RESEARCH HANDBOOK ON INSIDER TRADING

EDITED BY STEPHEN M. BAINBRIDGE

Edward Elgar Publishing, Inc., Northampton, MA, 2013. 485 pages, $240.00.

Reviewed by Christopher C. Faille

If you regularly peruse the business pages of U.S. newspapers, then you have lately been reading a good deal about insider trading allegations and enforcement. The cases of Raj Rajaratnam, Rajat Gupta, Danielle Chiesi, Bob Moffatt, and others have drawn considerable attention.

I will attempt in the course of this review to interest you in a distinction among the different types of people who become defendants in either civil or criminal actions in which they face charges that they traded illegally on the basis of nonpublic information.

Thinking of ImClone

Simply to get us started, let us think of Samuel Waksal, Peter Bacanovic, and Martha Stewart, three people whose moment of joint notoriety is now a decade behind us. Waksal was the ultimate insider in a biopharm company known as ImClone Systems—he was its CEO. Peter Bacanovic was not an insider at ImClone at all, until he became a tippee. He was a stock broker, and specifically he was Waksal's stock broker, as well as Stewart's, at Merrill Lynch.

In December 2001, Bacanovic learned from Waksal that the FDA was about to issue a ruling on a drug that ImClone had been developing—a ruling bound to hurt the value of ImClone's equity. He passed along the fact that Waksal was selling to another customer of his, domestic goddess and serial entrepreneur Stewart, and she traded on that basis. After the courts had sorted out this entire mess, Waksal received a sentence of seven years and three months. Bacanovic and Stewart each received the far lighter sentence of five months' imprisonment, five months' home confinement, and two years' probation.

The particulars of the case against Stewart are discussed in some detail in one of the chapters in *Research Handbook on Insider Trading.* The book is an anthology, with thoughtful chapters looking at insider trading from a range of points of view, each by a distinguished author. The ImClone case is part of the discussion by Donald C. Langevoort in his chapter on the *scienter* requirement.

Langevoort, a professor at Georgetown University Law Center, thinks that a plausible case can be made that Stewart's state of mind was not the *scienter* usually required for conviction. She believed "too hastily, perhaps, but without conscious doubt—that word of the FDA action had become public knowledge at least within sophisticated trading markets," and this good-faith belief could have been a defense to liability.

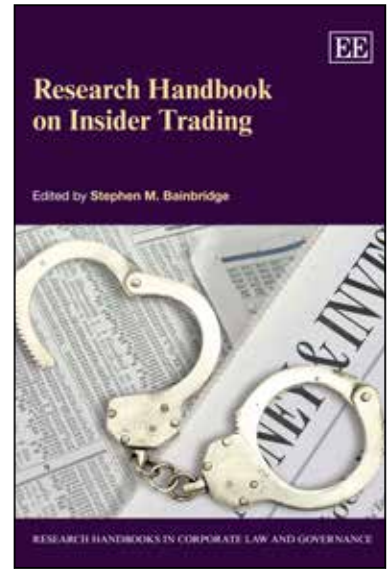
It doesn't follow, by the way, that her imprisonment represents an injustice. It was, as Langevoort also says, a "poorly executed cover-up [that] actually landed Martha Stewart in jail."

The simplest lesson that we might take from the ImClone example, though, is that there are a range of defendants in the insider-trading world: There is the actual corporate insider, the tippee within the securities industry, and the tippee outside of that industry. At the time, it seemed reasonable that the true insider should receive the harshest sentence, although that was regarded as a matter of judicial discretion, not a statutory mandate.

Understanding Enforcement Choices

Langevoort, like many other contributors here, has done fine work. To my mind, though, the most impressive contribution is M. Todd Henderson's discussion of the "private-interest model" of enforcement decisions in the United States.

The core of this model is the notion that there is a rivalry between public-corporation insiders on the one hand and securities-market professionals on the other, as represented, we might say, by Waksal and Bacanovic, respectively, though Henderson doesn't discuss ImClone specifically. Each group has a large stake in influencing actions and policies of the SEC, the Department of Justice, U.S. Attorneys' offices around the country, and so forth, in the direction of its own benefit, and



thus in making the other group the chief scapegoat when the inevitable interaction of these two groups goes bad and draws the enforcement spotlight. The private-interest model of securities fraud, then, portrays the SEC and other enforcers as the passive recipients of pressure from the organized activity of two sets of likely defendants.

Two developments in recent years have changed the respective incentives of both public-corporation insiders and securities-market professionals. The first big change is that stocks and stock options have exploded in significance as a form and as a share of executive compensation. This, Henderson writes, has "dramatically increased the stake firm insiders have in insider trading rules." Even an insider who does not trade on the basis of the nonpublic information that crosses his desk will have a powerful incentive to affect enforcer priorities as much as possible, because "enforcement is imperfect and errors are possible in sorting between legal and illegal trades, [so] insiders who are trading more will prefer regulations that are more permissive," Henderson explains.

The second big change is the rise of a new brand of securities market professionals: the principals and employees of corporate-activist hedge funds. These are funds whose basic strategy is threefold: (1) Find a company whose stock is undervalued

relative to these principals and employees' estimate of its worth given such underlying facts as balance sheet strength and the market demand for the issuer's products; (2) Buy a significant stake in the company (though generally far less than a majority); and (3) Use that leverage to get a voice in the boardroom and plug for changes.

The activists see themselves as catalysts of reform who remove obstacles, allowing the stock price to rise to its true value. That rise then allows the activists' firm to sell into the rising market and make its well-earned profit.

On the other hand, as critics see it, the fact of an activist fund's interest, the commotion it makes in the market as it starts buying in bulk, the publicity over its reform proposals and the back-and-forth that creates—all of this creates a lift in the stock value as a matter of psychology and momentum regardless of the actual merit of the reforms. Then the activists sell into the irrational price rise and reap their not-so-deserved profits.

We don't have to settle the argument over the value of hedge fund activism of this sort for the purposes of this review, nor did Henderson have to for the sake of his chapter. Instead, his point is just that the activity of funds with this orientation has become a major market factor only in recent years.

Conceding Power to Hedge Funds Isn't Pleasant

The CEOs (and other highly placed insiders) face personal costs and strains as a consequence of the rise of this sort of activism. The resignation or dismissal of the CEO is often one of the reforms for which the activist fund campaigns. Short of losing his job, though, a top manager will surely be made the most unhappy if a deal is reached (as it often is) in which the corporate brass remains in place but agrees to accept a policy shift along the lines proposed by the fund—agrees to spin off a division, say, or increase dividend payments. The upshot here, too, is that the real insiders have a whole new depth of motivation in their efforts to turn the attention of enforcers away from themselves, toward market professionals, including those same hedge fund types who are putting them under these new pressures.

Henderson provides empirical evidence that the focus of those enforcers has in fact shifted, in accord with what the private-interest model would predict. In a database going back to 1982, "of the top seven years in terms of percentage of market professionals as a defendants [of SEC insider trading actions], five were since 2000." Likewise, of the bottom seven years in terms of the targeting of market professionals, only one occurred in the past decade.

Look also at the question of criminal enforcement. This is where the headlines are. On Oct. 13, 2013, the U.S. District Court in Manhattan sentenced Raj Rajaratnam—the head of a hedge fund firm—to 11 years in prison. He had obtained information, in the thick of the financial crisis of 2008, about the purchase of a substantial block of Goldman Sachs stock by Berkshire Hathaway. His tipster, Rajat Gupta, who was a member of Goldman's board at that time, and would in time be sentenced to just two years.

Though much more was involved both in the Goldman/Berkshire case and in the ImClone case than is possible to expound upon here, it does seem *prima facie* that there has been a reversal of the government's attitude as to who is the principal malefactor and who is the accessory. Waksal, the CEO of ImClone and the presumed source of such inside tips as made their way out, was considered the principal in the earlier case and got a far more severe sentence than the tippees, one of whom was a securities professional. But Gupta, a director of Goldman Sachs and thus the presumed source of the inside dope, was considered a mere accessory, and received a far lighter sentence than the man he tipped off.

Statistics confirm that anecdotal sense of reversal. In the past five years, the risk of criminal prosecution for an insider charged in a civil case has remained what it was in the 1990s—about 14 percent of those charged civilly will also be charged criminally. But during the same last five years, the risk that a tippee market professional who has been charged civilly will also be charged criminally has increased by about 10 times.

Concluding Thoughts

Henderson's chapter is fascinating, and I recommend it and indeed the whole book to all legal professionals with an interest in securities issues. But I won't end this review without a shout out to Nicholas Calcina Howson.

Howson briefly discusses the case against insiders at Zhejiang Hangxiao Steel Structure Co., Ltd. In early 2007, they publicized their company's acquisition of a large infrastructure contract in Angola. The market responded enthusiastically to this news, and Zhejiang Hangxiao's stock rose 150 percent. Some insiders were said to have pocketed more than 5 million U.S. dollars by selling into this rally.

Howson, a professor at the University of Michigan Law School, also tells us that weeks later it became evident that the big Angola deal was a fiction, and prices collapsed, but of course by then the inside money was out, and only naïve outside money was still in. That sort of case is best understood as a pump-and-dump in which the pumpers' lies acquired credibility because they were insiders. For the most part, though, the two crimes occupy different realms. Insiders trade on fact, whereas pump-and-dumpers trade on pretense, often *pretending* to be insiders or tippees in the process.

Anyway … don't satisfy yourself with a review. Go get the book. ⊙

Christopher Faille graduated from Western New England College School of Law in 1982 and became a member of the Connecticut bar soon thereafter. He is at work on a book that will make the quants of Wall Street intelligible to sociology majors.

THE LAND WAS OURS: AFRICAN AMERICAN BEACHES FROM JIM CROW TO THE SUNBELT SOUTH

BY ANDREW W. KAHRL

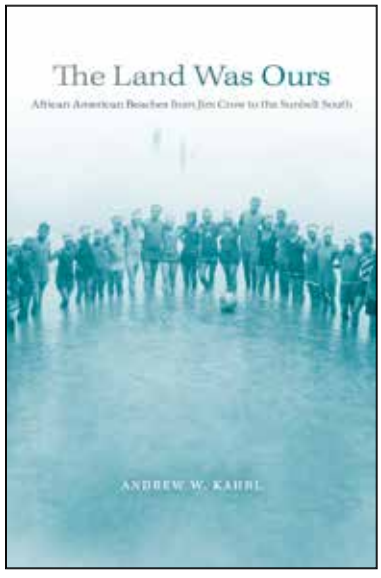
Harvard University Press, Cambridge, MA, 2012. 346 pages, $39.95.

Reviewed by Jon M. Sands and Noah L. Bucon

They came, in 2009, to the First Annual Carr's Beach Historic Music Festival, near Annapolis, Maryland, for the chance to have just one last dance on the beach. They had to go past the security gate, the luxurious waterfront condominiums, tennis courts, and boat slips. These African-Americans were past residents of the area, with memories of hot summer days spent on the beach and cool summer nights

where major black rhythm and blues singers sang loudly far into the morning. Now, in the afternoon, the African-Americans mingled with the mostly white residents of "The Villages of Chesapeake Harbour," who listened politely to these commemorations of a bygone age. This was a post-racial and color-blind gathering, at a place where segregation was long gone and there was no longer a marker for the colored side of the beach. It was ironic that the soulless corporate development that staged this historic festival had been the actor in its demise—that it had bought out the African-American owners of the properties and of the beachfront stores. Now, in the summer and throughout the year, the beaches stayed white because of gated communities and homeowners association fees. Class, rather than race, was the entry pass.

Andrew Kahrl opens his study of the African-American beach experience with this account. It illustrates what occurred along the Southern coasts as development and prosperity took off, and racial barriers came down. Through a series of such examples, Kahrl shows that, when the "Colored Only" signs were replaced by "for sale" signs, also lost were the "mom-and-pop restaurants, do-drop inns, nightclubs, and seaside amusement parks that sustained black social life, nourished cultural traditions, and gave rise to black business activity and struggles for economic empowerment throughout much of the twentieth century." This loss, Kahrl shows, was also part of the change of the coast from wasteland to valuable properties, and from sparse segregated beaches to overdeveloped gated communities. Kahrl labels this "coastal capitalism," which he defines as "the commodification of the beach as a commercial asset, exploitation of natural resources and environmental engineering of coastal zones and bodies of water for aesthetic and recreational purposes, and the transfer of public land to private entities." Coastal capitalism transferred black-owned properties to whites, through means occasionally fair but more frequently exploitative.



Owning beachfront property was not always a sign of financial success. After the Civil War, the coastal plantations lay in ruins. Economic power shifted away from the coasts to the interior, as railroads linked farms to markets, and natural resources to northern factories. Southern industry likewise relocated to the in-town railroad hubs. The value of coastal land further dropped with the loss of slave labor, exacerbated by weather and health conditions. In the 1870s, the value of some coastal land plummeted from $5,000 to $50 per acre. This drop in value, however, allowed African-Americans to afford to buy land. Some of the highest rates of black landownership occurred in coastal counties.

African-Americans were not the only ones to seek out communities on the coast. The nation's moneyed elite began to discover the virtues of summer playgrounds and winter havens. In the summers, northerners and, increasingly, southerners, left the cities for the shore. Beginning in the 1890s, capital investments in coastal property rose with advances in coastal engineering, the invention of the automobile, investment in roads, and the rise of a professional class that could take time off and had disposal income. The increased value of coastal property made its protection a matter of state and federal attention. Through cyclical booms and busts, vested interests led to the federal government increasingly undertaking responsibility for shoreline protection to assist coastal leisure economies and real estate. Post-World War II America, prosperous and prepared for the beach by the government, rushed to develop properties.

African-Americans participated in this nascent coastal capitalism. As development drew residents and increased land value, African-Americans began to carve out separate communities serving their interests and leisure opportunities. As development occurred on the coasts, Jim Crow sensibilities, previously somewhat relaxed at the shore, became pronounced. Designated colored beaches were frequently dangerous, polluted, and distant. In reaction, black developers and entrepreneurs established black steamship cruises up and down the Potomac, beach resorts along the Chesapeake Bay and North Carolina, and railroads to private black beaches along the Mississippi Gulf Coast. These resorts ran the spectrum from church-inspired retreats, to middle-class entertainment, to rowdy and rollicking joints. Those African-Americans who established black resorts were investors, speculators, and developers with a desire to make it. They had to operate in discriminatory real estate markets, with limited access to either credit or capital, and prey to high interest rates. Kahrl notes that African-Americans, forced to take risks and operate under crushing loan terms, were more vulnerable when downturns came or difficulties arose. They were also victims of unscrupulous and exploitative partners.

The beach and the coast became as much a battleground for the dismantling of Jim Crow as did bus routes, counter seats, and school rooms. The right to gain access to a public beach was as important and symbolic as was the right to freely use parks and swimming pools. African-American communities organized around access to beaches. As African-Americans struggled to enjoy the same leisure luxuries as whites, they encountered a new brand of injustice. An attempt to temporarily escape the summer heat could easily and quickly become a life-threatening activity. Whether it was a trip to a nearby river or lake or a day spent on the coast, blacks were disproportionately exposed to environmental hazards. A study conducted in the early 1950s found that a section of the Potomac frequented by African-Americans had more than 10 feet of raw sewage sludge resting on the river's bottom and was known as a breeding ground for typhoid fever, cholera, and other diseases. In addition to high levels of pollution, bathers also had to be cautious of dangerous swimming conditions and a general lack of supervision and safeguards. During the 1940s, the NAACP estimated that an average of 15 black children were drowning in New Orleans each summer. Unfortunately, the concerns of out-

raged communities failed to be addressed by politicians, who were either unwilling or incapable of instituting change. Kahrl astutely observes that African-American beach-goers were victims of environmental injustice long before the term was even coined. This fact was a driving force in the creation of black "privatopias," which allowed wealthier African-Americans the opportunity to escape from the degradation of segregated beaches.

Under the coastal capitalism paradigm, Kahrl writes, "the 'best use' of a given piece of property could be measured by the wealth generated from it," and this ran counter to African-American inheritance practices, known as "heirs' property." Heirs' property is a form of inheritance by tenancy in common, as opposed to joint tenancy. It works against consolidation of property. Many African-American landowning families preferred heirs' property, given, understandably, their limited "access to legal advice and a deep distrust in legal institutions." With heirs' property, the number of owners grew exponentially from generation to generation, spreading shares among the extended family and creating a communal sense of ownership. Kahrl points out "that the tangled web that constituted heirs' property might have been seen by some as a means of fending off outside developers who preferred to handle clear title and individual owners," while uniting the black landowners in a communal interest. Indeed, many black landowners thought that heirs' property could not be sold or mortgaged. Yet such practices, operating outside of Southern courts of law, tended to fragment properties. "Often the people who remained on the land had only a small fraction of an interest in the land, while many others, sometimes living far away, had little connection to the land but an equal share in determining its fate." Absentee owners were inclined to sell for any amount or to use shares as collateral for loans, with far-reaching consequences. Kahrl writes:

> In the coastal South, the decline of heirs' property owners' means of subsistence and self-sufficiency led many to sell their shares to parties outside of family or use them as collateral in securing a loan. The acquisition of shares by persons outside the family could have disastrous consequences for the family by exposing them to legal challenges to land claims adjudicated in Jim Crow courtrooms. Such was the case with the Freeman family's heirs' properties when, in 1940, Ellis Freeman sold his shares to the Home Real Estate Realty Company as part of a settlement on a defaulted loan. With these shares in hand, this group of white developers gained entry into the "family" and used their power as shareholders to seize ownership of some of the Freemans' increasingly prized beachfront. Immediately after gaining possession of Ellis Freeman's shares, the Home Real Estate Realty Company filed for a partition of a portion of the beachfront commensurate with the number of shares in their possession. The following year, the Superior Court of New Hanover County granted the Home Real Estate Realty Company title to a thirty-five-hundred-foot stretch of property along the southern portion of the Freemans' beachfront holdings to the immediate north of the town of Carolina Beach. The status of the remainder of the property was left unaddressed. After gaining title, the development firm successfully petitioned the town of Carolina Beach to annex the property, and they subsequently began construction on summer homes, hotels, and condominiums.

Unsurprisingly, and inevitably, African-American landowners, many lacking formal education, were taken advantage of by developers. One illustrative example happened in North Carolina, to the Cole family.

> "I'll never forget," [Edna] Cole recalls, "a man came to my dad's with a briefcase and telling him that Jordan Lake was going to come and part of the land in Chatham County was going to be used as a flood area and some of it was going to be for wildlife. ... And he took the briefcase out and showed him some of the things that was going to happen and told my father that, you know, if he didn't sell it, they would take it anyway." Seeing little option, Edna advised her elderly father to sell the man 22.5 acres of their farmland for $5,000. Jordan Lake was completed in 1982.
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> "In later years we found out that this man [Russell Barringer] was not from the Corps at all, but he had inside information about what the progress was or when it was going to happen." Through examining courthouse records, Cole learned that Barringer later sold the Coles' farm to the Army Corps of Engineers for twice the amount he paid to acquire it. Along with the land, Edna Cole lost her father's faith in its power to provide its possessors a measure of freedom and equality. "This America we live in, you know, you never own anything because at any given time they can take it back for whatever reason." In the end, she found a measure of comfort mixed with resignation knowing that Barringer's act of deceit was just another chapter in a long history of "blacks'… land being taken, or finagled." This, she remarked sarcastically, was the coming of progress to the South—and "You can't stop progress."

Unscrupulous African-Americans also used their personal and family ties to black coastal communities to gain trust and access and then to form partnerships with corporate developers. The ability of non-resident landowners to oust beach residents for a quick buck, or a get-rich scheme in the escalating markets, led to exploitation.

Beachfront and shoreline is much different now from what it was a century ago. Kahrl chronicles this transformation. He spent a great deal of time in county courthouses tracking property transactions and searching for information in newspapers and letters. He anchors his account with county recorder transactions, newspaper reports, and personal interviews. This research provides a fine-grained understanding of Anne Arundel County, Maryland; Hampton, Virginia; New Hanover, North Carolina; New Orleans, Louisiana; and the Mississippi Gulf. Each beach showed different aspects of transformation and different types of exploitation and racism. This can make the narrative hard going. Each chapter focuses on a dif-

ferent beach, but the pattern of archival research, personal recollections, and fiscal reckonings and regrets begin to blur. Yet, right when it all seems the same, one encounters incidents or personalities that fascinate: black steamships cruising from Washington, D.C., to Norfolk or Hampton; the segregated bathing beaches in the D.C. tidal basin, which closed rather than have a separate-but-equal "colored" access; shady African-American confidence men scheming with white speculators in selling purported prime real estate that turned out to be swamped or dilapidated housing. They shook hands while picking each other's pockets. Some things seemingly never change. It helps when Kahrl leaves the examples to take a step back and survey a larger picture, sketching the development of the coastline as a distinct history and exploring the environmental changes as well.

A history of coastal development, much less a portrayal of how racism and segregation affected beach-going blacks, could not be complete without discussing the role of the federal government and its attempts at environmental protection. As the Sunbelt's economy grew with the rise of a burgeoning beach culture, the interests of the Army Corps of Engineers' Beach Erosion Board in shoreline protection "veered from protection from invasion to protection of coastal leisure economies and real estate markets." The Flood Control Act in 1936 "established protection of property from flooding as a federal responsibility and led local administrators of New Deal agencies ... to use the threat of coastal erosion to justify embarking on massive, and often ecologically disastrous, measures of fortification." Sea walls, which were intended as beach restoration projects, often worsened erosion problems and exacerbated unsafe swimming conditions. At African-American beaches, this meant even greater risk for those simply desiring to cool off during the summer months.

Furthermore, beach replenishment projects, to replace the sand at eroding beaches, were typically undertaken only on shorelines frequented by whites. To add insult to injury, these projects washed taxpayer dollars out to sea as the replenished sand was eroded away by natural beach movement. This type of temporary and ill-planned solution was also exemplified by the passage of the National Flood Insurance Act in 1968, which continued to subsidize the inhabitation of unsafe and ecologically fragile areas. As hurricanes washed away coastal communities time and again, the coastline became increasingly white. Redevelopment following extreme weather was typically characterized by disaster capitalism in which regional black identity struggled to compete with powerful corporate interests in search of quick profits. Following Hurricane Katrina, Reverend Willie Walker of the Lower Ninth Ward warned, "They're going to take it all. They're going to bring in the developers, and this neighborhood is going to be gone."

For almost 150 years, black-owned seaside resorts and coastal communities dotted the shores of the Chesapeake, Mid-Atlantic and Gulf coasts. These properties afforded recreation and leisure destinations to African-Americans, provided opportunities for black landownership and beachfront development, and contributed to African-American culture. Yet, today, these formerly black-owned properties have been transformed into real-estate developments where distinctions are no longer based primarily on race, but on class. Karhl's history is a lament for what was destroyed by the vast changes that resulted from social, economic, and environmental tides that put a premium on coastal development. The erosion of Jim Crow segregation, the booming of the Sunbelt, increased leisure opportunities, and the impact of federal and state environmental developmental policies all made African-American-owned coastal properties that much more valuable. The transformation in the complexion of ownership resulted from both selling at the right time and exploitation. Examining selected historic black seaside communities, from Maryland through North Carolina and to the Mississippi Gulf Coast, Kahrl rescues black beaches from being swept away by historical tides. In so doing, he also makes valuable contributions to environmental studies, and to our knowledge of the rise of the new South and the Sunbelt. ⊙

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THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM

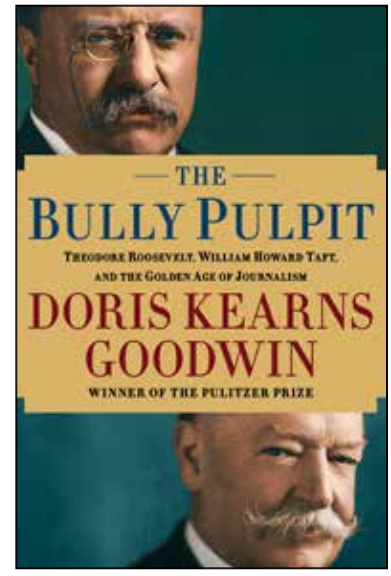
BY DORIS KEARNS GOODWIN

Simon and Schuster, New York, NY, 2013. 910 pages, $40.00.

Reviewed by David Heymsfeld

In *The Bully Pulpit*, Doris Kearns Goodwin vividly recalls an important, but now dimly remembered, era of American history: the Progressive era of the early 20th century. During this period, the federal government began to respond to the problems caused by the explosive growth of the country after the Civil War. This growth had led to the rise of big cities and the domination of the economy by large corporations with monopoly powers. In the late 19th century, the federal government had done little to deal with the problems caused by unconstrained growth. As Goodwin explains, "At the start of Roosevelt's presidency in 1901, big business had been in the driver's seat. While the country prospered as never before, squalid conditions were rampant in immigrant slums, workers in factories and mines labored without safety regulations, and farmers fought with railroads over freight rates. Voices had been raised to protest the concentration of corporate wealth and the gap between rich and poor, yet the doctrine of laissez-faire precluded collective action to ameliorate social conditions."

The steps that TR and his successor William Howard Taft took to deal with



these problems seem modest compared to those of the New Deal and the Great Society. But at the time TR's and Taft's departures from laissez-faire were controversial. Importantly, they began a discussion, which continues to this day, about the proper role of government in regulating business to prevent income inequality, monopolization, threats to health or safety, and degradation of the environment.

In recounting the early Progressive era (1901 to 1912), Goodwin focuses less on historical trends and analysis, and more on a highly readable narrative of events and the biographies of two extraordinary leaders, TR and Taft, whose relationship changed from close allies to bitter rivals. As in her past works, Goodwin shows great skill in portraying the personalities and interactions of her protagonists and their spouses. She also explores the important role of investigative journalists, who, often with the support and encouragement of TR, documented the abuses of unbridled capitalism and generated public support for government intervention.

Today, although many historians rank TR as one of our greatest Presidents, his achievements are largely unknown to the public. TR was accomplished, energetic, and productive. He was the author of 40 well-regarded books, on subjects ranging from American history and biography to literary essays and natural history. He had great physical stamina, evidenced by a typical day of relaxation in which he "[g]ot up with the sun; worked in the library until breakfast; took Mrs. Roosevelt for a long walk toward Cold Spring Harbor; rowed about twelve miles; went horseback riding after luncheon; and played six sets of tennis." He was physically courageous, placing himself in great danger when leading a military charge up San Juan Hill during the Spanish-American War. He was a masterful public speaker, tactician, and manager of the governmental process.

By today's standards, TR's departures from laissez-faire were limited. He accepted the growth of large corporations, but advocated regulation to prevent competitive abuses or threats to health and safety. His approach was less radical than that advocated by some Democratic party populists in the 1890s, who favored nationalization of railroads and grain elevators. It was also different from the progressive approach of Louis Brandeis, who favored government action to return the economy to smaller companies.

But, moderate as they seem today, TR's views were disturbing to the bosses who controlled the Republican party, and they tried to curb his career early on by persuading him, in 1900, to run for vice president on the ticket of the conservative William McKinley. At the time, the vice presidency was a dead-end position. No sitting vice president had ever been elected President. The only objection came from the Republican leader Senator Mark Hanna, who said, "Don't you realize that there's only one life between this madman and the White House?" After the election, it was made clear that TR would not be an active participant in the administration. TR thought that his political career was over and considered going back to finish law school and starting a legal practice, or becoming a history professor. In 1901, an assassin's bullet changed everything, and, at age 42, Roosevelt became President. Senator Hanna expressed the reaction of many Republicans: "That damned cowboy is President of the United States!"

Throughout his seven years in office, TR signed legislation that increased the federal government's power to regulate business. A major reform gave the Interstate Commerce Commission enhanced powers to regulate rail rates and ban rebates. Railroads had used their unfettered powers over rates to eliminate competition in the rail industry, to victimize farmers, and to give competitive advantages to trusts seeking control of industries shipping by rail, such as John D. Rockefeller's Standard Oil Co. TR also instituted an antitrust suit against Northern Securities Co., a railroad trust controlling the railroad industry in the West. He refrained, however, from bringing antitrust suits against other trusts. Other legislation enacted during his administration included a food and drug law and a meat inspection act. TR also intervened in a coal miners' strike. Contrary to the wishes of the owners, he forced them to accept arbitration by threatening to send in troops to run the mines.

To gain support for these measures, TR encouraged and relied upon a remarkable series of journalistic exposés. The authors of these exposés have come to be known as muckrakers, which originally was a term of opprobrium, but became a term of approval. Important exposés included Jacob Riis' study of the hardships of urban slum life, Ray Baker's study of railroad anti-competitive and corrupt practices, Ida Tarbell's study of the cutthroat practices John D. Rockefeller used to gain monopoly power for Standard Oil, Stephen Crane's revelation of dangerous and unhealthy conditions faced by workers in coal mines, and Upton Sinclair's portrayal of unsafe and unhealthy practices in the meat-packing industry. TR developed strong relationships with many of these authors, encouraging and critiquing their work, and in turn seeking their advice on his policies and speeches. In contrast to today's Presidents who have only infrequent press conferences, TR met with journalists virtually every day during his midday shave, and often in the evenings when he would multitask—reading his correspondence and talking with the press. In return for this frequent access to TR, journalists agreed not to "violate a confidence or publish news that the President thought ought not to be published."

After being elected to a full term in 1904, TR pledged not to run again, a pledge he later regretted. His choice for successor was William Howard Taft, his good friend and colleague of many years. Taft seemed superbly qualified. He shared TR's views and had served well as governor of the U.S.-controlled Philippines. He was the workhorse of TR's administration, serving as secretary of war and as the chief surrogate campaigner for TR in the election of 2008, when it was still considered unseemly for Presidents to campaign on their own behalf.

Taft had doubts about his capacity to be President, feeling with some justification that his public speeches were too ponderous to attract voters, and that he lacked TR's love of political combat. Taft thought he was better suited to be chief justice of the Supreme Court, which he ultimately became in 1921. However, Taft's wife Nellie wanted him to become President, and Taft acceded to her wishes and those of TR.

With TR's support, Taft was elected in 1908, and TR left for an extensive tour of Europe and a safari in Africa. Tensions began to develop during TR's absence. When TR was in Europe, he received a personal visit from Gifford Pinchot, head of the U.S. Forest Service, who had worked with TR in protecting forest lands against industrial development. Pinchot claimed that Taft was undermining TR's policies, and

brought letters from other Progressives criticizing Taft. There was a complete falling out in 1912 when TR opposed Taft's renomination.

One cause of the deterioration of their relationship was the belief of both men that they and their families were not receiving sufficient respect and deference from the other. Goodwin documents that these grievances were largely driven by misunderstandings and communications that were never delivered. TR especially resented Taft's firing of Pinchot. Taft justified the firing on the grounds that Pinchot had gone out of channels to make intemperate public charges against the secretary of another cabinet department. Goodwin's narrative generally supports Taft's decision.

In deciding to oppose Taft's renomination in 1912, TR stated that he was "convinced that Mr. Taft had definitely and completely abandoned the cause of the people and had surrendered himself wholly to the biddings of the professional political bosses and of the great privileged interests standing behind them." Goodwin suggests that this assertion was highly inflated and that Taft was generally as progressive as TR had been. During his term, Taft brought antitrust actions against Standard Oil, U.S. Steel, and American Tobacco, strengthened rail regulation, and protected more forest land than TR had. But Taft did not get credit for his accomplishments, lacking TR's communications skills and relationship with journalists. As Taft himself recognized, he never had the "genius of publicity."

Although Goodwin does not attempt a psychological analysis of TR's reasons for breaking with Taft, her narrative does call to mind the memorable observation of TR's daughter Alice: "My father always wanted to be the corpse at every funeral, the bride at every wedding and the baby at every christening."

TR's decision to seek the Republican nomination, and his subsequent entry into the race as a third-party candidate, ensured a split of the Republican vote and the election of Democrat Woodrow Wilson. With both TR and Taft in the race, former Senator Chauncey Depew thought, "The only question now is which corpse gets the most flowers." (In the election TR did gain more votes than Taft).

The election of Wilson did not mark the end of the Progressive era, because Wilson was also a Progressive and his administration enacted many Progressive reforms. The era ended in 1920, when, after World War I, the public had grown tired of activist government, and it elected Presidents Harding and Coolidge, who returned to laissez-faire. But the basic questions that the Progressives raised have never disappeared from the public arena. Today, in the era of the Tea Party, Obamacare, and growing income inequality, the country continues its vigorous debate over the proper role of government. ⊙

David Heymsfeld retired from the federal service in 2011 after a long career that included service as Staff Director of the House Committee on Transportation and Infrastructure.

THE HANGING JUDGE

BY MICHAEL PONSOR

Open Road Integrated Media, Inc., New York, NY, 2013. 479 pages, $16.99.

Reviewed by JoAnn Baca

Michael Ponsor is a U.S. district court judge for the District of Massachusetts, Western Division. David S. Norcross, the protagonist in Ponsor's novel, is as well. Ponsor presided over the first death penalty trial in Massachusetts in more than 50 years, as does Norcross. *The Hanging Judge* not only delivers an unequaled perspective on this experience, but it tells a crackling good story filled with caustic comments, sly jokes, and dynamic descriptions.

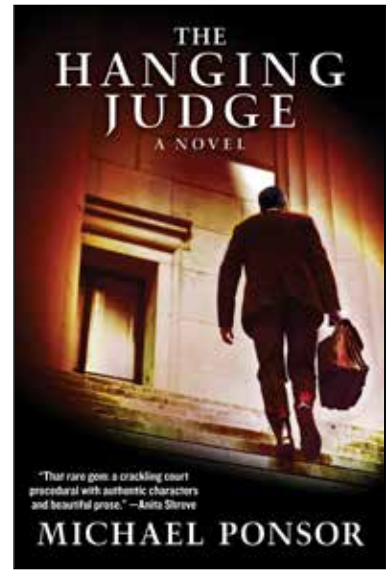
A drive-by shooting on the border between the territory of rival Hispanic gangs claims two lives. One of the dead is a gang member and drug dealer, the other a nurse caught by a stray bullet. Alex Torricelli, a policeman driving in the vicinity, follows the fleeing car. When someone exits the vehicle, Torricelli follows the car and not the passenger, who flees the scene wearing a hoody that disguises his features. The driver, Pepe Rivera, is caught. When questioned about the drive-by shooting, his story is murky.

The pressure on the police to solve the case is intense, as community outrage shines a spotlight on an already fraught investigation. It is not the killing of the gang member that stirs the town into an uproar. Rather, it is the killing of the nurse, Ginger O'Connor, who had deep ties to the community. She was a beloved member of a prominent local family, which had donated the building in front of which she was shot, to house a clinic that O'Connor had helped start. O'Connor had been petting a puppy when the stray bullet hit her. One of Norcross' clerks remarks, "At least they didn't shoot the damn dog. We'd have riots." Pressure for a quick resolution to the case comes from both the law enforcement community and the town's criminal element, as both groups loved O'Connor.

The driver, Rivera, is offered a deal to identify the shooter, and, surprisingly, he names Clarence "Moon" Hudson, a twice-convicted drug dealer and former gang member who had a history of business dealings with the dead man. But Hudson was thought to have put his criminal life behind him and has been holding down a legitimate, steady job. He is arrested in the home he shares with his wife, Sandra, a librarian, and their young child.

Despite an intensive search, the murder weapon cannot be found. What evidence exists isn't conclusive, and the witnesses are either unreliable or unsure of what they saw. Was Hudson a hit man hired by one of the gangs? Did he hold a grudge against the murdered gang member? Or is this a case of mistaken identity, or is Hudson a convenient patsy who lives in the neighborhood of the crime? Or is something else at play?

These questions do not bother the U.S. attorney. Sensing support for a death penalty trial in a state that has not held one in more than 50 years, he orders Hudson



prosecuted for a capital crime and also under RICO. The assistant U.S. attorney knows the charge is a stretch, but she has her orders to press ahead. Judge Norcross asks his law clerks to prepare a summary of the law of continuing criminal enterprises under RICO. "And here's a nice bone for you two to chew on: Can the accidental shooting of a bystander constitute conduct in aid of a racketeering enterprise such as a street gang?"

Hudson's court-appointed attorney is William Redpath, a defense lawyer with vast experience. "Transcripts of his politely remorseless dismemberment of prosecution witnesses were passed around at law schools ... as examples of the art of cross-examination at its finest." Redpath, quirky and curmudgeonly, is a stunningly drawn character who enlivens every page on which he appears. One senses that Ponsor had great fun in creating him.

Ponsor juxtaposes the current-day death penalty trial with a notorious true-life death penalty case from 1806. In fact, Ponsor dedicates the novel to the memory of Dominic Daley and James Halligan, two travelers who were hanged in Massachusetts in 1806 for the murder of a local man. He intersperses descriptions of modern-day political machinations and courtroom theatrics with those of the case from two centuries before. Local prejudices abounded then, and decisions were made based on matters other than evidence. Ponsor does not point them out, but the similarities with the Hudson prosecution are clear. The positioning for political gain, the willingness of those inside the circle to treat outsiders differently, the frenzy of the populace for a quick and onerous punishment—all find counterparts in the Hudson case.

Ponsor's main characters face choices that require them to consider not just the greater good as they or others perceive it, but ethical dilemmas that might forever change their lives. Pressure mounts and decisions take on greater importance—decisions on whether to speak or keep silent, on whether to say something with certainty when one is not certain, on whether to confide in another or not.

The Hanging Judge features not only a riveting legal case, but a subplot about Norcross' personal life. When we meet Norcross, a widower, he is just coming out of a reclusive period and beginning to date. He is aware of his awkwardness but cannot seem to find a way to compensate for it. He finds himself over-thinking situations and reacting in ways that surprise and dismay him. Most surprising for him is that his dating life interferes in unexpected ways with his work, and the story shifts between the Hudson case and the problems that Norcross faces in developing his relationship with Claire Lindemann, a professor at Amherst College. The evolution of this budding relationship, with all its missteps and misunderstandings, is crucial to the story, as, in addition to the angst of a new relationship, much of the novel is told through conversations between Norcross and Lindemann.

Being a judge, Ponsor provides an insider's knowledge regarding how a judge manages his courtroom and his cases, from the important aspects to the most mundane. As a writer, he integrates that information in the novel without distracting from the narrative. For instance, when Norcross is seating a jury, "[s]mile back, he told himself, but not too much. Look unconcerned. Trial judging was a kinetic art, like dance—a matter of posture and presence, aiming to create a certain pattern or atmosphere."

In a novel that invites so many considerations on aspects of death penalty cases, it may be inevitable that some matters are not fully realized. Although Ponsor understands the accused's point of view, he seems more comfortable with the legal aspects of the case, and gives less attention to how Hudson survives in a jailhouse full of convicted felons, many of whom are attached to various gangs, and some of whom may be angling for information from him that can be traded to prosecutors for sentence reductions. Ponsor sets up a serious problem for Hudson behind bars, but after an intense introduction, leaves the situation mostly unresolved. This is the only true disappointment in a novel that otherwise delivers in all respects.

In his acknowledgments, Ponsor writes, "Charles L. Black Jr.'s book *Capital Punishment: The Inevitability of Caprice and Mistake* ... offers the most pointed analysis of capital punishment I know of. My novel may be viewed, in part, as an attempt at a fictional version of his excellent book." No matter the inspiration, Ponsor has crafted a thoughtful story that neither preaches nor demands that a reader accept a particular viewpoint. Ponsor's art is in presenting shades of grey. *The Hanging Judge* leaves the door open to contemplation and assessment without the novelist's judgment interfering. ⊙

JoAnn Baca is retired from a career with the Federal Maritime Commission. Her husband, Lawrence Baca, is a past president of the Federal Bar Association.

THE COLLINI CASE: A NOVEL

BY FERDINAND VON SCHIRACH, TRANSLATED FROM THE GERMAN BY ANTHEA BELL

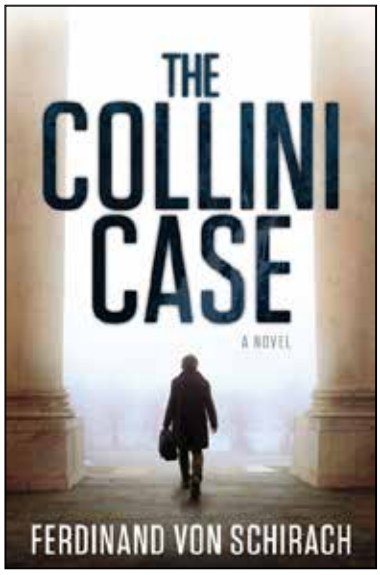
The Viking Press, New York, NY, 2012. 191 pages, $25.95.

Reviewed by Michael Ariens

Ferdinand von Schirach is a German criminal defense lawyer who has previously published two vivid and brilliant short story collections, *Crime: Stories* and *Guilt: Stories*, which were reviewed in *The Federal Lawyer*'s October 2011 and September 2012 issues, respectively. His latest book, *The Collini Case: A Novel*, like his short stories, gives the reader telling details that offer insights into the human condition. But *The Collini Case* seems less interested in its characters than in teaching us about the continuing stain of Germany's past. This leads von Schirach to use stock figures (the silent killer, the noble lawyer, the unhappily married woman, the long-grieving widower) who have suffered stock tragedies (the deaths of loved ones, unhappy marriages) and who engage in stock actions (uncover the larger truth, have an affair, threaten or attempt to bribe the hero). The novel is simply not realistic enough to induce the reader to suspend disbelief, and von Schirach only barely avoids turning it into a melodrama.

The Collini Case starts promisingly. Fabrizio Collini kills a man in Berlin's famous Hotel Adlon by shooting him four times. He then stomps on the man's face again and again with the heel of his shoe. He goes to the lobby and tells the receptionist to call the police because the man in room 400 is dead. Why did Collini so brutally murder this unnamed man?

The first occasion on which the reader—at least one who is an American law-



yer—may be unable to suspend disbelief is when Caspar Leinen, a criminal defense lawyer and the novel's protagonist, is called to serve as Collini's sole defense counsel despite his having qualified for his law license just 42 days before. It gets worse. Leinen later (in my eyes, too much later) learns that he personally knew the deceased. He also knows the deceased's only surviving relative, a granddaughter, and engages in a perfunctory affair with her while representing Collini. Leinen spills client confidences to too many other characters, apparently to advance the plot. Under German law, the family of the deceased may employ an "accessory prosecutor." The famous and world-weary Richard Mattinger, in his mid-60s, who has "never yet lost in a murder trial," agrees to serve in that capacity. The experienced Mattinger takes Leinen under his wing, but we know he is playing his own game. The lawyer for the company that the deceased owned makes several villainous and wholly ineffectual appearances. Finally, Leinen uncovers an explosive secret, which may end his career at its beginning. But our intrepid defense lawyer will not let mere friendships or career advancement get in the way of fulfilling his duty to his client.

Despite his best efforts, Leinen is initially unable to learn from Collini why he killed his victim, who turns out to be Hans Meyer, a well-known 85-year-old industrialist. The murder trial begins, and still Collini's motive is unknown. But German trials, unlike American trials, are intermittent and episodic, rather than continuous. The episodic nature of the trial allows for Leinen's eureka moment. He brilliantly finds the key to Collini's motive in Germany's past, and despite the harm that making this public may cause others, Leinen explains Collini's actions.

The legal twist in the case is one that lawyers and other students of the law will enjoy. Von Schirach has taken a page from German legal history, a subtle change in the German criminal code that can be used alike by the conflicted, such as Collini, and by the evil, such as Nazi collaborators. Leinen masterfully explains this actual change in German law in a way that advances Collini's case. Unfortunately, the pedantry of the explanation reduces the dramatic force of the novel.

Another problem with the novel is that, on occasion, it seems to be translated from one foreign language (German) to another (British English). It is simple enough to understand "lift" (elevator), or the variant spelling of "storey," but it is more difficult when the translator uses "landing barge" for "dock," "answerphone" for "answering machine," or, most annoyingly, "briefs" for "cases," which stems from the fact that, in England, solicitors prepare "briefs" for barristers. Unlike barristers, American defense lawyers, like German ones, take cases from the beginning.

Despite the criticisms in this review, *The Collini Case* resonates because it reminds us, as Faulkner said, that "The past is never dead. It's not even past." It continues to haunt the present. ⊙

Michael Ariens is a professor of law at St. Mary's University in San Antonio, Texas, where he teaches American legal history, constitutional law, evidence, and other courses. He is the author of Lone Star Law: A Legal History of Texas *(2011) and other books.*