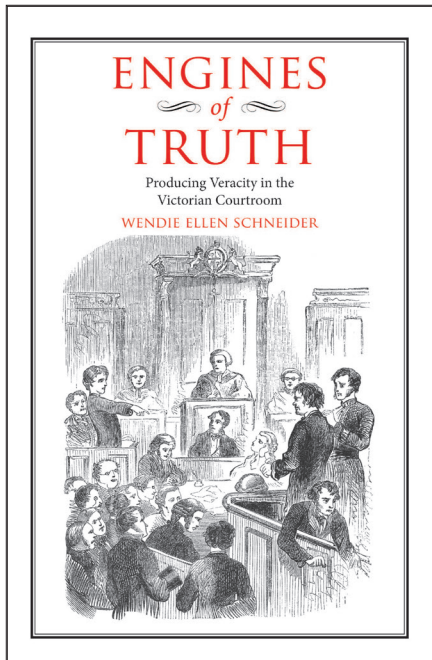




## Engines of Truth: Producing Veracity in the Victorian Courtroom

By Wendie Ellen Schneider

Yale University Press, New Haven, CT, 2015.

265 pages, \$85.

Reviewed by Henry S. Cohn

A central role for a trial judge is evaluating credibility and veracity. How do judges and the judicial system ensure that lying does not dominate the evidence received in court?

In *Engines of Truth*, Wendie Ellen Schneider, a Yale Law School graduate who teaches history at Iowa State University, explores this issue as it arose in Victorian England from 1840 to 1900. She demonstrates why English law adopted cross-examination as a method to promote truth-telling. She concentrates on civil cases in which lying might be prevalent, such as those involving road accidents, bankruptcy, divorce, and sexual misconduct. Her book does not stress preventing lying by criminal defendants, because, in England, they did not have the right to testify until enactment of the Criminal Evidence Act in 1898.

Schneider catalogs the various approaches (“engines of truth”) attempted by the

English court system. The first of these was to prosecute witnesses for perjury after a trial had concluded. These prosecutions were rarely successful. They proved costly and time-consuming and, when they were successful, tended to result in excessive punishments. Often the motive for these perjury trials was revenge. As Schneider describes one dramatic case from 1860, Henry Hatch, “a country vicar and part-time schoolmaster, was convicted of indecent assault after one of his pupils, an eleven-year-old girl named Eugenia Plummer, accused him of fondling her at school.” Hatch prosecuted Plummer for perjury. She was convicted, but Queen Victoria immediately pardoned her.

A prominent jurist of the time, James Fitzjames Stephen, believed that perjury leading to criminal inculpation should be treated as a serious crime, but, in civil actions, Schneider writes, Stephen cajoled and berated juries into acquitting perjury defendants. In 1859, Parliament passed the Vexatious Indictments Act, requiring more judicial involvement before a perjury charge could be brought against a witness. Loopholes in the statute, however, made it less than fully effective.

An effort to obtain truthfulness in the hotly contested area of divorce was the creation of an office of Queen’s Proctor within the Treasury Solicitor’s Office. The Queen’s Proctor was to intervene in a divorce matter when it appeared that one of the parties was not testifying honestly. In the 1870s, however, the Queen’s Proctor lost two cases in which the judges held that the Queen’s Proctor had no power to set aside the presumed factual findings of a jury. The functions of the office were diminished by these rulings and its interventions became less frequent.

With other methods not producing results, the English courts turned to cross-examination, but that had its own difficulties. The bar took the position in the 1840s that cross-examination must be conducted in a “gentlemanly” manner, not abusively or even assertively. Even as late as 1874, an attorney named Edward Kenealy was subject to censure for professional misconduct for asking one witness whether he had committed

perjury and another whether he was of good moral character. He had dared to blacken the reputations of a distinguished British family.

Two emotional divorce cases in which witnesses of high social standing were accused of sexual improprieties also led critics to complain about cross-examination. Opponents of the practice labeled it “a species of forensic attack.” Such goings-on might lead witnesses to refuse to testify.

But by the end of the 19th century, many of the objections to cross-examination began to disappear. Schneider writes that “Cross-examination, initially reviled for the way in which it seemed to depend on competitive word-twisting rather than a serious concern for the truth, came to supersede perjury prosecutions as the primary means of guaranteeing witness veracity.” Cross-examination was to be allowed “if the case at hand justified it in the barrister’s estimation.” In 1898, Parliament passed the Criminal Evidence Act, which left the regulation of cross-examination “to the consciences of counsel,” as a newspaper put it.

Schneider ably describes the eventual triumph of cross-examination over other engines of truth, interestingly reciting the facts of relevant cases. She also quotes from Victorian novelist Anthony Trollope’s *He Knew He Was Right*, *Phineas Redux*, and *Orley Farm*, which portray the Queen’s Proctor in court and attorneys engaged in cross-examination. I would have liked to have seen Dickens quoted, too. Who can forget C.J. Stryver’s wonderful cross-examination of a witness in *A Tale of Two Cities*, where the witness cannot distinguish Carton from Darney, or the prosecution’s examination of the hostile witnesses in *Bardell v. Pickwick*, especially where Mr. Winkle is rattled into describing Mr. Pickwick’s promise to Mrs. Bardell? ☉

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# Im·be·ciles (

## The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck

### Adam Cohen

## Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck

By Adam Cohen

Penguin Press, New York, NY, 2016.

402 pages, \$28.

Reviewed by Christopher C. Faille

As I read *Imbeciles*, I was forcefully reminded of a passage in a lecture that the psychologist and philosopher William James delivered in 1891. It is a passage that I have often pondered. James is discussing how a variety of mutually contradictory moral ideals encounter one another as adversaries in the life of a society, and how their interaction maintains and, over time, reforms that society's character. Accordingly, he lists several of the moral ideals that a perceptive New Englander of his day would have encountered:

See everywhere the struggle and the squeeze; and everlastingly the problem how to make them less. The anarchists, nihilists, and free-lovers; the free-silverites, socialists, and single-tax men; the free-traders and civil-service reformers; the prohibitionists and anti-vivisectionists; the radical darwinians with their idea of the suppression of the weak,—these and all the conservative sentiments of society arrayed against them,

are simply deciding through actual experiment by what sort of conduct the maximum amount of good can be gained and kept in this world. These experiments are to be judged, not a priori, but by actually finding, after the fact of their making, how much more outcry or how much appeasement comes about.

There is a lot of food for thought in that list: notably in the word “free,” which is used three times, each time as an adjective: once for love, once for silver, and once for trade, forcing the reader to wonder whether it bears the same meaning in each case, or even in any two of them out of the three.

There is food for thought, too, in the punctuation. Sometimes James will separate two ideals by a mere comma, and at other times he will separate them by a semicolon. Thus, “anarchists, nihilists, and free-lovers” are separated from one another only by commas, but from the other items in the list by a semicolon. Is this because anarchists, nihilists, and free lovers are allied in a loose sense? Perhaps. But the prohibitionists and antivivisectionists are likewise joined in apparent alliance. Why?

There is another bit of punctuation worth noting here: the dash. After having listed 11 different moral ideals, each concomitant with its own sort of reform, and after having sorted them neatly into five groups by those semicolons, James contrasts them all with “all the conservative sentiments of society arrayed against them.” A *dash* marks that contrast of a crowd of ideals against amorphous sentiments that serve as a counter to them all.

The conservative sentiments of society are on the right-hand side of that dash. All the reform movements, including the “radical darwinians,” are on the left-hand side of that dash. I believe that many 21st century readers of this passage probably suspect, if they know anyone they would describe as a “radical darwinian” harboring an idea of the “suppression of the weak,” that this person is a tool of the status quo, an intellectualizer of the “conservative sentiments of society.” But, for James, these “radical darwinians” are on the opposite side of that dash from the conservative sentiments. They belong in some sense with the members of the other, mutually contending, reform movements motivated by some ideal that demands changes to the status quo.

Who did James have in mind here? If we pay attention to the placement of the semico-

lon, as I think we should, then we notice that the radical Darwinians are the only reformers who stand alone, who aren't joined with anyone else in a group of three or even two. He has literally singled them out for us.

So who were they? I submit that James was not talking specifically of those whom in hindsight we call “social Darwinians,” typified by the names Herbert Spencer and William Graham Sumner. No: By “radical darwinians,” James more likely makes reference to the eugenicists of his day. Eugenics had received its now-conventional name eight years before James' lecture, when Francis Galton, a cousin of Charles Darwin's, published *Inquiries into Human Faculty and Its Development* (1883) and coined the term from the Greek for “good stock.”

Galton defined the new word as the science of improving stock, a science addressing questions of “judicious mating” as well as “all influences that tend . . . to give to the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable. . . .”

As early as 1859, the same year, as it happens, in which Darwin published *The Origin of Species*, the (London) *Times* quoted a “W. Cooper” as saying, “the State has a direct interest in guarding against a deterioration of our race.” The idea has been in the Anglo-phonetic air ever since.

Darwin himself, in his follow-up book, *Descent of Man, and Selection in Relation to Sex* (1871), agreed with an already-developing body of opinion to the effect that it was unfortunate that “vaccination has preserved thousands, who from a weak constitution, would formerly have succumbed to small-pox.” Darwin, though, backed away from giving any moral significance to such thoughts. Our “instinct of sympathy” has become “more tender and more widely diffused” over time, and we must bear with its consequences, he wrote. It was natural enough, then, for James to refer 20 years later to the “radical darwinians” as those who were more Darwinian than Darwin, in that they thought that policy reforms might and should reverse the purportedly dysgenic consequences of civilization.

I'm reminded of the above passage in James' lecture not simply because James is a minor character in Adam Cohen's new book on eugenics, Justice Oliver Wendell Holmes, and the infamous *Buck v. Bell* decision, but because it is important as a historical matter to distinguish between the social Darwinians of the Spencerian sort, on the one hand,

and the eugenicists such as Galton and his American counterpart, Harry Loughlin, on the other. On a Venn diagram of the two schools of thought, the intersection would be a small one. The Spencerians said, in effect, “the human world still is a jungle, the consequences of the struggle for survival within this jungle are good, and all that is necessary is for governments to remain strictly limited in order for this beneficial jungleness to remain in place and for this progress to continue.” The eugenicists, by contrast, said, in effect, “the world is no longer jungle enough, the natural course of evolution has been disturbed by misplaced pity, pieties, charities, widespread inoculations, and so forth. Our race (whether conceived of as the human race or the white race) must now take charge of its own evolution, in large part through judicious government policies.” Cohen is not always as clear as he might be about the distinction between the two movements that invoked Darwin for their very different purposes. There is a reason for that though, to which we will come.

As I read the above passage by James, in the context of James’ repeated discussions and references to various aspects of Spencer’s philosophy, I suspect that James probably did consider *social* Darwinism an expression of the “conservative sentiments of society” arrayed against the other ideals and experiments he listed, including *radical* Darwinism, with its idea of suppression of the weak through eugenics. That is my reading: I claim for it no authoritative character.

### Might Makes Right?

After this indirect approach, we may get rather closer to the heart of the book under review. Cohen wants us to see Holmes’ infamous assertion in *Buck v. Bell* that forced sterilization is constitutional because “three generations of imbeciles are enough,” not simply as a fleeting lapse of judgment or the excessive love of a snappy aphorism; he wants us to see it as part of a deep character flaw, a general and quite cynical disposition to side with “the most powerful organizations or individuals, on the theory that they should be allowed to use their power as they saw fit.”

Cohen follows other recent scholars in the dim view he takes of Holmes. He seems especially to have been influenced by Albert Alschuler’s takedown of Holmes in *Law without Values* (2000), which was reviewed in *The Federal Lawyer* in February 2001.

It is in his efforts to persuade his readers of this characterization of Holmes that

Cohen brings James into the story. After all, James and Holmes knew each other quite well. They moved in the same social circles, and were both members of the “Metaphysical Club,” an informal discussion group of Harvard students in the 1870s. More than that, according to G. Edward White, author of the leading biography of Holmes, the future Supreme Court justice felt comfortable enough in the company of William James and his brother, the novelist Henry James, that he accompanied them on summer vacations.

So William James’ words, when they shed an unflattering light on his friend, carry some weight. Accordingly, Cohen quotes a letter that William wrote to Henry in July 1876, in which William expressed dismay that the “noble qualities” of their friend were poisoned by “cold-blooded, conscious egotism and conceit.” As a consequence, “friendly as I want to be toward him, as yet the good he has done me is more in presenting me something to kick away from or react against than to follow and embrace.”

To Cohen, the personal egotism and conceit that James observed were of a parcel with the worldview Holmes was developing in those years, one in which the floor of a legislature is itself a jungle, with the fittest to survive in that jungle encoding their own interests into law. Judges, Holmes believed, need only ratify that coding.

In an 1873 essay, Holmes expressed skepticism about utilitarianism and moved directly from that skepticism to an embrace of eugenic premises: “Why should the greatest number be preferred?” he asked, “Why not the greatest good of the most intelligent and most highly developed?”

I mentioned “race” above. That’s worthy of emphasis. W. Cooper, as quoted in the *Times* in 1859, referred to the protection of “our race.” This could have had one of two meanings. He might have meant the human race, or he might have meant the “white race” or the “Nordic” race or whatever he would have called the race to which he, in his own eyes, belonged.

### An Overt Racism

Eugenics was part of a frankly racist perspective. In making this point Cohen quotes from *The Great Gatsby*, a novel published just two years before the Supreme Court issued its decision in *Buck v. Bell*. In one passage, Tom Buchanan pontificates about how “civilization’s going to pieces” and cites “*The Rise of the Colored Empires* by this man

Goddard.” There was at the time a prominent eugenicist named Henry Goddard, an early champion of IQ testing, but Buchanan’s reference better matches *The Rising Tide of Color Against White World Supremacy* (1920), by Lathrop Stoddard, which in turn echoed Madison Grant’s *The Passing of the Great Race* (1916). As Cohen observes, Tom’s reference to “Goddard” may be a portmanteau of Grant and Stoddard.

The sterilizations inspired by eugenic theories, including that of Carrie Buck, may aptly be considered acts of racial violence. Of course, many victims (including Buck) were white by any definition. This was consistent with the spirit of eugenic theorizing, which saw a need for the white/Nordic race to regulate itself in order to remain both pure and strong enough to maintain its (presumably deserved) world supremacy as “the great race.” One might recall in this context Galton’s definition of the “science” at issue as including measures that may give “the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable....” Filtering out the bad blood that was presumed to run through Carrie Buck’s veins—so ran the theory—gave the whites, as the more suitable race, a better chance of continuing to prevail.

More than half a century elapsed between Holmes’ 1873 essay referencing the “greatest good of the most intelligent and most highly developed” and his 1927 decision authorizing state-mandated sterilizations of “mental defectives,” including “imbeciles.” By Cohen’s account, what happened in that interval was a continuous hardening of Holmes’ mind, so that a view expressed hypothetically at the earlier date had become a hardened conviction by the time of the latter.

### Final Thoughts

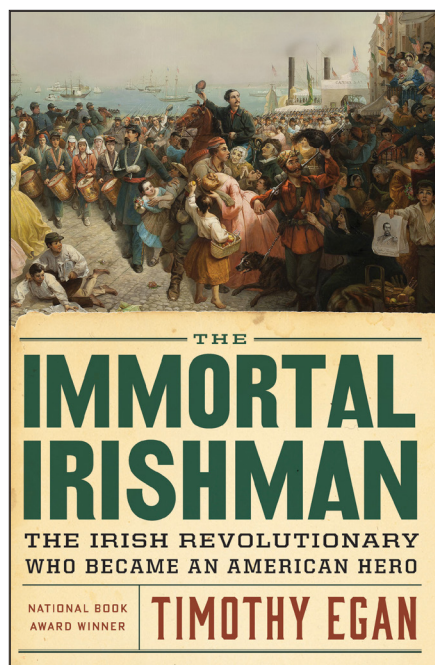
I discussed above my reason for regarding social Darwinism and eugenics as quite distinct schools of thought, and I observed that, on a Venn diagram, they would have a small area of intersection. Though small, the intersection exists. Indeed, Cohen’s book suggests that Holmes resided in that intersection. For social Darwinism can unite with eugenics if the floor of the legislature itself is considered as a jungle—an arena in which organisms contend for life and death (and procreative freedom) by means different only in form from the eons-old struggles with tooth and claw. Eugenics was a tool in that struggle.

Near the end of *Imbeciles*, Cohen quotes

a letter that Holmes wrote to the political scientist Harold Laski soon after his ruling in *Buck v. Bell*. He wrote that “the other day” he had “delivered a decision upholding the constitutionality of a state law for sterilizing imbeciles,” and he felt that he was “getting near to the first principle of real reform.”

One will make of that what one will. This book, like Alschuler’s and others that have come between them, is a sign that the generations of uncritical worship of the very name “Oliver Wendell Holmes” are now behind us. It took long enough. ☺

*Christopher Faille, a member of the Connecticut bar, is the author of Gambling with Borrowed Chips, a heretical account of the Global Financial Crisis of 2007-08. He writes regularly for AllAboutAlpha, a website devoted to the analysis of alternative investment vehicles, and for MJINews, a website for actual and potential investors in the legal marijuana industry.*



## Immortal Irishman: The Irish Revolutionary Who Became an American Hero

By Timothy Egan

Houghton Mifflin Harcourt, New York, NY, 2016.

368 pages, \$28.

Reviewed by Elizabeth Kelley

This year marks the 100th anniversary of the Easter Rebellion, or the Easter Rising, a bloody week of insurrection in Dublin during which the Irish, greatly out-

numbered by the British, suffered huge casualties, were forced to surrender, and saw their leaders executed. This rebellion fell amidst what Timothy Egan, in *The Immortal Irishman: The Irish Revolutionary Who Became an American Hero*, calls “seven-plus centuries of organized torment.” Egan is a Pulitzer Prize-winning reporter, a columnist for *The New York Times*, and a prolific author who won the National Book Award for *The Worst Hard Time: The Untold Story of Those Who Survived the Great American Dust Bowl*.

Egan is unsparing in his description of British rule in Ireland and of the prejudice against the Irish in England and in the United States. Indeed, as long ago as 1155, Pope Adrian IV empowered King Henry II to conquer Ireland and what he called its “rude and savage people.” Since then, prejudice against the Irish has flourished both in the law and in people’s attitudes. *The Immortal Irishman* does not allow the reader to forget the obstacles and oppression that the Irish have had to overcome on both sides of the Atlantic, and its story of the life and adventures of its hero, Thomas Francis Meagher, teaches us about a neglected chunk of history.

Meagher was born in 1823 in County Waterford, Ireland. His father was a member of the British Parliament—of the House of Commons. But members such as the elder Meagher could not vote. They were allowed to serve based on land ownership. This was a concession the British had made following numerous rebellions by the Irish Catholics.

Thomas Meagher attended a Jesuit boarding school in County Kildare, Ireland, until his father sent him to a prestigious school in England, hoping “that this quarrelsome boy, too much the prankster, would return as a gentleman on a leash.” But this, as Egan tells in lively detail, was not meant to be. Meagher, like many of his generation, not only chafed under the subjugation of the British, but openly rebelled against it. The Irish had long suffered at the hands of the British. Catholicism was outlawed, land-ownership was restricted, education was forbidden, strict curfews were imposed, and anyone daring to play a harp could have his or her fingernails removed. When the potato famine struck Ireland in the 1840s, the British turned a deaf ear. This led to the Irish diaspora and the failed Young Irishman rebellion of 1848. Egan exposes the famine as nothing less than genocide.

Meagher, who was blessed with a silver

tongue, became a leader of the Young Irishmen. He was arrested by the British, imprisoned, tried and convicted of sedition, banished to Tasmania, and forbidden from ever returning to Ireland. Relatively speaking, however, Meagher flourished in Tasmania, along with a group of other Irish rebel convicts. He married the daughter of another exile, but she died in childbirth. Yet his heart still burned for freedom. In a tale worthy of a Hollywood movie, Meagher escaped to New York City.

New York in the 1850s was teeming with immigrants. The Irish were quick to embrace the land of the free, and they were happy to be in a country that had bravely declared and won its independence from England. But a wave of anti-immigrant fever began to spread. The Know-Nothing Party gained support for its position that America was emphatically an Anglo-Saxon country, and that all others were unwelcome.

Meanwhile, Meagher began to assimilate or at least assimilate as much as a free-spirited Irishman could. He practiced law, and, not surprisingly, put his oratorical talents to good use in front of juries. He also married the beautiful Elizabeth Townsend. Egan describes the attraction of opposites:

She was everything the Irish in New York were not: different tribe, different religion, different financial circumstances. If Meagher had stunned his friends by marrying below his class in the penal colony, he drew gasps of another kind by romancing above his standing with a Fifth Avenue daughter of American royalty. By a consensus of those close to him, the love affair was doomed. He was Catholic, she Protestant. He was a Celt, she Anglo-Saxon. He was a convict, she the progeny of refined Yankee bloodlines. She knew nothing of Cromwell’s cruelty or Brian Boru’s bravery. He knew nothing of the Townsends of New York. To her, the Great Hunger was something that forced thousands of filthy wretches to wash up on Manhattan’s shores and chase pigs down 57th Street. She could not tell a Gaelic word from a hairbrush.

But the marriage endured, as both partners respected each other as equals and companions—an unusual concept in the 19th century.

When the Civil War began in 1861, Meagher encouraged the Irish to enlist in the Union Army, and he did so himself. Following numerous acts of bravery as the leader of the Irish Brigade from New York, he was promoted to a general in the Union Army. When Lincoln issued the Emancipation Proclamation in 1863, the loyalties of the Irish-Americans became more complex. Initially, they had rallied to the Union's side because of fierce loyalty to the land that had saved them from the potato famine. But not all Irish were willing to die for the cause of abolition. Egan quotes Frederick Douglass:

Perhaps no class of our fellow citizens has carried this prejudice against color to a point more extreme and dangerous than have our Catholic Irish fellow citizens, and yet no people on the face of the earth have been more relentlessly persecuted and oppressed on account of race and religion than these same Irish people. The Irish who, at home, readily sympathize with the oppressed everywhere, are instantly taught when they step upon our soil to hate and despise the Negro. They are taught that he eats the bread that belongs to them.

At the end of the Civil War, Meagher looked to the West. Although he yearned for his native land, the wide open spaces of the Northwest presented a welcome contrast to the crowded,

dirty conditions of Northeastern cities. He was made the acting governor of Montana Territory and embarked on what were to be the final adventures of an already colorful life.

Montana in the 1860s was truly the Wild West. It was unofficially ruled by the Vigilance Committee, a group of men who enforced what they saw as law and order. Malefactors were hanged for every type of suspected offense, even pickpocketing or the "crime" of being Mexican and not leaving town when told. No one was immune from this type of "justice." Egan describes the scene when the outgoing governor, Sidney Edgerton, greeted Meagher:

A radical Republican, with a long face whiskered to an arrowhead below his chin, Edgerton looked like a Gothic preacher with a toothache.... When Meagher asked a few perfunctory questions, he discovered that his "richest territory" had its own way of dispatching people on the wrong side of right-thinking citizens. The sheriff, for example. What of him? That would be the *late* sheriff, a Mr. Henry Plummer. *Late*? Considerably so. He'd been hanged. Oh. Was there a trial? No. A specific charge? Not really. But as one of the early leaders of these upstanding gentlemen had written in his diary, Edgerton could "recognize a bad man when he saw one." Wait—they'd killed the lawfully appointed sheriff without a trial

or due process? *He had it coming.*

The Vigilance Committee never liked Meagher, and he wrote his own death warrant by granting a reprieve to a citizen who was scheduled for hanging. The Vigilance Committee took umbrage and worked behind as well as in front of the scenes to undermine Meagher. It asked the U.S. Congress to declare all the laws passed by the Montana legislature null and void.

Meagher died under suspicious circumstances. His death appeared to be suicide caused by a drunken plunge into a river at night. This fed squarely into the stereotypes about the Irish and drinking. Egan does a good job of debunking the myth of suicide and of showing how later generations have been kinder to Meagher's memory.

You can tell that writing this book was a labor of love for Egan, whose family hailed from County Waterford. Reading *The Immortal Irishman* was pure pleasure. ☺

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## Supreme Court Previews *continued from page 82*

the "modified categorical approach" can be based only on the text of the state criminal statute as well as state court analysis of its elements, without regard to the court record or the means necessary to accomplish an element. The United States contends that the standard is simply that criminal statutes phrased in the disjunctive are divisible and that courts may then use court documents under the "modified categorical approach" to determine if the defendant was convicted of the generic crime. This decision will impact the severity of prison terms for many prior felons and has great repercussions for noncitizen felons. The full text is available at <https://www.law.cornell.edu/supct/cert/15-6092>. ☺

## McDonnell v. United States (15-474)

**Court below:** U.S. Court of Appeals for the Fourth Circuit

**Oral argument:** April 27, 2016

In this case, the Supreme Court will decide whether an "official action" is limited to exercise of actual government power. In light of this determination, the court will then decide whether the honest-services statute and Hobbs Act sufficiently define official actions to comply with the Constitution. Robert McDonnell argues that official actions should be limited to the actual exercise of government power and that his conduct as governor was never an exercise of actual government power. Thus, McDonnell argues that his conviction should be overturned on the merits, but he also argues that the trial court's jury

instructions were erroneous based on a flawed definition of "official action" given to the jury. In addition, McDonnell argues that the honest-services statute and Hobbs Act are unconstitutionally vague. The United States argues that McDonnell construes the definition of official action too narrowly, and that a proper interpretation encompasses McDonnell's conduct in this case. The United States rejects McDonnell's jury instruction arguments by noting that these instructions included a precise definition of "official action" from the statute, with additional information to clarify the definition. Finally, the United States rejects McDonnell's constitutional challenges by citing a recent and similar Supreme Court challenge to these statutes that failed. The full text is available at <https://www.law.cornell.edu/supct/cert/15-474>. ☺