The Naked Truth: Investing in the Stock Play of a Lifetime

By Mark Faulk

TogiEntertainment Inc., Oklahoma City, OK, 2008. 411 pages, $26.95.

Reviewed by Christopher C. Faille

"Blood diamonds" began to attract international attention in 1997. That was the year in which the U.N. Security Council voted to forbid nations from buying Angola's diamonds—a vote that arose out of the news that diamond exports had financed the escalation of the civil war in that country. In July 2000, the World Diamond Congress, meeting in Antwerp, adopted a resolution establishing an international certification system for the export and sale of nonconflict diamonds. By 2006, the stigmatization of the mining of diamonds in Africa's war zones in ways that finance those wars rose to the highest level of visibility on earth: the release of "Blood Diamond," a Hollywood movie starring Leonardo DiCaprio.

The history of Casavant Mining Kimberlite, or CMKM Diamonds, makes a certain melancholy sense against that background. CMKM Diamonds was marvelously successful as a promotion and a hopeless flop as a corporation. In retrospect, the story of the company can be vastly instructive in both respects.

In 2002, Urban Casavant accumulated claims to mineral rights on more than one million acres of land in and around Saskatchewan, Canada—surely among the places least likely to be troubled by civil war. Casavant then moved to Las Vegas and encountered two penny-stock promoters, who offered to raise $100 million for him to allow him to develop his mineral claims and, should his hopes for those claims come to fruition, to enable him to market the diamonds. Together, Casavant and his new associates created CMKM and issued press releases informing shareholders that CMKM had found promising kimberlite pipes (subterranean geological structures with volcanic origins that often hold diamonds); they began selling stock for 1/100 of a penny per share.

In December 2002, Casavant announced the opening of an office in Belgium that "would promote the 'Casavant' diamond brand and assist in the support of 'conflict free' diamonds." This opening was part of a grandiose global plan. According to Casavant, CMKM would "become involved in the entire sales chain in diamond merchandising with the view of becoming the largest wholesaler of Canadian diamonds."

The Mathematics of Hope

Between that beginning and spring 2007, when Casavant lost control of CMKM and returned to Canada, the company sold a total of $200 million worth of stock to the public. It still isn't clear where exactly the money went, but it didn't go toward mining or marketing diamonds. By May 2007, there was only $558.50 left in the corporate treasury, and the only noncash company asset of significance consisted of an interest in another mining venture that was also quite speculative.

In the heyday of 2002–2003, Casavant attracted not only investors' money but also their conviction. His investors were believers. As Mark Faulk puts it in this fascinating and detailed account, Casavant's "actions seemed to investors to encompass the perfect balance between an aggressive plan for financial success, and an ethical, moral, and humane approach to business."

Through the period 2003–2004, Casavant and his associates spread the notion that there was a big buyer in the wings who was ready to acquire CMKM and make its loyal investors millionaires. Many penny-stock investors seem to think in straightforward arithmetical terms, such as the following: "A price of $1 per share seems a modest goal. If a stock is today selling for, say, $0.01, then I can put my $10,000 of savings into it and own 1 million shares. When the big deal comes through, or when a vein of diamonds is verified—well, surely the stock's value will go up to $1, and I'll be a millionaire."

In January 2003, it cost $0.015 to buy a share of CMKM, or $15,000 to buy a block of a million shares. By the middle of February, the value of that block of stock had fallen to $3,500. By the end of March, as Faulk puts it, "the cost of a CMKM lottery ticket consisting of a million shares of CMKM stock was an incredibly low $400"—or 4/100ths of a cent per share. For true believers, this didn't mean that they had lost $14,600 in two months. No, it simply meant that it was even easier than before to load up on more such lottery tickets.

Casavant didn't concern himself with minor details, such as filing audited reports as required by law. Accordingly, in March 2005, the Securities and Exchange Commission instituted a proceeding pertaining to a delisting of the stock. In connection with that hearing, Casavant asserted his Fifth Amendment right to refuse to testify. The reaction of the true believers was—literally—disbelief.

Faulk quotes a posting from an Internet stock market message board: "Anybody that is reporting that Urban has taken the 5th at the hearing is full of S H I T in my opinion. And I would just love to slap around any individual that reports something like that without confirmation. He said, she said, it has been reported that, etc. etc. Does anybody here really think that in a hearing like this that Urban is going to take the 5th. That is ridiculous!"

Skipping to the Ending

I'll compress facts mightily here and simply say that, two years later, in March 2007, Casavant gave up control over what remained of the company, signing over control to a one-time true believer, Kevin West. According to a third party who was there, "Urban was acting like he was anxious and scared to death and couldn't wait to get on a plane back to Canada. He said he had a meeting with his attorney David Chesnoff and they were going to indict him and he was really worried about that."

Kevin West became the new chairman and chief executive officer of CMKM Diamonds, and Casavant took that airplane to Canada. West estab-

lished a new company headquarters in Tyler, Texas, and hired an experienced litigator as corporate counsel to try to win back through the civil courts some of the value that had been drained out of the bank accounts of investors over the years.

The book tells a story that may shock some of those who are unfamiliar with the netherworld of penny-stock promotion. It is a story that juxtaposes some of the best of human impulses against some of the worst and a tale that has a postmodern twist: Mark Faulk got swept up in the story as he researched and wrote this book, and, in September 2008, West (while remaining in office as chairman) named Faulk the new chief executive officer of the company.

I recommend this book heartily. I should say, though, that I didn't come to it as an impartial arbiter. Faulk was a great help to me in sharing the fruits of his then ongoing research when I wrote a story on the CMKM/Casavant case for my former employer, HedgeWorld, in May 2007. Indeed, I provided a blurb for the dust jacket of this book.

As final words, I can offer a caution for investors. It is too easy to be tempted by a Casavant or, for that matter—and on an even larger scale—by a Bernard Madoff. It is very easy, because these types of individuals prey upon the best in you. Your honest ambition, your desire to provide a comfortable retirement for yourself and your spouse and an education and a good future for your children, your sense of social responsibility (remember that these were nonconflict diamonds, an alternative to the inadvertent funding of African strife)—all these are handles by which the unscrupulous can get a hold of a money tree and shake it. There is no such thing as "too much" due diligence. **TFL**

Christopher Faille, a member of the Connecticut bar since 1982, writes on a variety of financial issues, and is the co-author, with David O'Connor, of a user-friendly guide to Basic Economic Principles *(2000).*

Madoff: Corruption, Deceit, and the Making of the World's Most Notorious Ponzi Scheme

By Peter Sander

The Lyons Press, Guilford, CT, 2009. 288 pages. $14.95.

Reviewed by Christopher C. Faille

The subject matter of this book needs no real introduction. The title alone will surely do that job for any reader of *The Federal Lawyer* or for almost anyone conscious in the United States over recent months. Let us jump right into the subject, then, by enumerating seven continuing mysteries of the Bernard Madoff affair, each raised in the course of this book. I could easily adopt a higher number, but I'll stop at seven to keep the size of this review manageable and also because a number with such scriptural resonance may be appropriate in homage to the Jewish philanthropies so cruelly devastated by Madoff's swindle.

These questions, presented roughly in chronological order, in accordance with the point in Madoff's career in which each question becomes pressing, follow and will be addressed individually in this review:

1. Where did Madoff get his initial seed money for the start of his Wall Street career?
2. When did his brother Peter come on board, and what role, if any, did Peter play in the eventual criminal activity?
3. Did the Madoffs receive any benefit by virtue of the romance and marriage of Peter Madoff's daughter, Shana, to securities regulator Eric Swanson?
4. Does "payment for order flow" hurt the retail customer?
5. What did Bernie's wife, Ruth Madoff, know and when did she know it?
6. How did Frank DiPascali spend his workdays?
7. Are there any ticked-off Russian mobsters in the picture?

1. Not a Small Sum

Let's begin at the beginning. Bernard Madoff graduated from Far Rockaway High School in 1956 and from Hofstra University in 1960. He did not make a deep impression on his classmates at either of those institutions. It appears that very soon after his graduation from Hofstra, before 1960 was out, he had created Bernard L. Madoff Investment Securities (BMIS) with seed money of $5,000.

That was not a small sum of money for a newly minted college graduate. At the time, $5,000 was nearly the annual income of the median wage earner in the United States; in 2009 dollars, the sum would be roughly $35,000. Where did the money come from? We don't know. In his book, Peter Sander rightly expresses his curiosity and moves on.

2. Peter Madoff: Waves and Chronology

Bernard Madoff's brother, Peter, is continuing to make waves, even in the face of his brother's long sentence and the continuing criminal investigation. On April 30, 2009, Peter demanded a half-million-dollar licensing fee for the software that was part of the market-making operation at BMIS. The company's market-making operation, it should be noted, was apparently run separately from the investment-advising operation and on a separate floor of the same office building; the vehicle of the Ponzi scheme was the latter, not the former. The market-making business was legitimate and has become the property of the estate of BMIS under the administration of its trustee, Irving Picard, who auctioned off the business in order to generate some cash with which to compensate the victims. Peter Madoff's demand for $500,000 may disrupt or delay that process—at the further expense of those victims.

Is Peter insisting on his rights under the law, or is he just acting like an especially brazen co-conspirator? I leave that to the reader, except to note, as does Sander, that much in these two brothers' relationship is unclear—even the question of chronology. When did Peter start working with his older brother Bernard? Some accounts have Peter starting in 1965, but one story has it that he did not join up until 1970.

At least two important events transpired in Peter's life between 1965 and 1970: his graduation from Fordham

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Law School and the birth of his daughter, Shana. That brings us to the third quandary.

3. Eric Swanson

Shana Madoff joined BMIS (as a "compliance attorney"—hold that thought) in 1995. As such, part of her job was to handle contacts between the firm and interested regulatory agencies, such as the Securities and Exchange Commission. In 1996, a fellow named Eric Swanson went to work as a lawyer with the SEC. He was still working for the SEC when he first met Shana in October 2003.

Swanson left the SEC in 2006 and married Shana the following year. His final title at the SEC had been assistant director of the Office of Compliance, Inspections, and Examinations. Note the word "compliance" in both job titles—Shana's and Eric's. It was their job to deal with each other—at arm's length of course—on behalf of their respective entities. During the period between 2003 and 2006, a fellow named Harry Markopolos was doing his best to alert the SEC to the fact that something was fishy at BMIS. Why, then, did no one at the SEC pay much attention to the reports? And could that have had something to do with a budding relationship between Madoff's niece—and BMIS's compliance attorney—on the one hand and the SEC's assistant director of compliance on the other? It seems a plausible suspicion.

4. Pondering and Dropping

Now I have to turn my attention—and that of the reader—to a more abstract-sounding concern: payment for order flow (POF). POF is the practice whereby an exchange—or a market-maker such as BMIS—pays a broker for passing along its orders. An investor tells his broker, "Buy X," and, if there are two or more markets from which the broker can buy X, then the broker can legitimately (with some constraints) look to see who will pay him or her—and pay the highest price—for executing that order in one market rather than another.

The practice is extremely controversial, because the broker's loyalty should be to the customer/investor, not to the exchange. On Dec. 24, 2008, the *Financial Times* ran a story by Greg Farrell under the headline "SEC inaction that helped fuel scheme." The second paragraph of this story reads: "But it was the SEC's decision in the 1990s not to take a stand on the controversial issue of 'payment for order flow' that helped fuel the rise of … the successful broker-dealer operation two floors above Mr. Madoff's private fund operation in Manhattan."

Putting the issue in these terms implies a government-centered way of looking at the world. There are lots of parties other than the SEC who missed this point and should have gotten it—like the folks responsible for due diligence at the various institutions than invested in Madoff's operations. Still, I do think the whole idea of payment for order flow stinks. If the Madoff meltdown does help finally discredit the practice, that will be a slender silver lining. Sander raises the issue, ponders it for four or five paragraphs, then drops it.

5. Ruth as Carmela Soprano

Bernard Madoff's wife, Ruth, has surrendered her passport, but, thus far, as long as she remains within the United States, her movements are of her own choosing. Her assets have been frozen, however, and she has been granted a monthly living allowance. If she was an innocent dupe, her situation may seem sympathetic to some. If she was a co-conspirator in the largest financial crime in history, then it seems that justice calls for a punishment that is more severe.

Sander can't sort this out for us. He writes, "Prosecutors have seen some evidence that she was involved in disbursing funds, but have not to date found anything specific enough to press charges." The blogosphere is full of comparisons between Ruth Madoff and Carmela Soprano, the female lead in the recent HBO series, "The Sopranos." As fans will remember, Carmela knew in a general way that her husband Tony was involved in nasty business, but she kept her gaze averted and enjoyed the lifestyle that Tony's business allowed her.

"The Sopranos" ended when the television screens went black, because the creative people writing and producing the series had decided to move on. The show's real-life analog on Park Avenue, if that is what it was, ended because of the sharp decline in the stock market in the second half of 2008—a decline that meant that a lot of people and institutions felt strapped for cash and decided to liquidate those assets that they thought they could count on to pay expenses, to meet margin calls, or just to have cash on hand. These investors' phonied-up account statements from BMIS assured them that they had lots of money with Bernie, so they did what came naturally.

As a consequence of these decisions to liquidate, at some point in the first week in December 2008, Bernie told one of his sons that he had approximately $7 billion in redemption demands pending and that he was struggling to raise the money to meet them. His son had apparently been under the impression that the firm had between $8 billion and $15 billion of assets under the firm's management. So, even if the actual amount was at the bottom of that range, there should have been enough to pay the reported demands and leave $1 billion in the kitty. In December 2008, the financial situation was such that many investment firms would have regarded a mere $1 billion as an enviable cushion.

Consequently, Bernie's statement seemed odd to his son, and this son, along with his brother, went to their father/boss' office on Dec. 10 to learn more. Their father said that he had wanted to tell his sons the truth, but he was not sure he'd be able to "hold it together" in the office, so he asked them to come to his apartment that evening.

7. What About Frank?

Madoff's sons met him in his home as requested, and he told them "it's all just one big lie," and that the investment-advising portion of BMIS was "basically, a giant Ponzi scheme." He actually had about $200 to $300 million under management. He expected to surrender to authorities, but not until he could distribute that money to deserving employees as bonuses.

Bernie's sons (wisely, given their own legal situation) did not give him that

time, but quickly contacted the Federal Bureau of Investigation. FBI agent, Theodore Cacioppi, along with a colleague, spoke to Bernard Madoff the following day. Madoff said that he knew why they were there, and Cacioppi replied, "We're here to find out if there's an innocent explanation," to which Madoff replied, "There is no innocent explanation," and repeated in essence the statements he had made to his sons.

Later investigations confirmed those dramatic confessions. Not only was it "all just one big lie" as of December 2008, but it had been one big lie for a long, long time. In February 2009, the bankruptcy trustee, Irving Picard, announced that Madoff had not been doing any actual investing on his clients' behalf since 1994 or earlier.

This leads us to ask how Frank DiPascali had been spending his working days during those years. DiPascali started with BMIS in 1975, researching stock. Over time, he became an assistant to Bernie's brother Peter on the market-making side of the business. But then, intriguingly, in 1986 DiPascali was named director of options trading for the investment-advising operation. We don't know whether BMIS has a legitimate investment-advising operation in 1986, but we can say that either DiPascali stepped into a key role as mayor of a Potemkin village, or he became the mayor of a real village that was transformed into a Potemkin village while he held that office.

DiPascali was director of options trading at BMIS, an activity that his boss was telling the world was at the heart of the firm's success. Madoff claimed to be using what is known as a split-strike options strategy—a strategy in which a trader buys a basket of stocks, then sells options to buy those stocks at a strike price above their value, then buys options to buy the same stocks at a strike price below their present value. If you find all this rather too complicated to follow, that is the point: Madoff wanted investors who would find his strategy too complicated to follow, because their confusion deterred them from asking questions.

Another point is that, if Madoff had been pursuing the strategy he claimed to be pursuing, then DiPascali, as director of options trading, would have been a critical employee. Because Madoff was not pursuing that strategy, it seems almost certain that DiPascali was aware of that. How could he not have noticed how empty of work his desk always was? Many observers have wondered about this lack of work, especially after the *Wall Street Journal* in January quoted an SEC memorandum that indicated that SEC investigators who questioned DiPascali soon after Madoff's arrest had found his answers both "evasive" and "incomprehensible."

On April 24, 2009—too late for inclusion in Sander's book—*Fortune* reported that DiPascali is negotiating a plea deal with federal prosecutors. The story claimed that DiPascali "has no evidence that other Madoff family members were participants in the fraud" but is willing to testify that there were co-conspirators among the apparent victims. In his blog entry on the day that the *Fortune* story appeared, Gary Weiss, a journalist who has covered white-collar crime for many years, said that the account might be baloney. There is a greater stigma, in some circles, on those who "rat up" and incriminate their boss than on those who "rat down," as DiPascali is said to be doing. In the Madoff case, to rat up (because the boss has already confessed and begun serving his prison term) would mean to rat out other Madoff family members. It is conceivable, then, that, even if Madoff's brother Peter or wife Ruth is guilty in connection with the Ponzi scheme, DiPascali would prefer to "see no evil" in that direction and point prosecutors elsewhere—namely, downward. The DiPascali enigma remains.

7. Mobster/Oligarch: "Tomayto" or "Tomahto"

Finally, we come to the hypothetical Russian mobsters. There are persistent rumors that Russian high rollers are among Madoff's victims, and that this is the real reason that Madoff's sons turned him in: they thought that their father would have to be imprisoned in order to be safe. Just to preserve my own reputation and that of this estimable publication, I should be very clear about the following: *These are rumors.* I have no substantiation for them—none whatsoever.

That said, the rumors are sufficiently common to make them a puzzle in this affair. One variation of the story has it that shadowy "Russian oligarchs" invested their money not with Madoff directly but with an Austrian investment manager named Sonja Kohn and her operation, Bank Medici, and that Kohn in turn invested the money in, and lost it to, BMIS. An article published in the *New York Times* on Jan. 7, 2009, stated that she had "dropped out of sight" and quoted an unnamed "Viennese banker who knew Mrs. Kohn and her husband socially." The Viennese fellow said, "With Russian oligarchs as clients, she might have reason to be afraid." Kohn has denied that she is hiding from anyone. Sander writes that Kohn maintains "that Bank Medici had institutional clients only, not once-wealthy individual investors of the type who might be out for revenge."

Until a good deal more has been said and done, though, some of us will have to wonder what—if anything—is the flame behind all this dangerous-angry-Russians smoke. The one certainty in all the above, surely, is that a good deal more will be said and done.

Summing Up

As for Sander's book, I can say that it is a quick read and, given the speed with which it was evidently compiled for the sake of a red-hot market, competently written. Sander has written 18 books, but this one is a departure for him. His usual beat is personal finance, with titles such as *The Complete Idiot's Guide to Day Trading Like a Pro*.

On second thought, perhaps there is a connection between this book and Sander's earlier work. The usual riposte to amateurs who wish to "day trade like a pro," is that a wise amateur will find a professional to whom he can entrust the task. Yet that is what Madoff's victims did. They could hardly have done worse had they become day traders. **TFL**

Christopher Faille, a member of the Connecticut bar since 1982, writes on a variety of financial issues, and is the co-author, with David O'Connor, of a user-friendly guide to Basic Economic Principles *(2000).*

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A Promise to Ourselves: A Journey Through Fatherhood and Divorce

By Alec Baldwin with Mark Tabb

St. Martin's Press, New York, NY, 2008. 224 pages, $24.95.

Reviewed by George W. Gowen

The blurb on the dust jacket of Alec Baldwin's book tell us that he "is one of the best-known, most successful actors in the world." If we are still not sure who he is, the blurb adds that he was an Academy Award and a Tony Award nominee as well as the recipient of the Golden Globe and Television Critics Association Awards in 2007. More relevant to this book, however, Baldwin was married to Kim Basinger, the star of the James Bond film "Never Say Never Again" in 1983; she was also featured in a nude pictorial for *Playboy* that year. She went on to win an Academy Award as best supporting actress in "L.A. Confidential" and has appeared in some 30 movies.

A Promise to Ourselves is Baldwin's take on what happened, California style, when his and Basinger's eight-year marriage cratered. More specifically, the book is about the four-year, multimillion-dollar custody battle for their daughter, Ireland.

Those who approach this book in the hope of finding a lot of Hollywood dirt will be disappointed. Instead, they will find an anguished plea for the reform of the country's divorce and custody laws as well as reform of our family courts. The book is also a strident condemnation of the judges, custody evaluators, special masters, therapists, bureaucrats of the California Department of Child Services, lawyers, and members of the press who populate those courts.

Early in the book we are given a clue to contentious litigation to be described. It seems that Basinger allegedly reneged on a movie deal because of its required nudity and physical contact with other actors. She was sued for breach of contract, and her lawyer recommended that she settle. Baldwin writes that she refused to do so, because she believed that she had done nothing wrong. After being hit with a $9 million judgment, she sought bankruptcy protection, after which, Baldwin writes, "[w]e entered a new phase, with attorneys intruding into every aspect of our daily lives as a bankruptcy trustee took full control of her seized assets." The press furthered shattered what should have been the conjugal idyll of the early days of marriage. Even the staid *New York Times* chimed in with a spread on those who use bankruptcy to avoid paying their debts; the article featured Basinger and included a photo of Baldwin's East Hampton estate.

After his marital bliss had ended, Baldwin had occasion to encounter more lawyers, and he was not impressed. Baldwin describes Basinger's counsel in the couple's divorce and custody proceedings as "a caricature of the avaricious, inhumane, garden slug of a divorce lawyer ... a simian-looking man who looks like a cross between Gabe Kaplan and Chuck Norris." I assume that Baldwin is equating Kaplan and Norris with—for those of my vintage—celebrated eyesores such as Boris Karloff and Peter Lorre.

Baldwin's dislike of lawyers is not limited to this alleged garden slug, however. Describing another lawyer, he writes, "He had a bad case of the intellectual vanity that afflicts most attorneys I had known. Since my own college days, most lawyers had always struck me as men and women who were not sufficiently smart enough to become doctors or engineers. Therefore, they opted for a career wherein rote recitation of the legal code and a gift for bullshitting people amounted to a profession." Nevertheless, Baldwin has kinder words for one of his lawyers: "Overall, however, I am grateful for having met her and for having her serve as my attorney."

Baldwin is understandably offended by the courts' inclination to favor the mother in custody battles. Indulging in history, he writes,

> From the mid-nineteenth century through the first three-quarters of the twentieth century, family law in the United States and Britain subscribed to the "tender years doctrine." Prior to this time, early English common law always gave custody to fathers. The passing of the Custody of Infants Act of 1839 changed this and established a presumption of maternal custody for children in the tender years, that is, under the age of seven…. In 1873, the presumption of maternal custody was extended to the age of sixteen. American courts and legislatures followed suit. … By the late 1970s, courts began to throw out the tender-years presumption as sexist, thus opening the door for fathers to seek joint or sole custody of their children. Rather than automatically award custody to mothers, courts began operating on the "best interests of the child" principle.

Despite this trend, and despite the fact that today's fathers, during marriage, spend much more time with their children than they did in the past, custody battles frequently continue to be a battle of one parent (often the mother) pillorying the other in an effort to alienate the child from that parent.

Baldwin, however, had a self-inflicted problem. In 2007, a tape of his voice mail message berating his daughter Ireland was somehow given to a media outlet, which, ignoring that the tape was probably privileged, released it to the world. Baldwin admits that he had "snapped" and, unable to contact Ireland by phone, had left the damning message. The recording is still available on the Internet for all to hear.

Baldwin has 13 suggestions for those contemplating marriage and the divorce that now so routinely follows:

- Get a prenuptial agreement before marriage (not a total solution if children are involved).
- File for divorce first.
- Don't hire a lawyer based on word of mouth.
- Have your lawyer explain what lies ahead.
- Participate in mediation only if your spouse is amenable to mediation.
- Place a time limit on the mediation process.

- Demand that you and your soon-to-be ex-spouse attend a minimum of 12 sessions of co-parenting counseling.
- Do not hide your assets.
- Set up sessions with a therapist who specializes in family law.
- Find a therapist you can trust.
- Don't make your home a shrine to your child.
- Put you and your ex-spouse's drug and alcohol problems on the table.
- Ask the court to provide flexibility as to visitation rights.

I am reminded of a stratagem, which Baldwin does not mention, that an acquaintance of mine used after experiencing a couple of divorces (including one when his wife flew off with his pilot): Keep the most prominent divorce lawyer—loosely referred to in the trade as "a bomber"—on retainer immediately upon marriage so that, when the day comes, you will have pre-empted your spouse from hiring the best. **TFL**

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Evolution: The First Four Billion Years

Edited by Michael Ruse and Joseph Travis

Harvard University Press, Cambridge, MA, 2009. 948 pages, $39.95.

Reviewed by Henry S. Cohn

While the United States was celebrating Abraham Lincoln's 200th birthday on Feb. 12, 2009, England was feting its native son Charles Darwin, also born on Feb. 12, 1809. The English are very proud of the man who, along with Alfred Russel Wallace, discovered evolution by natural selection; Darwin even appears on Great Britain's £10 note. Of the new books that have been published to mark the bicentennial of Darwin's birth, as well as the 150th anniversary of *The Origin of Species*, the best book for the general reader is *Evolution: The First Four Billion Years*. Encyclopedic in scope and providing multiple references for further study, the book contains 16 lengthy essays as well as an alphabetically arranged compendium of personalities and topics.

Evolution: The First Four Billion Years explains its scientific subjects in understandable language. These subjects include, of course, the root Darwinian concept of natural selection (or, as Herbert Spencer more crudely put it, "survival of the fittest"), which holds that species adapt over time to meet environmental challenges. An interesting example that the book discusses is the emergence of seed plants that required pollination at the same time that bees were developing a demand for pollen. A chilling matter explained in the book is David Raup's proof that dinosaurs were rendered extinct by a meteor that crashed into Yucatan, Mexico, 13 million years ago. Raup believes that there was a pattern to the formation of this meteor and predicts a similar collision with the Earth in another 13 million years.

The reader will also learn about Ernst Haeckel's famous, but erroneous, "biogenic law": "ontogeny recapitulates phylogeny," which refers to the principle that the "evolutionary history of a species is replayed during its embryological development." Haeckel was one of Darwin's chief proponents, and a recent biography of him by University of Chicago Professor Robert J. Richards, *The Tragic Sense of Life*, shows his struggles to overcome the death of his wife and that of a subsequent lover, as well as unfounded accusations against his scientific methods. The evolutionist Steven J. Gould accused Haeckel of supporting racism, but the author of an essay in *Evolution: The First Four Billion Years* contests Gould on this point.

The short biographies of the scientists in *Evolution: The First Four Billion Years* include one of Charles Darwin himself, of course, and it relates his wealthy family background, his trip to the Galapagos Islands on the *Beagle*, his years of delay in publishing *The Origin of Species*, and the triumphant reception of the book when it was finally issued. In 1858, another 19th-century scientist, Alfred Russel Wallace, wrote to Darwin about his own study of evolution, and Wallace's letters convinced Darwin to publish *The Origin of Species* in 1859 so that he would share credit with Wallace as the first scientists to formulate evolutionary principles.

Most of the subjects of the short biographies in *Evolution: The First Four Billion Years* are modern-day academics who modified Darwin (some merging genetics into the theory), and a few of them add human interest to the story. Nikolai Timofeeff-Ressovsky, for example, was a Soviet biologist who spent World War II working in Germany. His son took part in anti-Nazi activities and was executed at Mauthausen. Timofeeff-Ressovsky returned to the Soviet Union after the war, spent time in the gulag, and was partly rehabilitated by the Soviets in the post-Stalin years.

Evolution: The First Four Billion Years also contains a biography of Pierre Teilhard de Chardin, a French Jesuit priest, who wrote *The Phenomenon of Man*. His work inspired many by showing life as an upward climb, progressing through various stages, notably the "geosphere" (the physical world) and the "biosphere" (the living world) until it reached the "noösphere" (the world of human consciousness).

Evolution: The First Four Billion Years discusses the impact of Darwinism on Western society outside of science, as, for example, in the cases of social Darwinism and the efforts to prevent the teaching of evolution in public schools. Social Darwinism reached its height at the beginning of the 20th century, in part through the writings of Herbert Spencer. "Spencer envisioned society as a natural organism, analogous to a living body and subject to the same evolutionary laws. ..." Spencer left an impression on Justice Oliver Wendell Holmes, who wrote in his famous dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905), that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," and who, in his heavily criticized majority

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opinion in *Buck v. Bell*, 274 U.S. 200 (1927), endorsed Spencer's concept of negative eugenics.

Darwin's "bulldog," Thomas Henry Huxley threw down the gauntlet to the fundamentalists when he wrote in 1859 that "we humans are modified monkeys rather than modified dirt," and the alleged conflict between evolutionary theory and religious belief has, of course, entered the courtroom, most famously in *State v. Scopes*, 278 S.W. 57 (Tenn. 1926), which was a prosecution based on a statute forbidding the teaching of evolution in public schools. Although the Supreme Court of Tennessee upheld the statute (but set aside a fine against Scopes), the U.S. Supreme Court later struck down similar statutes in *Epperson v. Arkansas*, 393 U.S. 97 (1968). Clarence Darrow's role in the Scopes trial is set forth in *The Essential Words and Writings of Clarence Darrow*, which includes the transcript of Darrow's examination of his expert witness, William Jennings Bryan.

Another legal battle involved statutes that require public schools to give equal time to both evolution and "creation science"—the version of the creation in Genesis. The Supreme Court held these statutes unconstitutional in *Edwards v. Aguillard*, 482 U.S. 578 (1987). The current religious challenge to evolution, known as "intelligent design," has not yet reached the Supreme Court. Statutes that invoke intelligent design require schools to teach that evolution is flawed and that intelligent design is an alternative explanation for the origin of life. In *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005), the court struck down such a statute, finding that intelligent design was creationism in disguise.

On Feb. 4, 2009, the Pew Forum released what it called a "research package that explores the religious debate over evolution" (www.pewtrusts.org/news_room_detail.aspx?id=48692). The package finds that, in several states, litigation is in progress over such matters as mandating that stickers be placed in textbooks questioning evolution or supplementing textbooks with material that opposes the theory of evolution. An essay in *Evolution: The First Four Billion Years* concludes with this assessment: "It may be that the legal safeguards that have until now discouraged the inclusion of various forms of creationism in the public school science classroom will be more difficult to muster by the scientists and teachers and parents who support evolution education."

Despite that gloomy conclusion, *Evolution: The First Four Billion Years* constitutes a birthday party celebrating the explosion of thought that emanated from Darwin's creative endeavors. **TFL**

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When Law Fails: Making Sense of Miscarriages of Justice

Edited by Charles J. Ogletree Jr. and Austin Sarat

New York University Press, New York, NY, 2009. 349 pages, $70.00 (cloth), $22.00 (paper).

REVIEWED BY ELIZABETH KELLEY

Although it is a rich and provocative book, *When Law Fails: Making Sense of Miscarriages of Justice*, does not fulfill the mission it sets forth in its subtitle. The book does not make sense of the countless injustices that it details but leaves the reader to wonder how our system of justice became so broken and what can possibly be done to fix it. Then, again, maybe this is precisely what the editors intended.

When Law Fails is more than a collection of essays by professors of law and psychology about much-chronicled wrongful convictions. The book is also a critique of a system that has made huge assumptions because of race, has overcriminalized conduct, has overincarcerated individuals, and has become so bogged down with technicalities that fundamental fairness has been lost. All of this, the editors hope, will "force us to articulate the value of 'justice' in our society."

The danger of works by academics is that they can be deadly theoretical and horribly frustrating, because the authors seem to have little grasp of the daily reality of our courthouses, jails, and prisons (or so it seems to this practicing criminal defense attorney). A couple of essays in *When Law Fails* fall into this category, but, happily, the rest are penetrating and insightful.

When Law Fails begins with a lively historical essay, entitled "The Case of 'Death for a Dollar Ninety-Five,'" by Mary L. Dudziak, a professor of law at the University of Southern California. Dudziak tells of how, in 1957, an all-white jury in Alabama sentenced Jimmy Wilson, a young African-American male, to death for allegedly robbing an elderly white woman of $1.95. That the evidence was scarce and the penalty absurd gained the attention of the international community. The United States was embarrassed by the coverage, as, in the midst of the Cold War, other nations were quick to point out America's racial inequalities. Ultimately, Alabama's governor commuted Wilson's sentence to life in prison. The matter quickly disappeared from the headlines. And, as Dudziak points out, so did Jimmy Wilson.

"Margins of Error," an essay by Robert Weisberg, a law professor at Stanford University, is a masterful discussion of the absurdity of the concept of harmless error. Weisberg uses a series of Socratic dialogues between a hypothetical defendant and the legal system to underscore the flesh-and-blood consequences of the intellectual analyses in which judges engage.

"Miscarriages of Mercy," by Linda Ross Meyer, a law professor at Quinnipiac University, is especially timely because of the heightened interest in military justice brought about by the wars in Iraq and Afghanistan. Meyer argues that, unlike in the civilian justice system, there is the opportunity for discretion and mercy at every stage of a legal proceeding in the military:

> Military culture at its best promotes and depends on relationships of teamwork and mutual responsibility. In turn, both are supported by the gratitude and trust created in allowing room for mercy. Reacting to sentences in

war-related crimes by eliminating mercy from the military justice system would ignore the fact that mercy extended in soldier versus soldier cases actually promotes, rather than destroys, responsibility for others. Mercy enables the defendants to make a fresh start, reflects the community's gratitude for prior service, and recognizes communal and command responsibility for crime. The mercy-givers are themselves potential future victims, and they accept the risk of the defendant's future conduct. Mercy is not cheap and easy but reflects the mercy-giver's willingness to take risks on the strength of the relationship with the defendant. Defendants are already in close relationship with their victims and their commanding officers, responsible to and for them in the future, and bonds of gratitude, trust, and mutual commitment are formed and strengthened by the mercy-giving.

Thus, when we consider the light sentences given to soldiers who have committed serious—or even unspeakable—crimes (such as Lt. William Calley, who served only four months in prison for his role in the My Lai massacre), we must realize that this is not a case of institutional denial or a cover-up, but, rather, it is part of a culture in which soldiers protect one another and understand that the violence of war sometimes causes aberrant behavior.

Much has been written about wrongful convictions and the reasons behind them, but this is not the focus of *When Law Fails*. Instead, whether describing how thousands of African-American residents of Tulsa, Okla., were never able to collect compensation for damages caused by the rioting of a white mob in their neighborhood (discussed in "When Law Fails: History, Genius, and Unhealed Wounds after Tulsa's Race Riot," by Charles Ogletree), or the clemency petitions that were summarily denied in the name of finality (discussed in "Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State," by Austin Sarat), the thread uniting the 10 essays in *When Law Fails* is that, although true justice is a worthy aspiration, our system can rarely achieve it. Or, as Markus Dubber, a professor at the State University of New York at Buffalo, School of Law, notes in "Miscarriage of Justice as Misnomer":

> Here it might be useful to consider the relationship between the rule and the exception in the penal process. As long as miscarriages of justice are regarded as exceptions to the rule of justice delivery, then their exposure does little to challenge the legitimatory complacency of the penal process. The problem with miscarriage of justice is not that they are miscarriages or even miscarriages of justice. They are not miscarriages at all because the system does not seek to do justice in the first place. **TFL**

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Wearing the Robe: The Art and Responsibilities of Judging in Today's Courts

By James P. Gray

Square One Publishers, Garden City Park, NY, 2008. 326 pages, $21.95.

Reviewed by Amy B. Auth

"Who is the judge on the case?" As a lawyer, how many times have you asked that question or had another lawyer ask it of you? Consider the amount of time, and thus money, we lawyers spend thinking about the judges assigned to our cases. We consult other lawyers who have appeared before the judges or perhaps even seek out former law clerks to gain insight into a particular judge, and then we use this insight in planning our litigation strategy. But how much time do any of us spend thinking about what it is like *being that judge* and having to deal with our case? Not much, I suspect. And those of us who practice mainly in federal courts probably think even less about what it is like to be any of the many types of state court judges, especially the types who preside over matters other than ordinary civil trials.

Judge James P. Gray has thought about these things in depth, and he addresses them in *Wearing the Robe: The Art and Responsibilities of Judging in Today's Courts*. The book is essentially a textbook for new judges and those seriously thinking about becoming a judge, so its intended audience is a relatively narrow subset of the legal profession. Nevertheless, the book will be of wider interest because, in addition to offering advice to judges and would-be judges, Gray offers his perspective on the role judges should play in and out of the courtroom, and he makes important points that can benefit the practicing lawyer as well.

Gray knows life as a judge. The son of a former federal district court judge, Gray has been a California state court judge for almost 25 years. He has sat on a variety of courts, ranging from traffic court to probate and family court to criminal court. He notes that, although being a judge has the benefit of not having to have to bill your time in six-minute increments or worry about bringing in business, wearing the robe also has its drawbacks—including lower pay, increased scrutiny of one's life, and the inability to defend oneself from public criticism. Gray also notes that judges are required to be generalists in an age when lawyers are becoming more and more specialized—a fact that is well-known to those of us who have worried about appearing in a complex commercial or patent case in front of a judge who may have spent his or her career as a criminal lawyer. As Gray aptly points out, civil cases "involve factual patterns that are limited only by humankind's creativity, emotion, negligence, carelessness, and stupidity." He not only understands the day-to-day practicalities of being a judge but also has thought about the role of a judge in the community at large.

Gray believes in activist judges, not

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necessarily in the political sense that comes up in election years, but rather with respect to their day-to-day, in-the-trenches role in the courtroom. He believes that, regardless of the type of case before a judge, and regardless of whether the case is just beginning, in the midst of discovery, in trial, or in the process of being settled, judges should be activists in moving the case along and, in particular, in trying to settle the case. Moving the case along means not allowing counsel to play "procedural gotcha" or otherwise cause unnecessary delay. Delay, he notes, more often benefits lawyers than it does clients. The judge should anticipate potential discovery issues at the outset and ask the parties what the court can do to help move the case along in addition to setting settlement conference and trial dates.

Judge Gray also believes that judges should take an active role in the discovery process, including identifying and sanctioning lawyers who act unreasonably, addressing discovery disputes request-by-request with all the attorneys if necessary, offering the courthouse as a location for depositions, and reminding counsel that Saturdays are available for depositions as well. Gray's suggestions for moving discovery along, which are probably not appealing to most lawyers (can you imagine sitting down with the judge as he or she goes through your document requests one by one?), admittedly are likely to cut down on the number of discovery disputes brought before the court. Gray also believes in drafting and issuing tentative decisions in order to focus the parties on the critical issues. At first, the idea of a tentative decision may seem disconcerting, but lawyers should welcome a preview of how the judge intends to rule—the knowledge gives the attorneys an opportunity to change the judge's mind. Not surprisingly, Gray also believes in firm trial dates and no continuances, because continuances are a means of delay that, again, more often benefit the lawyers than the parties.

Gray's belief in judges' taking an active role in moving a case along is aimed primarily at moving the case toward settlement. Indeed, he devotes an entire chapter to his thoughts and advice on mediating and settling cases, and he himself mediates his own cases. Lawyers may disagree as to whether the judge assigned to the case, who will ultimately preside over the trial, should participate in settlement conferences, but Gray offers perceptive insights into the settlement process. He notes that settling is the only way that a party, particularly a plaintiff, can maintain control over the outcome of his or her case. Gray also notes that, often, for corporate defendants to authorize settlement, the corporate officers involved in the dispute will need some "political cover"; they will want the decision they made that led to the lawsuit to be viewed as a "plausible mistake that 'could have been made by anybody under the circumstances.'" Gray understands that some cases will not be settled and that some parties will insist on their day in court, but he believes that only a small number of cases fall into this category.

A considerable portion of *Wearing the Robe* is devoted to the variety of different types of courts in our judicial system, including the various levels of criminal courts, family courts, juvenile courts, drug courts, probate courts, traffic courts, and others. In many of these courts, the judges deal directly with the parties themselves and not with attorneys. Many people come before a court only one time in their lives, and they will judge the entire judicial system on the basis of that experience. Therefore, Gray believes that judges should ensure that all parties feel that they were able to tell their side of the story and were treated fairly, so that even losing parties will accept the results and leave with a favorable view of the judicial system. Gray genuinely believes that people listen to and respect the man or woman wearing the robe and that judges can have a significant impact on people's lives, especially in courts such as traffic court or probate courts.

According to Gray, judges can promote a greater understanding of and respect for our judicial system by participating in community activities such as inns of court, teaching, engaging members of the media as much as possible, and creating community programs. In Massachusetts, for example, Magistrate Judge Leo Sorokin is heavily involved in the Court Assisted Recovery Effort (CARE) program, which is an intensive one-year program designed to assist those on supervised release or probation to lead sober, employed lives. Sorokin himself presides over weekly sessions with the probation officers, prosecutors, defense attorneys, representatives from treatment contractors, and the participants themselves. (For more information on the CARE program, see www.mad.uscourts.gov/outreach/recovery.htm.) The success of Massachusetts' CARE program supports Gray's belief that individuals listen and respond to the individual wearing the robe and that positive interaction between individuals and the court will promote greater respect for our judicial system.

As noted, *Wearing the Robe* contains tips for practicing lawyers, and, even though many of those tips may seem self-evident, it is for that very reason that they are worth repeating. Gray tells us, for example, that, although motions to dismiss may impress the client, they rarely move the case forward. With respect to trials, he considers opening statements to be of fundamental importance, even in bench trials. He advises lawyers to resist the temptation to dump every document produced during discovery into evidence during the trial; instead, they should focus on the documents they plan to use in closing arguments. With respect to settlements, to which Gray devotes a significant portion of the book, he says that lawyers should keep in mind the psychological impact of their offer and consider using a neutral business accountant to reach a fair settlement. In addition, once a settlement is reached, he tells lawyers to get the settlement recorded right away.

For the most part, Gray is proud of the American judicial system and believes that it works. He notes that, although lay people often cite the McDonalds hot coffee case as an example of an outrageous verdicts and the court system run amok, few people know that the evidence at the trial indicated that there had been multiple similar incidents that had resulted in severe inju-

ry without the company's having taken any corrective action. Nor do critics of the verdict realize that the court reduced the plaintiff's award because of her own negligence.

But Gray also recognizes the problems of our judicial system, and he offers suggestions for improving it, including adopting a modified English rule for attorneys' fees, which would give the trial judge the discretion to award reasonable attorneys' fees to prevailing parties. Under this approach, the judge would be able to award attorneys' fees in cases that should never have been brought or should have been abandoned once relevant facts were discovered, but judges should not award fees in a way that would make it "ruinous for parties to pursue the righteous prosecution or defense of appropriate cases." Gray also recommends more interaction between the judiciary and the media, including allowing cameras in the courtroom.

His most important recommendations relate to the criminal justice system, and he suggests considering the legalization of drugs. His other recommendations with respect to the criminal justice system stem from the idea of "restorative justice." As Gray notes, 95 percent of all prisoners will be released, and prisons do not adequately prepare these people for this eventuality. He recommends not only helping prisoners address why they were sent to prison in the first place but, more important, the need to provide them with basic skills training, including reading, writing, and job and parenting skills, as well as drug and alcohol treatment, so that these people do not end up back in prison. Gray also recommends that, given the cost of keeping convicts in prison, especially with respect to an aging prison population that results from longer and longer sentences, we should also reconsider whom we send to prison. Gray points to the case of a former California legislator who had routinely voted for longer and longer prison sentences, until he himself had to spend two years in prison for election fraud. Once in prison himself, the legislator realized that many people in prison simply did not belong there. After his experience, the legislator was quoted as saying, "We should reserve our prison space for people we are afraid of, not people we're mad at." Coming from a judge who has worn the robe for so long, his suggestions are at least worth considering.

Wearing the Robe compels us, as lawyers, to look beyond our own interests in our particular cases and to consider for a moment the important role played in our judicial system, at all levels, by the person wearing the robe. **TFL**

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focusing specifically on the unique insights of the senior officer featured on the page. The sidebars support what is in the text, as opposed to distracting from it. At the same time, as with Michaels and Balling's book, the best way to follow the text and to get maximum benefit from the sidebars is to read the text first, then go back and read the sidebars. But reading the sidebars included is valuable.

This paper is worth reading for three specific reasons. First, the discussion does not fall anywhere in the left-vs.-right, environment-vs.-economy spectrum and thus presents a unique perspective on global warming. Like Lomborg's book, this paper takes a truly global view of climate change. At the same time, the authors do not lose their perspective on the issue of just why the United States should care about the problem. Second, the authors acknowledge and tackle head-on a vital issue: making decisions and taking action in the face of imperfect knowledge. The authors have spent their entire adult lives working on important and complex problems and have succeeded in positions of tremendous responsibility. They acknowledge that they do not know everything about climate change but have concluded that the evidence and the consensus within the scientific community are strong enough that we need to act now. As they state on pages 9–11 of their paper, it is a question of managing risk not of arriving at absolute certainty. Those pages alone make this work worth reading.

The third reason to read this paper is Appendix 2, "Climate Change Science—A Brief Overview," which is well-written. In this section, the authors specifically state that they sought out scientific experts to determine both the consensus and range of views within the scientific community. They showed that the current consensus is that the significant increases in average global temperature over the last half-century can be attributed to human activity (with a certainty of more than 90 percent); that those increases have already affected many natural systems on Earth; and that future climate change is inevitable (page 56). At the end, they also briefly discuss abrupt climate change, pointing out that were abrupt change to occur, it would be a significant challenge even for well-developed countries.

Each of the works reviewed here can help lawyers improve their understanding of the current discussions about global warming. **TFL**

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