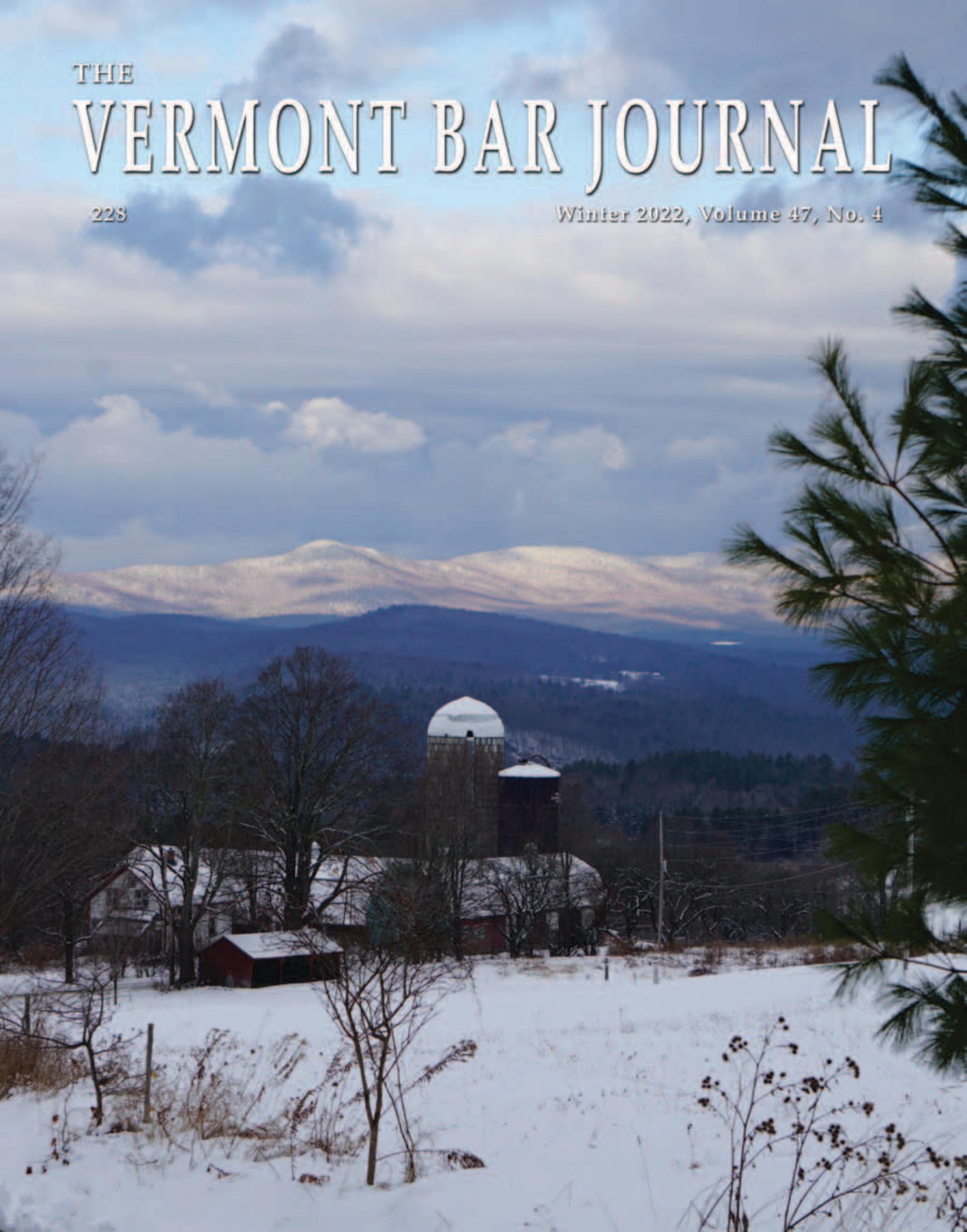


THE
VERMONT BAR JOURNAL

228

Winter 2022, Volume 47, No. 4





Complex Legal Challenges require legal teamwork

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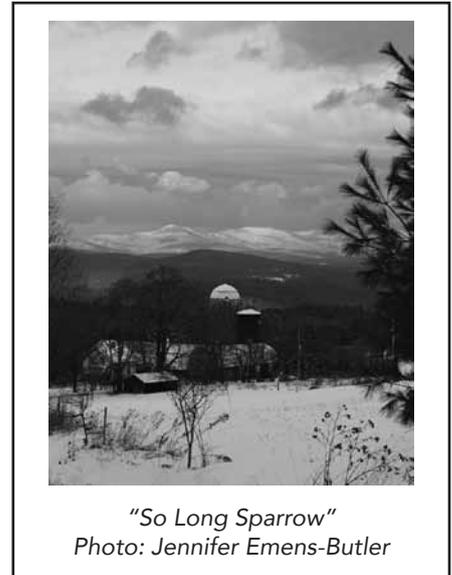
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"So Long Sparrow"
Photo: Jennifer Emens-Butler

Try out the
Crossword Puzzle
by Kevin Lumpkin
on page 17!

Bar News – Calling All New Lawyers

Are you a new lawyer (less than three years in practice) or a lawyer new to Vermont? If so, experienced Vermont lawyers have volunteered to offer you practical guidance as part of the new **Vermont Mentor Advice Program**. The Program is designed to assist lawyers new to the Vermont legal community by connecting them with veteran practitioners.

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We hope that this will be a helpful way to welcome you to the Vermont legal community. We're glad that you're here!

VERMONT BAR JOURNAL

Vol. 47, No. 4

Winter 2022

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Published four times a year by the
 Vermont Bar Association
 Subscription rates: 1 year \$35. 2 years \$65.
 Printed by Stillwater Graphics
 VBA assumes no responsibility for claims
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PRESIDENT'S COLUMN

"Meet the New Boss, Same as the Old Boss"¹

As much as I hoped we would be rid of COVID by now, it has refused to release its grip. More of us are sick with it, and all of us are sick OF it. It leads the news (usually); it impacts governments, economies, and travel; it drives discourse and factors into everything we do. It has closed or restricted access to schools, court houses, state houses and businesses. Most distressingly, it has taken lives and devastated families. It continues to command our attention.

Practicing law has certainly been impacted by COVID, and those impacts can be seen as both positive and negative.

I get it. Not all of us are comfortable practicing "remote" law. We want to see and talk in person with our coworkers, colleagues, and clients. We want to stand up in court and advocate. We want to go to closings with other folks at the table and we want to attend selectboard meetings and lobby the legislature. We want to get back to Town Meeting. Recently, some of these things have been more "doable," but we are a long way from where we once were. On the other hand, some of us are more attuned to a remote work environment, we have adapted to electronic advocacy and representation, and for very valid reasons, we prefer to have distance between ourselves and others. And there are undeniable benefits to "virtual law practice."

Clients benefit financially, as do we, if we don't have to travel 2 hours roundtrip for a 20-minute status conference. And filings through Odyssey means no one must drive in a snowstorm late on a Friday or try to get to a courthouse in less time than the rules of the road permit. Clients who are permitted limited time away from work or who have limited childcare flexibility will also benefit. If they can participate in a court appearance without having to take a whole day off from work, or without having to arrange for childcare, they may be able to keep their jobs and better provide for themselves and their families.

Whether we are where we are because of COVID or despite it, we need to embrace the changes and (I believe) do so in a professional manner.

Whether we prefer to practice the "old way" or the "new way" or some hybrid way, we need to respect the choices each of us is making about our practice preferences and our lives. We need to cooperate and be collegial with each other. We need to support the institutions with which we interact. We should actively listen, advocate for our clients and ourselves, and behave well. Respect for our colleagues and the rule of law is essential. In a word, we need to be law-

yerly, and expect the best from ourselves and from each other.

Those responsibilities transcend our immediate spheres of influence. Patricia Lee Refo, current President of the ABA, recently wrote that as lawyers, we "have a duty to model civility and respect in broader society" and to hold ourselves "to the highest standards of professional, public and personal behavior." In her view, "[l]awyers behaving badly reflect poorly on our entire profession," and she hypothesizes, most lawyers agree.²

Bad behavior by lawyers attracts public attention, I suggest, because society holds us, as a profession, to a higher standard. Some bad behavior is nuanced and probably doesn't resonate with the public. For instance, a federal judge recently sanctioned a law firm and one of its partners, ordering them to pay \$40,000 in sanctions for neglecting to point out "long-standing, settled caselaw" barring the court from issuing the injunction being sought by the firm.³ Other behaviors may.

A lawyer and her process server were held in contempt and fined \$100 by the presiding judge after the process server delivered a subpoena to a lawyer during a recess in a felony murder and 1st degree robbery case. The subpoena was delivered in a hallway outside the courtroom and in front of jurors. The judge described the service as "gamesmanship" and arising from "squabbles among lawyers." The sanctioned lawyer contends that the delivery was unobserved, and the sanction was unjustified – she plans to appeal. The ill-timed service of the subpoena would probably escape public notice; the notion that a lawyer would appeal a \$100 fine is likely fodder for the next new lawyer joke.

Whether either of these events was COVID-driven is not clear but ultimately that question is irrelevant. There is no excuse for (indeed there is an ethical prohibition



against) failing to advise the court of relevant precedent even if it militates against your client's position. And there is no justification for disrespecting our colleagues or taking advantage of someone in the moment. There is never a valid reason to disrespect one another or the rule of law.

COVID has well-overstayed its welcome. But it will eventually become another chapter in our history, just like all the challenges we have faced before and those we will face in the future. Through it all, though, we need to try to be our best selves in all aspects of our lives. And that means caring about our families and friends, about ourselves and each other, and about the rule of law. Don't let COVID be an excuse for being less than you can be.

¹ The Who – "Won't Get Fooled Again" (1971), Pete Townsend.

² ABA Journal, Aug/Sep 2021, Vol 107, No. 4.

³ <https://www.abajournal.com/news/article/judge-slams-davis-wright-for-failing-to-mention-longstanding-settled-case-law-orders-40k-sanction>





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PURSUIITS OF HAPPINESS

Interview with Scott McAllister. *Hickory and B-Town*

JEB: Thanks for agreeing to be interviewed, Scott. Not sure if you knew but you were nominated by Andrew Manitsky.

SM: Yes, he told me after one of our gigs and I was pleasantly surprised.

JEB: As you know, we interview people with interests and passions outside of the practice of law which keep them balanced. Andrew mentioned your golf pursuits, because I think at the time we spoke you were in Scotland playing. So let's start by talking about golf. First, were you born in Vermont?

SM: No, Connecticut. I grew up in Simsbury, Connecticut.

JEB: And did you start playing when you were young?

SM: Yeah, I think I was about six or seven-kind of born into a golf family, at least on my father's side.

JEB: That's why I asked where you were from since it's not the most popular sport in Vermont, given the short season.

SM: Yes, the weather's not real conducive. My, my dad was like 10-time club champ at the course I started playing as a kid and he played whenever he could, so I think I was bound to bound to take it up anyway. We played in a lot of parent/child tournaments when I was younger so that was a great introduction to the competitive side of the game.

JEB: Did you play for a team in high school also or just at the club?

SM: Yes, I played on the high school team. I went to Syracuse University and although there was a golf team at one time, we didn't have a team while I was there in the mid '80s. Apparently the coach, Jim Boenheim, wanted to focus his energy on another sport. But we did have an intramural club team and I played on that team. It was a lot of fun.

JEB: When did you come up here?

SM: We came to Vermont in 1995. I graduated from the University of Connecticut Law School in '95 and took the Connecticut bar then. I apparently enjoyed the exam so much that I decided I wanted to come up to Vermont and take another one!

JEB: [Laughs]. I'm the class of 1995 also, but I only took it once and just in Vermont and I can't imagine wanting to do that twice.

SM: Well, my wife and I got married in '95 and she was originally from Shelburne. So we came back here, having just gotten out



of law school not having a job, it was either be unemployed in Connecticut or be unemployed in Vermont and the skiing was better up here.

JEB: Not that you can afford skiing if you're unemployed...

SM: There is that. Actually my wife's company relocated her to Burlington so for her, it was coming back home.

JEB: And were you playing golf all along?

SM: Absolutely. Except when my son was born, I didn't play quite as much for the first couple years but then got right back into it. Starting mid-April and usually playing through October. And now we spend some time in Florida in the winter, so we play while we're in Florida.

JEB: So you continue to be a golfing family?

SM: Yes my daughter played for a while. She and a couple other girls actually start-

ed the girls' varsity golf team at CVU. But she's now into horses and that doesn't leave much time for golf. My son does play quite a bit though.

JEB: Glad to hear you got to pass the golfing bug down. So, we should talk about what you were doing in Scotland...

SM: Well, it all started about 12 or 13 years ago. A good friend of mine here in town named Matt Dodds got me into playing with antique hickory-shafted golf clubs from around 100 years ago.

JEB: Wait, what?! I always thought golfers were really into their equipment and that the evolution of equipment is what people rely on to improve.

SM: Right? Like why make a hard game harder? I knew what the clubs were like but had never actually tried them. And he came up to play at the club one Sunday afternoon and brought his hickory clubs with him. I hit one and I was hooked.

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JEB: Is it just a different tactile experience? Did you say it was all hand-carved?

SM: Well, the irons are just old, forged steel heads and the shafts are made of wood. The sweet spot is about the size of a dime. When it's cold out and you miss one you pretty much feel it in your teeth. There are some folks currently making replica clubs, but for the event we just had in

Scotland, the clubs actually have to be manufactured prior to 1935. These things were about as low tech as you can get but that is part of the challenge of it too. It has made the game a lot more fun for me. I was getting disillusioned with the constant push for the newest and greatest equipment to improve your game. And I've always loved the history of the game. So for me, it was kind of

a natural fit. I enjoyed it so much I ended up actually playing hickory clubs exclusively for about 12 years.

The Scotland event was modeled after the Ryder Cup, with a U.S. team playing against a European team. It's been going on every other year since around 2000. One year, the European team would come over and play a match somewhere in the states. And then two years later, the United States team would go over and play somewhere in Europe.

JEB: It's an entire hickory tournament?

SM: Yes and everyone plays with hickory clubs and period dress—shirtie and knickers or "plus fours." Actually, another event I played in a few years back required playing in a sport jacket. You could choose to play without the jacket, but it would be a two-stroke penalty. I went with the jacket.

JEB: [Laughs] Knickers?! I had no idea! I hadn't pictured that.

SM: The USA/Europe event is called the Hickory Grail and I was first invited by my friend Matt in 2013 to play at Walton Heath in England, which is where they played the actual 1981 Ryder Cup. It was all kinds of fun and we've made some really good friends from the European team whom we get to see every couple of years. When we heard they were going to play the 2021 event at St. Andrews in Scotland, we knew we couldn't miss it, St. Andrews being the "home of golf" and all.

JEB: Of course! So how'd you do?

SM: It was extremely close. Europe ended up retaining the Cup by two points. It's essentially three days of matches, two days of a format where you play with a partner and one day of singles. I unfortunately lost all three of my matches. But I actually had an almost career round at the Old Course, which sort of softened the blow of losing the matches a little bit.

JEB: Like a personal best?

SM: Right, and to have it at the Old Course at St. Andrew's was pretty special.

JEB: Perfect. Personal best at the Old Course with the old clubs! Was it gorgeous or I assume it rained the whole time?

SM: We had five days of golf and it was three days of pretty good weather book-ended by two days of misery, you know, 50 degrees and 30 mile an hour winds and rain. Just brutal conditions. We kind of knew going in looking at the forecast for the area for the week but it was still a bit of a slog for a couple of rounds.

JEB: That's always the case. I've been to Ireland a lot of times, but not Scotland, but I imagine it's the same, when it's green and

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sunny, it's the prettiest thing ever but most of the time it is gray and rainy. So when's the next one?

SM: The 13th Grail will be in two years--the European team will meet us in in Michigan.

JEB: Excellent! So do you play with regular clubs now or are you just spending the next two years working on your hickory game?

SM: I kind of got back into the modern equipment maybe two years ago. I kind of figured I had maybe 10 years competitive golf left in me, generally state events and the occasional shot at qualifying for USGA events. It's super competitive at that level with usually 75 guys or so playing for two spots, but my goal is really just to finish top half or top third of the field. Two years ago, I got to do a qualifier for the U.S. Senior Open at the Olympic Club in California. I've always wanted to play there. I took my son out to caddy for me and we had a great time. It was the most fun I've ever had shooting 85!

JEB: Ah, personally a good experience, but golf, maybe not.

SM: Not so much. Fun in spite of the score though, which as I get older, I'm realizing fun is a little more important.

JEB: Can you go to a regular event and just get a 'hickory handicap' to equate that you're playing with hickory clubs?

SM: No, not that you'd want to, but generally you can't play at a regular tournament. Well, club or local tournaments are okay, but I couldn't bring my hickory clubs to play at a USGA qualifying event because they're not technically legal since they don't conform to USGA rules.

JEB: Even though it's so much harder?

SM: Right, it's not like playing with these clubs is an advantage but rules are rules. You can actually get a hickory handicap through what's called the Society of Hickory Golfers, the organization that oversees most of the tournaments here in the states, includ-

ing what's called the U.S. Hickory Open. I've played in five or six of their tournaments, which occur all over the country. And they'll actually give you a Hickory handicap. You have to submit scores where you've played with these clubs, and they'll figure out a handicap for you.

JEB: Never thought I'd be learning about the Society of Hickory Golfers, sounds like something from a Wes Anderson film.

SM: It's kind of funny how some people take this stuff. Essentially, we're just civil war reenactors. But one problem with hickory golf is that when you have to have clubs made prior to 1935, there are only so many to go around. While there are two or three companies that make replicas of the old hickory clubs, some of the old school folks feel like if you win an event with replicas, it's not as legitimate a win as it would be if you were playing with original equipment. I've witnessed heated arguments on the subject, believe it or not...

JEB: Seems like splitting hairs especially with the limited supply—but the originals definitely are original shafts, right?

SM: Not necessarily. These things are made of one hundred-year-old wood and while they're surprisingly strong, they do break, whether during the course of play or out of anger (not that I'd know anything about that, of course). So when a club breaks, the shaft needs to be replaced and you technically no longer have an original club. The head is of course original, but the rest, not so much. It can get a little silly. My buddy has a running joke that he owns Abe Lincoln's original axe, but the head's been replaced three times and the handle twice.

JEB: That's too funny, also funny to squabble about it since a full original must be so rare, and then you add the knickers to the equation...

SM: Ha! Well, that's kind of half the fun, the clothes part. Better to look good than to play well.

JEB: Right. Is there a Hickory club in Vermont or is it just the two of you in Williston?

SM: There is a Vermont Hickory Open held every summer that draws people from all over. In Vermont there are probably about 20-25 people who play with these things, unlike some of the Southern states where they have hickory clubs and players in the hundreds.

JEB: Would you play all summer here with hickory clubs?

SM: I play at Vermont National here in town. And until recently, I'd play all my league matches and other club tournaments with my hickory golf clubs.

JEB: And you'd feel the need to explain to everybody why you're not doing as well, or would they just already, they know?

SM: No, I managed to do okay with them. And it's certainly a conversation starter on the first tee. Another buddy of mine always said it was it was a built-in excuse for not playing well.

JEB: Blame the tools of course. So do you play virtual in the winter?

SM: We have a simulator at the club and I've been to Gonzo's a few times but during the winter we spend enough time in Florida that I can get enough practice in.

JEB: That's the thing I was wondering. Especially with COVID everybody's working remotely and it's amazing how much you can get done just the same somewhere else. And now you can play golf during the day in the winter and still practice full time.

SM: Totally.

JEB: So I understand you're also in a band, but I guess that's going to take a break for a month while you are in Florida?

SM: I'm in a band with Andrew, actually. He joined fairly recently, but 'the band has been playing together for four years or so. We gig, well since COVID not as much, but in a normal year we probably play out 15-20 times a year.

JEB: And what do you play?

SM: I play electric guitar.

JEB: And how many people are in the band?

SM: Six.

JEB: That's a good-sized Vermont band. What, what kind of music is it?

SM: It kind of runs the gamut. A good part 'is 60s and 70s blues and soul—Motown kind of stuff. But we do some modern material too as long as it's danceable, so folks get on their feet.

JEB: You gig in Burlington bars?

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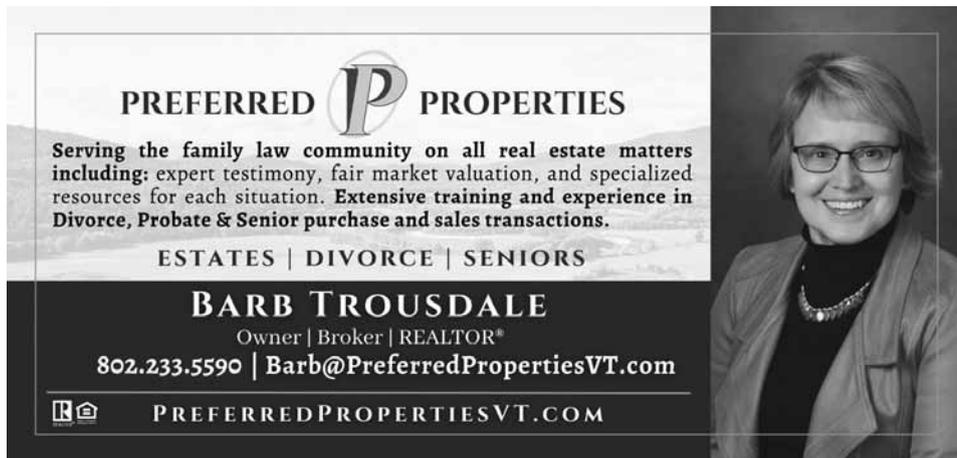
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SM: Yeah, for the most part we've done bars but we do a couple of country club gigs every summer. This year we played the South Burlington SOBU Night, which was a blast, and the South Hero Snow Farm Vineyard concert series. We also play the occasional wedding.

JEB: I forgot to ask, what's the name of the band?

SM: B-Town.

JEB: Fitting. So have you played the guitar your whole life too, or, I mean, since you were very young?

SM: Yes, I started playing when I was about 11. And I played electric guitar through high school and then studied classically in college. I played classical guitar for a bunch of years and then started playing steel string, acoustic solo stuff in the mid-nineties, lots of Irish music, with solo guitar arrangements of Irish fiddle tunes, harp tunes, that kind of stuff. I really got into that for a while, gigged quite a bit, and did a CD in 2000.

JEB: Of Irish tunes?

SM: Yep. Some originals, some traditional Irish tunes, a couple classical pieces, a fun little arrangement of a Sesame Street song.

JEB: Sounds awesome. What was the CD called?

SM: Journey. And the CD was actually a million seller. Just ask my wife, I have a million in my cellar...

JEB: [Laughs]. Ba dum-dum! I'm sure you sold some.

SM: I sold a few at gigs and had it at some of the local stores and it actually got some decent reviews. But I was smart not to quit the day job.

JEB: But that's the point of the column. So you have this full golf career and a full musician's career. And you practice law full time. That's three day/night jobs! How often do you practice or play with the band?

SM: We rehearse once a week, generally and those 15-ish gigs. It's just enough

to keep it fun and not too much work, you know?

JEB: A great release to get away from your day job and hang out but not a chore.

SM: Right. Gigging once or twice a week while you're working full time, and while you have all this other stuff would get to be a little much. So it's a pretty good balance.

JEB: Well, that is the word. And that's the theme of the column, speaking with lawyers who are doing things outside the practice of law and creating balance. And almost everybody I've interviewed said this definitely keeps me sane, helps me balance my work, etc. It's so good to take your head out of your work, but I assume since the golf course is long and slow, does work pop into your brain throughout or do you try to keep them separate?

SM: Well, I always have my cell phone with me but I'm getting better at turning it off while I play golf. I've screwed up enough rounds by answering work calls on the golf course that I've learned to just shut it off and try not to think about it for four hours. My practice is mostly estate planning. The question about the Will will be there when I finish.

JEB: Absolutely. But even doing that is what creates the balance and makes you a better lawyer.

SM: I think so. Just being able to get away from it and shut it off for a bit helps. I think that's true with anything.

JEB: Well, we lawyers tend to have obsessive personalities, so you don't want to keep going too hard with one thing.

SM: Yes, too much of any of any one thing can be a bad thing, I think.

JEB: Well, and it sounds so fun that you have a good friend to play hickory golf with but you also have your band members, just having that social connection outside of work too.

SM: Yes, and my wife just started playing golf a couple years ago and we try and get

out on Saturdays and play. It's been great.

JEB: So she just started-- were you the one who gave the lessons or did she get lessons from somebody else? Asking for a friend!

SM: Well, she's had a couple of actual lessons from a pro that knows what he's talking about, but we've been playing together quite a bit, so I'll try to give her tips, for what they're worth. We try to pick one thing to work on for the day, you know, one part of the swing to try and concentrate on. Not sure if you've tried it, but anything more than that is a lost cause for anyone...

JEB: Yes! Not golf but I play tennis. It's sort of the same kind of thing. And whenever you get lessons, you get worse for a while. Because you can't stop thinking about all those things that they told you to.

SM: You're absolutely right. You take a lesson and any adjustment you make feels really weird and you've got to hit 500 balls before it feels comfortable.

JEB: I'm glad you figured out the one thing at a time thing and found a way to enjoy golf together. My husband and I learned tennis at the same time, and it's been a great way to get out and create another level of life-life balance!

SM: Exactly.

JEB: Well, I think everything we talked about is absolutely 100% worthy of the pursuits of happiness column. Because you're doing these things while you're practicing law. And I never knew about the whole hickory golf slice of life. I think it's fantastic. We probably could have spent more time on your guitar because it sounds like you've had such an evolution in your guitar work as well, but alas we've run out of space and time. We hopefully at least made a pitch for folks to go out and dance to B-Town!

SM: This has been fun, so thank you to you and thank you to Andrew for nominating me.

JEB: Thanks so much for agreeing to do this. I love that I learned something new about golf as well. It's been a fantastic five plus years of me exploring the happiness that our members enjoy outside of the practice of law, from ping pong to golf and everything in between. Perfectly fitting for this, my last Pursuits of Happiness column. I've enjoyed every single interview and I thank the 20+ interviewees for sharing their adventures with me.

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RUMINATIONS

The Canon Against Absurdity

The legislature legislates. The General Assembly exercises the supreme legislative power, in a system where the other branches are separate and distinct from it, so that neither the legislative, executive, nor judicial departments exercise the power properly belonging to the others.¹ When a statute becomes the focus of a claim or crime, the court scrutinizes the law and applies it to reach a verdict. Sometimes the court finds the statute unconstitutional and strikes it down. Sometimes the court finds reason to question a statute's plain language, and alters it to fit the perceived intent of the legislature, after concluding that applying the law literally will lead to an irrational or absurd result. Instead of voiding the law, in these cases the court rewrites the law to save it, to ensure that the statute is enforceable. This is the canon against absurdity at work.²

In 1848, in *Spalding v. Preston*, the Vermont Supreme Court reviewed a demand for the return of certain coins. The state had seized them, after concluding they were counterfeit. How could this be illegal, asked the defendant. No statute made owning or making counterfeit coins a crime. In the Revision of 1839, the counterfeiting statute had been amended, adding additional subjects but deleting the word "coins" from the former statute. Judge Isaac Redfield explained that "this was a mere oversight is sufficiently apparent from the utter absurdity of any supposed distinction between the necessity, or propriety, of seizing the 'stamps, dies, plates, blocks, and presses,' &c., which are named in the statute, or 'bank bills,' which are also named, and seizing coin, which is not named. It is obviously nothing done by the legislature *ex industria*. No one will pretend, that the maxim, *expressio unius exclusio alterius*, can have any possible application here. It is a mere oversight." Redfield supplied the missing word, confirmed the coins were illegal counterfeit, and denied the claim.³

Judge William H. Taylor changed one statute's disjunctive "ors" to conjunctive "ands," justifying the amendment to avoid an absurd consequence. Read plainly, the law would have made jury selection impossible by limiting the array to jurors chosen that same year by the towns. He changed "chosen or drawn or summoned" to "chosen and drawn and summoned" so "force is given to each modifier." He maintained, "When the proviso is given the meaning which the law requires, there is no variance between the bill as said to have been passed by the Gen-

eral Assembly and as finally approved by the Governor."⁴ The court wasn't legislating; it was repairing a mistake of language.

Taylor explained the practice of altering statutes in a subsequent decision. "The founders of the state were not unmindful of the necessity for a system of laws that would readily adapt themselves to the changing conditions of society; while the effect of the statute claimed by the appellant would either petrify the common law as embodied in the decisions of the English courts at the time of the separation, or would require the courts to administer the common law blindly in accordance with decisions of the courts of the country of which they had recently declared their independence. The construction we give to the statute is supported by the original statute of adoption enacted in 1779."⁵ Legislation is not only what appears in the V.S.A., in other words, but includes the legislative history of the act.

Justice John Watson had no reservations with the practice of judicial tinkering with statutes. "[W]hen the true meaning can be collected from the context, words may be modified, altered, or supplied, to avoid absurdity, repugnance, or inconsistency."⁶

Absurd is a bad ruling to receive when you're arguing the plain meaning of a statute. Labeling an argument as leading to an absurd or irrational outcome is about the severest criticism a court can use to dismiss it. It is based on interbranch respect. The law invents a presumption that the legislature could not have intended a construction that would lead to absurd consequences.⁷ As the court has said on several occasions, the plain meaning isn't the law. The intent of the legislature constitutes the law.⁸

First Use

The first appearance of the word "absurd" in a published Vermont decision came from a contest over a heifer, seized for nonpayment of taxes, whose collector was charged with trespass by the owner of the animal. Chief Judge Nathaniel Chipman explained the trespass law. "The plain and obvious meaning is, that the defendant has done no wrong in the case. It may be that he has done the acts, or that he has done them in the manner charged; but if he had a good and legal authority, and acted within the limits of that authority, and indeed was bound in duty to do the acts which he did, it is absurd to say that he is in any sense guilty; for where there is no wrong there can be no guilt."⁹

Definition

"Absurd" is used in more than six hundred cases in the *Vermont Reports*. The dictionary defines it as "ridiculously unreasonable, unsound, or incongruous,"¹⁰ but that won't do. The Vermont Supreme Court has used the term in a variety of ways. Absurd is worse than unreasonable.¹¹ It is worse than unjust.¹² An absurd argument might "shock the general moral and common sense."¹³ It might "make the most absurd nonsense."¹⁴ It might be "absurd on its face."¹⁵ It might be "little short of absurdity."¹⁶

Sometimes arguments are so absurd, they offend the court that hears them, as in *State v. Caldwell* (1802). "The position of the defendant, 'that if a person about to be arrested by a sheriff upon a legal process, draw a line on the ground, and forbid the officer to pass over it, the officer passed it at the peril of even his life,' might seem to be so absurd as not to require any particular comment; for the Court trusted, that so baneful a doctrine had not, owing to the good sense of the people, been widely disseminated."¹⁷

When a defendant insurer claimed relief from a policy, arguing that plaintiff was presumed to know the law, Justice William Hill remarked, "It would be absurd to require contracting parties to be aware of every example of usage in the Vermont Statutes Annotated, whether or not related to the subject matter of the contract, in order to be sure their agreement said what they intended."¹⁸ Justice Louis Peck thought that "[t]o say that a police officer must recite a motorist's rights in audible tones while chasing a violent citizen across a cornfield was too absurd for the trial judge in the District Court and too absurd for this trial judge."¹⁹

Justice Luke P. Poland wrote that a seller of goods who tried to treat a sale as void and reclaim the goods while insisting on retaining the securities taken for the price was attempting to both "affirm and disaffirm the same contract, which was an 'unjust and absurd' argument."²⁰

Chief Justice Isaac Redfield concluded that a literal compliance with the statute relating to railroads would require fences across highways, which would be an "unnatural, unreasonable and absurd" construction. The statute, he explained, "is merely one which is imposed for the benefit of, and one which the railroad company is under to, the adjoining land-owner, and to him alone."²¹ In another case, Redfield wrote, "Such a construction would be ... so absurd

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and puerile that we should hesitate to adopt it, unless from necessity."²²

Chief Judge Nathaniel Chipman rejected a claim that an infant could agree to marry another. "It would be very absurd, indeed, that the law, which does not trust an infant with discretion to bind himself, by a contract to purchase an unnecessary Jewsharp, should, nevertheless trust his discretion with a contract, in the most important concern of life; on the prudence of which, depends his own future happiness and prosperity. What parent could wish to be placed in a situation so dangerous for his child, so unfortunate for himself! Could a law be endured, which should enable an infant, in a momentary delirium of youthful passion, to set at naught parental authority, and place himself in a situation to render unavailing all the counsel and advice of his nearest and dearest friends? Certainly the law, as it has been established, is wisest, best, and in every view, most salutary."²³

Judge James Barrett seemed to relish using the word. "It would be absurd to construe the transaction between the parties as giving the defendant the right to destroy the plaintiff's dam by the running of his logs through the bulkhead; absurd to infer that either party contemplated such a result from the running through of the logs; and absurd to hold that the agreement to repair and pay all damage in consequence thereof, was intended or thought of as covering such a consequence of the faulty negligence of the defendant in the manner of conducting the business."²⁴

Chief Judge Redfield also found the word too tempting to resist, using it in dozens of cases, well more than any other judge or jus-

tice, before or after.

Redfield

Judge and later Chief Judge Isaac Redfield was a conservative. In his remarks on retirement, he said, "I have never allowed myself to feel for a moment that I was at liberty to forget that an abiding and unaffected respect for the law and its regularly constituted ministers, whatever might be my private opinions of the wisdom of the one, or the good character of the other. . . . And in view of this I have always and under all circumstances, felt it my duty to study to vindicate all laws, however odious, from that contumely and reproach, which the well disposed and truly patriotic will sometimes thoughtlessly heap upon the constitution or laws of the state or the union, without reflecting that in so doing, they are doing all in their power to destroy that respect for law and order in society, which is the only guaranty in free states against outrage and abuse from the reckless violence of the mob or the assassin on the one hand, or of overbearing and unscrupulous majorities on the other."²⁵

Redfield was not reluctant to criticize. In *State v. Prescott* (1855), where the court ruled a statute unconstitutional for presuming guilt and authorizing forfeiture of liquor without just cause, he described the prevailing party this way: "I have no sympathy with any class of men, who make war upon this statute, or any other law of the state, in a spirit of preconceived reproach, of opprobrium, and hypercriticism, of which character I have felt compelled to regard, most of the former attacks upon this law, and while I would cheerfully and gladly uphold this law,

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and all laws, against any and all such attacks, with the tittle of zeal and strength accorded to me, I cannot but regard it as altogether unadvised and ill-judged, to push the defence of a statute, and especially a statute upon the subject of sumptuary law, a subject so rife with jealousy and suspicion, in all periods of the history of civilized states; to push the defence of such a statute any further than we can fairly justify our course, by just construction, and sound and sensible exposition, seems to me doing an essential disservice to the cause of legal administra-

tion, in general, and upon this exciting subject, in particular."²⁶

He was conscious of having to decide cases in ways he might not approve if he were able to make the law. He wrote, "Whatever I might have thought of the policy of this action of the legislature, I feel bound to give effect to their enactments, and, whatever I find the law to be, so to declare it; and if I find a decision, which I might consider as more congenial to my views of what the law ought to be, yet, if it is not the law, I do not feel at liberty to adopt it,—which

would be, in effect, to make, and not declare, the law."²⁷ This same thought is ably expressed by Judge John Mattocks, in his dissent against Judge Charles K. Williams' opinion in *Hunt v. Fay, Adm'r* (1835). Commenting on Joseph Story's explanation of a point of law in *Commentaries on the Conflict of Laws*, Judge Mattocks wrote, "[T]he admission of so great a judge, that the law is different from what he seems to desire it to be, is to me very convincing."²⁸

CROSSWORD PUZZLE

by Kevin Lumpkin, Esq.

Kevin is a litigation partner at Sheehey Furlong & Behm in Burlington, and in his spare time he enjoys puzzles and trivia of all kinds, especially crossword puzzles.

Note: For those readers who regularly solve the New York Times crossword, this puzzle is about a Thursday-level difficulty.

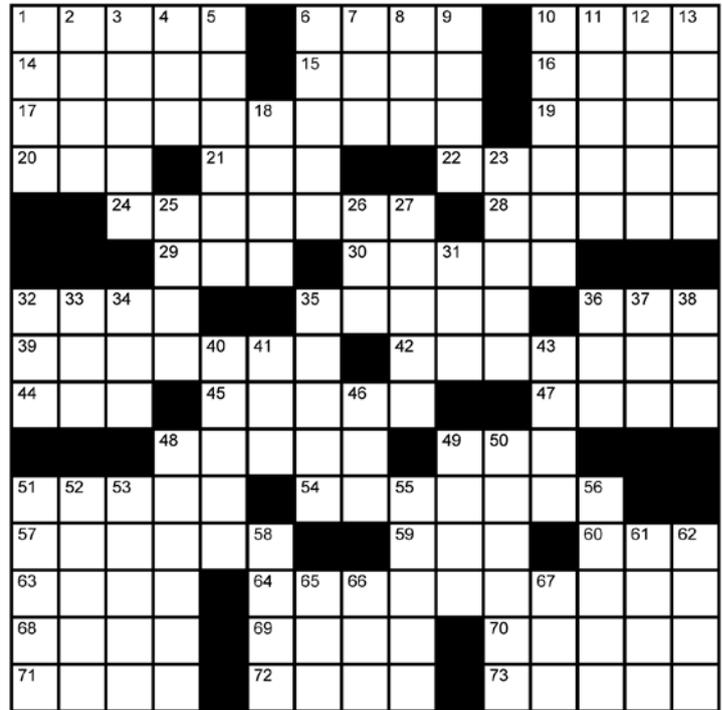
Across

1. Seasonal McDonald's sandwich
6. Pool accessory
10. Co-host with Che
14. Venue where you might see Phish perform
15. Ish
16. Where Honolulu is
17. Bargain outlet?*
19. Operator
20. "The Last O.G." network
21. Not too bright
22. Barbarism*
24. Went by
28. Makes a home
29. Spot
30. Certiorari and others
32. Actor Schreiber
35. Cognizant
36. On the ___ (fleeing)
39. Barbed wire*
42. Does some bartending*
44. Anonymous litigant surname
45. Things you don't want to find in your brief after you file it
47. Utilize a barbell*
48. Site of a Herculean feat
49. Significant historical period
51. Book of maps
54. Gillette Stadium offering
57. Bananas and such
59. Org. that runs 511VT
60. It can be member-managed or manager-managed
63. Follow
64. What you need to do to become a lawyer ... or a hint to 17-, 22-, 39-, 42-, and 47-Across
68. Border
69. Revise, as a pleading

70. Call to mind
71. Actress Tara
72. Stops up
73. Married again

Down

1. Grain used to make Long Trail or Magic Hat
2. Maryland delicacy
3. Partner of reduce and recycle
4. Cozy lodging you might find in Middlebury or Woodstock
5. Blue period?
6. Offerings at a 4-Down
7. Vaccination site
8. Something you might pick up at a farmers' market
9. Hoda of morning TV
10. Energy units named after an English scientist
11. Place of refuge
12. Crude Halloween costume
13. Territories
18. Yellow, maybe
23. Go in
25. First name in denim
26. "Gross!"
27. Proceeds like a meeting that could have been an email
31. Retirement vehicle
32. Subject of some MK-Ultra experiments
33. Stock market debut
34. Able I was ___ I saw Elba
35. Colorado ski town
36. Souvenir from 16-Across
37. Taylor of fashion
38. Noted 14-Across in NYC
40. Bikini blast, briefly
41. Press room?
43. Word in the common name of 7 V.S.A. § 501
46. Dolt
48. Aced
49. Achievement for Rita Moreno and Whoopi Goldberg, in brief
50. Prefer
51. Interested in
52. Barter
53. Mario's brother
55. Endures
56. Jostle
58. Violated a Title 23 statute, say
61. Elmore or Iriquois
62. Rep
65. Statute administered by the USDOL
66. Kind of card for a phone
67. First lady?



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Absurdity in Practice

Act 250 limited truck noise levels above 70-dB for all vehicles crossing the property line, although noise levels on the public highway were nearly as loud. Justice Harold Eaton wrote, "Such a result would be absurd because it would prohibit many uses that are otherwise expressly sanctioned by the bylaws."²⁹

Redfield replaced the commas in a statute with dashes, to "more clearly [show] how the construction should be, and, indeed, must be, to avoid partiality and absurdity.... In attempting to combine the two objects a form of expression was adopted, that seemed to exclude all other officers, except recording and certifying officers,—but not necessarily excluding them,—and the necessity of the case compels us to include them, at the expense of forcing the construction of the words of the act, in order to avoid so gross an absurdity as the literal interpretation would lead us into."³⁰

The Supreme Court underscored this point in 1982. "In construing statutes, we will not indulge in quibbles over minute points of punctuation; they are among the atomies of grammar. At best, the so-called grammatical stops are widely misunderstood and applied even among average and reasonably well educated laymen, including legislators and, *mirabile dictu*, even judges. Moreover, it is the general rule that punctuation, *per se*, forms no part of a statute and will not govern its construction as against the manifest intent of the legislature ascertained from a consideration of the statute as a whole."³¹ Justice William Billings explained, "[L]egislatures are not grammar schools; and, in this country at least, it is hardly reasonable to expect legislative acts to be drawn with strict grammatical or logical accuracy."³²

Redfield could overlook mistakes in statutes. "If we understand the proviso literally, it will take away from justices of the peace all power to bind over for trial any person brought before them, accused of either of the foregoing offences, let the value of the property be what it may. And as they cannot try such offences, where the value of the property exceeds seven dollars, in all such cases they must of course set the offenders at liberty. If such was the intention of the legislature, they certainly did intend to confer peculiar exemptions upon this class of offenders; for justices are required to bind over, for trial, all other offenders. The supposition, then, of its literal application is too absurd to be seriously entertained. We must, then, either declare the proviso void for uncertainty, as having no intelligible meaning, which is not too absurd to be entertained; or else we must find from the language used, with reasonable certainty, what was intended.

"But we prefer giving this portion of the

statute a sensible meaning, if it will fairly bear such a construction. And we think it will. In order to do this, we have only to limit the extent of the signification of the terms used in the proviso by the general scope of the enacting clause. This is no more than courts always must do in regard to contracts, and statutes, to prevent sometimes running into absurdity by the literal application of general terms. Very few subjects are discussed, by the plainest writers, where this is not necessary."³³

Where the law defined a bushel of corn by weight, at 56 pounds, an appellant argued capacity was a better measure, but Redfield was not persuaded. The parties to the contract didn't define bushels, and were bound by the statutory definition. "Should we give any other construction to the statute, we must render it either nugatory or absurd."³⁴

What Isn't Absurd

Sometimes claims of absurdity fail. In Probate, the intent of the testator is the goal. Judge Milo Bennett explained, "In the construction of a will, the grammatical one, if obvious should not be departed from, unless it would lead to absurdity, or unless there is enough in the will to satisfy the mind, that it was not the intention of the testator to have it construed according to its grammatical construction. In the present case there is nothing absurd or unreasonable in the idea, that the husband should wish to increase the widow's portion somewhat above one third of his estate, and there is nothing in any other portion of the will to control or qualify the clause in question. Indeed, I think, the other parts of the will countenance the construction we give to that part of it now in question."³⁵

The principle has been extended to deeds. Redfield concluded, "It never has been contended, since the enactment of our statutes requiring deeds of land to be executed with certain specified requisites, that a deed, executed merely according to the common law requirements, was good to convey the land, or that such a deed was entitled to registration. And to establish such a proposition, at any time, would be a virtual repeal of the statute, and would be especially strange, not to say absurd, after more than half a century of uniform acquiescence in regard to the construction of the statute."³⁶ Historic practice counts in construing statutes.

But Redfield also seemed to be wary of the practice. "[W]hen a case occurs, and especially one of such magnitude as the present, an anxiety to save it will suggest modes of argument, which nothing else, almost, will; and especially, when some technical requisite has been omitted through inadvertence, will courts go very far to uphold a conveyance,—and more especially, when it has been long acquiesced in. But this relax-

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ation must have some limits, and must not be exercised by a mere arbitrary discretion of the court. If that were so, no one could ever form any opinion what would not be held good."³⁷

Judge Charles K. Williams sounded disgusted with one argument. "It would be absurd to say that the action might be maintained to recover the price of one or two sheep or cattle, and not for a horse."³⁸

Appellants have a high bar to overcome in convincing a court. As the court wrote in 1801, "The statute certainly is not pregnant with such absurdity."³⁹ After a wife filed for divorce in Vermont, she moved to dismiss it, and refiled in Massachusetts, where the child support laws were more generous to her. Her husband argued granting the motion would justify forum shopping. Judge Karen Carroll, then sitting by assignment on the high court from her duties on the Superior Court, concluded that reasons such as the husband claimed were irrelevant. The reasons a party would file for dismissal are not for the court to judge. A rule is not absurd simply because it leads to "anomalous or perhaps unwise" outcomes.⁴⁰

Justice Marilyn Skoglund, another judge who used "absurd" unsparingly, commented that the "policy of reading statutes to get around absurd results avoids substitut[ing] this Court's policy judgments for those of the Legislature."⁴¹ The court has famously

directed a trial court to "resist the impulse to view itself as a "super planning commission."⁴² This is the same principle at work at the Supreme Court. The impulse to legislate is a temptation to be resisted.

What is Absurd

Sometimes the court acknowledges a law is absurd, and doesn't meddle with it. Chief Judge Luke P. Poland reflected on that idea. "The court held that as to the one hundred dollars paid by Mrs. Pinney at the time of the purchase, there was a resulting trust, but as to the residue there was none, but they further held that the son's written testimony, given long after all his title had become vested in the defendants, was sufficient to satisfy the statute of frauds, and uphold a trust for the residue. For myself, I must say that this mode of upholding the trust is wholly unsatisfactory, and seems frivolous and absurd, though I should say that her entering upon the land, paying off the mortgage, and her long and open possession of the land, which was notice to all the world of her title, was sufficient to entitle her to claim a conveyance, on the ground of a full performance."⁴³

Redfield admitted that a law that prohibited a claimant from recovering costs of defense even for a defective claim was bad law. "But that is the law of this state, absurd as it is, and the defendant was bound to know that..."⁴⁴

Redfield had no patience with absurdity. "Upon the principle claimed, in *Rossiter v. Marsh*, a promissory note whose date was not set forth, if it contained one, could not be given in evidence, on the ground of variance, and by parity of reasoning, no recovery could be had upon it, under the general counts. It is scarcely possible, in my judgment, to conceive a more absurd decision in regard to the law of variance."⁴⁵ But it was the law and he would respect it.

Haunted

Redfield was "haunted with the sense of absurdity" listening to one appellant's claim that the gift of a large herd of cows required some formality in delivery, which the judge felt would be "altogether idle and absurd."⁴⁶ Justice Louis Peck shared the visceral reaction absurdity can create, writing in a dissent that he had "long ago become infected by the virus of common sense, which persuades me to assume that legislative intent matches the ordinary meaning of the statutory language employed, and guides me away from the use of legalistic smoke screens to support a predetermined result"⁴⁷ The virus of common sense, the haunting that comes when listening to an absurd argument, reveal decision-making can be as much heat as light, as it should be. Deliberating, sort-

ing through competing readings of statutes, wills, contracts, and deeds, and choosing the reading that seems right, even if it means altering the statute, takes an emotional toll on the court. It is a risky business to march near the border of the branches.

Arguments Worthy of Being Absurd

Judge Laforrest Thompson thought it absurd that an applicant for a life insurance policy "must enumerate this and all the other aches and ills, however slight, transitory, and harmless, which he had had from his childhood to the date of the application" in answering questions on the written form.⁴⁸

Justice Milford Smith thought accepting the defendant's argument "that the Legislature, in enacting this statute, only intended to prevent the pointing of a loaded weapon at another but not to proscribe the pointing of an unloaded weapon would require us to construe the statute to lead to an absurd result. The most dangerous weapon is the 'unloaded gun', and the Legislature's intent was to proscribe the pointing of all firearms at others."⁴⁹

Chipman rejected a claim of libel for comments made in a petition to the legislature. "An absolute and unqualified indemnity from all responsibility in the petitioner is indispensable, from the right of petitioning the supreme power for the redress of grievances; for it would be an absurd mockery in a government to hold out this privilege to its subjects, and then punish them for the use of it."⁵⁰

Redfield thought a man who had promised not to litigate a claim about damage to his sheep couldn't have intended to preserve his right to claim money for damage to the wool on their backs.⁵¹

Redfield knew absurdity when it came before him. "It surely requires no labored argument, to expose the absurdity of requiring a man to cross a mountain with his produce, or bargain with a crusty neighbor, as he best can, or commit a trespass, every time he enters upon his own land, by crossing that of others,—which it seems to me must be the result, if one man may not ask [for] a highway, merely to accommodate his land. How can he build a house, if he should choose to, unless he have some convenient road to his land?"⁵²

Under Vermont law, drunkenness is no excuse, but Judge Samuel Prentiss noted that Blackstone had found cases "handed down in the times of Edw. 3, and Hen. 6, founded upon the absurd reasoning, that a man cannot know, in his sanity, what he did when he was non compos mentis; and he says, later opinions, feeling the inconvenience of the rule, have, in many points, endeavoured to restrain it."⁵³

What is at Risk

The court is well aware of the consequences of its decisions. Reacting to a charge of perjury and false swearing for words spoken in one incident, that treated this as separate crimes, Nathaniel Chipman feared the multiplicity of prosecutions such a ruling would invite, supporting his belief in the absurdity of the practice.⁵⁴

Chief Judge Poland also worried about consequences. "The doctrine of the defendant fully carried out would lead to most mischievous results, and such as would bring disgrace and reproach upon our legal tribunals. Two men, whose wives are sisters, or one the daughter of the other, do not thereby become at all related by affinity, and either may legally act as a judge, juror, or auditor, in a cause where the other is a party. These, not only absurd, but scandalous results of adopting any such rule, are satisfactory to us, that the legislature never contemplated its limitation to the narrow line claimed for it."⁵⁵

Redfield had the same concern. If the court adopted the reasoning of the appellant in another case, he wrote, it "would justly expose any court adopting it, to severe and just criticism."⁵⁶ Of course, courts don't shy away from brave decision-making out of such concerns for their reputation. But practical concerns play some role in the rejection of what are labeled absurd positions.

The Two Branches

Judges are cautious about interbranch relations. They try to avoid insulting the legislature. Sometimes, however, judges are willing to criticize the law-making body directly. Judge Asa Aldis explained the way he regarded the General Assembly in *Ryegate v. Wardsboro* (1858).

A rigid adherence to [the plain language of a statute] would not unfrequently involve us in contradictions, absurdities and palpable violations of the real intention of the legislature. The ignorance and inexperience of some legislators, the inability even of the wisest to foresee all the bearings and connections of an act—the great number of statutes proposed for enactment, and the variety of minds that modify and amend them,—the haste of legislation,—the imperfection of language, and want of skill, accuracy and perspicuity in the use of it,—and, not unfrequently, want of accuracy and clearness of ideas;—these all contribute to produce errors, imperfections and inconsistencies in the phraseology of statutes. Hence the letter of the law is found by experience not to be in all cases a correct guide to the true sense of the lawgiver. Hence have arisen those rules for

the construction of statutes which look to the whole and every part of a statute, and the apparent intention derived from the whole, to the subject matter, to the effects and consequences, and to the reason and spirit of the law; and thus ascertain the true meaning of the legislature, though the meaning so ascertained conflict with the literal sense of the words.

Applying this rule to the case at bar, we think all must agree that if the law maker were present, and so interrogated, he would answer that he did not intend to comprehend it within this statute. To hold to the contrary, would attribute to this section a meaning repugnant to the whole spirit and reason of this statute,—in direct conflict with other sections of the act, and with the very basis of all our legislation on this subject.⁵⁷

Justice Robert Larrow made it clear that the court would uphold a statute even if it didn't agree with its policies. "The result which we here reach is not only not absurd, but not inconsistent.... If the legislative intent were as appellee contends, it would then be clearly expressed. We neither approve nor disapprove such amendment; that is not our function. We merely state that, without it, we cannot reach agreement with the decision below."⁵⁸

A policeman had stopped a train to serve a man for a minor crime. The defendant questioned his authority. Judge H.H. Powers asserted, "It is illogical and absurd to say that the command of the law cannot be executed because of grounds of public convenience or expediency the court thinks it better to nullify the law."⁵⁹

Chief Judge John Rowell quoted a U.S. Supreme Court decision that "it is a familiar rule that a thing may be within the letter of a statute, and yet not be within the statute, because not within its spirit or the intention of its makers; that this is not the substitution of the will of the court for that of the Legislature, for frequently words of general meaning are used in a statute, broad enough to include the act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results that would follow from such a broad meaning, makes it unreasonable to believe that the Legislature intended to include the particular case."⁶⁰

Judge Titus Hutchinson explained, "The warrant commands the constable to remove and transport such stranger, with his family, &c. on the nearest and most convenient route, to the place of such stranger's legal settlement, if the same shall be within this state. Now, if, without regard to nicest grammar, this last clause be referred to the expression 'nearest and most convenient route,' the whole would not be the



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worst constructed sentence to be found in any statute whatever: and the sense would be, that the officer must keep within the state, though he might find a shorter route by crossing the line."⁶¹

The risk of crossing the separate and distinct line between branches is always present in these cases. In a *per curiam* decision from 1829, the court held it must "be governed entirely by the statute; for to go beyond, or fall short of it, would be in effect to legislate--to alter, or to add to, the statute."⁶² As Justice Rudolph Daley wrote, "It is not the function of this Court to pass upon the validity of this concern or the wisdom of the means the legislature has chosen to deal with it, but merely to determine whether the legislature may have acted in response to such a concern and whether in doing so it acted within its constitutional bounds."⁶³

"No power can be properly a Legislative, and properly a Judicial power, at the same time," wrote Asa Aikens, "and as to mixed powers, the separation of the departments, in the manner prescribed by the constitution, precludes the possibility of their existence."⁶⁴

The Process and the Principles

Judge Milo Bennett stated, "Language, by common consent, is made the representative of ideas, and is to be understood in its ordinary and usual acceptance, unless you are thereby led to absurd consequences. If the meaning of the words is obvious and free from ambiguity, both in their application and meaning, I know of no rule of law that will authorize a court to set aside their obvious import, and give them a tortured construction. A strained, unnatural construction of language is only to be tolerated, when you are involved in absurdity in understanding it according to its usual and approved acceptance."⁶⁵

Justice Louis Peck, in another of his dissents, faulted the majority for not following the proper order of statutory interpretation. He wrote, "Before a court relies on the plain meaning rule in construing a statute, it must examine and consider fairly, not just isolated sentences or phrases, but the whole and every part of the statute, together with other statutes standing *in pari materia* with it, as parts of a unified statutory system. The true purpose of the legislature should be sought. The effects and consequences of a possible interpretation are of great importance, particularly so in the case at bar, and must be considered. Only when these rules have been incorporated into the construction process, and determined to have no impact, may it be said with any degree of certainty that the meaning of a statute or any part thereof is plain on its face."⁶⁶

Writing for the majority in another case, Peck reminded us that "[r]ules of construc-

tion are not laws, hard and inflexible, which must be applied in a given situation simply because it is possible to do so [A] statute is to be construed as to carry out the legislative intent, though [it] may seem contrary to ... the letter of the statute or its literal sense.... [W]e are not confined to a literal interpretation of the statutory language.... [T]he plain and ordinary meaning rules are no more than that; they can be disregarded in an appropriate case like any of the other rules of construction."⁶⁷

"Departure from such straight-forward expression," wrote Chief Justice Albert Barney, "requires a convincing demonstration that the legislative intent cannot properly be as literally rendered. It must be established that carrying out the precise wording of the statute either produces results which are manifestly unjust, absurd, unreasonable or unintended, or conflicts with other expressions of legislative intent on the subject which must be held paramount. For this reason, all acts relating to the same subject matter should be read in conjunction with it, as parts of one system."⁶⁸

Justice Brian Burgess, dissenting, was shocked by the majority's decision. "We have just been treated to an unwarranted judicial revision of 13 V.S.A. § 7559. Its plain and unambiguous language is ignored in favor of terms and purposes foreign to its passage. The trial court's construction of the act, entirely consistent with legislative intent evinced by the chronology and context of its earlier expression and later amendment, is overruled based, in part, on inapposite snippets of legislative history. The Legislature's rational choice to create greater and lesser-included offenses for violating conditions of release is inaccurately characterized as absurd.... This plain legislative scheme, and its allowance of a lesser-included offense for all violations, including violations of other conditions like travel limits or nonharassment orders, may be curious, or even imperfect, but it is not irrational or ridiculous." He called the majority's use of legislative history a "bootstrap" and stressed that "resorting to legislative history falls outside of our canons of construction since the statute is plain on its face."⁶⁹

The Run Into Extremes

Chief Judge Charles K. Williams condemned attempts to argue statutes are absurd. "There is a tendency at the present day to run into extremes on every subject, and by pushing every argument to the utmost verge, and anticipating events which may, possibly, but without the least probability, happen, endeavor to draw absurd consequences, and, on that account, contend that the argument has no foundation. In theology, the doctrine of predestination has been carried so far as to deny altogether

free agency, and the doctrine of free agency has been extended so as to deny the omniscience of the Almighty. In law, it seems to be considered that, if it can be shown that a power may be abused, it is sufficient to prove that it does not exist. But it is a sound maxim that extremes prove nothing."⁷⁰

Relative Absurdity

What is absurd today may be reconsidered reasonable tomorrow. In *State v. Croteau* (1849), Judge Hiland Hall concluded that the jury was the judge of the facts and the law. He called the idea that only the court was the judge of the law absurd.⁷¹ Forty-three years later, in a decision reversing *Croteau*, Judge Laforrest Thompson treated *Croteau* as based on a "most nonsensical and absurd theory."⁷²

Absurdity then is not absolute. It is a judgment that kills an argument and triggers the refashioning of a statute to fit what the court finds as the true legislative purpose, case by case. It depends. The edge between legislating and perfecting legislation by judicial amendments to statutes (either expressly or by pretending some words don't exist) is razor-sharp. Curiously, there are few accessible instances where the legislature subsequently corrects or adopts the court's correction of its language.

The canon against absurdity is a tool, a powerful tool, created by judges to serve their needs. It is by its nature dramatic and, to admit it, a practice rarely to be necessary. Some might want to believe that the modern practice of articulating the legislative purpose of an act, along with the professional law-writing skills of the Legislative Council, will provide few instances when it is necessary. But they would be mistaken. There will still be challenges, limited only by the creativity of the bar. Absurdity isn't going away.

Note: You will find, after reading through this essay and its ninety or so "absurds" that the word will become so familiar to you that it begins to slip regularly into your conversation and writing. Sometimes it's just the right word to use. Overused, it loses its power. A hundred more uses and the word will become just a two-syllable sound. "Absurd" will never be the same for you again.

This is my last Ruminations. This column has been my bully pulpit, or podium, for 30 years and it's time to stop. I'm grateful to the editors for their support, and for the readers. I have other worlds to conquer, or at least to explore. I have one last favor to ask: *Keep retelling the old stories.*

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umns has been published under the title of *Uncommon Law, Ancient Roads, and Other Ruminations on Vermont Legal History* by the Vermont Historical Society. Paul is also the author of *The Law of the Hills: A Judicial History of Vermont* (©2019, Vermont Historical Society).

¹ Vt. Const., Ch.II, Secs. 2 and 5.
² *Weitz v. Weitz*, 210 Vt. 248, 259, 213 A.3d 1102, 1109 (2019); *Billewicz v. Town of Fair Haven*, 254 A.3d 194, 204, ¶ 29 (2021); *Gibbons v. Bristol-Myers Squibb Company*, 919 F.3d 699, 705-706 (2019); *Small v. U.S.*, 544 U.S. 385, 404 (2005), Thomas, Scalia, Kennedy, dissenting (“We should employ that canon only where the result of applying the plain language would be, in a genuine sense, absurd, i.e., where it is quite impossible that Congress could have intended the result ... and where the alleged absurdity is so clear as to be obvious to most anyone.”)
³ *Spalding v. Preston*, 21 Vt. 9, 12 (1848).
⁴ *Morse v. Tracy*, 91 Vt. 476, 100 A. 923, 924 (1917).
⁵ *In re Heaton’s Estate*, 89 Vt. 550, 96 A. 21, 29 (1915).
⁶ *In re Howard’s Estate*, 80 Vt. 489, 495, 68 Atl. 513 (1908).
⁷ *State Highway Board v. Gates*, 110 Vt. 67, 72, 1 A.2d 825 (1938).
⁸ *Ibid.*, 110 Vt. at 73, 1 A.2d at 827.
⁹ *Wilcox v. Sherwin*, 1 D.Chip. 72, 78 (1797).
¹⁰ Merriam-Webster online dictionary. Absurd | Definition of Absurd by Merriam-Webster. The Oxford English Dictionary defines the word as “inharmonious, tasteless, foolish,” and “out of harmony with reason or propriety.”
¹¹ *Wale’s Adm’r v. Bowdish’s Ex’r*, 61 Vt. 23, 17 A. 1000 (1889).
¹² “But to hold that he may by his own voluntary act deprive the plaintiff of any right to arrest and imprison him, and that this furnishes no reason for absolving his bail, (who had no knowledge of, and gave no assent to, his enlistment,) from the penalty of the contract, for not producing the principal to be arrested and imprisoned upon the execution, seems not only unjust but absurd.” *McFarland v. Wilbur*, 35 Vt. 342 (1862).
¹³ “We think that the section of the Public Laws under consideration here meets both of these requirements. The absurdity of a general license to the commissioner of banking and insurance to commit crime is so gross as to shock the general moral and common sense.” *State v. Reynolds*, 109 Vt. 308, 1 A.2d 730 (1938).
¹⁴ *Roberts v. McLean*, 16 Vt. 608 (1844).
¹⁵ *In re Rathborn*, 128 Vt. 429, 266 A.2d 423 (1970).
¹⁶ *Sturges v. Knapp*, 31 Vt. 1 (1858).
¹⁷ *State v. Caldwell*, 2 Tyl. 212, 215 (1802).
¹⁸ *Simpson v. State Mutual Assurance Company of America*, 135 Vt. 554, 382 A.2d 198 (1977).
¹⁹ “In this case [plaintiff] himself deprived the police officers of any opportunity to apprise him of his rights, and now as a reward for his outrageous behavior he asks the Court to find that he was deprived of his rights.” *Craw v. District Court of Vermont, Unit No. 1, Windham Circuit*, 150 Vt. 114, 118, 549 A.2d 1065, 1-68 (1988).
²⁰ *Bank of the Republic v. Baxter*, 31 Vt. 101 (1858).
²¹ *Jackson v. Rutland & Burlington Railroad Co.*, 25 Vt. 150, 152 (1853).
²² *Way’s Adm. v. Way’s Adm.*, 27 Vt. 625, 626 (1855).
²³ *Pool v. Pratt*, 1 D.Chip. 252, 255-256 (1814).
²⁴ *Dean v. McLean*, 48 Vt. 412, 420 (1875).
²⁵ Isaac Redfield, “Retiring Remarks,” 36 Vt. 765 (1860).
²⁶ *State v. Prescott*, 27 Vt. 194, 196 (1855).
²⁷ *Sanford v. Norton*, 17 Vt. 285, 293 (1845).
²⁸ *Hunt v. Fay, Adm’r*, 7 Vt. 170, 187 (1835).
²⁹ *In re JSCL, LLC CU Permit*, ¶ 21, 253 A.3d 429 (2021).
³⁰ *Henry v. Tilson*, 17 Vt. 479, 486 (1845).
³¹ *State v. Baldwin*, 140 Vt. 501, 511, 438 A.2d 1135,

1140 (1982).
³² *State v. Lynch*, 137 Vt. 607, 613, 409 A.2d 1001, 1005 (1979).
³³ *Treasurer of Vermont v. Clark*, 19 Vt. 129, 130 (1847).
³⁴ *Richardson v. Spafford*, 13 Vt. 245, 247 (1841).
³⁵ *Hart v. White*, 26 Vt. 260, 268-269 (1854).
³⁶ *Isham v. Bennington Iron Company*, 19 Vt. 230, 246 (1847).
³⁷ *Id.* At 247.
³⁸ *Kingsland v. Adams*, 10 Vt. 201, 202 (1838).
³⁹ “It would be a monstrous doctrine to conclude, that the administrator, by force of the probate act, might prosecute and recover the claims of his intestate by course of law, and the debtor be estopped from his defence.” *Olcott v. Morey*, 1 Tyl. 198, 210 (1801).
⁴⁰ *Weitz v. Weitz*, 210 Vt. 248, 259, 213 A.3d 1102, 1109 (2019).
⁴¹ *Judicial Watch, in. v. State*, 2005 VT 108, ¶ 16, 179 Vt. 214, 892 A.2d 191 (2005); *Billewicz v. Town of Fair Haven*, 2021 VT 20, 254 A.3d 194 (2021).
⁴² *Chioffi v. Winooski Zoning Board*, 151 Vt. 9, 13, 556 A.2d 103, 106 (1989).
⁴³ *Dewey v. Dewey*, 35 Vt. 555, 560-561 (1863).
⁴⁴ *Chilson v. Downer*, 27 Vt. 536, 539 (1855).
⁴⁵ *Allen v. Lyman*, 27 Vt. 20, 26 (1854).
⁴⁶ *Meach v. Meach*, 24 Vt. 591, 595, 597-598 (1852).
⁴⁷ *State v. Kreth*, 150 Vt. 406, 412, 553 A.2d 554, 557 (1988). He celebrated “persuasive merit of common sense” in another dissent. *Craw v. District Court*, 150 Vt. 114, 118, 549 A.2d 1065, 1068 (1988).
⁴⁸ *Billings v. Metropolitan Life Ins. Co.*, 70 Vt. 477, 41 A. 516, 518 (1898).
⁴⁹ *State v. Cushman*, 133 Vt. 121, 124, 329 A.2d 648 (1974).
⁵⁰ *Harris v. Huntington*, 2 Tyl. 129, 139-140 (1802).
⁵¹ *Downer v. Flint*, 28 Vt. 527, 531 (1856).
⁵² *Paine v. Town of Leicester*, 22 Vt. 44, 50 (1849).
⁵³ *Ward v. Barnard*, 2 Aik. 167, 169 (1826).
⁵⁴ *State v. Bishop*, 1 D.Chip. 120, 123 (1797).
⁵⁵ *Clapp v. Foster*, 34 Vt. 580, 584-585 (1861).
⁵⁶ *In re Dougherty*, 27 Vt. 325, 327 (1869).
⁵⁷ *Town of Ryegate v. Town of Wardsboro*, 30 Vt. 746, 750-751 (1858). The legislator who tries to testify about the intent of a statute, however, is unlikely to persuade. As Justice Marilyn Skoglund explained, one lawmaker’s “interpretation of the law once enacted ... cannot reflect the thought processes of the entire Legislature.” *Trudell v. State*, 193 Vt. 515, 527, 71 A.3d 1235, 1245 (2013). Judge Aldis probably didn’t expect such testimony; his use of the law maker reflected the presumption that no legislation could have been intended to be absurd and that the court might actually be applauded by the legislature for saving its work.
⁵⁸ *Grenafege v. Department of Employment Security*, 134 Vt. 288, 292, 357 A.2d 118 (1976).
⁵⁹ *St. Johnsbury & L.C.R. Co. v. Hunt*, 60 Vt. 588, 15 A. 186, 187 (1888).
⁶⁰ *Osgood v. Central Vermont R. Co.*, 77 Vt. 334, 60 A. 137, 139 (1905).
⁶¹ *Overseers of Poor of Georgia v. Overseers of the Pool of Grand Isle*, 1 Vt. 464, 467 (1829).
⁶² *Hazard v. Martin*, 2 Vt. 77, 84 (1829).
⁶³ *Andrews v. Lathrop*, 132 Vt. 256, 262, 315 A.2d 860 (1974).
⁶⁴ *Bates v. Kimball*, 2 D.Chip. 77, 87 (1824).
⁶⁵ *Preston v. Whitcomb*, 11 Vt. 47, 51 (1839).
⁶⁶ *State v. Lund*, 144 Vt. 171, 181, 475 A.2d 1055, 1234-1235 (1984).
⁶⁷ *State v. Baldwin*, 140 Vt. 501, 511, 438 A.2d 1135, 1140 (1981).
⁶⁸ *Town School District of the Town of St. Johnsbury v. Town School District of the Town of Topsham*, 122 Vt. 268, 271-272, 169 A.2d 352 (1961).
⁶⁹ *In re Miller*, 185 Vt. 550, 563, 975 A.2d 1226, 1236-1237 (2009).
⁷⁰ *Hutchinson v. Pratt*, 11 Vt. 402, 422 (1839).
⁷¹ *State v. Croteau*, 23 Vt. 14, 71 (1849).
⁷² *State v. Burpee*, 65 Vt. 1, 25, 71 (1892).

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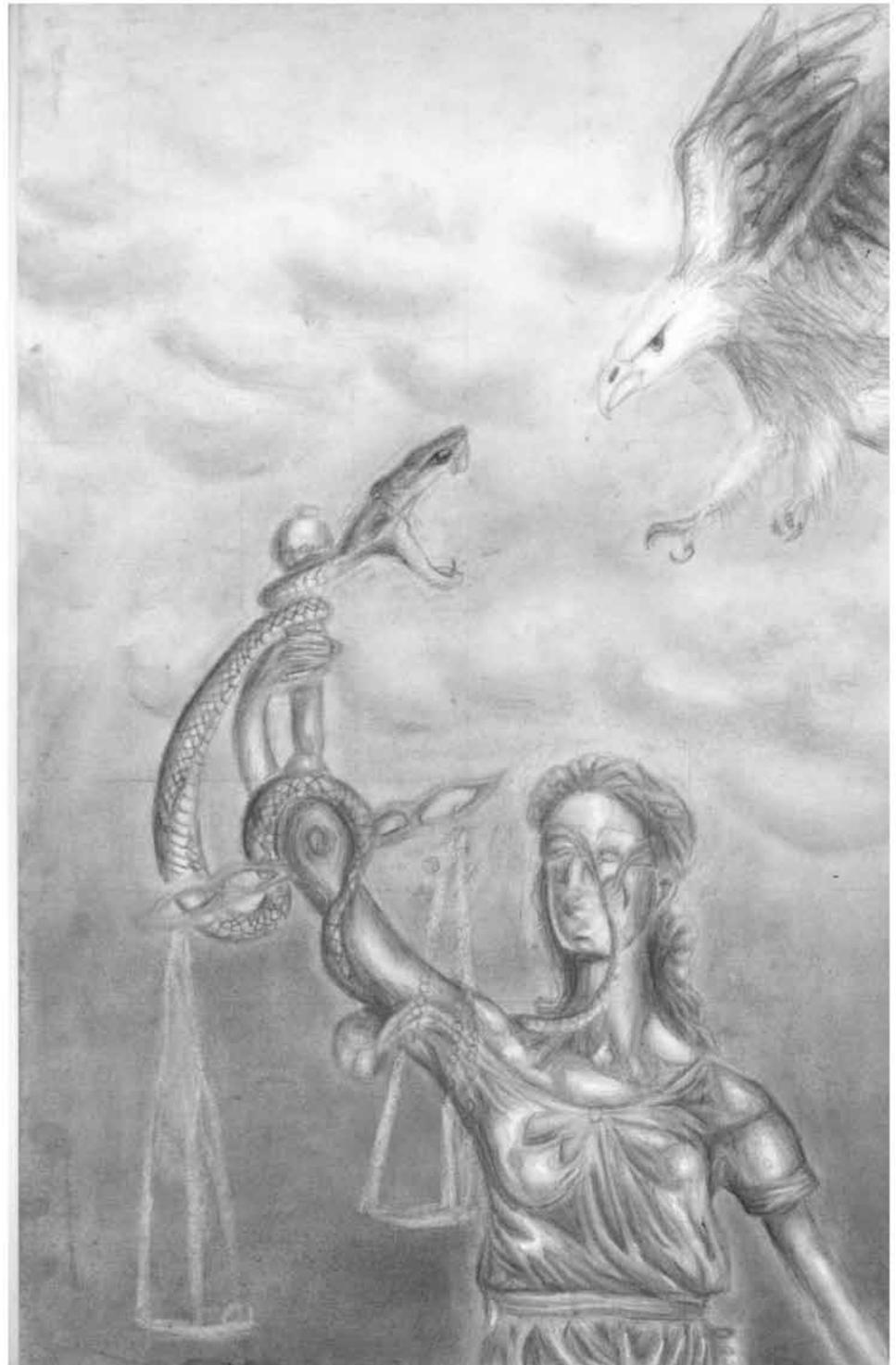
Fifth Annual Martin Luther King, Jr. Middle School Poster Essay Contest

For the fifth year in a row, the Vermont Bar Association, in partnership with the Diversity Section and Young Lawyers Division, sponsored a Martin Luther King, Jr. Poster-Essay Contest to celebrate the life and message of the late Dr. Martin Luther King, Jr. The contest was open to all Vermont middle school students, including those from public schools, private schools and home schools. This year the students were asked to create a poster and write a short essay interpreting Dr. King's quote "Injustice anywhere is a threat to justice everywhere" from Dr. King's "Letter from a Birmingham Jail". A copy of the letter written by Dr. King in April, 1963 while in the Birmingham City Jail and the circumstances surrounding it were also provided with the contest materials.

Students from around the state once again submitted impressive artistic renderings illustrating the meaning of Dr. King's quote and thought-provoking essays about how their posters reflected the message. What was particularly interesting about the submissions for this year's contest were the varied ways that students applied the quote. The students wrote thoughtfully and eloquently about many forms of injustice including racial, gender, socio/economic, and LGBTQ injustice, as well as about many topics that they cited in relation to the quote, including bullying, ageism, animal cruelty, farm ownership discrimination, unfair dress codes, and how the GI Bill has been applied over the years.

After applying criteria including relevance to theme, quality of design, creativity, content, spelling, grammar and punctuation, a committee comprised of representatives from the Diversity Section, the YLD, and the VBA selected one first place winner and two runners-up winners from the submissions.

Will Cunningham, a 7th grade student from the Mater Christi School in Burlington received the First Place Award for his artful drawing depicting an eagle swooping in to snatch a snake encircling a statue of Lady Justice. Will explained in his essay that the eagle represents Dr. King swooping into Birmingham to remove the snake of inequality from Lady Justice, noting that the snake in his drawing had succeeded in partially removing the blindfold on Lady Justice; a blindfold that normally ensures that justice is applied blindly. Will also emphasized Dr. King's belief in addressing injustice by non-violent means and re-stated



First Place Poster - Will Cunningham Mater Christi School

the contest quote as: "Justice cannot be complete when there are any people treated unequally. There is no such thing as half justice."

Koko Dando-Plasha, a 7th grade student from the Lake Champlain Waldorf School in

Shelburne, was selected for the First Runner-Up award for her striking drawing depicting a brown clenched fist raised upward while encircled by white chains. Varying shades of colors in equidistant diagonals form the background. Koko explained

in her essay that she wished to incorporate imagery of chains keeping someone or something restrained and utilized the "black lives matter fist in chains" image to represent what Dr. King's quote means to her. Koko also explained that she incorporated the "skin rainbow" background as a powerful way of representing all people.

The team of Annabelle Vose and Camille Hamilton, 6th grade students from the Robinson Elementary School in Starksboro, was selected for the Second-Runner Up Award. Annabelle and Camille centered Dr. King's quote in their colorful poster, with a number of different messages and images related to the quote radiating from the center. In their essay, they explained that Dr. King's quote "means that everyone should be treated equally and everyone should have the same rights as everyone else." They wrote that they drew pictures to illustrate that theme, representing peace, equality and the peaceful community that "we can all form by working together."

It's the tradition to invite the students, their families and a teacher of their choosing to an awards ceremony at the state-

house with Governor Scott, and for the students to then meet with the Vermont Supreme Court Justices at the Supreme Court Building where their winning posters and essays are on display outside the Supreme Court courtroom. At the time of this writing, the hope is that an in-person awards ceremony will be possible either close in time to the Martin Luther King, Jr. holiday or at a later date when safety protocols allow in-person gatherings at the statehouse and at the Vermont Supreme Court building. The students' posters and essays are also displayed during the Young Lawyers Division Thaw event in Montreal, now rescheduled to the week-end of April 29-May 1, 2022.

Congratulations to all of the students who submitted such impressive posters and essays celebrating the life and message of Dr. Martin Luther King, Jr.

First Place Essay (in its entirety)

In 1963 Martin Luther King, Jr. and many others were arrested on the streets of Birmingham, Alabama and thrown into jail. From his cell, MLK wrote the "Letter from

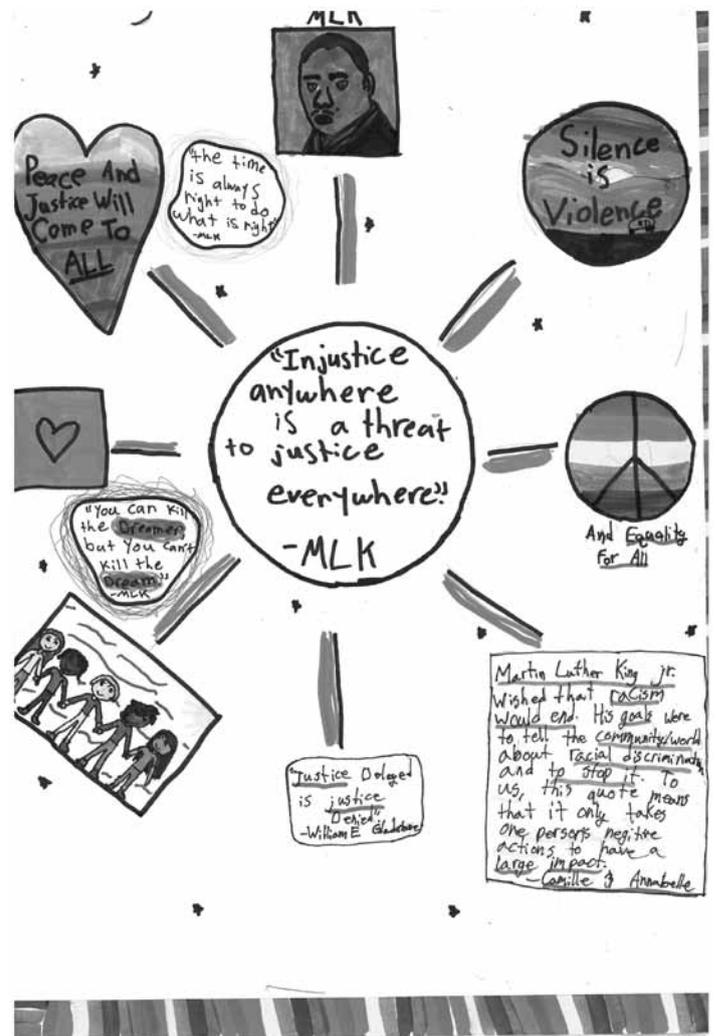
Birmingham Jail." In his letter MLK states that "Injustice anywhere is a threat to justice everywhere." Justice cannot be complete when there are any people treated unequally. There is no such thing as half justice.

My poster includes Lady Justice, who normally has a blindfold over her eyes. This blindfold symbolizes how justice is equal no matter your race, class, gender or nationality. In my poster, the snake of injustice pulls down the blindfold on one eye, making justice no longer blind and invoking bias. This tips the scales in favor of one group over another, allowing injustice to grow.

The snake's mouth is open, symbolizing the hate and violence toward MLK and others who stood beside him. Just like MLK swooped into Birmingham to remove the inequality that dwelled there, the eagle swoops down to pull the snake off Lady Justice, restoring equal treatment of all people. The eagle's mouth is closed because MLK believed in removing injustice by nonviolent means. From his "Letter from Birmingham Jail," MLK said he would remove "the snake" through peace, not harming anyone in the way.



First Runner-Up Poster - Koko Dando-Plasha - Lake Champlain Waldorf School



Second Runner-Up Poster - Annabelle Vose and Camille Hamilton - Robinson Elementary School

BE WELL

Start 2022 with Positive Habits and Resolutions that are Easy to Implement

As the temporal milestone of a New Year begins, many of us set goals to create new habits through the implementation of Resolutions. According to research, 44% of Americans create New Year's resolutions or positive habits/goals, but by February 80% have failed to stick with them.¹ Now, in a more skeptical country, such as Sweden, only 12-18% of the population makes resolutions. What enables people to stick to their new goals and not fizzle out in a month? I believe it is two-fold: (1) determine a habit you want to change; and (2) rephrase the resolution or goal as a positive.

What are habits? A habit is a routine of behavior that is repeated regularly and tends to occur subconsciously or involuntarily.² A habit must be done often and is built into your daily routine without much effort. A habit is something we do out of convenience. More than 40% of the actions people perform each day, are not the result of actual decisions, but habits. A habit is different from an addiction, which is some-

thing that is done over and over again, despite causing harm to our lives. Our brains actually cling to habits because they create neurological cravings where a certain behavior is rewarded by the release of "pleasure" chemicals in the brain.

13 Simple Ways to Cultivate Better Daily Habits:

- 1. Think Small – Really Small**
-- Create an atomic habit, or a really small habit. Thinking small is easier because once you get started, you can build. For example, don't promise yourself you are going to read more, instead commit to reading one page per day.
- 2. Create a Physical Reminder**
-- A physical totem can make the habit or standard you're trying to hold yourself to into something more than an idea. (Examples: AA chips, post-it note on your mirror, or calendar notification).
- 3. Lay out your supplies**
-- You are less likely to take the easy way out if it's embarrassingly simple to do the thing you want to do. (Examples: journal, running clothes, healthy foods).
- 4. Piggyback New Habits on Old Habits**
-- Use an existing habit and add something to it, like walking and picking up garbage. Instead of walking dog, run with your dog.
- 5. Surround Yourself with Good People**
-- We are the average of the five people we spend the most time with.
- 6. Commit to a Challenge**
-- It is easier to hand yourself over to a scripted practice when you just need to show up. Handing the wheel over to someone else is a way to narrow our focus and put everything into the commitment.
- 7. Make it Interesting**
-- Find a way to stay motivated. I use the Insight Timer to track my meditations, which hold me accountable, but it also has a supportive community.
- 8. It is About the Ritual**
-- Create the practice and then just repeat it in the exact same way.
- 9. It Does Not Have to be an Everyday Thing**
-- What matters is the results average out.

10. Focus on Yourself

-- If you wish to improve, be content to be seen as ignorant or clueless about some things, like the news and avoid comparison to others.

11. Make it About Your Identity

-- I am a writer, I am a meditator, I am healthy, etc.

12. Keep it Simple

-- Little things make a difference.

13. Pick Yourself Up When You Fall

-- Don't quit because you aren't perfect.

One of the most effective ways to create a habit, resolution or goal that will stick is to change it from being an "Avoidance Goal" to an "Approach Goal." Thus, you simply frame it as a positive thing that you would like to commit to doing RATHER than something that you would like to stop. So think: "I will start to do _____" NOT: "I will quit or avoid _____." Why does this positive reframing work? Because, it is hard, if not nearly impossible, to erase a negative habit or behavior. It is much easier to just replace this negative habit or behavior with something else. For example: (1) if you want to eat less sweets/sugar, commit to eating more fruits and vegetables each day; (2) if you want to drink less alcohol, commit to drinking more water and other non-alcoholic beverages each day; (3) if you want to watch less television, commit to reading more.

I do want to issue a **Pandemic Disclaimer** to implementing new habits, goals and resolutions in 2022 because we are really depleted, stressed, and may not have the energy and cognitive resources to tackle significant change. Pandemic Disclaimer:

- Avoid pushing yourself too hard to make too many changes.
- Be realistic, kind and compassionate with yourself.
- Join me in my resolution – "I will start to be gentle with myself."

¹ "A large-scale experiment on New Year's resolutions: Approach-oriented goals are more successful than avoidance-oriented goals," PLOS ONE Journal, published December 9, 2020 (<https://doi.org/10.1371/journal.pone.0234097>)

² The Power of Habit, by Charles Duhigg (January 7, 2014).



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My Former Client Posted What???

No one enjoys hearing feedback about themselves that is critical in nature; but don't get me wrong. Sometimes we need to hear that we're not meeting the expectations of others. Critical feedback shared respectfully can be a wonderful opportunity for personal and professional growth. That said, when a former client posts a review, on something like an attorney rating site, which is full of vitriol and outright lies, well that's something else entirely. Now the temptation to fight back and defend one's reputation is in play. The interesting ethical question is this. Can you?

The answer isn't as simple as you might think. Yes, there is an exception in our confidentiality rule (Rule 1.6) that permits an attorney to reveal information relating to the representation of a client to the extent the attorney reasonably believes necessary to establish a claim or defense in a controversy between the attorney and the client. This is often referred to as the self-defense exception. Unfortunately, every authority who has considered the question has held that an attorney facing this situation cannot disclose confidential information to rebut a former client's allegations about the attorney's representation of that person. Why? Because there is no legal controversy. The exception really doesn't come into play unless and until you are having to deal with the likes of a bar complaint, legal malpractice claim, or fee dispute. A negative online review simply doesn't get you there.

Although, while you can't disclose client confidences to defend yourself, there is no ethical prohibition against disagreeing with this client's publicly voiced criticisms of you in more generic terms. As a risk guy, however, I need to suggest that doing so may not be the best idea depending upon how you end up handling the exchange. Think about how others, some of whom might be potential new clients or even current clients, might respond to the debate you are about to enter into.

For example, don't take the bait on a fight you won't win. Participating in name calling, a war of words, or worse can too easily be viewed as you being someone who can't handle a little criticism; and truth be told, the consuming public isn't interested in trying to figure out who's right and who's wrong in their respective opinions. Making matters worse, the very fact that you feel free to fight with a former client on an online forum would suggest to any viewer that they risk being treated similarly were they ever to voice dissatisfaction with your services.

The better choice is to view the negative review for what it is, a marketing opportunity. Josh King, former General Counsel for Avvo, has shared the following advice to lawyers fearful of the fallout of a negative online review and I agree with him wholeheartedly.

Negative commentary can be a golden marketing opportunity. By posting a professional, meaningful response to negative commentary, an attorney sends a powerful message to any readers of that review. Done correctly, such a message communicates responsiveness, attention to feedback and strength of character. The trick is to not get defensive, petty, or feel the need to directly refute what you perceive is wrong with the review. . . . [A] poorly-handled response to a negative review is much worse than no response at all. It makes you look thin-skinned and defensive. Worse yet, if you argue and reveal client confidences (or even potential harmful non-confidences), you may be subject to discipline.¹

What might such a response look like? While the specifics of the negative review matter, here's just one idea:

It is unfortunate that the author of this negative review chose not to leave any identifying information which would have allowed me the opportunity to address his or her specific concerns directly. Understand that as a lawyer I am ethically prohibited from revealing information relating to my representation of any client in a public forum; however, I always welcome the opportunity to discuss the concerns any client, former or current, might have with the service I provide. It is with pride that I share that I have handled over 500 matters of this type during my 21 years of practice and I have yet to have anyone directly express any concerns with the representation they received.

I know that the desire to standup and defend one's self can be strong, particularly when your professional skills and reputation are called into question. Should you ever find yourself staring at a negative review that starts to make your blood boil, just stop and take a few breathes. Remember what Rule 1.6 says, think about what it means to be a professional, and take the high road by drafting a response along the lines of what I've suggested. As I see it, there's no better ethically permissible way to try and shut the criticism down and why not take advantage

of Josh's "golden marketing opportunity" at the same time!

Mark Bassingthwaighte, Esq., ALPS Risk Manager.

Since 1998, Mark Bassingthwaighte, Esq. has been a Risk Manager with ALPS, an attorney's professional liability insurance carrier. In his tenure with the company, Mr. Bassingthwaighte has conducted over 1200 law firm risk management assessment visits, presented over 400 continuing legal education seminars throughout the United States, and written extensively on risk management, ethics, and technology. Mr. Bassingthwaighte is a member of the State Bar of Montana as well as the American Bar Association where he currently sits on the ABA Center for Professional Responsibility's Conference Planning Committee. He received his J.D. from Drake University Law School.

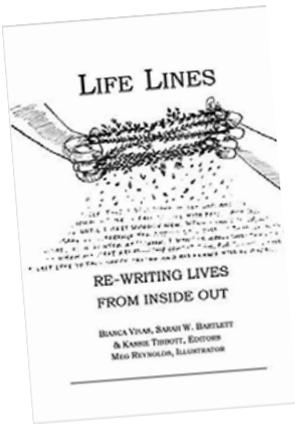
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¹ Josh King, *Your Business: Someone Online Hates You*, THE RECORDER (Aug. 16, 2013, 4:40 PM) <http://www.therecorder.com/id=1202614786352/Your-Business:-Someone-Online-Hates-You?slreturn=20140026162748>.



BOOK REVIEW



"Life Lines, Re-writing Lives from Inside Out"

Reviewed by Anna Saxman, Esq.

Life Lines, Re-writing Lives from Inside Out is a remarkable book of poetry and prose written by women incarcerated in Vermont. Praise is due to the writers and volunteers from www.writinginsidevt.com for this impressive book. While many articles in the press and in scholarly journals document the rising rate of women incarcerated in the United States and the impact on communities and families, this book examines the costs of incarceration in a personal and meaningful way.

For example, one writer says "[n]o kids, no family, no phone, no visits," capturing the loneliness and isolation of incarceration. In the book, the writers share the pain of separation from family and the longing for reconciliation. The love they show for their children, their mothers and their partners is evident throughout the book.

Nationally, a large number of incarcerated women are held pretrial; most often because they cannot pay the cash bail imposed. Incarcerated women, on average, have lower incomes than men and are disadvantaged by their poverty and the arbitrary imposition of high bail. One writer expresses her feelings: "[s]tuck in jail with no bail. Friends I had no longer exist, only my fellow convicts."

The writers' experiences shared in this outstanding collection speak strongly of the need to reduce jail time for women with children to minimize the long-term effects on children and families. By understanding the root causes of women's involvement in the criminal justice system—poverty, trauma, mental and physical illness, addiction—we can begin to address the solutions. The stark reality of these underlying circumstances is highlighted in the prose collected here and helps us to begin thinking about solutions.

The authors explore their challenges, missteps and remorse with honesty. One writer describes drug dealing: "[t]he hustle, as most call it, is nothing but lame." One poem titled "Heroin" reads: "Lost everyone and everything because of you and you still want more."

The difficulty of living in prison is also eloquently expressed:

[w]ith a single step, and one wrong choice, now I live in a concrete world, on an invisible rollercoaster that is in a house of horror. You must give up control. Make no plans, don't get too close. It's too cold, it's too hot, never comfortable. Keep moving. Don't cry. Everyone will ask you why.

The loss of identity is palpable in these pages: "In this place, I've been robbed of my identity. I have been gas-lighted, made to believe I am insignificant or unworthy."

There is so much in this book that reveals women's struggles with families, violence, addiction and loss. These are not poems of blame; the writers are looking inward, feeling pain and finding hope. Along with the very real struggle of incarceration, these writers use creative writing to share visions of happiness. This book is a must read for its literary merit and its insight into what is often unrecognized: the talent, grit and creativity of the women in our prisons and jails.

Anna Saxman, Esq. served as the Deputy Defender General and Appellate Defender for the State of Vermont and currently provides training to the Vermont criminal defense and family court bar. She is an adjunct professor at Vermont Law School where she teaches Criminal Procedure. She is a Past President of the Vermont Bar Association.

Want to review a book for the *Vermont Bar Journal*? You can review your own book or choose one of our titles and keep the book, on us! Latest titles include *Sales for Lawyers*, by Shavon Jones, *Strategic Networking*, by Carol Schiro Greenwald and *Persuasion Science for Trial Lawyers*, by John P. Blumberg. Request a book for review, send inquiries or submit a review to info@vtbar.org today!



IN MEMORIAM

Stephen Cosgrove

Stephen Cosgrove, age 71, died Nov. 8, 2021, in Rutland, after a short illness. He was born July 21, 1950 and attended Christ the King School and Rutland HS class of 1968. He graduated from University of Vermont in 1972, Phi Beta Kappa and received his J.D. from Vermont Law School in 1977. He began his career at Corsones & Hansen and later opened a private practice, continuing to work for over 30 years. Stephen was also the Town of Mendon zoning administrator. He enjoyed traveling, golf, Notre Dame Football, the Red Sox, horse

racing, and was best known for spirited, challenging debates with friends and foe. Stephen was a member of the Scottish Rite Valley of Rutland Masons and loved all the good times with fellow Shriners, trips to the Shrine Bowl and travelling across the country. Many people remember him as an immensely intelligent man who passed his brains and passion to his grandchildren. Stephen was predeceased by his father, his mother and his brothers. He is survived by his wife, Jane Dougherty; her sons, Jesse and Tony DeAngelis; his son, Chris Cosgrove and wife Sarah; the grandchildren, Emma and Owen Cosgrove; also, a brother, Kevin Cosgrove; nephew Morgan, niece

Layla, many cousins; and lastly, his parrot, BB.

Emily Davis

Emily Davis, 65, of Lyme, NH, died December 16, 2021, at Dartmouth-Hitchcock Medical Center. Emily was born in 1956 in Brooklyn, NY before moving to the Boston suburbs for most of her childhood. She attended Marblehead High School before graduating from the University of Massachusetts Amherst in 1978. After college, Emily went on to earn her JD from Boston College Law School before moving to Saint

Johnsbury where she began her legal career. In 1985, she met her husband, Matthew, and together they moved to Thetford, VT before marrying in 1988. Working for almost four decades in family law, Emily was well respected in the legal community and operated her own practice for over 30 years. She was president of the Vermont Bar Association from 1998-1999. Emily was a driven and independent woman with a passion for cooking, hosting dinners, reading over a hundred books a year, traveling, playing scrabble and walking with her dog, Gracie. In July 2021, Emily was diagnosed with late-stage cancer and lived her last five months primarily at her home. Emily is survived by her husband, her two sons, her sister Andrea Davis, and her nieces and nephews.

R. Allan Paul

R. Allan Paul passed away peacefully at home January 3, 2022, having lived a life full of love, law, and golf. Allan was born on August 18, 1931, in Albany, New York, graduating from Albany High School in 1949. He received his BA in Political Science at UVM in 1953, where he was a member of Phi Sigma Delta. While at UVM, Allan met the love of his life, Elsie Epstein, who would become his wife. He then graduated from Columbia Law School in 1956. The day after graduation, Allan returned to Vermont for his first job as a lawyer with A. Pearly Feen before later starting his own legal practice. In 1968, he, along with Joseph Frank and Peter Collins, formed Paul Frank and Collins. Allan served as its founding President for the first 26 years of its now 53-year history. In 1965, Allan was elected to the Burlington Board of Alderman in what is now Ward 6. He was active in the Burlington Rotary, serving as its President, the Lake Champlain Chamber of Commerce, the Vermont Business Roundtable and was a Director and Board Chair of the Greater Burlington Industrial Corporation, receiving that organization's highest honor for his work in bringing science and math education initiatives to local schools.

One of Allan's greatest honors was serving on the Board of Trustees of his alma mater, UVM, including two years as Board Chair. Allan was a strong supporter of the founding of Vermont Law School and served on the Board of Trustees of VLS from 1994 to 2004, as President from 1995 to 2001. In 2006, he received an honorary degree from VLS. He was a director of the Howard Bank for many years and served as Board Chair. He was a member of the Vermont State Racing Commission and its chairperson from 1977 to 1989. Allan served as President of the National Association of State Racing Commissioners from 1981 to 1982. Allan was honored as the Vermont Chamber of Commerce Citizen of the Year in 2006. A golfer from the time he was in high school, Allan loved the game and played at the Burlington Country Club as one of its longest-serving members. Allan is survived by Elsie, his wife of 67 years; his daughters and their families, including eight grandchildren.

Willem Jewett

Willem Westpalm van Hoorn Jewett was born August 23, 1963, in Larchmont, New York and passed away peacefully at home surrounded by family on January 12, 2022. The summer Willem was born, his parents bought 4 acres of land in Waitsfield and built a cabin on Tucker Hill Road. This simple two-room A-frame became the crucible in which Willem's love of outdoor exploration and adventure began. Willem grew up in Westport, Connecticut, and graduated from Loomis-Chaffee School in Windsor, CT in 1981 and from Bowdoin College with a degree in psychology in 1985. While at Bowdoin Will captained the alpine ski team to two back-to-back division championships. After college Willem met his first wife, Jean Cherouny, who was a talented ski racer. Jean joined Willem in his adventure-filled lifestyle, which included living in the Waitsfield A-frame. Willem and Jean ran a kids' biking summer camp in Waitsfield in the 1980s until Willem entered the law program at Lew-

is and Clark College in Portland, Oregon. He received his JD in 1994 and was admitted to the Vermont Bar in 1995. Willem and Jean were married in 1992. He joined Conley & Foote Law Firm in Middlebury in 1994 and remained with the firm until 2017, treasuring the friendships he made there, especially his relationship with Dick Foote. Willem and Jean built a house in Ripton, where they raised their two daughters, Abigail and Anneke. Willem's interest in public service led him to a successful run for the Vermont House of Representatives in 2002. He served the towns of Ripton, Goshen, Hancock, Salisbury, Cornwall, and Leicester from 2003 to 2017, including two years as the House Majority Leader from 2013 to 2014. In his roles as Assistant Majority Leader and Majority Leader he used his wit, kindness, and intellectual agility – as well as learned patience and listening skills – to lead and support a large and opinionated group of legislators. He loved co-organizing the annual Earth Day bicycle ride to the statehouse, bicycling the hilly 50+ miles from Ripton to Montpelier before work. Willem did all of this while maintaining strong friendships that crossed party lines. He had incredible attention to detail in the work of crafting legislation; was clear, dignified and fair while presiding on behalf of the Speaker over House proceedings, and among friends and colleagues in the statehouse was generous with both his laughter and mischievous sense of humor. He was extremely proud of his work to help pass Act 39, the Death with Dignity Law. Up until his last day, Willem lobbied for changes to Act 39 to make it more accessible for Vermonters who needed it. In October 2017, Willem and his business partner and friend Jenn Blomback started Mad River Valley Law in Waitsfield. Willem continued to guide others with legal counsel until a few weeks before his death. Willem's last four years were spent with Ellen Blackmer McKay, who brought motorcycle adventuring into Willem's portfolio of fun. Ellen and Willem were married in Ripton last June. Willem is survived by his wife Ellen, his daughters Abigail and Anneke, and his brother Joe Jewett.



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