Reading Garner

By Brandon Kemp

Later this month Ogletree Deakins (my employer) is sending all of its junior associates to Dallas for a writing seminar led by Bryan A. Garner. For me, this is on par with getting backstage passes to the Stones or Springsteen. I’ve already imagined myself at an open mic Q&A, fumbling out a request for an autograph. (Which of course raises a difficult question: if good taste suggests that I bring only one book, do I bring The Winning Brief or a usage dictionary? I think the answer has to be Garner’s Modern American Usage.) As any aspiring snoot would, I also feel a tug to ask Garner something about his friend David Foster Wallace, the singular Gen X novelist and essayist who is at least in something about his friend David Foster Wallace, the aspiring snoot would, I also feel a tug to ask Garner something about his friend David Foster Wallace, the singular Gen X novelist and essayist who is at least in...
We celebrate May Day every year on May 1 to honor our profession and celebrate the rule of law. This year we gathered for a luncheon featuring Court of Criminal Appeals Judge Clancy Smith. Judge Smith spoke to us on the topic of “The 14th Amendment – transforming American democracy”. She addressed how the 14th Amendment has impacted lives of Oklahomans and especially how those rights have evolved in Oklahoma through cases like Craig v. Boren (age for alcohol use), Ada Lois Sipuel Fisher (the right to attend an integrated law school) and Bishop v. Smith (same sex marriage licenses) . We were lucky to have Judge Smith with us because she has decided to retire from the Court of Criminal Appeals later this summer.

We honored our guests from Douglass High School who participate in the Moot Court team along with their coaches and mentors. Next year they will extend their mock trial work into a full year course under the leadership of Carolyn Thompson who is the Advisory Board Chair for the Douglas Law and Public Service Academy. This group offers you and your firms an opportunity to mentor or host the class for a tour of your courthouse or law firm. The Academy also sponsors internships for the students before their senior year. This summer, Crowe Dunlevy will sponsor two such students. Think about the impact we as OCBA members could have on the future of these high school students by sharing our experiences and legal work environments. Please contact the OCBA office or Carolyn Thompson directly when you might be available to help mentor or host the group.

We also honored Rex Travis as the Journal Record Award winner, presented by Ted Streuli, Editor of the Journal Record. As you may remember, the recipient does not know they are receiving this award before the luncheon and I always enjoy watching how far into the presentation we get before the recipient figures out they are the winner. Rex did not make it very far into the presentation, maybe only until they mentioned that the recipient worked with Gene Mathew’s law firm. This award honors those whose commitment to our legal profession spans many years and as many of you know Rex has earned the title of Insurance Law “Guru” in Oklahoma. He is always happy to share his wealth of knowledge and his recall of historical facts is legendary.

The Liberty Bell Award was presented to Barbara Lasater, legal secretary at McAfee and Taft. This award is presented to the outstanding non-lawyer in law. CASA of Oklahoma County is a great organization and she is an outstanding leader for children in need. This award is given to a charitable organization that is located in Oklahoma County and shows outstanding achievement or contribution to Justice or the Justice System. Ms. Limber was presented a cash award of $10,000 from the Oklahoma County Bar Foundation. Thanks for all you do to support the Juvenile Division of the court system in Oklahoma County.

We also celebrated attorneys who are active in the community as well as in their legal practice by awarding the Leadership in Law awards to Kevin Gordon, Chance Pearson, Chris Deason, Nicholle Edwards, and Representative Jon Echols. Thank you all for all you do for the legal profession and to promote justice for all.

A “huge” thank you to Amber Martin for her leadership and hard work as this year’s law day chair. And as always, great job by Debbie Gorden, Pam Bennett and Connie Resar in making the luncheon a great success!

May also brings us to the end of the legislative session. This year we (lawyers and judges) have few bills that make us want to get up on our hind legs. However, one bill you may want to contact your state Representative about is house bill #1925. This bill proposed redistricting the Supreme Court to include 5 members from the current congressional districts and 4 at-large seats with two reserved for residents of counties with less than 75,000 in population. No matter whether you support or oppose this measure, please contact your legislators and let them know your views. Another important matter is our state budget. We all know the severity of the issues but I propose that each member of our organization contact their representatives and let them know you support their efforts to raise the necessary revenue to fund a quality state government including education. If they know they have the support of their constituents when it comes time for re-election, we will have stronger legislative leaders. Please get involved in your state government and help make Oklahoma a stronger place for us and future generations to prosper.

May is also the month when we celebrate Memorial Day. I hope you all have a safe and enjoyable Memorial Day weekend and find a meaningful way to remember those military service members who serve now and who have served our nation in the past.

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As our readers may recall, the low pass rate on the July 2016 bar examination by OCU graduates generated much concern in the Oklahoma County legal community, evidenced by discussions among lawyers and published articles expressing that concern. The low pass rate of last July resulted in a search for the causes and action to counter those causes. Now, with a much improved pass rate, it is time for kudos andattaubs.

The February bar exam results are in, and all three schools fared better with respect to the success rate of their graduates, but neither OU nor Tulsa improved as much as did OCU. The rate for first time examiners increased from 67% to 75%, which is a significant improvement. But the pass rate for those repeating the examination was 32% in July and improved by almost fifty points to 81% in February. The combined pass rate for OCU in February was 80%, an increase of thirteen points from the July results.

After the July results came out last fall, Dean Cohen and the faculty of OCU reached out to the legal community for discussion and suggestions to reverse the low pass rate. Over the fall the OCU law faculty, the graduates taking the examination for the first time, and the body of graduates who were not successful last July worked with new energy, zeal and innovation to improve the test scores. The results speak for themselves.

I am well aware that there is body of lawyers and students of whom have the same gray coiffure as do I, who look at the February examination results and pronounce, “Well, back when I took the bar, the pass rate was 90%.” And that is certainly true. At one time that pass rate was the norm. We can all hope that in the future it will become the norm again. However, some of the parts of the bar exam are beyond the control of the forces of Oklahoma and its law schools. Nationwide we are seeing lower pass rates, and lawyers and law schools in many states are going through the same introspection as is Oklahoma and our law community.

Dean Valerie Couch is passing the leadership of OCU law school to a yet-to-be-announced replacement this summer. However, as she leaves the deanship, she can look at this excellent improvement with a sense of pride in her leadership, the law school faculty, and the OCU graduates.
And the Court Said . . .

**AN Olio of Court Thinking**
by Jim Croy

May 15, 1917

One Hundred Years Ago

[Excerpted from: *Penn v State*, 1917 OK, CR 97, 164 P. 992.]

The defendant was convicted of the crime of statutory rape in the district court of Greer county, and sentenced to imprisonment in the state penitentiary for a term of five years, the information alleging the crime as defined by subdivision 2 of section 2414, Rev. Laws 1910. He took the witness stand in his own defense, and while virtually admitting the commission of the act pleaded that at the time the crime was committed he was under the age of 18 years, 1913. The effect of the acquittal under the provisions of section 2415, Rev. Laws 1910, which provides:

> “No conviction for rape can be had against one who was under the age of fourteen years at the time of the act alleged unless his physical condition at the time such act was committed was over the age of eighteen years at the time of such act.”

The latter sentence in said section became a part of the law of this state May 16, 1913.

This alleged offense was committed on May 9, 1913. The effect of the adoption, in the 1910 Code of the foregoing provision of section 2415 was to repeal the preexisting penalty attached to the crime of rape committed upon a female over the age of 14 years with her consent should it appear that the person charged was under the age of 18 years at the time such act was committed. After the taking effect of such provision, no matter how such act was committed, it was held:

> “That petitioner and said Jordan had each been previously convicted of a felony in Oklahoma County and were not eligible for a suspended sentence, but they were sentenced to serve 25 years in the State Penitentiary, and recommended that each of said sentences be suspended. That the district judge before whom said petitioner and Jordan were taken was not the judge who had presided at the trial of said offense, but was one of the resident judges of Oklahoma County. That when he was informed by the assistant county attorney that the petitioner and said Jordan had each previously been convicted of a felony, he refused to give them a ten-year suspended sentence as recommended by the county attorney, but did sentence them to serve 25 years in the State Penitentiary and ordered said sentences suspended, and your petitioner was accordingly set at liberty.”

The statute under which the sentence was suspended is 22 O. S. 1941 § 991. Under the terms of this statute no person who was under 21 years of age at the time of the commission of the crime of robbery with firearms. That on December 10, 1934, petitioner and said Jordan went to trial upon said charge before a jury with an assigned judge from another judicial district presiding. That upon conclusion of said trial, the jury returned a verdict of guilty and assessed the petitioner and said Jordan a term of twenty-five years in the State Penitentiary.

> “That thereafter on February 12, 1936, the petitioner was arrested for vagrancy and brought before the District Court of Oklahoma County for revocation of the order of suspension of his sentence. That the petitioner at that time could have defended himself against said accusation upon which said order of suspension was sought to be revoked, but was advised by the judge that such defense would not avail him for the reason that he and his codefendant had made a mistake in giving him a suspended sentence in the first instance as he was not entitled to a suspended sentence under the statute because of his former conviction. That said court did, at that time, accordingly, enter an order revoking the twenty-five year suspended sentence and your petitioner has, since that date, been incarcerated in the State Penitentiary at McAlester.”

This court issued a rule to show cause and a hearing was had upon said petition on the 6th day of May, 1942. Without detailing all of the evidence which was introduced at said hearing, it is sufficient to state that the proof on behalf of the petitioner, which was undisputed by the state, abundantly supported the allegations of his petition.

The district judge who presided at the trial of petitioner appeared before this court and testified that the petitioner and his codefendant, Jordan, entered their pleas of guilty after it had been represented to them that they were eligible for and would receive a ten-year suspended sentence and thus secure their release from confinement if they would enter their plea of guilty. It is for this court to see how these two boys, who had remained in jail for approximately 60 days after the trial judge had set aside and would have dismissed the case had he been a resident judge of Oklahoma county.

We think the petitioner’s constitutional rights have been denied. It is undisputed that he and his codefendant, Jordan, entered their pleas of guilty after it had been represented to them that they were eligible for and would receive a ten-year suspended sentence and thus secure their release from confinement if they would enter their plea of guilty. It is easy for this court to see how these two boys, who had remained in jail for approximately 60 days after the trial judge had set aside and would have dismissed the case had he been a resident judge of Oklahoma county.

The statute under which the sentence was suspended is 22 O. S. 1941 § 991. Under the terms of this statute no person who was under 21 years of age at the time of the commission of the crime of robbery with firearms. That on December 10, 1934, petitioner and said Jordan went to trial upon said charge before a jury with an assigned judge from another judicial district presiding. That upon conclusion of said trial, the jury returned a verdict of guilty and assessed the petitioner and said Jordan a term of twenty-five years in the State Penitentiary. That the district judge before whom said petitioner and Jordan were taken was not the judge who had presided at the trial of said offense, but was one of the resident judges of Oklahoma County. That when he was informed by the assistant county attorney that the petitioner and said Jordan had each previously been convicted of a felony, he refused to give them a ten-year suspended sentence as recommended by the county attorney, but did sentence them to serve 25 years in the State Penitentiary and ordered said sentences suspended, and your petitioner was accordingly set at liberty.

> “That thereafter on February 12, 1936, the petitioner was arrested for vagrancy and brought before the District Court of Oklahoma County for revocation of the order of suspension of his sentence.”

The district court and county attorney were familiar with this statute. The petitioner was mistakenly informed as to his eligibility for a suspended sentence. There can be no doubt that the pleas of guilty would not have been entered if the court had informed them at the time they entered their plea that they were not eligible for a suspended sentence because of their prior conviction.

> “The pleas of guilty entered by petitioner and Jordan were induced by promises which could not lawfully be
carried into execution, and we think a plea of guilty thus obtained is contrary to the spirit of the Bill of Rights of our Constitution. Under such circumstances, it is our opinion that the judgment and sentence pronounced in cause numbered 9867 in the district court of Oklahoma county is void and that the petitioner, Clyde Farrar, is unlawfully restrained of his liberty and imprisoned by reason thereof without due process of law.

May 3, 1967
Fifty Years Ago

It appears from the record that the facts of the case are as follows, in substance. That on February 20, 1965, a Mrs. Mary Jo Young received the first in a series of obscene telephone calls from an unknown voice. She received more over a period of several weeks, the contents of which the Court will not recite here. On March 28, 1965, the police attempted to trace the telephone call but were unsuccessful. Mrs. Young then attempted, at the suggestion of the police and the assistant county attorney, Don K. Cunningham, to present in her apartment, to set up a meeting with the man making the calls. The first time, they went to the place designated and no one showed up. They then went back to Mrs. Young’s apartment, and the caller again phoned. And, again, a meeting was arranged. Mrs. Young drove her car, with Officer Rogers concealed in the floor of the back seat. The assistant county attorney, Don Cunningham and Officer Jordan followed in another car. Mrs. Young parked her car on the shoulder of the highway and waited. In a few minutes, a car pulled up behind her car and blinded his lights, which was the signal arranged on the phone. She got out of the car and attempted to talk the man out of the car, but in a few minutes, he took off at a high rate of speed. The car with Cunningham and Jordan was in pursuit, and Mrs. Young got back in her car and joined the chase. The car was stopped, and the defendant arrested on this charge.

Defendant alleges entrapment in his first proposition, arising from these facts as set forth above.

This Court has defined “entrapment,” many times, as in the case of Riddle v. State, Okl.Cr., 373 P.2d 832. The definition states: “Entrapment is the planning of an offense by an officer or someone acting under his direction, and his procurement by improper inducement of its commission by one who would not have perpetrated it except for the trickery of the officer.”

In the instant case, defendant was not “entrapped” into committing the offense, for that occurred when he made the telephone calls. He was trapped into a rendezvous, which ultimately resulted in his arrest. This does not constitute “entrapment.”

Defendant’s second allegation contends that as a matter of law, he introduced sufficient evidence to raise a reasonable doubt as to his sanity at the time of the commission of the act, and that it then became the duty of the State to prove his sanity beyond a reasonable doubt.

This Court has reviewed all of the testimony relative to the question of defendant’s sanity, and are of the conclusion that it merely raises a speculation as to his mental condition at the time the offense was committed. There is no direct evidence that defendant did not know right from wrong. However, the trial court adequately instructed on the question of sanity, and this Court has held in the case of Gonzales v. State, Okl.Cr., 388 P.2d 312, that it is for the jury to determine the weight of all the evidence, and not the reviewing Court.

Further, the defendant was committed to Central State Hospital at Norman for observation, and returned to stand trial summarizing that he was able to distinguish between right and wrong and to advise his attorney in his defense. . . . The testimony of the psychiatrist who testified for the defendant did not sustain the burden of proof on insanity. Therefore, it is the opinion of this Court that resolution of the factual question of sanity was properly left to the jury.

May 12, 1992
Twenty-Five Years Ago

Appellants, Marissa A. Shockley, a minor by and through Douglas Shockley, her father and next friend and Douglas Shockley, individually (Appellants) seek review of the trial court’s “stay” order which enjoins and prohibits them from engaging in any act to collect the debt alleged in their Petition from Appellee. Appellants brought this negligence action against Appellee for injuries sustained by Appellant Marissa A. Shockley when she was struck by Appellee’s automobile. Appellee maintains the debt was discharged in bankruptcy. We reverse.

Appellants filed the present action on November 19, 1987, to recover compensatory and punitive damages from Appellee for injuries caused in a November 6, 1987, automobile/pedestrian accident. On June 16, 1989, Appellee filed his voluntary petition in bankruptcy pursuant to Chapter 7, Title 11, United States Code. On June 19, 1989, Appellee filed a Plea to Abatement with the Oklahoma County District Court, seeking abatement because of the pending bankruptcy. Appellee was granted a discharge in bankruptcy on September 27, 1989. On May 30, 1990, the trial court granted Appellee’s Motion to Stay Proceeding, permanently enjoining and prohibiting Appellants from seeking to collect this debt from Appellee. Appellants did not respond to the Motion to Stay.

In their Petition below, Appellants sought compensatory damages for Appellee’s alleged negligence, and punitive damages for his “willful, wanton and reckless disregard” of their rights. The Pre-Trial Conference Order of January 30, 1989, indicates Appellants were seeking
**Jim Foliart**

By Rex Travis

James “Jim” Foliart died April 8. He was 97 years-old and a sort of a force of nature on the Oklahoma legal scene.

Jim was born in McAlester to parents who were educators and, for this reason moved around a lot. This later gave rise to a lot of remarks by Jim in trials which led the jurors to believe he was from part of the state. He was “from” more places than anybody I have ever known. He would say things like “My daddy is buried in the cemetery over at (fill in the blank).”

Jim became a pilot in the Army Air Force in WWII. He had already gotten a bachelor’s degree at Northwestern Oklahoma A&M (now Northwestern Oklahoma University) and done graduate work in government and history at OU before serving in WWII.

Upon returning from the war, he went back to OU and got his law degree in 1948. He went into practice in Oklahoma City with Draper Grigsby in what became the firm of Grigsby and Foliart and, eventually, the present-day firm of Foliart, Huff, Ottaway & Bednar.

The firm always did insurance defense work with (as we shall see) an occasional plaintiff’s case. When I first knew the firm, Draper Grigsby had died and it was known as Foliart, Hunt and Shepherd.

Foliart and Jake Hunt both had big egos, causing some turmoil in the firm. Jake Hunt (a character in his own right) walked with a pronounced limp. Jake always said he limped because of an injury when a half-track he was in hit a land mine in WWII. Jim Foliart always said Jake got the leg injury when he got drunk and rolled a 1946 Chevrolet convertible.

Jim Shepherd was as modest and unassuming as the other two were ego-driven. All three were great trial lawyers.

Jim Foliart was all about winning lawsuits. Ironically, one of the most famous cases from his career was one of the few in which he represented a plaintiff. That case resulted in an opinion published as Chicago, Rock Island & Pacific Railroad Co. v. American Airlines. You can read it at 1965 OK 190 or 408 P2d 789. It’s an interesting read if you (like me) have a particular interest in the trial of lawsuits.

The case originated in the Supreme Court of Oklahoma in one of the Con Track Lines rig, transporting two jet engines en route to the American Airlines repair facility in Tulsa had a bad encounter with a Rock Island train at a crossing in Yukon. The two jet engines were destroyed.

This presented a real problem for the Oklahoma City firm of Savage, Gibson, Benefield and Shelton, which happened to represent both Rock Island Railroad and American Airlines.

The solution was that the representation of American Airlines went to the Foliart firm while Savage Gibson defended Rock Island, which the firm represented on retainer.

Canadian County, where the wreck occurred, would not have been a good county in which to see the Rock Island which was by far the largest employer in the county. Foliart decided instead to file the suit in Lincoln County, where the Rock Island also had tracks. The case ended up being tried there before Judge Donald Powers.

The suit was a large one for that time: about $340,000 for the value of the engines plus $67,000 for the loss of use of the engines, totaling more than $400,000. Jim pulled out the stops in his closing argument in the case. Over strenuous objections from J.J. Gibson for Rock Island, Jim argued that what happened to the jet engines could just as easily have happened to any of the jurors or their families. He suggested that the only thing which would persuade the Rock Island not to send their trains through Yukon at 65 or 70 miles-per-hour, in violation of Yukon’s 15 MPH speed limit was a verdict for the entire amount Jim sued for.

The jury didn’t quite agree, returning a verdict for about $270,000. Rock Island’s appeal generated a lot of controversy. Fourteen lawyers, both plaintiff and defense, filed amicus curiae briefs advocating one side or the other of the issue whether the argument that the jurors should put themselves in the position of American Airlines and “punish” the Rock Island by its verdict was an improper argument.

In addition to being a great trial lawyer, Foliart mentored a large number of lawyers who have gone on to prominence in the Oklahoma bar. Earl Mills and John Niemeyer split off from the Foliart firm and each founded firms which, in turn, produced such lawyers as Reggie Whitten, Mike Noland, and the lawyers who formed Edmonds, Cole, Hargrave and Givens. Most of these lawyers attended Jim’s memorial service.

Speakers at that service included Glenn Huff, who stayed with Jim at the firm after the big split and Larry Ottaway, who joined the firm from the Fenton firm at the time of the split. All agreed Jim was a great mentor as well as a great lawyer.

In addition to being a great lawyer, Jim was a sort of renaissance man. He was a voracious reader who maintained his interest in history well beyond his bachelor’s and master’s in the subject. He continued to read and study history up until the time his advancing age made it too difficult for him to read. Indicative of that interest in history, Jim requested memorial contributions in lieu of flowers to the Oklahoma Historical Society.

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**Obituaries**

**Phil Hart**

By Rex Travis

Phillip D. “Phil” Hart died April 12, 2017. Phil was a long-time member of McAfee and Taft, since the merger into McAfee and Taft of his prior firm, Fowler & Rucks. Phil practiced 57 years, including service as a Captain in the U.S. Army Judge Advocate Corps.

Phil graduated with honors from undergraduate school at OU in government and from the OU law school in 1960. He was always highly-ranked in his class and was Order of the Coif.

Phil practiced oil and gas law and did a great deal of appellate practice. He wrote an oil and gas law casebook—Oil and Gas Contracts—Cases and Materials, which went to a second edition in 2015. He taught various oil and gas law courses as an adjunct professor at Oklahoma City University for 48 years. He also taught numerous continuing legal education courses in the oil and gas field.

Eugene Kuntz was a much-loved and respected oil and gas law professor and former dean at OU. Fittingly, Phil received the Eugene Kuntz Award from OU in 2000.

Phil’s academic pursuits went well beyond the law. He was widely-read and, toward the end of his life wrote regular book reviews which were published in the books section of the Sunday Oklahoman. His reviews dealt in a very scholarly way with historical and biographical topics. I have certainly read some books I would not have otherwise thought to read had I not seen Phil’s reviews.

But what perhaps most stands out about Phil Hart was his very personality. He was the epitome of what we as lawyers should all aspire to in the way of civility. Most who knew Phil never heard him say a negative thing about anybody.

McAfee Taft managing director Michael Lauderdale said, “His door was always open, and he had kind words for whoever bent his ear. His booming voice and cheerful attitude will be sorely missed. He was the epitome of a gentleman attorney with a heart of gold.”

Dee Replogle, of the firm said: “When I began practicing law, I joined the old firm of Fowler, Rucks, Baker, Jopling, Gramlich & Mee, and Phil was already an established and highly respected oil and gas attorney. We practiced together for the next 47 years. His professional accomplishments are legion and well-chronicled, but his personal achievements as a husband, father, grandfather, friend and devoted Christian are equally, if not more, impressive. As an esteemed law school professor, he influenced the lives of many, and his quick wit, kindness and compassionate nature will be sorely missed by all who knew him.”

Phil was certainly a lawyer to be emulated. He was a gentleman and a gentle giant.

Phil’s family has suggested, in lieu of flowers, contributions to All Souls’ Episcopal Church, Free to Live Animal Sanctuary or the charity of your choice.

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**Book Notes**

**Lenin on the Train**

By Bill Gordon

During the harshest part of World War One, 1917, one hundred years ago, each of the warring sides was desperate to win. Each had poured buckets of money and blood into the killing machine, and each side had contended with mutinies and refusal to fight from their own ranks. Quick fixes, such as Gallipoli for the Allies and Verdun for the Germans, resulted only in embarrassment and more lives and treasure lost. There was to be one more quick fix tried, one with immediate consequences and worldwide century-long consequences.

Russia was on the brink of collapse, and had tried a revolution that had stalled in its tracks, despite the killing of the Czar and his family. Multiple parties vied for control. The Germans wanted Russia out of the war, and so plotted to make one of those parties much stronger. The problem was that that parties leader, Vladimir Ulyanov, also called Lenin, was many miles from Russia, in exile in Switzerland. The German High Command hit on the idea of transporting Lenin to Russia to light the fuse to a riotous revolution, and a withdrawal of Russian from the war. Lenin was agreeable.

The Germans put Lenin in a “sealed” train car, and at some cost transported him across Germany over the course of numerous days. It was as if he was a bacillus being injected into Russia to make it sicker. There was much controversy on all sides, and much money was exchanged, particularly from the Germans to Russian bankers friendly to Lenin or others associated with Lenin. The plot, essentially worked. Bolshevism won, Russia toppled out of the war, Germany unsuccessfully unleashed all its might on the Allies. However, by then, the Americans had arrived, fresh and more than a replacement for the ailing Russian Empire. Germany was defeated, humiliated, and rose again as a worse menace. Meanwhile in the east Russia became a beast herself under Lenin, Stalin, and successors.

Getting across this story, Merridale has left little time to explicate the train trip itself. This book was likely set in motion by the hundredth anniversary, some newly discovered documents, and the author’s familiarity with the Russian sites. Finished with the book, one wishes still to learn more of the trip itself. There is some new light here on Lenin, who was at the same time a charmer and a brutal killer. The rest is a quite capable resume’ of the times and persons involved in this momentous adventure. There is plenty of room also for the reader to play “what if” with the basic facts.
Lawyers in the Library

On Tuesday May 2nd the Oklahoma County Law Library hosted Lawyers in the Library as part of the Law Day 2017 celebration. This event was held at the Downtown Metropolitan Library and with the assistance of the staff. Volunteer attorneys provided brief consultations for the patrons of the Library with each session lasting 15 to 20 minutes. We appreciate the attorneys from the Oklahoma County Bar who generously donated their time to make Lawyers in the Library happen. Also, many thanks to Lexis/Nexis and the Oklahoma County Bar for their donations of pizza, drinks, and gifts for all who attended.
2017 LAW DAY
LUNCHEON HIGHLIGHTS

OCBA President
Barbara Swinton welcomes the luncheon crowd.

Rex Travis was this year’s Journal Record Award recipient. Editor Ted Streuli presented the award from the Journal Record.

OCBF Director
Bob Nelon presents the Howard K. Berry Sr. Award to Lee Ann Limber.
YLD Chair
Merideth Herald presents the Liberty Bell Award to Barbara Lasater.

Keynote Speaker
Judge Clancy Smith

Law Day Chair Amber Martin introduced this year’s keynote speaker, Judge Clancy Smith, at the Law Day Luncheon.

Ask A Lawyer Volunteers.
One of the driving motivations for relocating the Oklahoma City University School of Law to our new downtown campus just over two years ago was putting our students, faculty, and staff into the middle of the action. Our location straddles the booming Midtown district and the Central Business District. Students are within walking distance of federal and state courthouses, law firms, governmental agencies, and many other legal employers.

To further enhance our role as the City’s law school, we will launch an innovative program called Capital City Connect in the fall of 2017. The inaugural year of Capital City Connect will feature six unique programs. Each program will focus on one of the school’s most active centers or certificate programs. The Capital City Connect programs will be co-chaired by a faculty member and a distinguished practitioner with expertise in the relevant subject matter area. Alumni and local practitioners are invited to attend programs in their areas of expertise.

The goal of each program is to connect second and third year law students with members of the practicing bar before graduation. The substantive content of each program will focus on cutting-edge issues faced by lawyers in each practice area. Programs will also include a networking and career development component. Students will gain insights into their potential practice area while networking and developing relationships with potential mentors.

Dean Valerie Couch developed the idea for Capital City Connect to capitalize on the school’s location and strong ties to alumni and local practitioners. She believes the program will “build strong connections between our current students and our alumni and friends in the legal community.” She described the program as one “OCU Law is in a unique position to offer because of our location in the center of the State’s capital city and our impressive network of alumni who are leaders in law, business, and government.”

Capital City Connect programs planned for the fall 2017 semester include:

- **Health Law** co-chaired by Professor Vicki MacDougall (Director of the Health Law Certificate) and Adjunct Professor Mary Richard (Phillips Murrah)
- **State and Local Government** co-chaired by Professor Andrew Spiropoulos (Director of the Center for the Study of State Constitutional Law and Government) and Adjunct Professor Jim Roth (Phillips Murrah).

Capital City Connect programs for the spring 2018 semester programs include:

- **Wills, Trusts, and Estates** co-chaired by Professor Carla Spivack (Director of the Certificate in Estate Planning) and Adjunct Professor Christin Mugg (Mugg Scott & Winston)
- **Homeland Security Law** co-chaired by Professor Marc Blitz (Director of the Murrah Center for Homeland Security Law and Policy) and Murrah Center Senior Fellow Homer Pointer (former Assistant General Counsel, FBI).
- **Public Interest Law** co-chaired by Professor Shannon Roesler.

The second year of programs is also taking shape, with events planned for Property and Land Use Law, American Indian Law, Criminal Law, Civil Trial Practice, Family Law, and Bankruptcy and Commercial Law.

The schedule will feature programs held over the lunch hour or a 5 pm program followed by a happy hour networking event. Alumni and practitioners interested in attending a Capital City Connect program in their area of expertise should fill out the short practitioner sign up form available here: http://law.okcu.edu/?current=capital-city-connect. Additional questions should be addressed to Professor Lee Peoples (lpeoples@okcu.edu) who will oversee the program while serving as Interim Dean of the School in the coming academic year.
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OU COLLEGE OF LAW PROFESSORS BACKUS AND ROBERTSON RECEIVE UNIVERSITY AWARDS

Two University of Oklahoma College of Law professors were recognized at the university’s “A Tribute to the Faculty” this week. Professors Mary Sue Backus and Lindsay Robertson both received Regents’ Awards at the annual event.

Backus received the Regents’ Award for Superior Teaching. The award is one of three Regents’ Awards given annually and recognizes excellence in teaching at OU.

Backus is the Robert Glenn Rapp Foundation Presidential Professor at the OU College of Law where she teaches Criminal Law, Education Law and Evidence. Her recent scholarship focuses on reformating Oklahoma law in the areas of juvenile competency and virtual charter schools. She joined the OU Law faculty in 2004 after serving as a visiting assistant professor of Oklahoma law in the areas of juvenile competency and virtual charter schools. She began her legal career as a law clerk to the Honorable H. Emory Widener on the U.S. Court of Appeals, Fourth Circuit.

From 2004 to 2007, Backus served as a co-reporter for the National Committee on the Right to Counsel, a bipartisan group reviewing the indigent defense system throughout the nation and creating consensus recommendations for reform. She currently serves on the board of directors for Oklahoma Close Up, a nonprofit, nonpartisan citizenship education program for high school students.

At OU Law, Backus volunteers as a moot court coach; is faculty sponsor of two student groups; the Organization for the Advancement of Women in Law Program; and the OU Student Bar Association. She is a member of the Oklahoma State Bar Foundation; and the author of the American Law Institute; a Fellow of the American Foundation for the Improvement of Legal Education; and a member of the American Bar Association’s Section of Public Contract Law. Backus is also a member of the Oklahoma Law Foundation Presidential Professor at the OU College of Law, which recognizes excellence in teaching at OU.

Robertson is the OU College of Law’s Chickasaw Nation Endowed Chair in Native American Law, an endowed Chair in Native American Law, Education Law and Evidence. Her recent scholarship focuses on reformatting Oklahoma law in the areas of juvenile competency and virtual charter schools. She began her legal career as a law clerk to the Honorable H. Emory Widener on the U.S. Court of Appeals, Fourth Circuit.

From 2010 to 2012, he was a member of the U.S. Department of State’s Advisory Committee on International Law. In 2014, he served as advisor on indigenous peoples law to the Chair of the U.N. Committee on the Elimination of Racial Discrimination. He has spoken widely on international and comparative indigenous peoples law issues in the United States, Europe, Latin America and Asia.

In 2014, Robertson was the first recipient of OU’s David L. Boren Award for Outstanding Global Engagement. He is an elected member of the American Law Institute; a Fellow of the American Bar Foundation; and the author of Conquest by Law. He earned his bachelor’s degree from Davidson College, and his M.A., J.D. and Ph.D. from the University of Virginia.

Gauri Nautiyal

Gauri Nautiyal joins Ogletree Deakins from the University of Oklahoma Office of Legal Counsel, where she was named the 2013 Outstanding Young Professional and University Service Award recipient. Trimble currently serves as an adjunct professor of Oil and Gas Law and is recognized by Chambers USA and Best Lawyers in America.

OU Law’s Moot Court Program Ranked Second In Nation

The University of Oklahoma College of Law jumped 12 spots in the latest Blakely Advocacy Institute’s annual ranking of Moot Court Programs to No. 2 in the nation. This marks the fifth consecutive year the OU College of Law has been ranked in the top 20 schools in the country, with this year’s ranking representing the college’s highest placement in school history. The No. 2 ranking qualifies the OU College of Law for the 2018 Kurth Tournament of Champions, which is reserved for the top 16 schools in the country to compete for the Moot Court National Championship. This year, 98 OU Law students participated on 34 teams traveling across the country. The college was also named a Top 20 Best Moot Court School of the Decade by National Jurist magazine.

In addition to its moot court recognitions, OU Law holds the highest ranking ever achieved by an Oklahoma law school (U.S. News & World Report); is an eight-time Best Value Law School (National Jurist); and is No. 18 in the nation for first-time bar passage (U.S. News Academic Insights).
The U.S. Supreme Court included in its opinion striking Oklahoma Loyalty Oath, a version of the oath. However, it’s not the exact version included by statute. The Oklahoma Supreme Court did not include the oath in their opinion upholding the Loyalty Oath. While the variances themselves are not germane to any issue, it is curious. Especially since the Oklahoma Supreme Court held the oath had to be taken specifically as written, and not as might have been interpreted to be consistent with Constitutional principles. But, first, where did the loyalty oaths arise, and why?

President Harry Truman issued Executive Order No. 9835 on March 21, 1947 establishing the first loyalty program in the United States and directing the Attorney General of the United States to come up with a list of suspected subversive organizations. The list was officially prepared by the United States Attorney General in 1947, Tom C. Clark. It was previously known as the “Biddle” list and was less formally begun in 1941, named after FDR’s Attorney General.

It eventually listed the following organizations as controlled by or fronts for the Soviets:

- American League Against War and Fascism
- American League for Peace and Democracy
- American Peace Mobilization
- American Youth Congress
- League of American Writers
- National Committee for the Defense of Political Prisoners
- National Committee for Peoples Rights
- National Federation for Constitutional Liberties
- National Negro Congress
- Washington Cooperative Bookshop
- Washington Committee for Democratic Action

The formal, legal list compiled beginning in 1947 eventually listed ninety different organizations. One cannot tell by the name of an organization what its purpose truly is. A lot like the completely misleading names given to laws passed by our own Congress, almost any name could cover almost any purpose. However, by 1959 the list included these organizations:

- American Lincoln Brigade April 29, 1953
- American Lincoln School April 29, 1953
- Action Committee to Free Spain Now April 29, 1953
- Alabama People’s Educational Association April 29, 1953
- American Association for Reconstruction in Yugoslavia April 29, 1953
- American Christian Nationalist Party April 29, 1953
- American Committee for European Worker’s Relief April 29, 1953
- American Committee for protection of Foreign Born April 29, 1953
- American Committee for the Settlement of Jews in Birobidzhan Inc September 28, 1953
- American Committee for Yugoslav Relief, Inc April 29, 1953
- American Committee To Survey Labor Conditions in Europe July 15 1953
- American Council for a Democratic Greece (formerly known as the Greek American Council; Greek American Committee for National Unity), April 29,1953
- American Peace Crusade
- American Polish League
- Black Dragon Society
- Cervantes Fraternal Society
- Committee to Abolish Discrimination in Maryland
- Committee to Aid the Fighting South
- Committee to Defend the Rights and Freedom of Pittsburgh’s Political Prisoners
- Committee for a Democratic Far Eastern Policy
- Committee for Constitutional and Political Freedom
- Committee for the Defense of the Pittsburgh Six
- Committee for Nationalist Action
- Committee for the Negro in the Arts
- Committee for Peace and Brotherhood Festival in Philadelphia
- Committee for the Protection of the Bill of Rights
- Committee for World Youth Friendship and Cultural Exchange
- Committee to Defend Marie Richardson
- Committee to Uphold the Bill of Rights
- Congress of African Women
- Dai Nippon Butoku Kai
- Daily Worker Press Club
- Detroit Youth Assembly
- Elsinore Progressive League
- Families of the Baltimore Smith Act Victims
- Federation of Greek Maritime Unions
- Florida Press and Education League
- Freedom Stage, Inc.
- Friends of the Soviet Union
- Garibaldi American Fraternal Society
- German American Bund
- Harlem Trade Union Council
- Hellenic-American Brotherhood
- Hungarian Brotherhood
- Independent Socialist League
- Industrial Workers of the World
- Japanese Association of America
- Jewish Community of Cortlandt
- Jewish Culture Society
- Knights of the White Camelia
- Ku Klux Klan
- Labor Youth League
- League of American Writers
- Mario Morgantini Circle
- Michigan Council for Peace
- Michigan School of Social Science
- Nanka Teikoku Gunyudan
- Oklahoma League for Political Education
- People’s Educational and Press Association of Texas
- Shinto Shriners
- Virginia League for People’s Education
- Youth Communist League

Did I already mention that this was the McCarthy era? You remember, the time when Senator Joseph McCarthy poured gasoline on a growing fire of anti-communist paranoia? Yes, a time of witch hunts for communists everywhere. Senator McCarthy publicly announced in 1950 that several hundred card carrying members of the Communist Party were employed by the United States Department of State. In response to the taunt by Senator McCarthy, the House Un-American Activities Committee (HUAC) rolled up their sleeves and went to work.

Spies, saboteurs and enemies of the state were imagined everywhere. Everyone was a red commie until proven otherwise. Naturally, a wave of fear and trepidation rolled through the nation and individual states began passing laws requiring state officers and employees to swear to loyalty oaths. The Oklahoma Loyalty Oath law was passed and became effective in April, 1951. Suit was filed in May, 1951 to terminate employees at Oklahoma A&M who refused to sign the loyalty oath. Judgment was entered against the employees in late May, 1951.

The Oklahoma Supreme Court affirmed the trial court, specifying that the oath had to be taken as written, and not as interpreted.

The case was appealed to the U.S. Supreme Court as Wieman v. Updegrave, 344 U.S. 183, 73 S. Ct.215, 97 L.Ed. 216, decided December 15, 1952 in an opinion by Justice Tom C. Clark (yes, that Tom C. Clark, the former U.S. Attorney General who wrote the official “list” of subversive organizations for President Truman in 1947 that was adopted by reference in Oklahoma).

In June we will examine why the Oklahoma Supreme Court was reversed in this iconic case of freedom of expression and freedom of association. Too much of hint?

LAW DAY, From PAGE 1

Howard K. Berry, Sr. Award was given to Lee Ann Limber, Executive Director for CASA of Oklahoma County. The Journal Record presented Leadership in Law Awards to Chris Deason, OK Representative Jon Echols, Nicholle J. Edwards, Kevin D. Gordon and Chance Pearson. Additionally, The Journal Record Award is presented each year to an attorney or judge who has spent a lifetime serving both the community and legal community in a professional and outstanding way. This year’s honoree was Rex Travis. The Law Day Luncheon Keynote Speaker was Judge Clancy Smith, Oklahoma Court of Criminal Appeals. Judge Smith expounded on how vital the 14th Amendment has been not only in the nation’s history but also in Oklahoma’s. Litigants have used it to fight for all kinds of access, everything from beer for teenagers to advanced degrees in law and science. “As lawyers, you have so much power,” said Judge Smith. “Every day, you have the opportunity to do the right thing. I urge you and encourage you to do that.”

Finally, the Oklahoma County Law Library, in conjunction with the Oklahoma Metropolitan Library System, held a “Lawyers in the Library” on Tuesday, May 2. This effort, led by Oklahoma County Law Librarian Venita Hoover, provided legal advice for walk-in clients at the downtown Oklahoma City library.
a total of $1,312,000.00 in damages for personal injury, pain and suffering, medical and hospital expenses, loss of earnings and impairment of earning capacity, past and future medical expenses, and deprivation of services. The Order did not reflect any amount sought in punitive damages. Appellants’ claims for $1,312,000.00 were included on Appellee’s Schedule A-3: “Unsecured Creditors” in the bankruptcy action although there was no reference that punitive damages were being sought.

Appellee admits Appellants did not receive official notice of Appellee’s bankruptcy action because their names and addresses were “inadvertently omitted” from the mailing matrix. Because of such omission, Appellants did not receive any of the statutorily-required notices, including the first meeting of creditors and notice of bar dates. However, Appellants’ attorney received notice of the bankruptcy on the date the bankruptcy petition was filed by a phone call from Appellee’s attorney. Further, the Plea in Abatement filed in this case three days after Appellee filed his bankruptcy petition, listed the case number of Appellee’s bankruptcy case.

Appellants contend their claim constituted 92% of the unsecured claims asserted against Appellee in the bankruptcy and that his failure to properly schedule Appellants constituted a denial of due process. Appellee argues the notice given to Appellants and their attorney was legally sufficient and Appellants’ failure to object to the discharge in the bankruptcy court rendered the debt discharged.

Appellants maintain the trial court erred in applying Appellee’s discharge to bar their claim because they were denied sufficient notice of the bankruptcy proceedings, making the claim nondischargable under 11 U.S.C. § 523(a)(3). Appellants do not specify whether the debt is to be governed by subparagraph (A) or (B) of that subsection. Appellants further argue the trial court abused its discretion by ordering the stay because punitive damages are nondischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(6).

Section 342(a), Title 11, United States Code, provides: “There shall be given such notice as is appropriate, including notice to any holder of a community claim, of an order for relief in a case under this title.”

11 U.S.C. § 523(a) lists the exceptions to a Chapter 7 discharge. Individual debtors are not discharged from any debt: * * * * *

(3) neither listed nor scheduled under Section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit -

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request; * * * * *

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity; * * * * *

(Emphasis supplied.)

Appellants cite Reliable Electric Co. Inc. v. Olson Construction Co., 726 F.2d 620 (10th Cir. 1984) in support of their position that they lacked adequate notice, making the debt nondischargeable, and rendering the trial court’s stay order an abuse of discretion. In Reliable, the corporate debtor failed to list the creditor’s claim in its Chapter 11 reorganization. The 10th Circuit affirmed the bankruptcy court’s order which found the creditor’s claim was not discharged or subject to the confirmed plan because the creditor had no written notice of the confirmation hearing, even though the debtor’s attorney had notified the creditor’s attorney by telephone that Reliable had instituted Chapter 11 proceedings. The 10th Circuit held that the creditor had been denied due process of law. As specifically applied to bankruptcy reorganization proceedings, a creditor who has general knowledge of a debtor’s reorganization proceedings, has no duty to inquire about further court action. Reliable, at 622. “The creditor has a ‘right to assume’ that he will receive all of the notices required by statute before his claim is forever barred.” Supra.

The 10th Circuit further expounded upon the rule in In re Green. 876 F.2d 854 (10th Cir. 1989). In In re Green, the creditor was not duly scheduled in the bankruptcy proceeding. However, the facts indicated the creditor had received actual timely notice of the filing and the bar date. In concluding the creditor was not deprived of due process, the Court held that because of the specific language of 11 U.S.C. § 523(a)(3)(A) which allows discharge of the debt if the debtor is not given notice in a timely manner, a Chapter 7 creditor holding an unsecured claim did not have the “right to assume” receipt of further notice when that creditor has received notice of a bar date in time sufficient to act.

The District Court of the Northern District of Oklahoma has recently analyzed In re Green. In Maritan, the District Court reversed the Bankruptcy Court’s order which had concluded the creditor’s attorney’s knowledge of the case constituted actual notice under § 523 and therefore denied the creditor’s motion for leave to file an objection to the debtor’s discharge. The creditor, Maritan, was listed as a creditor on the bankruptcy schedules but such schedules failed to include Maritan’s address. Because of such omission, the debtor’s notice of bankruptcy, including the notice of the date for the first meeting of creditors and the two bar dates, was never mailed to Maritan. Maritan and Maritan’s attorney first learned of the debtor’s petition in bankruptcy by reading the Tulsa Legal news. Maritan’s attorney then searched the debtor’s schedules filed with the Bankruptcy Court to confirm its status as a creditor. The attorney, however, had no actual notice of the objection cut-off date until the time for filing objections had passed.

Applying In re Green and Reliable Electric, the District Court concluded Maritan was entitled to formal notice from the District Court, specifying the objection cut-off date, within a reasonable time to file an objection. The District Court refused to agree with the Bankruptcy Court’s application of In re Green without a finding that Maritan’s attorney had actual knowledge of the bar date.

In the present case, the record indicates Appellants’ attorney had actual knowledge that Appellee had filed a petition in bankruptcy. However, there is no evidence to indicate Appellants or their attorney had notice of the bar dates for filing objections to Appellee’s discharge or the dischargeability of the debt. Appellants were entitled to formal notice from the Bankruptcy Court which specified the objection bar date. The failure to so notify them, denied Appellants of due process. Accordingly, we hereby determine the Appellants’ claim for compensatory and punitive damages was excepted from Appellee’s discharge pursuant to 11 U.S.C. § 523(a)(3). It was therefore error for the trial court to permanently enjoin the continuation of Appellants’ negligence action.
JAMES D. FOLIART
1919 - 2017

We are saddened to announce the passing of our Firm’s Founder, Jim Foliart. Jim was a friend and mentor to countless lawyers throughout his many years of practice. A true legend among Oklahoma trial lawyers, Jim will be sorely missed.

In 2005, over 40 of his current and former partners and associates gathered to honor Jim Foliart by appearing for this group photograph.

Front Row Left to Right: Lance Leffel, Whitney E. Buergler, Jonice Meziere, Susan A. Short, Glen D. Huff, Amy Sherry Fischer, James D. Foliart, Amanda Miller, Michael C. Felty, Denise Canada, Matthew Stangl, John R. Hargrave, Bana Blasdel Roberts
Second Row Left to Right: Timothy Melton, Larry D. Ottaway, Larry Harden, David K. McPhail, Chad Ihrig. Gregory D. Givens, Michael T. Maloan, Monty B. Bottom, Steven J. Johnson, Robert D. Hoisington, Michael Noland, Margaret Clarke

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