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# Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Winter 2024 Vol. 13, No. 2 Editor Emerita Lynne Liberato Editor-in-Chief Hon. John G. Browning

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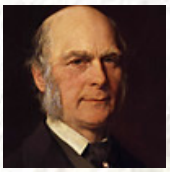

Francis Galton, who coined the term "eugenics"

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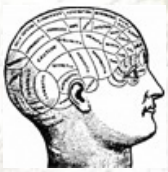

A phrenology map of the head

In 1840, the "science of phrenology" used the "bumps" on one's head to give insight into how "anatomical and physiological characteristics have a direct influence upon mental behavior." Read more...

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David Crockett

David "Davy" Crockett is one of the earliest and greatest heroes of both Tennessee and Texas. Both states have counties named for him. Read more...

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**By Hon. John G. Browning**

William Barret Travis

Long before the legend emerged of how William Barret Travis told the Alamo defenders that death was their destiny and how he drew a line in the sand with his sword, he was "just" a lawyer. Read more...

## News & Announcements

### Editor-In-Chief Named a "Courageous Judge" by National Judicial College

Hon. John G. Browning

The National Judicial College marked its sixty years as the nation's oldest and largest school for judges by honoring sixty "Courageous Judges," including Hon. John G. Browning. Read more...

### *Charting Constitutions and Taming Texas* at the 2024 TSHA Annual Meeting

**By David A. Furlow**

Texas A&M Conference Center, site of the meeting

The Society will present a program, *Charting Constitutions and Taming Texas*, at the Texas State Historical Association's 128th Annual Meeting in College Station February 28 through March 2, 2024. Read more...

## Membership & More

Officers, Trustees & Court Liaison

2023-24 Member Upgrades

2023-24 New Member List

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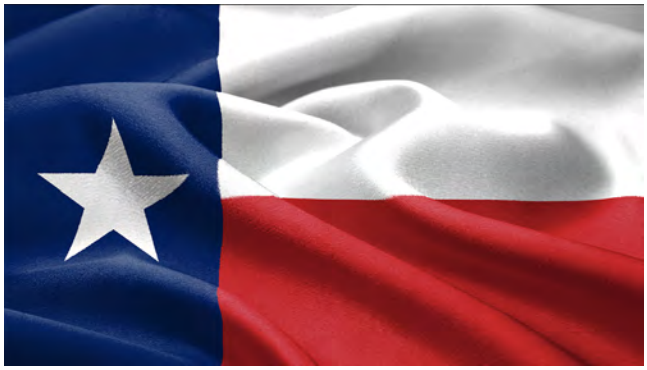
Richard B. Phillips, Jr.

# Message from the *President*

How does a kid born in Salt Lake City, Utah end up being President of the Texas Supreme Court Historical Society? I wasn't born in Texas, but, as the saying goes, I got here as fast as I could. My family moved to Texas from Utah when I was in the middle of the fourth grade. I can't pinpoint the exact moment when I began to fully identify as a "Texan." The fact that I sang in a youth choir that spent 1986 singing exclusively Texas-related songs for the sesquicentennial probably had a lot to do with it. We sang about Galveston, Luckenbach, El Paso, and Dallas. We sang about the families who declared that they were "Gone to Texas." We sang a Texas-centric rewrite of "I've Been Everywhere" that included Cut-n-Shoot, New Dime Box, and Muleshoe. The closing number was called "Our Great State," and interspersed Texas facts (i.e., our Capitol Building is taller than the U.S. Capitol) with the very subtle refrain:



*Our great State is the greatest state,*
*The greatest state in the nation!*
*Our great State is the greatest state,*
*The greatest state of them all!*

And we sang those songs in the Capitol Rotunda, at the Alamo, and at the Sesquicentennial Celebration at San Jacinto. (I have a vague recollection that we performed on the Deaf Smith Stage, but I could be wrong about that.) Needless to say, by the end of that year, I was fully Texan at heart.

Right after that, we moved to the Chicago area, where being the "kid from Texas" was a big part of who I was. I'm sure the Chicagoans were convinced we were a little crazy. One of them asked (probably only somewhat jokingly) if I had ridden a horse to school (in Plano, no less). During the three years we lived in Illinois, I spent a lot of time defending the honor of Texas (and the Texas Rangers baseball team). By the time we moved back to Texas, my Texan identity was probably even more settled than it had been when we left Texas three years before.

When I went away to college at Brigham Young University, I wrote home to ask for a Texas flag to hang in my dorm room. My parents sent a small—probably 8" x 12"—flag. I told them that I needed a bigger one. So, they sent me one that had flown over the Capitol, and I hung that on the wall of my dorm room. My roommate from Utah was mostly a good sport about it.

Later, as an undergraduate in the BYU History Department, I wrote a paper arguing that Texas pride qualifies as a form of nationalism. I don't think my professor quite knew what to make of the thesis. I think he was mostly bemused about the whole thing. (Mercifully, I have no idea where that paper is now. Hopefully, the floppy disk it was stored on has long since been lost, erased, or destroyed.) By the time I returned to Texas for law school at the University of Texas, I knew that I wanted to stay in Texas after graduation.

As a Texan who wasn't born here, I've always appreciated that some of our biggest heroes weren't born here either. In this issue, we have articles about Davy Crockett and William Barret Travis. When you get this issue, we'll be a few short weeks away from Texas Independence Day, the Fall of the Alamo, and San Jacinto Day. As we enter the Texas holiday season, I hope you'll enjoy these new looks at these key figures in these formative events of Texan identity.

Please enjoy this issue. And, as always, if you have thoughts about how the Society can perform its mission or if you'd like to be more involved, please feel free to reach out to me at: rich.phillips@hklaw.com.

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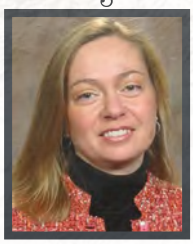
Executive Director's Page



Sharon Sandle

# Science and the Courts

During its history, Texas has witnessed the disruption caused by events that challenge our understanding of the natural world and dramatic advances in science and technology that cause us to question the assumptions and rules that we relied on to make decisions.

Take, for instance, the discovery of oil under Spindletop Hill near Beaumont. When a geyser of crude oil gushed from the ground on January 10, 1901, the event vindicated self-taught geologist Pattillo Higgins for his theory that oil pooled under salt domes—a theory that had been derided as nonsense before the physical evidence of a geyser of crude oil made it difficult to ignore. The discovery of oil in Texas was simply the beginning of the law's struggle to make sense of the new industry. Liquid oil was unlike static minerals like copper or coal. Most notably, oil moved. Once the oil field was punctured, oil could be drained from beneath a neighbor's land. But until then, oil did not flow underground like water. None of the existing models for determining property rights fit the emerging industry. As oil and gas authority A. W. Walker, Jr. noted "[a] better understanding of the nature of oil and gas soon revealed that in many respects oil and gas was a species of property unique unto itself, and that rules of law that worked very well when applied to other species of property were wholly inadequate and unjust in their operation when applied to oil and gas."

More than a hundred years later, controversy over the potential effects of hydraulic fracturing, "fracking," provoked nationwide battles over the practice. Opponents of fracking claim that the practice contaminates groundwater, causes earthquakes, and pollutes the air. In 2015, ground zero for the controversy was the town of Denton, Texas. Motivated by concerns about fracking, the Denton City Council commissioned a number of studies on the effects of the practice, followed by a public hearing at which the City Council declined to ban fracking. It instead developed a set of regulations designed to mitigate the effects. Unpersuaded that the city's regulations addressed the problem, the citizens of Denton passed a ban on fracking by referendum later that year. The Texas legislature responded by passing H.B. 40, asserting that oil and gas operations are subject to the exclusive jurisdiction of the state, effectively nullifying Denton's ban. While the controversy received attention from legal scholars as representing a conflict between state and local entities and their respective rights to regulate, the underlying scientific controversy illuminates the difficulty the law faces in determining what to do with new and uncertain technology.

This issue of the Texas Supreme Court Historical Society Journal looks at how the courts have handled science. It's worth noting that almost every scientific discovery or advance in technology is developed in a cloud of uncertainty. It takes time to understand the implications of the new discovery or the technological advance. We may be on the brink of just such a sea-change in technology with the development of generative artificial intelligence. If the promise of this technology is realized, it could be one of the most dramatic and disruptive technological changes in our lifetime. In the legal realm, we have already witnessed cautionary tales of how generative AI can be misused, as the unfortunate experience of New York lawyer Steven Schwartz demonstrated.[1] And we have already seen some courts struggle to protect the process from damage through bans on the use of artificial intelligence or requirements that lawyers disclose its use. In his annual report, Justice John Roberts addressed the challenges posed by artificial intelligence and advised that "any use of AI requires caution and humility."

As we consider how we will face this challenge and what rules we will develop, perhaps we can learn from a consideration of how we have faced such challenges in the past.

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[1] Schwartz became notorious after including six fictional case citations in a legal brief. The citations were generated by OpenAI's ChatGPT. See Merken, Sara. "Lawyer who cited cases concocted by AI asks judge to spare sanctions." June 8, 2023. https://www.reuters.com/legal/transactional/lawyer-who-cited-cases-concocted-by-ai-asks-judge-spare-sanctions-2023-06-08/

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# Fellows Column

**By David J. Beck, Chair of the Fellows**

Photo by Alexander's Fine Portrait Design-Houston

Beginning in 2016, the Fellows have sponsored an illustrated legal history book series as part of its Taming Texas judicial civics course materials. Coauthored by Jim Haley and Marilyn Duncan, the books include *Taming Texas: How Law and Order Came to the Lone Star State* (2016); *Law on the Texas Frontier* (2018); *The Chief Justices of Texas* (2020); and *Women in Texas Law* (2023). Copies of the hardback books are donated to the classrooms that participate in the judicial civics program described below. You may download a free copy of the books at www.tamingtexas.org.

If you have not yet seen our latest book, *Women in the Law*, you should visit tamingtexas.org and review it. This book captures the importance of the Texas women who shaped our law and justice system throughout Texas legal history. The book features the ten women who have served on the Texas Supreme Court, including the Hon. Debra Lehrmann, Hon. Jane Bland, Hon. Rebeca Huddle, Hon. Eva Guzman, and Hon. Harriet O'Neill. The book is full of interesting historical information, such as a listing of women "Firsts" in state and federal courts. The book's back cover features favorable comments on the book by Society Fellows Justice Jane Bland, Justice Harriet O'Neill, and Lynne Liberato. Chief Justice Hecht wrote the foreword for this book, as he has done for our prior three books. We appreciate the support for this important project given by Chief Justice Hecht and the entire Court.

The Houston Bar Association (HBA) has used our Taming Texas materials to teach seventh graders in Houston-area schools since 2016. This program has already reached over 23,000 students, and the HBA is partnering with us on Taming Texas again this year. It will take over sixty lawyers and judges to reach the thousand-plus students we will teach this year, and we could not implement this vast program without the HBA's invaluable support. Justice Brett Busby is coordinating efforts to have the Austin bar join us in implementing Taming Texas in Austin-area schools this school year, and we also are working on an expansion in Dallas schools.

One of the benefits of being a Fellow is our exclusive event, the annual Fellows Dinner. About this time each year, the Fellows gather with the Justices of the Texas Supreme Court for a collegial dinner. We always choose a unique Austin venue, and the locations for past dinner have included the Blanton Museum of Art, the Texas Lieutenant Governor's private dining room in the State Capitol, the Bullock Texas State History Museum, the Frank Denius Family University of

Texas Athletics Hall of Fame, and the Bauer House. The attendees always comment on the dinner's elegance, uniqueness, and fellowship. We are in the process of planning this year's Fellows Dinner. Invitations with further details will be sent to all Fellows shortly.

The Fellows are a critical part of the annual fundraising by the Society and allow the Society to undertake new projects to educate the bar and the public on the third branch of government and the history of our Supreme Court, such as our Taming Texas judicial civics program. If you would like more information or want to join the Fellows, please contact the Society office or me.

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Editor-in-Chief's Column

Hon. John G. Browning

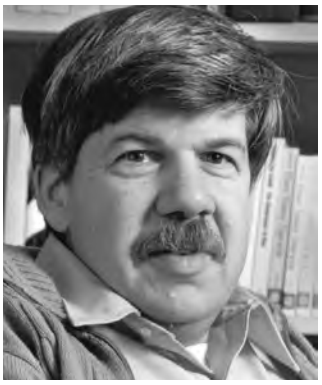
# Science and *Skepticism*

During his closing argument in the famous Scopes "Monkey Trial," William Jennings Bryan said the following:

> Science is a magnificent force, but it is not a teacher of morals. It can perfect machinery, but it adds no moral restraints to protect society from the misuse of the machine.

William Jennings Bryan

While Bryan may not have been on the side of history with his stance against the teaching of evolution in the *Scopes* trial, his words were prescient. Science has been used and misused as the underpinning of many laws and legal decisions over the years, a fact well-chronicled by such authors as Stephen Jay Gould in *The Mismeasurement of Man*. Gould's book meticulously lays out how scientific racism laid the foundation for everything from miscegenation laws and other eugenic legal measures to the unreliable IQ testing at the heart of America's strict anti-immigration laws of the late nineteenth and early twentieth centuries.



Stephen Jay Gould

As this winter issue illustrates, trust in "science," however deeply flawed it turns out to be, has impacted our legal system throughout Texas legal history. In my articles on phrenology and later eugenics in Texas law, the misplaced beliefs in these pseudosciences seems almost quaint today. But as Professor Brian Shannon points out in his wonderful examination of the history of the insanity defense in our state, Texas really hasn't deviated that much from its original embrace of the M'Naghten rule, despite decades of advances in the field of forensic psychiatry. Our legal system has strived to protect juries from the damages of "junk science" with the adoption of the Daubert standard and the trial judge's function as a gatekeeper to assess the reliability of scientific expert testimony. With many subjects, reliable science has won out over its shakier variants—ranging from forensic bite mark "science" to dog scent "evidence." All too often, however, individuals have been wrongly convicted on the basis of improper or invalidated forensic "science."

Arguably the single most important scientific development in recent decades—the rise of artificial intelligence—has had a transformative effect on the legal system. And, as with other scientific advances, it has both detractors (some of whom regard it as an existential threat) and proponents. While AI is capable of incredible things, the legal system's reaction to it must be a measured one. Pointing at the misuse of generative AI tools like ChatGPT to research and write briefs with fake sourcing, well-meaning courts in Texas and nationwide have begun adopting required disclosures by attorneys who are using AI tools. But a far greater danger, now that the AI genie is out of the bottle, is the use of "black box" algorithms that analyze complex data sets and "predict" the likelihood of a criminal defendant of re-offending and provide a recommendation to judges making sentencing, bail, and parole decisions. Though widely used, such algorithms are far from perfect and have been the subject of legal challenges for bias and the technology's lack of transparency.

Is the legal system's reliance on this new science misplaced, or is the distrust of those urging caution about "robot lawyering" unfounded? Time will tell, but probably there are valid points to be made on both sides. As the articles in this issue demonstrate, lawmakers, judges, and lawyers have sometimes been blinded by the latest scientific "toy" or theory—as was the case at the height of the eugenics movement when laws passed by so-called reformers and interpreted by courts in many states resulted in the involuntary sterilization of tens of thousands of the supposedly "unfit." Only with the revelations of Nazi Germany's eager adoption of many of these principles did Americans abandon such "science" as quickly as they had once flocked to it.

The legal system needs to welcome scientific advances, but it should not lose a healthy dose of informed skepticism. We hope that you enjoy our offerings on how science and pseudoscience has influenced Texas legal history: my articles *The Unkindest Cut: Eugenics in the Lone Star State* and *Phrenology and the Texas Courts*, along with Prof. Brian Shannon's *A History of the Insanity Defense*. Rounding out this issue are two articles examining the less well-known legal backgrounds of the iconic figures of the Texas Revolution, my piece *From Alabama Failure to Alamo Hero: The Early Legal Career of William Barret Travis*, and Tennessee legal historian Russell Fowler's article *David Crockett: Judge and Legal Reformer*. In addition, we're pleased to bring you our usual mix of news items and recurring columns. Enjoy!

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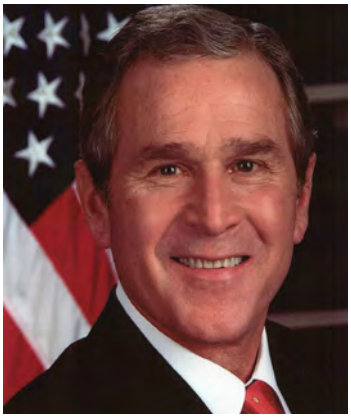
# The Unkindest Cut:
## Eugenics in the Lone Star State

By Hon. John G. Browning

### I. Introduction

In June 1997, prompted by two convicted sex offenders who actually requested surgical castration, the Texas legislature passed a law allowing judges to offer castration as an option for certain such offenders.[1] Senate Bill 123 established that "[the Texas Department of Criminal Justice] may perform orchiectomies on inmates convicted of indecency with a child or aggravated sexual assault of someone younger than 14 years old" who had a previous conviction for one of these same offenses. It prohibited sterilization to be introduced in sentencing or as part of probation or parole, and was characterized not as a punitive issue, but as the House Research Organization put it, "a viable treatment plan." Yet to those outside the legislature, it was certainly viewed as punitive. As then-governor George W. Bush wrote to a constituent after signing the bill into law,



Then-Gov. George W. Bush

> Texans are fed up with sex offenders. It should be clear to everyone that if you commit a crime in Texas, you are going to pay. Our laws say to criminals that if you ever get out of prison, the eyes of Texas will be upon you for a long time.[2]

Critics of the law said that castration of sex offenders was barbaric, and echoed the days of eugenics, involuntary sterilization, and even Nazi Germany. In reality, however, the very first eugenic sterilization law proposed in this country came from a Texas physician in 1855. Texas, as this article will demonstrate, has a unique relationship with eugenics and the sterilization of "the unfit." This article will first look at the history of eugenics in the United States, before analyzing the forced sterilization law proposed in 1855, the 1893 calls by yet another Texas doctor for eugenic sterilization, and subsequent efforts during the 1930s to pass a eugenic sterilization law in Texas. In contrast to the many states that rushed headlong to embrace eugenics, Texas walked its own path, never passing a eugenic sterilization law, despite these early calls for one.

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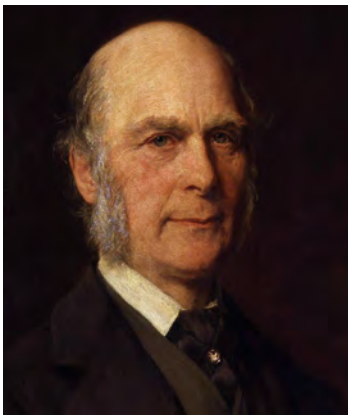
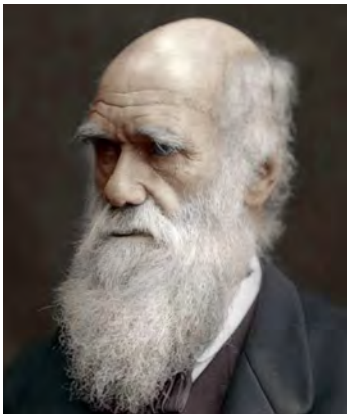
1 Senate Bill 123, Texas Legislature Senate (75th Regular Session, 1997). The statute uses the term "orchiectomy," the surgical term for castration.

2 Letter, Gov. George W. Bush to constituent, Sept. 11, 1997 (courtesy of George W. Bush Presidential Library and Archive, Dallas, Texas).

## II. Eugenics: a Brief History


Francis Galton

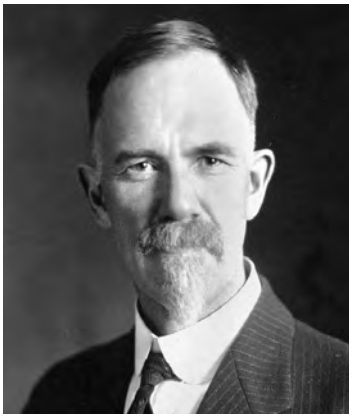

Charles Darwin

Francis Galton, a cousin of Charles Darwin, coined the term "eugenics" in 1883, defining it as:

> the science of improving stock, which is by means confined to questions of judicious mating, but which, especially in the case of man, takes cognisance of all influences that tend in however remote a degree to give to the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable than they otherwise would have had.[3]


Harry Laughlin

As Galton's definition suggests, the primary concern of eugenicists was that "inferior" people were reproducing so rapidly that they threatened to "infect" the rest of society with their undesirable genes. Of course, eugenics advocates maintained crude theories of human heredity that posited the wholesale inheritance of traits associated with a broad spectrum of feared conditions, including criminality, "feeblemindedness," and sexual deviance. Many eugenics proponents viewed surgery to sterilize "unfit" individuals as a necessary public health intervention that would essentially protect society from such "harmful" genes and of course the social and economic price of managing "degenerate stock."


Charles Davenport

Hastened by fears of immigration, the eugenics movement picked up steam in the early twentieth century. Harry Laughlin and Charles Davenport (an early researcher into Mendelian inheritance in the United States) opened the Eugenics Record Office in Cold Spring Harbor, New York in 1910, aided by funding from New York philanthropist Mrs. E.H. Harriman and the Carnegie Institute. One of Laughlin's and Davenport's main goals was to encourage states to pass compulsory sterilization laws. At first, this met with some success, as Indiana passed the first such law in 1907 and Connecticut soon followed in 1909. In fact, by 1914, twelve states had passed sterilization laws. However, the laws were not vigorously enforced, and in Laughlin's view, many were poorly worded and vulnerable to constitutional challenge.


Mrs. E.H. Harriman

So, in 1914, Laughlin drafted his own Model Eugenical Sterilization Law, a model act intended to serve as a template to help states

[3] Francis Galton, *Inquiries into Human Faculty and its Development* (New York: 1883), 24. However, the concept behind eugenics dates back at least to Plato and his work *The Republic*.

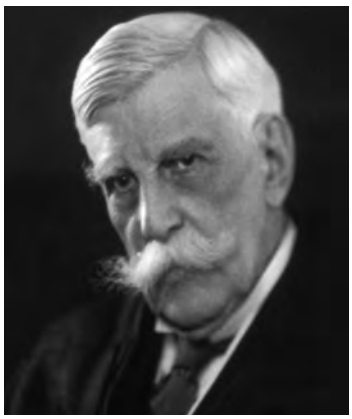
planning to introduce eugenics laws. Laughlin's definition of the "unfit" who were proper subjects for sterilization was a broad one: it included the "feebleminded," the insane, criminals (including vagrants), epileptics, alcoholics, blind people, deaf persons, deformed individuals, and indigent persons. Based on Laughlin's model statute, an additional eighteen states passed eugenical sterilization laws. One state, somewhat surprisingly, enthusiastically embraced sterilization—California—which sterilized approximately 20,000 men and women between 1909 and 1979 (often without their full knowledge and consent).

However, the most famous of the states to have passed a eugenic sterilization law was Virginia. A key proponent of eugenics there was Albert S. Priddy, the first superintendent of the Virginia Colony for the Epileptic and the Feebleminded. Having been sued once already,[4] Priddy wanted a test case to try out the new law. Acting collusively with the counsel for the Colony, Aubrey Strode, and attorney Irving Whitehead (appointed counsel for the patient), Priddy found someone he believed to be the perfect test subject. That was Carrie Buck—born into a poor family and placed with foster parents after her mother was institutionalized. Raped by her foster parents' nephew, Carrie was pregnant and her foster parents wanted her out of the picture. The eighteen-year-old Colony resident, having been classified as "feebleminded" and a "moral delinquent," would make an ideal test subject.


Albert Priddy


Aubrey Strode


Irving Whitehead


Justice Oliver Wendell Holmes

At trial, Strode put on eight witnesses (including two Virginia physicians and a eugenicist flown in from New York), while Whitehead presented no witnesses. The trial court affirmed the validity of Virginia's sterilization law in 1925, and the Virginia Supreme Court of Appeals upheld this ruling. In 1927, it reached the United State Supreme Court. The Court, by an 8–1 decision, upheld Virginia's sterilization statute. In an infamous opinion, the thrice-wounded Civil War veteran and ardent Social Darwinist, Justice Oliver Wendell Holmes, analogized cutting the Fallopian tubes to compulsory vaccination. As he put it,

> It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their

[4] *See generally* Roberta M. Berry, "From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of *Buck v. Bell," Notre Dame Journal of Law Ethics & Public Policy 12,* (1998): 401, 415.

imbecility, society can prevent those who are manifestly unfit from continuing their kind.[5]

Then Holmes continued in a sweeping manner, proclaiming that "the principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . Three generations of imbeciles are enough."[6]

The saddest thing about *Buck* is the human tragedy. Impregnated after a rape, Carrie Buck was sterilized and then returned to society. When she passed at age seventy-six, she was remembered as someone of warmth and intelligence. Her daughter Vivian—used as "proof" of a "third generation of unfit"—only lived to complete two years of schooling before dying of rheumatic fever, but she was on the school's Honor Roll for both years.

Left: Carrie Buck and her mother Emma. Right: Carrie Buck's daughter, Vivian, with her adoptive mother in 1924. In this moment Vivian is determined by a eugenics researcher to be "feeble-minded" for not looking at a coin held in front of her face.

The effect of *Buck v. Bell* was felt almost immediately. Within days of the ruling, Alabama and Florida had eugenic sterilization bills proposed. In the four years following the decision, seventeen states either enacted or revised sterilization statutes.[7] And the number of sterilizations soared: between 1907 (when the first eugenics law passed) and 1927, only about 8,500 sterilizations had been performed nationally.[8] After the *Buck* decision, more than 4,000 were performed at the Colony *alone* (including Carrie's sister, Doris), and at least 60,000 such surgeries happened nationwide (a figure that is probably underreported). Virginia's law wasn't repealed until 1974. Based on Laughlin's work, Nazi Germany's Reichstag passed the Law for the Prevention of Hereditarily Diseased Offspring in 1933; that law was ultimately used to justify the sterilization of more than 350,000 people. In 1936, Laughlin was awarded an honorary degree from the University of Heidelberg for his work on "the science of racial cleansing."

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5 *Buck v. Bell*, 274 U.S. 200, 207 (1927).

6 *Ibid.*

7 Paul A. Lombardo, "Three Generations, No Imbeciles: New Light on *Buck v. Bell*," *New York University Law Review* 60, (1985): 30, 33.

8 Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* (2016).

However, as eugenics became associated with Nazi Germany and questionable science, its popularity waned. By 1939, the Eugenics Record Office had lost its funding and was forced to close. As for Harry Laughlin (who would remain childless), he suffered a series of seizures that same year and was pressured into retirement. It is widely believed that the cause of these seizures was epilepsy—a hereditary disease.

Eugenics Record Office, circa 1921.

But during its peak popularity, interest in eugenics approached fad-like dimensions. Organizations within states all over the country even held "Fitter Family" and "Better Baby" exhibits and contests in order to promote to the public the benefits of a "healthy" race. The "strong rhetoric of these events sought to mold public perception of eugenics in the first quarter of the twentieth century."[9] By focusing on issues like nutrition, child welfare, and heredity, "Better Baby" contests linked contemporary eugenics concerns with pediatricians and activists for public health. Such "scientific" contests were quite popular.

Although Texas never passed a eugenic sterilization law unlike so many of its contemporaries, trappings of the eugenics movement like the "Better Baby" contests (usually held at county fairs) were as popular in Texas as anywhere. Within six years of the first contest in Texas, it was reported that:

> the Baby Health Contest has already gained widespread popularity and its influence for good can hardly be overestimated. No less than twenty-five contests were held last year at state fairs, over a hundred county contests were conducted, and considerably more than that number of local contests were held.[10]

[9] Ramona L. Hopkins, "Was There a "Southern" Eugenics? A Comparative Case Study of Eugenics in Texas and Virginia, 1900–1940," Unpublished M.A. thesis, University of Houston Department of History, 2009.

[10] J. I. Collier, M.D., "The Baby Health Contest and Educational Factor in Preventative Medicine," *Texas State Journal of Medicine* 10, (Jan. 1915): 9.

A doctor and nurses examine contestants at a "Better Baby" event.

By 1915, fairs in Houston, Fort Worth, Austin, San Antonio, Longview, Mineral Wells, and Marshall had hosted Better Baby Contests, often sponsored by large organizations.[11] They were widely reported in the media as well, and in 1913, the first such event in Fort Worth had as many as 500 babies entered in the contest.[12] Each contest promised a "scientific" three-part examination of the baby, education for parents about how to raise healthy babies, and the presentation of a prize for the winners.

As with these "Better Baby" events, Fitter Family contests were popular in Texas as well, promoting reproduction with eugenic racism and science while trying to demonstrate that American families were capable of producing strong, moral, and healthy offspring. Each contest involved evaluating the health of each individual family member and then gathering the family history before presenting it to the judges—usually at an agricultural fair the way one might exhibit a prize heifer. The object was to "interest people in racial betterment and stronger and more virile families," according to one expert.[13]

Like the Better Baby contests, these competitions were widely reported. They served as a means of making public pronouncements about what traits American society valued; if there was a cross-eyed child in an otherwise perfect family, it was a blight on the entire family. "Better Baby" and "Fitter Family" contests were forms of eugenic popular culture and emphasized "positive" eugenics. On the other hand, institutions like the legislature and the courts would be tasked with

[11] *Ibid.*

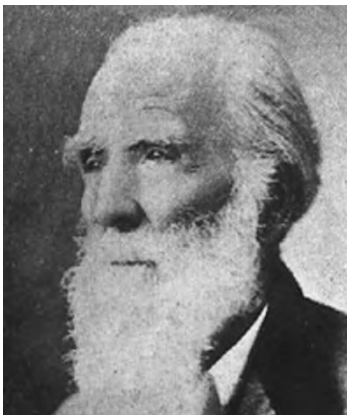
[12] "Better Baby Contest Held in Fort Worth," *Dallas Morning Star*, Nov. 26, 1913, 11.

[13] "Fitter Families Campaign Object," *Dallas Morning Star*, Oct. 7, 1924.

dealing with "negative" eugenic policies, like sterilization as a means of eliminating the "unfit." As this article explores, while Texas may have been as susceptible as any other state to the "positive" eugenics of things like Better Baby and Fitter Family contests, it resisted the "negative" eugenic policies.

## III. Dr. Gideon Lincecum and the "Purifying Knife"

Long before the word "eugenics" entered the lexicon, an influential Texas physician called for castration as a means of not only punishing criminals, but of improving the human race by preventing these criminals from having children. Born on April 22, 1793 in a backwoods settlement in Warren County, Georgia, Gideon Lincecum was raised on the frontier and actually studied Native American herbal medicine after serving in the War of 1812.[14] Lincecum practiced "botanic" medicine in the Columbus, Mississippi area for years and in September 1847, he made the decision to move to Texas with his family.[15] Settling in Long Point, Texas in 1848, Lincecum found many things that interested him more than actual "doctoring," such as the study of plants, fossils, birds, and small animals. He frequently railed at the inadequacy of the medical profession, deploring the lack of sanitary conditions around the ill, the failures to control epidemics, and the indiscriminate use of questionable narcotics. By the time of the outbreak of the Civil War, Lincecum had largely ceased to practice medicine.


Gideon Lincecum

Something of a cranky eccentric, Lincecum was an early believer in Charles Darwin's theory of evolution. Much like later proponents of eugenics, Lincecum feared that the "unfit" would run roughshod reproductively over the biologically superior unless society made a conscious decision to halt the breeding of those deemed "unfit." As his biographer, Lois Woods Burkhalter, would later write, "Gideon dreamed of a perfect world inhabited by a physically superb race of men and women, morally and intellectually perfect, who selectively reproduced for even higher attainment."[16]

So Lincecum decided to draft a bill to legalize castration and substitute it for capital punishment. This "Memorial," as he referred to it, was "suggested to my mind on examining the crania of three unfortunate specimens of humanity whom the citizens of Washington and Fayette Counties found it necessary to hang during the year of 1849."[17] These "true criminal types," according to Lincecum, could have had a simple operation that not only would have kept them from propagating but also restored them to a useful life. Lincecum mailed 676 copies of his "Memorial" to Texas lawmakers, newspapers, doctors, and scientists in 1855. Pointing out that all forms of punishment failed to decrease crime, Lincecum argued that castration would serve as both a deterrent to crime and as a check against the propagation of "the criminal type." Society, he felt, had the right to undertake anything that would benefit the whole:

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[14] Lois Wood Burkhalter, *Gideon Lincecum, 1793–1874: A Biography* (1965): 27.

[15] *Ibid.*, 58–59.

[16] *Ibid.*, 93.

[17] *Ibid.*, 93–94.

> Remove the cause of sin from the unfortunate transgressor and the proclivity to evil ceases. The truth is the intellectual developments in the human family do not sufficiently predominate to control the animal range . . . It is the animal and not the intellectual portion of our organic structure that commits crime and does violence.[18]

Writing to a friend, Parson Lancaster, in 1859, Lincecum reiterated his belief in the power of a "purifying knife." "The only available remedy is the knife," Lincecum wrote.[19]"Its power to deter and to save the wicked is indisputably efficient[. A]s to the 'inhumanity' and 'cruelty' of the proposed changes in our penal code, when compared with the rope, penitentiary, and the branding iron, it is an objection that will never be brought forward by intelligent men."[20]

Lincecum's belief was far from being merely theoretical. As he confessed to a friend from New York:

> Did you never see a eunuch? I have been familiarly acquainted with five of them. One of them I made myself. He was a degraded drunken sot—in delirium tremens at the time and I did it in a kind of youthful frolic. It cured him forever and made an honest . . . man of him and he often thanked me for it, telling me at the same time that I had by that act *saved his life*. He became quite industrious, religious and studious.[21]

Lincecum continued, writing that "I do not propose . . . to undertake the purification of the community at the first dash. It is only aimed at the ruined specimens of society—the actually condemned criminal . . ."[22] As Lincecum told others, it was simply a matter of good breeding as Texas ranchers had long practiced:

> To have good honest citizens, fair acting, truthful men and women, they must be bred right. To breed them right we must have good breeders and to procure these the knife is the only possible chance . . . Until it is demonstrated satisfactorily that man is not an animal I shall contend that the same laws will apply.[23]

The Lincecum "Memorial" was published partially in many Texas newspapers, and published in full by the *Colorado Democrat* and the *Ranger* (out of Washington, Texas).[24] But in its 1855 presentation to the legislature, it did not fare well. On November 16, 1855, representatives from Washington County—Benjamin E. Tarver and John Sayles—presented it. However, it did not go over well. As Lincecum would later recall, ". . . had it not been for the manly interference of Dr.

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[18] Letter from Gideon Lincecum to Dr. Josiah Higgarson (Somerville, Tennessee) on May 30, 1859 (on file in the Lincecum Papers, Dolph Briscoe Center for American History, Austin, Texas).

[19] Letter from Gideon Lincecum to Parson Lancaster on June 12, 1859 (on file in the Lincecum Papers, Dolph Briscoe Center for American History, Austin, Texas).

[20] *Ibid.*

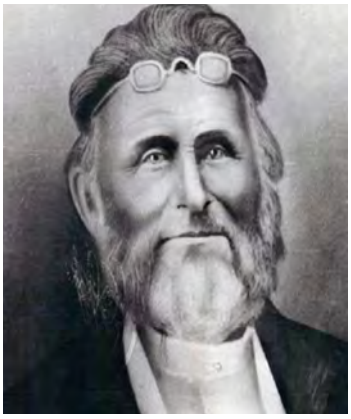
[21] Letter from Gideon Lincecum to Dr. R.P. Hallock (New York) on May 15, 1859 (on file in the Lincecum Papers, Dolph Briscoe Center for American History, Austin, Texas).

[22] *Ibid.*

[23] Burkhalter, *Gideon Lincecum*, 96.

[24] It should be noted that the jacket of Memorial No. 147 in the State Archives, which should contain the original Memorial, is empty. However, a copy of the Memorial, dated April 1854, in in the Lincecum Papers.

Dr. Ashbel Smith



Judge John A. Rutherford

A[shbel] Smith of Harris County there would have been nothing done with it further than a few sarcastic remarks accompanied by a great deal of half-drunk, googled-eyed laughter."[25] This same Dr. Smith motioned for the bill to be referred to the Judiciary Committee; Representative Tarver, the chairman of the Judiciary Committee, promptly proceeded to put it in a drawer of the committee, from which it disappeared and was never called up for action.[26]

Lincecum would urge his "Memorial" bill again in 1856. This time, he received some support from lawmakers like Dr. J.R. Beauchamp of Cameron, Alpheus Knight of Pilot Point, and Judge John A. Rutherford of Lamar. Franklin H. Merriman, a Galveston lawyer, district attorney, and state legislator, was also encouraging. On July 13, 1856, Merriman wrote to Lincecum that he would "do what I can to aid you," saying that "It is clear that the condition of mankind would be vastly improved."[27] However, it was to no avail. In 1856, the "Memorial" was similarly greeted with raucous laughter and little success. This time, as Lincecum reported, "it occasioned a smart amount of angry discussion and was finally referred to the committee on stock and stock raising"—where it again died in the committee room.[28]

Although Lincecum did not push his "Memorial" bill any further, the subject of eugenic improvement of the race remained at the forefront of his mind until his death in 1874. Most marriages—even those of his own grandchildren—gave him no joy since he viewed them mainly as increasing the population of mediocrities. As time marched on, Lincecum continually added to the list of those who he would "prune" from humanity, ranging from ministers (or as Lincecum referred to them, "the deceptive priesthood") to "deceivers, liars, drunkards, [and] praying superstitionists."[29] Reacting to the "extensive frauds and peculations" of state government in 1861, Lincecum wrote to his friend, S.B. Buckley of Austin, that:

> Don't you think that society would greatly benefit itself in diminishing the possibility with these fellows to reproduce their kind by a free use of the knife on their genital apparatus? If I had the authority to purify that type of our species and prevent the recurrence of such filthy unreliable beings, I could go to work at it as I would to purify and improve a spikenosed scrub breed of hogs, and the remedy that I should apply to improve the hog would be the very same that I should apply to them.[30]

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[25] Burkhalter, *Gideon Lincecum*, 96.

[26] *Ibid*., 97.

[27] Letter from F.A. Merriman to Gideon Lincecum on July 13, 1856 (on file in the Lincecum Papers, Dolph Briscoe Center for American History, Austin, Texas).

[28] Burkhalter, *Gideon Lincecum*, 98.

[29] Letter from Gideon Lincecum to John Lincecum (Bear Creek, Louisiana) on May 22, 1859 (on file in the Lincecum Papers, Dolph Briscoe Center for American History, Austin, Texas).

[30] Letter from Gideon Lincecum to S.B. Buckley (Austin, Texas) on Feb. 17, 1861 (on file in the Lincecum Papers, Dolph Briscoe Center for American History, Austin, Texas).

During the Civil War and during Reconstruction, Lincecum's "purifying knife" was certainly—and illegally—applied. On one occasion, it was apparently applied in a superficially legal manner. In 1864, an enslaved Black American in the vicinity of Belton, Texas was accused of rape, convicted, and was sentenced to be—and was—castrated.[31] Hearing about this, Dr. Lincecum wrote to his friend, Belton physician John A. Ewing:

> I understand that a rape occurred in your vicinity which was perpetrated by a negro who, after a fair and impartial examination of the case by twelve good citizens, was found worthy to suffer the penalty of emasculation. The operation being performed, I understand turned out to be a complete success and that the negro is now well and returned to his duties as a slave.[32]

"Fair and impartial examination" by "twelve good citizens," of course, meant a jury composed of entirely white men. And being deemed "worthy" of castration likely meant assessing a punishment that would not completely deprive a slave owner of the working value of his chattel property. Although we have no additional details on the supposed crime, it is quite possible that any crime would have involved a Black victim; had the defendant been accused of sexually assaulting a white woman, the all-too-familiar history of lynchings in the South indicates that he would have been either killed extralegally or, following trial and conviction, executed.

Lincecum was so taken with this "complete success" of a case that when he heard that another Black man was in the Brenham jail awaiting trial on a charge of attempted rape, Lincecum wrote to Judge John Stamps urging him "to try for a Belton verdict."[33] He also wrote to another friend, Reverend H.C. Lewis of Brenham:

> I address this letter to you from having understood that you were in favor of relieving the negro of the cause of his transgression and to save his life for the use of the owner. I hope you may be able to convince the people about Brenham of the propriety, philosophy, and the humanity of such a course. At present the community can not be made to understand the far-reaching benefits, the peace and protecting results to society from a judicious use of the purifying knife. If a man has a vicious bull that is hooking and gutting his stock about his lots he knows very well how to tame him and make a good docile steer of him besides stopping the increase of that breed of cattle. Man is an animal.[34]

However, to Lincecum's chagrin, the Black man in Brenham was acquitted. Of this somewhat unexpected result, Lincecum later wrote "Oh well. It was only an *attempted* rape."[35]

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[31] Burkhalter, *Gideon Lincecum*, 101.

[32] Letter from Gideon Lincecum to Dr. John. A. Ewing on Oct. 25, 1864 (on file in the Lincecum Papers, Dolph Briscoe Center for American History, Austin, Texas).

[33] Letter from Gideon Lincecum to Judge John Stamps (Brenham, Texas) on Oct. 25, 1864 (on file in the Lincecum Papers, Dolph Briscoe Center for American History, Austin, Texas).

[34] Letter from Gideon Lincecum to Rev. H.C. Lewis (Brenham, Texas) on Nov. 1, 1864 (on file in the Lincecum Papers, Dolph Briscoe Center for American History, Austin, Texas).

[35] Letter from Gideon Lincecum to C.B. Shephard on Nov. 25, 1864 (on file in the Lincecum Papers, Dolph Briscoe Center for American History, Austin, Texas).

Despite the fact that at least one Texas state senator, Chauncey Berkeley Shepard, planned to introduce a bill in the post-war legislature to make rape punishable by castration instead of hanging, it did not happen. Post-Civil War Texas was a very different place, and there were more pressing issues for the legislature to consider. But Lincecum's influence would not be forgotten, especially during the eugenics' heyday during the early twentieth century—and even later. On the eve of World War II (and before Nazi atrocities in the name of "science" were common knowledge), distinguished San Antonio physician Pat Ireland Nixon presented a paper before the Texas Surgical Society about Lincecum entitled *A Pioneer Texas Emasculator*. It was shortly after published in the *Texas State Journal of Medicine*.[36] Dr. Nixon told his audience that Gideon Lincecum had been ahead of his time, saying "We of this generation are prone to believe that surgical sterilization of the mentally unfit, criminals and criminally insane is a modern day procedure."[37]

Sen. Chauncey Berkeley Shepard

Dr. Pat Ireland Nixon

However, the torch of sterilizing the "unfit" was passed, decades after Lincecum's death, to another prominent Texas physician, Dr. F.E. Daniel.

## IV. Dr. F.E. Daniel and "A Rational Method of Dealing with Disease"

Although the Texas legislature did not pay any heed to Dr. Gideon Lincecum's theories of sterilization, Dr. Ferdinand Eugene Daniel certainly did. Born in 1839, F.E. Daniel served both the Confederacy and Union armies during the Civil War as a field surgeon. The Galveston physician later became a renowned professor of anatomy and surgery at Texas Medical College in that city. He also founded the *Texas Medical Journal* in 1885, and in that publication he had free rein to wage a campaign for eugenics and sterilization of the "unfit." Daniel also became the president of the Texas Medical Association.

Daniel's national prominence on the eugenics stage began as early as 1893, when he addressed the International Medico-Legal Congress in Chicago and proclaimed that "no fact is better established than that drunkenness, insanity, and criminal traits of character, as well as syphilis, consumption, and scrofula may descend from parent to child."[38] For Dr. Daniel, commitment of the unfit to asylums or sanitariums would not work because:

> The wealth of all the Czars would not be adequate to provide asylum and medical treatment for the progeny of these people in fifty years from now; for, while insane people do not marry, those do in whom disease exists undeveloped, and with the

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[36] Dr. Pat Ireland Nixon, "A Pioneer Texas Emasculator," *Texas State Journal of Medicine* 36, (1940): 34–38.

[37] *Ibid.*

[38] Dr. F.E. Daniel, "Should Insane Criminals, or Sexual Perverts, Be Allowed to Procreate?," *Texas State Medical Journal*. (1894) (read to the Medico-Legal Congress in 1893).

lower classes, particularly negroes, it is known that illicit intercourse is extremely common.[39]

Daniel's address to the Medico-Legal Congress was published in its entirety in the *Medico-Legal Journal*, and his advocacy of castration as a means of "solving" everything from rape to insanity to even homosexuality is incredible for the modern reader to behold. To Daniel, state action was necessary. He protested that "In no state are such restrictions put upon the privilege of marriage as are calculated to arrest the propagation of consumption, syphilis, insanity, drunkenness, and criminal propensity; nor is any other method resorted to, calculated to counteract, or lessen the degrading effects of hereditary transmission of these vices."[40] For Daniel, the states had failed to protect their citizens from these "biological degenerates," who would continue to proliferate and eventually swamp the "fit" members of society.

Daniel was shocked that institutions like the criminal courts would not simply use the same techniques that Texas ranchers and farmers routinely used to weed out the obviously defective—the list of whom had now grown beyond rapists to include even chronic masturbators. As his article explains, "Rational man will not permit his defective stock to breed, but contrary to reason, common sense, and the best interest of society, will permit the consumptive, the insane, the intemperate, the syphilitic, and the criminal to propagate each his kind, under the protection of the law."[41] According to Daniel, castration of such individuals was the only answer, since it would be "PUNITIVE, CURATIVE, and PREVENTATIVE." In Daniel's world view, "Rape, sodomy, bestiality, pederasty, and habitual masturbation, should be made crimes or misdemeanors, punishable by forfeiture of all rights including that of procreation; in short, by castration, or castration plus other penalties, according to the gravity of the offense."[42] Indeed, for Dr. Daniel, Lincecum's "purifying knife" was merely "preventative medicine."

When the eugenics movement gained momentum, its national leaders like Harry Laughlin were quick to credit F.E. Daniel as the first "scientist" to articulate their main arguments in favor of forced sterilization. Not only did he make claims about the alarming rate of increase in the number of "defectives," the link between what were viewed as sexual perversions and biological or mental inferiority, he also advocated for the use of sexual surgeries—castrations—to both treat existing problems and to eliminate them from future generations.

Of course, Daniel had a clearly racist bent to what he called for. To him, "the moral effect [of sterilization] on this community will be salutary, and no doubt will act as a powerful restraint on the evil-inclined, for a negro values these possessions more than life," as he wrote in 1907.[43] Indeed, while most eugenic proponents ignored the Black population, Daniel went out of his way to insist that sterilizing Black people would actually improve their morals and help "control" the Black population. For Daniel, then, sterilization was both punitive and therapeutic. Those who

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[39] *Ibid.*

[40] *Ibid.*

[41] *Ibid.*

[42] *Ibid.*

[43] Dr. F.E. Daniel & George R. Tabor, "Emasculation for Criminal Assaults and for Incest," *Texas State Medical Journal* 22, (1907): 347.

were regarded as "unfit" were punished, thus controlling them for the perceived therapeutic and hygienic benefit of the so-called fit—white, middle- and upper-class Americans. His theories had less to do with alleviating the suffering of people than with relieving the burden Daniel felt they placed on society.

Daniel believed that this burden was created by what he believed was the hereditary nature of certain conditions, such as insanity. Of insanity, Daniel wrote:

> It will not stop: for insanity being a hereditary disease, is being transmitted to succeeding generations, and if conditions are not changed—if something is not done to arrest it—it is a matter of simple calculation that in two more decades the insane will have increased until it will be, as it almost is now, practically impossible to care for them.[44]

For Daniel, to prohibit insanity in the population, one had to sterilize the insane—and anyone else viewed as mentally or physically "defective." Only through this punitive crusade could society be "bettered."

During this time, Texas and the rest of the nation were changing. The percentage of foreign-born Texans increased, both in sheer numbers and in terms of the percentage of the total Texas population, between 1880 and 1920. The Lone Star State's total population swelled from nearly 1.6 million in 1880 to about 4.7 million in 1920.[45] The numbers of those born abroad soared from 114,616 to 362,832 during that forty-year period. Mexican immigration had the biggest impact, particularly in the decade of Mexico's political and economic tumult between 1910 and 1920. Approximately 100,000 Mexicans crossed into Texas during that time, and by 1930, the Mexican population of Texas was around 700,000, or roughly 12 percent of the total population.[46] Many in the state were bigoted towards these newest Texans.

Even though Dr. Daniel's cries for forced sterilization went unheeded in Texas, there were several bills that were introduced. House Bill 259 was introduced in 1913, targeting "criminals, lunatics, and epileptics and syphilitics and persons with a hereditary tendency to congenital diseases of mind or body."[47] House Bill 259 would have given the superintendents of state hospitals decision-making power to order the sterilization of such individuals. The bill's sponsors characterized the would-be statute not as punitive in nature, but as hygienic. The bill stated that "no inmate of any institution named in this act whose sterilization would probably be advisable, shall be discharged, furloughed, or paroled without previously having been examined by the board provided for in this act and having been submitted to any operation it recommended."[48] In other words, freedom from such a mental institution came with a steep price tag: one's ability to procreate. This repeated emphasis on criminality and the mentioning of parole further blurred

[44] Dr. F.E. Daniel, "Sterilization of Male Insane," *Texas State Medical Journal* 5, (1909): 122–24.

[45] *Table 13–Nativity of the Population, for Regions, Divisions, and States: 1850–1990*, United States Bureau of the Census, Population Div.

[46] Terry G. Jordan, "A Century and a Half of Ethnic Change in Texas," 1836–1986, *Southwestern Historical Quarterly* 89, (Apr. 1986): 418.

[47] House Bill 259, Tex. Leg. H.R., 33d Reg. Sess. (1913).

[48] *Ibid.*

the lines between what was "therapeutic" and what was "punitive."

Since not every resident of the institutions to whom House Bill 259 was directed had committed any crime (many were simply viewed as mentally ill or "unfit"), the bill would have allowed forced sterilization without any way of determining or measuring insanity. Thankfully, House Bill 259 failed. Unfortunately, for the next two decades, the eugenics movement enjoyed its heyday in the United States as dozens of states passed laws allowing for the forced sterilization of those considered "unfit"—the "feebleminded," the insane, criminalistic, epileptic, alcoholic, diseased, blind, deaf, the "juvenile delinquent", and deformed.[49] Shortly after the U.S. Supreme Court's 1927 decision in *Buck v. Bell*[50] (with Justice Holmes' chilling words that "Three generations of imbeciles are enough"), Texas tried again with House Bill 399. Introduced in 1929, House Bill 399 placed the power of nominating someone for sterilization with the superintendent of an institution, who would then present the application to a state board of control.[51] That board would then hold a hearing with the inmate, and the inmate's legal guardian. Just like its unsuccessful predecessor, House Bill 399 was concerned with preventing the reproduction of specific groups and thus limiting the existence of certain traits. So, according to House Bill 399, if the board of control found that an individual would be "a problematic potential parent of socially inadequate offspring likewise afflicted," then that person could be sterilized.[52] In short, by introducing social constructs like "feeblemindedness," House Bill 399 adopted the language of the national eugenics movement.[53] Indeed, in the wake of the Supreme Court's decision in *Buck v. Bell*, eugenics was very popular.[54] Forced sterilization of the "unfit" was seen as a way of preventing the birth of children who would then be a drain on society by needing public assistance or committing crimes. However, they didn't count on a powerful enemy: Texas Catholics.


Gov. James Allred

Even after House Bill 399 failed to pass, the eugenics fervor that gripped America meant that eugenic sterilization laws would continue to be passed nationwide, and at least proposed in Texas. In 1939, Governor James Allred proposed a forced sterilization law for Texas.[55] Although he received some letters of support, Texas Catholics—particularly galvanized through the national fraternal society of Catholic men, the Knights of Columbus—lined up to oppose the suggested law.

These letters from local Knights of Columbus councils across Texas are at the Texas State Archive and were sent to Governor Allred between 1935 and 1936.[56] Many are simply letters or

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[49] *See generally* Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* (2016); Mark A. Largent, *Breeding Contempt: The History of Coerced Sterilization in the United States* (2008).

[50] 274 U.S. 200 (1927).

[51] House Bill 399, Tex. Leg. H.R. 41st Reg. Sess. (1929).

[52] *Ibid.*

[53] *Ibid.*

[54] Cohen, *Imbeciles.*; Largent, *Breeding Contempt*.

[55] Kathleen D. Stansbury, "The Eyes of Texas: Forced Sterilization in the Lone Star State" (unpublished sociology thesis, Trinity U. 2019).

[56] Resolutions Against the Proposed Sterilization Bill, Knights of Columbus to James Allred, Governor of Texas, 1935, Tex. Office of the Gov. (Archives & Info. Servs. Div., Tex. St. Library & Archives Comm'n.).

resolutions themselves, while some are accompanied by an explanatory letter from a council's Grand Knight (leader).[57] The resolutions follow a common template, expressing the belief that a proposed sterilization bill violates not only individual rights and exceeds governmental powers, but also opposes the will of God. Among other themes, these letters and regulations refer to reproductive rights. As one such resolution states:

> Be it further resolved that it is not within the province or scope of government, federal or state, to maim the unfit to prevent the exercise of the legitimate power of procreation which according to the will and design of God, the creator, who has dominion over all his creatures, governed by divine, positive, and natural law from the very beginning of time.[58]

Note how even in recognizing certain people or groups as "unfit," or somehow inferior to the rest of the population, these resolutions reject the concept of certain genetics being inherently harmful—basically opposing the views of both Lincecum and Daniel. Moreover, as other resolutions explicitly stated, forced sterilization was not only in conflict with existing moral law and natural and religious rights, but also "with the basic American principles of the state and federal governments of these United States." In other words, forced sterilization didn't protect the "fit" portions of the population—it actually infringed upon their rights.

Catholic opposition certainly manifested itself in response to Governor Allred's proposed bill. Even though the population of Texas was only about 10 percent Catholics in the early 1930s, Allred's proposal failed. Catholic action against forced sterilization laws was felt in other states as well; in Alabama, for example, Catholics were successful in persuading the governor of Alabama to veto a sterilization law.

Of course, the failure of Governor Allred's plan did not mean a complete end to forced sterilization bills in Texas. After the U.S. Supreme Court struck down the forced sterilizations of convicts in the 1942 decision *Skinner v. Oklahoma*,[59] the Texas legislature tried again with House Bill 786 during the 50th Regular Legislative Session in 1947.[60] Under House Bill 786's language, a state board of eugenics would be created (consisting of the state health officer, the chief of the various institutions involved, and a licensed physician appointed by the governor). It established that any male inmate under the age of sixty-seven and any female inmate under the age of forty-five institutionalized throughout the state and who were considered to be mentally ill or "defective" should be considered for sterilization.[61] House Bill 786 specifically stated—unlike its predecessors—that "The purpose of the Board's finding and others shall be for the betterment of the physical, mental, neural, or psychic condition of the inmate or to protect society from the menace of procreation by said inmate, and not in any manner a punitive measure."[62]

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[57] *Ibid.*

[58] *Ibid.* (resolution from Knights of Columbus – Corpus Christi Chapter, 1935).

[59] 316 U.S. 535 (1942).

[60] House Bill 786, Tex. Leg. H.R., 50th Reg. Sess. (1947).

[61] *Ibid.*

[62] *Ibid.*

While House Bill 786 claimed it wasn't a punitive measure, in reality it only medicalized the punitive aspects of the bill. There may not have been any explicit references to dangerous genes lurking around the population or therapeutic benefit to the rest of society, but instead sterilization was supposedly therapeutic for the inmate. The language of House Bill 786 also reflected certain post-*Skinner* realities: the measure allowed those who were going to be sterilized to choose and pay for their own physician, while another provision shielded the bureaucrats involved from civil liability.[63] Nevertheless, despite all of this, House Bill 786 still failed.

## V. Conclusion


Carrie Weaver Smith

Just because Texas has never had a forced sterilization law in place doesn't mean that pro-eugenics views were not fairly prevalent, or that involuntary sterilizations never occurred. Consider, for example, Carrie Weaver Smith (1885–1942), widely hailed as a social reformer, physician, and respected expert on the subject of female juvenile delinquency. In 1913, she was appointed as the first director of the Texas State Training School for Girls (later known as the Gainesville State School for Girls).[64] In 1919, Dr. Smith brought in Cornelia Augenstein, the first eugenics field worker in Texas from the Eugenics Record Office in Cold Spring Harbor, New York. By the next year, in her presentation at the National Conference of Social Work in New Orleans (entitled *The Unadjusted Girl*), Smith said the following:

> Eugenically, the delinquent girl is a terrible misfit, and reflects the folly and criminal negligence of the state in regard to marriage regulations . . . Idiots, epileptics, syphilitics, tuberculars, marry ad libitum . . . [We] take care of their offspring in the penitentiaries, asylums, schools for the feebleminded, and finally . . . by the hangman's noose or the electric chair.[65]

Beyond merely echoing the eugenics sentiments of the times, the only institution in Texas to have allegedly engaged in forced sterilizations was the Goree State Farm. Opened in 1911 just outside Huntsville as a prison reform institution for women (the majority of whom had convictions for drug possession, theft, or prostitution), the Goree State Farm became famous for, of all things, singing.[66] Between 1938 and 1944, a musical group called the Goree All-Girl String Band regularly appeared on national radio. According to statements made to *Texas Monthly* writer Skip Hollandsworth by descendants of multiple female inmates who belonged to this band, their relatives reported being sterilized against their will.[67] While there are no longer extant medical records for these women, public records show that other than one member of the band, no

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[63] *Ibid.*

[64] Michael Phillips & Betsy Friauf, "Carrie Weaver Smith (1885–1942)," *Handbook of Texas Online*, https://www.tshaonline.org/handbook/entries/smith-carrie-weaver.

[65] *Ibid.*

[66] Skip Hollandsworth, "O Sister, Where Art Thou?," *Texas Monthly* (May 2003), https://www.texasmonthly.com/being-texan/o-sister-where-art-thou/.

[67] *Ibid.*

Top: The Goree All Girl String Band. Bottom: Female inmates sewing at the Goree State Farm in 1958.

other original members of the Goree All Girl String Band ever had children following their incarceration.[68]

Despite these, Texas resisted being pulled into the ethical morass of eugenic sterilization. Even though Gideon Lincecum's "Memorial" bill was the first piece of forced sterilization legislation in the country and was first brought to the Texas legislature in 1855—fifty-two years before Indiana actually passed the first such law in the country—Texas did not bite. Despite having highly influential Texans involved, including prominent physicians like F.E. Daniel and Governor James Allred, Texas rejected every effort to legally sanction eugenic sterilization. It is certainly not that there was a shortage of individuals who believed in the aims behind such legislation.[69] Yet, Texans rejected every justification offered, from Lincecum's hope of deterring criminals and decreasing crime to F.E. Daniel's seeking to protect the "purity" of the population from being subsumed by those he deemed "inferior."

The effects of the eugenics movement are still being felt in Texas. The University of Texas at Arlington (UTA) recently renamed the on-campus building that houses administrative departments and the university president's office; formerly known as Davis Hall, it was named for Edward Everett Davis, dean of the then-racially segregated North Texas Agricultural College from 1925 to 1946. Although Davis shepherded the school that would become UTA through the Great Depression and World War II, he was also an ardent eugenicist who advocated for involuntary sterilization and supported House Bill 259 in 1913.[70] In 1940, Davis authored the novel *The White Scourge*, in which he wrote:

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[68] *Ibid.*

[69] *See, e.g.*, Betsy Friauf & Michael Phillips, "A Serviceable Villain: Eugenics, the Fear of the "Underman," and Anti-Democratic Discourse in Texas Thought and Culture, 1900–1940," East Texas Historical Journal 55, (2017): 2.

[70] Brayden Garcia & Valeria Olivares, "UTA Renames Building That Honored Former School Leader Who Supported Eugenics, Segregation," *Dallas Morning News* (May 13, 2021), https://www.dallasnews.com/news/education/2021/05/13/uta-renames-building-that-honored-former-school-leader-who-supported-eugenics-segregation/

Too much of America's worthless human silt has filtered into the cotton belt. The most serious rural problem in the south is not that of soil conservation, crop production, co-operative marketing, or race relationships, but that of the biologically impoverished tribes of marginal humanity—black, white, and Mexican—subsisting on cotton.[71]


Edward Everett Davis

On March 22, 2021, the University of Texas System voted to change the name from Davis Hall to the University Administration Building.

Texas, like every other state, has had its fair share of legislative and judicial sins. But for nearly a century and a half between Gideon Lincecum's "Memorial" in 1855 and Senate Bill 123 that then-governor George W. Bush signed in 1997, Texas exhibited the rarest of qualities regarding eugenic sterilization—restraint.

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[71] Dalton Heitmeier, "UTA Alumnus Questions Merit of Davis Hall's Namesake," *The Shorthorn* (Oct. 15, 2018), https://www.theshorthorn.com/news/uta-alumnus-questions-merit-of-davis-halls-namesake/article_2b92c46e-d0bd-11e8-9047-8ff597d3821f.html

**Return to Journal Index**

# A Brief History of the Texas Insanity Defense

**By Brian D. Shannon**[1]

The Texas insanity defense for adult offenders is set forth in Section 8.01 of the Texas Penal Code and provides the following:

> **Insanity.** (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.
> (b) The term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.[2]

This formulation of the insanity defense is a somewhat narrow variation on the old *M'Naghten* test, first formulated in England in 1843.[3] Except for a ten-year period between 1973 and 1983, which will be discussed below, Texas has applied the *M'Naghten* test since 1854. Accordingly, knowledge of the history of the *M'Naghten* standard is useful for understanding its scope.

The name of the test comes, of course, from *M'Naghten's Case*, in which the British government prosecuted a defendant named Daniel M'Naghten for the murder of Edward Drummond, who was the private secretary to Sir Robert Peel, the Prime Minister of England.[4] M'Naghten apparently intended to kill Peel but instead mistakenly shot Drummond.[5] At trial, the "thrust of the medical testimony was that M'Naghten was suffering from what would today be described as delusions of persecution symptomatic of paranoid schizophrenia."[6] The jury acquitted M'Naghten on grounds of insanity, and the acquittal caused widespread public outrage.[7] Queen Victoria was also concerned, particularly given that she had been the target of previous assassination attempts,

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1 Portions of this article originally appeared in Brian D. Shannon, "The Time is Right to Revise the Texas Insanity Defense: An Essay," 39 *Texas Tech Law Review* 67 (2006) and are being reproduced with the permission of the *Texas Tech Law Review*.

2 Tex. Penal Code Ann. § 8.01 (West 2023).

3 *See* M'Naghten's Case, 10 Clark & Finnelly 200, 8 Eng. Rep. 718 (H.L. 1843). Interestingly, "M'Naghten's name has been spelled at least 12 different ways" and "the traditional spelling—the one used here—is the only one that cannot be reconciled with the defendant's own signature." Richard J. Bonnie et al., *A Case Study in the Insanity Defense: The Trial of John W. Hinckley* 9, n.f (3rd ed. 2008).

4 *See* M'Naghten's Case, 8 Eng. Rep. at 719; *see also United States v. Freeman*, 357 F.2d 606, 617 (2d Cir. 1966) (providing additional history of *M'Naghten*).

5 *Freeman*, 357 F.2d at 617-18.

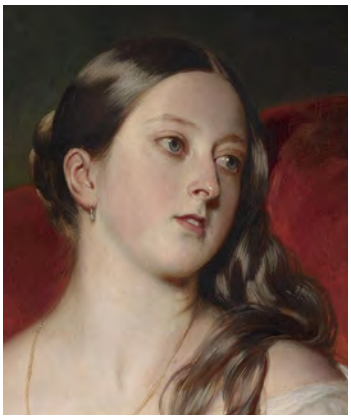
6 Richard J. Bonnie et al., *A Case Study in the Insanity Defense,* 10.

7 *See ibid*., 11 (observing that the "verdict caused considerable popular alarm").


Daniel M'Naghten


Edward Drummond


Sir Robert Peel


Queen Victoria in 1843

including one in which "one of her attackers had also won an insanity acquittal."[8] Accordingly, after M'Naghten's trial in 1843 "she summoned the House of Lords to 'take the opinion of the Judges on the law governing such cases.'"[9]

Responding to the Queen's summons, the House of Lords conducted a general inquiry into the matter of the insanity defense and asked the judges of the Queen's Bench a series of questions regarding the standards that should be employed.[10] In responding to the questions, the English judges in effect reversed the approach that the court had employed in M'Naghten's trial for any ensuing cases.[11] A combining of the "answers to two of those questions have come to be known as the *M'Naghten* rules," or *M'Naghten* test, as follows:

> [E]very man is to be presumed sane. ... [T]o establish a defence [sic] on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring [sic] under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.[12]

The *M'Naghten* test is often referred to as the right-wrong test because of its near-exclusive focus on whether the accused individual knew the difference between right and wrong at the time of the alleged offense.[13]

The *M'Naghten* test "quickly became the accepted approach to the insanity defense in England and in the United States."[14] In fact, it reached Texas after just more than a decade. In 1854,

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8 *Ibid.*, 11, n.h.

9 *Freeman*, 357 F.2d at 617.

10 *Ibid*.

11 *Ibid*., 617-18.

12 Richard J. Bonnie et al., *A Case Study in the Insanity Defense,* 11.

13 *See Freeman*, 357 F.2d at 617 (commenting that the Lord Chief Justice "with the Queen's breath upon him, reaffirmed the old restricted right-wrong test despite its 16th Century roots and the fact that it, in effect, echoed such uninformed concepts as phrenology and monomania").

14 Richard J. Bonnie et al., *A Case Study in the Insanity Defense,* 12.

the Texas Supreme Court embraced and applied the *M'Naghten* rules in *Carter v. State*,[15] although ironically the court never actually cited *M'Naghten*. Instead, the court relied on and quoted at length from Francis Wharton's famous 1846 *Treatise on the Criminal Law of the United States*, as follows:

> It has been laid down as the law, upon great authority and consideration, "That before a plea of insanity should be allowed undoubted evidence should be adduced that the accused was of diseased mind, and that, at the time he committed the act, he was not conscious of right and wrong. This opinion related to every case in which a party was charged with an illegal act, and the plea of insanity was set up. Every person was supposed to know what [the] law was, and therefore nothing could justify a wrong act until it was clearly proved that the party did not know right from wrong. If that was not satisfactorily proved, the accused was liable to punishment."[16]

Francis Wharton

Given the challenges of long-distance travel and communication from that era, it is remarkable that Wharton described the *M'Naghten* rules in his 1846 treatise only three years after their promulgation, and that the Texas Supreme Court had embraced the *M'Naghten* approach by 1854.

Two years after the Texas Supreme Court's decision in *Carter v. State*, a codification of the insanity defense in Texas first appeared in Articles 41-42 of the Penal Code of 1856.[17] Article 41 of the 1856 Penal Code established the following:

> No act done in a state of insanity can be punished as an offence. No person who becomes insane after he committed an offence [sic], shall be tried for the same while in such condition. No person who becomes insane after he is found guilty shall be punished for the offence while in such condition.[18]

In turn, Article 42 provided:

> The rules of evidence known to the common law in respect to the proof of insanity, shall be observed in all trials where that question is in issue. The manner of ascertaining whether the insanity is real or pretended, when it is alleged that the

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[15] 12 Tex. 500 (1854).

[16] *Ibid.*, 504-05 (quoting Francis Wharton, *Treatise on the Criminal Law of the United States* 13 (1846), *available at* https://babel.hathitrust.org/cgi/pt?id=coo.31924076573439&seq=5 (last visited Oct. 10, 2023)). In turn, Wharton had quoted from the *M'Naghten* rules.

[17] The Texas Legislative Reference Library describes the Codes of 1856, or the "Old Codes," as follows:

> In 1854 the fifth Legislature passed an act requiring the Governor to appoint a commission to codify the civil and criminal laws of Texas. The Commission proposed four codes, but only the Code of Criminal Procedure and the Penal Code were adopted by the Legislature. The two adopted Codes are commonly referred to as the Codes of 1856 or the Old Codes.

Tex. Leg. Ref. Library, The Codes of 1856, https://lrl.texas.gov/collections/oldcodes.cfm.

[18] Art. 41, Tex. Penal Code of 1856, *available at* https://lrl.texas.gov/scanned/statutes_and_codes/Penal_Code.pdf.

> defendant became insane after the commission of the offence [sic], is prescribed in . . . the Code of Criminal Procedure.[19]

Accordingly, Article 42 required that the standard and proof for the insanity defense be drawn from the common law. In turn, at the time of adoption of the Penal Code of 1856, that common law approach had already been established two years earlier in *Carter v. State* as the *M'Naghten* standard.

The use of the *M'Naghten* test quickly became well-entrenched. Interestingly, the Penal Code of 1911 included not only the statutory provisions, but—much like a treatise—also case annotations and commentary. With regard to the legal test for insanity, the 1911 Code cited *Carter v. State* and many subsequent precedents in identifying the following rule:

> The legal test of insanity is whether or not accused was laboring under such defects of reason from disease of the mind as to not know the nature and quality of the act he was doing; or, if he did know, he did not know he was doing wrong. In other words, the party's knowledge of right or wrong in respect to the very act with which he is charged, is the criterion.[20]

Also, comparable to current law, the defendant carried the burden of proving an insanity defense by a preponderance of the evidence.[21]

The typical charge under *M'Naghten* asked the jury to consider both whether the defendant knew the nature and quality of defendant's acts; or if the defendant did know it, whether the defendant knew what he or she was doing was wrong. Nonetheless, there was authority that an instruction focused only on right and wrong, with no mention of the "nature and quality" of the defendant's acts, was not error. In a 1913 decision, *Lester v. State*, the Court of Criminal Appeals upheld a conviction for horse theft.[22] After the defendant raised an insanity defense, the trial court instructed the jury as to whether at the time of the offense "the defendant … was laboring under disease of the mind to such an extent … that he did not know right from wrong, and did not know that the act of taking the horse at the time … was wrong."[23] On appeal, the court rejected a challenge that the charge was deficient in that it did not also include instructions regarding whether the defendant knew the nature and quality of his acts.[24] The court reasoned that the

[19] *Ibid.*, art. 42.

[20] Annotations to Art. 39, Texas Penal Code of 1911, at 9, *available at* https://www.sll.texas.gov/assets/pdf/historical-statutes/1911/1911-3-penal-code-of-the-state-of-texas.pdf.

[21] Annotations to Art. 40, Texas Penal Code of 1911, at 10 (citing Boren v. State, 25 S.W. 775, 776-77 (Tex. Crim. App. 1894), and subsequent cases), *available at* https://www.sll.texas.gov/assets/pdf/historical-statutes/1911/1911-3-penal-code-of-the-state-of-texas.pdf. The Court of Criminal Appeals in *Boren* also affirmed the trial court's rejection of the defendant's requested additional instruction, "that if appellant was prompted by an insane delusion when he killed deceased, then he would be excused." *Ibid.*, 776. The court reasoned that the standard instruction on the insanity defense was adequate, noting: "If a person is deluded, he is insane; if insane, he is deluded. We are not treating of illusions or hallucinations. The evidence is conflicting with regard to the only issue in the case, viz., insanity." *Ibid.*

[22] *Lester v. State*, 154 S.W. 554, 557 (Tex. Crim. App. 1913).

[23] *Ibid.*, 555.

[24] *Ibid.*

instruction provided was sufficient "for an intelligent jury to understand the law, and if defendant did not know right from wrong, he should be acquitted …."[25]

From 1856 through 1973, the statutory provisions for the Texas insanity defense remained largely unchanged. Although the section numbers differed, the Penal Code of 1879 contained almost verbatim language from the Old Code of 1856 for the Texas insanity defense. Article 39 reiterated: "No act done in a state of insanity can be punished as an offense."[26] And, Article 40 required courts to turn to the common law for the necessary standard and proof of insanity: "The rules of evidence known to the common law, in respect to the proof of insanity, shall be observed in all trials where that question is in issue."[27]

Subsequent legislatures continued to employ this same language in later recodifications of the Texas Penal Code in 1895,[28] 1911,[29] and 1925,[30] although the section numbers were revised in 1925 from Articles 39 and 40 to Articles 34 and 35. Indeed, the exact same language requiring the courts to use the common law test for insanity remained the law until the 1973 enactment of the modern Texas Penal Code based on the Model Penal Code. As one commentator noted, "Prior to the enactment of the new Penal Code effective January 1**,** 1974, the M'Naghten Rule constituted the legal test of insanity as a defense in all criminal cases in Texas."[31]

Indeed, early Texas courts also rejected alternative insanity tests, such as an "irresistible impulse" standard. In an 1896 decision, *Leache v. State*, a defendant convicted of homicide asserted that the trial court had erred in not instructing "the jury to the effect that defendant would not be responsible if he was overwhelmed by an impulse which took away his will power and rendered him incapable of controlling his actions."[32] In a lengthy discussion, the Texas Court of Appeals rejected this contention that a jury in an insanity case should be instructed on "moral insanity or irresistible and uncontrollable impulse as excuses for crime."[33]

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[25] *Ibid.*

[26] Art. 39, Texas Penal Code of 1879, *available at* https://www.sll.texas.gov/assets/pdf/historical-statutes/1879/1879-4-penal-code-of-the-state-of-texas.pdf.

[27] *Ibid,.* art. 40.

[28] Arts. 39-40, Texas Penal Code of 1895, *available at* https://www.sll.texas.gov/assets/pdf/historical-statutes/1895/1895-3-penal-code-of-the-state-of-texas.pdf. The 1895 Penal Code also first included the possibility of introducing evidence of "temporary insanity produced by … use of ardent spirits" for the purpose of mitigating a sentence, while also otherwise declaring: "Neither intoxication nor temporary insanity of mind, produced by the voluntary recent use of ardent spirits, shall constitute any excuse … for the commission of a crime …." *Ibid.,* Art. 41. Similar concepts pertaining to voluntary intoxication are found today in Tex. Penal Code Ann. § 8.04(a)-(b) (West 2023) (barring voluntary intoxication as a defense but permitting evidence of "temporary insanity caused by intoxication" to be introduced as mitigation during sentencing).

[29] Arts. 39-40, Texas Penal Code of 1911, *available at* https://www.sll.texas.gov/assets/pdf/historical-statutes/1911/1911-3-penal-code-of-the-state-of-texas.pdf.

[30] Arts. 34-35, Texas Penal Code of 1925, available at https://www.sll.texas.gov/assets/pdf/historical-statutes/1925/1925-3-penal-code-of-the-state-of-texas.pdf.

[31] Kerry Fitzgerald, "The Law of Incompetency and Insanity in Texas," 37 *Texas Bar Journal,* 1077, 1079 (1974).

[32] 3 S.W. 539, 542 (Tex. App. 1896) (internal quotations omitted).

[33] *Ibid. See also Cannon v. State*, 56 S.W. 351, 361 (Tex. Crim. App. 1900) (affirming trial court determination not to instruct jury on the doctrine of irresistible impulse); *Lowe v. State*, 70 S.W. 206 (Tex. Crim. App. 1902) (affirming trial court rejection of a separate instruction on kleptomania in a horse theft case). For another interesting early

A significant problem with Section 41 of the Old Code of 1856, which was carried forward for 118 years until 1974, was that the statute addressed insanity "at three [distinct] times: as a defense, as a bar to trial, and as a bar to punishment."[34] Under the former law, Texas "utilized the term *insanity* indiscriminately" in referring not only to the insanity defense, but also to competency to stand trial and competency to be sentenced.[35] Whereas insanity at the time of the acts that resulted in criminal charges was, as it is today, a defense to those charges, a lack of competency to stand trial was styled as "present insanity."[36] Today, matters relating to a defendant's lack of competency to stand trial are addressed separately in Chapter 46B of the Texas Code of Criminal Procedure.[37]

**Adoption of the ALI Test.** Although Texas, like most American jurisdictions, quickly embraced the *M'Naghten* test,[38] for a brief ten-year period from 1973 to 1983 Texas used a different insanity test. The Texas Legislature departed from the narrow *M'Naghten* standard in 1973 when it adopted an insanity defense based largely on the American Law Institute's (ALI's) 1962 Model Penal Code.[39] Accordingly, the 1973 Texas enactment added a "volitional" prong to the Texas insanity defense consistent with the ALI recommendation: "Thus, in addition to the narrow *M'Naghten* inquiry of whether the defendant knew that his conduct was wrong, the test was expanded to ascertain whether the defendant was capable of conforming his conduct to the requirements of the law."[40]

opinion, see *Clark v. State*, 8 Tex. Ct. App. 350, 359 (1880) (affirming the trial court's rejection of a charge that included a purported defense of "insanity created by jealousy and other conditions of the mind growing out of the infidelity, or suspected infidelity, as the case may be, of the wife").

[34] Janelle White Nolan, "Texas Rejects M'Naghten," 11 *Houston Law Review* 946, 947 (1974). The modern Texas Penal Code became effective on January 1, 1974, superseding former Article 34. *Ibid.*, 946-47.

[35] *See ibid.*, 947.

[36] *Ibid.* In other words, the same statute that provided for an insanity defense, also addressed a lack of sanity at the time of trial, or at the "present" time, as opposed to the time of the acts resulting in the criminal charges. For an early case involving a person's lack of competency to be tried, see *Guagando v. State*, 41 Tex. 626, 630-31 (Tex. 1874) (reversing a murder conviction where defendant was denied an ability to obtain a determination of whether "the accused [was] mentally competent to make a rational defense … before proceeding with the trial for murder").

[37] Tex. Code Crim. Proc. Ann. Chapter 46B (West 2023). The Old Code of Criminal Procedure of 1856 also prescribed a process pertaining to a convicted defendant's mental competency after conviction but prior to sentencing or prior to execution of a sentence. Under Article 788, if the issue of insanity was raised after conviction and prior to judgment being rendered, the statute required the court to suspend the judgment until the defendant became sane. Art. 788, Tex. Code Crim. Proc. of 1856, *available at* https://lrl.texas.gov/scanned/statutes_and_codes/code_of_criminal_procedure.pdf. Correspondingly, if the issue of insanity arose after the judgment, but prior to execution of the judgment, Article 789 required that the execution of the judgment be suspended until the defendant became sane. *Ibid.* art. 789. In the case of capital murder, this provision is somewhat akin to today's requirement, both constitutionally and under Article 46.05(a), Texas Code of Criminal Procedure, that a person not be executed if incompetent to be executed. Tex. Code Crim. Proc. Ann. art. 46.05(a) (West 2023).

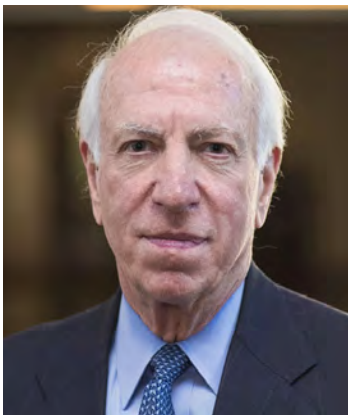
[38] *See* Richard J. Bonnie et al., *A Case Study in the Insanity Defense,* 12 (observing that the *M'Naghten* standard "inspired at least a part of the test for the insanity defense in virtually all American jurisdictions").

[39] Tex. Pen. Code Ann., 63d Leg., R.S., ch. 399, § 8.01, 1973 Tex. Gen. Laws 883, 896, *amended by* Act of Aug. 29, 1983, 68th Leg., R.S., ch. 454, § 1, 1983 Tex. Gen. Laws 2640; *see* Model Penal Code § 4.01 (Proposed Official Draft 1962) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [(wrongfulness)] of his conduct or to conform his conduct to the requirements of law.").

[40] Ray Farabee & James L. Spearly, "The New Insanity Law in Texas: Reliable Testimony and Judicial Review of Release," 24 S. Texas Law Review 671, 673 (1983). The 1973 legislation also resulted in the repeal of old Article 34, which had confusingly addressed not only insanity as a defense, but also competency to stand trial and competency to be punished. Issues relating to incompetency were thereafter addressed only in the Code of Criminal Procedure. *See*

The volitional prong of the ALI test derived from (1) courts' dissatisfaction with the narrow, right-wrong inquiry under the *M'Naghten* standard, and (2) some states having developed and tinkered with the so-called "irresistible impulse" test.[41] The ALI test has been styled "an amalgam of *M'Naghten* and 'irresistible impulse.'"[42] Professor Richard Bonnie and his colleagues described the underlying theory supporting the volitional prong as follows:

> It rests on the notion . . . that the conviction of crime expresses a moral judgment about the defendant's behavior. Moral judgments about people, the argument goes, are premised on the concept of free will. In general, behavior is the product of choice, and people who make bad choices are subject to moral condemnation. In cases where mental disease or defect robs people of the capacity to choose not to engage in criminal behavior, the argument concludes, it is inappropriate to condemn them morally and therefore inappropriate to convict them of a crime.[43]



Prof. Richard Bonnie

Sen. Ray Farabee

Although the 1973 revisions to the Texas insanity defense were based largely on the ALI test, they differed in one significant respect. The short-lived Texas standard retained the narrow "did not know" language for the *M'Naghten* prong of the test, as opposed to the ALI's recommended use of "appreciate the wrongfulness" verbiage. This was an intentional narrowing of the ALI approach. As former Senator Ray Farabee reflected, "The use of the term 'know' in reference to whether conduct was wrong was . . . more restrictive."[44] Thus, even while including a volitional component in 1973, the Texas Legislature opted not to use the term "appreciate" for the cognitive prong of the test.

**A Return to *M'Naghten*.** Regardless of its phrasing, however, the use of the ALI test was short-lived in Texas, at least for adult offenders. In 1982 John Hinckley was found not guilty by reason of insanity in the federal prosecution for his March 1981 attempt on President Ronald Reagan's life. This outcome caused public outrage and "crystallized public

Janelle White Nolan, "Texas Rejects M'Naghten," 946-48.

41 Richard J. Bonnie et al., *A Case Study in the Insanity Defense,* 18-20. Decades ago, one court declared its dissatisfaction with the *M'Naghten* test as follows:

> The vast absurdity of the application of the M'Naghten Rules in order to determine the sanity or insanity, the mental health or lack of it, of the defendant by securing the answer to a single question: Did the defendant know the difference between right and wrong, appears clearly when one surveys the array of symptomatology which the skilled psychiatrist employs in determining the mental condition of an individual.

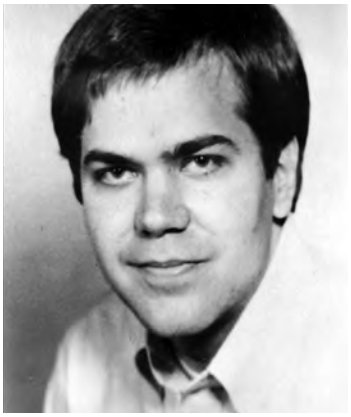
*United States v. Currens*, 290 F.2d 751, 766-67 (3d Cir. 1961). A later court observed that to ask merely whether a person knows right from wrong "is to ask a question irrelevant to the nature of his [or her] mental illness or to the degree of his [or her] criminal responsibility." *People v. Drew*, 583 P.2d 1318, 1322 (Cal. 1978). *See* Michael L. Perlin, *Law and Mental Disability* 566-67 (1994) (providing a thoughtful and succinct collection of some of the many criticisms of the *M'Naghten* standard).

42 Richard J. Bonnie et al., *A Case Study in the Insanity Defense,* 19.

43 *Ibid*., 16.

44 Farabee & Spearly, "The New Insanity Law in Texas," 674.

discomfort with the insanity defense and its administration, and triggered legislative activity throughout the country."[45] Texas was no exception. In 1983, during the next legislative session following the verdict, the Texas Legislature rushed to narrow the scope of the insanity defense for adult offenders to its present restrictive *M'Naghten* formulation.[46] Moreover, the revised statute not only excised the volitional component, but also maintained use of the word "know" rather than "appreciate" for the amended right-wrong standard.[47]


John Hinckley

The legislative sponsor of the 1983 Texas revisions, former Senator Ray Farabee, later wrote that over ninety percent of the residents in his senatorial district favored a restriction on the insanity defense in response to polling that followed the Hinckley verdict.[48] In addition to the outcome in the Hinckley prosecution, a contemporaneous case from Senator Farabee's district also influenced the powerful legislator.[49] A woman whose diagnosis revealed that she had "experienced a post-partem [sic] psychosis" had "cut out her young daughter's heart in an effort to exorcise a devil which she thought possessed her child."[50] Following an insanity acquittal, the state hospital released the woman after less than two years of treatment without further required supervision.[51] Senator Farabee indicated during the legislative session that "his primary interest in the insanity defense centered on increased court supervision of those acquitted," which became a major component of the 1983 legislation, in addition to reestablishing the *M'Naghten* standard as the sole basis for an insanity defense for adults.[52] Ironically, as will be discussed below, the 1983 legislation did not make any similar revisions to the insanity defense for juveniles.


Prof. George Dix

**Attempted Legislative Revisions.** The late distinguished professor George Dix of the University of Texas School of Law advocated that the Texas insanity defense for adults be revised to replace "know" with "appreciate," and that the term "wrong" be amended to "be defined

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45 Richard J. Bonnie et al., *A Case Study in the Insanity Defense,* 127.

46 Act of Aug. 29, 1983, 68th Leg., R.S., ch. 454, § 1, 1983 Tex. Gen. Laws 2640.

47 Tex. Pen. Code Ann. § 8.01(a) (West 2023). In contrast, under the federal insanity test enacted by Congress in 1984 following the Hinckley verdict, the standard is whether "at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. § 17(a). Similarly, The American Bar Association also recommends use of the word "appreciate." *See* ABA Criminal Justice Standards on Mental Health, at 47 (Aug. 8, 2016), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf.

48 Farabee & Spearly, "The New Insanity Law in Texas," 671.

49 *Ibid.,* 674.

50 *Ibid.*

51 *Ibid.*, 671.

52 House Study Group, Tex. House of Representatives, Special Legislative Report: Reshaping the Insanity Defense 12 (1984); Tex. Pen. Code Ann. § 8.01(a) (West 2023).

as either legally wrong or morally wrong."[53] The latter recommendation was a response to court decisions that have construed "wrong" for purposes of Texas law as being limited to *legal* wrongs. As Professor Dix argued, "This change would not make insanity cases like [Andrea] Yates' simple ones. But it would tell juries they must not reject defendants' claims of insanity simply because the defendants retained some minimal ability to intellectually understand that their conduct was against the law."[54] These revisions would serve to recognize that cognition is not limited to a person's simple awareness of surrounding circumstances and that the concept of wrongfulness includes a moral component.


Andrea Yates

During the 2007 legislative session, a bill would have made the changes recommended by Professor Dix. House Bill 2795 would have provided the following:

> **Sec. 8.01. Insanity.** (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not appreciate [~~know~~] that the actor's [~~his~~] conduct was legally or morally wrong.[55]


George Parnham

The bill passed out of the House Criminal Jurisprudence Committee but died in the final days of the 2007 session. During the House committee hearing on the bill, the committee heard favorable testimony from George Parnham (Andrea Yates's attorney) and two of the jurors from Yates's trials. Similar bills were filed in subsequent legislative sessions, but none made it beyond the committee stage. Prior to the 2013 session, there were negotiations between key prosecutors and defense attorneys to agree to this new standard in exchange for changing the burden of proof to "clear and convincing evidence," as under the federal test, but nothing was enacted.

**Other Legislative Proposals.** On a related note, and although not an insanity defense, for the third consecutive legislative session the Texas House passed legislation in 2023 that would have taken the death penalty off the table in a capital case if the defendant's actions were the result of active psychotic symptoms from certain serious mental illnesses.[56] Specifically, under the proposed legislation, if the jury determined that the defendant was experiencing active psychotic symptoms from either schizophrenia or a schizoaffective disorder at the time of committing the capital offense that substantially impaired the person's capacity to either "(1) appreciate the nature, consequences, or wrongfulness of the person's conduct; or (2) exercise rational judgment in relation to the person's conduct," the sentence would be mitigated to life without parole.[57]

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[53] George E. Dix, "Texas Must Refine Insanity Standard," *San Antonio Express-News*, Dec. 4, 2005, 5H.

[54] *Ibid.*

[55] Tex. C.S.H.B. 2795, 80th Leg., R.S. (2007), https://capitol.texas.gov/tlodocs/80R/billtext/html/HB02795H.htm (House committee substitute).

[56] Tex. H.B. 727, 88th Leg., R.S. (2023), https://capitol.texas.gov/tlodocs/88R/billtext/html/HB00727E.htm (engrossed version passed by the House).

[57] *Ibid.*

However, as in the two previous legislative sessions, the bill died in the Texas Senate.

**Court-appointed Experts.** Chapter 46C of the Texas Code of Criminal Procedure governs procedural aspects of insanity defense cases. Under Article 46C.101, once a notice of intent to raise the insanity defense has been filed, "the court may … appoint one or more disinterested experts to: (1) examine the defendant with regard to the insanity defense; and (2) testify as to the issue of insanity at any trial or hearing involving that issue."[58] During the 2005 legislative session, the Legislature enacted Senate Bill 837, which resulted in a substantial overhaul of the procedures relating to the insanity defense in Texas.[59] S.B. 837 repealed former Texas Code of Criminal Procedure Article 46.03 and replaced it with Chapter 46C.[60] S.B. 837 did not include any changes to the substantive test for insanity for adults, but instead focused on procedure. One of S.B. 837's significant changes was the establishment of training and qualification requirements for experts to closely mirror similar provisions mandated for experts who conduct evaluations of a defendant's competency to stand trial.[61] As enacted in 2005, and amended in part in 2021, Article 46C.102 provides the following for court-appointed experts:

> (a) … To qualify for appointment under this subchapter as an expert, a psychiatrist or psychologist must:
>
> (1) as appropriate, be a physician licensed in this state or be a psychologist licensed in this state who has a doctoral degree in psychology; and
>
> (2) have the following certification or training:
>
> (A) as appropriate, certification by:
>
> (i) the American Board of Psychiatry and Neurology with added or special qualifications in forensic psychiatry; or
>
> (ii) the American Board of Professional Psychology in forensic psychology; or
>
> (B) training consisting of:
>
> (i) at least 24 hours of specialized forensic training relating to incompetency or insanity evaluations; and
>
> (ii) at least eight hours of continuing education relating to forensic evaluations, completed in the 12 months preceding the appointment.
>
> (b) In addition to meeting qualifications required by Subsection (a), to be appointed as an expert a psychiatrist or psychologist must have completed six hours of required continuing education in courses in forensic psychiatry or psychology, as appropriate, in the 24 months preceding the appointment.[62]

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[58] Tex. Code Crim. Proc. Ann. art. 46.101(a) (West 2023).

[59] Act of May 30, 2005, 79th Leg., R.S. ch. 831, 2005 Tex. Gen. Laws 2841 (codified as Tex. Code Crim. Proc. Ann. Chapter 46C (West 2023)) (filed as Tex. S.B. 837, 79th Leg., R.S. (2005)) [hereinafter S.B. 837].

[60] *Ibid*. §§ 1-2.

[61] Tex. Code Crim. Proc. Ann. arts. 46C.102-.103 (West 2023). These provisions track those set forth in Tex. Code Crim. Proc. Ann. art. 46B.022 (West 2023), which relate to qualifications for experts who conduct competency evaluations. Prior to 2005, there were no statutory standards for expert witnesses in insanity cases in Texas.

[62] Tex. Code Crim. Proc. Ann. art. 46C.102(a)-(b) (West 2023). An additional provision creates an exception to the foregoing requirements in the event of "exigent circumstances." *Ibid.* art. 46C.102(c).

Texas courts have described a court-appointed psychiatrist or psychologist as "the court's disinterested witness," who is not considered an expert witness for either the state or the defense.[63] In addition, the requirements apply only to court-appointed experts, and do not apply to experts hired by the state or defense.[64] Even if the state's or defense's expert does not meet the statutory criteria, however, the expert must nonetheless qualify as an expert under Rule 702 of the Texas Rules of Evidence.[65] For an interesting early case regarding expert qualifications in an insanity trial, consider the 1897 Court of Criminal Appeals decision in *Burt v. State*.[66] In *Burt* the defendant in a murder trial sought to qualify an Austin Presbyterian minister as an expert regarding the defendant's alleged lack of sanity. The Court of Criminal Appeals affirmed the trial court's ruling that the minister, who "had read some authors on moral and intellectual science, but nothing on insanity or medical jurisprudence," was not an expert.[67] The court's reasoning was blunt and to the point, "This witness was offered as an expert, when in fact he was not an expert."[68]

In addition, although Article 46C.103(a) permits a court to appoint the same disinterested expert to examine the defendant for both competency to stand trial and insanity, if the expert determines that the defendant is incompetent to stand trial, then per Article 46C.103(b) the expert must stop his or her evaluation and not proceed to examine the defendant on issues regarding insanity.[69] This is required because once the expert concludes that the defendant is incompetent, any further questions and answers regarding the defendant's mental state at the time of the acts leading to the criminal charges would be inherently unreliable and suspect. In such a case, the expert should file the report on incompetency, but may not file any report (or continue the examination) regarding insanity.

**Juveniles.** Although the Texas Legislature hastily abandoned the ALI insanity test and returned to a limited variation of *M'Naghten* in 1983, there has never been a corresponding narrowing of the insanity defense for juveniles.[70] Instead, section 55.51(a) of the Family Code provides the following standard:

> A child alleged by petition to have engaged in delinquent conduct or conduct indicating a need for supervision is not responsible for the conduct if at the time of the conduct, as a result of mental illness or an intellectual disability, the child lacks

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[63] *DeFreece v. State*, 848 S.W.2d 150, 154 (Tex. Crim. App. 1993) (also observing that prior to statutory changes in 1967, "there was no express authority in Texas for appointing an expert to examine a criminal accused to determine either competency to stand trial or sanity at the time of the offense").

[64] *See Pham v. State*, 463 S.W.3d 660, 670 (Tex. App. – Amarillo 2015, *pet. ref'd*) (holding that an expert hired by the state need not meet the qualifications set forth in Article 46C.102). The *Pham* court further observed that the Article 46.102 qualification requirements would also not have to apply to "an expert of the defendant's own choice." *Ibid*., 668.

[65] *Ibid.*, 670.

[66] 40 S.W. 1000, 1003 (Tex. Crim. App. 1897).

[67] *Ibid.*

[68] *Ibid.*

[69] Tex. Code Crim. Proc. Ann. art. 46C.103(a)-(b) (West 2023).

[70] The insanity defense for juveniles in Texas is not designated as an "insanity defense" in the Family Code. Instead, Subchapter D of Chapter 55 of the Family Code is entitled, "Lack of Responsibility for Conduct as a Result of Mental Illness or Intellectual Disability." Tex. Fam. Code Ann. §§ 55.51-.59 (West 2023).

substantial capacity either to appreciate the wrongfulness of the child's conduct or to conform the child's conduct to the requirements of law.[71]

Several aspects of section 55.51(a) are worthy of comment. First, the statute makes available to juveniles the kind of insanity defense Texas formerly provided for adults between 1973 and 1983—before Texas revised the insanity test by changing it back to the *M'Naghten* right-wrong standard that focuses solely on a defendant's cognitive capacity. Instead, the Texas formulation of the juvenile insanity defense is a slightly modified version of the 1962 ALI standard.[72] Not only does the juvenile standard include a volitional component relating to the child's ability to conform his or her conduct to the requirements of the law, it also uses the somewhat broader term "appreciate" rather than "know" for the cognitive prong of the test.[73] Moreover, the statute uses modern language, "mental illness or an intellectual disability," rather than the more arcane and dated language, "mental disease or defect," as set forth in the adult standard.[74] This contrast between the Family Code and the Penal Code results in an anomalous situation in Texas. For all but ten of the last 169 years, Texas has limited the insanity defense for adults to the narrow, right-wrong *M'Naghten* test, yet for the last fifty years has afforded a juvenile defendant the benefit of the broader, ALI insanity test.

**Parting Thoughts.** It is interesting to observe that we now know more about the brain and serious mental illnesses than at any point in human history, and certainly far more than we knew in 1834, yet our standard for assessing the insanity defense for adults remains rooted in the law established in 1834.

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[71] Tex. Fam. Code Ann. § 55.51(a) (West 2023).

[72] *Compare ibid*., *with* Model Penal Code § 4.01(1) (Proposed Official Draft 1962).

[73] Tex. Fam. Code Ann. § 55.51(a) (West 2023).

[74] *Compare ibid.*, *with* Tex. Pen. Code Ann. § 8.01(a) (West 2023).

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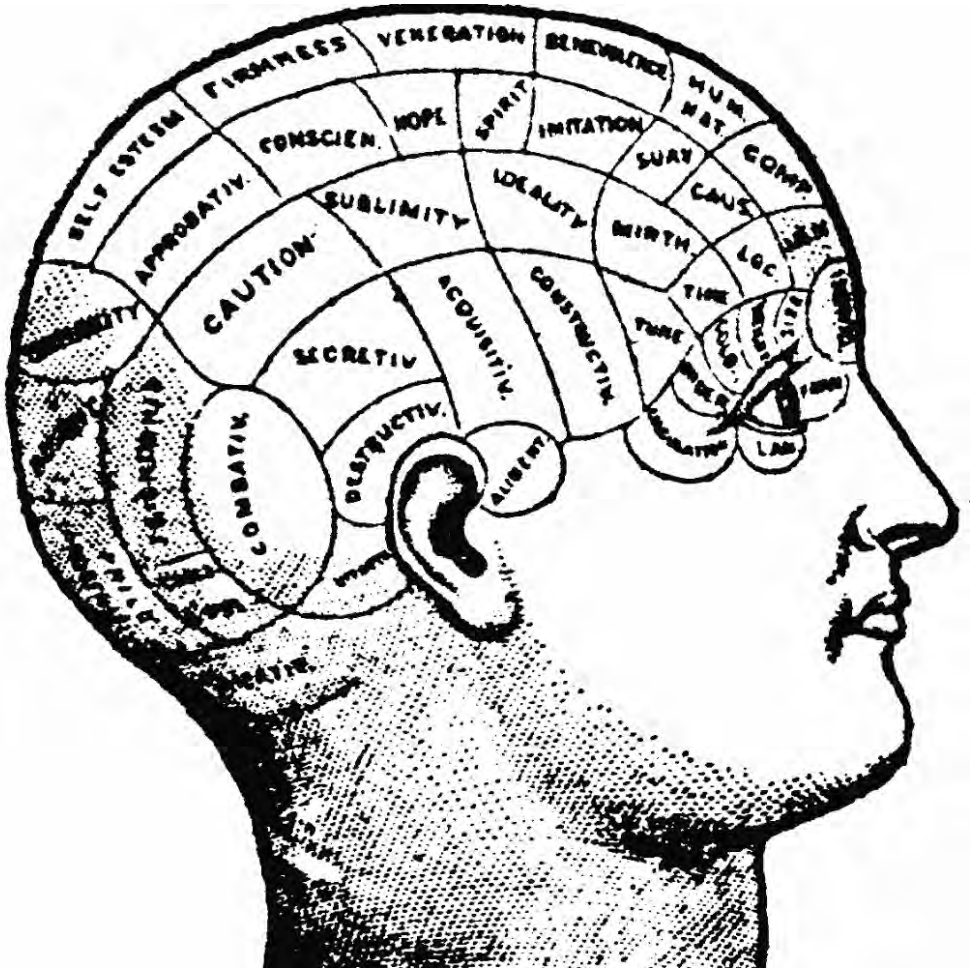
Return to Journal Index

# Phrenology and the Texas Courts:
## When Pseudo-Science Came to the Lone Star State

By Hon. John G. Browning

### I. Introduction

In 1840, the "science of phrenology" held sway in America. This "study" of the mind, developed at the end of the eighteenth century by Viennese physician Franz Joseph Gall, used the "bumps" on one's head to give insight into how "anatomical and physiological characteristics have a direct influence upon mental behavior."[1] There were conferences and symposia. There were professional associations. There were lengthy learned tomes and scholarly journals like the *American Phrenological Journal* (which first appeared in 1838). Phrenology grouped human beings into four recognizable types, with predictable behavior. For Gall and his followers, the human mind was composed of thirty-seven different "faculties" or "propensities," each housed in a particular "organ," or part of the brain.[2]



A phrenology map of the head

[1] John Davies, *Phrenology, Fad and Science: A 19th Century American Crusade*, (1955) 3.

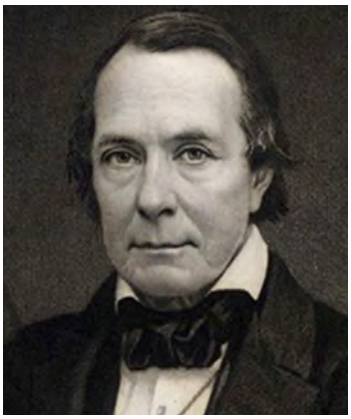
[2] Courtney E. Thompson, *An Organ of Murder: Crime, Violence, and Phrenology in Nineteenth Century America*, (2021).

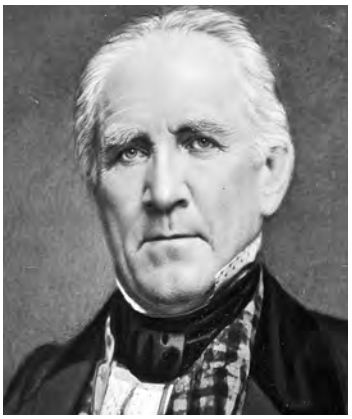
As silly as it might sound to the modern reader, phrenology represented the very roots of what eventually became modern criminology—from the innovations of Cesare broso in criminal anthropology in the 1870s and 1880s and his theory of the criminal to Alphonse Bertillon later on. Practices like mug shots, handwriting analysis, and other criminal sciences were presaged by phrenologists. Phrenologists used such physical "evidence" to explain the potential of individuals for violence and criminality. And despite the reformist impulse of phrenologists, it was also used as a scientific basis to justify racism and gender stereotyping.

Phrenology was more than just a fad—it provided "scientific" justification for all kinds of beliefs. For example, one phrenologist's analysis of Chief Justice Marshall's head found that it displayed "a strong preponderance" of the "higher sentiments and higher intellect."[3] According to the examining phrenologist, Chief Justice Marshall had "noticeably large" organs of "Comparison, Causality, Benevolence, Reverence, Firmness, Conscientiousness, and Ideality." To the phrenologist, Chief Justice Marshall's organs not only constituted "a great judge," but also gave him "an intellectual region so large and well balanced, Judge Marshall had little difficulty in acquiring all the knowledge necessary to the formation of judgement . . ."[4]


Franz Joseph Gall


Chief Justice Marshall


Mirabeau Lamar


Sam Houston

## II. Phrenology Comes to Texas

Early Texans viewed phrenology as simply another "scientific" innovation. In 1835, the future president of the Texas Republic, Mirabeau Lamar, wrote in his journal that one of the men he encountered left a bad impression "on account of his appearance and phrenological developments."[5] Wrote Lamar, "I saw stinginess indelibly stamped upon his countenance and strongly developed in the appropriate organ, and accordingly when he went to feed my mare this principle of his nature was fully displayed."[6] Sam Houston was "phrenologized" by a blind professor in 1849. Many early Texans "relied heavily on their phrenological charts when making major life decisions, and employers sometimes consulted a bump doctor about a prospective employee's character."[7]

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3 Pierre Schlag, "Commenting: Law and Phrenology," *Harvard Law Review* 110, (1977): 877.

4 *Ibid.*

5 Nancy Boothe Parker, "Mirabeau B. Lamar's Texas Journal," *Southwestern Historical Quarterly* 84:2, (Oct. 1980): 214–15.

6 *Ibid.*

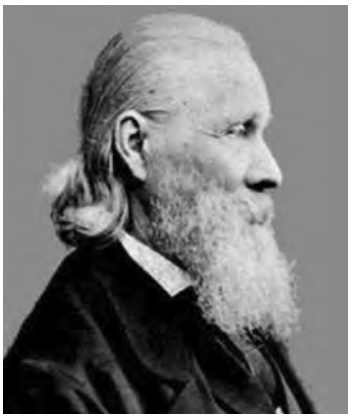
7 Gene Fowler, "Bonehead Medicine in Texas," *Texas Cooperative Power* (June 2009).

Phrenology's influence in Texas lasted well into the late nineteenth century. Two of the most active Texas phrenologists, "Professor" William Windsor and his wife, "Madame" Lilla Windsor, operated a phrenology parlor in Gainesville. In 1890, the good professor exhibited his collection of skulls at the State Fair of Texas, showing eager fairgoers the telltale bumps and ridges that supposedly indicated that one was capable of murder.[8] In 1892, he gave a week-long series of lectures at San Antonio's Casino Hall on "Phrenology and How to Read the Characters of Men."[9]

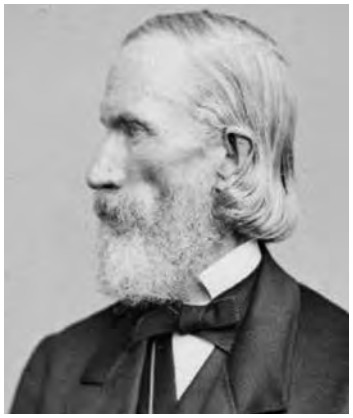
William Windsor

Lilla Windsor

Phrenology was more than merely pop psychology. Adherents believed that the brain consisted of regularly thirty-seven separate physical "organs," each of which was responsible for a different "mental faculty" or "propensity." According to this "science," an individual's characters and abilities could be deduced from the size and shape of various bumps on the head. Characteristics like verbal memory, "Amativeness," and "Secretiveness" were controlled by corresponding "organs" of the brain—the more developed the trait was, the larger the "organ," and therefore the larger of a "protrusion" it formed in the skull. Phrenologists even believed that these traits and their corresponding "organs" could be modified through either practicing "restraint" or by "exercising" a positive quality.



Lorenzo Fowler



Orson Fowler

The spread of phrenology across the United States is largely due to two brothers, Orson and Lorenzo Fowler. The pair of frustrated evangelists traveled the nation, lecturing and offering "readings" of the bumps and valleys on strangers' skulls. Some of their readings appear in retrospect to be spot on. Of a shy fifteen-year-old named Clara Barton, Lorenzo Fowler's reading was that the future founder of the American Red Cross "will never assert herself for herself—she will suffer wrong first—but for others she will be fearless."[10] P.T. Barnum even sat for a reading, reportedly scoring highly "in all traits but 'Cautiousness.'"[11] After Aaron Burr died in 1836, the Fowlers ordered a cast of his head, predictably finding upon examination that Burr's organs of "Secretiveness" and "Destructiveness" were "far larger than those of the average person."[12]

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8 *Ibid.*

9 *Ibid.*

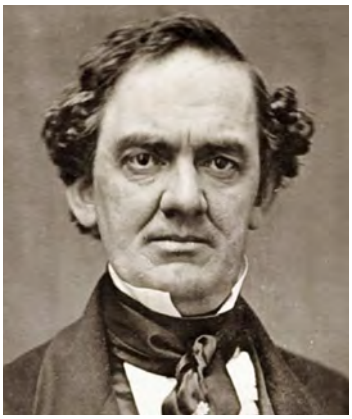
10 Minna S. Morse, "Facing a Bumpy History," *Smithsonian* 5, (Oct. 1997).

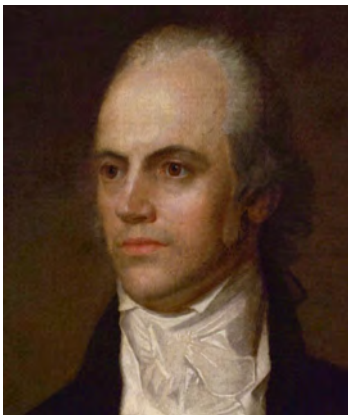
11 *Ibid.*

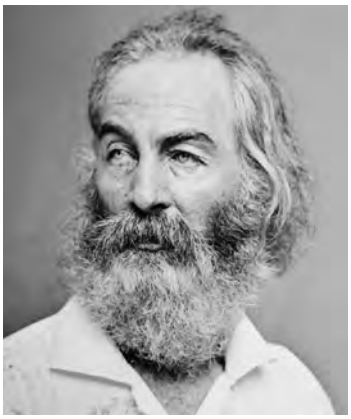
12 *Ibid.*

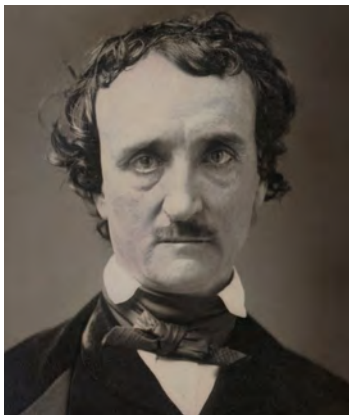
From small town folk to the wealthy, everyone wanted a "reading." Women even began changing hairstyles in order to show off more flattering phrenological features. From Walt Whitman to Edgar Allan Poe to Charlotte Bronte and Herman Melville, writers wove phrenological references into their work. Of course, there were skeptics as well. John Quincy Adams reportedly wondered "how two phrenologists could look each other in the eye without laughing."[13] And humorist Mark Twain was tickled by the fact that, after an examination by one of the Fowlers, he supposedly had on his skull a "cavity" where humor should have been.


Clara Barton


P.T. Barnum


Aaron Burr

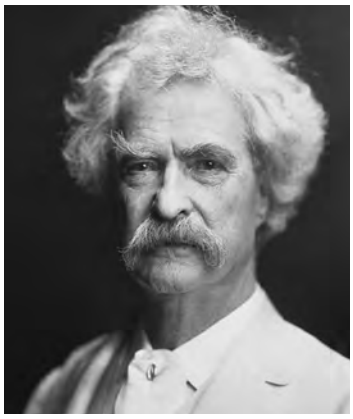

Walt Whitman


Edgar Allan Poe


Charlotte Bronte


Herman Melville


John Quincy Adams


Mark Twain

## III. Phrenology and the Courts

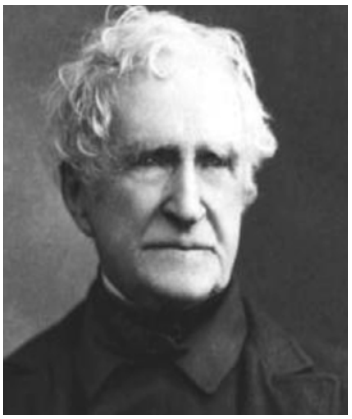
But what about phrenology's effect on the law? After all, the nineteenth century witnessed many important developments in forensic medicine, medical jurisprudence, and even the professionalization of expert witnesses in fields like toxicology and surgery. What about the "science" that had everyone talking—phrenology?[14]

Arguably, the highest-profile case involving phrenology came in 1834 in Maine. A nine-year-old boy named Major Mitchell was tried for the beating and mutilation of an eight-year-old boy. The publicity surrounding the case attracted the attention of

[13] *Ibid.*

[14] Interestingly enough, the word "phrenology" itself appears only once in a LexisNexis search of Texas cases, and then only in passing, in which two witnesses in a theft case had been engaged in a conversation about phrenology. *Koch v. State*, 48 Tex. Crim. 396 (1905).

Portland (Maine) lawyer John Neal, who edited a phrenology-friendly publication, the New England Galaxy. Neal came along after young Mitchell had made an apparently rehearsed confession to a jail physician. Neal was a devotee of phrenologist Isaac Ray (later known as the founder of forensic psychiatry in America), and both took measurements of Mitchell's head. Neal had high hopes that phrenology could play a pivotal role in adjudicating legal matters. As he put it,



John Neal

Isaac Ray

> I determined to introduce a new question of Medical jurisprudence; and being satisfied that if I could *prove* the injury to the child's head, or render it *probable* by the testimony of medical men, that *it had sustained an injury*, or that there was a *malformation* of the head, or that the remarkable want of symmetry . . . and the developments of the [organs of] Destructiveness and Secretiveness considerably larger on that side indicated something *doubtful* as to the healthy condition of the brain . . .[15]

Phrenological sketches of Major Mitchell

Neal had seen the confession and believed there was an explanation for its rote quality, its detached affect, and its repetition of numbers (Mitchell said he hit his victim 500 times, that he used 500 sticks, etc.). In searching for some physical explanation for Mitchell's behavior, Neal interviewed the boy's mother and learned that at the age of one week, he had fallen from a high chest and his head swelled. The treating doctor did not expect Mitchell to live, but he did; subsequent "wild" behavior was attributed to that injury.

Neal had a cast of the boy's head made, and also had a sketch of the head prepared to highlight the size of the "Organ of Destructiveness" just above Mitchell's ears, which supposedly was the abnormality that provided the causal link to the boy's violence.

So was this a case of infantile traumatic brain injury or was this an abnormally prominent "Destructiveness" organ, either of which might persuade a jury that Major Mitchell was "damaged" and therefore not responsible for his actions? Unfortunately, neither the boy's mother nor stepfather were willing to testify about the head injury in Mitchell's infancy.[16] As defense counsel, Neal had a goal and strategy that may have had more to do with him than with his client's interests: "I should be able to introduce Phrenology, for the first time, into a Court of Justice . . . This would, or rather might, open a passage for the introduction of

[15] John Neal, "The Case of Major Mitchell," *New England Galaxy* 18, (Jan. 31, 1835): 1 (quoted in Kenneth J. Weiss, "Isaac Ray at 200: Phrenology and Expert Testimony," *Journal of the American Academy of Psychiatry and the Law* 35:3, (2007)).

[16] Weiss, "Isaac Ray at 200," 341.

Phrenological testimony, and thereby enlarge the boundaries of legal science."[17]

And despite calling two physicians, who "believed" in phrenology, that was not good enough for Neal. He wanted them to be qualified on the still-new "science" of phrenology, to which the state objected. But the presiding judge, Judge Emery, disagreed. He directed the jury to disregard any consideration of a phrenological nature, and instead charged them with determining whether, at the time of the incident, Major Mitchell could distinguish right from wrong. Noting that defendants between the ages of seven and twelve were presumed under Maine law to have the capacity to commit crimes, Judge Emery stated:

> There is no disposition to keep out of Courts of Justice *true* science, but on the contrary to pay a marked deference . . . Where people do not speak from *knowledge*, we cannot suffer a *mere theory* to go as evidence to a jury . . . Our decisions are made in the daylight, and the jury are judges, of law as well as of facts.[18]

Note the similarity between this rationale and the landmark *Frye* test nearly a century later:

> . . . While courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities, as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.[19]

Major Mitchell was convicted and sentenced to nine years at hard labor in the prison at Thomaston, Maine. His case "was the first time that psychiatric testimony (by way of phrenology) was used in an American court."[20] And despite the defeat, Neal interpreted the case as a success, writing "Phrenology has been mentioned seriously in a court of justice without provoking laughter. Two most respectable physicians have acknowledged their belief in phrenology as a science, upon oath."[21]

One might assume that phrenology was quickly dismissed from the legal repertoire after the *Mitchell* case. Yet as one scholar points out, "phrenology made its way into American courtrooms over the course of the next two decades, borne by lawyers, judges, and expert witnesses alike, particularly in cases of criminal insanity."[22] The last verifiable case of a phrenologist appearing on the witness stand in the United States occurred in 1872, when Dr. Samuel Wells testified for the defense in the case of Lawrence Sullivan, who was on trial in New York for the murder of John O'Brien.[23]

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17 Neal, "The Case of Major Mitchell," *New England Galaxy.*

18 Neal, "The Case of Major Mitchell," *New England Galaxy.*

19 *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

20 Weiss, "Isaac Ray at 200," 343.

21 John Neal, "The Case of Major Mitchell," *Annals of Phrenology* 1:3, (Nov. 1835).

22 Thompson, *An Organ of Murder,* 68.

23 *Ibid.,* 191 n.4.

## IV. Phrenology in Texas

The best example of phrenology in a Texas case actually occurred *after* the case, when the bodies of two recently hanged murder defendants were ordered exhumed so that the bumps on their heads could be examined. This happened in the early days of the Republic of Texas, in 1838. David James Jones, a hero of the Texas Revolution and survivor of the Goliad Massacre, had fallen on hard times after Texas won its independence. Jones fell in with a crowd of hard-bitten men that the inhabitants of the then-Texas capital Houston called the "rowdy loafers."[24] In other times, they might have been labeled as "transients" or "homeless."

Jones was hired to watch over a stranger's racehorse on November 11, 1837. While that stranger was running errands, he encountered a potential buyer, Mandred Wood, and invited him to take the horse for a test ride—unfortunately, no one told Jones about this. When Jones saw the high-hatted "dandy" Wood in the saddle, and when Wood saw the "rowdy loafer" chasing him, no one stopped to question the other. Jones demanded that Wood "stop," and Wood replied with "harsh epithets." As Wood dismounted, Jones plunged his Bowie knife into the man's belly; Wood died two days later. Jones, a "rowdy loafer," had mortally wounded "someone who mattered."


Francis Moore, Jr.

The new mayor of Houston, Francis Moore, Jr., had taken office on January 1, 1838, and vowed to make good on a promise to do something about Houston's violence. Another revolutionary veteran, John Christopher Columbus Quick, had killed a man in a gambling dispute. The Houston press called for both Quick and Jones to be quickly convicted and hanged, with one newspaper writing "It is time for Texas to speak—to annihilate their hopes, and rebuke their craven spirits, by exacting judicious compliance with the law, and enforcing its entire execution."


Judge James W. Robinson

Indicted on March 19, Jones stood trial on March 12, 1838.[25] He was convicted on March 24.[26] The following day, John Quick was found guilty after the jury deliberated for twenty minutes.[27] Both were sentenced to hang by Judge James W. Robinson, a veteran of the Battle of San Jacinto. Not long after the sentences were carried out, the graves of Quick and Jones were dug up by several doctors and avowed phrenologists—Dr. J. Hervey Price**,** John Hunter Herndon**,** Dr. Robert H. Watson**,** Dr. Charles B. Snow, and a Mr. Cavanaugh.[28] The heads of both of the hanged men were removed and taken, graverobbing being fairly common among physicians at that time. After the heads were dissected and examined,

[24] Stephen L. Hardin, *Texian Macabre: The Melancholy Tale of a Hanging in Early Houston*, (2001): 119.

[25] *Ibid.,* 204.

[26] *Ibid.*

[27] *Ibid.,* 205. Interestingly, Quick was defended by Houston newcomer J.C. Watrous, who would go on to become Texas' first federal judge.

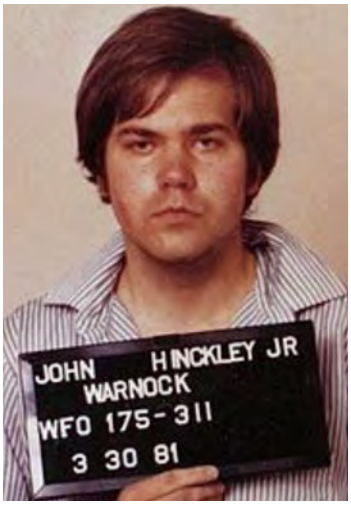
[28] *Ibid.,* 214.

Herndon wrote of the late David Jones: "Phrenologically, Jones had a very bad head, all moral power very deficient, the bumps of disructiveness (sic) and firmness remarkably large. No reverence, Veneration, and but little perception, with no comparison or ideality. His animal organs [were] well developed."[29] Of Quick, Herndon observed that he "had a much better head. His moral powers pretty well developed and intellectual tolerably well, but distructiveness (sic) and combativeness very large. His animal powers also strongly developed."[30] After preserving Jones' brain, on March 31, Herndon buried what remained of both Quick's and Jones' heads.

## V. Conclusion

While the pseudoscience of phrenology may have faded away, some of its concepts—including propensities and physical localization in the brain of different characteristics—have persisted. Neuroscience or behavioral genetics appeared in more than 1,800 judicial opinions between 2005 and 2012—but was viewed favorably in only about twenty percent of those cases. Brain scans were first used in U.S. courts in the 1982 defense of Ronald Reagan's would-be assassin, John Hinkley, Jr. Ten years later, functional magnetic resonance imaging (fMRI), made its American courtroom debut, in the case of a New York man (who had an arachnoid cyst pressing down on his brain) charged with homicide. After the fMRI evidence, his sentence was reduced from murder to manslaughter.

President Ronald Reagan




John Hinckley on the day of the shooting

Today, the last vestiges of phrenology in Texas can be found at the Woodson Research Center and Rice's Humanities Research Center, which developed an exhibit entitled "Diagnosing Deviance: How Social Norms Influence Our Definitions of Health and Disease." It uses the nineteenth century "science" of phrenology as a case study to "explore how cultural understandings of race and gender biased medical diagnoses and population perceptions of 'ideal' facial features."[31] Included in the exhibit are archival materials, including real phrenological charts, human skulls, and a bust displaying the phrenological "organs." Perhaps they hold lessons for us all.

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[29] *Ibid.,* 220.

[30] *Ibid.*

[31] Amanda Focke, "Phrenology: Bumps on Your Head Defining Your Aptitudes?," *WoodsonOnline.com* (Nov. 23, 2016).

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# David Crockett: Judge and Legal Reformer

**By Russell Fowler**

***"I gave my decisions on the principles of common justice and honesty between man and man."***

**— Judge David Crockett**

David "Davy" Crockett is one of the earliest and greatest heroes of both Tennessee and Texas. Both states have counties named for him. And while neither a lawyer nor well educated, he was clever, kind and courageous in striving to marshal the law to aid the frontier's poor and powerless as a judge and lawmaker.

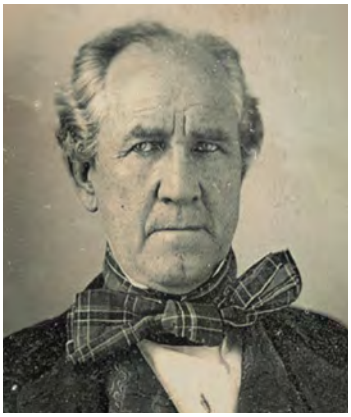
David Crockett

Crockett was born on August 17, 1786, in East Tennessee's Greene County, then a part of North Carolina. His grandparents were massacred in a 1777 Creek Indian raid. When a flashflood washed away his father's gristmill, the family moved to nearby Jefferson County and kept a tavern. Early on showing his strong sense of independence and love of adventure, at the age of twelve Crockett fled with waggoners to Virginia but returned two years later, at first unrecognizable by his family, and worked for neighbors to pay his father's many debts.[1]

After the young Crockett's marriage proposal was rejected, he lamented: "I was only born for hardship, and disappointment."[2] Yet he recovered, wed and began a family. In 1809, he moved to a farm in Lincoln County in Middle Tennessee near the Alabama state line. Next, in 1813, he relocated to adjacent Franklin County to the east on a tract ten miles north of Winchester. From there, he volunteered for the Tennessee militia and fought under General Andrew Jackson in the vicious Creek War in the deep forests of Alabama from 1813 to 1815. At times, his independent streak made him difficult to command, but he forged lifelong friendships with Sam Houston

[1] J. Ralph Randolph, "David Crockett" in *Heroes of Tennessee,* ed. Billy M. Jones (Memphis: Memphis State University Press (now University of Memphis), 1979), 69, 72; Michael A. Lofaro, "Crockett, David 'Davy'" in *The Tennessee Encyclopedia of History & Culture*, ed. Carroll Van West (Nashville: Tennessee Historical Society, 1998), 219; Buddy Levy, *American Legend: The Real-Life Adventures of David Crockett* (New York: G. P. Putnam's Sons, 2005), 12.

[2] Randolph, "David Crockett," 72.


Sam Houston

from Maryville, soon to be a rising star in the Jackson political orbit, and the witty and wealthy Pleasant M. Miller, a former congressman from Knoxville, one of Jackson's oldest friends and arguably Tennessee's best courtroom lawyer.[3]


Andrew Jackson

Also in 1815, Crockett's wife died. He remarried the following year. After almost succumbing to malaria and considering a move to Alabama to find more fertile land, the always restless Crockett and his ever growing family went westward to a frontier settlement on Shoal Creek in a region that on October 21, 1817, became southern Middle Tennessee's Lawrence County.[4] He later recalled that "without any law at all; and so many bad characters began to flock in upon us, that we found it necessary to set up a sort of temporary government of our own."[5]

His "rough and unpolished honesty" and "infectious straightforwardness"[6] impressed Crockett's fellow settlers. After pondering numerous nominees, they elected him to his first public position: county judge. His selection was approved by the Tennessee General Assembly on November 25, 1817.[7] He thereafter adopted the motto: "Never seek, never decline, office."[8]

A historian has written, "That Crockett got selected as magistrate testifies to the solid nature of his character, since he was uneducated in the law, but rather operated from a platform of common sense and decency."[9] A biographer has said, "his honesty and sense of justice made him popular."[10] Judge Crockett soon exhibited "his great capacity for on-the-job training."[11] He proudly remembered:

> My judgements were never appealed from, and if they had been they would have stuck like wax, as I gave my decisions on the principles of common justice and honesty between man and man, and relied on natural born sense, and not on law learning to guide me; for I had never read a page in a law book in all my life.[12]

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3 *Ibid*., 72-74; Michael A. Lofaro, "Crockett, David 'Davy'" in *The Tennessee Encyclopedia of History & Culture*, ed. Carroll Van West (Nashville: Tennessee Historical Society, 1998), 219; Russell Fowler, "Pleasant M. Miller, 1773-1849: The Last of the Titans of Tennessee's Founding Age," *The West Tennessee Historical Society Papers* XLIX (1995), 30.

4 Buddy Levy, *American Legend: The Real-Life Adventures of David Crockett* (New York: G. P. Putnam's Sons, 2005), 84.

5 *Ibid*.

6 *Ibid*.

7 *Ibid*.; Randolph, "David Crockett," 74; John H. Finger, *Tennessee Frontiers: Three Regions in Transition* (Bloomington, IN: Indiana University Press, 2001), 269.

8 Levy, "American Legend," 86.

9 *Ibid*., 84.

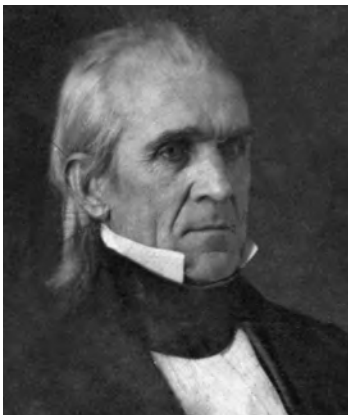
10 Randolph, "David Crockett," 74.

11 Levy, "American Legend," 86.

12 David Crockett, *A Narrative of the Life of David Crockett of the State of Tennessee: A Facsimile Edition with Annotations and an Introduction by James A. Shackford and Stanley J. Folmsbee* (Knoxville: University of Tennessee Press, 1973), 135.

While a judge, Crockett heard a diverse docket: domestic disputes, including child custody cases, debt collections, issued marriage licenses, granted bounties on wolves and presided over a trial determining ownership of slaughtered hogs.[13] Even though admitting to being "nearly illiterate,"[14] maybe an exaggeration, he said of his time on the bench: "In this way I got on pretty well, till by care and attention I improved my handwriting in such manner as to be able to prepare my warrants, and keep my record book, without much difficulty."[15] Nonetheless, he suddenly resigned his judgeship on November 1, 1819, to dedicate himself to his burgeoning frontier enterprises: a distillery, gristmill and gunpowder factory.[16]

With an authentic, bright-eyed boyishness and a gift for extemporaneous stump speaking with a "broad backwoods humor," Crockett was elected to the Lawrenceburg town commission and, in 1821, to the Tennessee house representing the people of Hickman and Lawrence counties, winning by a two-to-one majority.[17] While traveling from Lawrence County to the then state capital of Murfreesboro, Crockett met the new clerk of the state senate, James K. Polk of Maury County, a future political rival. Polk had recently been admitted to the bar. During their ride together, the young, enthusiastic Polk commented that the General Assembly would probably enact major reforms of the judiciary. Crockett recalled in his autobiography: "Now so help me God, I knew no more what a 'radical change' and a 'judiciary' meant than my horse, but looking straight into Mr. Polk's face as though I understood all about it, I replied, I presume so.'"[18]


James K. Polk

Sporting "a tanned-skin hunting jacket" on the floor of the house and made fun of because of it, Crockett "surfaced as an outspoken and vehement champion of the underclass, the poor, dispossessed, and disenfranchised, groups with whom he would always align himself."[19] During his initial session, and informed by his service as a judge, he was an active member of the house committee addressing land ownership, debt collection and the rights of divorced women and widows.[20] He voted against judges receiving filing fees, opposed anti-gambling legislation and endeavored to assist the poor "squatters" flooding West Tennessee, between the Tennessee and Mississippi rivers, by advocating for improved land surveys of the region, tax relief and a constitutional convention to remedy their heavy and inequitable taxation and gross underrepresentation in the legislature.[21]

In the 1822 special session, Crockett presented a bill to give financial aid to "Mathias, a free man of color" and opposed bills to end protections against fraud in the execution of wills and the lessening of the rights of widows and orphans in probate cases. He fought to keep the sale price

[13] Levy, "American Legend," 85, 87.

[14] Randolph, "David Crockett," 74.

[15] Levy, "American Legend," 87.

[16] *Ibid*., 87.

[17] John H. Finger, *Tennessee Frontiers: Three Regions in Transition* (Bloomington, IN: Indiana University Press, 2001), 296.

[18] Walter R. Borneman, *Polk: The Man Who Transformed the Presidency and America* (New York: Random House, 2008) 11-12.

[19] Levy, "American Legend," 94, 96.

[20] Randolph, "David Crockett," 74-75.

[21] Levy, "American Legend" 96; Randolph, "David Crockett," 75.

Davy Crockett's Last House and Museum in Rutherford, TN, built from logs remaining from his last house

of public land low so settlers could afford to buy the property they cleared. Therefore, he was in opposition to state land sales structured to raise as much funds as possible for primary and secondary education, which his constituents thought of little benefit. And he supported measures encouraging the construction of nascent industries such as iron works.[22]

After a flood destroyed his distillery and grist and powder mills, Crockett relocated his family, including his elderly mother, to the verdant, game abundant wilderness of West Tennessee he had excitedly explored between sessions of the legislature.[23] In 1822, he constructed a log cabin at a scenic site on the Obion River, near today's Rutherford's Fork, in the western portion of the then sprawling Carroll County that was divided and became Gibson County the following year.[24] Crockett and his eight beloved hunting dogs, in one season, killed 105 bears, keeping his family and the whole settlement in meat for the winter.[25]

In 1823, Crockett was elected to the General Assembly by West Tennesseans after he decried his "aristocrat" challenger for having a rug on his floor rather than a bearskin. In Murfreesboro, he fought against a bill to use prison labor on state projects because many prisoners were jailed simply for debt, and he offered a bill to free "honest debtors" and end debtors' prison altogether.[26] He attempted to lower property taxes, outlaw the sale of liquor during elections, criminalize dueling and advocated for the creation of a state bank with rural branches. He argued against the

[22] Levy, "American Legend, "104-05.

[23] *Ibid*., 96-99.

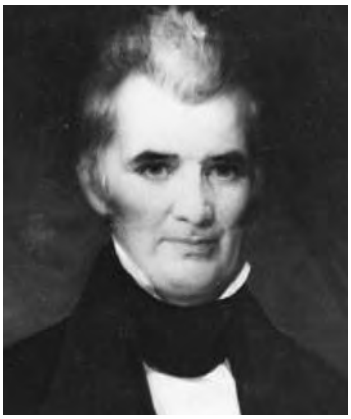
[24] Randolph, "David Crockett," 75-76; see Marvin Downing, "Davy Crockett in Gibson County, Tennessee: A Century of Memories" in XXXVII *West Tennessee Historical Society* Papers (1983), 54.

[25] *Ibid*., 77.

[26] *Ibid.,* 75-76; Levy, "American Legend," 118.

legislature's practice of granting divorces and, far ahead of his time, he called for the state paying for attorneys for the poor in domestic cases.[27] Finally, in 1823, he bravely displayed independence from Andrew Jackson's powerful and vindictive political organization by voting for the unsuccessful reelection of U.S. Senator John Williams when Jackson challenged Williams. Crockett came to believe Jackson and his faction only served the wealthy and corrupt land speculators.[28]


John Williams


William Carroll


Benjamin Franklin

Since Crockett represented the politically weak settlers, he proposed, opposed, and rarely achieved enactment of legislation. However, most of his imaginative and altruistic agenda eventually became law due to the exertions of perhaps Tennessee's greatest governor and Crockett's close friend, the reform minded and charismatic William Carroll of Nashville. Most of the reforms, including the ending of debtors' prison and the adoption of a new and much more egalitarian and democratic state constitution, were attained after Crockett had left the legislature and during the later years of Carroll's monumental twelve-year tenure as the state's chief executive from 1821 to 1827 and 1829 to 1835.[29] In 1835, Sam Houston succeeded Carroll in the Tennessee governorship.

In the fierce, ever-shifting landscape of West Tennessee politics, Crockett was defeated in 1825 when he ran for the U.S. House challenging Congressman Wilson Alexander but was victorious against Alexander in 1827 and was returned to Congress in 1829. In full-fledged opposition to President Jackson, he was defeated for reelection in 1831 by William Fitzgerald. He blamed his loss on the machinations of local "small-fry lawyers," but joyfully recaptured the seat from Fitzgerald in 1833.[30]

In Washington, Crockett became an American cultural icon because of his wildly popular autobiographies (the real and the outrageous unauthorized versions), novels, plays and his triumphant speaking tour of the northeast, all telling of his stirring exploits such as wrestling monstrous bears and other death-defying frontier feats, interspersed with bits of homespun humor and wisdom. There had not been such an all-American celebrity since Benjamin Franklin, who also sometimes wore a coonskin cap. (Crockett's fame would be reinvigorated mid-twentieth century by two other American cultural icons: Walt Disney and John Wayne.) Although the Congressman frequently antagonized Jackson and supported the Whig platform of internal improvements at federal expense, such as roads and canals, he never officially joined the Whigs. But in political

[27] Levy, "American Legend," 117-18; Michael Wallis, *David Crockett: The Lion of the West* (New York: W. W. Norton & Company, 2011), 186.

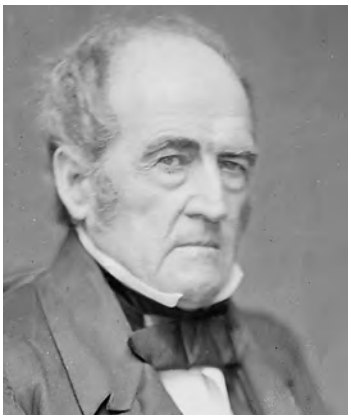
[28] See Randolph, "David Crockett," 76.

[29] *See* Harriet Stern, "William Carroll" in *Governors of Tennessee*, ed. Charles Crawford (Memphis: Memphis State University Press (now University of Memphis), 1979), 135-36; Levy, "American Legend," 99.

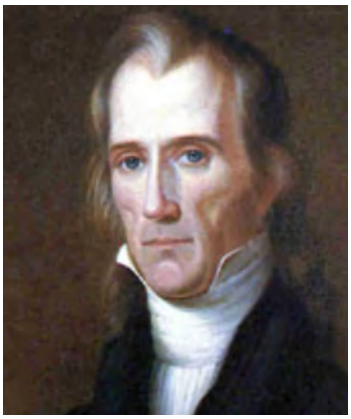
[30] *Ibid*., 76-79.

circles he was seriously considered a possible 1836 Whig presidential nominee, and Whig Party functionaries fanned the flames of Crockett's popularity and news of his disagreements with the administration.[31]

Notwithstanding past differences, when first in Congress, Crockett was still considered tangentially a member of the President's Democratic Party faction.[32] But he irreversibly crossed Jackson when opposing Congressman Polk's plan for the sale of federal land in West Tennessee "with all his crude might" to protect the frontier families who cleared and improved the land absent title.[33] Similar to his plan in the Tennessee legislature, Polk desired to transfer the public land to Tennessee to be sold in large tracts by the state to the highest bidder with earnings financing higher education. Crockett, viewing the proposal as profiting the speculators, struggled to permit the settlers or squatters to purchase at the lowest conceivable price or even be granted the land outright for free.[34] He contended that "the rich require but little legislation. We should, at least occasionally, legislate for the poor."[35] His political enemies thought him naïve, but his obstructionism stalled the federal land sale until 1841, well after his death, and with conditions favoring the subsistence farming families.[36] And despite the permanent break with the administration, and his growing collaboration with leaders outside the Jackson fold that was an origin of Tennessee's Whig Party and ultimately a fiercely competitive two-party system in the state, Crockett's friendship with Jackson protégé Sam Houston remained as solid as ever.[37]



John Bell



Hugh Lawson White

Congressman John Bell of Nashville and Senator Hugh Lawson White of Knoxville were the primary sponsors in their respective houses of Congress of Jackson's Indian Removal Bill culminating in the appalling Trail of Tears.[38] Crockett was the only Tennessean in Congress to oppose removal.[39] He later wrote, "I opposed Andrew Jackson in his famous Indian Bill . . . . I thought the rights reserved to the Indians were about to be frittered away; and events prove that I thought correct."[40] He further said his vote against removal would "not make me ashamed in the Day of Judgment."[41]

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31 Randolph, "David Crockett," 79; Lofaro, "Crockett," 219.

32 See Robert E. Corlew, *Tennessee: A Short History* (Knoxville: University of Tennessee Press, 1982), 160.

33 Thomas Perkins Abernethey, *From Frontier to Plantation in Tennessee* (Chapel Hill, N.C.: University of North Carolina Press, 1955), 259-60.

34 *Ibid*., 260; Randolph, "David Crockett," 77-78; Finger, "American Frontiers," 270.

35 Randolph, "David Crockett," 78.

36 Abernethey, "From Frontier to Planation," 260.

37 Wallis, "Lion of the West," 253; see Corlew, "Tennessee: A short History," 180.

38 Corlew, *"Tennessee: A Short History*," 152.

39 Randolph, "David Crockett," 78; see Finger, "American Fronters," 270-71; see Wallis, "Lion of the West," 218-23.

40 David Crockett, *The Autobiography of David Crockett* (New York: Charles Scribner's Sons, Hamlin Garland ed., 1923), 173.

41 David Crockett, *Narrative of the Life of David Crockett*, 6th ed. (Philadelphia: E. L. Carey and A. Hart,1834), 206.

As early as 1829, Jackson and Polk had maneuvered for Crockett's defeat by encouraging and backing the formidable candidacy of Pleasant M. Miller, Crockett's old friend and former congressman from East Tennessee who had moved to West Tennessee in 1824 to practice law and manage his vast land holdings. Moreover, the esteemed Miller was a longtime advocate for squatters' rights to the detriment of his own financial interests. But, for some unknown reason, Miller abruptly turned on Jackson, later becoming a leading Tennessee Whig, and withdrew from the race in the midst of the campaign to Jackson's anger and Crockett's amusement.[42] Six years later, however, by hypocritically criticizing Crockett's failure to win protections for squatters, the Jacksonian Democrats barely secured his defeat in 1835 by supporting Adam Huntsman, a Madison County lawyer recruited and financed for the task.[43] The vote totals were 4,400 for Crockett to Huntsman's 4,652.[44] While Crockett suggested voting fraud, an affluent Jackson devotee gleefully wrote to Polk: "We have killed blackguard Crockett at last."[45]


Adam Huntsman

Crockett had easily brushed off prior election losses, but this one was different. Forever lured by the adventure and possibilities of the frontier's edge, and possibly improved political fortunes, a still somewhat bitter Crockett enthusiastically prepared to go west again. After holding a huge barbeque at his home on the Obion for friends and family, he and a few other well-armed and supplied frontiersmen began their journey.[46] His youngest child fondly recounted the last time she saw her father: "He seemed very confident the morning he went away that he would soon have us all to join him in Texas."[47] At Memphis, the night before leaving Tennessee in late November 1835, he spoke to a raucous crowd of supporters and disclosed that his eye was on Texas before his latest electoral defeat:

> My friends, I suppose you are all aware that I was recently a candidate for Congress in an adjoining district. I told the voters that if they would elect me, I would serve to the best of my ability; but if they did not, they might go to hell, and I would go to Texas. I am on my way now.[48]

Wearing his renowned coonskin cap, Crockett, at the age of 49, forded the Mississippi River at Memphis and evermore departed the state to soon find his destiny and glory in Texas.[49] A leading Tennessee historian concluded that "David Crockett should be remembered not only for

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42 Fowler, "Pleasant M. Miller," 39-41.

43 See Randolph," David Crockett," 80.

44 Levy, "American Legend," 227.

45 *Ibid*., 227-28.

46 *Ibid*., 232.

47 Manley F. Cobia Jr, *Journey into the Land of Trials: The Story of Davy Crockett's Expedition to the Alamo* (Franklin, TN: Hillsboro Press, 2003), 25.

48 Levy, 236.

49 See Michael A. Lofaro, "Crockett, David 'Davy'" in *The Tennessee Encyclopedia of History & Culture*, ed. Carroll Van West (Nashville: Tennessee Historical Society, 1998), 219; Levy, "American Legend," 235-38.

what he did at the Alamo, but also for his efforts to help the people of Tennessee."[50] He was a trailblazer of the frontier and of the law. Hence, a movement is ongoing in the Tennessee General Assembly to erect a statue of him before the state capitol building in Nashville to stand with those of Andrew Jackson and Andrew Johnson and the tomb of James K. Polk. In any event, with his life and the law, he was always faithful to another of his mottos: "Be always sure you're right—THEN GO AHEAD!"[51]

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[50] Randolph, "David Crockett," 81.

[51] *Ibid*., 69.

**RUSSELL FOWLER**, *a 10th generation Tennessean, is Director of Litigation and Advocacy and Managing Attorney at Legal Aid of East Tennessee (LAET) and since 1999 has been adjunct professor of political science at the University of Tennessee at Chattanooga (UTC). In 2005, he was selected UTC's Outstanding Adjunct Professor by the faculty. Fowler earned his law degree at the University of Memphis in 1987 and served as the law clerk to Chancellor Neal Small of the Chancery Court of Tennessee at Memphis. He was also with a leading civil litigation firm in Memphis for a decade and regularly served as special chancellor before joining LAET management in 1997. Fowler has many publications on law and legal history, including for the Smithsonian Institution, the ABA, the Journal of Supreme Court History, the New England Law Review, and the Tennessee Bar Journal. He writes the column "History's Verdict" for the bar journal. In 2016, he was presented the B. Riney Green Award by the Tennessee Alliance for Legal Services (TALS) for promoting inter-program cooperation and strengthening the provision of legal aid in Tennessee. He has taught continuing legal education courses across Tennessee on Chancery practice, Tennessee civil procedure, and legal history.*

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# From Alabama Failure to Alamo Hero:
## The Early Legal Career of William Barret Travis

By Hon. John G. Browning

## I. Introduction

William Barret Travis

Long before the legend emerged of how William Barret Travis told the Alamo defenders that death was their destiny and how he drew a line in the sand with his sword, he was "just" a lawyer. Of the triumvirate of the Alamo's larger-than-life heroes, Travis was merely the educated one; as one biographer observed of Travis, he "moved with no air of violence about him as did Bowie, nor had any of Crockett's legendary frontier exploits and eccentricities."[1] Yet even as the most mundane of the three, William Barret Travis has still inspired several biographies and biographical articles, most of which focus only on his life in Texas. This Journal has even made brief mentions of Travis' life as a Texas lawyer.[2] And, of course, Travis himself kept a diary of his life in Texas.

On the other hand, much less is known about Travis' life in Alabama, including his legal career. Part of the reason for this void in the scholarship is that there is comparatively little documentation to go on, and some of the information that occasionally emerges may not be as reliable as most legal historians would like. Similarly, there are contradictions; while there are some indications that Travis was an active attorney in Alabama, he was never admitted to practice before the highest court in that state. There are also conflicting stories about what caused Travis to leave Alabama in the first place. While some speculated that he fled Alabama after killing a man he believed to be involved with his wife, Rosanna,[3] it is more likely that a deep sense of failure—in both the personal sense and the professional—was to blame.

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1 William C. Davis, *Three Roads to the Alamo: The Lives and Fortunes of David Crockett, James Bowie, and William Barret Travis*, 576 (1998).

2 *See, e.g.*, Dylan O. Drummond, "The Toughest Bar in Texas: The Alamo Bar Association, Est. 1836," 4 *Texas Supreme Court Historical Society Journal* 7 (2014); Michael Rugeley Moore, "Celia's Manumission and the Alcalde Court of San Felipe de Austin," 5 *Texas Supreme Court Historical Society Journal* 36 (2015).

3 Archie P. McDonald, *Travis*, 52 (1976).

This article will attempt to shine some much-needed light on William Barret Travis' early legal career, particularly his time in Alabama. It will also try to answer some of the unresolved questions that have surrounded Travis as an Alabama lawyer, including whether or not the man we know as the heroic commander of the Alamo defenders was disbarred by his home state. Most of all, this article will provide a look at one side of an ambitious but flawed human being who experienced profound setbacks in his life, and yet who went on to leave an indelible mark on the history of the Lone Star State.

## II. A Rising Star in Alabama

Born near Red Banks, South Carolina in 1809, William Barret Travis came to Conecuh County, Alabama with his family in 1818.[4] He worked on his father's 200-acre farm near Sparta and gained his first formal education at nearby Sparta Academy until the age of sixteen or seventeen. Travis went on to extend and polish his education at the Claiborne Academy in neighboring Monroe County. He did so well there that, within a year or so, he had not only graduated but became a teacher at the school in 1827 or 1828. Although we lack any information on what kind of instructor he was, Travis apparently made quite the impression on at least one student: in 1828, he married Rosanna Cato, one of his students. Nine months and thirteen days after their wedding, Rosanna gave birth to their son, Charles Edward.[5]

Travis wanted more than a schoolteacher's desk could give him, and in 1828, ambitious young men had only two paths open that led to the kind of success Travis craved: either as big planters or as lawyers. The latter was the most viable option for William Barret Travis, particularly if he moved to Claiborne, the county seat of Monroe. There, in 1828, Travis presented himself to a giant of the frontier bar, James Dellet.


James Dellet

Dellet, a New Jersey native who graduated from the University of South Carolina, was just shy of forty years old in 1828.[6] Although he had arrived in Alabama at roughly the same time as the Travis family, his star rose quickly. Dellet became a circuit court judge almost immediately, and then spent three terms in the Alabama legislature becoming the first speaker of the house in 1819.[7] He agreed to take on the nineteen-year-old Travis as his apprentice.

In keeping with the custom of the time, young Travis studied torts, contracts, and criminal law. He read the texts in Dellet's law library, including Blackstone's *Commentaries*, Chitty's *Pleadings*, and Harry Toulmin's *Digest of Alabama Law*. In addition to assigning Travis readings from these treatises and examining him verbally, Dellet had the aspiring lawyer observe courtroom

4 Thomas M. Owen, *History of Alabama and Dictionary of Alabama Biography*, 1681 (1921).

5 McDonald, *Travis*, (1976) 47.

6 Davis, *Three Roads to the Alamo,* 194.

7 *Ibid.*

Home of Travis and Rosanna, restored and relocated to Perdue Hill, Alabama in 1985. Photo by Jeff Reed.

proceedings at the Monroe County courthouse when the county and circuit judges sat. As one of Alabama's five largest towns at the time, Claiborne was a hub for business—and that meant a thriving environment for lawyers as well. It was a relatively crowded bar, but this did not deter Travis. On February 27, 1829, Travis went before Judge Anderson Crenshaw and submitted himself for examination—after barely a year of apprenticeship (most candidates "read the law" for at least two years).[8] He passed, and the *Claiborne Herald* quickly published the announcement that "William B. Travis has established his Office for the present at the next door about the Post Office, where he may be found, at all times, when not absent on business."[9]

This is actually the only record attesting to his admission to practice, however. The Monroe County Courthouse burned down in 1833, and no records survive of Travis' admission or of any cases he handled there as counsel of record. A biographical sketch of Travis written by someone who briefly clerked for him in Texas, Jonathan Hampton (J.H.) Kuykendall, states that "so intense was [Travis'] application [to the practice of law] that he was admitted to the bar before he was twenty-one years of age."[10]

There are, however, indications that Travis had an active practice in neighboring Clarke County, and had an office in Clarkesville, Alabama. The earliest of these is an 1882 history of Clarke

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8 *Ibid.*, 199.

9 *Claiborne Herald*, Feb. 27, 1829.

10 *J.H. Kuykendall's Recollections of William B. Travis* (undated), Jonathan Hampton Kuykendall Papers, Dolph Briscoe Center for American History, University of Texas at Austin. J.H. Kuykendall did not ultimately become a lawyer, admitting that as a law clerk, he "imperfectly digested" the legal texts Travis tried to teach him.

County.[11] This is cited in later accounts as well, including the Clarke County Historical Society's book, *Illustrated Sketches of Clarke County, Alabama*, which refers to William Barret Travis being a member of its bar and to "Travis, a lawyer at Clarkesville."[12]

One respected author has insisted that after examining Clarke County's Courthouse records, including the County Court Minutes books and the Commissioners Court books, "not a single mention of Travis as either resident or practicing attorney appears in any of its suits, court minutes, or subpoenas issued or in any indexes of conveyances."[13] The same scholar reminds us of the words of Travis' own newspaper announcement, which clearly refers to his office being in Claiborne. Yet there *are* surviving Clarke County records verifying in Travis' own handwriting and bearing his signature, the work of "W.B. Travis, Plaintiff's attorney," on behalf of a William R. Hamilton suing a Collin Cocke. This was in the circuit court records for the October 1829 term, and it involved the disputed debt of $141.75 allegedly owed involving "a certain mullatto (sic) boy named Jacob," an enslaved person worth "five hundred dollars."[14] Cocke, who was the county constable, had supposedly "replevied and delivered" Jacob to a third party without "demanding and taking from" that third party "special bail" required by statute, thus "contriving and wrongfully and unjustly intending to injure the same William R. Hamilton" by "wholly defrauding [Hamilton] of the negro boy slave."[15] Perhaps realizing that suing a county constable wasn't the best legal strategy, by the October 1830 term of that same circuit court, Travis filed a voluntary nonsuit by the plaintiff.

Apparently, William R. Hamilton was a repeat client, since "W.B. Travis, defendant's attorney" represented him in a breach of contract suit filed by one Robinson Davenport in the fall of 1829. By the Clarke County Circuit Court's Spring 1831 term, a jury on April 6 of that year had ruled in Hamilton's favor that "said Robinson Davenport take nothing by this suit."[16] There were other Clarke County Circuit Court records as well, including a lawsuit in which one relative, John C. Summers, sued his relative Jesse Summers for a debt of $300 dollars owed on a promissory note.

## III. The Downfall

However, Travis' ambition exceeded his means. Wanting to add to his income, build his name, and exert some community influence, Travis decided to embark upon the path of frontier journalism—while he was still reading the law under James Dellet. On May 16, 1828, Travis launched the first issue of the *Claiborne Herald*, "Edited and Published by William B. Travis."[17] There was certainly a vacuum to be filled; in the past few years, Claiborne had seen the failure of no less than three weekly newspapers. *The Alabama Courier* started in 1819, and lasted three years, while the *Gazette* began in 1824 and ended after about a year, and the *Alabama Whig* had an even shorter tenure.[18]

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[11] Timothy Horton Ball, *A Glance into the Great South-east, or Clarke County, Alabama and its Surroundings, from 1540 to 1877*. [With a Map], 196 (1882).

[12] "Illustrated Sketches of Clarke County, Alabama," (*Clarke County Historical Society* 1977) 102–03.

[13] Davis, *Three Roads to the Alamo,* 631 n.47.

[14] *Circuit Court Record 1829–1831*, Clarke Cnty., Ala. (XS3E-Ci-47). The entries for "W.B. Travis" appear at pages 233–328, and 353.

[15] *Ibid.*

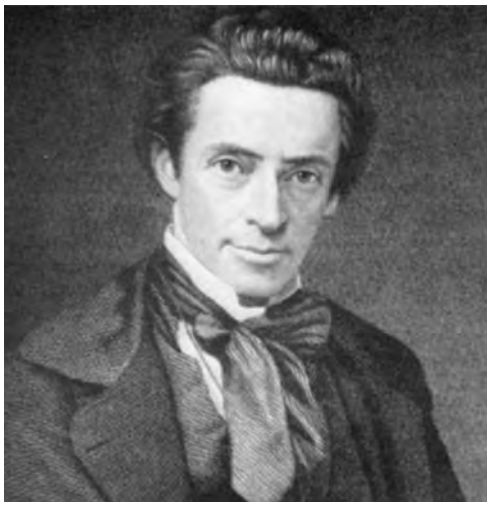
[16] *Ibid.*

[17] Davis, *Three Roads to the Alamo,* 195.

[18] *Ibid.*

After nine months in business, Travis' *Herald* was running more advertising than it ever had before, and it was still bringing in only $65.00 in monthly revenue. Travis borrowed at least $90.00 at the beginning of 1829, and soon borrowed $55.37 to launch his law practice.[19] Travis took in a variety of print jobs to help defray his operating expenses, and at home he took in two or three "boarding students" to tutor. By the end of 1829, it was clear that the struggling newspaper was a failure; not even his mentor, Dellet, subscribed to it. As Travis struggled to be both lawyer and editor, he missed weekly issues; by December, he published a single two-sided sheet consisting largely of an apology. Advertising revenue sharply declined, while Travis' debts increased. Even his legal work failed to generate the income the young lawyer had hoped. His brother-in-law, William M. Cato, hired him to collect a $5.50 debt (which would net Travis a whopping 27.5 cent fee) but reserved his larger matters for representation by someone else—James Dellet.[20] The miniscule collections cases that Travis had generated little in fees; in short, as William C. Davis noted, "Just like the newspaper, his law practice was a dismal failure."[21]

That was not the only failure. With Travis attempting to be a lawyer, newspaper editor, and generally a person supposedly on the rise, he had little time to be a husband to a teenage wife or a father to his infant son. Mounting debt was undoubtedly a strain on Travis' marriage, and their marriage was unraveling. Travis never publicly went into details, only saying later that "my wife and I had a feud which resulted in our separation."[22] Despite many lurid legends claiming that Travis killed a man in Alabama who'd had an affair with his wife, Rosanna, there is nothing to substantiate this. In fact, Claiborne had not had a murder since 1827, and a search of the available Alabama newspapers for the entirety of Travis' last few months there revealed no mentions of any murder in the town.[23]



Benjamin Porter

Travis was sued first by one creditor, and then the deluge began. By the spring 1831 term of the circuit court in Claiborne, Travis' former mentor James Dellet alone represented multiple creditors suing Travis for debts totaling $834, including Travis' own brother-in-law for his unpaid loan of $55.06.[24] To add to the financial humiliation of the rapidly-proliferating debt collection suits against him, Travis had undoubtedly heard that his successor apprentice to James Dellet, a newcomer named Benjamin Porter, was experiencing success that Travis had hoped for himself. Porter, admitted to the bar after Travis in 1830, was about to be named Dellet's law partner and was being touted as a candidate for the Alabama legislature in the 1831 election.

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[19] *Ibid.*, 199.

[20] *Ibid.*, 202.

[21] *Ibid.*

[22] *J.H. Kuykendall's Recollections of William B. Travis,* Jonathan Hampton Kuykendall Papers, 10.

[23] Davis, *Three Roads to the Alamo,* 638 n.85.

[24] *Ibid.*, 203.

When he went to court in Claiborne to answer the multiple lawsuits against him, Travis, in his desperation, seized upon a possible defense. Although he was now seven months past his twenty-first birthday, virtually all the debts dated back to the two years prior to that milestone. Since a minor (under the age of twenty-one in many jurisdictions) was not legally allowed to enter into a valid contract, such as a loan, Travis asserted the legal defense of "infancy." But as soon as he did so, James Dellet called upon the bearded, 5'10" Travis to stand and face the jury, and theatrically proclaimed, "Gentlemen, I make 'proofest' of this infant."[25] The jury convulsed in "howls of derisive laughter" before quickly finding Travis liable for the debts.[26]

After the court's judgment on these debts, the clerk would be issuing orders for Travis' arrest beginning on March 31, 1830 (the last day of the court's spring term). It is not known exactly when Travis left Alabama, but he did not arrive in Texas until May 11 of that year. Alabama, like some states, still put some debtors in jail. Given the cost and conspicuousness of a steamboat passage, Travis likely saddled his horse for a long trip sometime in the first half of April. Supposedly, he told Rosanna that he would return to her and the children (Rosanna was pregnant with their second child, Susanna), when he could pay his debts or that he would send for them after he established himself in Texas. However, while there is no record of Travis contacting his wife after he left Alabama, his Texas diary makes reference to correspondence to her. Nevertheless, she claimed to be unaware of his whereabouts until months after his death. Rosanna Travis was granted a divorce from William Barret Travis by the Alabama Legislature on January 9, 1836—just months before Travis died at the Alamo.[27]


Rosanna Travis

One of the rumors surrounding Travis' brief legal tenure is that he was disbarred in Alabama. In Alabama in 1829, an attorney's license to practice could be suspended or vacated either for conviction of a "felonious crime," or if the attorney was found by a jury to have committed malpractice.[28] Regardless of the reason, there would be a court record of any disbarment proceedings in the Monroe County Circuit Court. Unfortunately, since no court records survived that courthouse's 1833 fire, there is no official evidence that would directly prove or disprove any alleged disbarment of Travis.

Indirect evidence is inconclusive as well. William Barret Travis' name does not appear on the Roll of Attorneys maintained by the Clerk of the Alabama Supreme Court. While that *could* indicate that Travis was disbarred and that his name was stricken from the Rolls, it could also be the more benign indication that Travis was simply never admitted to practice before the Alabama Supreme Court. In Alabama in 1829, an attorney could be licensed in one of two ways: the Supreme Court could grant him a license that would entitle him to practice in any court in the state; or two circuit

[25] *Ibid.*, 205.

[26] *Ibid.*

[27] Act to Divorce Rosanna E. Travis from Her Husband Wm. B. Travis, Ala. Acts 112 (1836).

[28] John G. Aikin, *A Digest of the Laws of the State of Alabama*, (1833) 44.

judges could grant an attorney a license entitling him to practice only in the circuit or county courts.[29] If the lawyer wanted to handle an appeal, he would have had to obtain a license from the Supreme Court—which would have resulted in the recording of that fact in the Minute Books of the Supreme Court. A search of the Alabama Supreme Court Minute Books for the years 1820–1835 reflects no sign of William Barret Travis' name.


Judge Walter B. Jones

Lists of Alabama attorneys have also been compiled and periodically published in the *Alabama Lawyer* and in the *Alabama Historical Quarterly*. The most extensive is a list published by the late Judge Walter B. Jones in 1948.[30] Travis' name does not appear on this list; however, Judge Jones conceded that his list (the vast majority of which was compiled through the Supreme Court's Roll of Attorneys, with the remainder coming from assorted historical lists of Alabama lawyers dating back to 1845) was "imperfect."[31] In short, there is no historical documentation of any disbarment.

## IV. Conclusion

William Barret Travis enjoyed more success as a lawyer in Texas, opening a law office in San Felipe de Austin in 1832. He learned to speak and write in Spanish and studied *La Siete Partidas* as he had once parsed Blackstone's *Commentaries*.[32] Travis' practice and reputation grew, and soon he became involved with the people and the events involved in Texas' bid for independence. While his role in leading the defense of the Alamo in 1836 is well-known, less attention has been paid to his work as an attorney in Texas, and virtually none has been devoted to his brief tenure as an Alabama lawyer. Although Travis prospered as a lawyer in Texas, understanding the frustration of his ambitions in Alabama is crucial to understanding him as a person, and as the leader he would become.

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[29] *Ibid.*

[30] Walter B. Jones, *Alabama Lawyers, 1818–1948*, 9 ALA. LAW. 123–89 (April 1948).

[31] *Ibid.*

[32] The *Siete Partidas* ("Seven Parts," or the "Seven Part Code") was a Spanish legal code dating back to the thirteenth century that was one of the most fundamental legal texts governing the Spanish empire. Often compared in its influence to Blackstone, it covered both civil and criminal law and was in use will into the nineteenth century.

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# Editor-In-Chief Named a "Courageous Judge" by National Judicial College

Hon. John G. Browning

On December 7, 2023, the National Judicial College celebrated its 60th anniversary at a gala event at the Resorts World Hotel in Las Vegas, Nevada. To mark its sixty years as the nation's oldest and largest school for judges, the College chose to honor sixty "Courageous Judges" who exemplified the NJC's enduring commitment to upholding the rule of law and "making the world a more just place." Among the current and former judges honored was the Journal's editor-in-chief, Justice (ret.) John G. Browning.

The College's selection criteria were simple: to honor sixty judges present and past, "from courts in the United States and abroad, who have demonstrated courage in upholding the rule of law and providing justice for all." Honorees were selected from nominations by NJC alumni and staff, and could be recognized for achievements on or off the bench. Among those recognized were the late Judge Frank Johnson, who presided over the trial of Rosa Parks as well as other civil rights trials; the late Judge Constance Baker Motley, noted civil rights lawyer and later a federal judge; and Justice James T. Brand, chief justice of the Oregon Supreme Court who served on the Nuremberg war crimes tribunal.

Justice Browning was honored for his work in seeking posthumous bar admissions for aspiring lawyers of color who were denied admission during the nineteenth and early twentieth centuries on racial grounds. Justice Browning's work has not only resulted in multiple historic posthumous admissions throughout the country, but has also raised awareness of the contributions of early minority legal trailblazers. Most recently, he led the successful campaign to have the Supreme Court of Maryland posthumously admit Edward Garrison Draper, a Dartmouth graduate who in 1857 was denied the chance to become Maryland's first Black lawyer. Browning's efforts were widely chronicled in the media, including the *Washington Post*, *Bloomberg Law*, *CBS News*, and media outlets nationwide. He characterized his work, which began before his service on Texas' Fifth District Court of Appeals, as a "labor of love" to demonstrate that "justice has no expiration date."

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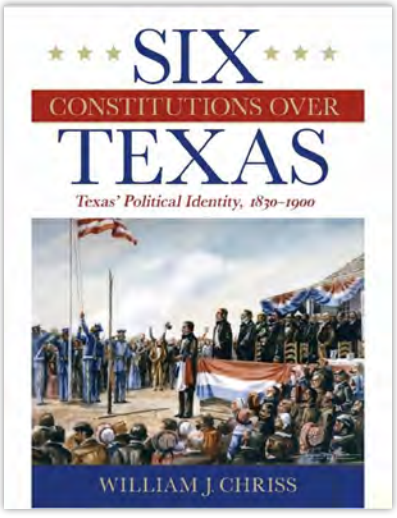
# *Charting Constitutions and Taming Texas*
## at the 2024 TSHA Annual Meeting

**By David A. Furlow**

The Society will present its next panel program—*Charting Constitutions and Taming Texas*—at the Texas State Historical Association's 128th Annual Meeting in College Station this February 28 through March 2, 2024. The conference will occur at the Texas A&M Conference Center. Please save the date and consider joining us there.

Our Society's President, Richard B. Phillips, Jr., an appellate partner in the Dallas office of Holland & Knight, will begin our session by presenting a PowerPoint that illustrates our Society's indispensable role in chronicling and publicizing the history of the Texas Supreme Court and the evolution of Texas law.

Our first presenter will be Corpus Christi attorney, historian, and scholar William J. "Bill" Chriss, J.D., Ph.D. Bill will present "Six Constitutions over Texas, 1836-2024," from his second book (he published *The Noble Lawyer* through Texas Bar Books in 2011). *Six Constitutions* offers an in-depth examination of the six constitutions that have provided the framework of Texas law and society from 1836 until today. In his presentation, as in his book, Dr. Chriss will discuss the drafting, ratification, and interpretation of those constitutions, and the ways they have shaped the lives of all Texans. Bill will introduce attendees to his forthcoming Texas A&M University Press book, *Six Constitutions over Texas: Texas's Political Identity, 1830-1900*.




Bill has long been known as a scholar's scholar. Early on he earned a prestigious nomination for a Rhodes Scholarship and, later, attended Harvard Law School where he became one of the youngest members of his graduating class at the age of twenty-three. He studied ancient Eastern Orthodox manuscripts at Saint Catherine's Monastery, officially known as the Sacred Autonomous Royal Monastery of Saint Katherine of the Holy and God-Trodden Mount Sinai. Fluent in ancient and modern Greek, he can discuss with equal ease the campaigns of Alexander the Great and the history of the Greek community in Texas. He holds post-graduate degrees in literary studies, theology, history and politics, including a Ph.D. in history from The University of Texas. While maintaining a busy law practice, Dr. Chriss *taught Judicial Politics, Political Philosophy, History, and Constitutional Law* within the Texas A&M University system.

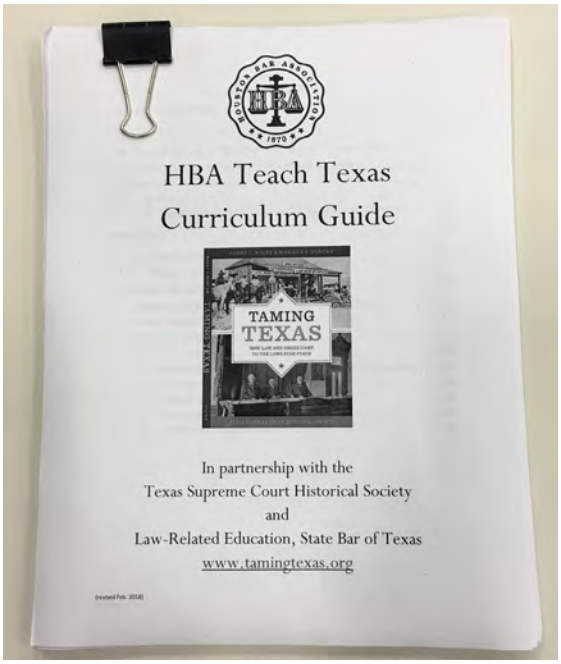
Bill has long served as one of this Society's trustees. He has published articles about Texas constitutionalism in the Journal of the Texas Supreme Court Historical Society and in many other scholarly publications. He is an elected member of the American Law Institute (ALI), the organization that has published Restatements of the Law for over a century. He also served as past Chair of the Texas Pattern Jury Charge Committee-Business, Consumer, Insurance & Employment. A past Editor-in-Chief of *The Journal of Texas Insurance Law*, he won accolades as Executive Director of the Texas Center for Legal Ethics, which promotes the highest levels of ethics and professionalism among Texas lawyers. In 2016, Bill received the Texas Center for Legal Ethics' statewide Chief Justice Jack Pope Professionalism Award, which honors an appellate lawyer or judge who epitomizes the highest level of professionalism and integrity.

Jonathan Smaby, left, Bill Chriss, center, and Texas Supreme Court Chief Justice Nathan Hecht during the Texas Center for Legal Ethics' presentation of its 2016 Chief Justice Jack Pope Professionalism Award. Photo courtesy of the Texas Center for Legal Ethics.

The author of *The Noble Lawyer*, Bill earned the Texas Bar Foundation's 2005 statewide Dan R. Price Award for service to the legal profession and excellence in teaching and scholarly writing. Over the years, he has provided legal ethics training to government agency and corporate attorneys, including lawyers employed by the State Bar of Texas, the U.S. Army, and American Airlines. He has shared insights with accountants, architects, attorneys, judges, insurance adjusters, real estate agents, and other professionals.

Bill is responsible for the first historical book published through Texas A&M University Press. Since its founding in 1974, TAMU Press has been the publishing arm of one of Texas' leading research universities and land grant institutions. The Press has won more than five hundred book awards in a wide variety of disciplines, every Texas publishing award, and national awards from the American Library Association Best of the Best, the National Book Foundation, PEN American Center, and many others. The Press publishes fifty to sixty new titles a year in print and e-books. Bill has granted all royalties from sales of *Six Constitutions* to the Society, another first.

The Society's second major speaker is Warren W. Harris, a former president of this society and of the Houston Bar Association. He will present "Taming Texas: Teaching the Rule of Law to 7th Grade Students." No one can offer more insights about how to organize and present a major educational program that teaches young men and women about Texas law, courts, and history.





Left: The Houston Bar Association developed a curriculum guide to the "Teach Texas" program when HBA partnered with the Society. Right: Warren led the training of HBA attorneys before sending attorneys and judges into schools to teach the Society's Taming Texas program. Photos by David A. Furlow.

In conjunction with David J. Beck, Warren has led the Society's Taming Texas educational project since its inception in 2015. Warren will offer those who attend the 2024 TSHA Annual Meeting a broad band of personal experience in appellate law and educational expertise. Warren is the President of the American Academy of Appellate Lawyers. Warren received the Gregory S. Coleman Outstanding Appellate Lawyer Award from the Texas Bar Foundation. A past president of the Houston Bar Association, the Texas Supreme Court Historical Society, and the Texas Bar Foundation Fellows, he pioneered the Texas Supreme Court Historical Society's Fellows program, organized its *Taming Texas* Project, and administered its commission and funding of four textbooks written by historians James Haley and Marilyn Duncan. The *Taming Texas* educational program has brought lawyers and judges into 7th Grade Texas history classrooms to teach over 21,000 students in Houston, Dallas, and Austin about courthouse history, the rule of law, and the Texas Supreme Court.

Kirsten M. Castaneda, one of our Society's trustees, a partner in the Alexander, Dubose, Jefferson, L.L.P. law firm, and the Chair of the State Bar of Texas Appellate Section, will serve as the Society's Commentator. The Commentator serves as the Master of Ceremonies responsible for directing questions from the audience to the speakers and sometimes offers her own observations about the presentations that preceded hers.

On behalf of the Society, I'd like to extend an invitation to join us at TSHA's 2024 annual meeting in College Station. It's the proper venue for Texas historians, lawyers, judges, and scholars. More than 700 people regularly attend the meeting—an event that shapes the work TSHA does on behalf of another 170,000 TSHA members


Texas A&M Conference Center and Hotel

and constituents. In addition to offering one hundred and fifty speakers and more than forty separate panels, the conference includes eight banquets and receptions, multiple offsite tours, and additional special events that enable attendees to engage with our host city's unique history and culture. Besides, our Society's former president Justice Ken Wise has been elected as TSHA's president.

Come join your friends and colleagues at College Station on Thursday, February 29, 2024 and stick around to watch a great set of speakers prove that lawyers are familiar with more history than case histories. Society members and anyone interested in Texas history, law, or courts can register for the 2024 TSHA Annual Meeting at its website at "2024 Annual Meeting, College Station, TX," *Texas State Historical Association*, https://am.tsha.events/, accessed October 21, 2023. The conference hotel is located at 177 Joe Routt Blvd, College Station, Texas 77840.

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# THE TEXAS SUPREME COURT HISTORICAL SOCIETY



### DISCLAIMER

The Texas Supreme Court Historical Society (the "Society") is a nonprofit, nonpartisan, charitable, and educational corporation. The Society chronicles the history of the Texas Supreme Court, the Texas judiciary, and Texas law, while preserving and protecting judicial records and significant artifacts that reflect that history.

The *Journal of the Texas Supreme Court Historical Society* welcomes submissions, but the Editorial Board reserves the right to determine what will be published in every issue. The Board does not discriminate based on viewpoint, but does require that an article be scholarly and interesting to the *Journal*'s readership. The *Journal* includes content concerning activities of public figures, including elected judges and justices, but that chronicling should never be construed as an endorsement of a candidate, a party to whom a candidate belongs, or an election initiative. Publication of an article or other item is neither the Society's nor the *Journal*'s endorsement of the views expressed therein.

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# 2023-24 Membership Upgrades

The following Society members have moved to a higher Membership category since June 1, 2023.

**TRUSTEE**

Chad Baruch

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# 2023-24 New Member List

The Society has added 29 new members since June 1, 2023.
Among them are 20 Law Clerks for the Court (*) who will receive
a complimentary one-year membership during their clerkship.

## TRUSTEE

Tyler Talbert

Dr. Frank de la Teja

## REGULAR

Reed Bartley*
Daniel Borinsky
Dasha Brotherton*
Courtney Cater*
Seth Cook*
Allison Ebanks
Emily Fitzgerald
Samantha Garza*
Josh Geesling*
Andrew Gould
John Heo*
Ben Hunt*
Taylor Luke*
Clifford D. MacKenzie
Connor Madden*
Jacob Mathew*
Jake McIntosh*
Jordan Redmon
Mikaela Schulz*
Weldon Sloan*
Lindsey Smith*
Cole Stenholm*
Andrew Swallows*
Jonah Ullendorf*
Sarah Winslow*
Hon. Lee Yeakel
Seth Young*

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# Membership Benefits & Application

**Hemphill Fellow** $5,000

- Autographed Complimentary Hardback Copy of Society Publications
- Complimentary Preferred Individual Seating & Recognition in Program at Annual Hemphill Dinner
- All Benefits of Greenhill Fellow

**Greenhill Fellow** $2,500

- Complimentary Admission to Annual Fellows Reception
- Complimentary Hardback Copy of All Society Publications
- Preferred Individual Seating and Recognition in Program at Annual Hemphill Dinner
- Recognition in All Issues of Quarterly *Journal of the Texas Supreme Court Historical Society*
- All Benefits of Trustee Membership

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