



# Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Fall 2014 Vol. 4, No. 1 General Editor Lynne Liberato Executive Editor David Furlow

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Gary Lavergne

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James Haley, author of the Society-sponsored book, *The Texas Supreme Court: A Narrative History, 1836-1986*, shared his perspective on the Court's history. [Read more...](#)



James Haley

### Phillips Elected to Texas State Historical Association Board

Former Chief Justice Thomas R. Phillips has been elected to the Board of Directors of the Texas State Historical Association for a three-year term. [Read more...](#)



Former Chief Justice Phillips

### Former Chief Justice Wallace Jefferson Will Receive Texas Appleseed's Good Apple Award

Texas Appleseed has named former Chief Justice Wallace Jefferson as the 2014 recipient of its J. Chrys Dougherty Good Apple Award. [Read more...](#)



Former Chief Justice Jefferson

### The Hon. James A. Baker and the Hon. William L. Garwood Are Inducted into the Texas Appellate Hall of Fame

The Texas Appellate Hall of Fame, a collaboration of the State Bar of Texas Appellate Section and the Society, honored two distinguished inductees at a ceremony at the Four Seasons Hotel in Austin on September 4. [Read more...](#)



Justice Baker and Judge Garwood

## Calendar of Events

## Membership & More

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### Join the Society

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*Marie Yeates*

# Letter from the *President*

**WE ARE BEGINNING AN EXCITING 2014–2015 YEAR** at the Texas Supreme Court Historical Society, with many projects aimed at preserving the Court's history, educating the public about the mission of the judiciary, and engaging our fellow members of the bar in the Society's efforts. The success of these efforts is ensured by the outstanding work of many of my colleagues on the various projects that the Society is pursuing. Additionally, Justice Paul Green, our Supreme Court liaison, continues to assist, support, and encourage our efforts.

To preserve the Court's history, the Society is in the process of having the Court's portraits appraised and preserved. Bill Ogden is leading that effort. We are pushing forward with the Society's Oral History Project, led by Bill Chriss and Josiah Daniel, in which the history of the Texas judiciary and Texas law is preserved through recorded interviews with former justices of our Supreme Court.

The Society's book projects continue as well. Having gone to press with our book on Chief Justice Jack Pope, we have other books in the works, including one by former Chief Justice Tom Phillips on the history of Supreme Court elections in Texas. Former Justice Craig Enoch is leading the fundraising efforts for our book projects.

The Society's Fellows, led by David Beck, are sponsoring the publication of a book for seventh-grade Texas history classes that will enrich the students' education concerning the judiciary. Warren Harris is shepherding that initiative to bring education about the Texas judicial system into classrooms. Finally, Doug Alexander and Blake Hawthorne are working on a longer-term effort to create a museum, at the Court, concerning Texas judicial history.

Our Society members have access to insightful writings in the Society's e-Journal, edited by David Furlow and Lynne Liberato. And Dylan Drummond and Don Cruse continue their work on upgrading the Society's website.

Our President-elect, Ben Mesches, is chairing our drive to increase membership in the Society. And Jim Ho has agreed to chair the fundraising for the Hemphill Dinner. We are looking forward to another wonderful occasion. Stay tuned for further information about this event.

The work of our Society is a collective effort. Please let me know if you would like to be involved in any of these projects or if you have ideas for projects that you believe the Society should pursue.

Very truly yours,  
Marie R. Yeates

**MARIE R. YEATES** *is a partner with Vinson & Elkins LLP in Houston.*

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*Pat Nester*

## State Bar's 75th is *Cause for Celebration*

**N**O DOUBT SOME OF YOU HAVE BEEN COUNTING DOWN THE YEARS until the State Bar of Texas celebrates its 75<sup>th</sup> anniversary. Well, yee haw and other pure oblations, because 2014 is the year.

The Archives Department of the State Bar of Texas, in particular Alexandra Swast and Caitlin Bumford, have assembled an excellent display in the lobby of the Texas Law Center showing off some highlights of our history. For those of you unable to see the exhibit, I will describe some of the important milestones.

One of the most pressing issues to face Texas lawyers in the 1920s and 1930s was whether to continue on as a voluntary bar association or whether to become a mandatory membership organization. Some thought the old Texas Bar Association, established in 1882, focused too much on conviviality. The rationale was that all 7,500 Texas lawyers—rather than the 3,000 or so who were members of the TBA—could accomplish much more for the profession by working together. Responsible self-governance was considered the prime directive. Also of special interest was the general upgrading of lawyer conduct and lawyer reputation.

The integration of the bar in Texas followed that of many other states starting with North Dakota in 1921 and Alabama in 1923. When the State Bar Act passed in 1939, only six other states west of the Mississippi had not unified their bars. The act brought the legal profession under the umbrella of the state's judicial branch, placing the implementation of the act in the hands of the Texas Supreme Court and giving the Supreme Court administrative oversight over the bar. At the same time, the act gave the bar a wide berth to develop its own programs and services.

The big question for the newly hatched SBOT became what to do. There had for many years been a big annual convention, so that continued. Various committees were appointed including the first grievance committees and the unauthorized practice committee. Legal aid clinics were organized, and by the 1950s, a full time public relations director had been recruited. Support for local bars was considered a priority, and second president Few Brewster (who later served on the Texas Supreme Court) traveled the state to encourage them to get organized. The first bar dues were \$4.00.

By the 1960s, a bar committee with the grand name of “Professional Efficiency and Economic Research” created a minimum fee schedule, which came to include very specific amounts for very specific services. If you were representing the owner of a property under construction, for instance, the suggested fee for the first \$50,000 of the construction contract price was one percent. Three steps later, when the price went above \$2,000,000, the fee went down to one fourth of one percent. Those were the days, right? But we know that the fee schedule eventually was deemed to run afoul of antitrust laws, even though in their last incarnation, the fees had been

watered down to “suggestions only” and, everyone was assured, “no attempt will be made to enforce them.”

Out of the gate, there were only five State Bar sections: Insurance Law, Mineral Law, Junior Lawyers, District and County Attorneys, and Judicial. They focused their energies on legislation, newsletters and CLE events. Now forty-six of them do similar things, but much more as well.

In 1965, President Clint Small used his influence to establish the Texas Bar Foundation, the largest charitably funded organization of its kind. Today it has provided more than \$15 million in support for legal services for the poor, administration of justice, law related education, and legal ethics.

A recurring theme to which the bar has returned again and again is the education of the public about the profession and us practitioners. One PR poster asked the question, “Would you try to take out your own appendix?” (Today, there’s a YouTube video on that.) Another poster took a different approach, “BEWARE OF BARN-YARD LEGAL ADVICE.” In case you were wondering, this refers to legal advice from non-lawyers.

There was also a clever poster encouraging clients to speak up. “Why didn’t my lawyer TELL me? Answer. YOU DIDN’T ASK HIM.” Valuable advice indeed, except for all those things the client doesn’t even know to ask about. And what does one do when one’s lawyer is not a HIM?

Having worked at SBOT since 1978, I can personally report that, despite occasional evolutionary ripples, it has done a ton of good across such a wide range of activities that even those of us who work there can’t keep up with it all. The activities of the Texas Young Lawyers Association alone span such a spectrum that probably only the TYLA president herself can recite them. Sections and bar committees are thinking about and acting on hard problems deserving immediate legislative and judicial attention.

It’s a proud history. Congratulations and Godspeed to today’s bar leaders for keeping the great engine moving ahead.

Be sure to check out the exhibit if you happen to come by the Law Center. It includes pictures from days when everyone wore suits and smiled for the camera even with no air conditioning.

**PAT NESTER** is Executive Director of the Society, Director of the Professional Development Division of the State Bar, and part-time Executive Director of the State Bar College.

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# Fellows Column

By David J. Beck, Chair of the Fellows



Photo by Alexander's Fine Portrait Design-Houston

**I**N JUNE, the Fellows presented their second reenactment of the oral argument of a historic case at the State Bar of Texas Annual Meeting in Austin. A standing-room-only crowd was on hand in the original Supreme Court Courtroom in the Capitol to watch as the Fellows held a live oral argument reenactment and discussion of *Sweatt v. Painter*, 339 U.S. 629 (1950). Chief Justice Tom Phillips gave an overview of the case before

the reenactment and after the argument discussed the impacts of the case. The Honorable Dale Wainwright argued on behalf of Sweatt and the Honorable David Keltner argued on behalf of the State.

We were pleased to have a distinguished panel to hear the arguments. Chief Justice Nathan Hecht presided with a panel that included Justice Paul Green, the Supreme Court's liaison to the Society, and Judge Priscilla Owen of the United States Court of Appeals for the Fifth Circuit. "It was clear that Wainwright and Keltner spent a great deal of time in getting ready for the reenactment, like they would for a real oral argument," said Justice Green. He also added that "the audience noticed and appreciated the superb advocacy presented in the case." Photos from the reenactment appear below.

As I indicated in my last column, one major educational project we are developing is a judicial civics program that will present the history of the Texas Supreme Court to Texas history classes in middle schools statewide. Thanks to the support of the Fellows, the Society has engaged award-winning author James L. Haley to write the new book that will be used with this project. As you may recall, Haley is also the author of the Society's history book on the Texas Supreme Court. We are very excited about having Haley working on this project, and we will give you updates as it progresses.

## FELLOWS OF THE SOCIETY

### HEMPHILL FELLOWS

David J. Beck  
Joseph D. Jamail, Jr.  
Richard Warren Mithoff

### GREENHILL FELLOWS

Marianne Auld  
S. Jack Balagia  
Robert A. Black  
E. Leon Carter  
Tom A. Cunningham  
David A. Furlow and Lisa Pennington  
Harry L. Gillam, Jr.  
William Fred Hagans  
Lauren and Warren Harris  
Allyson and James C. Ho  
Jennifer and Richard Hogan, Jr.  
Dee J. Kelly, Jr.  
David E. Keltner  
Thomas S. Leatherbury  
Lynne Liberato  
Mike McKool, Jr.  
Ben L. Mesches  
Nick C. Nichols  
Hon. Thomas R. Phillips, Chief Justice (Ret.)  
Hon. Jack Pope, Chief Justice (Ret.)  
Shannon H. Ratliff  
Robert M. Roach, Jr.  
Leslie R. Robnett  
Prof. L. Wayne Scott  
Reagan W. Simpson  
S. Shawn Stephens  
Hon. Dale Wainwright, Justice (Ret.)  
Charles R. "Skip" Watson  
Dick Watt  
R. Paul Yetter

Save the date for the Third Annual Fellows Dinner, to be held in Austin on May 7, 2015 in conjunction with the Society's biannual Symposium. The Symposium, which is a day-long CLE course focused on the history of Texas jurisprudence, is co-sponsored with TexasBarCLE. The Fellows are able to attend the one-day Symposium on a complimentary basis as a benefit of being a Fellow.

The Society is appreciative of the Fellows for their support. If you would like more information on the Fellows of the Society or are interested in joining the Fellows, please contact me or the Society's office.

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## Highlights from the Reenactment of *Sweatt v. Painter*, June 27, 2014



The Honorable Dale Wainwright (standing, right) offered Thurgood Marshall's argument on behalf of Heman Sweatt, who had been denied admission to the UT Law School in 1946 solely because of his race. Assisting with the oral argument for Sweatt was Liz Kozlow Marcum (seated at table).

The Honorable David Keltner argued the case on behalf of the State of Texas, a role originally played by Assistant Attorney General Joe R. Greenhill. Joe R. Greenhill V (not pictured) assisted Keltner in the oral argument.



Former Chief Justice Tom Phillips discussed the significance of *Sweatt v. Painter* in dismantling the separate-but-equal doctrine in public education.

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David A. Furlow

# Help Us Save and *Share History*

**T**ONY AWARD-WINNING PLAYWRIGHT ALAN BENNETT explained the value of the history our Society is dedicated to preserving, protecting, and sharing with others:

The best moments in reading are when you come across something—a thought, a feeling, a way of looking at things—which you had thought special and particular to you. And now, here it is, set down by someone else, a person you have never met, someone even who is long dead. And it is as if a hand has come out, and taken yours.<sup>1</sup>

As Executive Editor, I'd like to ask lawyers, judges, justices, and historians to join with the *Journal* in sharing ideas, photos, artifacts, and new ways of looking at the history of the Texas judiciary, the state's appellate courts, and the Texas Supreme Court. General Editor Lynne Liberato, Deputy Executive Editor Dylan Drummond, Managing Editor Marilyn Duncan, and I welcome your ideas, input, and articles.

This is the third issue of the *Journal* dedicated to special aspects of the Texas Supreme Court's history. After examining the Chief Justice's role in shaping jurisprudence in the Winter 2013 issue and exploring Civil War and Reconstruction Texas in our Spring 2014 issue, we now focus on "Murder and Mayhem on the Texas Supreme Court." The two speakers the Society invited to present papers at the Texas State Historical Association Annual Meeting in San Antonio—Judge Mark Davidson and author Gary Lavergne—addressed important issues in their March 7, 2014 presentations, as did Society President Doug Alexander and retired Executive Director Bill Pugsley. The *Journal* is publishing Judge Davidson's and Gary Lavergne's TSHA papers in fulfillment of the Society's mission of sponsoring scholarly historical writing.

Gary Lavergne examines a troubled son's murder of a beloved judge and his wife, the young man's mother. Lavergne based his paper on numerous sources, including Justice Pierson's correspondence made available by Court Archivist Tiffany Shropshire as well as contemporary newspaper stories and research Lavergne conducted while writing previous books about criminal cases. In the article, he explores the history of Texas's insanity defense and the triumph of the Court's institutional integrity over personal tragedy.

Judge Davidson discusses how judicial-appointment politics, the public's lack of interest in courthouse races, and an aberrational vote briefly threatened the Court's reputation for judicial integrity. Yet Judge Davidson also shows how Don Yarbrough's electoral triumph hubris soon resulted in nemesis: a perjury prosecution, an *in absentia* criminal conviction, and an extradition from Grenada aboard Ross Perot's personal jet.

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<sup>1</sup> ALAN BENNETT, *The History Boys: The Film* 60 (Faber & Faber 2006) (script and film diary) (quoted by the character Hector in the 2006 film *The History Boys*), at <https://www.tumblr.com/search/alan%20bennett> (film clip last accessed Sept. 17, 2014).

Former prosecutor Rachel Palmer Hooper's article about the Texas Supreme Court's *Santana* decision sheds new light on another aspect of Texas legal history: the Court's interaction with juvenile justice issues most of the public consider to be criminal.

As these articles reflect, the *Journal* welcomes papers about Texas's rich judicial and legal history, whether submitted by a journalist, a judge or justice, or a J.D. We're also looking for submissions from other scholars, especially historians, biographers, political scientists, sociologists, and economists. If you'd like to join us in preserving, protecting, and sharing the history of Texas courts and Texas law, please e-mail your draft article to [dafurlow@gmail.com](mailto:dafurlow@gmail.com) or call me at 713.202.3931 to discuss how we at the *Journal* can work with you.

**DAVID A. FURLOW** is a historian, archeologist, and lawyer.

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# Election Hustle: The Flimflam, Fraud, and Flight of Justice Yarbrough

By Judge Mark Davidson

**M**OST STUDENTS OF TEXAS HISTORY COULD NAME without much difficulty the names of at least fifteen of Texas's governors and presidents. If pressed, few of them could name more than four or five of our state's twenty-eight Chief Justices of the Texas Supreme Court. This is, in part, because judges are supposed to follow the law given to them by their predecessors and the legislative branch of government, a task that strongly encourages anonymity.

Limited interest in the identity of the members of the judicial branch of government is not unique to historians. It is shared by the voters of our state. Although Texas voters strongly favor continuing to elect judges, very, very few actually go to the polls to vote for judges. They vote in judicial races if something else draws them to the polls that day, like a presidential, gubernatorial, or county commissioner race. Many people simply skip judicial races after voting for other races on the ballot.<sup>1</sup> Many who vote put little effort into their selections.<sup>2</sup> More than 96 percent of all voters in recent elections cast their vote for judges solely on party affiliation. The small minority who cast multi-party ballots tend to vote for candidates with familiar names—Smith, Jones, or Davidson.

Voting for familiar names has had good and bad results. Almost certainly the worst result was the 1976 election of Justice Donald Burt Yarbrough to the Supreme Court of Texas. It was the result of a perfect storm of gubernatorial indifference to filling a vacancy, an almost total lack of press coverage of a charlatan until too late, and a number of recent campaigns by people with similar names. The effects of the race would be far reaching and continue to resound in our judicial branch today, thirty-eight years later.

## Yarborough, Not Yarbrough

Ralph Webster Yarborough was an icon of the “loyalist” wing of the Texas Democratic Party and a very durable politician. Appointed a Travis County District Judge in 1936, he ran for Texas Attorney General in 1938, finishing third. In 1952, 1954, and 1956, he ran for governor, losing the last two races very narrowly and controversially in runoffs to Governor Allan Shivers and Senator Price Daniel. After Daniel became governor, he had to resign from the U.S. Senate, and Yarborough ran in the special election to fill the vacancy. Only a plurality was necessary to win the election, and Yarborough won, defeating Daniel's interim appointee, Bill “Cowboy” Blakely, Congressman Martin Dies, Senator Searcy Bracewell, Agriculture Commissioner John White, and Thad Hutchison, the Republican candidate. His success was due both to his popularity with the liberal wing of the Democratic Party and to his campaigning for statewide office almost continuously for the previous eight years. Yarborough would serve in the Senate until 1971 after being reelected in 1958 and 1964.<sup>3</sup>

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<sup>1</sup> One study of judicial retention elections in ten states between 1964 and 1994 reflected that rolloff—*i.e.*, voter decisions to stop voting after reaching the judicial candidates—was 34.5 percent on average. See Larry Aspin, et al., *Thirty Years of Judicial Retention Elections: An Update*, 37 Soc. Sci. J. 1, 12 n.17 (2000).

<sup>2</sup> See, e.g., Charles A. Johnson et al., *The Salience of Judicial Candidates and Elections*, 59 Soc. Sci. Q. 371, 374–75 (1978) (analyzing voting in Lubbock, Texas).

<sup>3</sup> His opponent in 1964 was future president George Herbert Walker Bush.



Senator Ralph Yarborough

Senator Yarborough never made, and never really attempted to make, any inroads into the conservative wing of the Democratic Party. His feuds with Lyndon Johnson were legion, and the mutual hostility between him and Governor John B. Connally was well known. Connally and Johnson recruited and supported a Houston businessman and former congressman, Lloyd Bentsen, to run against Yarborough in 1970. In what was seen as an upset, Yarborough was defeated, winning 46 percent of the vote to Bentsen’s 54 percent. Yarborough would run again for the Senate two years later. Although he missed winning without a runoff by 546 votes, he was defeated in the runoff by Harold “Barefoot” Sanders. He was, and would remain for the rest of his life, the idol of the liberal wing of the Texas Democratic Party.

In the early 1960s, a dynamic Houston lawyer named Donald Howard Yarborough was starting his political career. Although he was not related to Senator Yarborough, he was an unabashed liberal and endeared himself to leaders of the Democratic Party’s liberal wing. His first race for public office came in 1960 (the first year Ralph’s name would not have been on the ballot since 1950), when he ran for lieutenant governor. In 1962, he ran for governor against four candidates from the conservative wing of the party and lost to John Connally in a runoff by only 28,000 votes. He ran again in 1964 and 1968 but failed to match his earlier successes.



Gubernatorial candidate  
Donald H. Yarborough

By the end of the 1972 election cycle, either Ralph Yarborough or Donald Yarborough had appeared on the statewide ballot in thirteen of the last fifteen election cycles. They had both built fervent support from the liberal wing of the party. The Yarborough name was as well-known as any in Texas politics, as beloved by the Democrats’ ascendant liberal wing as it was hated by the conservative wing. Both men retired from politics after that year, ignoring the value and potential of a name with that much identification. In doing so, they forgot the quotation attributed to P. T. Barnum—“I don’t care what they say about me, as long as they spell my name right.” As it would turn out, they wouldn’t even do that.

### **Dolph Briscoe Makes an Obscure Appointment**

In August of 1975, Justice Ruel Walker announced his retirement from the Texas Supreme Court after twenty-one years of exemplary service. He was renowned as a scholar—he finished first in his class each year at the University of Texas Law School—as well as a lucid writer. Filling his shoes would not be easy, for the job called for someone with strong writing skills and appellate experience. He almost certainly resigned when he did to enable the governor to make an appointment of a qualified individual who could then run in the 1976 elections as an incumbent. Walker was in good health and could have served out his term. His retirement was seen by many as his way of honoring the Court and making sure his successor fulfilled its traditions.

Dolph Briscoe had been elected governor in 1972, and in his first three years in office, he had nominated a record number of residents from his hometown of Uvalde to state boards and agencies. A popular joke at the time was that the governor’s appointments office kept a Uvalde phone book handy to fill any vacancy in any state

agency. Many people in the organized bar and on the Court hoped that the Chief Justice of the San Antonio Court of Appeals, Charles Barrow, would get the appointment. But Briscoe bypassed Barrow and appointed the district judge from Uvalde, Ross Doughty, to fill the balance of the term.<sup>4</sup>

Doughty's selection was puzzling. Doughty had never expressed an interest in being an appellate judge. He had no interest in serving on the Court for any length of time. Upon being sworn in, he announced that he would not seek election to a full term on the Court. According to one insider, "Justice Doughty was a nice man and had been a great trial judge. He was out of his league on the Supreme Court."

Briscoe's appointment and Doughty's announcement meant there would be no incumbent on the ballot for Walker's seat. The last time there had been an open race for a position on the Court had been in 1972, when Chief Justice Robert Calvert had announced his retirement. Justice Joe Greenhill announced he would run for the Chief Justice position, and Fourteenth Court of Appeals Justice Sam Johnson announced his candidacy for Greenhill's spot. Both were supported by the bar, and neither was opposed in the 1972 elections. After Chief Justice Barrow announced his candidacy in 1976, lawyers and public officials from around the state acclaimed his candidacy. No opponent was expected, and none filed—until the last day of the filing period.

### **What Difference Does a Vowel Make?**

Donald Burt Yarbrough was born in Dallas in 1941 and obtained both his undergraduate and law degrees from the University of Texas. After graduating from law school in 1964, he worked for the Texas Water Rights Commission's legal department before moving to Houston. In 1974, he ran for state treasurer against longtime incumbent Jesse James. Notwithstanding the absence of a campaign and his opponent's well-known name, Yarbrough received 46 percent of the vote.

His law practice in Houston would later become mired in controversy. While he said he was serving as counsel to the Campus Crusade for Christ, clients who came to him because of his oft-stated religious principles were often steered into investments under his direction. According to numerous lawsuits filed against him, he was not only a legal adviser but also an investment adviser to a number of clients. All the petitions in nine different lawsuits allege a consistent pattern: clients came to Yarbrough for tax advice and were encouraged to deposit money that would be invested in bank stock or gold bars, or both. The investments would churn capital losses that would end tax liability and build value.<sup>5</sup>

In late 1975, the bank investments and the gold hedges were apparently not going well. In the first four months of 1976, eight lawsuits were filed against him in Harris County. Of course, no jury determination of facts would be made for a number of months, and, as of that winter, nothing appeared in the public record that would serve as an adjudicated blot on Yarbrough's name. On February 2, the filing deadline, Yarbrough filed for the Supreme Court. He later said that he was uncertain whether to run for the Court or for the Railroad Commission, and that the Lord instructed him to run for the Court.

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<sup>4</sup> There was a rumor, which today cannot be confirmed, that Briscoe had offered the position to Clarence Guittard, a Justice on the Dallas Court of Appeals. The balance of the rumor is that Guittard declined to accept because he did not want to move his family to Austin. Guittard would certainly have been a well-qualified appointee.

<sup>5</sup> See also CAROL S. VANCE, *BOOMTOWN* DA 237–54 (2010) ("A Supreme Court Justice Goes Bad").

## See How They Run

Races for the Supreme Court had traditionally been low-key affairs. Candidates seldom raised enough money for television advertising. There was sometimes enough money to place ads in selected newspapers. Candidates would tour the state, visiting courthouses and law offices, and try to see community leaders who were considered to be influential. Justice Barrow raised very little money and spent less. Terence O'Rourke, who was running for the Texas Railroad Commission that year, remembers today that, as he toured the state, he kept seeing Barrow at events. "Judge Barrow was tireless, and appeared to be a consensus candidate among all Democratic groups," O'Rourke said.

Yarbrough did not campaign. He turned out a press release, which stated that he thought it was inappropriate for a judge to raise money from lawyers or anyone else. Whether this statement reflects a high degree of ethics is questionable, because there is no record that anyone tried to donate to his campaign. He later said that he gave one speech during the entire campaign.

The Barrow-Yarbrough race was met with total indifference by the state's press. Reviews of the *Houston Post*, *Austin American-Statesman*, and *Dallas Morning News* for the thirty days before the election show no coverage of the race, other than listings of endorsements by labor and business groups (all of which went to Barrow) and a couple of "Voters' Guides" entries that gave each candidate a two-sentence biography. It is surprising that neither of the Houston newspapers, which had full-time courthouse reporters in 1976, mentioned the suits against Yarbrough. There was a relatively favorable article on Yarbrough in the *Chronicle* the week before the election, lauding his refusal to take campaign contributions from lawyers—not that he would have received any.

The voters were not focused on the Supreme Court race either. The first-ever presidential primary election in Texas history took place in 1976. Senator Bentsen had developed the idea of a primary election. By the time the election took place, the Democratic presidential nomination had been all but won by the governor of Georgia, Jimmy Carter. What had not been determined, and would not be decided until the Republican Convention three months later, was the winner of a bitter race between President Gerald Ford and former California Governor Ronald Reagan. Declining interest in the Democratic race and intense interest in the Republican race in both the national and the local media would have a significant impact on the composition of the electorate.

Texans had been voting for Republican candidates for national office in increasing numbers since Eisenhower's candidacy in 1952.<sup>6</sup> However, they had not voted for Republican candidates for local offices, nor had they voted in significant numbers in the Republican primary elections. The reason was simple—voters who wanted a voice in local or state government had to vote in the Democratic primary, regardless of how they might vote in the fall. These voters, who constituted the conservative wing of the Democratic Party, usually—but not always—outvoted the liberals in the party. These conservative voters could have been counted on to vote against almost anyone named "Yarborough," or anything like it. The problem was that, in 1976, the absence of any statewide race of interest to most voters in the Democratic primary siphoned off conservative voters to do what most had never done before—vote in the Republican primary. Nearly 418,000 voted in the Texas Republican primary in 1976, up from 118,000 four years before, which itself had been a record. A solid majority of those could have been expected to vote for Barrow had they not abandoned his primary.

With the conservatives gone from the primary, liberals constituted an unprecedentedly high percentage of the voters. They could have been expected to vote with enthusiasm for anyone whose name was or resembled Yarborough. Congressman Charlie Wilson of Lufkin, a member of the party's progressive wing and as

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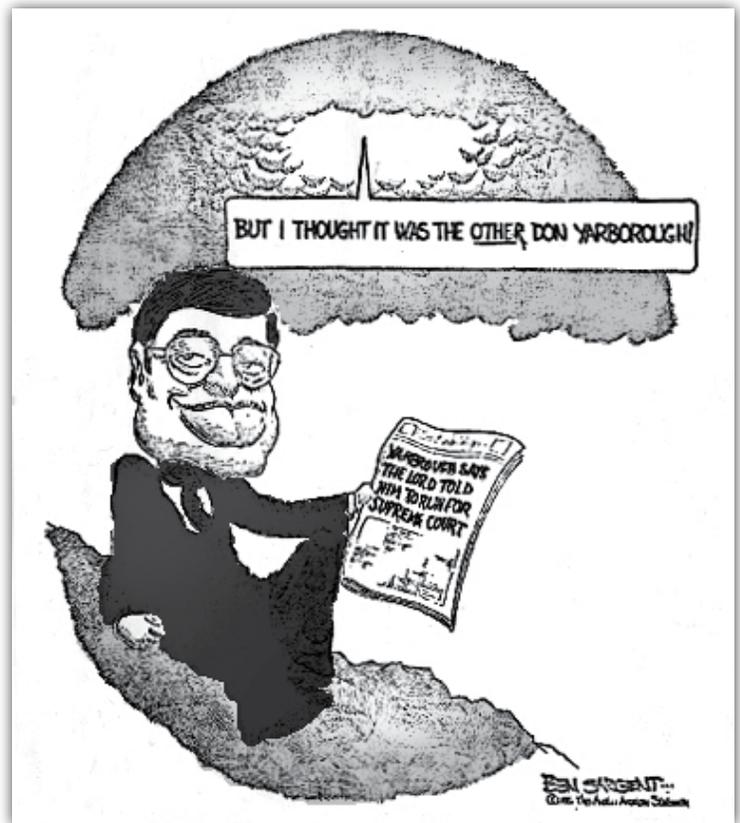
<sup>6</sup> Herbert Hoover had been the first Republican to carry Texas in 1928, but those results were due to anti-Catholic bigotry among many Texans and the fact that the Democratic candidate was Al Smith, the Roman Catholic former governor of New York.

knowledgeable a politico as existed, told a friend after the election, “I didn’t know my old friend Don Yarborough was running.” He wasn’t.

## Vox Populi

Although a year later hardly anyone would admit that they’d voted for Don Yarborough, a substantial number of people did. Yarborough received 831,621 votes to Barrow’s 537,394.<sup>7</sup> He carried 237 counties and won 60 percent of the vote. Barrow’s defeat was total. He lost his home county of Bexar, and got 37 percent of the vote in McClennan County, where, as an honored alumnus and regent of Baylor University, he would have been expected to do well.

With the exception of the victor, everyone attributed the result to the similarity of Yarborough’s name to Ralph and Don Yarborough’s.<sup>8</sup> The Justice-elect had an alternate explanation—he told the *Dallas Morning News* that he had been instructed to run for the Supreme Court by Jesus Christ, and that his election was “God’s will.”<sup>9</sup> If true, revelations soon forthcoming would embarrass even God.<sup>10</sup>



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## The Press Makes Up for Lost Time

Within a week of the election, the *Houston Post* ran an exposé of Yarborough’s legal difficulties. In a scathing article, the paper disclosed the results of interviews with his disgruntled clients. The paper did not mention why it had not run the article two weeks before, when the story might have done some good. Shortly thereafter, newspapers in Corpus Christi, Dallas, San Angelo, and San Antonio would join in. Again, no newspaper would explain why it had not previously mentioned what had been available in the public record for months before the election.

Yarborough defended himself, correctly stating that no court had ruled he’d done anything wrong and that he was entitled to his day in court. He made no public comment on any specific allegation in the lawsuits, saying that he would make a full statement later.

In the summer after his primary win, the first of the cases against him went forward. Rex Cooper, a

<sup>7</sup> I am indebted to Judge Tom Phillips’s masterful and comprehensive assemblage of election results in his magnum opus, “Popular Elections for the Texas Supreme Court,” which I have used in its draft version. The final version will be published by the Texas Supreme Court Historical Society next year.

<sup>8</sup> Your author must admit that in 1976 he was a politically active second year law student, and voted against Yarborough because he was a Tory Democrat, and for no other reason.

<sup>9</sup> *Yarborough Gives Creator Credit*, DALLAS MORNING NEWS, May 5, 1976.

<sup>10</sup> One of the world’s greatest political cartoons was drawn by Ben Sargent and published in the *Austin American-Statesman* on May 17, 1976 in the aftermath of the primary (see above).

trucking executive, had invested \$130,000 in a gold hedging/bank stock scheme and lost it all.<sup>11</sup> After a three-and-a-half-week trial, a unanimous jury verdict in Harris County’s Eleventh District Court found that Yarbrough had committed fraud and awarded substantial damages. Both the *Houston Post* and *Chronicle* covered the trial gavel to gavel and provided daily summaries of the testimony.

A curious event took place the week after the trial. A former associate of Yarbrough’s firm, Richard Reece, was assaulted in his West University Place home by two masked men. After beating him up, they took no money or property. Justice Greenhill’s notes from the time expressed suspicion that the assault was retaliation against the associate for “disloyalty.”

The legal establishment decided that something must be done to stop Yarbrough’s election, and a duo of write-in candidacies was launched. Well-regarded Houston attorney Tom Lowrance announced, and a week later, a Denton judge with somewhat fewer qualifications but a much better name—Sam Houston—also announced his write-in campaign. The Republican Party, which had not fielded a candidate for any position on the Supreme Court since 1958,<sup>12</sup> tried to find a way to field one. Unfortunately, the Texas Election Code was unyielding. A party that had no candidates by the February deadline could not later place someone on the ballot. With no opponent listed on the ballot and benefiting from straight-party votes, Yarbrough swept to victory, getting 1,895,972 votes to Tom Lowrance’s 168,992. Houston, who had a name even better than Yarbrough’s but was not on the ballot, received 441,828.<sup>13</sup>

### Mr. Justice Yarbrough

The other eight members of the Court certainly knew he was coming. Chief Justice Greenhill sent a couple of memos to the Justices informing them of the latest developments in Yarbrough’s civil cases. According to Justice Tom Reavley, the Court decided informally a few weeks before Yarbrough’s swearing-in that if there were any 5–4 decisions to be made by the Court in which its junior member was the deciding vote, they would hold the case and try to work out another solution. Although Greenhill is known to have denied that this took place, all of the 5–4 opinions issued during Yarbrough’s tenure were ones in which he was in the minority.



Justice Yarbrough (right), seated on the Texas Supreme Court in spring 1977; also pictured are Justice Price Daniel (center) and Justice Sears McGee. Photo Collection, Archives of the State Bar of Texas

There were some important rulings made by the Court, and one of them was a Yarbrough opinion. In

<sup>11</sup> The case had been preferentially set to be heard in March, two months before the primary, but Yarbrough had obtained a continuance on the grounds that his fourteen-month-old son had been hospitalized. No medical records were attached to the motion.

<sup>12</sup> Harlingen Attorney John Q. Smith ran against Justice Robert Hamilton, but his candidacy had yielded only 14 percent of the vote. See generally Phillips, *supra*.

<sup>13</sup> See generally *id.*

*Waites v. Sondock*, 561 S.W.2d 772 (Tex. 1977), Yarbrough was listed as the author of an opinion that the statute authorizing legislative continuances for attorney/legislators was unconstitutional in the context of child support collection cases. In two dissents, well-reasoned and eloquent opinions were issued expressing populist beliefs. According to Justice Yarbrough's briefing attorney, Charles Snakard, "not one word of any opinion was ever written by the Judge." Snakard said that Yarbrough spent most of his time in Houston dealing with his legal difficulties and came into Austin only for oral arguments on Wednesday mornings.

Yarbrough's relations with his colleagues were not close. Justice Reavley said that he never met anyone who could lie to you as openly as Yarbrough and make you believe it—at least for a while. On one occasion, Chief Justice Greenhill assigned him a case, and because he didn't make it back to Austin for arguments, a new judge was assigned the opinion. After his retirement, Greenhill helped found the Texas Supreme Court Historical Society, one of whose missions was to honor former justices with portraits placed in the Supreme Court building. Greenhill wrote a strongly worded recommendation to the Society's board that no funds be raised for a portrait of Yarbrough.<sup>14</sup>

### **When Things Go Wrong, They Really Go Wrong**

In hindsight, Justice Yarbrough should have known that the press, having fumbled its investigative duties before his election, would not let up while he was on the Court. In hindsight, he should have hunkered down, kept a low profile, and tried to prove to his colleagues, the bar, and the press that—given a chance—he could be a good member of the Court. In hindsight, he should have tried to settle his civil cases. That isn't what happened.

A much more disturbing allegation would be made against Yarbrough—that he had forged a signature on the automobile title of a client. It was not an expensive car, a 1973 Ford Galaxie. Why he did it is unknown, but under the Texas Penal Code, forgery of a car title is a felony regardless of the value of the car. A banker from Victoria, William Kemp, went to Travis County Attorney Ronnie Earle with proof of the forgery. On May 12, 1977, Yarbrough was indicted.

By now, Yarbrough was paying his Houston attorney, Michael Manness, to defend him in the civil suit, and hired former Attorney General and Speaker of the House Waggoner Carr to represent him in the criminal matter in Travis County. The salary of the members of the Supreme Court in 1977 was \$89,000, and the use of officeholder funds to defend oneself from criminal charges was not yet common, even if one could construe the charges against Yarbrough to be related in any way to his official duties. He needed a miracle to extract him from his criminal problems. How he tried to find that miracle is both a tragedy and extremely revealing.

On May 13, 1977, Yarbrough was taped meeting with a longtime associate, John William "Bill" Rothkopf. Rothkopf was apparently working with the Travis County district attorney, for he carried a "wire" that gave an audiotape backup of the conversation. In that conversation, Yarbrough clearly and unambiguously asked Rothkopf to murder Kemp, the Victoria banker, take the body to northern Mexico, and leave it there. Also mentioned with disdain by Justice Yarbrough, in language described by one listener as "extremely rough," was Carol Vance, the district attorney of Harris County, and Earle.

On June 28, unaware of the tape recording of the conversation, Yarbrough was to testify before the Travis County grand jury. It was considering an additional indictment relating to the forgery allegation. When asked, he denied ever meeting with Rothkopf. That voluntary testimony was a mistake.

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<sup>14</sup> Statements are from the author's interviews with Justice Reavley and other correspondence and file memos.

Two days later, the tape of the solicitation of murder was made available to KPRC TV, the Houston NBC affiliate owned by Oveta Culp Hobby, the mother of Lieutenant Governor William P. Hobby, Jr. Needless to say, the airing of the tape did not enhance Justice Yarbrough's legal or political position. Allegations of a Supreme Court Justice's solicitation of murder was a story line too good for the press to ignore. Tom Kennedy, the political columnist for the *Houston Post*, led the parade of the print media covering the story. Kennedy, who said he did not get his information from the Hobby family, ran several days' columns on Yarbrough's problems. Meanwhile, the Travis County grand jury added a count of perjury against Yarbrough.

The Commission on Judicial Conduct opened a file on June 14, 1977 in the Yarbrough matter. The tape had aired on May 25, so it is odd that it would take more than two weeks to begin an investigation. Under Commission procedures at the time, a judge was entitled to a preliminary ruling that a case merits consideration, and then thirty days' notice of a hearing under that scenario, and then await the next monthly meeting of the Commission. Therefore, even if the matter had received expedited consideration by the Commission, it would have been September 1 at the earliest before Yarbrough could be removed. An appeal to the Supreme Court could have followed, and that would have extended his tenure even further.

Virtually everyone in Austin thought Yarbrough should go.<sup>15</sup> He was defiant, stating repeatedly and publicly that he would not resign. Fortunately for him, the timing of the revelations came only five days before the Sixty-fifth Session of the Legislature was to adjourn *sine die*. The only known alternative to removal from office by the Commission was impeachment by the Legislature, and it just couldn't have been accomplished in that time frame.

Unfortunately for Yarbrough, Governor Briscoe had to call a special session of the Legislature to address school finance. He did not open the call of the session to consideration of impeachment, but, citing a precedent from the 1917 impeachment of Governor James P. Ferguson, legislative leaders decided that the governor's consent was not required. Attorney General John Hill agreed, finding that removal of an official was not a legislative function, but a judicial one entrusted to the Legislature, and therefore could be considered in a special session without gubernatorial consent.

Senator Don Adams recalled being at home in Jasper watching the news when he first heard about the murder solicitation. Today he says, "Forgetting the old rule in the military that you should never volunteer for anything, I called [Lieutenant Governor] Bill Hobby and told him that we [the Texas Senate] should do something about this as soon as possible. Bill said, 'I agree. I am appointing you as the prosecutor should the House impeach him.'" Adams, who was an excellent lawyer, tried briefly to get out of it, and then accepted.<sup>16</sup>

Adams researched impeachment proceedings and stumbled across removal "by address," a means of removing someone from state office by a two-thirds vote of both houses of the Legislature.<sup>17</sup> It had been used by the Legislature only one time before: in an 1874 removal of a Reconstruction Republican by the newly elected Democratic Legislature. Adams decided that the "address" would avoid committee hearings, a House vote on impeachment, and a separate trial in the Senate and could easily be accomplished in a thirty-day special session.<sup>18</sup> On July 5, the opening day of the special session, Adams and Robert Maloney, a state representative from Dallas,<sup>19</sup>

<sup>15</sup> Former Senator Ralph Yarborough would send a letter to each member of the Legislature asking them to do something to remove Yarbrough.

<sup>16</sup> Adams graciously allowed an extensive interview for this article. His notes and files on the Yarbrough matter, including the tapes, are on file at Baylor University Law School.

<sup>17</sup> It is authorized by Article XV, Section 8 of the Texas Constitution.

<sup>18</sup> The Legislature had been through impeachment proceedings the year before, when Judge O. P. Carillo of Duval County had been impeached and convicted by a unanimous House and Senate.

<sup>19</sup> Maloney would later become a justice on the Fifth Court of Appeals and a federal judge, a position he holds today.

passed resolutions adopting procedures for the removal by address. Notice of the removal rules was served on Justice Yarbrough's office.<sup>20</sup> Notice was further given that the Legislature, sitting in joint session as a committee of the whole, would consider the matter on July 15. Waggoner Carr, who had served as speaker of the house before becoming attorney general, asked that subpoenas be served on Kemp, Rothkopf, Vance, Earle, and, oddly enough, Senator Yarborough.<sup>21</sup>

Proceedings began on July 15 with Waggoner Carr asking for a continuance of the proceedings. Although he had called the legislative action a "kangaroo court" in federal court the day before,<sup>22</sup> he now extolled the virtues of the Texas Legislature and its members. He asked for "not less than" a thirty-day delay in the interest of fairness and justice to his client. Maloney responded that once the special session had adjourned, its ability to proceed was unclear. Adams, speaking more colloquially, argued that if a continuance was granted, "you can just throw out the constitutional provision calling for removal by address."



Although they were sitting as one body, the Senate members and House members cast separate ballots on the motion for continuance. The House members rejected the motion 61 to 87. The Senate members voted for it by a 14 to 13 margin. Because the two bodies were sitting as one committee, it was announced that the motion was denied. Carr then asked Adams and Maloney for a thirty-minute delay. Before a packed and tense Legislature, a letter of resignation signed by Yarbrough was read. The letter stated that he could no longer afford the fight to keep his job, and that it was causing his family too much stress. Adams and Maloney both say that they had no idea Yarbrough would resign until Carr read the letter of resignation. An hour later, Briscoe had accepted the resignation, and the "joint session" of the committee adjourned. The next day, Briscoe appointed Charles Barrow to the Supreme Court.

### **It Still Wasn't Over**

There remained the disbarment case, pending in Houston, and the criminal actions in Travis County. The disbarment case played out in a manner similar to the removal action. The case was set for trial on September 8, 1977 before Bert Tunks, a widely respected retired judge. Yarbrough's attorney, Mike Manness, put the State Bar's special prosecutor, Frank Bean, through extensive discovery fights. He asked for a continuance to allow him to get ready for trial and tried to withdraw when that motion was denied. After his motion was denied, Yarbrough agreed to resign from the State Bar and surrender his license to the Supreme Court. Three days later, an order from the Chief Justice accepted his resignation and acknowledged receipt of his license. Its whereabouts today are unknown.

<sup>20</sup> The Senate Journal shows that the notice was served on Charles Suenard. This is almost certainly Charles Snakard, his briefing attorney.

<sup>21</sup> Earle was asked to bring with him a paper bag that Rothkopf had over his head when he testified before the Travis County Grand Jury.

<sup>22</sup> He had filed an application for a Temporary Restraining Order in federal court, claiming a denial of due process. Judge Thomas Gee denied the motion.

The criminal action would not go forward until January 23, 1978. After a four-day trial, it took a jury twelve minutes to announce a guilty verdict. The conviction was *not* for the offense of solicitation of murder, or even of the car title forgery. Instead, Yarbrough was found guilty of perjury, for having told the grand jury that he had not talked to Rothkopf. Judge Mace Thurmond sentenced him to six years in prison. Yarbrough refused any comment to the press, but his attorney announced that they would ask for a review of the conviction by the Court of Criminal Appeals. Since the sentence was under ten years, Yarbrough was eligible to stay out of the penitentiary, pending appeal. The appellate process began to move forward, albeit glacially. Then things really got bizarre.

### The Runaway Defendant

The conviction was affirmed on appeal on May 20, 1981, forty months after trial. Waggoner Carr was notified that his client was to appear on August 11, 1981, to begin his incarceration. That morning, Carr told Judge Thurmond that he had informed his client in writing and by phone of his obligation, but Yarbrough did not appear. An apologetic Carr informed the court that his client had elected to enroll in a medical school on the Caribbean island of Grenada.

In 1981, many people had not heard of Grenada. It is an island just north of the coast of Venezuela. It had been part of the Federation of West Indies while under British control but had achieved its total independence in 1974. It was best known for producing 40 percent of the world's nutmeg supply and for having a medical school. Yarbrough claimed he had moved there to attend the school. After the conviction was affirmed, he announced that he wasn't coming back to the United States. A *Houston Post* interview with the head of school indicated that Yarbrough was not a stellar student—he flunked biology. After the conviction, the school feared that its graduates would not be licensed to practice medicine in the U.S. if the school sheltered a convicted felon. The school announced that Yarbrough would not receive credit for courses but that he could continue to audit courses.

The State Department, at the request of Senator Bentsen, tried to begin extradition proceedings, but a complication developed. Grenada's first elected prime minister, Sir Eric Gairy, had been overthrown by a Cuban-funded Communist paramilitary force and had fled to New York. The new government sought Gairy's extradition, but the Reagan Administration refused to hand him over—notwithstanding a treaty that Gairy's government had made with the U.S. When Yarbrough's arrest was requested, the government declined to enforce its treaty obligations on the not-unreasonable grounds that the U.S. was refusing to surrender its former prime minister. It is unclear whether Yarbrough knew of this dispute when he selected Grenada as his sanctuary.



The island of Grenada and the Grenadines.  
Public-use image from en.wikipedia.org

District Attorney Ronnie Earle and newly-elected Governor Mark White both wanted Yarbrough returned. Earle came up with an idea. Invitations were sent out to the medical students to a special medical seminar on the neighboring island of St. Vincent and Grenadines. All of the students of the school were given access to a chartered boat to take them there. When Yarbrough got off the boat for the non-existent seminar, he was forcibly taken to the airport. Governor White arranged for the use of H. Ross Perot's private jet, which took Yarbrough to the U.S. Virgin Islands. From there, a U.S. court ordered his return to Texas. White would ask Perot to lend him his jet again, and it was made available. Yarbrough arrived in Texas, shaken but well-tanned, on March 8, 1983, and began his sentence the next day.<sup>23</sup>

Eighteen months later, the Texas Parole Board voted to release Yarbrough. The stated ground for the release was that "he had attended church, sang in the choir, and took college courses." White expressed outrage. "He spent more time on the beach than he did in prison." Earle said that was a decision of the parole board and was not his fault. Chief Justice Greenhill, when contacted, declined to comment.

Yarbrough moved to Florida after his release but got into trouble again. In 1986, he was found guilty in a federal court of bribery of a public official. He was released in March of 1990. Today, at age seventy-two, he is said to be living in Orlando operating a medical billing collection company.

### **Epilogue—Why it Matters**

In the aftermath of Yarbrough's tenure on the Court, a group of lawyers met who saw the electoral potential represented by his election. If Yarbrough, who had no funding or support, could defeat a bar-backed candidate, candidates with better credentials and adequate funding could bring about real changes on the Supreme Court. Starting in 1978, and continuing into the 1990s, efforts were made by various factions of the bar to elect justices to the Texas Supreme Court through organized slates. Indeed, Yarbrough's candidacy and election started, quite accidentally, an era of highly contested elections for the Supreme Court. Whether this era has been good for the Court is beyond the scope of this paper. It is a subject for a legal scholar, not a historian.

Finally, in a bit of history coming full circle, the briefing attorney for Texas Supreme Court Chief Justice Nathan Hecht last year was Donald Kelly Yarborough, the son of the Democratic candidate for Governor of Texas in 1962, 1964, and 1968.

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<sup>23</sup> President Reagan would send the Marines and Navy SEALs into Grenada six months later, on October 25, 1983, to remove the government. He succeeded. Had Perot and White not conned Yarbrough off the island, the Marines might have given him a ride back to Texas six months later—almost certainly not in a private jet.



**JUDGE MARK DAVIDSON** serves as the Multi-District Litigation Judge for all asbestos cases in the State of Texas, named to that position by Chief Justice Wallace Jefferson and the Multi-District Litigation Panel of the Texas Supreme Court. He previously served for twenty years as Judge of the Eleventh District Court in Harris County. This article is a revised version of a paper he presented at the Society's Joint Session at the 2014 Annual Meeting of the Texas State Historical Association in San Antonio.

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# Murder and Mayhem on the Texas Supreme Court: The Shocking Death of Justice William Pierson and the Evolution of the Insanity Defense in Texas

By Gary M. Lavergne<sup>1</sup>

**N**EAR THE INTERSECTION OF THE CAPITAL OF TEXAS HIGHWAY and Ranch Road 2222 are some of the most exclusive neighborhoods in all of Austin, Texas. Over decades, prime real estate at the confluence of the Colorado River and Bull Creek, the realization that the hills offered majestic views of the Hill Country, and the dramatic growth of the University of Texas, the City of Austin, and state government spurred the development of the area. As Fifth Circuit Court of Appeals Senior Judge Thomas Reavley said recently in an interview for this paper, “it is filled with expensive homes today.”<sup>2</sup>



The view from the Colorado River near Cat Mountain—  
not out in the sticks anymore.

But in 1935, the same area was in what many people called “the sticks.” It was a dark and quiet area mostly populated by deer and coated with cedar pollen. Austin was a sleepy college town of about 60,000.<sup>3</sup> The area between Bull Creek and the Colorado River held few homes and they served as modest ranch headquarters connected by narrow roads or quiet, lonely trails and paths. One trail went from Bull Creek Road to the Pecan Experiment Station on the river’s bank. It was there, on April 24, 1935, that an Associate Justice of the Texas Supreme Court and his wife were brutally murdered ... by their own son.<sup>4</sup>

Like every other elected official in Texas at the turn of the twentieth century, William Pierson was a life-long Democrat. He was born in Gilmer, Texas, on March 12, 1871 and was raised by his father in a rural area called Haskell. He graduated from Baylor University in 1896 and completed his education with two years of law school at the University of Texas. Afterwards, Pierson hung his shingle in Greenville in Hunt County. In 1901, he married Lena Haskell and the union produced three children: two sons, named William, Jr. (hereafter referred to as Bill) and Howard, and a daughter named Alice.<sup>5</sup>

<sup>1</sup> [www.GaryLavergne.com](http://www.GaryLavergne.com) © 2014 Gary M. Lavergne. An earlier version of this article appears as *Murder and Mayhem on the Texas Supreme Court Family Matters: The Shocking Death of Justice William Pierson*, available at <http://www.garylavergne.com/TSCHS-Lavergne-PiersonCasePaper-20140307.pdf> (last visited Aug. 20, 2014).

<sup>2</sup> Interview with Hon. Thomas Reavley, Senior Judge, U.S. Court of Appeals for the Fifth Circuit, in Austin, Tex. (Dec. 10, 2013) [hereinafter Judge Reavley].

<sup>3</sup> See CITY OF AUSTIN, POPULATION HISTORY 1840 TO 2014, [http://www.austintexas.gov/sites/default/files/files/Planning/Demographics/population\\_history\\_pub.pdf](http://www.austintexas.gov/sites/default/files/files/Planning/Demographics/population_history_pub.pdf) (last visited Sept. 19, 2014).

<sup>4</sup> See Will Ervin, *The Tragic Case of Justice William Pierson: Justices in the State Cemetery, Part 2*, J. TEX. SUP. CT. HIST. SOC’Y, Fall 2012, at 14.

<sup>5</sup> See David Minor, “Pierson, William,” HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/fpi17> (last visited Sept. 19, 2014).



Justice William Pierson

William Pierson was elected to the Texas House in 1901. As a legislator he is remembered for sponsoring the bills that established a significant part of what is now the second tier of our state university system. What was then called the College of Industrial Arts for Women is now known as the Texas Woman's University. His bills also created the state normal schools that became the University of North Texas at Denton and Texas State University at San Marcos. He served in the House for only one term, returned to his law practice in Greenville, and later ran successfully for a judgeship of the Eighth Judicial District of Texas. During his tenure on the bench his decisions in seven brewery cases impressed Governor Pat Neff, who appointed Judge Pierson as an Associate Justice of the Texas Supreme Court in 1921.<sup>6</sup>

Historian James Haley described Justice Pierson as “another in the growing set of native Texans who replaced aging Confederates born in the Deep South.”<sup>7</sup> Citing memoirs of a Supreme Court clerk, Haley described Justice Pierson as “a kind Christian gentleman, [who was] saddened by his own somewhat frail health, and more [so] by a siege of family problems, not the least of which was his six-year-old younger son, Howard.” The clerk related how, shortly before Pierson's swearing-in, the new Justice lifted young Howard into his chair on the distinguished bench to show him the courtroom. Howard reacted to this show of affection in a “strange and resentful” way. As Haley summarized, “The boy was clearly, in country parlance, not right.”<sup>8</sup>

By the time Howard grew to be a young man of twenty-one, he had a firm reputation among his own family members for having a troubled soul. But as a family, the Piersons had unconditional devotion to the profoundly delusional and disturbed Howard. His delusions included the unshakable belief that he was not, in fact, the son of an accomplished and well-known jurist, but of some renowned scientist. He believed that he had been adopted and that the Piersons were determined to suppress his emergence as a premier scientist who would literally “save the world.” This delusion was Howard's explanation for his father's refusal to fund his education at the University of Texas. Howard was quoted as saying, “To my mind it is just a question of whether my success as a scientist means more to the world than my father.”<sup>9</sup> Howard also believed that his father had always favored Bill and Alice and nurtured their ambitions and education. He hated French people and wanted them exiled to Mars.

Howard eventually realized that one way to secure funds for an education in science was to gain access to a \$17,000 life insurance policy Justice Pierson owned. The problem was that for Howard to receive any of that money his mother, Mrs. Pierson, would have to die: “Of course, I would have to kill my mother, too, or she would get it all.”<sup>10</sup>

In addition to (or because of) his delusions, Howard was a difficult employee in the job he held as an oil

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<sup>6</sup> *Id.*

<sup>7</sup> JAMES L. HALEY, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986*, 163–64, 171–72 (Univ. of Tex. Press 2013).

<sup>8</sup> *Id.*, Haley cites Carl Lyda, at 5 (on file at the Texas Supreme Court Historical Society). The frail health attributed to Justice Pierson was severe rheumatism. There were rumors that the Justice would have to resign as a result. *SAN ANTONIO LIGHT*, Apr. 25, 1935.

<sup>9</sup> One of the most complete descriptions of Howard's delusions is a sworn statement of an unidentified high school and college friend dated April 25, 1935. A redacted copy of the statement is in the Austin History Center. *PIERSON MURDER AF Murders M800 (27)*.

<sup>10</sup> See Austin History Center: *PIERSON MURDER AF Murders M800 (27)*; *HOUSTON POST*, Apr. 25, 1935; *AUSTIN AMERICAN-STATESMAN*, Apr. 25, 1935; *DAILY TEXAN*, Apr. 25, 1935; HALEY, at 163–64, 171–72.

field gauger.<sup>11</sup> Howard's inability to find rewarding and meaningful employment was evidenced by two unstamped, blood-stained letters soon to be found in his pockets that Justice Pierson had written on his behalf. In a pleading tone the letters extolled Howard's progress as a mental patient and stated that he was employable: Howard was "thoroughly sound in character, vigorous in body, industrious, reliable, and loyal."<sup>12</sup>

The extent of Howard's profound mental impairment first manifested itself on April 20, 1935 during a conversation with a close friend. On that clear Saturday afternoon, he discussed in great detail, why he needed to kill his father, why his mother had to die, the different ways he could do it, and how he could get away with the crime. The different methods included poisoning, a staged automobile accident, beating to death with a pipe, and gunshots. Howard admitted he had been planning for the murder of his parents since November of 1934. He had never been violent before and his friend dismissed the entire conversation as another of Howard's harmless delusions.<sup>13</sup>

Howard's friend did not know that, on his way to Austin from a worksite at High Island, south of Beaumont, Howard had driven an hour out of his way to Galveston to purchase a handgun. Four days later, during the afternoon of Wednesday, April 24, 1935, Howard lured his parents into his car for a short drive west of Austin. He brought them to the foot of an area known today as Cat Mountain. He said he wanted to show them Indian artifacts he had discovered along a remote road in the woods. On Bull Creek Road, Howard turned on to a small path that led to the Colorado River.<sup>14</sup>

Near the fork created by the Colorado River and Bull Creek, Howard murdered his parents. The closest inhabited home belonged to a rancher named Will Phillips and was about three hundred yards away. Phillips told the Travis County Sheriff that he heard two shots, followed by a woman's scream, then another shot. A short time later there were two more shots.<sup>15</sup>

Later that night, the Austin Police Department received a call from the Seton Infirmary. Howard Pierson, the twenty-one-year-old son of Associate Justice William Pierson, was being treated for a gunshot wound in the arm.<sup>16</sup> Howard spun a tale of two men stopping the Pierson vehicle and attempting a robbery. As Howard ran, he saw his father fighting one of the robbers and then he heard several gunshots. Howard fought the other robber and was shot in the arm. The robbers eventually fled and Howard, because of his wound, was unable to place his dead parents into his car. So Howard decided to get help and medical attention at the Seton Infirmary.<sup>17</sup>

Even before Howard could bring law enforcement to the crime scene, the Travis County Sheriff's department and the Justice of the Peace had found Justice and Mrs. Pierson. The officers were part of a large search party that included the Governor, members of the Legislature, and members of the Texas Supreme Court. It was a gruesome discovery. Lena Pierson had been shot in the right temple, in the right side of the neck, and in the left thigh. Her glasses lay at her feet. Afterwards, she was dragged about eight feet in front of where Howard

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<sup>11</sup> HALEY, at 163–64, 171–72.

<sup>12</sup> Judge Reavley; HALEY, at 163–64, 171–72; AUSTIN AMERICAN-STATESMAN, Apr. 25, 1935 (quoting Justice Pierson's letter).

<sup>13</sup> Austin History Center, PIERSON MURDER AF Murders M800 (27).

<sup>14</sup> *Id.*; see HOUSTON POST, Apr. 25, 1935; HOUSTON POST, Sept. 8, 1963; AUSTIN AMERICAN-STATESMAN, Apr. 25, 1935; DAILY TEXAN, Apr. 25, 1935; see also HALEY, at 163–64, 171–72.

<sup>15</sup> Some of the best reporting of this tragic story was done by a young University of Texas Journalism student named Walter Cronkite, who was reporting for the *Daily Texan*. DAILY TEXAN, Apr. 25, 1935.

<sup>16</sup> HALEY, at 163–64, 171–72.

<sup>17</sup> See Austin History Center: PIERSON MURDER AF Murders M800 (27); HOUSTON POST, Apr. 25, 1935; HOUSTON POST, Sept. 8, 1963; AUSTIN AMERICAN-STATESMAN, Apr. 25, 1935; DAILY TEXAN, Apr. 25, 1935; see also HALEY, at 163–64, 171–72.

had parked his car, in a rut created by the tires of Howard's car. Justice William Pierson was about six feet away. He had been shot in the right temple, through the left hand, and in the right shoulder.<sup>18</sup>

The news immediately captured national attention, especially after Governor James Allred, who had been sworn in as Governor by the now deceased Justice William Pierson, became personally involved in the investigation. "I have lost a warm friend and Texas has lost a worthy citizen. It is too terrible to comprehend," said the Governor.<sup>19</sup>

But at police headquarters Howard's story started to unravel. District Attorney James P. Hart, as well as Sheriff Lee O. Allen and his deputies, grilled Howard and demanded explanations for inconsistencies. The officers were also suspicious of the extraordinarily detailed descriptions of the suspects. Hart confronted Howard by saying, "If you think you have committed the perfect crime, you are a fool, because these officers will find out about it." Early the next morning, after about nine hours of interrogation, Howard confessed to shooting himself in the arm to cover up his murders of his parents. He admitted that he shot his mother first "because she was closest to me." Then he led officers to the crime scene and other locations where the police retrieved the murder weapon, empty shells, and his parents' effects.<sup>20</sup>

On the day before the funeral, Justice and Mrs. Pierson lay in state in the Texas Supreme Court. The public display offended Clerk Carl Lyda, who found it "the most ill-conceived and obnoxious experience during the time I was with the Court—and probably of my whole life.... [D]uring that day and far into the night thousands of total strangers filed by to view their remains. Most of these people had never heard of the Piersons before the news of their tragic deaths ... and were impelled strictly by morbid curiosity and not by sympathy or any decent concern." Services were held at the University Baptist Church only a few blocks from the Pierson home. They were buried in the Texas State Cemetery.<sup>21</sup>

As soon as law enforcement officials were able to get a confession, those who knew the Pierson family understood that, for some time, Howard had been "not right." What was shocking was that Howard had become so violent and dangerous. His quiet demeanor and small stature did not fit the enormity of the crime he had committed. A close family friend, Dr. Joe Wooten, who had been referred to at the time as a "noted alienist," visited the jail and spent time with Howard. He diagnosed the prisoner as suffering from dementia praecox, or premature dementia. It was often described in news reports as a form of schizophrenia. It is a "chronic, deteriorating psychotic disorder characterized by rapid cognitive disintegration, usually beginning in the late teens or early adulthood."<sup>22</sup> Dementia in a person so young is extremely rare. Dr. Wooten immediately recommended that Howard be removed from jail and placed in a state hospital for observation.<sup>23</sup>

<sup>18</sup> AUSTIN AMERICAN-STATESMAN, Apr. 28, 1935.

<sup>19</sup> SAN ANTONIO EVENING NEWS, Apr. 25, 1935 (quoting Governor Allred).

<sup>20</sup> See SAN ANTONIO EVENING NEWS, Apr. 25, 1935; Austin History Center: PIERSON MURDER AF Murders M800 (27); HOUSTON POST, Apr. 25, 1935; HOUSTON POST, Sept. 8, 1963; AUSTIN AMERICAN-STATESMAN, Apr. 25, 1935; DAILY TEXAN, Apr. 25, 1935; see also HALEY, at 163–64 and 171–72.

<sup>21</sup> See TEXAS STATE CEMETERY, WILLIAM PIERSON, [http://www.cemetery.state.tx.us/pub/user\\_form.asp?pers\\_id=2104](http://www.cemetery.state.tx.us/pub/user_form.asp?pers_id=2104) (last visited Sept. 19, 2014); HALEY, at 163–64, 171–72.

<sup>22</sup> "Alienist" is now an outdated and obscure term usually referring to a psychiatrist who specializes in legal applications of psychiatry. See MERRIAM WEBSTER, "ALIENIST," <http://www.merriam-webster.com/dictionary/alienist> (last visited Dec. 18, 2013). For more information on Dementia Praecox, see [http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Dementia\\_praecox.html](http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Dementia_praecox.html).

<sup>23</sup> One of the better treatments of the Pierson murders is by Susan P. Baker in her book, *Murdered Judges of the 20th Century and Other Mysterious Deaths*, SUSAN P. BAKER, MURDERED JUDGES OF THE 20<sup>TH</sup> CENTURY AND OTHER MYSTERIOUS DEATHS (Pale Horse Pub. 2003). The chapter on Pierson is available at <http://susanpbaker.com/html/excerpt3.html>.



Two days after the murders, the spotlight fell on Justice Pierson's son Howard.<sup>24</sup>

Howard's cause was given a tremendous boost when both his brother and sister publicly supported Dr. Wooten's recommendation for treatment rather than punishment. For the next 40 years, the story of Bill and Alice Pierson and their selfless devotion to the brother who killed their parents is more than remarkable. Bill and Alice Pierson saved their brother from a lifetime in prison. For decades they saw to his best interests, protected his inheritance, and provided for his legal defenses ... and no one ever remembers any gratitude from their stoic brother.<sup>25</sup>

The Travis County District Attorney, James P. Hart, however, could not ignore the circumstances of the deaths. National media outlets covered the story in great (often gruesome) detail and the case needed to be adjudicated through a fair and legal

process. That process began with indictments for two counts of murder. But before any trial could take place, the presiding judge arranged for a competency hearing. Prior to that hearing, a battery of physicians examined Howard and there is no record or account of any of them concluding that he was competent to stand trial. During that time, newspaper reporters had access to Howard and the reports they filed are a heartbreaking tale of Howard's confusion and delusion. Several observers noted that Howard showed no emotion or remorse; it was like he hadn't killed anyone, but instead was removing inanimate impediments to his ascension into the Pantheon of scientific saviors. One of the physicians testified that it was unlikely that Howard would ever recover from his present condition.<sup>26</sup>

Courts pay close attention to the expertise and testimony of physicians, but those physicians do not determine the sanity of a person accused of a crime. This is because insanity is not an illness—it is a legal condition. Renowned criminal defense attorney Frank Jackson of Dallas, Texas, in what would become a landmark murder case fifty years later (*Texas v. Belachheb*, 291<sup>st</sup> Judicial District, 1984), explained the concept during his summation:

Insanity is not a medical term. Insanity ... is a legal definition for a complex psychiatric phenomenon, and that's what we are dealing with. We are dealing with a real ... vital living concept in the law, and until it's taken out of law, ladies and gentlemen, jurors like you, lawyers like myself, and lawyers like [the prosecutors] are going to have to deal with it no matter how much they don't like it.<sup>27</sup>

<sup>24</sup> *The Mexia Weekly Herald* (Mexia, Tex.), Vol. 37, No. 18, Ed. 1 Friday, April 26, 1935, Newspaper, April 26, 1935; digital images, <http://texashistory.unt.edu/ark:/67531/metaph299399/?q=the%20mexia%20weekly%20herald%20vol%2037%20no%2018>, (accessed September 22, 2014), University of North Texas Libraries, The Portal to Texas History, <http://texashistory.unt.edu>; crediting Gibbs Memorial Library, Mexia, Texas.

<sup>25</sup> Judge Reavley.

<sup>26</sup> BAKER, at Ch. 12, available at <http://susanpbaker.com/html/excerpt3.html> (last visited Sept. 19, 2014).

<sup>27</sup> GARY M. LAVERGNE, *WORSE THAN DEATH: THE DALLAS NIGHTCLUB MURDERS AND THE TEXAS MULTIPLE MURDER LAW 199–200* (Univ. of N. Tex. Press 2003) (quoting Frank Jackson).

The lead prosecutor in the case, Dallas County Assistant District Attorney Norman Kinne, added, “The people of Texas decide what’s criminal and what’s not and what’s sane and what’s insane. They send legislators [to the Capitol] to do that.”<sup>28</sup>

In October of 1935, the people, represented by the State District Court, found Howard Pierson to be of unsound mind, and he was ordered committed to the Rusk State Hospital for the Criminally Insane. It was almost a foregone conclusion. There had been no meaningful testimony to the contrary, and probably most significant of all, Bill and Alice Pierson strongly supported their brother with statements that the Pierson family had known for many years that Howard was mentally ill. Only days after the brutal murder of his parents, after visiting Howard in the county jail, Bill said, “It was pitiful. I told him that we had only sympathy for him.” The two murder indictments against him were left pending.<sup>29</sup>

One would expect this sad story to have ended by Howard, who was believed to have incurable dementia, living and dying in the State Hospital. Instead, it was the beginning of decades of escapes and adventures. He escaped twice and spent nearly five years on the run. His first recapture was delayed by the remarkable revelation that he had never been fingerprinted while a murder suspect. The local sheriff explained that Howard had been a member of such a prominent family that fingerprinting would have been an unnecessary indignity.<sup>30</sup>

Howard’s first escape took place during the evening of April 15, 1938. The next day, during a routine morning checkup, hospital guards reported him missing. He had stuffed a roll of clothes under the covers of his bunk to deceive the guards and make his escape. He had lowered street clothes down a drainpipe to change into and blend in with the free world. Hospital officials surmised that he had managed to secure a key to the facility, unlocked the door, and simply walked out of the facility. He would not be located for another two and a half years—in Minneapolis—over 1,200 miles away. He was arrested by a Minneapolis police captain who recognized him from a wanted poster.<sup>31</sup>

His second escape took place on December 9, 1952. On this occasion, he and a cellmate named Gilbert Wagner used tied bed sheets to climb out of their third floor window to freedom. He would not be discovered for almost three years, and the only reason he was found was because he admitted to a psychiatrist in Syracuse, NY that he was an escaped mental patient from Texas. By that time Howard had tired of running from the law and had resigned himself to life in a state hospital for the mentally insane. His brother Bill, who had been warned that Howard might want to harm him and his sister as he had his parents, responded with his usual tenderness: Howard should be treated kindly at a state hospital “where he cannot escape.”<sup>32</sup>

Howard returned to Rusk State Hospital, where he remained until June 1963, when the superintendent of the hospital, Dr. Charles Castner, certified that Howard was no longer medically insane. Castner argued that the hospital no longer had the legal authority to detain him. In a letter to Judge Herman Jones of the 53<sup>rd</sup> District Court, Castner requested that, “[i]nasmuch as we can no longer confine Howard Pierson in this hospital, it will be appreciated if you would require the Sheriff of your county to take Howard Pierson from this hospital and place him in the proper custody.”<sup>33</sup>

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<sup>28</sup> *Id.* at 218 (quoting Norman Kinne).

<sup>29</sup> HOUSTON POST, Apr. 28, 1935 (quoting Bill Pierson).

<sup>30</sup> See BAKER, available at Ch. 12, <http://susanpbaker.com/html/excerpt3.html> (last visited Sept. 19, 2014); AUSTIN AMERICAN-STATESMAN, June 13, 1963.

<sup>31</sup> Unidentified clipping in Austin History Center, in PIERSON MURDER AF Murders M800 (27).

<sup>32</sup> *Id.*; AUSTIN AMERICAN-STATESMAN, June 13, 1963.

<sup>33</sup> AUSTIN AMERICAN-STATESMAN, June 13, 1963.

But again, doctors do not determine legal sanity. District Attorney Tom Blackwell bluntly informed the public that, “[a] hospital superintendent can’t adjudge a person sane. Adjudication is up to a jury.”<sup>34</sup> That occurred in another sanity hearing in September of 1963, where the district court found Howard competent to stand trial for the murder of his parents, which had taken place 28 years earlier. He was released on a \$15,000 bond.<sup>35</sup>



Hon. Thomas M. Reavley

As he had in 1935, Bill Pierson arranged for Howard’s defense. He retained the services of a law firm that included Thomas Morrow Reavley, a gifted, Harvard-educated attorney.<sup>36</sup> Reavley represented Howard in both the sanity hearing and the murder trial. It was an odd combination of legal proceedings insofar as Reavley’s goal was twofold: first, to establish Howard’s sanity in the 1963 hearing, and second, his insanity in 1935. In other words, he sought to prove that Howard was legally sane in 1963 and was competent to stand trial, but that he had been insane at the time he committed the crime.<sup>37</sup>

Not surprisingly, the trial became one of the most covered events of the day, and would likely be remembered in much greater detail had the JFK assassination not occurred only a little later. In an effort to protect his troubled client and the rest of the Pierson family, Reavley offered to house Howard, who had been released from custody, and Bill in a lake house Reavley owned in Austin. “I suggested it because they needed to avoid the public and publicity—and maybe develop a relationship. They did not stay long and Bill told me that Howard was too difficult.”<sup>38</sup>

The murder trial took place in November of 1963 amid media frenzy. District Attorney Blackwell, like District Attorney Hart before him in 1935, decided to adjudicate the pending indictments. He apparently felt he could not avoid taking action on such a high-profile murder case, but he evidently approached the case believing that Howard would ultimately be freed in some way or acquitted outright. He stated publicly that the trial would be “over ... in time for deer shooters and football fans.” Reavley lined up an impressive cadre of doctors to testify to Howard’s diminished mental state. But Reavley also argued that his client was no longer dangerous because, after decades in a mental hospital, Howard was “burned out” and not a threat to anyone. Reavley also used Howard’s voluminous writings about himself, which made evident that Howard was delusional and “not right.” District Attorney Blackwell quietly offered Howard a plea bargain in which Howard would plead guilty but would be set free as a result of a “time served” sentence. Bill flatly rejected the offer when he found out that under such an arrangement Howard would have to forfeit his share of his father’s estate. The result of the trial was a comprehensive victory for Howard Pierson, who was declared legally sane in September of 1963, but was found not guilty by reason of insanity because he was legally insane in April of 1935. The seven-man five-woman jury deliberated only five hours.<sup>39</sup>

<sup>34</sup> *Id.* (quoting Tom Blackwell).

<sup>35</sup> *Id.*

<sup>36</sup> See TARLTON LAW LIBRARY: JAMAIL CENTER FOR LEGAL RESEARCH, JUSTICES OF TEXAS 1836–1936: THOMAS MORROW REAVLEY, <http://tarlton.law.utexas.edu/justices/profile/view/85> (last visited Sept. 19, 2014). Reavley, who served on the Texas Supreme Court from 1968 to 1977, is now a Senior Judge of the United States Court of Appeals for the Fifth Circuit. The Pierson case remains the only insanity case he has ever represented.

<sup>37</sup> Judge Reavley.

<sup>38</sup> Email from Thomas Reavley, Senior Judge, U.S. Court of Appeals for the Fifth Circuit, to author (Dec. 18, 2013).

<sup>39</sup> *Id.*; see also AUSTIN AMERICAN-STATESMAN, Nov. 16, 1963.

Within a week following the not guilty verdict, Bill Pierson petitioned the Court to release that portion of Justice Pierson's estate that would have gone to Howard back in 1935. Back then, it would have been one-third of an estate worth about \$50,000. The extreme irony is that one of Howard's many delusions was that he would become the beneficiary of one-third of a \$17,000 life insurance policy on his father—roughly the equivalent of his share of the actual estate. For nearly thirty years Bill and Alice Pierson had maintained Howard's share of their parents' estate in a trust, and because of numerous real estate and other investments it became worth over \$800,000. (Today such an estate would be worth many millions.) Such devotion to the brother who killed their parents is even more remarkable since, for decades, Bill and Alice sent Howard money and gifts while he was confined in the State Hospital. As noted earlier, Howard was never known to show any gratitude.<sup>40</sup>

Howard Pierson understood that his notoriety precluded his living a normal life in Austin under his own name. He lived out the rest of his life in Seattle, Washington as Robert Hamilton, and died of an accidental drowning in the 1970s. His inheritance remained in a high-earning trust account, so he left a hotly-contested estate valued in excess of \$1,000,000.<sup>41</sup>

The case of Howard Pierson is a complex one, not only because it spanned almost three decades and had many unexpected twists and turns, but also because it touched on a range of thorny legal and moral issues. His is more than just a tragic story of a profoundly disturbed young man who became violent and murdered his parents. He is an example of the wrenching choices we often face when deciding, as an enlightened and civilized people, how we are to deal with the mental health of our fellow citizens who kill. It is entirely conceivable that some other person, under similar mental circumstances, would have had to face a vigorous prosecution including far more rigorous questions of premeditation (he admitted to beginning his plans for murder as early as November of 1934) and an attempt to cover-up a crime (his false statements and self-inflicted gunshot wound). He lured his parents to an area where he was able to shoot his father two times and his mother three times. Most haunting of all, he knew what he was doing and tried to cover it up.

In the years since Texas courts decided, twice, that Howard Pierson had been insane at the time of his parents' murders, several nationally publicized cases brought the plea into disrepute.<sup>42</sup> In 1978, San Francisco municipal supervisor Dan White killed Mayor George Moscone and fellow supervisor Harvey Milk. White won a diminished-capacity defense that made him guilty of manslaughter rather than murder because his lawyers convinced the jury that he was suffering from untreated depression evidenced by his degeneration from a health-conscious individual into a junk-food junkie. White's infamous "Twinkie defense" symbolized the absurdities to which defense attorneys would go to obtain acquittals by reason of insanity.<sup>43</sup> Sentenced to seven years in prison for killing two civic leaders, he received parole in 1984 after serving just five years in prison.<sup>44</sup>

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<sup>40</sup> See Judge Reavley; BAKER, Ch. 12, available at <http://susanpbaker.com/html/excerpt3.html> (last visited Sept. 19, 2014); AUSTIN AMERICAN-STATESMAN, Nov. 21, 1963.

<sup>41</sup> BAKER, Ch. 12, available at <http://susanpbaker.com/html/excerpt3.html> (last visited Sept. 19, 2014).

<sup>42</sup> *Editor's Note*: Texas courts have worked to balance the rights and interests of the mentally ill with the rights and interests of other members of society since at least 1888. In *Pearson v. Cox*, 71 Tex. 246, 249-50, 9 S.W. 124, 12526 (1888), for example, Texas Supreme Court Justice Walker ruled that parties seeking to set aside a conveyance of land based on the grantor's insanity had to repay all of the money they had received when they petitioned a court to rescind a land sale, ruling that, "[h]e that seeks equity must do equity." *Id.*, 71 Tex. at 249-50, 9 S.W. at 125-26.

<sup>43</sup> See LAVERGNE, at 151, 217, 219 n.29; DOUGLAS LINDER, FAMOUS AMERICAN TRIALS: THE JOHN HINCKLEY TRIAL, 1982, <http://law2.umkc.edu/faculty/projects/ftrials/hinckley/HINCKLEY.HTM> (last visited Sept. 19, 2014).

<sup>44</sup> See John Geluardi, *Dan White's Motive More About Betrayal Than Homophobia*, SF WEEKLY, Jan. 30, 2008. On October 21, 1985, Dan White killed himself. See LAVERGNE, at 219 n.30.

On March 30, 1981, John Hinckley, Jr. wounded President Ronald Reagan, Press Secretary Ron Brady, a Secret Service agent and a policeman while attempting to assassinate the President.<sup>45</sup> Hinckley's defense team convinced a Washington, D.C. jury that Hinckley shot the President in a delusional effort to impress actress Jodi Foster, whom Hinckley had stalked since watching her film *Taxi Driver* fifteen times the summer it debuted.<sup>46</sup> In a letter sent to Jodi Foster shortly before the assassination, John Hinckley, Jr. announced,

Jodie, I would abandon this idea of getting Reagan in a second if I could only win your heart and live out the rest of my life with you, whether it be in total obscurity or whatever. I will admit to you that the reason I'm going ahead with this attempt now is because I just cannot wait any longer to impress you. I've got to do something now to make you understand, in no uncertain terms, that I am doing all of this for your sake!<sup>47</sup>

Eighteen years after the shooting, John Hinckley left intensive psychiatric treatment at St. Elizabeth's Hospital in Washington, D.C. on his first unsupervised furlough. Hinckley lost that privilege one month later, after guards discovered in Hinckley's room a book about Jodi Forster that demonstrated she was still the subject of a continuing obsession.<sup>48</sup>

An ABC News Poll taken the day after the Hinckley verdict revealed that 83 percent of those surveyed believed that "justice was not done" during the Hinckley trial. Congress reacted to a nationwide storm of criticism by enacting the Insanity Defense Reform Act of 1984.<sup>49</sup> The statute severely limited the availability of the defense in future federal proceedings and resulted in the promulgation of Federal Rule of Evidence 704(b).<sup>50</sup> Half of the states, including Texas, soon imposed similar restrictions.<sup>51</sup>

The Texas Legislature reacted by severely tightening the insanity defense. Before the Hinckley acquittal, a jury had to find either that: (1) a defendant had a mental illness that prevented him from knowing wrong from right (the *M'Naghten Rule*, which originated from Parliament's adverse reaction to the acquittal given psychotic Daniel M'Naghten after his 1843 assassination attempt on British Prime Minister Robert Peel),<sup>52</sup> or (2) the defendant

<sup>45</sup> See LAVERGNE, at 151, 217, 219 n.29; Linder.

<sup>46</sup> See LAVERGNE, at 151, 217, 219 n.29; see also UNIV. OF MO.–KS. CITY SCH. OF L., JOHN W. HINCKLEY, JR., A BIOGRAPHY, <http://law2.umkc.edu/faculty/projects/ftrials/hinckley/HBIO.HTM> (last visited Sept. 19, 2014); *Larry King Live: Remembering the Assassination Attempt on Ronald Reagan* (CNN television broadcast Jan. 11, 1990).

<sup>47</sup> Letter from John W. Hinckley, Jr. (March 30, 1981), available at UNIV. OF MO.–KS CITY SCH. OF LAW, <http://law2.umkc.edu/faculty/projects/ftrials/hinckley/jfostercommun.HTM> (last visited Sept. 20, 2014).

<sup>48</sup> See LAVERGNE, at 219 n.29 (citing PBS, AMERICAN EXPERIENCE, BIOGRAPHY: JOHN HINCKLEY, JR., <http://www.pbs.org/wgbh/american-experience/features/biography/reagan-hinckley/> (last visited Sept. 19, 2014)).

<sup>49</sup> Pub. L. No. 98–473, § 402, 98 Stat. 1837, 2057 (codified at 18 U.S.C. § 20). The federal Insanity Defense Reform Act changed the previous statute by, *inter alia*, requiring that a defendant prove that he suffered from a "severe" mental disease while eliminating the American Law Institute's volitional insanity defense. The new federal insanity-defense statute required a defendant to prove insanity by clear and convincing evidence and barred the admissibility of opinion testimony as to the ultimate issue of insanity.

<sup>50</sup> See FED. R. Evid. 704(b) (1984) ("In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone."); *United States v. Freeman*, 804 F.2d 1574, 1575 (11th Cir. 1986) (describing the statute's changes to the law).

<sup>51</sup> See Kimberly Collins, Gabe Hinkebein, and Staci Schorgl, *The John Hinckley Trial and Its Effect on the Insanity Defense*, available at <http://law2.umkc.edu/faculty/projects/ftrials/hinckley/hinckleyinsanity.htm> (last visited Sept. 19, 2014); LAVERGNE, at 151, 162 n.5; see also Linder.

<sup>52</sup> See *M'Naghten's Case* (1843), 10 Clark & Fennelly 200, 8 Eng. Rep. 718 (H.L.). See Brian D. Shannon, *The Time is Right to Revise the Texas Insanity Defense: An Essay*, 39 TEX. TECH L. REV. 68, 71–72 (2007).

was incapable of controlling his actions or conforming his conduct to the requirements of the law (the “volitional prong” of the insanity defense).<sup>53</sup> In August 1983, soon after the Hinckley trial, the Texas Legislature amended the law to eliminate the “volitional prong” of the insanity defense.<sup>54</sup>

But acting “crazy” is not the same as being legally “insane.” By reducing the definition of insanity in Texas to the British Parliament’s minimalist 1843 “Right/Wrong” Rule, the Texas Legislature effectively disallowed an insanity defense for anyone who engaged in preparation, execution, and flight during the criminal act being prosecuted.<sup>55</sup> Howard Pierson and his attorneys would have faced a far greater challenge proving an insanity defense after 1983, when competent evidence of Howard’s preparation and execution of his murderous plans would have made a guilty verdict much more likely.<sup>56</sup>

Although high profile cases like Justice Pierson’s murder often give the public the illusion that criminals can make outlandish claims into a defense—and that the defense often works—that is not the way the real world works. In 1980, more than 80,000 criminal cases were heard in Texas, but only 20 resulted in verdicts of not guilty by reason of insanity, that is, 2.5 one-hundredths of one percent.<sup>57</sup> The twice-successful invocation of the insanity defense in Howard Pierson’s prosecutions was the exception to a much larger rule. In the end, insanity is a rather subjective condition.

All we will ever know was that Howard was “not right.”

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<sup>53</sup> See RITA J. SIMON & DAVID E. AARONSON, *THE INSANITY LEGAL DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA* 12–14 (1988) (discussing the *M’Naghten* standard).

<sup>54</sup> See LAVERGNE, at 151–52, 162 n.25.

<sup>55</sup> Texas courts adopted the *M’Naghten* test from English courts after its 1843 enactment by Parliament. See Shannon, 39 TEX. TECH L. REV. at 71–72. The *M’Naghten* test governed insanity proceedings in Texas criminal courts until 1973, when the Legislature enacted a new insanity defense based on the American Law Institute’s (ALI) 1962 Model Penal Code, which included a “volitional” insanity defense that remained Texas law through 1983. See *id.* at 72.

<sup>56</sup> LAVERGNE, at 152. Texas now codifies its insanity defense in Chapter 46C of the Texas Code of Criminal Procedure Annotated. As a result of the Seventy-ninth Legislature’s enactment of Senate Bill 837, effective September 1, 2005, Article 46C.151 of the Code states that “the issue of the defendant’s sanity shall be submitted to the jury only if the issue is supported by competent evidence,” and “[i]f the issue of the defendant’s sanity is submitted to the jury, the jury shall determine and specify in the verdict whether the defendant is guilty, not guilty, or not guilty by reason of insanity.” See generally Ray Farabee & James L. Spearly, *The New Insanity Law in Texas: Reliable Testimony and Judicial Review of Release*, 24 S. TEX. L. REV. 671 (1983).

<sup>57</sup> See LAVERGNE, at 218, 219 n.32 (citing DALLAS TIMES HERALD, Oct. 28, 1984).



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# On Trial: Reasonable Doubt and the Rights of the Juvenile Offender

By Rachel Palmer Hooper

*It is more important that innocence be protected than it is that guilt be punished, for guilt and crimes are so frequent in this world that they cannot all be punished. But if innocence itself is brought to the bar and condemned, perhaps to die, then the citizen will say, 'whether I do good or whether I do evil is immaterial, for innocence itself is no protection,' and if such an idea as that were to take hold in the mind of the citizen that would be the end of security whatsoever.*

John Adams—Argument for the Defense in *Rex v. Wemms*<sup>1</sup>

**E**ACH NEW PROSECUTOR at the Harris County District Attorney's Office completes a rotation through the Office's Juvenile Division because of the importance of the juvenile justice system to the administration of criminal justice in the county. The Division typically staffs Harris County's three juvenile courts with three prosecutors who handle varying degrees of cases. During my tenure at the District Attorney's Office, I made four rotations through the Juvenile Division. Although most prosecutors view the rotation as a form of cruel and unusual punishment, time spent there is important because of the system's impact on the lives of children and each child's family. It was during this time that I first learned about Justice Jack Pope's significant role in improving the juvenile justice laws not only in Texas but throughout the United States.

During my first rotation through the Juvenile Division, a long-tenured defense attorney told me that he appreciated the juvenile courts because the courtroom encounter is structured to serve the best interests of the child. But, that begs the question: what does "best interests of a child" mean?



Harris County Juvenile Justice Center, Houston, Texas.  
Photo by David A. Furlow, 2014

<sup>1</sup> Suffolk Superior Court, Boston (Dec. 3–4, 1770), in *THE ADAMS PAPERS DIGITAL EDITION* (C. James Taylor ed.), <http://rotunda.upress.virginia.edu/founders/ADMS-05-03-02-0001-0004-0016> (last visited Aug. 3, 2014) (digitizing JOHN ADAMS, 3 THE LEGAL PAPERS OF JOHN ADAMS, Cases 63 and 64).

The Republic of Texas adopted English common law, which included a limitation on the criminal responsibility of children.<sup>2</sup> At that time, the age of responsibility began at eight years old.<sup>3</sup> The principle of the age of responsibility can be linked to the age of witness competency.<sup>4</sup>

Juvenile court legislation was first enacted in 1907 with the solitary aim that the “interests of the child” should “at all times be the object in view of [the] proceeding against it.”<sup>5</sup> The Texas Legislature then created and deleted a series of juvenile laws before it began to develop some of the concepts that we retain today. The age of criminal responsibility was raised to age seventeen in 1918, and all criminal procedures in juvenile cases were replaced with special civil procedures in 1943.<sup>6</sup>

With a focus on the interests of children, the Fifty-first Texas Legislature enacted the Gilmer-Aikin Laws in 1949, which established the Texas Youth Development Council (TYDC) as part of a statewide reorganization of the public education system.<sup>7</sup> The TYDC morphed into the Texas Youth Council in 1957 and finally became the Texas Youth Commission (TYC) in 1983.<sup>8</sup> In 1981, the Legislature created the Texas Juvenile Probation Commission (TJPC) to create uniform standards for juvenile probation departments throughout the state.<sup>9</sup> Following a vicious, agency-wide scandal within TYC in 2011, the Legislature merged the TYC and TJPC into one state agency: the Texas Juvenile Justice Department.<sup>10</sup>

The Legislature wrote the original version of Title III of the Texas Family Code in 1973. More than two decades later, in 1995, the Legislature amended the law to make significant reforms to juvenile law and procedure. The aim of the reforms was to provide for the safety and protection of the public, promote the concept of punishment and accountability, and provide treatment and rehabilitation of the juvenile offender.<sup>11</sup>

As in the adult criminal justice system, the juvenile delinquency proceeding is bifurcated. The fact-finder is first asked to determine whether the juvenile has engaged in delinquent conduct, and second to determine whether the child is in need of supervision. In a juvenile prosecution, the State is now required to prove its case to a fact-finder by the “beyond a reasonable doubt” standard.

<sup>2</sup> Martin A. Frey, *The Evolution of Juvenile Court Jurisdiction and Procedure in Texas*, 1 TEX. TECH L. REV. 209, 209 (1970).

<sup>3</sup> See *id.* at 209–10.

<sup>4</sup> *Freasier v. State*, 84 S.W. 360, 361 (Tex. Crim. App. 1904).

<sup>5</sup> See Acts 1907, 30th Leg., R.S., ch. 65, §§ 1–10, 1907 TEX. GEN. LAWS 137, 137–40 (codified as TEX. REV. CIV. STAT. ANN. tit. 33b, §§ 1–10).

<sup>6</sup> In 1943, the Texas Legislature adopted a new definition for the delinquent child. See Acts 1943, 48th Leg., R.S., ch. 204, § 3, 1943 TEX. GEN. LAWS 313 (codified as TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3). In 1965, the Legislature amended section 3, but the acts constituting delinquency remained unchanged. See Acts 1965, 59th Leg., R.S., ch. 577, § 1, 1965 TEX. GEN. LAWS (codified as TEX. REV. CIV. STAT. ANN. art. 2338-1 § 3). Under the 1925 Code of Criminal Procedure, the juvenile court proceedings were classified as criminal. In 1925, the existing code and revised statutes were repealed by Texas Code of Criminal Procedure 181. In 1943, the Legislature enacted new legislation in the Texas Code of Criminal Procedure and the revised civil statutes related to delinquent children were repealed and a new statutory procedure was created. See *In re Dendy*, 175 S.W.2d 297 (Tex. Civ. App.—Amarillo 1943), *aff’d sub nom. Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944).

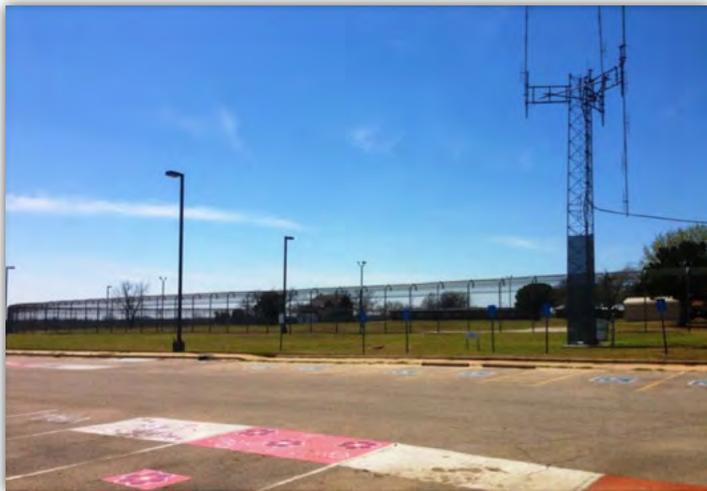
<sup>7</sup> See Charles Christopher Jackson, “Texas Youth Commission,” HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/mdt35> (last visited Aug. 3, 2014).

<sup>8</sup> See EVERETTE B. PENN & JENNIFER TANNER, TEXAS AND ITS JUVENILE JUSTICE SYSTEM ch. 1, available at (<http://www.sagepub.com/juvenilejustice7e/study/state/texas/TexasJuvenileJusticeSuppch01.pdf>) (last visited Aug. 3, 2014).

<sup>9</sup> See *id.*

<sup>10</sup> See Maurice Chammah, *Closing Corsicana: Lessons from a Juvenile Lock-Up*, <http://www.texastribune.org/2014/02/12/corsicana-closure-lessons-juvenile-lock-/> (last visited Aug. 3, 2014) available on the Texas Juvenile Justice Foundation website at <http://www.tjjd.texas.gov>.

<sup>11</sup> TEX. FAM. CODE § 51.01.



Corsicana State Home Residential Treatment Center, a facility of the Texas Youth Commission. Photo by David A. Furlow, 2014

“Reasonable doubt” is one of the basic tenets of America’s criminal justice system and a familiar phrase in American culture. *Law and Order*’s Jack McCoy spent years convincing juries that his evidence met this elevated legal standard, and the term is the title of rapper Jay Z’s inaugural album. While the reasonable doubt standard of proof is now viewed as fundamental to every criminal trial, this was not always so.

Although the term, “reasonable doubt,” is not included in the United States Constitution, the United States Supreme Court has held that the Fifth and Fourteenth Amendments protect the accused from conviction “except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”<sup>12</sup> The Court requires a

criminal trial court judge to instruct a jury on the standard of proof.<sup>13</sup> But the Court has never directed trial courts to use any specific set of words to communicate the reasonable doubt concept to juries.

American courts have pondered a Shakespearean question: to define or not to define. In 1994, the U.S. Supreme Court held that a definition of “reasonable doubt” is not required.<sup>14</sup> Nonetheless, a federal jury in Texas will receive a definition of reasonable doubt based on Fifth Circuit practice and precedent:<sup>15</sup>

A “reasonable doubt” is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in making the most important decisions of your own affairs.<sup>16</sup>

If federal courts in Texas can define the “beyond a reasonable doubt standard,” so can state courts.

In its 1991 decision in *Geesa v. State*, the Texas Court of Criminal Appeals approved a definition of reasonable doubt that a trial judge could use in conducting a jury trial.<sup>17</sup> And, then, nine years later, in 2000, the same court reversed its *Geesa* decision and held that not defining the term is the best practice in Texas.<sup>18</sup>

The story of how the reasonable doubt standard came to be applied to juvenile cases in Texas is one with interesting ties to a case decided in 1969 and then reversed in 1970: *State v. Santana*.<sup>19</sup> The story began with the landmark juvenile law decision in *In re Gault*, which was handed down by the U.S. Supreme Court on May

<sup>12</sup> *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>13</sup> *See Victor v. Nebraska*, 511 U.S. 1, 14–16 (1994).

<sup>14</sup> *See id.*

<sup>15</sup> FIFTH CIR. PATTERN CRIM. JURY INSTR. NO. 1.05 (Thompson Reuters: 5th Cir. Dist. Judges Ass’n 2012) (<http://www.lb5.uscourts.gov/juryinstructions/fifth/crim2012.pdf>) (last visited Aug. 4, 2014), at 12.

<sup>16</sup> *Id.*

<sup>17</sup> *Geesa v. State*, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991).

<sup>18</sup> *Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000).

<sup>19</sup> *State v. Santana*, 444 S.W.2d 614 (Tex. 1969), *vacated*, 397 U.S. 596 (1970).

15, 1967.<sup>20</sup> In *Gault*, the State of Arizona accused a fifteen-year-old boy, Gerald Gault, with making an obscene telephone call to a female neighbor, which was a criminal offense if committed by an adult.<sup>21</sup>

Justice Black wrote an opinion that underscores the importance of providing due process to juvenile delinquents.<sup>22</sup> He opined that due process “is the primary and indispensable foundation of individual freedom” and that “procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting ... data that life and our adversary methods present.”<sup>23</sup>

Two years after *Gault*, on July 23, 1969, the Texas Supreme Court released its opinion in *Santana*. The issue was whether the government was required to prove beyond a reasonable doubt that fourteen-year-old George Santana committed a rape.<sup>24</sup> When the Lubbock County Attorney’s Office prosecuted Santana, the court instructed the juvenile court jury to answer the issues based on the “preponderance of the evidence” standard.<sup>25</sup> The Lubbock Court of Civil Appeals reversed the trial court’s judgment of conviction, holding that Santana was denied due process.

Writing for the majority, future Chief Justice Joe Greenhill recognized the fundamental importance of whether the State was required to bear its burden of proof under the civil preponderance-of-the-evidence standard or under the criminal reasonable-doubt standard.<sup>26</sup> Justice Greenhill reasoned:

So it boils down to this: are juvenile proceedings hereafter to be true adversary proceedings like the ordinary criminal trial? . . . Is the quantum of proof “beyond a reasonable doubt” so essential that its absence, in a juvenile case involving loss or curtailment of liberty, is a denial of constitutional rights? Or may the State be able to assist youth in these *sui generis* proceedings where the finder of fact, the judge or jury, is convinced by a preponderance of the evidence that acts have been committed, that the child is a delinquent, and that he needs the help of the State?<sup>27</sup>

Justice Greenhill’s majority reversed the Court of Civil Appeals and reinstated the trial court’s conviction.<sup>28</sup>

Another future Chief Justice, Jack Pope, authored the dissenting opinion in which Justices Smith and Steakley joined.<sup>29</sup> Typically, a dissent is associated with the losing side; but, in this instance, many of Justice Pope’s dissenting arguments were subsequently mirrored in U.S. Supreme Court Justice Brennan’s opinion in *In re Winship*, issued less than a year after the Texas Supreme Court’s decision in *Santana*.<sup>30</sup> As we will see, Justice Pope’s opinion is an eloquent and far-reaching statement of juvenile law post-*Gault*.

In *Santana*, Justice Pope recognized the “great impact” of the *Gault* decision on “all professionals

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<sup>20</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>21</sup> *See id.* at 4.

<sup>22</sup> *See id.* at 20.

<sup>23</sup> *See id.*

<sup>24</sup> *Santana*, 444 S.W.2d at 615.

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at 618.

<sup>27</sup> *Id.*

<sup>28</sup> *See id.* at 615–23.

<sup>29</sup> *See id.*, at 623–28 (Pope, J., dissenting, joined by Smith and Steakley, J.J.).

<sup>30</sup> *See In re Winship*, 397 U.S. 358, 360 n.3 (1970) (citing to *Santana*).



December, 1968

Left to right (standing): Robert W. Hamilton, Zollie C. Steakley, Jack Pope, Thomas M. Reavley  
 Left to right (sitting): Ruel C. Walker, Meade F. Griffin, Robert W. Calvert,  
 Clyde E. Smith, Joe Greenhill

The Texas Supreme Court that handed down the *Santana* decision in 1969 was headed by Chief Justice Robert W. Calvert (seated, center) and included two future Chief Justices: Joe R. Greenhill (seated, far right) and Jack Pope (standing, second from right). Other members of the Court were (seated, from left) Justice Ruel C. Walker, Justice Meade F. Griffin, and Justice Clyde E. Smith; and (standing, from left) Justice Robert W. Hamilton, Justice Zollie C. Steakley, and Justice Thomas M. Reavley. Photo from the personal files of former Chief Justice Jack Pope.

interested in juvenile behavior.”<sup>31</sup> Using *Gault*’s logic along with rulings from cases decided after *Gault*, Justice Pope formulated the reasoning Justice Brennan’s majority would later adopt in *Winship*.

It would have been easy and understandable for Justice Pope to reference *Gault* and dissent. It also would have been painless for Justice Pope to side with the majority, especially in light of the serious charges against *Santana*. Wouldn’t society benefit from identifying and adjudicating a juvenile sex offender at an early age even if that meant a lower burden of proof?

Justice Pope absorbed *Gault*’s lessons and wrote a well-organized and deeply researched dissenting opinion. His dissent falls into four distinct parts: (1) a discussion of the juvenile delinquency process, (2) the influence of *Gault* throughout the country, (3) various standards of proof including the beyond a reasonable doubt

<sup>31</sup> *Santana*, 444 S.W.2d at 624.

standard, and (4) a description of the state of the law in Texas.<sup>32</sup>

The facts of *Santana*—a rape—made the decision to raise the State’s burden of proof challenging. Justice Pope handled that fact up front by providing a step-by-step description of the juvenile adjudicatory process.<sup>33</sup> He made a point to highlight the fact that the burden of proof applies to all offenses ranging from misdemeanors to felonies.<sup>34</sup> Then, he segued into *Gault* and its consequences.<sup>35</sup>

Instead of focusing on *Gault*’s application in Texas, Justice Pope discussed a vast spectrum of scholarly opinions regarding juvenile courts. Throughout this passage, he emphasized the importance of holding juvenile offenders accountable while recognizing their due process rights. He also acknowledged the need to provide rehabilitative services, but noted that good intentions to rehabilitate do not equate to a disregard for fundamental constitutional rights.<sup>36</sup>

“Why does the law recognize a division in standards of proof?”<sup>37</sup> Justice Pope asked. He understood that the question concerned not only George Rivera Santana but all children.<sup>38</sup> Why would any state in the United States apply a lower standard of proof in criminal proceedings against children? Why would we teach children that they do not deserve the same due process rights as adults?

Finally, Justice Pope asked these questions to analyze the state of the law across the United States.<sup>39</sup> He discussed the inconsistent application of *Gault* and the burden of proof in juvenile cases, including Samuel Winship’s case, which had not yet reached the U.S. Supreme Court.

Although the majority of important criminal cases in Texas are decided in the Court of Criminal Appeals, juvenile cases fall under the jurisdiction of the Supreme Court, and one of the most significant statements about the juvenile justice system is found near the end of Justice Pope’s dissent. He wrote:

Liberty is our real concern. Perhaps no greater harm could come to Santana than the State’s misguided efforts to rehabilitate him if, in fact, he is innocent to begin with.<sup>40</sup>

Justice Pope used cases from throughout the United States to bring a true national perspective to an important juvenile justice issue regarding the burden of proof. His love of research and writing is visible in this dissent.<sup>41</sup>

In his survey of juvenile justice cases, Justice Pope looked to the Illinois Supreme Court’s handling of a post-*Gault* case:<sup>42</sup>

<sup>32</sup> See MARILYN P. DUNCAN (ed.), *COMMON LAW JUDGE: SELECTED WRITINGS OF CHIEF JUSTICE JACK POPE OF TEXAS* 279–91 (Texas Supreme Court Historical Society 2014).

<sup>33</sup> *Santana*, 444 S.W.2d at 623.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 624.

<sup>36</sup> *See id.*

<sup>37</sup> *Id.* at 626.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 627–28.

<sup>40</sup> *Id.* at 628.

<sup>41</sup> See JAMES L. HALEY, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986*, 200–01 (University of Texas Press 2013).

<sup>42</sup> *Santana*, 444 S.W.2d at 618.

The Supreme Court of Illinois . . . absorbed the dark picture of *Gault*, equated juvenile trials to adversary criminal trials, and held that it would be a denial of due process and equal protection to afford less safeguards....<sup>43</sup>

Justice Pope's analysis also referred to the Fourth Circuit's opinion in *United States v. Costanzo*,<sup>44</sup> where the court concluded that American juveniles were entitled to receive the same basic constitutional protections as American adults:<sup>45</sup>

We see a compelling similarity between the enumerated safeguards due a juvenile in as full measure as an adult and the requirement of proof beyond a reasonable doubt. In practical importance to a person charged with crime the insistence upon a high degree of proof ranks as high as any other protection; and if young and old are entitled to equal treatment in the one respect, we can think of no reason for tolerating an inequality in the other.<sup>46</sup>

In *In re Winship*, the U.S. Supreme Court held that Samuel Winship, a twelve-year-old boy prosecuted for stealing \$112 from a woman's purse, could not be convicted of a crime because the government had not proven that Winship committed a crime under the reasonable doubt burden of proof.<sup>47</sup> Writing for the majority, Justice Brennan wrote that the Fifth and Fourteenth Amendments' Due Process Clauses require that the government use the strict, reasonable-doubt standard.<sup>48</sup> *Winship* is important because the opinion reaffirmed the U.S. Supreme Court's decision in *Gault* and clarified that *Gault* and *Winship* applied to both state and federal courts.<sup>49</sup>

One month after its decision in *Winship*, the U.S. Supreme Court reversed the Texas Supreme Court's opinion in *Santana*. In a per curiam opinion, the Texas Supreme Court resolved Santana's appeal in accord with Justice Pope's dissent:

After a decision of this Court in *State of Texas v. Santana*, Tex., 444 S.W.2d 614 (1969), the judgment of this Court was reversed by the Supreme Court of the United States, and the cause was remanded to this Court for further proceedings not inconsistent with the opinion of that Court, 397 U.S. 596, 90 S.Ct. 1350, 25 L.Ed.2d 594 (April 20, 1970). That Court's decision in *Santana* was based on its opinion and judgment in *In the Matter of Samuel Winship*, 379 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (March 31, 1970).

There has since been presented to this Court a joint motion of counsel for Santana and counsel for the State, acting through the County Attorney of Lubbock County, Texas. Such motion recites that George Rivera Santana had been discharged by the Texas Youth Council on January 21, 1970; that no further court proceedings, either civil or criminal, would be pursued against the said Santana; and that all proceedings against Santana arising out of the matters alleged in the State's petition should be dismissed with prejudice to the State.<sup>50</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *United States v. Costanzo*, 395 F.2d 441 (4th Cir. 1968).

<sup>45</sup> *Id.* at 445.

<sup>46</sup> *Santana*, 444 S.W.2d at 618 (citing *Costanzo*, 395 F.2d at 444).

<sup>47</sup> *In re Winship*, 397 U.S. 358, 358–64 (1970).

<sup>48</sup> *Id.*

<sup>49</sup> Compare generally, *Winship*, 397 U.S. 358, with *In re Gault*, 387 U.S. 1 (1967).

<sup>50</sup> *State v. Santana*, 457 S.W.2d 275, 275 (1970) (per curiam). George Santana was released from the custody of the Texas Youth Council in January 1970 because he had served a year of parole and had reached the age of seventeen in November 1969.

Today, Texas courts fill every criminal voir dire with discussion of the burden of proof ladder. Defense attorneys stress the high burden of proof under the beyond a reasonable doubt standard, but few recognize that our children received the right to hold the State to the highest burden of proof relatively recently in the history of our court system. Justice Pope's dissent in *Santana* articulated these principles clearly and convincingly, and laid the groundwork for a fundamental change in the way courts approach juvenile cases. His opinion helped ensure that a reasonable doubt standard of proof for accused criminals was a fundamental right for people of all ages.



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# The Making of a Hemphill Dinner

**Narrative and photos by David A. Furlow**

**I**F IT TAKES A VILLAGE TO RAISE A CHILD, it takes almost as many people to bring us the Texas Supreme Court Historical Society's Annual John Hemphill Dinner. This year's dinner, which drew 376 Society members and guests and featured a keynote address by former U.S. Trade Representative Ron Kirk, took place on Friday, June 6, at the Four Seasons Hotel in Austin. It was the culmination of many months—and, in a real sense, of many years—of effort by many individuals. This story spotlights some of those who made major contributions to the dinner's success.

**Fundraising, fun, and fascinating legal history.** The Hemphill Dinner serves several important purposes. Former Society President Lynne Liberato explained that those purposes include “raising money, because the dinner is the biggest fundraising event of the year; providing a social occasion to bring together the lawyers, judges, justices, and members of the public who comprise the Society; and bringing speakers to discuss topics that affect the Texas Supreme Court, the Texas judiciary, and Texas law.”

Lynne attributes the Society's initial success in fundraising to former Society President Larry McNeill, who set the Society on its current, scholarly path after asking, “Why does this Society exist?,” and to her predecessor, former Texas Supreme Court Justice Craig Enoch, another articulate proponent of the Society's educational mission and advocate of its book projects.

Macey Reasoner Stokes, the Chairperson for the 2013 Hemphill Dinner, attributes much of the Dinner's continuing success to Marie Yeates's decision, as a former Dinner Chair, to create different levels of sponsorship. “That decision brought in the big firms in a big way, adding \$10,000 per firm,” Macey noted.

When I asked current Society President Marie Yeates about her role in selling Hemphill Dinner tables in 2012, she said, “It was easy. I gathered lawyers from the firms that always attended and told them, ‘Haynes and Boone is going to buy two tables, and Baker Botts is going to buy two tables, and Bracewell Giuliani is going to buy two tables.’ They all lived up to the challenge. And it's been great for the Society's bottom line.”

**Meet Mary Sue Miller.** Macey noted that her biggest job as a Chairperson of the Hemphill Dinner in 2013 was fundraising, which was time-consuming despite the creation of premium tables. But Mary Sue Miller, the Society's Administrative Coordinator, made her job easier by providing logistical support. “Mary Sue took care of the logistics for the Dinner,” she said, “And that was nice. That freed me up to devote my time to the fundraising.” Mary Sue Miller is now the key staff person responsible for making the Hemphill Dinner a success.

Mary Sue has worked for the Society as an accountant and administrator since then-Executive Director Bill Pugsley hired her in August 2011. Born in Tennessee, she grew up in Corpus Christi, studied accounting at Delmar College, married, and moved to the Austin area. She went to work for the State Bar of Texas in March 1982. Her work with the Society's Hemphill Dinner began ten years ago, when she first started proofing name

badges and helping as a volunteer at the registration table.

Mary Sue continued serving as a volunteer every year until she retired from the State Bar in July 2011 and began working part time for the Society in August. For the 2012 and 2013 Hemphill Dinners, she was Bill Pugsley's primary assistant in handling the logistics of table placements and nametag production as well as the all-important task of handling the proceeds of ticket sales. After Bill Pugsley retired from the Society in the summer of 2013, Mary Sue assumed full responsibility for administering the 2014 Hemphill Dinner.

This past spring, after 2014 Hemphill Dinner Chairperson Marcy Greer and her committee completed the task of obtaining law firm pledges for premium tables, the process of gathering checks and guest information began. The process goes something like this: Mary Sue prepares a spreadsheet that identifies every guest who will attend the Hemphill Dinner. The Society asks each sponsoring law firm to identify who will sit at their tables as far as possible in advance of each dinner. Advance notice is important because each dinner guest is entered on the master spreadsheet that becomes the basis for the nametags.

The spreadsheet includes a variety of information, including what law firm or other table sponsor invited a guest, and whether the guest is a Society member, a Fellow, a member of the Board of Trustees, a judge or justice, or a member of the general public. Mary Sue creates a matrix of tables and sponsorships, then creates a map of them using special software. As shown here at her desk on the day of the dinner, she continues to revise the computer files throughout the dinner cycle.

In conjunction with the Society's Treasurer, David F. Johnson, Mary Sue collects all payments for the dinner. The checks begin arriving months in advance of the dinner and continue to arrive until and after the event. As former President Lynne Liberato has observed, collecting those checks is of vital importance because the Hemphill Dinner is the Society's most important annual fundraiser.



In addition to preparing the master guest list, Mary Sue produces copy for the dinner program. The program identifies all sponsors purchasing tables, names the Society's Board of Trustees and Fellows, presents the menu, and lists the full program agenda. Responsibility for setting the agenda—including inviting the keynote speaker and other program participants—lies with the Society's President and the Chair of the Dinner Committee, this year Doug Alexander and Marcy Greer, respectively. The dinner program also includes a memorial card honoring any justice who passed away during the year; this year that honoree was Justice Jack Hightower. Several months ahead of the Hemphill Dinner, Mary Sue contacts the Banquet Coordinator at the Four Seasons hotel, to begin working up the contract. As Executive Director of the Society, Pat Nester approves the Four Seasons contract. Eight to six weeks before the dinner, Mary Sue begins working up the dinner menu. Drawing on former President and current Fellow Warren Harris's experience and expertise, Mary Sue identifies the wine selections that will be made available at premium tables, as well as the hors d'oeuvres to be offered at the VIP reception preceding the dinner. She arranges lodging for each speaker at the Four Seasons or other hotel for one or two nights.

Other logistical details in advance of the dinner include contacting the professional photographer (Mark

Matson), inviting the Color Guard (this year, the Bedicek Middle School Junior Marine Corps), and assembling a team of volunteers to assist at the dinner. Mary Sue also ensures that materials to be distributed at the dinner are in hand before the day of the event. This year those materials included not only the dinner program, but the Society's new bookmark and color brochure as well as a special print version of the Summer 2014 issue of the Society's *Journal*. Each piece was planned and produced by teams of Board members, including Ben Mesches, Lynne Liberato, Warren Harris, and (yours truly) David Furlow.

On the evening of the dinner, Mary Sue oversaw the volunteers who placed copies of the materials on each seat at each table. Those volunteers also placed copies of the Society's new book of former Chief Justice Jack Pope's writings—*Common Law Judge*, edited by Consulting Editor Marilyn Duncan—and order forms, as well as envelopes with valet parking passes, on each table. Since there were almost 400 chairs at 40 tables, this task took almost an hour.

Among the volunteers and staff members who helped distribute Society materials or assisted with the private reception for Ambassador Ron Kirk were Executive Director Pat Nester; Consulting Editor Marilyn Duncan; Paul Burkes, Director of Video Production at the State Bar of Texas; and Supreme Court of Texas staff members Nadine Schneider, Administrative Assistant; Linda Smith, Executive Assistant; Claudia Jenks, Chief Deputy Clerk; and Tiffany Shropshire, Archivist.



Volunteers who assisted dinner attendees at the registration table included Amanda Caudle, Accounting Clerk for the State Bar of Texas; Tracy Jarratt, Comptroller of the State Bar; and Blanca Valdez, Deputy Clerk for the Supreme Court. "I really appreciate the help that the Society's volunteers give us—they took time out of their busy schedule to help at registration and at the dinner," Mary Sue told me.

The afternoon before the dinner is a busy time, as Mary Sue and her helpers put all of the final pieces together in the Society's office before heading to the Four Seasons. This year I decided to get a behind-the-scenes look at this staging process, and to offer whatever assistance I could. Marilyn Duncan, pictured at left stuffing valet parking passes into envelopes, was also part of the work crew, as she has been for the past seven years.

One of the most important and time-consuming final tasks is preparing name tags. The job is an exacting process because each tag carries coded messages. The cardstock of each name tag distinguishes members of the Society from non-member guests. Special ribbons designate the President, the President-Elect, members of the Board of Trustees, Fellows, and the Chief Justice and Justices of the Texas Supreme Court. The tags also include each guest's assigned table number, so the table chart has to be created as early as possible. Mary Sue aims to update all of the final information necessary to print out the name tags on Thursday so that she and her assistants can put them in plastic badge holders and add all the ribbons on Friday before the dinner. Again, this process takes many hours and many hands to complete. To add to the excitement, Mary Sue is busy almost until the last minute fielding phone calls and emails about changes in the guest list, most of which result in the creation of new name tags.

Late on the afternoon of the dinner, members of the work crew pack boxes containing all 376 name tags, programs, books, and other materials for the dinner, change clothes, and head to the Four Seasons. Pictured at right are Mary Sue and Marilyn arriving at the registration area, with boxes of name tags ready to be emptied and arranged on the tables.



As the hour of the receptions and dinner approaches, the planning and logistical phases of the 2014 Hemphill Dinner come to an end, and Mary Sue can begin to relax. She has completed this cycle of the Society's most important fundraising event without a glitch—a major accomplishment.



Along with President Doug Alexander, Dinner Chair Marcy Greer, Executive Director Pat Nester, and the rest of the village, Mary Sue Miller deserves a warm thank you for making this year's event a memorable one.



**DAVID A. FURLOW** is Executive Editor of the Journal, a Hemphill Fellow, and a member of the Society's Board of Trustees.

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# An Evening in Pictures: Scenes from the Nineteenth Annual John Hemphill Dinner June 6, 2014, Four Seasons Hotel, Austin, Texas

Compiled by Marilyn P. Duncan

**FREELANCE PHOTOGRAPHER** Mark Matson, who has photographed the John Hemphill Dinner and other Society events since 2008, was on hand again this year to record the highlights of this year's Hemphill Dinner for posterity. A sampling of the photos appears below.



Society President-Elect Ben Mesches (right) and Board member Josiah Daniel were among the first guests to arrive at the private speaker's reception for Ambassador Ron Kirk before the main reception and dinner.



Other early arrivals at the speaker's reception included former Justice Craig Enoch (center), Kay Enoch, and Board member and Fellow Jim Ho.



Ambassador Ron Kirk (center) chats with Chief Justice Nathan Hecht (left) and Society President Doug Alexander.



Among other guests at the private reception were Chief Justice Woodie Jones of the Third Court of Appeals (left), Colleen Brady, and Chief Justice Jim Worthen of the Twelfth Court of Appeals.



Fellow and Board member Warren Harris stands with attorney Kelly Carruth Burns, Fellow and former Justice Dale Wainwright, and Justice Eva Guzman.



Guests fill the foyer of the Four Seasons ballroom during the main reception.

Ambassador Ron Kirk poses with former Chief Justice Wallace Jefferson (right) and Rhonda Jefferson before moving into the ballroom for dinner.



The Bedichek Junior Marine Corps leads the audience in the Pledge of Allegiance. The Corps, which has won three national championships for its drill exhibitions, has become an annual presence at the Hemphill Dinner.

2013-2014 President Doug Alexander welcomes attendees to this year's dinner, thanking in particular the firms and organizations that sponsored tables (see list at end of article).





Justice Jeff Brown offers a stirring memorial to the late Justice Jack Hightower, the Society's founding president. Justice Brown was a briefing attorney for Justice Hightower.

Former Chief Justice Jefferson accepts the 2014 Chief Justice Jack Pope Professionalism Award from Patti Gearhart Turner, Chair of the Texas Center for Legal Ethics.



Chief Justice Nathan Hecht pays tribute to his former colleague on the Supreme Court, Chief Justice Wallace B. Jefferson.





Society Fellow and Board member Jim Ho introduces the evening's keynote speaker, former U.S. Trade Representative Ron Kirk.



Ambassador Ron Kirk offers the audience an inspiring testimonial on the value of equal opportunity in education and the importance of making Texas a hospitable environment for public leaders of all races.



Incoming President Marie Yeates takes the oath of office from Justice Paul Green, the Society's Supreme Court Liaison.

# 2014 John Hemphill Dinner Table Sponsors

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Texas Center for Legal Ethics - 2  
Texas Trial Lawyers Association  
Thompson, Coe, Cousins & Irons  
Thompson & Knight  
Winstead  
Wright & Close

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# Hard Times: A Short List of Violent Episodes in the Life of the Texas Supreme Court

By Marilyn P. Duncan

**I**N KEEPING WITH THE THEME of the lead articles in this issue of the *Journal*, the following summary offers a further look at how violence has touched the Texas Supreme Court over the course of its existence. To learn more about these episodes, read the accounts referenced in parentheses to the Society's narrative history book by James L. Haley.<sup>1</sup>

**In the days of the Republic of Texas, District Judges served *ex officio* as Associate Judges of the Supreme Court. As circuit judges on the frontier, they faced many hardships.**

- In 1837, District/Associate Judge Robert McAlpin “Three-Legged Willie” Williamson purportedly opened a district court hearing in East Texas with a confrontation with a litigant who stuck his Bowie knife into Judge Williamson’s bench and said, “This, sir, is the law of Shelby Country!” Williamson drew his pistol, placed it on the table beside the knife, and declared, “Then this, sir, is the constitution that overrules your law.” The hearing proceeded without further incident. (See Haley, p. 25)
- On July 11, 1838, Chief Justice James T. Collinworth went overboard in Galveston Bay in a possible suicide. He was a heavy drinker, as was common at that time, and he had purportedly been “under the influence of Ardent Spirits” for a week before the incident. (Haley, p. 19)
- On March 19, 1840, Fourth District Court/Texas Supreme Court Associate Judge John Hemphill, acting in self defense, killed a Comanche warrior with a Bowie knife in his San Antonio courtroom during a failed negotiation known as the Council House Fight. (Haley, pp. 26–27)
- In September 1842, a session of the Fourth District Court under Judge Anderson Hutchinson came to a violent halt when Mexican troops led by General Adrian Wall stormed the courtroom and took everyone in the room hostage. The hostages were marched to Mexico City and held there in Perote Castle until the next spring. (Haley, p. 28)

**During early statehood, the Civil War posed special challenges to the operations of the Court and the lives of its members.**

- On October 11, 1863, troops under the authority of Confederate Major General John Bankhead Magruder began a series of military arrests of civilian draft protesters that eventually led to a confrontation between Magruder and the Texas Supreme Court. Although the Court ruled that Magruder imposed martial law and suspended

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<sup>1</sup> JAMES L. HALEY, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986* (University of Texas Press 2013).

habeas corpus without the authority to do so, the prisoners eventually landed in military custody and were imprisoned in Mexico until the late summer of 1864. (Haley, pp. 70–72)

- On April 9, 1864, Chief Justice Royall Wheeler committed suicide in his home, apparently despondent over the inevitable downfall of the Confederacy. (Haley, p. 73)

**The twentieth century was not exempt from violence associated with members of the Court, as is evident in two episodes covered in this issue of the *Journal*.**

- In April 1935, Justice William Pierson and his wife were murdered by their son, Howard, a crime that took almost three decades to find closure. (Haley, pp. 171–172; and Gary Lavergne’s article in this issue, pp. 20-27)
- In July 1977, Justice Don Yarbrough resigned from the Texas Supreme Court under the threat of impending impeachment as a multitude of crimes of various magnitudes—including solicitation of murder—came to light. His subsequent convictions, flight to Grenada, and prison term are low points in the history of the Court. (Haley, pp. 207–209; and Judge Mark Davidson’s article in this issue, pp. 9-19)



Judge Three-Legged Willie, as immortalized by the Sierra Toy Solider Company (54mm tall; \$15)

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# For the Record: Significant Autumn Dates in the History of the Nineteenth Century Texas Supreme Court

## September

- Sept. 10, 1867** All three members of the Texas Supreme Court are removed from office by the U.S. military as “impediments to Reconstruction” and are replaced with Union sympathizers.
- Sept. 1, 1879** The Texas Revised Civil Statutes take effect, the first codification of the state’s civil laws.

## October

- Oct. 13, 1845** Moving toward annexation by the United States, Texans adopt a state constitution by a vote of 4,174 to 312. The state constitution establishes a full-time three-member Supreme Court, including a Chief Justice and two Associate Justices appointed by the Governor for six-year terms. Under the Republic, the Chief Justice is the only full-time member of the Supreme Court, with District Judges serving *ex officio* as Associate Judges; all are elected by the Republic Congress.
- Oct. 10, 1858** After eighteen years of service, Chief Justice John Hemphill resigns from the Supreme Court when the Legislature elects him to replace Sam Houston as U.S. Senator. Justice Royall Wheeler takes Hemphill’s place as Chief Justice.
- Oct. 1, 1878** Chief Justice Oran Roberts resigns from the Supreme Court to run for Governor.

## November

- Nov. 30, 1869** Voters adopt the Radical Reconstruction Constitution of 1869, which calls for a Supreme Court of three judges, appointed by the governor for nine-year staggered terms; the judge with the shortest initial term is to be designated as Presiding Judge. The Constitution abolishes the Tyler and Galveston sessions; all sessions will meet in Austin.
- Nov. 5, 1878** Outgoing Chief Justice Oran Roberts wins election for Governor; Justice George F. Moore is elected Chief Justice.
- Nov. 9, 1881** Fire destroys the State Capitol, where the Supreme Court courtroom and offices are housed. The Court meets in temporary quarters until the new Capitol opens in 1888.

# Historian James Haley Speaks at State Bar Annual Meeting



**A**TTENDEES OF THE STATE BAR'S 2014 Annual Meeting in June had an opportunity to hear author James L. Haley share his unique perspective on the history of the Texas Supreme Court. Haley's presentation, titled "No Rest for the Weary: The Texas Court Enters the Twentieth Century," was drawn from his Society-sponsored book, *The Texas Supreme Court: A Narrative History, 1836–1986*.

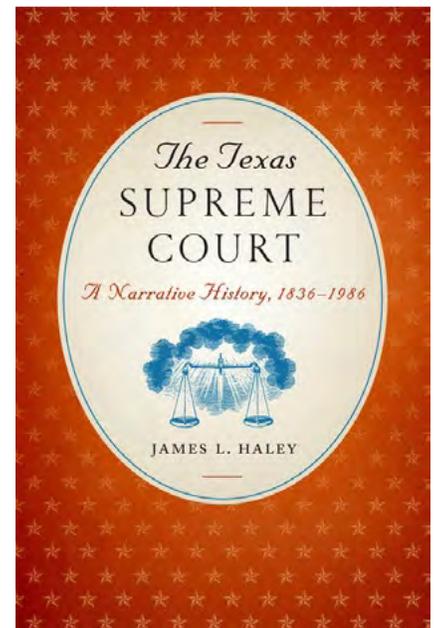
Among other stories, Haley recounted how productivity slipped from a steady high during the years of the so-called Consensus Court (1900–1912) to an all-time low during the tenure of Justice William Hawkins (1913–1921), who won election based on his Prohibitionist stance and then found to his disappointment that the Court almost never heard alcohol-related cases. His response was to avoid writing opinions at all, which led to an unprecedented backlog and to the reestablishment of the Commission of Appeals to provide relief.

Haley also described the Court's role in the evolution of women's rights, including the milestone appointment of the country's first all-woman Supreme Court in 1925, some thirty years before women could serve on juries in Texas.

On the topic of judicial selection, Haley offered several examples of how the election process went awry in the first half of the twentieth century. In the 1944 campaign, for example, incumbent Justice Richard Critz faced a former State Bar President, Gordon Simpson, an army officer who remained stationed in Italy during the entire campaign, but who won election because his campaign managers misrepresented facts about Justice Critz's service on the Court and insinuated that his German-sounding name meant he had German sympathies.

Following his talk, Haley signed copies of his book outside the conference room in the Austin Convention Center, the main venue for this year's Annual Meeting.

The book is available from the University of Texas Press at <http://utpress.utexas.edu/index.php/books/haltex>.



— Marilyn P. Duncan

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# Phillips Elected to Texas State Historical Association Board



**F**ORMER CHIEF JUSTICE THOMAS R. PHILLIPS has been elected to the Board of the Directors of the Texas State Historical Association (TSHA) for a three-year term.

TSHA is a nonprofit organization dedicated to preserving the history of Texas through research, publications, and educational outreach. Organized in Austin on March 2, 1897, TSHA is the oldest learned society in the state. Its publications include the *Southwestern Historical Quarterly*, the *Texas Almanac*, the *Handbook of Texas Online*, and a long list of scholarly books. Through its various education programs, TSHA directly serves more than 50,000 elementary through college-aged students each year, while indirectly reaching an additional 86,000 students through its teacher training activities.

Phillips, who served as Chief Justice of the Texas Supreme Court from 1988 to 2004, is a partner in the Austin office of Baker Botts L.L.P., concentrating in appellate litigation and alternative dispute resolution. He served on the Texas Historical Commission from 2005 to 2012 and on the Texas Supreme Court Historical Society Board of Trustees from October 2004 through May 2014.

— Marilyn P. Duncan

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# Former Chief Justice Wallace Jefferson Will Receive Texas Appleseed's Good Apple Award



**T**EXAS APPLESEED, a nonprofit organization dedicated to ensuring social and economic justice for vulnerable Texans, has named former Chief Justice Wallace Jefferson as the 2014 recipient of the prestigious J. Chrys Dougherty Good Apple Award.

In announcing the award, Texas Appleseed's Board of Directors said: "Chief Justice Jefferson has been an unwavering advocate in seeking equality for all Texans, especially for the poor and for those without a voice. He is a nationally respected jurist, and he made Texas judicial history as the Court's first African-American Justice and Chief Justice. During his tenure, he and the Court worked with other branches of government to fund access to justice programs, and he successfully urged the Legislature to reform juvenile justice. Chief Justice Jefferson embodies the spirit of advocacy by continuing to assist with major projects and issues that will help Texans. Texas Appleseed salutes him for his tireless work on behalf of all Texans, especially the underprivileged."

Chief Justice Jefferson will receive the award at the organization's annual Good Apple Dinner on November 14 at the Four Seasons Hotel in Austin.

— Marilyn P. Duncan

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# The Hon. James A. Baker and the Hon. William L. Garwood Are Inducted into the Texas Appellate Hall of Fame

**A**t a ceremony held September 4 at the Four Seasons Hotel in Austin, the late Justice James A. Baker and the late Judge William L. Garwood became the newest inductees into the Texas Appellate Hall of Fame.



Justice James A. Baker

Now in its fourth year, the Texas Appellate Hall of Fame is a collaborative program of the State Bar of Texas Appellate Section and the Texas Supreme Court Historical Society. Its purpose is to honor deceased appellate practitioners and judges who, through their outstanding advocacy, professionalism, and service to the citizens of Texas, have left a significant mark on the practice of appellate law in the state.

Justice Baker was appointed to the Texas Supreme Court by then-Governor George W. Bush in 1995 and served on the Court until 2002. While on the Court, he was known



Judge William L. Garwood

both for his rigorous attention to detail and for his strict application of the standard of review. Justice Baker was a member of the Board of Trustees of the Texas Supreme Court Historical Society for many years, and served as Board President from 2005 to 2007. At the time of his death in 2008, he was head of the appellate practice group at the Dallas law firm of Hughes & Luce L.L.P., now K&L Gates.

Judge Garwood served on the Texas Supreme Court in 1979–1980, the first Republican since Reconstruction to serve on the Court. He was also the only second-generation member of the Texas Supreme Court—his father was Justice W. St. John Garwood, who served on the Court from 1948 to 1958. In 1981, President Ronald Reagan nominated the younger Garwood to the United States Court of Appeals for the Fifth Circuit, where he served until his untimely death in 2011. Judge Garwood was a founding member of the Texas Supreme Court Historical Society and was a member of the Board of Trustees at the time of his death.

For more information about the two inductees' accomplishments, see Justice Harriet O'Neill's tribute to Justice James A. Baker at <http://www.supreme.courts.state.tx.us/court/JABTribute.pdf> and the Garwood family's biography of Judge Garwood at [http://www.cemetery.state.tx.us/pub/user\\_form.asp?pers\\_id=6411](http://www.cemetery.state.tx.us/pub/user_form.asp?pers_id=6411).

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# Calendar of Events

*Society-sponsored events and other events of interest*

## Fall 2014

Sat.–Sun., Oct. 25–26

**Texas Book Festival**

State Capitol Grounds, Austin

<http://www.texasbookfestival.org/> (home page)

<http://www.texasbookfestival.org/festival-schedule/> (schedule)

Tues., Oct. 28

**Fall Meeting, TSCHS Board of Trustees**

Texas Law Center Conference Room (State Bar Building)

1414 Colorado St., Austin TX 78701

10:15 a.m.–12:00 noon, Board Meeting

12:00–12:30 p.m., Luncheon Speaker, Bill Chriss

“Six Constitutions over Texas: Law as a Reflection of Cultural Identity”

## Spring 2015

Fri., March 6

**TSCHS Joint Session**

**Texas State Historical Association Annual Meeting**

Nueces A Conference Room

Omni Bayfront Hotel, 900 North Shoreline Blvd.

Corpus Christi, TX 78401

10:30 a.m.–12:00 noon, Session 27

**Session:** *The King James Bible, the Courts, and the Preservation of Records: A Historical Tie-in with a Twist*

**Session Chair:** Marie Yeates, President, TSCHS

**Presenter 1:** Laura K. Saegert, Assistant Director for Archives, Texas State Library and Archives Commission

**Presenter 2:** David A. Furlow, Executive Editor of *The Texas Supreme Court Historical Society Journal*

**Commentator:** William J. (Bill) Chriss, Gravely & Pearson, LLP

**Fri., March 27**

**Spring Meeting, TSCHS Board of Trustees**  
(date tentative, location TBD)

**Thurs., May 7**

**Back by Popular Demand: The Second Biannual  
History of Supreme Court Jurisprudence Symposium**  
8:30 a.m to 4:00 p.m.  
Radisson Hotel Austin  
111 E. Cesar Chavez St.  
Austin, TX 78701  
(More details to come)

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*To profit from the past, we must first preserve it.*

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## 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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# 2014–2015 Membership Upgrades

The following Society members moved to a higher dues category since June 1, 2014.

## **GREENHILL FELLOW**

Charles R. “Skip” Watson

## **PATRON**

Hon. Jeff Brown

Hon. Grant Dorfman

## **CONTRIBUTING**

Thomas M. Michel

Jason F. Muriby

Hon. Greg Perkes

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# 2014–2015 New Member List

The Society has added 28 new members since June 1, 2014. Among them are 7 Law Clerks for the Supreme Court (\*) who received a complimentary membership.

## **GREENHILL FELLOWS**

Marianne Auld  
Leslie Robnett

## **TRUSTEES**

Hon. Rick Strange

## **PATRONS**

James W. McCartney  
Prof. Ernest E. Smith

## **CONTRIBUTING**

Austin Barsalou  
Gilbert J. Bernal, Jr.  
Prof. Barbara Bintiff  
Stephanie Cagniard  
John Grace  
Mary Jo Graham Holloway  
Elizabeth Kozlow Marcum

## **REGULAR**

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Krystal Elaine Garcia Riley  
Maitreya Tomlinson  
Kendall Valenti\*  
Ryan Vassar  
Amy Wills\*  
William A. Worthington

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# Membership Benefits & Application

## **Hemphill Fellow - \$5,000**

- Autographed Complimentary Hardback Copy of Society Publications
- Complimentary Preferred Individual Seating and 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 Supreme Court Historical Society*
- All Benefits of Trustee Membership

## **Trustee Membership - \$1,000**

- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- Complimentary Admission to Society's Symposium
- All Benefits of Regular Membership

## **Patron Membership - \$500**

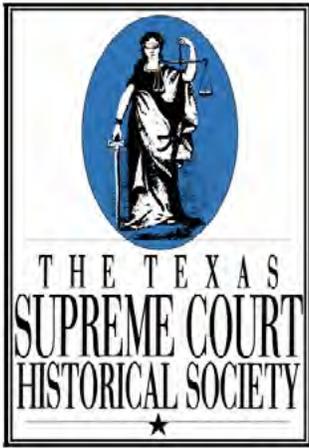
- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

## **Contributing Membership - \$100**

- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

## **Regular Membership - \$50**

- Receive Quarterly *Journal of the Supreme Court Historical Society*
- Complimentary Commemorative Tasseled Bookmark
- Invitation to Annual Hemphill Dinner and Recognition as Society Member
- Invitation to Society Events and Notice of Society Programs



# Membership Application

The Texas Supreme Court Historical Society conserves the work and lives of the appellate courts of Texas through research, publication, preservation and education.

Your membership dues support activities such as maintaining the judicial portrait collection, the ethics symposia, educational outreach programs, the Judicial Oral History Project and the Texas Legal Studies Series.

Member benefits increase with each membership level. Annual dues are tax deductible to the fullest extent allowed by law.

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