Charter's 800th anniversary, this was my favorite. Dan Jones, a British historian with a rare talent for turning remote facts into lively contemporary narrative, portrays Magna Carta at its inception as an attempt by rebellious English barons — the 1% of their day — to be rid of King John's extortionate taxes, highhanded treatment, and costly military campaigns to regain the Plantagenet Crown's lost territories in France. King John repudiated Magna Carta within months of signing it and civil war continued. Does it matter that the modern view of Magna Carta as a charter of freedom and democracy is unmoored from its origins and all but a few scattered phrases in its lengthy text? Not in the least, answers the author, although Magna Carta's legendary afterlife "would have come as a surprise to the men who stood at Runnymede in June 1215 and thrashed out an unsatisfactory peace treaty."

Burt Neuborne,
Madison's Music: On Reading the First Amendment
(New Press 2015)

Alexander Hamilton may have been the toast of Broadway and the hip-hop world in 2015, but fellow-Publius James Madison starred in at least five new books, including *Madison's Music*. There, Professor Burt Neuborne urges American judges to recapture what he calls the "music" or "poetry" of the First Amendment

by giving due regard to the order, placement, meaning, and structure of its scant 45 words. He argues that, instead of reading Madison's constitutional handiwork as a coherent whole, the judiciary has reduced the First Amendment (and, indeed, the entire Bill of Rights) to "a set of isolated, self-contained commands" to the detriment of its inherently democracy-friendly text. Original in concept and elegantly written from start to finish, I was captivated the minute I read the book's dedication, Professor Neuborne's affecting tribute to "Odysseus the Tailor," his World War II-veteran father.

Cass R.Sunstein,
Constitutional Personae
(Oxford University Press 2015)

Professor Cass R. Sunstein theorizes that individual Supreme Court Justices, past and present, typically exhibit one of four distinct judicial personae that transcend politics and ideology: Heroes, who favor big and bold steps and take an expansive view of the judiciary's role; Soldiers, who generally defer to the choices of the elected branches and venerate judicial restraint; Minimalists (Professor Sunstein's preferred persona), who either demand reasons and require the government to justify its practices or, alternatively, emphasize traditions and see traditions as justifications; and Mutes, who seek to avoid making constitutional decisions if narrower grounds exist for resolving a dispute or the dispute is arguably non-justiciable. This book is probably irresistible to an alumna of a state's highest court who has necessarily thought a lot about the wellsprings of judicial behavior. And revelatory, too: It turns out I was a fairly reliable Soldier during my 12-year appellate tenure. Who would have thought?

THE ADVENTURE OF THE SECOND *STRAND*

[parallel citation: 2016 Green Bag Alm. 226]

Ira Brad Matetsky†

The Sherlock Holmes story featured in this *Almanac*, "The Adventure of the Reigate Squire,"[1] was the nineteenth Holmes short story to see print. It first appeared in the June 1893 issue of *The Strand Magazine. The Strand* was the London-based magazine, published by George Newnes, in which 58 of the 60 Holmes stories first appeared between 1891 and 1927. These began with the 24 stories later collected as *The Adventures of Sherlock Holmes* (1891-1892) and *The Memoirs of Sherlock Holmes* (1892-1893).

The importance of *The Strand* to Arthur Conan Doyle and Sherlock Holmes — and of Conan Doyle and Holmes to *The Strand* — is well known.[2] "Arthur Conan Doyle was associated with *The Strand* through its entire existence, from an advertisement in the very first issue dated January 1891 to an article titled 'Holmesiana' in the last issue for March 1950."[3] Although the Holmes stories were collected soon enough in book form, when British readers first encountered them, it was in *The Strand*'s pages.[4]

But what about contemporary American readers? The early publication history of the stories that became *The Adventures* and *The Memoirs* was far more complex in the United States than in England. Americans who read fiction in the early 1890s might have first met Sherlock Holmes and his chronicler Dr. John Watson in *The Strand*'s pages just as their English

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† Litigation partner at Ganfer & Shore, LLP in New York and an increasingly addicted Sherlockian. Thanks to Michael Ashley, Philip Bergem, Denny Lien, Randall Stock, and Tim Stroup for extremely helpful e-mails and leads.

[1] This is the title that the story bore on its first appearance. For discussion of variant forms of the title, see "The Reigate Puzzle: A Lawyerly Annotated Edition," *supra*, at 123, n.†.

[2] Recent works on Conan Doyle and *The Strand* include Philip G. Bergem, *A Doylean and Sherlockian Checklist of* The Strand Magazine (rev. ed. 2014); Robert Veld, *The Strand Magazine & Sherlock Holmes: The Two Fixed Points in a Changing Age* (2014); and Michael Ashley, *Adventures in the Strand* (2016). A general history of *The Strand*, focused almost exclusively on the British edition, is Reginald Pound, *Mirror of the Century: The Strand Magazine* 1891-1950 (1966).

[3] Bergem, at 1.

[4] The two Holmes novels that did not first appear in *The Strand*, *A Study in Scarlet* (1887) and *The Sign of Four* (1890), were published before *The Strand* began publication in 1891.

counterparts did, but others encountered him in more homegrown American newspapers and magazines.

Though *The Strand* is primarily remembered today as a British publication, "[proprietor George] Newnes recognized the importance of the American market from the onset."[5] An American edition of the magazine began publication in 1891, at the same time as the British edition, although far fewer copies of the American edition survive for persual today.[6]

From 1891 to 1895, the American edition of *The Strand* had the same contents as the British edition.[7] Indeed, it appears that the interior pages of each issue were printed from the same or perhaps duplicate printing plates, so that the editorial content of a British *Strand* issue and the corresponding American issue were necessarily the same. The illustration on the covers of the two issues would also be identical. The only visible identifiers of the U.S. edition were the cover price (given in the U.S. in cents rather than pence) and American publication and copyright notices on the bottom of the cover. In addition, because it took time for the printing plates to cross the Atlantic from London to New York, for several years the date of each issue of the U.S. version of the magazine was one month later than the corresponding U.K. issue.[8] Thus, while "The Reigate Squire" appeared in the June 1893 issue of *The Strand* in London, it appeared in the *July* 1893 issue of *The Strand* in New York.

However, while the 24 Sherlock Holmes short stories that appeared between 1891 and 1893 were published in the U.S. in *The Strand*, they were not published *only* in *The Strand*. From 1891 on, "Doyle remained faithful to the London edition [of *The Strand*] for all of his Holmes stories but this relationship did not hold true for the American edition. Competition among magazines in America led to the stories being printed farther afield tha[n] just in the pages of *The Strand*."[9] Each of the first 24

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[5] Bergem, at 8.

[6] There are a couple of reasons for this. First, most surviving copies of *The Strand* are in bound volumes prepared by the publisher, and it is the U.K. edition that was bound. Second, the U.K. edition's circulation was always higher than the U.S. edition's, especially in earlier years. Only a handful of libraries hold any copies of the U.S. edition. These include the University of Minnesota Library and the New York State Library in Albany, N.Y.

[7] Bergem, at 8.

[8] *See, e.g.*, Frederick Faxon, "Magazine Perplexities I. *Strand Magazine*," 1 Bulletin of Bibliography 8, at 122 (Jan. 1899); Bergem, at 8.

[9] Bergem, at 5.

short stories also was authorized to appear, and did appear, in American newspapers or in an American magazine *at the same time* as the story appeared in the U.S. *Strand*, and sometimes even a few weeks earlier.

The first 12 of these short stories (the ones later collected in book form as *The Adventures*), in addition to appearing in the U.S. *Strand* in 1891 and 1892, appeared at about the same time in American newspapers around the country. For example, the first story,

> "A Scandal in Bohemia" was published in the [U.K.] *Strand Magazine* in July 1891. There was a New York edition of the *Strand Magazine*, and the story appeared there as well, in August 1891. However, many of the stories from the *Adventures* were also syndicated, that is, sold by a syndicate to newspapers across the United States. "A Scandal in Bohemia," for example, appeared in at least seven newspapers *before* the New York *Strand Magazine* publication.[10]

The story appeared in several more U.S. papers later in the year.[11]

These newspapers, which included papers in Chicago, Louisville, Buffalo, New Orleans, Seattle, Washington, Toledo, Cincinnati, San Francisco, Baltimore, and later New York, belonged to the McClure newspaper syndicate. The publisher, S.S. McClure, later recalled in his autobiography:

> I brought the first twelve Sherlock Holmes stories from Mr. [A.P.] Watt, Conan Doyle's agent, and paid £12 ($60) apiece for them. . . . When I began to syndicate the . . . stories, they were not at all popular with editors. The usual syndicate story ran about five thousand words,

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[10] Leslie Klinger, note 1 to "A Scandal in Bohemia", in 1 *The New Annotated Sherlock Holmes* 5 (2005). Conan Doyle's agent delayed publication of the stories in both the U.K. and the U.S. until after July 1, 1891, when the International Copyright Act of 1891 (Chace Act), c. 565, 26 Stat. 1106, providing for U.S. recognition of U.K copyrights, took effect. *See* Veld, *supra* note 2, at 20; Randall Stock, "Revealing 'A Scandal in Bohemia': Its History and Manuscript," *in* Otto Penzler, ed., *Bohemian Souls: A Facsimile of the Original Manuscript of "A Scandal in Bohemia"*, at 105, 114 (BSI Press 2011). Prior to July 1, 1891, works first published in the United Kingdom did not receive copyright protection in the United States and could be freely published by any American publisher without authorial permission or payment of royalties. Just this fate had befallen the two early Sherlock Holmes novels, *A Study in Scarlet* and *The Sign of Four*, and Conan Doyle was not going to allow this to happen again. *See generally* Donald A. Redmond, *Sherlock Holmes Among the Pirates: Copyright and Conan Doyle in America 1890-1930* (1990).

[11] For the details of periodical publications of the stories in *The Adventures*, see Richard Lancelyn Green & John Michael Gibson, *A Bibliography of A. Conan Doyle* 54-58 (1983; rev. ed. 2000). A table listing all the Holmes stories, and other writings of Arthur Conan Doyle, in the London and New York *Strand*s is found in Bergem, *supra* note, 2, at 20-35.

> and these ran up to eight and nine thousand. We got a good many complaints from editors about the length, and it was not until nearly all of the first twelve of the Sherlock Holmes stories had been published, that the editors of the papers I served began to comment favorably on the series and that the public began to take a keen interest.[12]

McClure does not mention that the stories appeared in *The Strand* around the same time they were appearing in his papers.

Conan Doyle wanted to drop the character of Holmes after the twelve stories of *The Adventures*, but *The Strand* secured another series by offering financial terms that Conan Doyle decided he could not refuse. In book form, these stories later appeared as *The Memoirs of Sherlock Holmes.*

The Strand continued to carry these stories in both Britain and America, with each story appearing in the U.S. edition one month after the U.K. edition. However, the non-*Strand* American rights apparently became the subject of competition between the McClure newspaper syndicate, which had just serialized *The Adventures*, and Harper & Brothers, publishers of *Harper's Weekly*, a popular magazine.[13] Harper won the rights, and "brought Sherlock Holmes to American magazines on January 14, 1893 with 'The Adventure of the Cardboard Box.' Within the year, *Harper's Weekly* ran eleven Holmes stories from *The Memoirs of Sherlock Holmes* series."[14] Each of these stories appeared in an issue of *Harper's Weekly* dated in the same month as the U.K. appearance (and thus dated before the month of the U.S. *Strand* appearance). Thus, "The Reigate Squire," which as noted appeared in the U.K. *Strand* issue of June 1893 and the U.S. *Strand* of July 1893, appeared in the *Harper's Weekly* dated June 17, 1893.

Anomalously, the story with which Conan Doyle ended the series (and at the time intended to end Holmes forever), "The Final Problem," did not appear in *Harper's Weekly.* The author believed he deserved greater compensation for this extraordinary story and on November 5, 1893, he wrote to his literary agent, A.P. Watt: "I hope we'll find an American opening for Sherlock Holmes' death, just as a protest against Cassell's. But if not it

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[12] S.S. McClure, *My Autobiography* 204-05 (1914). Other sources give the price as £50. *See, e.g.*, Veld, at 20.

[13] Eugene Exman, *The House of Harper: One Hundred and Fifty Years of Publishing* 176-78 (1967).

[14] Leroy Lad Pakek, *Probable Cause: Crime Fiction in America* 53 (1990). Pakek interestingly compares *The Memoirs of Sherlock Holmes* with the other, non-fictional contents of *Harper's Weekly* and *McClure's* during the same period. *See id.* at 53-54.

doesn't matter. Or should we settle for £50? Nothing less."[15] Ultimately "The Final Problem" appeared in *McClure*'s *Magazine* for December 1893 and in the American *Strand* in a special "Christmas Number" for 1893.[16]

Thus, each story of *The Adventures* and *The Memoirs* was first serialized in the U.S. by two publishers at or near the same time. To a modern reader this is unusual. Publishers almost invariably demand exclusive rights to a work, at least for a specified initial time period and within a specified geographical area — and all the more so when paying premium rates, such as those Conan Doyle received. This anomaly was first pointed out by Sherlockian scholar Bliss Austin, whose 1979 article "Wanderings on a Foreign Strand" in the *Baker Street Miscellanea* revived attention to Holmes's appearances in the American *Strand*.[17] Austin's article also corrected some previously prevalent misconceptions, such as that *The Adventures* and *The Memoirs* had not appeared in the American *Strand* at all.[18]

Austin observed that "during 1893, while the stories were running monthly in *The Strand*, the same tales, with the exception of ['The Final Problem'], were being published by *Harper's Weekly*, though not in the same order nor at the same time. As Alice remarked: 'Curiouser and curiouser.'" [19] Austin described the situation as a "perplexit[y]" and opined that "[j]ust how this duplication came about, and how *Harper's* lost ['The Final Problem'] to *McClure's Magazine*, are interesting questions," although he chose not to speculate about the answers.[20] Perhaps, however, today we can go beyond the sort of speculation without data that Sherlock

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[15] Letter from Arthur Conan Doyle to A.P. Watt, Nov. 5, 1893, Sir Arthur Conan Doyle Collection of Papers, Henry W. and Albert A. Berg Collection of English and American Literature, New York Public Library. Why Doyle thought of publishing this story in the United States as "a protest against Cassell's" — which had not published any Sherlock Holmes stories, although it had published some of Doyle's other stories — is not clear.

[16] Green & Gibson, at 75. The story also appeared the same month in several of the McClure newspapers.

[17] Bliss Austin, "Wanderings on a Foreign Strand," *Baker Street Miscellanea*, No. 17, at 1 (March 1979). *See also* Bliss Austin, "More Wanderings on a Foreign Strand: The American Strand Quarterly," *Baker Street Miscellanea*, No. 26, at 1 (Summer 1981). I am indebted to Bergem, *supra* note 2, at 16, for calling these important articles to my attention, as well as for his own contributions on this subject. Regarding Austin's contributions to the Sherlockian world, see Sonia Fetherston, *Prince of the Realm: The Most Irregular James Bliss Austin* (BSI Press 2014).

[18] Austin, "Wanderings," at 1.

[19] *Id.* at 3-4.

[20] *Id*.

Holmes would deplore, and infer with some confidence why the stories enjoyed dual publication in America.

To begin with, between 1891 and 1893, Conan Doyle could not — logistically — readily have sold *The Strand* the right to publish his stories in the U.K. without including the right to publish them in the U.S., even if he had wanted to, nor could *The Strand* have bought the stories on that basis. As discussed above, during these years there was no genuinely distinct "American edition" of *The Strand* (although, as we shall see, one would later evolve). The "American *Strand*" was just the British one with a different cover price. Proprietor Newnes saved effort and expense every month by acquiring, editing, and typesetting one set of content, preparing one set of printing plates, printing the British edition in London, and then shipping the plates to New York and printing the American edition there.[21] At this early stage, Newnes surely would not have accommodated any author's request that his stories be excluded from the American edition, thereby upsetting the entire production process for the magazine. Conan Doyle may not even have dreamed of asking.

At the same time, everyone seems to have accepted that while *The Strand* enjoyed what we would today call first American serial rights in the stories, it did not have the *exclusive* first American serial rights. Very likely Newnes understood that it would be unreasonable to demand these rights. And likely *McClure's* and *Harper's* did not demand them either, because the initial American circulation of *The Strand* was relatively small.[22] We do not have circulation figures for *The Strand*'s U.S. edition during these early years. Nineteenth-century magazines were not required to publish their circulation figures[23] and many declined to do so,[24] leaving any assessment

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[21] The "manufacturing clause" of the 1891 copyright act (*see supra* note 10) required that to be copyrightable in the United States, a work must be printed from type set in the United States or from prints made from such type. Many publishers, however, sought to evade the intent if not the letter of this requirement.

[22] That is, McClure and Harper seem to have been content to publish the stories at about the same time they were appearing in *The Strand*. That is not to say that either would have tolerated sharing the rights with the other, as they were direct competitors and McClure, at least, "had never heard of a publisher's loving cup." Exman, *supra* note 13, at 176. As a seeming counterexample, the first story of *The Memoirs*, "Silver Blaze," did appear in two McClure newspapers before it ran in *Harper's Weekly*, but this seems to have resulted from a misunderstanding over the rights, and co-publication by Harper and McClure did not happen again.

[23] The first U.S. legislation requiring what evolved into the familiar "Statement of Ownership, Management and Circulation" was the Act of August 24, 1912, 37 Stat. 553. The statute was

(then or now) to estimation and guesswork. Nonetheless, we can state with confidence that *The Strand*'s U.S. circulation was limited.

In April 1891, when Watt sold the American rights to *The Adventures* to McClure, neither man may even have realized that *The Strand* had an American edition. In an April 14, 1891 letter, Watt wrote to McClure confirming McClure's offer to acquire "the American serial rights" to one of Conan Doyle non-Holmes novels, *The Doings of Raffles Haw*. In the same letter, Watt also confirmed that McClure would pay 50 pounds for "a series of a detective nature relating to the experiences of a Mr Sherlock Holmes, also by Dr Doyle," which was "to be published in this country [the U.K.] in a monthly magazine."[footnote here] Not only did no one mention that the British monthly magazine also had some limited circulation in America, but the fact that the stories would appear in *The Strand* rather than some other British monthly was not mentioned at all. Watt did not tell McClure and probably Newnes had not told Watt.[25]

By 1893 (the publication year of "Reigate"), an economic downturn in the U.S. left "[t]he American *Strand* . . . particularly hard hit since, despite the attraction of the Holmes stories, its circulation had been, and was still, discouragingly small."[26] Moreover, the compendious *N.W. Ayer & Son's Newspaper Annual*, which listed estimated circulation figures for

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intended to address what were perceived as abuses of discounted second-class mailing privileges by publishers. *See generally* Ross E. Davies, *The Regulatory Adventure of the Two Norwood Builders*, 2015 Green Bag Alm. 567, and sources cited therein. The 1912 Act required all periodicals to publish ownership and management information, but only newspapers were required to include circulation information. 37 Stat. at 554. This requirement was extended to magazines in 1960, *see* Act of June 24, 1960, 74 Stat. 208, and is currently codified at 39 U.S.C. § 3685(a)(4).

[24] When a would-be advertiser asked the publisher of *Harper's Weekly* to reveal the magazine's circulation, "[t]he publishers plainly regarded him as a prying busybody" and rejected his agency's next set of advertisements to show what they thought of his inquiry. Theodore Peterson, *Magazines in the Twentieth Century* 21 (1956; 2d ed. 1964). However, Pearson concludes that *Harper's Magazine* (a different publication from, though co-owned with, *Harper's Weekly*) "apparently had between 100,000 and 200,000 readers in 1891, and few other magazines had more than that." *Id.* at 3.

[25] Letter from A.P. Watt to S.S. McClure, April 14, 1891, in A.P. Watt & Son letterbooks, vol. 25 at 186, A.P. Watt & Son Records, Henry W. and Albert A. Berg Collection of English and American Literature, New York Public Library.

[26] Austin, "Wanderings," *supra* note 17, at 4 (citing a 1901 column in which Newnes stated that "while at first *The Strand Magazine* had very little sale in America," although "it has now . . . [gained] a very widespread circulation" in excess of 200,000).

thousands of periodicals, does not even mention *The Strand* in its listings for 1893-1894, although by 1898 it estimated *The Strand's* U.S. circulation at 150,000.[27]

Moreover, the publishers may have reasoned that *The Strand*, with its British-focused content, probably drew much of its American readership from different circles than either the daily newspapers or *Harper's Weekly*, so the papers and the magazine were unlikely to lose much circulation because *The Strand* was also publishing the stories. Finally, the national circulations of the newspaper syndicate and of *Harper's Weekly* surely extended to many parts of the U.S. that *The Strand* did not reach.

All of these things were true, at least, between 1891 and 1893, and help to explain the "perplexity" of *The Adventures'* and *The Memoirs'* dual American serializations. Thereafter, for the remainder of the Sherlockian Canon, things were different.

After *The Memoirs*, Conan Doyle published no Holmes stories until the nine serialized parts of *The Hound of the Baskervilles* in 1901-1902, followed by the thirteen stories collected as *The Return of Sherlock Holmes* in 1903-1904. But by this era, *The Strand* had created a *bona fide* U.S. edition, distinct from its British edition.[28] The two editions were not totally different, of course; the contents of the magazines continued to overlap, and the printing plates for the U.S. edition were still manufactured in London and shipped to New York. But the U.S. edition increasingly included content aimed at American readers, while omitting content of interest primarily to British (and British Empire) readers.

Because the contents of the two magazines were now different, it was readily possible for an author to sell the British rights to an article or story to *The Strand*, while retaining the American rights for sale to an American magazine. And because *The Strand's* U.S. circulation now made it a much

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[27] *N.W. Ayer & Sons Newspaper Annual* 1893-94, at 1088-92 (omitting *The Strand* while giving circulation of 85,000 for *Harper's Weekly*) (available on Library of Congress website). By 1898, the same directory gives the U.S. *Strand* an estimated circulation of 150,000, *see N.W. Ayer & Sons Newspaper Annual* 1898, at 1148, but by that time the American edition of the *Strand* was a very different magazine.

[28] *See, e.g.*, Bergem, *supra* note 2, at 8-10; Austin, "Wanderings," at 4-12; "The One Hundredth Number of 'The Strand Magazine': A Chat about Its History by Sir George Newnes, Bart.", *The Strand*, vol. 17, no. 100 at 363-64 (Apr. 1899) (stating that the magazine's "sale in America has also become very large" and that the "American Edition is specially edited for that market").

more formidable competitor to the American magazines, it must have been necessary for authors wishing to maximize their pay to do just that.[29] Likely for this reason, *The Hound*'s serialization was handled differently from *The Adventures* and *The Memoirs*. The nine parts appeared in both the U.K. and U.S. *Strand*s (from August 1901 to April 1902 in the U.K.; from September 1901 to May 1902 in the U.S.). Only after the entire novel had appeared in *The Strand* were the second American serial rights released to the McClure syndicate, whose newspapers republished the story between July and September 1902.[30]

Next, for the 13 stories of *The Return of Sherlock Holmes*, Conan Doyle broke away from the American *Strand* altogether. He had reluctantly agreed to revive Holmes in this series of stories after receiving a lucrative offer from another American magazine, *Collier's Weekly Magazine*.[31] The stories appeared in the U.K. *Strand* between October 1903 and December 1904 — but in the U.S. they appeared exclusively in *Collier's Weekly*, and not in the U.S. *Strand* at all.[32] The chapters of the last Holmes novel, *The Valley of Fear* (1914-1915), likewise never appeared in the American *Strand*,[33] nor did a majority of the short stories (1908-1913) later collected in *His Last Bow*.[34]

The Strand stopped publishing its American edition in 1916,[35] while its

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[29] Likewise, the editors were now able to decide that a given submission would appeal to a British but not to an American audience, or the reverse, and base their purchasing decisions accordingly.

[30] Green & Gibson, *supra* note 11, at 127-29; *see also* Bergem, *supra* note 2, at 5 ("*The Strand*, in both England and America, had a monopoly on th[is] series of stories although they were reprinted in a variety of newspapers across America after the first series as complete.").

[31] *See, e.g.*, Bergem, at 6; *see also* Cattleya Concepcion, *The Adventure of the Elusive Postcard*, 2015 Green Bag. Alm. 442, 443-45, and sources cited therein.

[32] Green & Gibson, at 138-40. This was not the first time that a Conan Doyle story appeared in the U.K. but not the U.S. *Strand*. *See* Austin, "Wanderings", at 7 (noting that Conan Doyle's story "Rodney Stone" was published in 1896 in the U.K. but not the U.S. edition).

[33] Green & Gibson, at 176.

[34] *Id.* at 180-82. Two stories in *His Last Bow*, "The Adventure of the Red Circle" and "The Adventure of the Devil's Foot," did appear in both the U.S. *Strand* and another publication. *Id.; see* Austin, "Wanderings," at 1, 11-12. This must have resulted from story-specific negotiations. "The Cardboard Box" and "His Last Bow," both found in *His Last Bow*, are irrelevant to this discussion, as the former was merely a long-delayed reprinting of a story from *The Return*, while the latter first appeared after the U.S. *Strand* was discontinued. The 12 stories of *The Case-Book* are not discussed here for the same reason.

[35] *See, e.g.*, "American Strand Magazine Quits," *The Fourth Estate* 17 (Jan. 22, 1916) (stating

better-remembered British counterpart continued to appear monthly until 1950. As discussed above, for a long time it had been forgotten that much of the Canon first appeared in both the British and the American *Strand*s. But for those interested in the introduction and reception of Sherlock Holmes in the United States,[36] it is good to know about *The Adventures* in the second *Strand*.

that "[a] ban recently put upon the exportation of all metals by the British government made it impossible to send over the plates from the English Strand for use in the American edition").

[36] *See generally* Bill Blackbeard, *Sherlock Holmes in America* (1981).

Exemplary Law Books of 2015

Five Recommendations

[parallel citation: 2016 Green Bag Alm. 303]

Cedric Merlin Powell[†]

Ta-Nehisi Coates,
Between the World and Me
(Spiegel & Grau 2015)

Expanding the canon on Black identity previously explored in works such as W.E.B. DuBois' *The Souls of Black Folks* (1903) and James Baldwin's *Notes of a Native Son* (1955), Ta-Nehisi Coates offers a searing critical assessment of how the Black male body is framed, as a rhetorical tool of oppression, in his memoir and open letter to his son. Building upon his articles making the case for reparations and analyzing structural inequality in the criminal justice system of mass incarceration in *The Atlantic*, Coates posits that violence against the Black male body is an indispensible component of the history of racial oppression and subjugation in America. The present day effects of this brutal history are manifested in state-sanctioned violence, which results in the disproportionate use of lethal force against young Black boys and men. In winning the National Book Award for non-fiction, this evocative book secured its place in the national literary imagination and canon, but its true significance rests in its scathing eloquence in trying to

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reconcile the aspirational tenor of American exceptionalism with America's primal thirst for violence against its own citizens who live in bodies long scorned because of race and racism.

Ellen Berrey,
The Enigma of Diversity: The Language of Race and the Limits of Race Justice
(University of Chicago Press 2015)

This term, the United States Supreme Court will render its opinion in *Fisher v. University of Texas*, and many constitutional law scholars are predicting the end of affirmative action as it is currently conceived and constructed. This may be premature; however, some of this uncertainty rests in the core concept that is essential in determining the constitutionality of the admission program — diversity. Ellen Berrey presents a comprehensive and insightful analysis of the rhetorical and doctrinal limits of diversity. The aspirational features of diversity, particularly inclusion, are laudable goals for any societal institution, but diversity never really eradicates racial hierarchies or the permanence of structural inequality. Berrey examines three arenas of social life — the University of Michigan, housing redevelopment in Chicago's Rogers Park, and a Fortune 500 company — to conceptualize how the pursuit of diversity is advanced in these institutions and what this means in terms of race, culture, and inequality. Deconstructing the rhetorical allure of diversity, Berrey effectively illustrates its limitations because its value is not in dismantling systemic inequality, but appealing to the interests of whites so that they will accept the incremental (and oftentimes transitory) progress of affirmative action. The path-breaking Critical Race Theorist Derrick Bell made this point by articulating the interest convergence theory: there is only minimal progress for people of color when it is in the interest of whites to embrace this limited social change. Berrey's work is a valuable addition to the literature for political scientists, sociologists, and constitutional law scholars.

Jeffrey A. Engel (editor),
The Four Freedoms: Franklin D. Roosevelt and the Evolution of an American Idea
(Oxford University Press 2016)

This edited collection focuses on freedom and how it is central to the American polity. In 1941, with World War II looming ominously on the horizon, President Roosevelt sought to define the unique strands of the American identity in relation to freedom. Roosevelt espoused four essential freedoms: freedom of speech, freedom from want, freedom of religion, and freedom from fear. Indeed, it would be these freedoms that Americans would fight for in World War II in less than a year. But these pivotal freedoms have even broader implications as the scholars writing in this volume explore how Roosevelt's four freedoms have evolved over time for post-World War II America and the world. These essays resonate with

clarity and analytical power because they trace, in comprehensive detail, how some of the central debates in American political life have transformed government and its underlying policies.

Nancy E. Dowd (editor),
A New Juvenile Justice System: Total Reform for a Broken System
(NYU Press 2015)

Advancing an argument for the replacement of the existing system of juvenile justice with a new model emphasizing the centrality of child well-being rather than an exclusively punitive approach, the scholars in this volume seek to re-envision the current system around three core ideals. First, the authors seek to incorporate the substantive ideals of equality, freedom, liberty, and self-determination into a transformative conception of juvenile justice. Second, they theorize a rehabilitative model that moves away from the inherent labeling which fast tracks juveniles to the adult criminal justice system and precludes any chance of a meaningful transition to adulthood and active citizenship. Third, a new model is proposed that emphasizes family-focused and community-based interventions rather than the current imprisonment model. While much of the public discourse on the criminal justice system has focused on the use of lethal force on communities of color, this edited collection takes an important look at the structural factors that buttress the school-to-prison pipeline. The authors make a compelling argument for a new juvenile justice system.

Adam Benforado,
Unfair: The New Science of Criminal Injustice
(Crown 2015)

Incorporating implicit bias analysis into his comprehensive study of injustice in the criminal justice system, Adam Benforado crafts a strikingly persuasive argument about the discriminatory impact of ostensibly neutral decision-making by criminal investigators, judges, and juries. The system is fundamentally flawed because crucial decisions about guilt or innocence are based on human intuition rooted in subjective assessments that are often automatic. Thus, even if the criminal justice system functions as it should structurally, there are still inherent psychological factors that produce "wrong convictions, biased proceedings, trampled rights, and unequal treatment." Benforado argues for a new model of criminal justice, "grounded in the science of the mind," so that any structural change is accompanied by full integration of psychological inquiry to ensure equality of results.

Exemplary Law Books of 2015

Five Recommendations

[parallel citation: 2016 Green Bag Alm. 439]

Lee Epstein[†]

Stephen Breyer,
The Court and the World
(Knopf 2015)

Justice Breyer's latest isn't on my list because I'm fascinated by normative debates over the use of foreign materials in domestic constitutional law decisions. To the contrary. As with most debates over methods, these are too narrow or ideological for my taste. *The Court and the World* is here because it's neither. Breyer's chief point is that cases before his Court increasingly raise questions that, like it or not, force the Justices to confront "foreign realities." Sometimes this is obvious (think national security), sometime it's less so (commerce, the environment, jurisdiction) but either way Breyer suggests that plausible answers can come from looking across time, space, and place. Social scientists have been arguing as much for decades now, and judges will — must(?) — follow suit as they confront what is, according to Garoupa and Ginsburg (see below), a truism: "globalization has increased cross-border transactions and interaction" — the law not excepted.

[†] Ethan A.H. Shepley Distinguished University Professor, Washington University in St. Louis.

Nuno Garoupa and Tom Ginsburg,
Judicial Reputation: A Comparative Theory
(University of Chicago Press 2015)

Among political scientists who study judicial behavior, there has been little debate about "the" driver of judges' choices: it's ideology, stupid. As more scholars from law and the social sciences have entered the field that view is changing. Ideology continues to play a role in many accounts (see below, *Policy Making in an Independent Judiciary*) but scholars have posited other goals, motives, and preferences. Garoupa and Ginsburg bring reputation to the fore in several interesting — and non-obvious — ways. I'm especially taken with their discussion of the globalization of reputation. Although some judges think they can burnish their reputation by resisting legal developments elsewhere, they may be in the minority. The increasingly global implications of many cases have paved the way for something of a competition among judges and their "teams" for world-wide influence on law. Advancing in this game may require competitors to hone their reputations in some of the very ways that Breyer discusses, whether hobnobbing at conferences, teaching abroad, or citing or at least considering developments elsewhere.

Gunnar Grendstad, William R. Shaffer, and Eric Waltenburg,
Policy Making in an Independent Judiciary: The Norwegian Supreme Court
(ECPR Press 2015)

Written by three political scientists, this is likely the first comprehensive, rigorous, dispassionate large-*n* study of the Norwegian Supreme Court (and, arguably, of any European high court). Among the many interesting findings, it turns out that who serves on the Court matters: Justices appointed by a social democratic government are more likely to side with parties claiming a public economic interest and those with a law degree from the University of Oslo, and so with social connections in the nation's capitol, tend to vote with the government in civil cases. Had Grendstad et al. reached these conclusions about the U.S. Supreme Court, no one would have batted an eye. But the book caused a bit of a stir in Norway perhaps because legalistic thinking about the enterprise of judging is still pervasive in Europe. To the extent that realistic accounts of judicial behavior developed for U.S. judges can be adapted elsewhere, the jig may be up. But we still need more evidence, and this book shows how to develop it for apex courts in Europe and beyond.

Richard A. Posner,
Divergent Paths: The Academy and the Judiciary
(Harvard University Press 2016)

Judge Posner's latest is an entreaty to the legal academy: The judiciary needs your help! But to provide it, you should make some changes — in who you hire, in how they teach, and in what they research. This is the short of it but even this may be saying too much. As Paul Horwitz wrote, "reducing *Divergent Paths* to a dry précis gives no sense of the genuine intellectual treasures to be found in it." Horwitz is exactly right. Even if you don't find Posner's plea especially compelling (I do), *Divergent Paths* is still worth reading for Posner's iconic, sometimes irreverent take on legal education and judging, from the "fetishism of words" in judicial opinions ("a superfluity of legal jargon, numbing detail, overstatement, superfluous footnotes, throat clearing, repetition . . ."), to the *Bluebook* (which should be "banished"), to courses on statutory interpretation ("I doubt [their] need. Interpretation is a natural human activity.").

Michael A. Zilis,
The Limits of Legitimacy: Dissenting Opinions, Media Coverage, and Public Responses to Supreme Court Decisions
(University of Michigan Press 2015)

Several interesting books on dissent have appeared in the last few years, though Urofksy's *Dissent and the Supreme Court* received the lion's share of attention. This is justifiable — it's a great book — but so is Zilis's. Plus they're related. Urofsky is interested in how dissents become part of the "constitutional dialogue" down the road; Zilis wants to know how they influence public dialogue and reactions in the here and now. Recognizing that most Americans don't read judicial opinions, Zilis's focus is on how journalists frame them. Using data drawn from case studies, experiments, and surveys, he shows that the media cites dissents — especially those with colorful or dramatic language — to highlight controversy. And when reporters "eschew[] deference for controversy," as histrionic dissents can lead them to do, their stories depress public support for the Court's decisions. This finding is compatible with Urofsky's historical analysis of the occasional importance of dissents; it also fits with a growing social science literature showing a decline in Americans' support for the Court when they think it's a political and not legal body.

Arthur Conan Doyle's "The Field Bazaar"

A Bibliography

[parallel citation: 2016 Green Bag Alm. 443]

Cattleya M. Concepcion[†]

Bibliographers of Arthur Conan Doyle's "The Memoirs of Sherlock Holmes: The Field Bazaar" have not had many publications to report. In the 119 years since the vignette first appeared in print, publishers have paid it far less attention than the short stories and novels traditionally recognized as the canon of Sherlock Holmes. While this perhaps gives bibliographers less to find, it does not make the task any easier. A nod must be given to those who have followed the trail, especially Ronald Burt De Waal (author of *The Universal Sherlock Holmes*) and Richard Lancelyn Green and John Michael Gibson (authors of *A Bibliography of A. Conan Doyle*). I have updated their efforts by identifying publications of "The Field Bazaar" from its first appearance in 1896 through 2015:

Periodicals

The Student: The Edinburgh University Magazine, Vol. 11, Bazaar Number, pp. 35-36, November 20, 1896 (original publication)

The Daily Californian (University of California, Berkeley), Vol. 4, No. 9, p. 11, January 14, 1969

The Sherlock Holmes Journal, Vol. 23, No. 1, Winter 1996 (unnumbered, inserted page)

Sherlock Holmes Mystery Magazine, Vol. 4, No. 2 (#10), pp. 176-178, September/October 2013

Books — Single Works

The Memoirs of Sherlock Holmes: The Field Bazaar (Athenaeum Press Ltd. 1934) (100 copies[1]) (first English printing)

[†] Faculty and Web Services Librarian, George Mason University School of Law.

[1] One hundred copies were distributed at a dinner for the Baker Street Irregulars. *Baker*

FIELD BAZAAR: A SHERLOCK HOLMES PASTICHE (Pamphlet House 1947) (250 numbered copies[2] and 25 unnumbered copies[3]) (first American printing)

BOOKS — COLLECTED WORKS

VINCENT STARRETT, 221B: STUDIES IN SHERLOCK HOLMES (Macmillan 1940)

reprintings: Baker Street Irregulars 1956 (350 copies[4])

Biblo & Tannen 1969

Otto Penzler Books 1994

SHERLOCK HOLMES: THE PUBLISHED APOCRYPHA (Jack Tracy ed., Houghton Mifflin 1980)

EDINBURGH STORIES OF ARTHUR CONAN DOYLE (Polygon Books [University of Edinburgh Student Publications Board] 1981)

THE FINAL ADVENTURES OF SHERLOCK HOLMES: COMPLETING THE CANON (Peter Haining ed., W.H. Allen 1981) (first English printing)

reprintings: Castle Books 1981 (first American printing)

Crescent 1986

Warner Books 1993

Barnes & Noble Books 1993, 1995, 1996

Robert Hale 2001 (new, rev., illus. & expanded ed.)

Apocryphile Press 2005 (special rev. collectors' ed.)

THE UNCOLLECTED SHERLOCK HOLMES (Richard Lancelyn Green ed., Penguin Books 1983)

THE RETURN OF SHERLOCK HOLMES (Richard Lancelyn Green ed., Oxford University Press 1993)

THE FURTHER ADVENTURES OF SHERLOCK HOLMES (Reader's Digest 1993)

THE GAME IS AFOOT: PARODIES, PASTICHES AND PONDERINGS OF SHERLOCK HOLMES (Marvin Kaye ed., St. Martin's Press 1994, 1995)

Street Gleanings, CHI. DAILY TRIB., at 14, Feb. 7, 1940.

[2] 148 NATIONAL UNION CATALOG: PRE-1956 IMPRINTS 248 (1971).

[3] ARTHUR CONAN DOYLE, THE UNCOLLECTED SHERLOCK HOLMES 148 (Richard Lancelyn Green ed., 1983).

[4] Anthony Boucher, *At Large*, N.Y. TIMES, at 26-27, Apr. 22, 1956.

BEYOND THE CANON: FOUR APOCRYPHAL STORIES (The Battered Silicon Dispatch Box 2000)

THE VICTORIAN CRICKET MATCH: THE SHERLOCK HOLMES SOCIETY OF LONDON VERSUS THE PG WODEHOUSE SOCIETY (MC Black ed., The Sherlock Holmes Society of London 2001)

THE COMPLETE SHERLOCK HOLMES, Vol. 2 of 2 (Barnes & Noble Classics 2003, 2004)

THE APOCRYPHA OF SHERLOCK HOLMES (Leslie Klinger ed., Gasogene Books 2009)

SONS OF MORIARTY AND MORE STORIES OF SHERLOCK HOLMES (Loren Estleman ed., Tyrus Books 2013, 2014)

SHERLOCK HOLMES VICTORIAN PARODIES AND PASTICHES: 1888-1899 (Bill Peschel ed., Peschel Press 2015)

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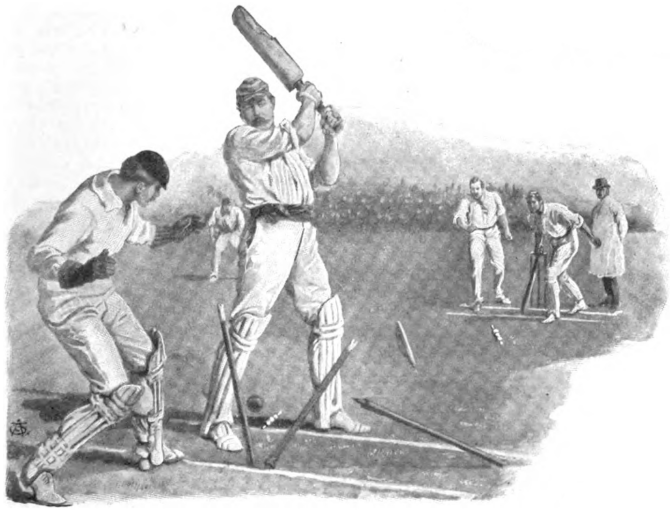

[A] game which has on the whole given me more pleasure during my life than any other branch of sport. Arthur Conan Doyle, *Some Recollections of Sport*, 38 The Strand 243, 248, 249 (Oct. 1909).

THE MEMOIRS OF SHERLOCK HOLMES

"THE FIELD BAZAAR"

ILLUSTRATED

[parallel citation: 2016 Green Bag Alm. 464]

story by A. Conan Doyle

illustrations by David Hutchinson; introduction by Ross E. Davies

INTRODUCTION: PICTURING HOLMES AND WATSON

Would *The Strand Magazine* have published "The Field Bazaar" — that odd little 1896 Sherlock Holmes and John Watson vignette — if Arthur Conan Doyle had opted not to give it to *The Student* magazine at Edinburgh University?

I am pretty sure *The Strand* would have taken the story, gladly. Herbert Greenhough Smith, editor-in-fact of *The Strand*, liked tales of Sherlock Holmes.[1] He had published and would continue to publish most of the original Holmes stories. Besides, they were quite profitable. According to Conan Doyle scholar Daniel Stashower, "Conan Doyle's name carried such weight that it could add 100,000 copies to *The Strand*'s monthly circulation figures."[2] (Of course, Conan Doyle would not have given the story to anyone other than *The Student*. It was a charitable gift, written just for the occasion in support of Edinburgh University's real-life field bazaar.[3])

The Strand did not publish "The Field Bazaar" in 1896, nor did it ever republish the story. But what if it had? For starters, the story would have enjoyed a larger readership.[4]

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[1] *See* page iv above; *see also* DANIEL STASHOWER, TELLER OF TALES: THE LIFE OF ARTHUR CONAN DOYLE 121-22 (1999).

[2] *Id.* at 125.

[3] *The Field Bazaar*, in THE RETURN OF SHERLOCK HOLMES, App. I at 319-20 (Oxford 1993) (Richard Lancelyn Green ed.) (introductory note by Green); *see also* J.I. MACPHERSON, TWENTY-ONE YEARS OF CORPORATE LIFE AT EDINBURGH UNIVERSITY 29-30, 44 (1905).

[4] *See* REGINALD POUND, MIRROR OF THE CENTURY: THE STRAND MAGAZINE 1891-1950 at 32 (1966).

THE LATE MR. SIDNEY PAGET

Second, "The Field Bazaar" would have been illustrated (it was not in *The Student*), and the pictures would have been drawn by Sidney Paget. Smith would surely have made sure of that. He had enlisted Paget to illustrate the Holmes *Adventures* and *Memoirs* series (1891-93), and would later do the same for *The Hound of the Baskervilles* (1901-02) and the *Return* series (1903-04). In the 1890s and early 1900s, Paget's illustrations were for many readers the true pictures of Holmes and Watson — and they remain influential.[5]

Third, and perhaps most interestingly, if "The Field Bazaar" had somehow found its way into *The Strand*, it might have become something more than the obscurity that it is today. It has long been regarded by experts not as a canonical Sherlock Holmes story, but as a pastiche. In other words, the "The Field Bazaar" is not a true glimpse of the world Conan Doyle created (or the life Watson lived), but, rather, a mere echo (a humorous, exaggerated one) created in the style of a genuine Sherlock Holmes story.[6] Might the combination of (a) contemporary publication in close proximity to classic Holmes stories (in their primary home periodical) with (b) contemporary pictures by Paget (the primary early illustrator of those stories) have been sufficient to tilt some experts toward a more favorable view of canonical status for the story?[7]

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[5] *See* Glen S. Miranker, *Sidney Paget's Sherlock Holmes*, in NICHOLAS UTECHIN AND CATHERINE COOKE, SHERLOCK HOLMES: THE MAN WHO NEVER LIVED AND WILL NEVER DIE 34 (2015); CHRISTOPHER REDMOND, SHERLOCK HOLMES HANDBOOK 84-88 (2d ed. 2009); *see also* George Newnes, *The One Hundredth Number of "The Strand Magazine,"* 17 THE STRAND 363 (Apr. 1899); POUND, MIRROR OF THE CENTURY at 42-43.

[6] Questioning the canonical status of this or that Sherlock Holmes story is a thoroughly respectable exercise in the admirably open-minded community of Holmes scholars. *See* Leslie S. Klinger, *Why We Write*, in THE GRAND GAME: A CELEBRATION OF SHERLOCKIAN SCHOLARSHIP VOLUME TWO 1960-2010 at 1, 2 (2012); Michael J. Riezenman, *Thoughts on the Canonicity of* The Sign of the Four, 60 BAKER STREET J. 12 (Summer 2010); *see also* Arthur Conan Doyle, *The Reigate Puzzle* (1893) (Sherlock Holmes: "Now I make a point of never having any prejudices, and of following docilely wherever fact may lead me . . . ."); Bernard Davies, *Introduction*, in THE SHERLOCK HOLMES REFERENCE LIBRARY: THE SIGN OF FOUR xi, xi-xii (2004) (Leslie S. Klinger, ed.).

[7] *Cf.* DONALD A. REDMOND, SHERLOCK HOLMES AMONG THE PIRATES: COPYRIGHT AND CONAN

It is, alas, too late for that thought to be more than speculative. Paget died in 1908. The last Paget-illustrated Holmes story was "The Adventure of the Second Stain," published in the October 1904 issue of *The Strand*.[8] So, we will never know how Paget would have portrayed the Holmes and Watson of "The Field Bazaar." Would they have been clownish caricatures of themselves, or would Paget have played it straight and sober with the imagery?[9] The former would have been a fairly unambiguous signal that the story was a pastiche, the latter, not so clear.

In fact, "The Field Bazaar" did not appear anywhere other than *The Student* until the mid-1930s.[10] Since then it has floated on the margins of the world of Holmes and Watson, denied not only canonical status, but also original illustration. It has been, really, an orphan work.

Canonizing is outside the scope of the *Green Bag*'s authority (and interest, and competence), but illustrating and publishing are not. So, having both some sympathy for "The Field Bazaar" and some appreciation for the story it tells — whether canonical or comical, it is fun to read — the *Green Bag* has enlisted an excellent modern illustrator to illuminate it.

David Hutchinson is well-suited to the task of adding pictures to "The Field Bazaar" for a *Green Bag* version of this entertaining tidbit for lawyers. He is both a skilled amateur artist and a successful practicing lawyer.[11] His offerings here are, first, a respectfully derivative salute to Paget (see page 467 below) and, second, an entirely original, Paget-inspired portrayal of a contemplative Watson (page 469). We hope that Hutchinson's best efforts to bring the words of "The Field Bazaar" to visual life — combined with our best efforts to bring these old words and new pictures together tastefully — bring you new pleasure in this amusing, anomalous sidelight on Sherlock Holmes and John Watson:

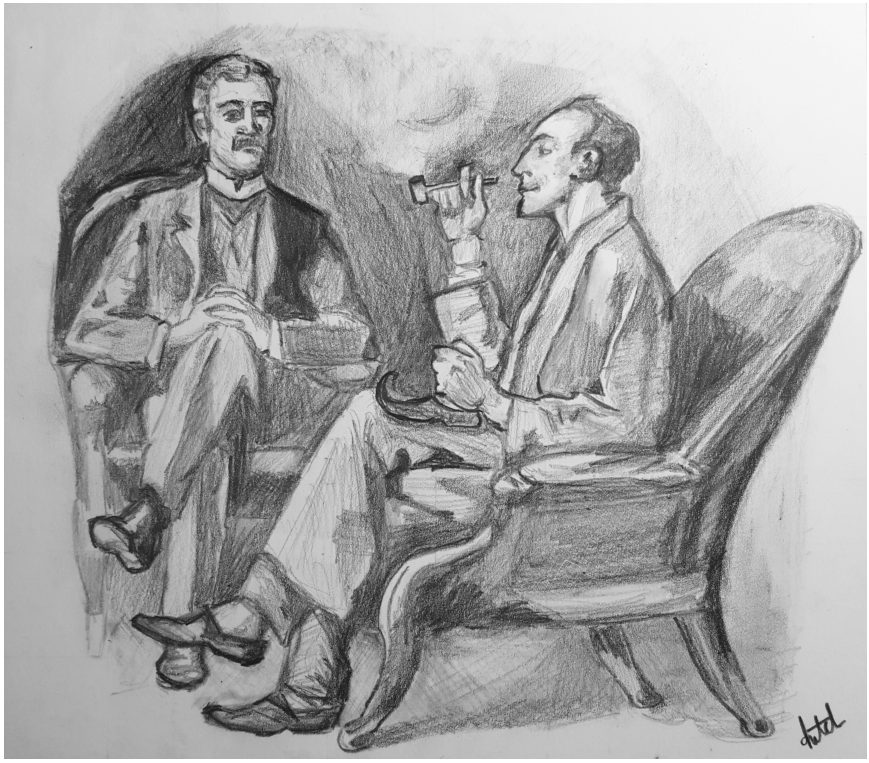
DOYLE IN AMERICA 1890-1930, at 18 (1990) (wondering how American views of Sherlock Holmes might have been affected "if the 'Adventures' as published in American newspapers had had the Paget illustrations").

[8] In the early 20th century, the English Paget was succeeded by the American Frederic Dorr Steele, whose first-rate illustrations of Holmes stories appeared in *Collier's Weekly* and other magazines. *See* REDMOND, SHERLOCK HOLMES HANDBOOK at 84, 88-90.

[9] Cf. VINCENT STARRETT, THE PRIVATE LIFE OF SHERLOCK HOLMES 169 (1934) ("Frederic Dorr Steele, the artist, also has done a parody or two in prose, for the delectation of his fellow members of the Players . . . .").

[10] *See* Cattleya M. Concepcion, *Arthur Conan Doyle's "The Field Bazaar": A Bibliography*, page 443 above.

[11] *See* jenner.com/people/DavidHutchinson.



He smiled as he took his slipper from the mantelpiece and drew from it enough shag tobacco to fill the old clay pipe with which he invariably rounded off his breakfast. (Based on Sidney Paget illustrations for "The Adventure of the Copper Beeches" and "The Adventure of the Stockbroker's Clerk.")

The Field Bazaar

"I SHOULD certainly do it," said Sherlock Holmes.

I started at the interruption, for my companion had been eating his breakfast with his attention entirely centred upon the paper which was propped up by the coffee pot. Now I looked across at him to find his eyes fastened upon me with the half-amused, half-questioning expression which he usually assumed when he felt he had made an intellectual point.

"Do what?" I asked.

He smiled as he took his slipper from the mantelpiece and drew from it enough shag tobacco to fill the old clay pipe with which he invariably rounded off his breakfast.

"A most characteristic question of yours, Watson," said he. "You will not, I am sure, be offended if I say that any reputation for sharpness which I may possess has been entirely gained by the admirable foil which you have made for me. Have I not heard of debutantes who have insisted upon plainness in their chaperones? There is a certain analogy."

Our long companionship in the Baker Street rooms had left us on those easy terms of intimacy when much may be said without offence. And yet I acknowledge that I was nettled at his remark.

"I may be very obtuse," said I, "but I confess that I am unable to see how you have managed to know that I was . . . I was . . ."

"Asked to help in the Edinburgh University Bazaar."

"Precisely. The letter has only just come to hand, and I have not spoken to you since."

"In spite of that," said Holmes, leaning back in his chair and putting his finger tips together, "I would even venture to suggest that the object of the bazaar is to enlarge the University cricket field."

I looked at him in such bewilderment that he vibrated with silent laughter.

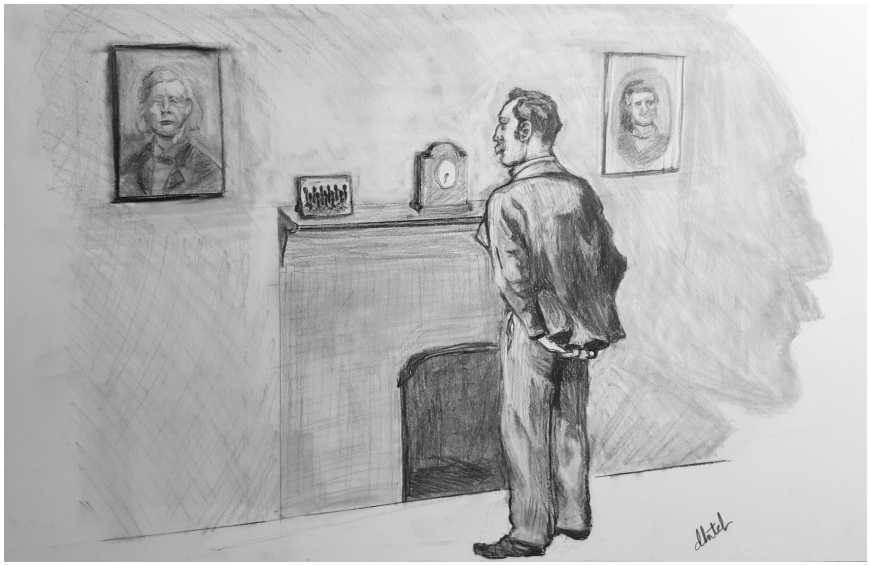
"The fact is, my dear Watson, that you are an excellent subject," said he. "You are never *blasé*. You respond instantly to any external stimulus. Your mental processes may be slow but they are never obscure, and I found during breakfast that you were easier reading than the leader in the *Times* in front of me."

"I should be glad to know how you arrived at your conclusions," said I.

"I fear that my good nature in giving explanations has seriously compromised my reputation," said Holmes. "But in this case the train of reasoning is based upon such obvious facts that no credit can be claimed for it. You entered the room with a thoughtful expression, the expression of a man who is debating some point in his mind. In your hand you held a solitary letter. Now last night you retired in the best of spirits, so it was clear that it was this letter in your hand which had caused the change in you."

"This is obvious."

"It is all obvious when it is explained to you. I naturally asked myself what the letter could contain which might have this effect upon you. As you walked you held the flap side of the envelope towards me, and I saw upon it the same shield-shaped device which I have observed upon your old college cricket cap. It was clear, then, that the request came from



". . . you laid down the letter beside your plate with the address uppermost, and you walked over to look at the framed photograph upon the left of the mantelpiece."

Edinburgh University — or from some club connected with the University. When you reached the table you laid down the letter beside your plate with the address uppermost, and you walked over to look at the framed photograph upon the left of the mantelpiece."

It amazed me to see the accuracy with which he had observed my movements. "What next?" I asked.

"I began by glancing at the address, and I could tell, even at the distance of six feet, that it was an unofficial communication. This I gathered from the use of the word 'Doctor' upon the address, to which, as a Bachelor of Medicine, you have no legal claim. I knew that University officials are pedantic in their correct use of titles, and I was thus enabled to say with certainty that your letter was unofficial. When on your return to the table you turned over your letter and allowed me to perceive that the enclosure was a printed one, the idea of a bazaar first occurred to me. I had already weighed the possibility of its being a political communication, but this seemed improbable in the present stagnant conditions of politics.

"When you returned to the table your face still retained its expression, and it was evident that your examination of the photograph had

not changed the current of your thoughts. In that case it must itself bear upon the subject in question. I turned my attention to the photograph, therefore, and saw at once that it consisted of yourself as a member of the Edinburgh University Eleven, with the pavilion and cricket-field in the background. My small experience of cricket clubs has taught me that next to churches and cavalry ensigns they are the most debt-laden things upon earth. When upon your return to the table I saw you take out your pencil and draw lines upon the envelope, I was convinced that your were endeavouring to realise some projected improvement which was to be brought about by a bazaar. Your face still showed some indecision, so that I was able to break in upon you with my advice that you should assist in so good an object."

I could not help smiling at the extreme simplicity of his explanation.

"Of course, it was as easy as possible," said I.

My remark appeared to nettle him.

"I may add," said he, "that the particular help which you have been asked to give was that you should write in their album, and that you have already made up your mind that the present incident will be the subject of your article."

"But how —— !" I cried.

"It is as easy as possible," said he, "and I leave its solution to your own ingenuity. In the meantime," he added, raising his paper, "you will excuse me if I return to this very interesting article upon the trees of Cremona, and the exact reasons for their pre-eminence in the manufacture of violins. It is one of those small outlying problems to which I am sometimes tempted to direct my attention.["][12]

[12] *See* Ross E. Davies, *The Quotation Mark Puzzle*, page 511 below.

The Quotation Mark Puzzle

An Imperfection of "The Field Bazaar"

[parallel citation: 2016 Green Bag Alm. 511]

Ross E. Davies[†]

The rare, and until now rarely seen, first printing of "The Field Bazaar" — that odd little 1896 Sherlock Holmes and John Watson vignette — has an intriguing defect of punctuation. Or is it a feature? (Versions of the entire story, which is very short, begin on pages 369, 464, and 519 of this *Almanac & Reader*. Read it now, if you haven't already.)

The last paragraph of "The Field Bazaar" is in Holmes's voice. He is speaking about his interest in violins made from the trees of Cremona, in Italy. When that paragraph ends, Holmes stops speaking, of course. But there is no closing quotation mark at the end of the paragraph. See for yourself. Here is a picture of that paragraph — the original version — from page 36 of the November 20, 1896 issue of Edinburgh University's *The Student* magazine[1]:

> " It is as easy as possible," said he, " and I leave its solution to your own ingenuity. In the meantime," he added, raising his paper, " you will excuse me if I return to this very interesting article upon the trees of Cremona, and the exact reasons for their pre-eminence in the manufacture of violins. It is one of those small outlying problems to which I am sometimes tempted to direct my attention.

Now compare that original version to leading early reprintings. The first reprinting — A.G. Macdonell's — was made in 1934[2]:

> " It is as easy as possible," said he, " and I leave its solution to your own ingenuity. In the meantime," he added, raising his paper, " you will excuse me if I return to this very interesting article upon the trees of Cremona, and the exact reasons for their pre-eminence in the manufacture of violins. It is one of those small outlying problems to which I am sometimes tempted to direct my attention."
>
> The Athenæum Press Ltd.

[†] Professor of Law, George Mason University School of Law, and *Green Bag* editor.

[1] For the entire issue of *The Student*, see pages 327-419 above.

[2] The Memoirs of Sherlock Holmes: The Field Bazaar [2] (Athenæum 1934). Courtesy of Kent State University Libraries, Special Collections and Archives.

Vincent Starrett's, in 1940[3]:

> "It is as easy as possible," said he, "and I leave its solution to your own ingenuity. In the meantime," he added, raising his paper, "you will excuse me if I return to this very interesting article upon the trees of Cremona, and the exact reasons for their pre-eminence in the manufacture of violins. It is one of those small outlying problems to which I am sometimes tempted to direct my attention."

Edgar Smith's, in 1947[4]:

> "It is as easy as possible," said he, "and I leave its solution to your own ingenuity. In the meantime," he added, raising his paper, "you will excuse me if I return to this very interesting article upon the trees of Cremona, and the exact reasons for their pre-eminence in the manufacture of violins. It is one of those small outlying problems to which I am sometimes tempted to direct my attention."

The Daily Californian's, in 1969[5]:

> "It is as easy as possible," said he, "and I leave its solution to your own ingenuity. In the meantime," he added, raising his paper, "you will excuse me if I return to this very interesting article upon the trees of Cremona, and the exact reasons for their pre-eminence in the manufacture of violins. It is one of those small outlying problems to which I am sometimes tempted to direct my attention."

Jack Tracy's, in 1980[6]:

> "It is as easy as possible," said he, "and I leave its solution to your own ingenuity. In the meantime," he added, raising his paper, "you will excuse me if I return to this very interesting article upon the trees of Cremona, and the exact reasons for their pre-eminence in the manufacture of violins. It is one of those small outlying problems to which I am sometimes tempted to direct my attention."

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[3] VINCENT STARRETT, 221B: STUDIES IN SHERLOCK HOLMES 4 (Macmillan 1940).

[4] THE FIELD BAZAAR: A SHERLOCK HOLMES PASTICHE 15 (Pamphlet House 1947).

[5] THE DAILY CALIFORNIAN (University of California, Berkeley), Jan. 14, 1969, at 11, reprinted in Appendix A, pages 518-519 below.

[6] SIR ARTHUR CONAN DOYLE AND ASSOCIATED HANDS, SHERLOCK HOLMES: THE PUBLISHED APOCRYPHA 9 (Houghton Mifflin 1980) (Jack Tracy ed.).

Richard Lancelyn Green's, in 1983[7]:

> 'It is as easy as possible,' said he, 'and I leave its solution to your own ingenuity. In the meantime,' he added, raising his paper, 'you will excuse me if I return to this very interesting article upon the trees of Cremona, and the exact reasons for their pre-eminence in the manufacture of violins. It is one of those small outlying problems to which I am sometimes tempted to direct my attention.'

You can see the critical, terminal difference: Unlike the original story from 1896, all the reprintings end with a closing quotation mark.

In 1934, when A.G. Macdonell commissioned the Athenæum Press to produce the first reprint edition of "The Field Bazaar,"[8] either Macdonell ordered insertion of the additional quotation mark or someone at the press — perhaps a helpful typesetter — added it on their own initiative. I do not know why whoever did it did it, but I am inclined to suspect that it was a manifestation of the natural, good-spirited, often unconsciously exercised human impulse to correct errors, to tie up loose ends. It would have felt right to end "The Field Bazaar" with a closing quotation mark, marking the end of Holmes's comments on trees and violins, and the end of the story — because a story isn't over until the last speaker stops speaking.[9] Later editors and publishers of "The Field Bazaar" either worked from the 1934 Macdonell edition (or a successor to it),[10] or were moved by an impulse not unlike the one that was at work when the type was set in 1934.[11]

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[7] SIR ARTHUR CONAN DOYLE, THE UNCOLLECTED SHERLOCK HOLMES 151 (Penguin 1983) (Richard Lancelyn Green ed.).

[8] *See* Richard Lancelyn Green, *Introduction*, 23 SHERLOCK HOLMES J. (Winter 1996) (supplement), reprinted at pages 308-309 above.

[9] *Cf.* Mary A. Celeste, *Oyez, Oyez: An Inside Look at Romer v. Evans*, 41 William Mitchell L. Rev. 44, 79 (2015) (making the same observation about litigation, and about singing); *FDIC v. Mmahat*, 907 F.2d 546, 553 n.8 (5th Cir. 1990) (same).

[10] Though at least one returned to the primary source. *See* Green, *Introduction*, 23 SHERLOCK HOLMES J. ("The Centenary Edition [of 'The Field Bazaar'] is set from the copy of the *Student* used by A.G. Macdonell and is published by The Sherlock Holmes Society of London as a supplement to the *Sherlock Holmes Journal* (Winter 1996).").

[11] The same holds true for more recent editions of the story. *See, e.g.,* ARTHUR CONAN DOYLE, THE RETURN OF SHERLOCK HOLMES 323 (Oxford 1993) (Richard Lancelyn Green ed.); 23 SHERLOCK HOLMES J. (Winter 1996) (supplement); THE VICTORIAN CRICKET MATCH: THE SHERLOCK HOLMES SOCIETY OF LONDON VERSUS THE PG WODEHOUSE SOCIETY 3 (Sherlock Holmes Society of London 2001) (MC Black ed.); SIR ARTHUR CONAN DOYLE, THE APOCRYPHA OF SHERLOCK HOLMES 4 (Gasogene 2009) (Leslie Klinger ed.); *see also* THE EDINBURGH STORIES OF ARTHUR CONAN DOYLE 11 (Polygon 1981).

But what if there was no error to correct? It seems only fair to begin with the presumption — rebuttable, to be sure — that the editors and publishers of *The Student* did a good job in 1896 of faithfully converting Conan Doyle's manuscript into type and then text. (Unfortunately, the manuscript itself is nowhere to be found.) This starting point is made more difficult to avoid by two facts: (1) *The Student*'s version of the story was the only one published in Conan Doyle's lifetime, and (2) Conan Doyle seems never to have objected to it. Moreover, the best available evidence — contemporaneous issues of *The Student* (November 12 and 27, and the November 20 "Bazaar Number" containing "The Field Bazaar")[12] — indicates that *The Student* was edited and published by meticulous punctuators of even the most elaborate dialogue.[13] And with respect to closing quotation marks in particular, they were quite good. In those three issues of *The Student*, there are seven works — other than "The Field Bazaar" — that indisputably ought to close with a closing quotation mark. All of them do. So, in a magazine with impressively clean and complete punctuation,[14] the nonexistent closing quotation mark at the end of "The Field Bazaar" is either an extraordinary error or an extraordinary adherence to an original text.[15]

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[12] Facsimiles of all three issues in their entirety are at pages 310-436 above. For a snapshot of the context in which "The Field Bazaar" occurred, see Ross E. Davies, *Philanthropical (and Apocryphal, or Canonical?) Cricket in Edinburgh: The Geography and Scenery of a Sherlock Holmes Vignette*, 2016 GREEN BAG ALM. (supp.).

[13] *See, e.g.*, Louis Tracy, *Shooting the "Rapids"!*, THE STUDENT, Nov. 20, 1896, at 24, 28, reprinted above at pages 356-365.

[14] More impressive, it might be said, than the 1934 Macdonell version. In addition to adding the closing quotation mark at the end of "The Field Bazaar," the Athenæum Press made two other changes in punctuation that were undoubtedly wrong. First error: In the 19th paragraph of the story — which, like the paragraph at the end of the story, contained one of Holmes's little speeches to Watson — the closing quotation mark (present in the original version in *The Student*) was left out. Second error: In the same paragraph, a comma (also present in the original version in *The Student*) was left out of the first sentence. With the comma in place, the original version fluidly introduces a paragraph of classic Holmesian reasoning. Without the comma, the Macdonell version opens in a slightly clumsy and confusing rush. This critique is, I must admit, of the pot-versus-kettle variety. The *Green Bag* has never put out a perfect publication.

[15] The absence of a manuscript against which to check *The Student* does leave open one other chilling possibility: copyfitting by cutting. "The Field Bazaar" does fit very snugly onto two pages. It is possible that a tail end — a few lines? a few paragraphs? — was lopped off at a late stage in the publication process, after the point at which a good-spirited typesetter might have had an opportunity to spot and correct the resulting end-of-story

If *The Student*'s original version of "The Field Bazaar" is indeed the true version, then attentive readers must take all of it — including the punctuation — seriously, as they do when reading anything else, from Shakespeare[16] to the U.S. Constitution.[17] And then what does the odd ending of "The Field Bazaar" mean? What could explain a nonexistent-but-not-missing closing quotation mark?

The most obvious possibility — the grammatical one — is that Holmes had at least one more paragraph of thoughts to express,[18] perhaps about violins or cricket or medical education, or perhaps about some interesting case that had just come to his attention. In other words, the nonexistent closing quotation mark suggests that either (a) "The Field Bazaar" was longer than the vignette published in *The Student*, or (b) "The Field Bazaar" was itself just an excerpt, one scene, from some longer story.

There is precedent for thinking along these lines.

Consider the cutting and pasting of the opening scenes in two other Holmes stories — "The Adventure of the Resident Patient" and "The Adventure of the Cardboard Box" — both published in 1893. Holmes scholar Donald E. Curtis nicely encapsulates that business in "An Examination of 'The Resident Patient'":

> ["The Resident Patient"] opens at 221B Baker St. with Watson reading the paper and Holmes lying "in the very center of five millions of people, with his filaments stretching out . . . ." Here we are treated to an outstanding example of Sherlock Holmes's deductive abilities, for

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defect. But, as unfortunate as such an event might have been, accepting that theory of the case would mean accepting that "The Field Bazaar" was part of a more substantial story than the one that appeared in *The Student*.

[16] *See, e.g.*, J. Dover Wilson, *Review: Shakespeare's Punctuation*, 23 REV. ENGLISH STUDIES 70 (1947); Peter Alexander, *Correspondence*, 23 REV. ENGLISH STUDIES 263 (1947); *see also, e.g.*, J. Gavin Paul, *Performance as 'Punctuation': Editing Shakespeare in the Eighteenth Century*, 61 REV. ENGLISH STUDIES 390 (2010); Theodore Leinwand, *Charles Olson After Shakespeare*, 32 NEW ENGLAND REV. no. 4, 22, at 22, 30 (2011-12); Clifford Leech, *Studies in Hamlet, 1901-1955*, 9 SHAKESPEARE SURVEY 1, 5-6 (1956).

[17] *See, e.g., Parker v. District of Columbia*, 478 F.3d 370, 378 (D.C. Cir. 2007); *see also, e.g., Sobranes Recovery Pool I, LLC v. Todd & Hughes Const. Corp.*, 509 F.3d 216, 223 n.19 (5th Cir. 2007); *cf. Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519 (1991).

[18] CHICAGO MANUAL OF STYLE § 10.29 (14th ed. 1993) ("If a passage consisting of more than one paragraph from the same source is quoted and is not set off as an excerpt, quotation marks are used at the beginning of each paragraph and at the end of the last paragraph. That is, quotation marks are not used at the *end* of any paragraph in the quotation except the last one.").

> as Watson drifts into a "brown study," Holmes seemingly reads Watson's mind! (This wonderful passage was originally part of "The Cardboard Box" as published in the *Strand Magazine*. ["The Cardboard Box"] was left out of the collected stories published as *The Memoirs of Sherlock Holmes* and later included in *His Last Bow*. When *The Complete Sherlock Holmes Short Stories* was published in 1928, this "mind-reading" passage was included in both ["The Resident Patient"] and ["The Cardboard Box"].)[19]

Why was this done? No one is certain (the evidence is sparse), but most commentators agree that the mind-reading scene that was originally part of "The Adventure of the Cardboard Box" was felt to be too good to lose when that story was excluded (perhaps because of its racy content) from most editions of *Memoirs of Sherlock Holmes*. So, the scene was moved to "The Adventure of the Resident Patient," which was included in the *Memoirs*.[20] Whatever the reason, the fact that a scene was susceptible to excision from one story and engrafting onto another means that the "The Field Bazaar," too, could have been excised or engrafted or both. That is, it might once have been, or have been intended to become, part of a complete Sherlock Holmes mystery.

Consider also some Holmes stories with opening scenes that might, with slight revision and re-dovetailing, introduce a different mystery. For example, in just the first handful, published in 1891, there are:

- "A Scandal in Bohemia"— with Watson's reflections on marriage, his visit to 221B Baker Street, and then Holmes's deductions, based on Watson's appearance, about his home and professional lives, which then segue into the case of the adventures of Irene Adler.
- "A Case of Identity" — with the fireside debate between Watson and Holmes, aided by a newspaper, about Holmes's claim that "there is nothing so unnatural as the commonplace," which then segues into the case of the romantic problems of Mary Sutherland.

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[19] Donald E. Curtis, *An Examination of "The Resident Patient,"* 50 BAKER STREET J. 41, 42 (Summer 2000).

[20] *Id.*; *see also, e.g.*, H.W. Bell, *On the Variant Readings of* The Resident Patient, 1 BAKER STREET J. 312, 313-14 (July 1946). "The Adventure of the Cardboard Box" was included in the first U.S. edition of the *Memoirs*, published by Harper & Brothers in 1894, and in that edition it retained the mind-reading scene, while "The Adventure of the Resident Patient" remained in its original form, without any overt mind-reading. *See* A. CONAN DOYLE, MEMOIRS OF SHERLOCK HOLMES 29-32, 181-82 (1894).

"I FELL INTO A BROWN STUDY."

This illustration for the mind-reading scene in "The Adventure of the Cardboard Box" in *The Strand Magazine* (January 1893, page 61) was recycled to illustrate the same mind-reading scene in "The Adventure of the Resident Patient" in *Memoirs of Sherlock Holmes* (1894, page 168).

- "The Five Orange Pips" — with its inventory of unreported cases and discussion of the foul weather, followed by Holmes's deductions about his prospective client, and only after all of that the segue into the case of the KKK's vengeance on the Openshaws.

A complete list of promising candidates would be wearyingly long. And the point would remain the same. The structures of numerous stories about Holmes and Watson leave open the possibility of changeable, even interchangeable, opening scenes.

Questions about the substance of the story told in "The Field Bazaar" are beyond the scope of this little paper, which is limited to documenting one little punctuation puzzle. No doubt there are troubling inconsistencies between some facts presented there and some facts in other Holmes stories. For example, I doubt anyone could read Catherine Cooke's

"Making Bricks without Clay: The Medical Training of Dr. Watson,"[21] and fail to doubt the accuracy of Holmes's statement in the "The Field Bazaar" that Watson received his Bachelor of Medicine degree from Edinburgh University. Inconsistencies abound in the Holmes stories, however, and some may even be of importance comparable to Watson's academic pedigree. The number, identities, and lifespans of Watson's spouses come to mind.[22] So, it may be that the explaining away, or not, of inconsistencies cannot by itself resolve basic questions about the nature or status of "The Field Bazaar."

"The Field Bazaar" has never been in the same league with the traditional Sherlock Holmes canon of 56 short and four novel-length works of detective fiction published under the byline of Arthur Conan Doyle. But is this little story something more than just a pastiche that happens to have the same Conan Doyle byline as the canonical stories? Is it —though not substantially canonical on its own — enough of a kernel or fragment or vestige of such a story to be treated as something more than a mere trivial echo? Could it be a demi- or semi-memoir of Sherlock Holmes (the full title in *The Student* is "The Memoirs of Sherlock Holmes. 'The Field Bazaar.'"), doomed to perpetual imperfection?

On the other hand, could the nonexistent closing quotation mark in *The Student*'s original version really be just an editorial or typographical error at the end of an otherwise well-written and well-set short story, in an otherwise meticulously punctuated and typeset magazine? Yes, it could, though for the reasons given earlier in this paper that is not an answer to be accepted lightly.

In any event, the most interesting question about "The Field Bazaar" remains unanswered, at least for the moment: Is there an Arthur Conan Doyle scholar (or Sherlock Holmes artist) resourceful enough (or creative enough) to find (or fabricate) the fuller story of which it was (or should have been) a part?

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[21] Catherine Cooke, *Making Bricks without Clay: The Medical Training of Dr. Watson*, in NERVE AND KNOWLEDGE: DOCTORS, MEDICINE AND THE SHERLOCKIAN CANON 23 (2015) (Robert S. Katz and Andrew L. Solberg eds.).

[22] *See, e.g.*, Willis Frick, *Watson's Wives*, 3 THE WATSONIAN 113 (Spring 2015); Leslie S. Klinger, *The Dating of* The Five Orange Pips, 45 BAKER STREET J. 70, 75 & nn. 45-54 (June 1995); Robert C. McGregor, *The Curious Affair of Watson's Wives*, 30 BAKER STREET J. 26 (Mar. 1980); D. Martin Dakin, A SHERLOCK HOLMES COMMENTARY 250-51, 280 (1972).

APPENDIX A

THE FIELD BAZAAR IN *THE DAILY CALIFORNIAN* JANUARY 14, 1969, PAGES 1 & 11

actual size: approximately 11 inches wide by 17 inches tall

source: Bancroft Library, University of California, Berkeley

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There is one copy of the original of this version of "The Field Bazaar" in existence (other than any in inaccessible private collections), or at least that is what my exceedingly resourceful colleague Cattleya Concepcion and I concluded after a lot of digging. The top of page 1 (see below) is reproduced here only for information about provenance and citation. Page 11 (see next page) includes, in addition to "The Field Bazaar" in its entirety: (1) Edgar W. Smith's introduction to his 1947 pamphlet edition of "The Field Bazaar,"[23] (2) Arthur Conan Doyle's Holmes-Watson pastiche, "How Watson Learned the Trick," and (3) a short explanation of the provenance of that story.[24] The "How Watson Learned the Trick" material is redacted because we are not 100% certain about its copyright status. The rest is reproduced here in facsimile for the convenience of readers who might otherwise have to exert themselves in order to see it.


The Daily Californian
WEEKLY MAGAZINE
Volume 4, Number 9 © Copyright 1968, The Daily Californian Tuesday, January 14, 1969

[23] Edgar W. Smith, *By Way of Introduction*, in THE FIELD BAZAAR: A SHERLOCK HOLMES PASTICHE 7 (Pamphlet House 1947).

[24] "How Watson Learned the Trick" is available in a nice modern edition that includes a replica of the original miniature volume and a pamphlet containing a transcript and background information about the story. ARTHUR CONAN DOYLE, A MINIATURE TREASURE FROM QUEEN MARY'S DOLLS' HOUSE: HOW WATSON LEARNED THE TRICK (Walker Books 2014).

Tuesday, January 14, 1969 THE WEEKLY MAGAZINE Page Eleven

Two 'New' Holmes Tales

The Field Bazaar

The corpus of the Sacred Writings consists of the sixty canonical tales brought forth in celebration of the saga of Sherlock Holmes—all of them, with four admitted exceptions, from the inspired pen of Dr. John H. Watson. Deriving from this Pauline source in the measure they do, the Writings are fixed and definitive as they are writ: their scripture body can know neither change nor accretion unless, some blessed day, the vaults of the bank of Cox & Co. at Charing Cross give up the secret they have held so long. Then, and only then, will there be further revelation to delight men's souls.

It is idle, obviously, to think that any secular tribute to the Master could bear scrutiny in the fierce light thrown out by the true word. The canon is jealous of its integrity and of the purity of its inspiration: even the non-Watsonian tales long since subsumed into its content—two of which, be it known, were written by Sherlock Holmes himself, with a third, only a little lower in the plane, ascribed to his brother Mycroft—stand awkward and uneasy in the sublime company they find themselves obliged to keep. No mere outsider, certainly, can ever hope to assault a bulwark so strongly built.

Yet for all that the canon is whole and impregnable in its own right, there is much material crowding close upon the threshold which must be held, if not in reverence, at least in deep respect. Superior to all else in this category, certainly is the Sherlockian product of Dr. Watson's close friend and associate, Sir Arthur Conan Doyle, whose writings so closely resemble the Writings themselves that efforts have sometimes been made, by the uninitiate, to endow them with the full odor of sanctity. They are, in fact, in the order of the Apocrypha, as distinguished from the next lower order of the Higher Criticism, and they include the manuscript of a tale tentatively titled, "The Man Who Was Wanted," which was found, together with a scenario for another tale, among Dr. Doyle's papers after his death; a three-act play, *The Speckled Band*, taken loosely from Dr. Watson's story of the same name and published in 1912, and a short essay in the field of the parody-pastiche called "The Field Bazaar."

This amusing little piece appeared originally in the University of Edinburgh undergraduate magazine, *The Student*, in November, 1896, carrying the bare and still unknighted signature of A. Conan Doyle. It has been reprinted in a 100-copy private edition—by A. G. Macdonnel in 1934—and in *221B: Studies in Sherlock Holmes*—Macmillan, 1940—but in none of its appearances has it reached a wide circle of readers. As imitations go, it is a good one: it is, in fact, one of the best ever done, despite the readily-observed lapses and lacunae which stamp it as Conancial rather than canonical. Dr. Watson, who took his degree of Doctor of Medicine at the University of London in 1878, is blithely assigned, in deference to the purpose the tale is designed to serve, to the University of Edinburgh; and, as if this were not liberty enough, the author goes out of his way to have Sherlock Holmes assert that Watson was not really a doctor at all, since he had taken only a baccalaureate. Worse still, the final and climactic deduction in the tale is left dangling and without explanation, in completely un-Watsonian design.

Yet we must not carp or quibble when such an offering as this is laid before us. "The Field Bazaar" is ill-rounded, too short, and slightly mocking, it is true; but we shall take it to our hearts unchallenged, because it was written by that great and good man who walked and talked with Dr. Watson, and who has done more than most of us are willing to admit to make the name of Sherlock Holmes a household word wherever right and justice are esteemed.

Edgar W. Smith

Summit, N.J., July 1, 1947

"I should certainly do it," said Sherlock Holmes.

I started at the interruption, for my companion had been eating his breakfast with his attention entirely centered upon the paper which was propped up by the coffee pot. Now I looked across at him to find his eyes fastened upon me with the half-amused, half-questioning expression which he usually assumed when he felt that he had made an intellectual point.

"Do what?" I asked.

He smiled as he took his slipper from the mantlepiece and drew from it enough shag tobacco to fill the old clay pipe with which he invariably rounded off his breakfast.

"A most characteristic question of yours, Watson," said he. "You will not, I am sure, be offended if I say that any reputation for sharpness which I may possess has been entirely gained by the admirable foil which you have made for me. Have I not heard of debutantes who have insisted upon plainness in their chaperones? There is a certain analogy."

Our long companionship in the Baker Street rooms had left us on those easy terms of intimacy when much may be said without offense. And yet I acknowledge that I was nettled at his remark.

"I may be very obtuse," said I, "but I confess that I am unable to see how you have managed to know that I was . . . I was . . ."

"Asked to help in the Edinburgh University Bazaar."

"Precisely. The letter has only just come to hand, and I have not spoken to you since."

"In spite of that," said Holmes, leaning back in his chair and putting his fingertips together, "I would even venture to suggest that the object of the bazaar is to enlarge the University cricket field."

I looked at him in such bewilderment that he vibrated with silent laughter.

"The fact is, my dear Watson, that you are an excellent subject," said he. "You are never *blase*. You respond instantly to any external stimulus. Your mental processes may be slow but they are never obscure, and I found during breakfast that you were easier reading than the leader in the *Times* in front of me."

"I should be glad to know how you arrived at your conclusions," said I.

"I fear that my good nature in giving explanations has seriously compromised my reputation," said Holmes. "But in this case the train of reasoning is based upon such obvious facts that no credit can be claimed for it. You entered the room with a thoughtful expression, the expression of a man who is debating some point in his mind. In your hand you held a solitary letter. Now last night you retired in the best of spirits, so it was clear that it was this letter in your hand which had caused the change in you."

"This is obvious."

"It is all obvious when it is explained to you. I naturally asked myself what the letter could contain which might have this effect upon you. As you walked you held the flap side of the envelop towards me, and I saw upon it the same shield-shaped device which I have observed upon your old college cricket cap. It was clear, then, that the request came from Edinburgh University, or from some club connected with the University. When you reached the table you laid down the letter beside your plate with the address uppermost, and you walked over to look at the framed photograph upon the left of the mantlepiece."

It amazed me to see the accuracy with which he had observed my movements. "What next?" I asked.

"I began by glancing at the address, and I could tell, even at the distance of six feet, that it was an unofficial communication. This I gathered from the use of the word "Doctor" upon the address, to which, as a Bachelor of Medicine, you have no legal claim. I knew that University officials are pedantic in their correct use of titles, and I was thus enabled to say with certainty that your letter was unofficial. When on your return to the table you turned over your letter and allowed me to perceive that the enclosure was a printed one, the idea of a bazaar first occurred to me. I had already weighed the possibility of its being a political communication, but this seemed improbable in the present stagnant conditions of politics.

"When you returned to the table your face still retained its expression and it was evident that your examination of the photograph had not changed the current of your thoughts. In that case it must itself bear upon the subject in question. I turned my attention to the photograph, therefore, and saw at once that it consisted of yourself as a member of the Edinburgh University Eleven, with the pavilion and the cricket-field in the background. My small experience of cricket clubs has taught me that next to churches and cavalry ensigns they are the most debt-laden things upon earth. When upon your return to the table I saw you take out your pencil and draw lines upon the envelope, I was convinced that you were endeavouring to realize some projected improvement which was to be brought about by a bazaar. Your face still showed some indecision, so that I was able to break in upon you with my advice that you should assist in so good an object."

I could not help smiling at the extreme simplicity of his explanation.

"Of course, it was as easy as possible," said I.

My remark appeared to nettle him.

"I may add," said he, "that the particular help which you have been asked to give was that you should write in their album, and that you have already made up your mind that the present incident will be the subject of your article."

"But how—!" I cried.

"It is as easy as possible," said he, "and I leave its solution to your own ingenuity. In the meantime," he added, raising his paper, "you will excuse me if I return to this very interesting article upon the trees of Cremona, and the exact reasons for their pre-eminence in the manufacture of violins. It is one of those small outlying problems to which I am sometimes tempted to direct my attention."

How Watson Learned the Trick

ARTHUR CONAN DOYLE'S PIG, AND YOURS

A CHALLENGE

[parallel citation: 2016 Green Bag Alm. 537]

Ross E. Davies†

During the late 19th and early 20th centuries, *The Strand Magazine* printed Arthur Conan Doyle's byline many, many times — on dozens of Sherlock Holmes stories, and also on a wide range of other works.[1] Only once, however, did the magazine publish a Doyle-signed work that was purely graphical: the pig (yes, it is a pig) pictured above. He drew the pig in response to a challenge *The Strand* issued to several Victorian-era celebrities. Full details are given in an article — "Pigs of Celebrities," by Gertrude Bacon — published by *The Strand* in March 1899 (and reprinted on pages 542-546 below).[2] The gist of the challenge is easily summarized:

> Lift a pen and close your eyes. Keep them closed while drawing a pig. Autograph your work and send it to us.

The *Green Bag* is renewing that challenge. It is open to all our readers, every one of whom is a celebrity in the eyes of the *Bag*'s editors. Please use the form (and follow the rules) on page 547 below. We will: (1) post on our website all, or at least most, pigs submitted in accordance with

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† George Mason University law professor and *Green Bag* editor.

[1] *See* RICHARD LANCELYN GREEN & JOHN MICHAEL GIBSON, A BIBLIOGRAPHY OF A. CONAN DOYLE *passim* (1983; 1st rev. ed. 2000); *see also, e.g.*, DANIEL STASHOWER, TELLER OF TALES: THE LIFE OF ARTHUR CONAN DOYLE 5-6, 121-25, 416 (1999).

[2] Gertrude Bacon, *Pigs of Celebrities*, 17 THE STRAND 338 (Mar. 1899).

the rules (we reserve the right to exclude mean-spirited and copyright-infringing pigs), and (2) publish some exemplary pigs in a future *Almanac & Reader*, or issue of the *Green Bag* itself, or perhaps both.

This year's *Green Bag Almanac & Reader* is an especially appropriate forum in which to revive *The Strand*'s "blindfold pigs" project, because of the common ground shared by Arthur Conan Doyle and Gertrude Bacon in their respective works republished here. Both authors seriously yet entertainingly emphasize the value of attending to the way people express themselves in ink, on paper. Compare for example, this passage from "The Reigate Puzzle" (pages 156-157 above), in which Sherlock Holmes analyzes the handwriting of the nefarious Cunninghams, . . .

> "We come now, however, to a point which is of importance. You may not be aware that the deduction of a man's age from his writing is one which has been brought to considerable accuracy by experts. In normal cases one can place a man in his true decade with tolerable confidence. I say normal cases, because ill health and physical weakness reproduce the signs of old age even when the invalid is a youth. In this case, looking at the bold strong hand of the one and the rather broken-backed appearance of the other, which still retains its legibility, although the t's have begun to lose their crossing, we can say that the one was a young man and the other was advanced in years, without being positively decrepit."
>
> "Excellent!" cried Mr. Acton again.
>
> "There is a further point, however, which is subtler and of greater interest. There is something in common between these hands. They belong to men who are blood-relatives. It may be most obvious to you in the Greek e's, but to me there are many small points which indicate the same thing. I have no doubt at all that a family mannerism can be traced in these two specimens of writing. I am only, of course, giving you the leading results now of my examinations, which would be of more interest to experts than to you. They all tended to deepen the impression upon my mind that the Cunninghams had written this letter.["][3]

. . . with this passage from "Pigs of Celebrities" (page 542 below) . . .

> To those who make a study of calligraphy it seems that the handwriting affords an index to character to be almost implicitly relied on, and to these students, as well as in a lesser degree the casual

[3] *See also* WILLIAM S. BARING-GOULD, 1 THE ANNOTATED SHERLOCK HOLMES 342-43 (2d ed. 1972); *cf.* L.S. Holstein, *The Puzzle of Reigate*, 2 BAKER STREET J. 221 (Oct. 1952).

> observer, a glance at the drawings which accompany these words will, I think, sufficiently satisfy them that, in an almost greater degree, the blindfold pigs exemplify the teaching of the autographs below.

In addition, there is the inclusion of Conan Doyle's pig and autograph in Bacon's article (see pages 537 above and 545 below), accompanied by her analysis of his work:

> Turning to the "pig literary," he must be wanting in imagination indeed who fails to trace in Dr. Conan Doyle's spirited little sketch the resemblance to the immortal and lamented Sherlock Holmes. That pig is evidently "on the scent" of some baffling mystery. Note the quick and penetrating snout, the alert ears, thrown back in the act of listening, the nervous, sensitive tail, and the expectant, eager attitude. The spirit of the great detective breathes in every line and animates the whole.

So, what better place and time could there be to bring back the "blindfold pigs" than right here and now?

For the dignified reader who might be hesitant about drawing a pig, consider this: Both Mary Jeune and Francis Jeune participated in *The Strand*'s pig project (see page 543 below). In 1899, at the time they were drawing pigs for *The Strand*, Mary was a prominent public figure — a well-published author, activist, and charity organizer (she would later serve as an alderman on the London County Council, beginning in 1910)[4] — and Francis was a judge of the Probate, Divorce and Admiralty Division of Her Majesty's High Court of Justice (a post he would continue to hold until he retired from public life in 1905).[5] Even *Green Bag* readers in the most elevated positions at the bar, in industry, in government, in the academy, or elsewhere should feel comfortable in the company of the Jeunes and other eminent Victorian pig artists represented in the following pages.

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[4] William A. Davis, *Mary Jeune, Late-Victorian Essayist: Fallen Women, New Women, and Poor Children*, 58 ENGLISH LITERATURE IN TRANSITION, 1880-1920, at 181 (2015); *Lady St. Helier Dies*, N.Y. TIMES, Jan. 26, 1931, at 17; *see, also, e.g.*, Lady Jeune, *London Society*, 154 NORTH AMERICAN REVIEW 603 (Feb. 1892); LADY JEUNE, LESSER QUESTIONS (1894); *London Society Fifty Years Ago*, N.Y. TIMES SATURDAY REVIEW OF BOOKS, Nov. 6, 1909, at 688.

[5] Herbert Stephen (rev. Sinéad Agnew), *Jeune, Francis Henry, Baron St Helier (1843-1905)*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004; online ed. May 2015, Jan. 25, 2016), www.oxforddnb.com.

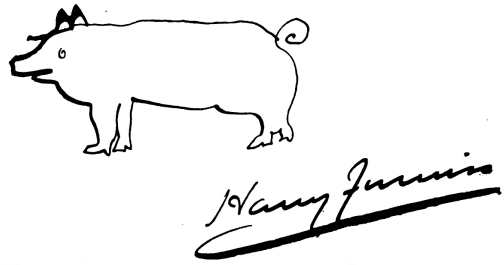
A final point: For readers seeking a leg up in what some may view — incorrectly — as a pig portraiture competition, we have advice offered by an expert, Harry Furniss, in the April 1899 issue of *The Strand*:

MR. HARRY FURNISS ON "BLINDFOLD PIGS."

> At the end of an article last month on pigs drawn blindfold by various celebrated people, we promised to give in this issue the very interesting letter and sketches by which Mr. Harry Furniss exemplified his method of drawing such pigs with almost as much accuracy as when the eyes are open. Mr. Furniss's letter runs as follows: "With pleasure, I inclose my first attempt for you, but it is by no means my best blind pig. I have a trick in drawing with my eyes shut. It is not a difficult one — perhaps you would like to try it. Simply *use your left hand as a guide*. In drawing a pig with your eyes shut, use the *little finger* of the left hand to start from, by touch. (Keep the left hand on the paper firmly.) Begin with the ears of the pig, then the head, legs, tail — and you can then feel the pen travelling along the back till it comes over the little finger again. Then you have the eye a little lower. Don't give this away till you have your piggery full. Wishing you every success.
>
> — Believe me, yours sincerely, HARRY FURNISS."[6]

Furniss was a thoroughly credible authority on drawing things. He had spent the better part of the 1870s, '80s, and '90s as a popular contributor of caricatures and other illustrations to leading periodicals such as *Punch*, *Vanity Fair*, and the *Illustrated London News*, as well as to his own publishing enterprises. He would remain an active artist and lecturer (and, eventually, actor, as he embraced the new media of his day) for

[6] *Curiosities*, 17 THE STRAND 491 (Apr. 1899).

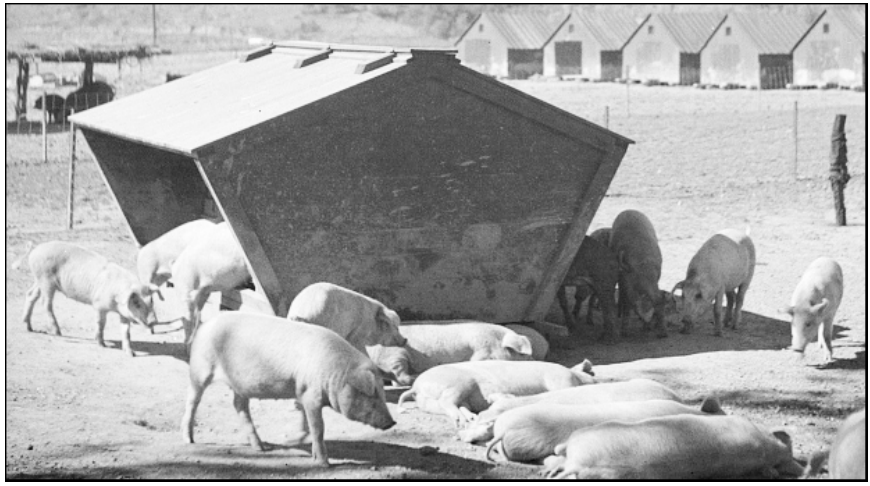


two decades after drawing his pig. He spent most of his career in London. But late in life he visited the United States for a couple of years, during which he worked for Thomas Edison, and then returned to England before the outbreak of World War I.[7]

Now it is your turn to put pen to paper (or tablet), or cursor to screen.

PIGS AT REST, AND ON THE MOVE

This is just a reminder — for our readers who may not have found themselves in the company of pigs recently — of what those wonderful creatures really look like. This offer is made with all due respect to the images on the next few pages, and to the people who created them:



[7] John Jensen, *Furniss, Henry [pseud. Lika Joko] (1854-1925)*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004; online ed. Jan. 2011, Jan. 25, 2016), www.oxforddnb.com.

Pigs of Celebrities.

BY GERTRUDE BACON.

THERE is ever a fascination in collections, and ours is, perhaps, a more essentially collecting age than any other. We collect all the things that our forefathers used to—pictures, books, plate, and other articles of *vertu*; and we have added to them a number of quite new ideas of our own—stamps, post-cards, railway-tickets, buttons, and what not, whose chief value would appear to lie in their strange character and utter uselessness.

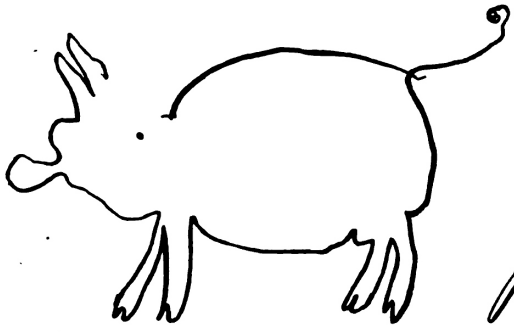
But now, as always, the palm of collections is universally accorded to those of personal relics of the great, and the fact that these are hard to come by only enhances their value; which value too is immensely increased on the death of the original owners. Very often indeed it is then only that they acquire any worth at all. For example, Lord Nelson's coat may now be well-nigh priceless, may form a worthy gift to the Sovereign herself; while the coats that the great sailor gave away during his lifetime descended to the rag-man in natural course, as those of his humblest lieutenant. This is one of the difficulties in the way of those who would fain form collections of mementos of yet living celebrities, and to the great majority of these, as in past days, the only course open is autograph-hunting.

Autographs possess certainly a very great advantage over many other souvenirs. They are lasting, they are portable, and they are eminently characteristic, which is more than can be said of snuff-boxes and old clothes. They, moreover, lie more or less within the reach of those whose worldly means may not be great, but who possess a fair amount of perseverance and self-assurance. The name of these is legion, as every celebrity knows only to his cost, and we may well believe that the information regarding autograph-hunters, which might be supplied by distinguished people, would be not only extremely interesting, but also somewhat startling in its nature.

Of course, there are various species of autograph collections. There is the autographed book, with "the author's compliments" on the fly-leaf. This is particularly attractive and valuable, and not to be lightly come by; but then all geniuses are not literary men, any more than all literary men are geniuses. There is likewise the autographed photograph, most delightful form of all, for besides perpetuating the face as well as the handwriting, its possession usually indicates a certain amount of personal friendship between giver and receiver. The following pages are intended to show yet another variety that the collection may assume, and which, among other advantages, may, at least, claim for itself a share of novelty and originality.

It consists, in short, of a number of drawings of that familiar animal the pig, drawn with the eyes shut, by leading representatives of science, art, literature, society, etc., whose world-wide renown is only equalled by their ready kindness and courtesy in ministering to the pleasure and benefit of those around them, and their exceeding indulgence in yielding to an audacious request. The idea, of course, originates in the old drawing-room game, though as a *bonâ-fide* collection is less often seen than its obvious advantages would seem to warrant.

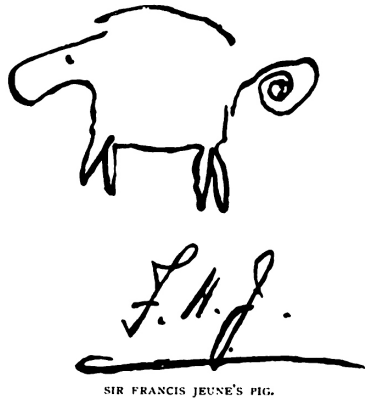
Carlyle says that, given a hero, or in other words a genius, it is only a question of his environment whether he will develop "into a poet, prophet, King, priest, or what you will." The vital spark is there, and will assert itself, no matter into what lines it falls. In a similar manner, granted a man of genius and strong personality, then everything about him and every action, however slight, he performs will bear the unmistakable imprint of his great characteristic. It is no hard task to read a man's character in his face, but, as has been before exemplified in these pages, it is equally possible to do so from his hands and ears. To those who make a study of calligraphy it seems that the handwriting affords an index to character to be almost implicitly relied on, and to these students, as well as in a lesser degree the casual observer, a glance at the drawings which accompany these words will, I think, sufficiently satisfy them that, in an almost greater degree, the blindfold pigs exemplify the teaching of the autographs below.



LORD ROBERTS'S PIG.

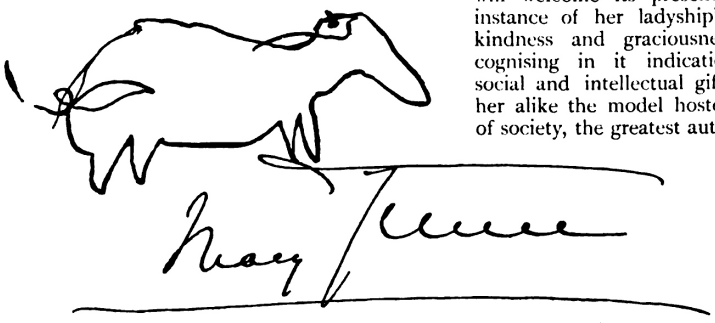
Take the first specimen for example, which Lord Roberts so graciously consented to draw for this article. Is it possible to conceive an animal more endowed with the martial spirit of its noble artist? It is essentially and above all a *fighting* pig. Note the firmly planted feet, the aggressively forward sloping ears, the quick eye, the stubborn, determined face, and pugnacious tail. The whole attitude is instinct with pluck and defiance. This animal is "game" to the last; he has also undoubtedly "got his back up." That Lord Roberts has paid particular and unusual attention to the "trotters" indicates a careful and observant eye, a keen sense of what is right and fitting, and an untiring attention to details, while the fact that he has consented to draw a pig at all is only another proof that, besides one of the bravest, he is likewise among the most courteous of men.

Equally distinctive is the pig of Sir Francis Jeune. Its judicial characteristics are apparent to all, even without the aid of the familiar initials beneath. It is in all respects a "carefully balanced" animal, and there is no mistaking the shrewdness and penetration of the eye. There is no wandering from the point, no unnecessary digressions and flourishes. The very gait suggests the even course of justice, not prone to jump to rash conclusions, not to be unduly hastened, but with patient and cautious footsteps progressing slowly and surely and impartially to the goal of equity and truth.



SIR FRANCIS JEUNE'S PIG.

The companion drawing is by the famous judge's equally famous wife. Those among Lady Jeune's admirers (and who are they who do not reckon themselves in that great army?) will welcome its presence as a fresh instance of her ladyship's never-failing kindness and graciousness; while recognising in it indications of those social and intellectual gifts that render her alike the model hostess, the leader of society, the greatest authority on every branch of women's life and work, and the prime mover in every good scheme for the ameli-

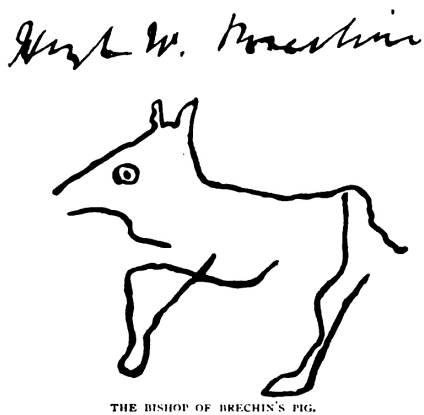


LADY JEUNE'S PIG.

oration and benefit of her poorer neighbours. A peculiarity about this animal, shared only by Professor Ramsay's, is that it turns its head to the right, the reverse position to that naturally given to a pig when drawn with the right hand.

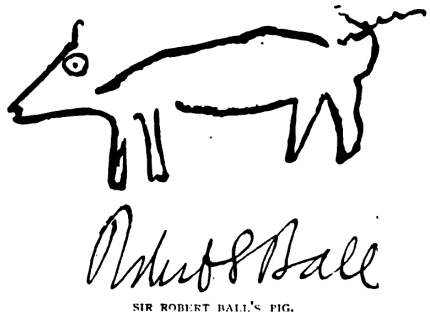
The kindness of the Bishop of Brechin in allowing his pig to adorn these pages will be appreciated by all. The popular and revered Primus of Scotland displays in his drawing those kindly and genial traits which have endeared him to all throughout an active and varied career.

Turn we now to the "pig scientific,"

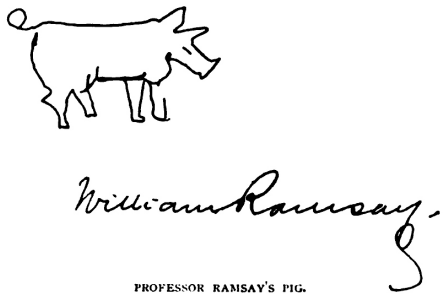


THE BISHOP OF BRECHIN'S PIG.

luckily represented in the two great branches of Astronomy and Chemistry, by Sir Robert Ball and Professor Ramsay. The renowned astronomer, author, lecturer, and most genial of men draws us a pig, in which he himself would be the first to trace its Irish antecedents. The keen eye of the star-gazer is there, and the fine, tapering snout that indicates the man of letters. Sir Robert



SIR ROBERT BALL'S PIG.



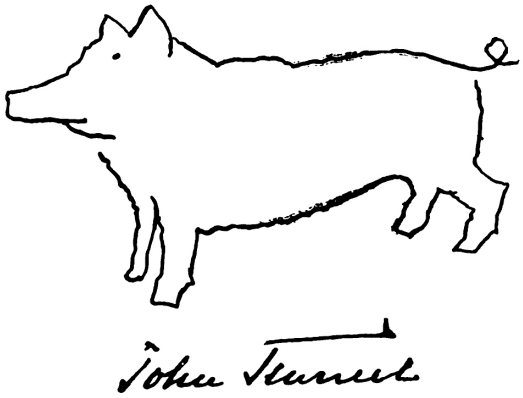
PROFESSOR RAMSAY'S PIG.

seems to have forgotten the ears, as, too, oddly enough, has Sir Francis Jeune, a curious omission in his case, for if justice be blind it is certainly not deaf.

The extreme excellence of Professor Ramsay's pig leads one almost to the suspicion that the great chemist had a corner of one eye open when he drew it, or else possessed a Röntgen-ray-like power of seeing through closed lids; but in this I may be doing him injustice. That his animal possesses a most fascinating personality no one will deny. There are indications of extreme modesty about the lowered head, downward sloping ears, and half-shut eye, while a capacity for taking infinite pains, minute attention to details, and the power of laborious research is as plainly evident in the talented little sketch as in the famous discoverer of Argon, Krypton, and the other rare constituents of the atmosphere himself.

SIR HENRY IRVING'S PIG.

Again, in the "pig histrionic" what can be more apparent than the tragic tendency it has unconsciously received from the hand of the greatest of tragedians? Sir Henry Irving has instilled a pathos and despair into the expression of his pig that the jocund and



SIR JOHN TENNIEL'S PIG.

light-hearted animal can scarcely display in real life. But to Sir Henry himself it is the tail that appeals most. "It may be vanity," he writes, "but I cannot help regarding it as a masterpiece," and in this opinion admiring and grateful beholders will readily acquiesce.

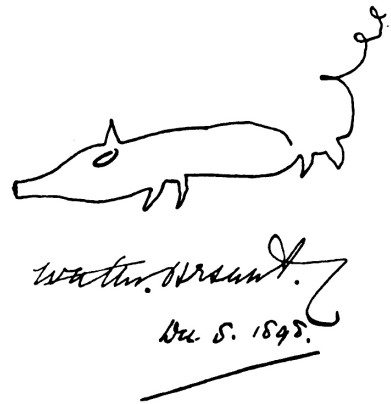
An unfortunate diffidence has robbed this article of another famous actor's pig, Mr. Wyndham writing in response to an appeal that he "cannot draw with his eyes open, let alone if they were closed." Sir Evelyn Wood too replied in almost the same words. These gentlemen unfortunately did not know that the less capable you are of drawing a pig with eyes open the better one you will probably produce with eyes shut. An ardent collector will never accept as an excuse an alleged incapacity for drawing. Very frequently the objector possesses a latent talent which he either conceals from modesty or else is unconscious of; and in any case the chances are that he will produce an animal that will surprise him very much by its excellence.

Certain it is that, the better a man draws, the harder work it is to coax a pig out of him. To get a blindfold pig from a celebrated artist is rare indeed, and I doubt whether an R.A. has ever been known to draw one. We may feel the more grateful, then, to that famous veteran, Sir John Tenniel, for his unexampled goodness in giving us a specimen from his own unrivalled pencil. It is the work of an artist, indeed, and even Sir John himself seems rather proud of it; for he writes: "I have much pleasure in sending you my picture of a 'Piggee,' drawn in pencil (blindfold), and duly signed. The result, *as I need hardly say*, fills me with wonder and admiration. It is simply an amazing *fluke*." He further adds that he will never attempt another, but we will venture to disagree with him as to the fluke, believing that whatever comes from that deft pen will inevitably be the best possible.

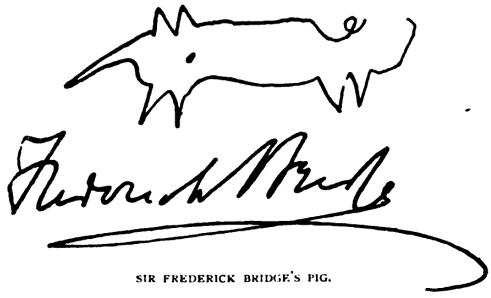
Turning to the "pig literary," he must be wanting in imagination indeed who fails to trace in Dr. Conan Doyle's spirited little sketch the resemblance to the immortal and lamented Sherlock Holmes. That pig is evidently "on the scent" of some baffling mystery. Note the quick and penetrating snout, the alert ears, thrown back in the act of listening, the nervous, sensitive tail, and the expectant, eager attitude. The spirit of the great detective breathes in every line and animates the whole.

DR. CONAN DOYLE'S PIG.

Nor is the indication of patient and deep research, literary skill, and subtle imagination less apparent in the animal Sir Walter Besant has favoured us with. The absence of the



SIR WALTER BESANT'S PIG.



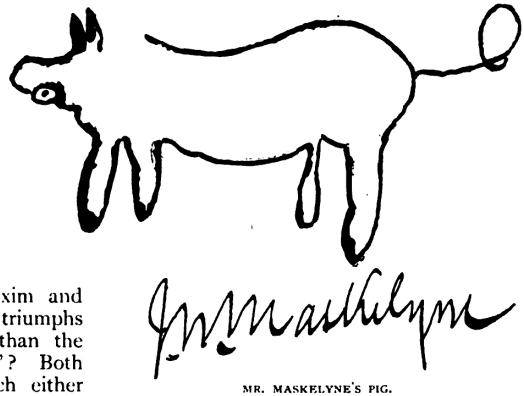
SIR FREDERICK BRIDGE'S PIG.

second ear is, doubtless, to be accounted for by its being directly behind the other.

On the contrary, the ears drawn by Sir Frederick Bridge are both well defined. This, of course, is only what would be looked for in the animal of a composer. Note the deep-set eye. That in a human being is generally considered a mark of a mathematical mind, and music and mathematics are proverbially associated. The gait of this pig, too, is undoubtedly "andante."

In the "pigs mechanical" we have been lucky, indeed, in securing the work of two such mighty masters of their art as Mr. Maxim and Mr. Maskelyne. What two greater triumphs of human ingenuity can we find than the Maxim gun and the "Box trick"? Both are mechanical problems, for which either mechanician may well envy the other, while the ordinary intellect stands amazed before such inventive genius.

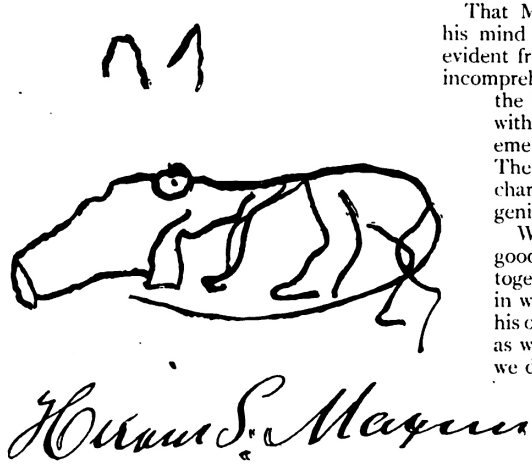
Referring to his pig, Mr. Maxim writes: "I have just a suspicion that the pigs that are so well drawn in your album are by people who had their eyes partly open. The trouble with my pig is that my eyes were too tightly closed." But nobody will find fault with Mr. Maxim's animal on this score or on any other. It bears the imprint of his matchless genius, and is certainly suggestive of the action of his incomparable gun.



MR. MASKELYNE'S PIG.

That Mr. Maskelyne had the box trick in his mind when he drew his shapely pig is evident from the resemblance it bears to the incomprehensible creature known generally as the "monkey," but sometimes credited with being something more, that emerges from that unfathomed mystery. The animal otherwise is eminently characteristic of one of the most ingenious, genial, and generous of men.

We have also received a remarkably good pig from Mr. Harry Furniss, together with a most interesting letter in which Mr. Furniss reveals a secret of his own for drawing pigs blindfold almost as well as when the eyes are open. As we do not wish to give away this secret before our readers have had an opportunity of trying what they can do in the ordinary way, we reserve Mr. Furniss's letter and drawings for publication next month.



MR. MAXIM'S PIG.

GREEN BAG PIG FORM

The Rules:

1) With your eyes closed, draw a pig in the box above. No peeking.
2) With your eyes open or closed, add your autograph. It must fit in the box, with the pig, and it must be legible, or at least not entirely illegible.
3) Both pig and autograph must be drawn in blue, green, or purple ink. Or pink.
4) Mail this form to the *Green Bag* at 6600 Barnaby St. NW, Washington, DC, 20015, or email a color picture of it (scan or photo) to editors@greenbag.org.

5) By sending this form (or a picture of it) to the *Green Bag* you are giving us a free, irrevocable, unlimited, intergalactic license to use it any way we want to, including letting others use it. If you want a copyright notice to accompany your pig, write it in the box, with the pig, in the same color as the pig.