

Rhode Island Bar Journal

Rhode Island Bar Association Volume 64. Number 2. September/October 2015



**Jurors Perceptions
of Forensic Evidence**

**Estate Planning For
Same-Sex Married Couples**

**Carrying on With and
Without a Comma**

**BOOK REVIEW:
*Excellent Sheep***



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RHODE ISLAND BAR ASSOCIATION LAWYER'S PLEDGE

As a member of the Rhode Island Bar Association, I pledge to conduct myself in a manner that will reflect honor upon the legal profession. I will treat all participants in the legal process with civility. In every aspect of my practice, I will be honest, courteous and fair.

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Cover Photograph by Brian McDonald

Dealing With Change



Melissa E. Darigan, Esq.
President
Rhode Island Bar Association

My first President's Message heralded the changes in our profession and the need to face the challenges before us. In these unprecedented times, clients are demanding that lawyers provide greater value and results at a lower (or at least more predictable) cost. Non-lawyers and online, do-it-yourself resources are occupying space traditionally reserved for lawyers. Unrelenting innovations in technology confound many lawyers as much as they help. And increasing demands on lawyers' time add to the stress. Beyond the changes directly impacting our practices is the growing public need for access to legal services and the courts, which requires new approaches to how legal services are provided. Addressing all of these changes is, in my view, imperative. And our Bar Association is taking action.

For one, we are helping lawyers through education and training to be better, smarter and faster to satisfy client demands. Just look at the slate of offerings at our last Annual Meeting. There were eight seminars on technology and practice management issues alone. Other CLEs at the Annual Meeting and throughout the year address substantive practice areas and teach lawyers the basic, as well as specialized, skills needed to compete and serve clients effectively.

Our new Law Center is another initiative that will enhance members' professional development and experience. The new space is terrific – modern, with technology bells and whistles, lots of meeting rooms and a new Lawyers' Lounge. Moving to our new location resulted in substantial cost savings for the Association, reducing pressure on dues and enabling us to focus on long term planning, including continuing to provide valuable, relevant services to members and programs in the public services area. Additionally, our new Law Center is now even more accessible to all parts of the State, which will encourage the engagement of members in the counties who found it burdensome to travel to Providence for Bar events. We hope the new Law Center will become a mainstay for our members, especially younger lawyers, as a place to learn, network and service clients.

In the public services, our Bar Association is doing a world of good for those needing lawyer assistance and the members who provide it. Though difficult to imagine in our small State, the Bar's public services department typically receives between 1,200 and 1,400 calls per month. Many of these callers need assistance with legal issues that go to the very core of their personal, family and financial lives – from family and elder law matters to landlord/tenant issues to bankruptcy and collections concerns. We are able to assist these Rhode Islanders through the Volunteer Lawyer and Lawyer Referral Programs and Reduced Fee, Elder Law, Lawyers for the Arts and Armed Services panels, as well as Ask-A-Lawyer events and legal clinics provided statewide. These services not only help fill a critical public need, they also provide important benefits to the lawyers doing the work. Members who volunteer their services can obtain free CLE credit, receive mentoring and training in substantive practice areas (which they can utilize with fee-generating clients) and have opportunities to meet other lawyers and develop mentors, networks and friends. These benefits are particularly helpful to new lawyers who are looking to build a practice. And, not all of the Bar's public services efforts are *pro bono*. The Lawyer Referral Program last year made over 9,000 referrals to members, and we know at least one resulted in a \$35,000 fee.

Additionally, our Bar Association is taking important steps to help shape how Limited Scope Representation (LSR) is implemented in Rhode Island. This new way of practicing law is intended to provide competent lawyer assistance to litigants, while enabling clients with limited means to effectively control the cost of litigation. Though well-established in other states, there are currently few parameters in place to guide Rhode Island attorneys wishing to provide LSR. In response to the Supreme Court's request for comment, a new task force was formed make recommendations on protocols, parameters, rules, and regulations for consideration by the Court in its rule-making process.

This is not a commercial for our Bar Association. This is a call to action. For lawyers to continue in successful, happy and productive practices, and for the Bar to continue to do the good

This is a call to action. For lawyers to continue in successful, happy and productive practices, and for the Bar to continue to do the good work it does for members and the public, we need everyone to be engaged.

work it does for members and the public, we need everyone to be engaged. Engagement is a term I use frequently in my law firm and can be difficult to define. To me, it means to be involved, to participate and, more importantly, to care. It means rolling up your sleeves and doing the work.

So this is what I am asking from our members – be engaged. Join a committee, go to meetings, think outside of the box, offer your opinions and do the work. Young lawyers especially should get involved; change is here, and it is going to affect you the most. For everyone, be inquisitive and be proactive. If you have a specialized skill set, or have developed

best practices or processes in the delivery of legal services, contact the CLE Committee about offering a session to share your insights, innovations and knowledge. And where you can, especially if you have experience in legal issues that directly impact people's daily lives, help the under-served through the Bar's *pro bono* and public service partnerships.

As for our Bar Association, we will continue to do our best to help lawyers deal with the changes in the profession. We do a lot of good for our members, our profession and the public in today's changing world – we can do better, and more of it, if you will join us. ♦

Are you looking for answers to practice-related questions?

Try the Bar's dynamic List Serve!

Since its inception under the sponsorship of Past Bar President Michael McElroy, our Bar's List Serve has grown exponentially in participating members and in a wide range of answered questions. From nuances of the Rhode Island Courts e-filing system to requests for local and out-of-state referrals, List Serve members are providing each other with timely answers. List Serve topics encompass a wide range of practice areas including consultants, traffic violations, medical marijuana, landlord/tenant, divorce, *pro hac vice*, immigration and more!

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Free and available for all actively practicing Rhode Island attorney members, the Bar's List Serve gives you immediate, 24/7, open-door access to the knowledge and experience of hundreds of Rhode Island lawyers. If you have a question about matters relating to your practice of law, you post the question on the List Serve, and it is emailed to all list serve members. Any attorney who wishes to provide advice or guidance will quickly respond.

Here is what one List Serve member, Russell M. Bergevine, Esq., recently noted: *"I am relocating to Southern California in the next few weeks, and I want to thank the entire ListServe membership for helping me while I practiced in RI. Many of you have personally answered my questions, and several of you have even become off-list sources of mutual support. I also learned much from the experience and wisdom of this group simply by lurking and reading the daily threads. In all, this group has been wonderfully supportive, genuine, and caring to me and to each other. A truly wonderful resource. I wish all of you continued professional success, and positive and enriching lives."*

If you have not yet joined the List Serve, please consider doing so today. To access to this free member benefit go to the Bar's website: ribar.com, click on the **MEMBERS ONLY** link, login using your Bar identification number and password, click on the **List Serve** link, read the terms and conditions, and email the contact at the bottom of the rules. It's that easy!

RHODE ISLAND BAR JOURNAL

Editorial Statement

The *Rhode Island Bar Journal* is the Rhode Island Bar Association's official magazine for Rhode Island attorneys, judges and others interested in Rhode Island law. The *Bar Journal* is a paid, subscription magazine published bi-monthly, six times annually and sent to, among others, all practicing attorneys and sitting judges, in Rhode Island. This constitutes an audience of over 6,000 individuals. Covering issues of relevance and providing updates on events, programs and meetings, the *Rhode Island Bar Journal* is a magazine that is read on arrival and, most often, kept for future reference. The *Bar Journal* publishes scholarly discourses, commentary on the law and Bar activities, and articles on the administration of justice. While the *Journal* is a serious magazine, our articles are not dull or somber. We strive to publish a topical, thought-provoking magazine that addresses issues of interest to significant segments of the Bar. We aim to publish a magazine that is read, quoted and retained. The *Bar Journal* encourages the free expression of ideas by Rhode Island Bar members. The *Bar Journal* assumes no responsibility for opinions, statements and facts in signed articles, except to the extent that, by publication, the subject matter merits attention. The opinions expressed in editorials represent the views of at least two-thirds of the Editorial Board, and they are not the official view of the Rhode Island Bar Association. Letters to the Editors are welcome.

Article Selection Criteria

- The *Rhode Island Bar Journal* gives primary preference to original articles, written expressly for first publication in the *Bar Journal*, by members of the Rhode Island Bar Association. The *Bar Journal* does not accept unsolicited articles from individuals who are not members of the Rhode Island Bar Association. Articles previously appearing in other publications are not accepted.
- All submitted articles are subject to the Journal's editors' approval, and they reserve the right to edit or reject any articles and article titles submitted for publication.
- Selection for publication is based on the article's relevance to our readers, determined by content and timeliness. Articles appealing to the widest range of interests are particularly appreciated. However, commentaries dealing with more specific areas of law are given equally serious consideration.
- Preferred format includes: a clearly presented statement of purpose and/or thesis in the introduction; supporting evidence or arguments in the body; and a summary conclusion.
- Citations conform to the Uniform System of Citation.
- Maximum article size is approximately 3,500 words. However, shorter articles are preferred.
- While authors may be asked to edit articles themselves, the editors reserve the right to edit pieces for legal size, presentation and grammar.
- Articles are accepted for review on a rolling basis. Meeting the criteria noted above does not guarantee publication. Articles are selected and published at the discretion of the editors.
- Submissions are preferred in a Microsoft Word format emailed as an attachment or on disc. Hard copy is acceptable, but not recommended.
- Authors are asked to include an identification of their current legal position and a photograph, (headshot) preferably in a jpg file of, at least, 350 d.p.i., with their article submission.

Direct inquiries and send articles and author's photographs for publication consideration to: Rhode Island Bar Journal Editor Frederick D. Massie email: fmassie@ribar.com telephone: 401-421-5740

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As Seen On TV: Jurors Perceptions of Forensic Evidence



Hon. Brian P. Stern
Associate Justice,
RI Superior Court¹



Scott L. Rubins, M.A.
President, Forensic Futures
Education Group

We found the defendant not guilty because we wondered why a gun residue or trajectory analysis was not conducted to determine who fired the gun and the path of the bullet. Isn't that what the police are supposed to do in every case? (ACTUAL CASE QUOTE)

Introduction

There is little argument television and other forms of media impact our society. This impact is not just apparent in influencing a person's decision to purchase a laptop or deciding on a political candidate, but also influences people's perception of a criminal court case.² Media has strongly romanticized courts of law and makes technology seem more accessible and flawless than it may actually be.³ It is hard to ignore that potential jurors watch crime dramas on television. Additionally, the majority of jurors have not had previous experience with the criminal justice system before reporting for jury duty.⁴ To prosecute or defend a criminal matter effectively, an understanding of what is being portrayed on crime dramas, the field of forensic science, and the common types of forensic evidence is necessary.

History of the Crime Drama

Beginning with radio, and stretching throughout the history of television, there have been crime dramas. The television show *Dragnet*,⁵ first began as a radio show in 1949 using actual cases from the Los Angeles Police Department. Crime dramas became more popular when introduced to television. In the 1950s, *Perry Mason*⁶ taught us the most effective way to prove the guilt of a criminal defendant was to ask them enough tough questions until they confessed on the witness stand. In the 1970s, *Colombo*'s⁷ Peter Falk would question a witness and have no success. However, after a pregnant pause, he would ask one final question and crack the case. On the original *Hawaii Five-O*⁸ viewers could count on the catchphrase "Book 'em, Danno," before the end of the show, after the crime was solved.

Entering the 1980 and 1990s, a new type of crime drama was introduced. These stories were ripped from the headlines like those in *Law & Order*,⁹ where a crime occurs in the first few minutes of the show, is investigated by the police during the next half hour, and, in the final ten minutes, the accused is prosecuted and convicted by the jury or

pleads guilty to the crime.

During the past ten years, recent crime dramas have the aspects of the earlier shows, but with technology on steroids. In shows like *CSI*, the investigation and prosecution are based on solving crimes to a legal and moral certainty with science. DNA, facial recognition, and chemical tests are introduced within days or weeks of the crime and shown to the jury. In most episodes, solving the crime is complex and difficult, but, in the end, the jury always knows they convicted the right person.

Beyond a Reasonable Doubt

Jurors are instructed in criminal cases that, to find the defendant guilty, the prosecution must establish the elements of the crime beyond a reasonable doubt. In the seminal case, *In the Matter of Samuel Winship*, 397 U.S. 358 (1970), the United States Supreme Court held that the reasonable doubt standard has a constitutional stature. The reasonable doubt standard is a prime instrument for reducing the risk of convictions and the loss of liberty resting on factual error. It is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts issue and to command the respect and confidence of the community in the applications of criminal law.¹⁰

While juries are instructed to apply the reasonable doubt standard when determining the guilt of a criminal defendant, there is not an explicit definition of reasonable doubt. In 1994, the United States Supreme Court had the opportunity to clarify the reasonable doubt standard in *Victor v. Nebraska*, 114 S.Ct. 1239 (1994). The Court did not prescribe any specific wording to be used by a trial judge, but, rather, outlined elements that should be included: 1) the standard is inextricably intertwined with the presumption of innocence; 2) the burden of proof rests with the prosecution and never shifts to the accused; 3) a reasonable doubt is based on common sense and not upon sympathy or prejudice; 4) it is logically connected to the evidence or lack of evidence; 5) it does not involve proof to an absolute certainty; and 6) more evidence is required than the accused is *probably* guilty.¹¹

Due to the lack of precise guidance regarding the beyond a reasonable doubt standard, the individual juror's background and experience become vital when making their determination. Given a normal juror's experience with television crime dramas, they may be lead to believe the prosecution must demonstrate, in every case, the defendant's guilt with scientific and/or technological means. It could also lead them to decide the criminal defense attorney is required to present its own scientific evidence and/or expert testimony in every case to rebut evidence submitted by the prosecutor. Regardless of what the jurors decide, some of them will end up giving more weight to scientific evidence because they are used to seeing it on television where it is generally dispositive.¹²

What is Forensic Science?

The word forensic comes from the Latin *ferensis*, meaning "on or before the forum." Today, the field of forensic science encompasses a broad range of scientific disciplines including: toxicology, pathology, and biology, each with their own set of technologies and practices. Science, as it is related to the law, is most commonly used to define forensic science, but does

not really provide the depth and breadth this field deserves. Forensic scientists, or Criminalists, investigate and process firearms, fire debris, blood, DNA, and controlled substances. Through this process, Criminalists do not just examine and process specific evidence to solve a crime, but endeavor to gain an understanding of the methodology of the crime.

Reliability of Forensic Science

DNA, toxicology, fingerprints, trace evidence, blood spatter, firearms, hair, fibers, and arson are common fields of forensic science testified to in court. Some have been around for hundreds of years, while others are relatively new.¹³ But, does the length of the field's existence mean it is reliable in a court of law? It is not possible to cast a broad net, stating that all forensic science is reliable or unreliable. For each type of forensic evidence, it is critical to understand the reliability of the methodology used to determine the scientific facts, the background, training, and experience of the forensic scientist, and the correlation of the scientific facts to the opinion the forensic scientist expresses at trial.

There are certain types of forensic evidence, such as DNA, that will produce a

result with a high degree of certainty for a particular piece of evidence so long as issues such as the method of collection, chain of custody, maintenance and calibration of the scientific instrumentation are verified.¹⁴ Other forensic evidence, such as bite marks, firearm evidence, tire impressions, fingerprints and forensic odontology¹⁵ have been criticized by some because they have not been exposed to stringent scientific scrutiny. A 2009 report issued by the National Academy of Science provides a comprehensive overview of the state of forensic evidence at the time. Reports such as these, while important to the evolution of the discipline, are the opinion of the issuing body and are open to interpretation and subsequent changes to the field.¹⁶

Analytical Sciences

Analytical-based sciences are those that some might consider to be the hard core sciences, those where instrumentation provides a definitive answer. Whose DNA was on the rim of the water bottle? What drug does the baggie contain? What was the driver's blood alcohol level? Criminalists analyze this evidence in labs where they have set procedures for processing, documenting, and evaluating this



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type of evidence. Their instrumentation is calibrated at regular intervals, and there are usually proficiency exams to ensure the Criminalists are competent.

Interpretive Sciences

No less important than analytical sciences, interpretive sciences are subject to a greater degree of human interpretation. A large majority of scientific evidence brought to trial is of this nature including, fingerprints, firearms identification, and shoe impressions. Criminalists evaluating evidence have to determine if fingerprints are from the same source or if a bullet came from the recovered gun. This type of evidence is only as reliable as the human providing the interpretation. From a scientific perspective, some areas of interpretive science are the subject of standards and extensive scientific peer review, while others have been criticized.¹⁷ Criminalists who perform these tasks are frequently subject to proficiency exams to assure they are competent to provide accurate reports to the courts.

Types of Forensic Evidence Fingerprints

Fingerprints, palm prints, and sole prints have been used to identify people

for more than a century in the United States. Collectively, the analysis of these prints is known as friction ridge analysis, which consists of experience-based comparisons of the impressions left by the ridge structures of volar (hands and feet).¹⁸ A common misconception is that anything you touch will leave a fingerprint that can identify you. The reality is, at many crime scenes, there are no fingerprints, and, even if there are, they might not be usable. This is because fingerprints require a good surface on which to deposit. Hard, smooth, non-porous surfaces, such as glass, are considered the ideal material for a fingerprint. As you deviate from that ideal surface, bumpy, sandpaper-like, porous, the less likely you are to visualize a fingerprint. Movement can also affect whether or not a fingerprint will be usable. As an individual moves their fingers, the prints begin to smudge. Sometimes this leaves a print that is completely unusable, other times it leaves behind what is known as a partial print.

When an examiner evaluates a print, everything about the print must be taken into account. The type of surface on which it was found, how it was visualized and collected, its quality as a fingerprint,

and its viability for examination and comparison. Friction ridge examination is considered an interpretive science.

Firearms Investigation

Firearms investigation is commonly thought of as matching a bullet from a crime scene to the gun of a suspect. When a bullet leaves a gun, markings known as grooves, lands, and striations are impressed onto the sides of the bullet. The grooves and lands cause the bullet to spin so it flies straight and accurately hits its target. Grooves and lands can sometimes be used to identify the type of weapon from which it came. These are known as the class characteristics. Class characteristics are common traits shared by more than one object, such as the tread on a specific brand of sneaker. The striations – small fine scratches – are a product of the rifling process and provide the bullet's individual characteristics. Individual characteristics are unique and random markings that allow us to link evidence to a single source, similar to a nick or tear in a specific location on the bottom of a sneaker. If both the bullet and the suspect gun are in good condition, it is possible to individualize a bullet to the gun.

Important Notice

Rhode Island Bar Association Public Service Legal Assistance Referral Process

The recent relocation of the Rhode Island Bar Association headquarters from Providence to 41 Sharpe Drive, Cranston, RI, 02920 prompted us to remind the Rhode Island Courts, legal community, and social service agencies of our standard, public service programs' referral processes, including: Lawyer Referral Service; Legal Information & Referral Service for the Elderly; Volunteer Lawyer Program; and US Armed Forces Legal Services Project. To ensure individuals receive the most efficient and timely attention when requesting legal assistance provided through the Rhode Island Bar Association's public service programs, please direct them to first telephone 401-421-7799. Or, they may email their request by accessing the Bar Association's website at ribar.com. Once on the Bar's website, click on the **FOR THE PUBLIC** drop down, and then click on the sub-menu category, **Finding and Choosing a Lawyer**. This page provides email addresses and an email lawyer referral request form that is easy to fill out and send to the Bar. Upon receipt, Bar staff will contact the individual and make the proper referral.

Please do not send potential clients to the Bar offices. There are no attorneys at the Bar building who handle public service legal assistance requests. Individuals who walk into the Bar offices before making the telephone call and/or going through the Bar's website are unduly inconvenienced, often by having to arrange transportation for a matter more efficiently and easily resolved by telephone or email.

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To individualize a bullet to a specific gun, the firearms examiner will fire a new bullet from the same gun into a water tank. Next, the examiner will use a comparison-microscope to compare the two bullets' markings. First, the grooves and lands are examined, and, if they match, then the striations are examined. The striations are like a fingerprint and, with a microscope, can be superimposed upon each other to demonstrate they came from the same source.

The science of firearms investigation extends beyond mere comparison of bullets to include knowledge of the operation of all types of weapons, restoration of obliterated serial numbers on weapons, detection and characterization of gun-powder residues on garments and around wounds, estimation of muzzle-to-target distances, and detection of powder residues on hands. Firearms investigation is an interpretive science.

Biological Evidence and DNA

Biological evidence is provided by specimens originating from a living organism available in a forensic investigation. Such specimens may be found at the scene of a crime on a person, clothing, or weapon, and some biological evidence comes from the environment, animals, and plants. Other biological evidence comes from specimens obtained directly from the victim or suspect, such as blood, saliva or sweat.¹⁹ Many of these are common sources for DNA collection, nuclear DNA specifically, which is quite valuable in associating evidence to a specific individual with a high degree of certainty. More than 99% of our DNA is the same. However, the amount that individualizes each of us is less than 1%.²⁰

Locating biological evidence at a crime scene is not as easy as crime dramas on television make it appear. If there is blood on the floor or a wall at a crime scene, locating the evidence is easy. However, evidence such as semen, saliva and blood may not be readily visible. In some cases, investigators rely on swabbing multiple locations to find possible samples. Other times, they use an Alternate Light Source (ALS), which allows a monochromatic beam of light, usually a laser, to shine on evidence and cause certain body fluids to fluoresce. Sometimes chemicals, such as Luminol or Blue Star, that glow in the presence of blood proteins are sprayed. Other times, crime scene investigators are able to locate DNA from items simply

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touched by an individual, such as a steering wheel of a car or the slide or grip of a gun.²¹ This method is known as low copy or touch DNA testing, and, in many cases, is more successful in identifying suspects than fingerprints. Once the DNA evidence is obtained, it is prepared for analysis in the lab. This analysis usually takes a few weeks, unlike the television shows, which have complete results in ten minutes.

Nuclear DNA testing is most commonly performed in labs through what is known as Short Tandem Repeat (STR). STR tests for 13 or more loci, these loci are used so the probability of two people matching all of them would be miniscule. Comparison of these samples can be made using the FBI DNA database known as Combined DNA Indexing System (CODIS). CODIS houses three databases: convicted felons; unidentified persons; and profiles generated from crime scenes. The DNA sample is run against each of the databases with hopes of identifying an individual. When the Criminalist testifies there is a DNA match, they are testifying the *frequency of occurrence* of that DNA is so high, the probability of it being someone else barely exists. DNA is an analytical science.

Addressing Juror Expectations

Judges, prosecutors, and defense counsel must adapt to, rather than fight against, the modern juror. The parties should address these issues during their trial preparation and as part of their *voir dire* examination. Counsel can pose targeted questions to help identify biased jurors and educate the jury panel about the dangers of using crime show dramas in their consideration of the case.²² Some areas of inquiry include: 1) making the distinction between the cases depicted on crime dramas and the case before the court; 2) can the juror convict, even if evidence they would see in a crime drama is not presented?; (3) does the juror understand that some of the tests and investigation procedures used on television may not even be possible in real life?²³; and 4) that although the juror cannot consider as evidence what they see on television, can they still consider the evidence or lack of evidence presented at the trial?

The judge may also act as the gatekeeper of the evidence during the trial. The trial judge should carefully consider whether or not a forensic witness would

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be allowed to give expert or opinion testimony. The trial judge may require testimony, outside the presence of the jury, to determine whether or not the methodology is adequate for the expert to express an opinion to the jury on a particular issue within his or her expertise.²⁴

The parties may request, and the trial judge may craft jury instructions that directly address forensic evidence. These instructions should direct jurors to use only the standards articulated by the court to weigh the evidence, not standards they've learned from television or other sources outside the courtroom.²⁵

Conclusion

When the 6th Amendment was ratified in 1791, the nation was drastically different than it is today. There were no telephones, no radios, no televisions, and no internet. Juries of the time did not face the barrage of media influence a contemporary jury faces on a daily basis.

The recent popularization of *CSI* and similar dramas has increased the public's exposure to forensic evidence. As these shows become more popular, their portrayal of forensic evidence as an infallible truth propagates as well. It is, therefore, very important that courts and the other participants in a criminal trial, encourage jurors to think critically and to process information presented at trial without bias, to ensure the portrayal of forensic evidence in the media does not unduly influence their analysis when reaching a verdict.

Without this division of fact from fiction, a jury may let someone go free who has committed a crime, or worse, convict someone of a crime they did not commit. While studies have indicated that this *CSI* Effect may not be an absolute, it remains critical for the preservation of our criminal justice system that jurors are educated on the true value of evidence; not by the cast of *Law & Order*.

ENDNOTES

¹ *The authors thank Michael Messoro, Esq. and Zackary Moricas, Roger Williams University School of Law, Class of 2016 for their assistance with the preparation of this article.*

² *JURORS 24/7: THE IMPACT OF NEW MEDIA ON JURORS, PUBLIC PERCEPTIONS OF THE JURY SYSTEM, AND THE AMERICAN CRIMINAL JUSTICE SYSTEM* by Nicole L. Waters, Senior Research Associate, National Center for State Courts and Paula Hannaford-Agor, Director, Center for Jury Studies, National Center for State Courts.

³ *Journal of Criminal Justice and Popular Culture*, 10(2) (2003) 109-126, *MEDIA CONSUMPTION AND PUBLIC ATTITUDES TOWARD CRIME AND JUSTICE:*

THE RELATIONSHIP BETWEEN FEAR OF CRIME, PUNITIVE ATTITUDES, AND PERCEIVED POLICE EFFECTIVENESS, *Kenneth Dowler, Department of Criminal Justice, California State University at Bakersfield.*

4 http://www.americanbar.org/content/dam/abamigrated/publiced/practical/books/family/chapter_14.authcheckdam.pdf.

5 *Dragnet, Jack Webb, Creator, NBC, 1949-1951 (radio), 1951-2004 (television).*

6 *Perry Mason, Erie Stanley, Creator, CBS, 1957-1966.*

7 *Columbo, Richard Levinson, Creator, 1968-1978 (NBC), 1989-2003 (ABC).*

8 *Hawaii Five-O, Leonard Freeman, Creator, CBS, 1968-1980.*

9 *Law & Order, Dick Wolf, Creator, NBC, 1990-2010.*

10 *In the Matter of Samuel Winship, 397 U.S. 358, 363-364 (1970).*

11 *Victor v. Nebraska, 114 S.Ct. 1239 (1994).*

12 *Hon. Donald E. Shelton, Juror Expectations For Scientific Evidence in Criminal Cases: Perceptions and Reality about the "CSI Effect" Myth, 27 T.M. Cooley L. Rev. 1 (2010).*

13 *John Perritano, Science Beats Crime 6 (2011).*

14 *Committee on Identifying the Needs of the Forensic Sciences Community National Research Council, Strengthening Forensic Science in the United States: A Path Forward, (2009), 100.*

15 *The process by which dentists attempt to match marks found at crime scenes with dental impressions of suspects.*

16 *Giannelli, Paul C., The 2009 NAS Forensic Science Report: A Literature Review (April 12, 2012). 48 Crim. L. Bulletin 378 (2012); Case Legal Studies Research Paper No. 2012-11. Available at SSRN:*

<http://ssrn.com/abstract=2039024>.

17 *Ibid.*

18 *Committee on Identifying the Needs of the Forensic Sciences Community National Research Council, Strengthening Forensic Science in the United States: A Path Forward, 136.*

19 *Other biological evidence could also come from vaginal secretions, semen, epithelial cells, vomitus, feces, urine, hair, tissue, bones, and microbiological and viral agents obtained directly from the victim or suspect.*

20 *Committee on Identifying the Needs of the Forensic Sciences Community National Research Council, Strengthening Forensic Science in the United States: A Path Forward, 170.*

21 *Common places to find DNA evidence include but are not limited to: the handle of baseball bat or pipe, a cigarette butt, eyeglasses, a bullet that has passed through a body and a door handle.*

22 *Tamara E. Lawson, Before the Verdict and Beyond the Verdict: the CSI Infection within the Modern Criminal Jury Trials, 41 LYUCHILJ 119, 143.*

23 *Ibid.*, 154.

24 *The Court may consider: (1) whether the proffered knowledge has been or can be tested; (2) whether the theory or technique has been the subject of peer review and publication; (3) whether there is a known or potential rate of error; and (4) whether the theory or technique has gained general acceptance in the scientific community. Morabit v. Hoag, 80 A.3d 1, 12 (R.I. 2013).*

25 *Ibid.* ❖

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Lunch with Legends: Trailblazers, Trendsetters and Treasures of the Rhode Island Bar

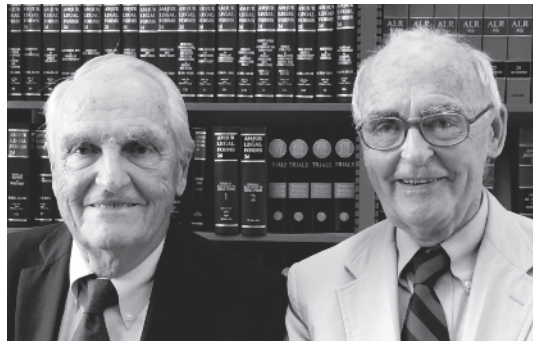


Matthew R. Plain, Esq.
Barton Gilman LLP, Providence



Stephen Adams, Esq.

Ned and Bill Corcoran were born in Newport, Rhode Island in the 1920s. Upon graduating from Rogers High School in 1944, Ned joined the Army, and served in the Specialized Training Program in the Philippines. At the end of World War II, he enrolled at Brown University. After Brown graduation, he attended and graduated from Columbia Law School. He returned to Rhode Island and joined his father's firm, Corcoran, Peckham & Hayes, which, at the time, had been continuously operating for one hundred years. Ned has maintained his practice at this firm for the past sixty one years. Bill Corcoran graduated from Rogers High School in 1947 and then attended the Portsmouth Priory School (now Portsmouth Abbey School), before attending Georgetown University. He returned to Rhode Island and earned his degree at Brown University. Upon graduating, Bill joined the Navy. He attended Officer Candidate School in Newport and deep-sea diving school in Anacostia, Maryland. Bill served in a submarine rescue fleet. During his service, he had opportunities to study at the Naval Justice School in Newport. These experiences helped pique his interest in the law. Accordingly, he enrolled at Boston College Law School, serving on the Law Review. After graduation, Bill joined Corcoran, Peckham & Hayes (at a salary of \$25 per week). He continues to practice at the firm fifty-seven years later. We had the opportunity to speak with the Corcoran brothers, veterans of the Rhode Island Bar, and active members of the Newport community. Excerpts from our conversation follow.



William "Bill" Corcoran and Edward "Ned" Corcoran

Who mentored you?

BILL: My father. He was a real student of the law. He was a bar examiner. He was very disciplined about getting his work done, and he was very personable. His clients loved him. He was also extraordinarily civic-minded. He served as a chairman of the Board of Review and the School Committee in Newport, and he was town solicitor for Middletown, Portsmouth and Little Compton. And he was exceptionally honest.

NED: Honest to a fault.

Who would you hire if you needed an attorney?

NED: Joe Houlihan, a partner of ours for years, was one of the best trial lawyers in the state. We'd go out in the reception area, and all of the judges and state representatives who were in trou-

ble were sitting out in the lobby. "Oh, Hi, Judge, how are you?" **BILL:** Joe Cavanagh, for most anything. I worked with Joe on different issues, and I've retained him for BankNewport. He is a very competent lawyer.

What are your most memorable moments?

BILL: The purchase of The Breakers was a high point. My father and I went to a big law firm on Park Avenue. And he said, "Well, we'll take the bus." We negotiated the final purchase price, and the New York firm's head attorney said, "Mr. Corcoran, would you like me to call a limousine to take you to the airport?" And my father said, "Oh, no, our bus doesn't leave till 5:00 o'clock, we've got plenty of time to walk back to Penn Station." The lawyers looked at us like we were crazy.

NED: I had a high profile case representing a defendant who had murdered his father-in-law, a prominent, well-known guy. My client had a history of deep mental illness. I tried the case before Judge Bulman, and I got him acquitted by reason of insanity.

What is the best advice you ever received?

BILL: Answer every telephone call you get. No matter who it is, answer it. The public perception of your ability and your willingness to serve depends on answering client telephone calls.

NED: The failure of a lawyer to respond to a client upsets them and leaves them feeling something may be wrong.

What's the greatest joy or satisfaction you have from practicing?

NED: The thing that's kept me with it is the people I've been able to help. I am proud and happy I've been able to help.

BILL: I agree. Being able at this age – I'm 85 and Ned is 88 – to help somebody out offers a lot of satisfaction.

Would you do it all over again?

NED: When I look back, I've had an awfully good life. Newport is one wonderful place with a great community. I've been very lucky.

BILL: I echo that. I don't know what I'd do if I didn't have this office to come to. My wife said one time, 'I've taken you for better, for worse, but not for lunch.'



This photograph, of Melissa E. Darigan, Esq. presenting Robert A. Arabian, Esq. with his 2015 Volunteer Lawyer Program *Pro Bono Publico* Award at the Bar's July House of Delegates meeting, was taken by immediate past Bar President Bruce W. McIntyre, capturing one of Melissa's first acts as new Bar President.

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Estate Planning Opportunities For Same-Sex Married Couples After *Obergefell*



Marc J. Soss, Esq.
Sarasota, Florida

Federal recognition of same-sex marriages makes the unlimited marital deduction from federal estate tax and gift tax for transfers available to same-sex spouses.

The U.S. Supreme Court's ruling on June 26, 2015, in *Obergefell* prevents a state from denying a marriage license to a same-sex couple (same-sex marriage is legal in all 50 states and Washington DC). However, the Supreme Court ruling limited the scope of its decision to "lawful marriages," and not so-called marriage equivalents (civil unions and domestic partnerships).

Unlimited Marital Deduction and Portability.

Federal recognition of same-sex marriages makes the unlimited marital deduction from federal estate tax and gift tax for transfers available to same-sex spouses. They are no longer required to rely on an individual's applicable exclusion amount from federal estate tax and federal gift tax (currently \$5.43 million, adjusted annually for inflation).

The portability provisions available under federal gift and estate tax laws will also be available to the surviving spouse of a same-sex marriage. This allows the surviving spouse to use any portion of the deceased spouse's unused Applicable Federal Estate Tax Exemption and make additional tax-free gifts and reduce the amount of estate taxes owed upon the surviving spouse's death.

Review Current Estate Planning Documents to Ensure that the Amount and Structure of any Spousal Bequests Remain Appropriate.

Existing estate planning documents should be revisited in light of the fact that any gift or bequest to the spouse of a same-sex married couple will be subject to the unlimited marital exemption (no limitation on gifts between spouses) and not the individual's Applicable Federal and State Exclusion Amount(s). This can shelter a significant amount of assets that will not be subject to federal estate tax (currently at a rate of 40 percent).

Estate planning documents should also be reviewed to include, if appropriate, a separate marital trust. This trust can be designed to permit a surviving spouse to use any of the deceased

spouse's unused Federal Generation Skipping Transfer (GST) Exemption.

Review Retirement Account Beneficiary Designations and Joint and Survivor Annuity Elections to Ensure that they Remain Appropriate.

A surviving spouse may roll over a deceased spouse's retirement account into their retirement account without being required to take minimum distributions or lump sum distributions, until such time as the surviving spouse ordinarily would be required to take minimum distributions (usually upon attaining age 70½). To take advantage of this opportunity, married same-sex couples should name each other as the beneficiary of his or her retirement accounts to defer income tax recognition as long as possible.

If a spouse's retirement plan is covered by the Employee Retirement Income Security Act of 1974 (ERISA), a participant's spouse may automatically be a beneficiary of the retirement plan as a result of their marriage. As a result, if a participant desires to designate someone other than their spouse as the plan beneficiary, they will need to obtain the consent of the non-participant spouse to make such a designation. In addition, state employment benefits are now available to same-sex spouses.

Replacing Individual Life Insurance Policies with Survivor Policies.

Prior to the Supreme Court ruling, many same-sex couples purchased individual life insurance policies naming their partner as the beneficiary (either directly via beneficiary designation or indirectly through a life insurance trust). These policies were utilized to provide the surviving partner with sufficient liquid assets that could be used to pay federal estate taxes due upon the death of the first to die. However, with the unlimited marital deduction now available to married same-sex couples, these policies should be examined and, if appropriate, replaced with a second-to-die policy (pays benefits only upon the death of the surviving spouse). These types of policies can provide liquidity to beneficiaries of married same-sex couples, and are generally



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Gift Splitting Between Spouses.

Until the Supreme Court rulings, a same-sex married spouse could only make annual gifts up to his or her annual federal gift tax exclusion amount (currently \$14,000). Any gift in excess of the exclusion amount was deducted from his or her federal estate tax exclusion amount.

Each spouse may now make gifts from his or her own assets and, with the other spouse's consent, have such gifts deemed to have been made one-half by each spouse for purposes of federal gift tax laws. As a result, both spouses acting together may now give up to \$28,000 to any individual without using any portion of either spouse's federal gift tax exclusion amount.

Amend Previously Filed Federal Estate, Gift and Income Tax Returns and State Income Tax Returns.

Subsequent to the Supreme Court ruling in Windsor, on August 29, 2013, the Treasury and the IRS issued Revenue Ruling 2013-17 with directions for administering all federal tax laws including those pertaining to income, gift and estate taxes, married same-sex couples who were lawfully married in any jurisdiction (domestic or international), and providing they will be treated as married, regardless of whether the jurisdictions in which such couples are resident or domiciled recognize the marriage. As a result, same-sex married couples, who were married in prior years may, but are not required to, file original or amended tax returns within the statutory limitations period (ordinarily three years from the date the tax return was originally due or filed or two years from the date the tax was paid, whichever is later).

Both spouses may also amend prior year income tax returns to change their filing status from single to married filing jointly and obtain a refund if the amount of tax owed, based on their married filing status, is less than that owed based on their prior single status, again subject to the limitations period described above. Additionally, married couples living in states that did not previously recognize same-sex marriages may be able to amend more recently filed state income tax returns for the years 2012-2014, depending on the laws in such states.

Non-citizen spouses should consider seeking permanent residency and/or becoming citizens.

Non-citizen spouses are now eligible for citizenship or permanent residency on the basis of their marriage to a spouse of the same sex who is a US citizen. Before applying for this status, there are numerous tax and non-tax consequences that should be carefully considered. ❖

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Bar's Environmental and Energy Law Committee Hosts South Kingstown CLE, *Local Food Law: Aquaculture and Agriculture*

In May, over 30 Bar members and guests attended and enjoyed the Environmental and Energy Law (EEL) Committee's CLE, *Local Food Law: Aquaculture and Agriculture*, featuring a panel discussion on: local farming, sustainability and open space; the benefits and detriments of aquaculture regulations; the tax and economic benefits and detriments of aquaculture regulations; the tax and economic benefits and detriments from land and sea farming; and the nutritional benefits of local food production and sales to underprivileged members of society. For more information on the EEL Committee, please contact EEL Chair Richard M. Fil, Esq. by email at rfill@rc.com or telephone at 401-709-3300. To join the Committee, please go the Members Only section of the Bar's website at ribar.com.



EEL Committee CLE panelists included (l-r), Kenneth Payne, RI Food Policy Council; Rupert Friday, RI Land Trust Council; William Penn, RI Farm and Food Fund; and Kenneth Ayars, RI Department of Environmental Management Division of Agriculture.

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The program is quite simple, but the effects are significant. Bar members notify the Bar Association when they need help, or learn of another Bar member with a need, or if they have something to share or donate. Requests for, or offers of, help are screened and then directed through the SOLACE volunteer

email network where members may then respond. On a related note, members using SOLACE may request, and be assured of, anonymity for any requests for, or offers of, help.

To sign-up for SOLACE, please go to the Bar's website at www.ribar.com, login to the **Members Only** section, scroll down the menu, click on the **SOLACE Program Sign-Up**, and follow the prompts. Signing up includes your name and email address on the Bar's SOLACE network. As our network grows, there will be increased opportunities to help and be helped by your colleagues. And, the SOLACE email list also keeps you informed of what Rhode Island Bar Association members are doing for each other in times of need. These communications provide a reminder that if you have a need, help is only an email away. If you need help, or know another Bar member who does, please contact Executive Director Helen McDonald at hmcDonald@ribar.com or 401.421.5740.

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When contacting Coastline EAP, please identify yourself as a Rhode Island Bar Association member or family member. A Coastline EAP Consultant will briefly discuss your concerns to determine if your situation needs immediate attention. If not, initial appointments are made within 24 to 48 hours at a location convenient to you. Or, visit our website at www.coastlineeap.com (company name login is "RIBAR"). Please contact Coastline EAP by telephone: 401-732-9444 or toll-free: 1-800-445-1195.

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Punctuation Law: Carrying on With and Without a Comma



Zona Douthit, Esq.
Attorney at Law, Pawtucket

“The comma is the Don Quixote of punctuation: gallantly struggling to right wrongs while constantly losing the war. Commas, like the knights of old, can save or destroy lives...”

TEXAS COURT OF CRIMINAL APPEALS JUDGE

Some significant decisions have recently come down on both state and federal levels highlighting the confusion in punctuation law. Here, I deal only with our most used and abused little friend, the comma. While most of the cases reviewed below involve clear reversible error, conflicting opinions in the 5th and 11th Circuits will probably force the U.S. Supreme Court to grant *certiorari* to resolve one particularly thorny comma issue. We begin there, where the absence of a comma may be the difference between biscuits with gravy or without.

In *Huckabee v. God’s Grits and Gravy*,¹ the trial judge in the Northern district of Mississippi held that a restaurant selling “eggs any style, flaky biscuits, grits, and gravy” unambiguously was selling gravy only with grits based on the name of the restaurant and that “flaky biscuits” were offered as a separate item. The appellate court reversed, stating that “if the owner of the establishment, whom we assume here is not God, had intended to limit the gravy offering to solely the grits, the menu should have read ‘grits and gravy’ without the comma before ‘and’ to clearly indicate that the gravy was offered solely for the grits and not also the flaky biscuits.”²

On the other hand, in *Dean v. Paula’s House of White Grits*,³ the appellate panel overturned the trial judge for the Southern Alabama district that had held for the defendant restaurant. The trial court, citing *Huckabee*, held that a menu offering of “eggs, biscuits, grits and gravy” did not obligate the restaurant to serve gravy with the biscuits as well as the grits because the term “grits and gravy” should be read as a single item in the series. The circuit court reversed, holding “that a series of 3 or more items does not always require an additional comma before the concluding *and*. Thus, a reasonable person could conclude that gravy should have been provided with the biscuits as well as the grits.”⁴ In a concurring opinion, Justice Hacker noted that, while she agreed with the other two justice’s conclusion, “it is better practice to include the final comma so as to avoid confusion” such as occurred in this instance. When the Supreme

Court of the United States upholds *Dean* – clearly the correct ruling – we can only hope the Court includes Justice Hacker’s advice so that biscuits will be served with gravy, as God intended.

*Pixar v. Woody*⁵ involved an employment contract between Pixar Animation Studios and the actor Sheriff Woody for the movie *Toy Story 4*. After filming began, the director modified the story line to add a scene where Sheriff Woody was to be blown sky high into thousands of pieces and later reassembled by Buzz Lightyear. The plaintiff refused to do the stunt, as it was not in the original script. The contract language at issue read “Actor [Sheriff Woody] shall perform all of his own stunts, that are required by the script.” The plaintiff claimed use of the word *that* made the clause following it a restrictive element; therefore, he was not required to do stunts added to the plot after the date of the contract. The defendant argued that the comma after the word “stunts” created a non-restrictive clause and was merely a description of the plot however it was shot. The California Supreme Court settled the rule: “Restrictive clauses contain language that is essential to the meaning of the entire sentence and should begin with the word *that* while non-restrictive clauses contain adjectival information, rather than essential information, and should be set off with a comma and introduced by the word *which*.”⁶ The Court ruled for the studio reasoning that the comma was more indicative of intent, and that the confusion between *that* and *which* is so widespread

– and tolerated – it would not be fair to base its decision on a violation of that rule. Don’t look for a *Toy Story 5*. Sheriff Woody may be ready to retire to a toy box in Tampa after shooting this scene.

In *Furst v. State*⁷ a murder conviction hanged (hung?) on two commas. In *The Minx*, an HBO documentary about the life and alleged crimes of oil heiress Mimi Furst, a film editor wrote a note found in his studio after his death that said “Fred claimed Mimi murdered her husband.” No reference to this statement was ever found in the film footage, and the director had no knowl-



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edge of such a scene or statement. The defense argued there was reasonable doubt because the note could be read "Fred, claimed Mimi, murdered her husband." The prosecution argued that the note clearly meant "Fred claimed that Mimi had murdered her husband." After convicting Furst, a poll of the jury showed unanimous agreement that the absence of commas clearly gave the note the prosecution's meaning.

The Texas Court of Criminal Appeals quickly disallowed the note as hearsay and remanded, but then Justice Strunk devoted most of his decision to some brave dicta about commas.

The comma is the Don Quixote of punctuation: gallantly struggling to right wrongs while constantly losing the war. Commas, like the knights of old, can save or destroy lives, as Ms. Furst has learned. A comma after an introductory element turns an unnatural love — *While he was kissing his horse bolted* – to an honorable one – *While he was kissing, his horse bolted*. A comma that sets off a non-restrictive appositive can also get a knight out of hot water. *Sir Galahad loves the lady Marie*, without a comma, requires naming Marie specifically to avoid confusion with the other ladies the cad Galahad loves. With a comma – *Sir Galahad loves the lady, Marie* – clearly indicates that Marie is the same as the lady, and therefore, the only one whom he loves.

And then there are those confused souls who use the comma quixotically because they don't really know the rules, but they hope that a few commas sprinkled about will leave an impression of erudition. This court has seen briefs that appear to have been lying on a desk in peace when a comma comet flew past, scattering some of its detritus in its wake. Like chivalry, there are rules.

Alas, of late, this court has noticed an ignoble trend to use commas in lieu of semi-colons to link short, closely-related sentences. Think of two sentences as a loving couple. If they are joined in holy matrimony with a short conjunction, such as and, so, but, yet, or, or nor, they require a symbol of their love. A comma before the conjunction is the golden ring that binds them. However, if they are merely cohabitating with no conjunction, they

require a semicolon to signify a mere close relationship. *King Arthur loved Queen Guinevere, but she loved Sir Lancelot. Lancelot and Guinevere fell in love; they broke poor Arthur's heart.*⁸

Rhode Island surely cannot be immune from comma errors in briefs, statutes, regulations, contracts, wills, or trusts. It is time for the Rhode Island legislature to once again consider adopting the American Bar Association's Uniform Code of Grammar, Punctuation, and Spelling (UCGPS). We can only hope that Rep. White (D. Chepachet) will persevere and reintroduce the UCGPS in the next legislative session.

ENDNOTES

- 1 *Huckabee v. God's Grits and Gravy*, 298 F3rd 482 (5th Cir. 2013).
- 2 *Id.* at 486.
- 3 *Dean v. Paula's House of White Grits*, 301 F3rd 1127 (11th Cir. 2014).
- 4 *Id.* at 1129.
- 5 *Pixar v. Woody*, (2015) 345 Cal. 4th 789.
- 6 *Id.* at (791).
- 7 *Furst v. State*, 401 S.W.3d 375 (Tex. Crim. App. 2014).
- 8 *Id.* at (376-77). ❖

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Defense Counsel of Rhode Island Honors Judge Edward C. Clifton

At the Defense Counsel of Rhode Island (DCRI) Annual Meeting in June, DCRI honored retired Rhode Island Superior Court Associate Justice Edward C. Clifton for a career of outstanding public service as a judge, advocate for access to justice for all, and an involved community leader. DCRI is an association of attorneys defending the interests of business and individuals in civil litigation. DCRI members include lawyers in private practice, corporate counsel and insurance company counsel. DCRI provides educational and support services for its members and serves as a members' advocate on legislative issues impacting the defense bar and the judicial system. DCRI Officers for 2015-2016 include: President John F. Kelleher, Esq.; President-Elect Lauren D. Wilkins, Esq.; Vice President William F. White, Esq.; Secretary Rebecca McSweeney, Esq.; and Treasurer Amy Beretta, Esq.

Outgoing DCRI President Faith A. LaSalle presented Judge Clifton with a crystal memento and noted, "We all welcomed appearing before you because you were fair, courteous to attorneys and our clients, and always reasonable to deal with. We will remember you as a judge who always issued sound decisions in a professional manner."



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BOOK REVIEW

Excellent Sheep

by William Deresiewicz



Anthony F. Cottone, Esq.
Practices in Providence

In *Excellent Sheep, The Miseducation of the American Elite and The Way to a Meaningful Life* (Free Press, 2014), William Deresiewicz, a former English professor at Yale who also spent twenty-four years as a student and teacher at Columbia, has a message which needs to be heard, even if it is more timely than original. In a consistently provocative and well-written 262 pages, Deresiewicz makes the case that the way we select students to fill our elite colleges and universities reflects our society's basest impulses. And, according to the author, once selected, these schools fail their students by doing "nothing... to challenge the values of a society that equates virtue, dignity, and happiness with material success," thereby rendering our best and brightest incapable of either perceiving the problem, or of doing anything about it.

The book is an outgrowth of Deresiewicz's widely-discussed 2008 essay in *THE AMERICAN SCHOLAR*, *The Disadvantages of an Elite*

Education: Our best universities have forgotten that the reason they exist is to make minds, not careers.

Shortly after failing to get tenure in New Haven, Deresiewicz moved to

Portland, Oregon and began expanding the essay into the book.

The Problem

As Deresiewicz tells us at the outset, *Excellent Sheep* is not about all students or all schools, but only about the "elite," by which he means: ...prestigious institutions like Harvard or Stanford or Williams, as well as the larger universe of second-tier selective schools... [and]...everything that leads up to and away from them: the private and affluent public high schools; the ever-growing industry of tutors and consultants, test-prep courses and enrichment programs; the admissions process itself, squatting like a dragon at the entrance to adulthood; the brand name graduate schools and employment opportunities that come after the BA; and the parents and communities largely upper middle class, who

push their children into the maw of this machine.

It is a machine or system which, according to the author, "manufactures students who are smart and talented and driven, yes, but also anxious, timid, and lost, with little intellectual curiosity and a stunted sense of purpose: trapped in a bubble of privilege, heading meekly in the same direction, great at what they're doing but with no idea why they're doing it." A leader is now "someone who, in a very energetic, upbeat way, shares all the values of the people who are in charge...when people say 'leaders' now, what they mean is gung ho followers." As for "character," the "the word arises only in connection with issues like cheating or date rape, as if it signified nothing more than not doing bad things."

Deresiewicz claims this state of affairs is the culmination of an "admissions frenzy" that "has been raging, in good times and bad, for close to fifty years." It all began in the 1960s, according to the author, when Harvard President James B. Conant began placing increasing reliance on the SAT. Thus began a "resume arms race" which, fueled by the need to stay atop the all-important rankings in *U.S. News & World Report*, has resulted in the insane demands currently placed upon students seeking entry into elite schools.

As reported by the author, other than the children of very rich donors, "who get admitted under almost any circumstances," students seeking admission to elite schools today not only have to have extremely high SAT scores and impeccable grades, they also have to be (in the terminology of the Yale Admissions Committee) either "well rounded"—i.e., "great at one or two of their nine to ten extra-curricular activities and "really, really good" at everything else — or "pointy"—outstanding in one particular way. And, if you are pointy, you have to be "really pointy: a musician whose audition tape had impressed the music department, a scientist who had won a national award." As a result, students who are admitted appear, to Deresiewicz, "to be an alien species — Super People, perhaps, or a race of bionic hamsters."

Another result of the resume arms race is what Deresiewicz terms "credentialism," where

... the way we select students to fill our elite colleges and universities reflects our society's basest impulses.

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“the purpose of life becomes the accumulation of gold stars.” Yet, as noted in a recent study quoted by the author, American higher education is more socio-economically stratified today than at any time during the past three decades, and Deresiewicz concludes, “the major reason for the trend is clear. Not increasing tuition, though that is a factor, but the ever-growing cost of manufacturing children who are fit to compete in the college admission game.”

Deresiewicz maintains, “we preen ourselves on our progressive views on race, gender, and sexuality, but we blind ourselves to the social division that matters the most, that we guard most jealously, that forms the basis of our comfort, our self-respect, and even of our virtue itself: class.” In fact, he argues, “diversity of sex and race has become a cover, even an alibi, for increasing economic re-segregation,” concluding:

Elite private colleges will never allow their students’ economic profile to mirror that of society as a whole.

They can’t afford to, and it’s not even clear that they’d want to. They need a critical mass of full payers, they need to tend to their donor base, and they need to serve their primary constituency, which is not the nation so much as the nation’s – and increasingly the world’s – upper and upper middle classes: the classes from which their alumni come, to which their administrators belong, and for which their graduates are destined.

Credentialism also has brought with it “a narrow practicality that’s capable of understanding education only in terms of immediate utility, and that marches, at the most prestigious schools, beneath a single banner: economics,” which is now the most popular major by far. “Return on investment” is the phrase, Deresiewicz claims, “you often hear today when people talk about college,” adding that although:

we talk, in the overheated conversation we’ve been having about higher education lately, about soaring tuition, rising student debt and the daunting labor market for new students...we never talk about the premises that underlie this conversation, as if what makes for a happy life and a good society were simply self-evident, and as if in either case the exclusive answer were more money.

“We’re still a very wealthy country by any reasonable standard,” which, Deresiewicz suggests, “means that [our children] have been presented with a rare and remarkable chance, one that’s far more precious than the opportunity to be rich: the opportunity not to be.” Quoting the critic Dwight MacDonal, Deresiewicz notes, “we think it odd that a man should devote his life to writing poems, but natural that he should devote it to inducing children to breakfast on Crunchies instead of Krispies,” and concludes, “it is one of the great testaments to the intellectual – and moral, and spiritual – poverty of American society that it makes its most intelligent young people feel that they are being self-indulgent if they pursue their curiosity.”

To educate means to lead forth, yet Deresiewicz argues that today’s education leads to only a very few of what are essentially the very same places. As the author notes, “finance and consulting have emerged as the most coveted careers and capture a very high percentage of graduates at the elite schools. “The irony in all of this,” he says, is:

Elite students are told that they can be whatever they want, but most of them end up choosing to be one of a few very similar things. Whole fields have disappeared from view: the clergy, the military, electoral politics, teaching, even academia itself, for the most part, including basic science.

“Everybody does the same thing because everybody’s doing the same thing.”

Deresiewicz’s prose is passionate, and, if the reader had any doubt that this good Jewish boy, himself the son of an Ivy League professor, was talking from personal experience, it is soon laid to rest. He frankly admits, “everything I’m talking about is very personal, because I used to be one of these kids, but this above all. For years, I rode the roller coaster of grandiosity and depression, struggled to separate myself for the need for my father’s approval.” And Deresiewicz then gets to the heart of the matter, which he views in psychological terms, referring to Alice Miller’s *The Drama of the Gifted Child*. As recounted by the author, the thesis of Alice Miller’s classic psychoanalytic study – which has almost become a meme of our culture, causing everyone from Al Gore to David Foster Wallace to claim it was of great influence – is:

...the self of the ‘gifted’ or accom-

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plished child is formed in response to the parents' need for gratification through achievement (typically rooted in their own 'brittle selves'...the result of the same kind of upbringing). The child gives his parents what he understands they want, becomes the person that they need him to be. But the demand is insatiable. The child is 'never good enough' ('only as good as your last sales quarter'), and so he tries to be perfect... He seeks insatiably for admiration,' Miller writes, of which he never gets enough because admiration is not the same thing as love.'

Perhaps the most tragic aspect of the drama is the gifted child is blind to the psychology propelling all the manic effort. Thus, merely gaining entry to an elite institution is never enough, no matter how many times some version of what the author describes as the standard accolade, i.e., "you are the most extraordinary class ever to walk through our gates," is drummed into a student's head. Indeed, as Deresiewicz notes, feelings of superiority and contempt for those who have not succeeded – for the "losers" who aren't at a prestigious school, and who therefore are "not worth wasting time with" – is a part of the "elite dynamic," a necessary guard against the feelings of inadequacy always lurking beneath the surface (as Alice Miller has noted). Deresiewicz concludes this dynamic helps explain why today's "leaders," the elite, who are supposed to work for the greater good, enrich themselves at everyone else's expense and justify their actions with the notion that they are 'better.'

If, as Deresiewicz posits, happiness consists of two things (beyond a moderate level of material comfort): "being connected to others and engaging in meaningful work," it seems clear we have let most of our best and brightest children down if, as he also posits, we have deprived them of any opportunity to fail, stigmatized any attempt to get off the credentials merry-go-round, and made them excessively fearful of leading anything but "orderly, linear, lives," even if the lives of most truly interesting and successful people, are neither. He concludes, "the elite have purchased self-perpetuation at the price of their children's happiness," proclaiming:

The contemporary meritocracy, which in all its glory is presiding over an era of unprecedented national decline, is

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an exact reflection of the educational system that is charged with reproducing it. The time has come, not simply to reform that system top to bottom, but to begin to plot our exit to another form of leadership, another kind of society, altogether.

The Solution

Though not religious, Deresiewicz is an old fashioned moralist and claims what we need is more religion, albeit not the conventional variety, but rather the study of the humanities, broadly defined, which, he claims, is “what we have, in a secular society, instead of religion.” And, he suggests we should begin “by deploying that most powerful of instructional technologies: a liberal arts education, centered on the humanities, conducted in small classrooms by dedicated teachers.”

In the author’s view, the purpose of an authentic education is to create self-knowledge so students can “build a self,” or develop their “soul,” and thereby have at least a chance of being called by a vocation, rather than choosing a career to placate the fear that they will not maintain their parents’ opulent life style. Ranging from James Joyce to consultant Lara Galinsky, who has written on the need for purpose, Deresiewicz makes the case that students should find their purpose in life by learning what they are “connected to.” He notes, for example, that “becoming a lawyer isn’t a purpose,” but “becoming a lawyer to defend the rights of workers or to prosecute criminals, is.”

The author, however, is all too aware of the obstacles preventing his notion of education from becoming reality, especially at the elite schools. Thus, the current system “increasingly resembles any other business,” and everything – not only admissions, but curriculum and the compensation and tenure of teachers – must be justified “in technocratic terms.” The “metric” everybody pays attention to is the rankings in *U.S. News & World Report*; students are viewed as “customers,” and so swanky new dorms and grade inflation are rampant; and teachers are valued not for their ability to teach, but by the volume (if not necessarily the quality) of their publications and/or their ability to garner funds for research.

Deresiewicz thus concludes, “the profession’s whole incentive structure is biased against teaching, and the more

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prestigious the school, the stronger the bias is likely to be.” Yet, as the author notes, “a commercial relationship is exactly the opposite of a pedagogical one ...learning is an emotional experience, and mentorship is rooted in the intimacy of intellectual exchange.”

Conclusion

Several critics of *Excellent Sheep* suggest Deresiewicz is elitist himself and has a message which, if not elitist, addresses “quandaries [that] are distinctly middle-class.” Another reviewer suggests the author’s “profoundly elitist worldview” is evidenced by the fact that he is “dismissive of business and professional work ...as all just “climbing the greasy pole of whatever hierarchy you decide to attach yourself to.” And, the point has been made that “one has the sense that [Deresiewicz] is not so much seeking a better version of the contemporary university as reaching back toward an older one.”

However, the book was not about vocational education, but what currently passes for a liberal one, and the fact that Deresiewicz argues for a return to an older notion of what it means to be educated does not, *ipso facto*, evidence he is wrong. On the other hand, it is true the author’s cynicism appears to know no bounds, and no service organization escapes being branded as a promoter of “self-aggrandizement.” Thus, for example, Teach for America (of all things) is “a sterling example of service both as resume-building and as ruling-class messianism.”

In any event, responses to the book, whether pro or con, are passionate and frequently *ad hominem*, confirming not only that its many reviewers (most of whom were excellent sheep themselves) were moved, but also that the author may be on to something. Clearly, Deresiewicz is more preacher than healer, and has written a book which, while accurately and perceptively diagnosing an illness, has not presented much of a cure. In his view the root of the problem is:

...we have contracted the training of our leadership class to a set of private institutions. However much they claim to act, or think they’re acting, for the common good, they will always place their interests first. They will always be the creatures of the rich. The arrangement is great for the schools, whose wealth and influence continue

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to increase, but is Harvard's desire for alumni donations a sufficient reason to perpetuate the class system?

At the same time, Deresiewicz concedes that establishing first class public institutions and providing the kind of liberal education to all interested and qualified students would be terribly expensive. His proposals for raising the necessary funds – “tam[ing] the \$700 billion gorilla of defense, defeat[ing] the prison lobby in the states,” and increasing taxes on corporations and the super-rich – suggest he does not get out much. And, he essentially ignores the fact that the real problem is only a very small percentage of our high school graduates have the academic skills necessary to take advantage of such an opportunity even if it were made available.

Yet, the fact that a proposed solution is politically untenable does not nullify the value of an articulate diagnosis, especially when those officially charged with the task are the very “excellent sheep” described in the book. I’m reminded of Senator Sheldon Whitehouse’s habit of taking the floor of the Senate each week to remind his colleagues of the urgent need to address global warming. Hopefully, it is not too late to both avoid the most destructive effects of global warming and to address the very different, but no less harmful, problem described in *Excellent Sheep*. Perhaps, unlike our children, our grandchildren will not suffer from the effects of conflating education with job training, and meaning with the ability to acquire a decadent life style, but I’m not optimistic. ❖

Lawyer on the Move

Joseph E. O’Neil, Esq. was elected as President of the International Association of Defense Counsel (IADC) for the 2015-2016 term. Joseph is a shareholder in the Litigation Practice Group in the Philadelphia office of Lavin O’Neil Cedrone & DiSipio.



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In Memoriam

Paul H. Anderson, Esq.

Paul H. Anderson passed away on June 27, 2015.

Alan J. Goldman, Esq.

Alan J. Goldman, 80, of Boca Raton Florida, formerly of Bristol, Rhode Island, passed away on December 23, 2014. He was the husband of Virginia “Ginger” Leatherman Goldman. Born in Pawtucket, he was a son of the late Samuel and Rose Kearns Goldman. Alan was a graduate of LaSalle Academy, where he was an All-State swimmer. A graduate of Colgate University, he was an All-American swimmer, and swam in the Pan-American Games. He graduated from Boston College School of Law. After graduation, Alan founded the law firm of Goldman & Biafore. During his career, Alan served as Executive Counsel to Governor Frank Licht, East Providence Democratic Party Chairman, Special Counsel to the General Assembly Joint Committee on Legislative Affairs, and was admitted to practice before the United States Supreme Court. Alan’s law office was the first Legal Counsel to the Coastal Resources Management Council upon its establishment in 1971. Alan was a lobbyist for several national and international firms. He continued practicing law for the past twelve years with Goldman Law Offices. He served his country in the United States Air Force and the Rhode Island Air National Guard, earning the rank of Lt. Col. He deployed overseas during the Berlin Wall Crisis. In addition to his wife Ginger, he leaves a daughter, Hon. Jeanne L. Shepard and her husband Amos; a son, Brian A. Goldman, Esq. and his wife Anna; a stepdaughter, Kathy Shaw and her husband Bruce; and a sister, Joan M. Caley.

Anthony E. Grilli, Esq.

Anthony E. Grilli, 82, of Coventry, passed away on June 29, 2015. Born in Providence, he was the son of the late Anthony Grilli, Esq. and Della Cantini Grilli. He is survived by his wife and caretaker Diana. He also leaves a son, Anthony Jr. and his wife Gwynne, of Orlando, FL; a stepdaughter Dawn, her husband Michael Andrews, of Coventry; and his brother Albert Grilli. Anthony graduated from Mt. Pleasant High School and Providence College. He received his law degree from Georgetown Law School where he graduated 3rd in his class. He practiced law in Providence for 50 years. He was a member of the Justinian Law Society, the Workers’ Compensation Board and the Arbitration Board. His passions were playing golf and bowling.

Hon. Jeremiah S. Jeremiah, Jr.

Jeremiah S. Jeremiah, retired Chief Judge of the Rhode Island Family Court, 80, of Warren, passed away on July 19, 2015. He is survived by his wife Theresa Candon Jeremiah; his daughter Dr. Jennifer Jeremiah Armenio and her husband Vincent of Rehoboth, MA; his daughter Jessica Jeremiah of Columbus, MS; and his daughter Julianne Haskell and her husband Stephen of Medfield, MA.

He also leaves a sister, Retired Judge Constance Messoro and her husband Michael of Bristol, RI. Jeremiah was appointed to the Family Court in March 1986 and was named Chief Judge a year later. In 1963, he was appointed assistant city solicitor in Cranston and promoted to city solicitor in 1978, serving until 1984. Jeremiah served as Executive Counsel to the Governor of the State of Rhode Island. As Chief Judge, he instituted the R.I. Family and Juvenile Drug Court in December 1999. School-located Truancy Courts were initiated in 2000. He supported the initial regional conference of drug court practitioners in New England. He was a delegate to the State Congress of Drug Court Associations, past president of the New England Association of Drug Court Professionals and a member of the Board of Directors, National Association of Drug Court Professionals. He established a domestic violence court, juvenile victim/offender mediation, supervised child/parent visitation, and the adoption registry and juvenile hearing boards. He was a member of the board of Trustees of the National Council of Juvenile and Family Court Judges. He received the 2005 National Council of Juvenile and Family Court Judges’ “Judge of the Year Award” for meritorious service to the juvenile courts, children and families of America. The American Bar Association awarded him the Scripps Howard Foundation’s “Distinguished Service to Literacy Award.” Other recognitions included: Office of Justice Programs Certificate of Appreciation for outstanding service and dedication to young people and their families of Rhode Island; the Jack and Ruth Eckerd Achievement for Youth Award; the Urban League of Rhode Island Community Service Award; Caritas, Inc. award for dedication and commitment to adolescent substance abuse prevention in Rhode Island; Children’s Friend and Service Michelle Norris Memorial Award for outstanding support of work with vulnerable children and families; Giannini Award for outstanding contributions to law-related education in RI; and Advent House, Inc.’s Lifetime Achievement Award. He was a Cranston Hall of Fame inductee and named the 2001 Armenian of the Year by the Armenian Masonic Degree Team. He was awarded the Casey Medal for Meritorious Journalism from the Casey Journalism Center on Children and Families at the University of Maryland. Jeremiah received a B.A. and a J.D. from Boston University. He received an Honorary Doctor of Laws Degree from Rhode Island College. He was in the United States Army Reserve from 1957-1967 and was a recipient of the Department of the Army, Commander’s Award for Public Service.

Thomas D. Pucci, Esq.

Thomas D. Pucci, 89, passed away on July 10, 2015. He was the son of the late John and Marion Pucci. A Rhode Island resident, he spent many years in Marco Island, Florida with his beloved late wife of 63 years, Marie DePasquale. He is survived by his son John Pucci and his wife Angela Dalia;

In Memoriam (cont.)

and his daughters Jeanne Dolan and her husband James; Joan Bennet and her husband Douglas; Marie McGovern and her husband Frank; Marian Pucci; and Mary Jane Euell and her husband John. He graduated from Westerly High School and earned a degree in Electrical Engineering from Brown University in 1948, after proudly serving two years in the US Navy during World War II. Tom graduated from the Boston University School of Law. After law school, Tom and his partner founded the law firm of Pucci & Goldin. Tom served as a Justice of the Providence Municipal Court and Chairman of the Rhode Island Public Building Authority. He received the Annual Award for Distinguished Service to State Government. Tom also enjoyed politics, serving as Campaign Manager for late Governors Frank Licht and J. Joseph Garrahy. He was a delegate to the Rhode Island Constitutional Convention and a Rhode Island Commodore. Tom was a lobbyist and vice president of the Rhode Island Reds hockey organization for many years. He served as secretary and legal counsel for Bonanza Bus Lines. He dedicated his life to being a devoted husband and father. Tom and Marie attended several religious retreats around the world and had a private audience with Pope Saint John Paul II. Tom was active at San Marco Catholic Church during his time in Florida, serving as a lector and Eucharistic Minister. He was a parishioner of St. Patrick's Church and a supporter of St. Patrick Academy in Providence.

Jonathan L. Stanzler, Esq.

Jonathan L. Stanzler, 60, passed away July 13, 2015. He was a practicing attorney. He is survived by his sister, Jill Stanzler-Katz.



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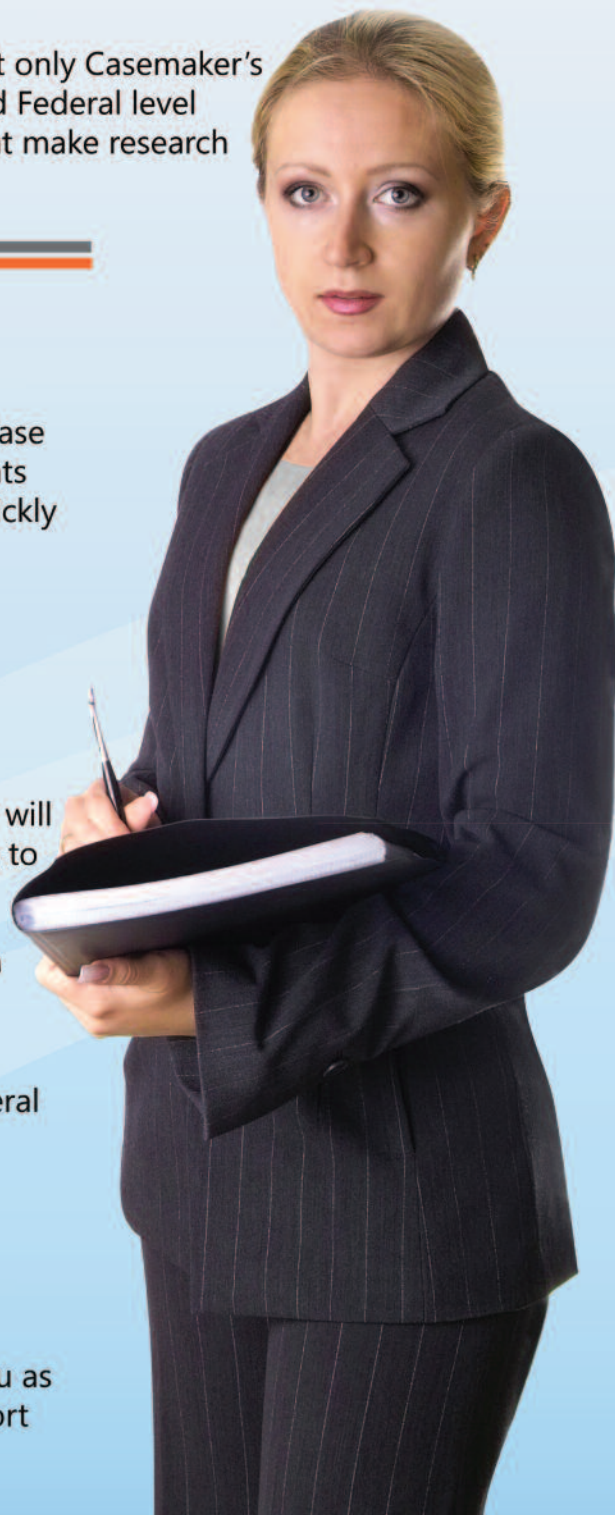
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