Silver Gavel

2009 Awards Presentation
FOR MEDIA & THE ARTS

Recognizing Outstanding Efforts to Foster Public Understanding of Law
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Recognizing Outstanding Efforts to Foster Public Understanding of Law

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Points of view or opinions in this publication do not necessarily represent the official policies or positions of the American Bar Association.
Welcome

It is an honor to present the American Bar Association’s 2009 Silver Gavel Awards for Media and the Arts. In 1958, then-ABA president Charles S. Rhyne presented the first Silver Gavels, including one for Sidney Lumet’s classic juryroom drama *Twelve Angry Men*. This year marks the 52nd annual Silver Gavel Awards. The Gavel Awards are extremely selective. Among this year’s many worthy entries, the Standing Committee selected only five to receive Silver Gavels:

- *Kafka Comes to America: Fighting for Justice in the War on Terror, A Public Defender’s Inside Account* by Steven T. Wax, Other Press (Books)
- “Open Discovery Columns” by *The Plain Dealer* columnist Regina Brett (Commentary)
- *Writ Writer*, a documentary film about “writ writer” Fred Cruz by Austin, Texas-based Passage Productions and Independent Television Service with Latino Public Broadcasting (Documentary)
- *The Response*, a courtroom drama about a Guantanamo military tribunal by Look at the Moon Productions, University of Maryland School of Law and Venable LLP (Drama & Literature)
- “Broken Families, Broken Courts,” a *San Jose Mercury News* series about California dependency courts (Newspapers)

In addition, two entries received Honorable Mention citations:

- *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* by James Q. Whitman, Yale University Press, (Books)
- “American Purgatory: Political Asylum in the Age of Terrorism” (Radio)

Congratulations to each of the 2009 Gavel Award winners for their outstanding work. We commend them for their dedicated efforts to enhance the American public’s understanding of issues of law and justice.

We also very much appreciate the work of the members of the Standing Committee on Gavel Awards. Along with a dedicated 43-member Screening Committee, they devoted many hours to review hundreds of entries.

I am honored to serve this year as chair of the American Bar Association Standing Committee on Gavel Awards. As highlighted on pages 4–5, we are presenting our first Silver Gavel Award for Commentary, for Regina Brett’s “Open Discovery Columns” published in *The Plain Dealer* in my hometown of Cleveland. This is just the second year for “Commentary,” following a restructuring of our award categories, which now also include books, documentaries, drama and literature, magazines, newspapers, radio, television programs, and websites.

Last year’s awards presentation program booklet included a look back at some of the awards presented during the Silver Gavel’s first decade. This year I would like to highlight some award winners from the second decade, 1968–1977. In 1968 the *Saturday Evening Post* feature article by Stewart Alsop, “The Supreme Court Asks a Question: Is It Fair?” won a Silver Gavel. Four years later “Jail with No Bail,” an episode of the public television series *The Advocate* (moderated by future Massachusetts governor Michael Dukakis) also earned the award.

The seminal legal event of the decade, of course, was Watergate. In 1974 NPR’s “All Things Considered” won a Silver Gavel for its coverage. The 1975 CBS Movie of the Week, *Fear on Trial*, was recognized for its dramatic portrayal of John Henry Faulk, an Austin, Texas radio show host who brought a lawsuit that helped end the Hollywood blacklist. The Silver Gavel’s second decade ended in 1977 with awards for Archibald Cox’s book *The Role of the Supreme Court in American Government* and “Gun Control: Pro and Con,” an ABC News Closeup documentary. Receiving the Silver Gavel that year for ABC News from ABA President Justin Stanley was Marlene Sanders—mother of Jeffrey Toobin, author of *The Nine*, winner of the 2008 Silver Gavel Award for Books. We are pleased that Mr. Toobin is also the featured speaker for this year’s awards presentation program (see pp. 10–11).

This booklet features interviews with award honorees, committee commentaries and illustrative excerpts. I encourage you to read through it carefully and also visit our website at www.abanet.org/publiced/gavel.

My sincere appreciation to the members of the Gavel Award review committees for their efforts. My thanks to Vinson & Elkins LLP and the other supporters of the Gavel Awards for their generous contributions to sustain the program.

Finally, I especially offer my congratulations to each of this year’s Gavel Award winners for their thoughtful efforts to foster public understanding of the law.

H. Thomas Wells Jr.
President, American Bar Association

Alan S. Kopit, Chair
ABA Standing Committee on Gavel Awards
Kafka Comes to America is Stephen Wax’s compelling story of his representation of two very different clients detained on suspicion of terrorism in the wake of the September 11 attacks. Adel Hamad, a Sudanese hospital administrator, was taken from his home in Pakistan in 2002 and sent to the United States prison at Guantánamo Bay, Cuba. Brandon Mayfield, an attorney and United States citizen, was arrested and detained by the FBI after federal authorities concluded that one of Mayfield’s fingerprints had been found on materials associated with the 2004 train bombings in Madrid. Wax, a former prosecutor and long-time Oregon federal defender, zealously defended both men, ultimately securing their freedom. In Kafka Comes to America, Wax admirably weaves together the compelling human dramas of Hamad and Mayfield and their families with an informative and detailed account of the legal issues and proceedings involving both men. At the same time, Kafka Comes to America is about Wax—his passionate belief in an accused’s right to a defense and his abiding admiration for the American system of justice, under which the government paid him to vigorously defend the very same individuals it detained and sought to prosecute. Kafka Comes to America combines first-rate storytelling with an important firsthand account of the struggles of two clients and their lawyers to obtain justice in the challenging political and legal environment stemming from the events of September 11. Wax’s accessible and rich account deserves to be widely read.

INTERVIEW with Steven T. Wax

Steven Wax is the long-serving Federal Public Defender for the District of Oregon. He is the author of Kafka Comes to America.

When did you first start writing? Did you consider focusing on only Mayfield or Hamad and not both? What did you hope to accomplish by writing about both of them? I started writing shortly after the plane took off from the airfield at the base at Guantánamo after my second visit to see clients there in May 2006. Periodically throughout my career, I have spoken and written about human and civil rights and the relationship between the citizens of this great country and our government. My experience in representing Brandon Mayfield put some of those issues into high relief. The experience in Guantánamo was, however, different in kind. Visiting with my clients chained to the floor, seeing firsthand what our government was attempting to keep hidden, and learning firsthand the lies that our government was telling had a tremendous emotional impact on me. I felt that I was in a unique position and wanted to share what I had seen with as many people as possible in the hopes that they would be motivated to help change the government’s policies and ensure that the men in Guantánamo received some fair process. Both Hamad’s and Mayfield’s stories could have stood alone. Telling them together, however, reinforces the point that the abuses of the war on terror were not limited to aliens—“the other,” “over there”—but were taking place with U.S. citizens here at home as well.

What resources were required to write your book? I wrote the book while working full time, so I had to make the time to write in the early morning hours, late at night, and on the weekends. The primary resource required for the book was my time and the support of my family. Once Judith Gurewich and Other Press purchased the book, the wonderful resources of Other Press, including editor Corinna Barsan, copy editor Yvonne Cardena, and publicists Terrie Akers and Megan Feulner, kicked in.

How do you think Kafka Comes to America fosters public understanding? What do you see as its public impact? Kafka Comes to America addresses some of the most fundamental legal, constitutional, and political issues of our day through the stories of two men and their families whose lives were devastated by the policies of the Bush administration. While questions about the scope of presidential power, the separation of powers, and the importance of the writ of habeas corpus are fundamental, it is sometimes difficult to grasp their import when discussed as constitutional...
A Cry for Help from Guantánamo

The choices we make in the grip of fear are the truest test of our humanity.

—Stephen Kyle

Early in the evening of March 3, 2006, I stepped out of a fifteen passenger twin-propeller plane onto the airfield of the United States Naval Base in Guantánamo Bay, Cuba. Nonmilitary personnel could get to Guantánamo only out of Ft. Lauderdale, Florida, on Lynx Air, which ran the fifteen-passenger planes, or Sunshine Air, whose planes were even smaller and noisier. ….

The sun had set by the time we landed and the plane pulled up to the airport building, a small room attached to a large hangar. Walking across the tarmac to picnic tables under a walled roof, where two soldiers waited to search our suitcases, I was excited finally to be in Guantánamo to meet one of the four clients my office was then representing—Adel Hassan Hamad, a Sudanese man who had been a prisoner there for forty-four months. It had been a long road for me but a much longer one for Adel.

It was one year to the day since Adel had handed a one-paragraph handwritten habeas corpus petition to the guards in Guantánamo and asked them to send the paper to the United States District Court in Washington, DC. Adel’s petition, like those of nearly fifty other prisoners who filed petitions at the same time, is poignant in its brevity and clarity. He proclaimed his innocence and asked for help, concluding deferentially, “With my appreciation and my respect to you and my trust you will do me justice.” Unlike the other three petitions my office had received, Adel’s did not reveal anything about himself, including why he thought his imprisonment was unjust.

Habeas corpus, Latin for “bring the body forward,” is one of those seemingly arcane legal writs that were brought to America from England. Unlike any of the other ancient English writs with Latin names—like audita querela or assisa de morte antecessoris—that sound like they should be incantations uttered by one of Harry Potter’s teachers and whose meaning is known today only to scholars of legal history, habeas corpus has remained a fundamental part of both Anglo and American law. It dates back to 1215, to the Magna Carta, when the barons reined in King John at Runnymede. …

The Founding Fathers were so concerned about the abuses of the English kings that they enshrined habeas corpus in the Constitution in what is called the Suspension Clause.

Kafka Comes to America retails for $25.95 hardcover. It is available from Other Press and booksellers nationwide. For more information go online to www.otherpress.com/bookpage.php?bkID=540
Why are you interested in the issue of open discovery? For years, I have been writing about open discovery and pushing for the rights of defense attorneys to share police reports and other evidence with defense attorneys representing those accused of crimes. This legal practice, known as “open discovery” is common in most jurisdictions in the United States but had not been required in the state of Ohio. Brett focused her attention on practices in Cuyahoga County, home to Cleveland and Ohio’s largest county. She wrote powerfully about death-row inmate Joe D’Ambrosio and how prosecutors withheld key evidence in his case, evidence that might have led to a not guilty verdict. Brett addressed head-on objections to open discovery made by Cuyahoga County prosecutors, making a compelling case to the public that they were without merit. She wrote about the consequences of the lack of open discovery, including tremendous waste of taxpayer resources to conduct unnecessary trials and, even, wrongful convictions. Drawing on considerable skills of persuasion through the written word, Brett’s columns caused a groundswell in public opinion. The result was a judicial determination to support open discovery—first in Cuyahoga County, but ultimately in the entire state of Ohio.

What prompted you to write these columns? Too often we read about people who have been incarcerated unjustly because information that could have acquitted them was withheld by prosecutors. Joe D’Ambrosio served 20 years on death row in Ohio until a federal judge confirmed that local prosecutors had withheld ten pieces of evidence that might have resulted in an acquittal. Joe is now free and waiting for a new trial.

What resources did it take to write and publish the columns? I am grateful for the support of the Cuyahoga County Common Pleas judges who made themselves available to me every time I needed their input and insights. The local and state bar associations were of great help, as was the Ohio Association of Criminal Defense Lawyers. The greatest resource was my editor, Stuart Warner, who went to bat for me every time the local prosecutor objected to my stance on open discovery.

How do the columns foster public understanding? What was their public impact? Newspapers still have the power to change the world. Columns carry power because of the masses who still read newspapers. Until I started writing about open discovery, most of our readers had no idea that we did not have open discovery in Ohio. They assumed it was a given. When I asked readers to support open discovery, 10,000 of them signed petitions or wrote letters supporting it. It was a tsunami of support that no one could stop. The judges in Cuyahoga County voted for open discovery in their court-
rooms, which was a victory for everyone. From there, the wave spread across Ohio. The greatest impact the columns had was this—they opened the eyes of the public and wore down the resistance of prosecutors who fought against open discovery. The Ohio Prosecuting Attorneys Association and the Ohio Association of Criminal Defense Lawyers announced in May that they have agreed on a plan for open discovery for the entire state of Ohio. That was my dream. I’m still pinching myself. It really happened.

What does winning the Silver Gavel Award from the ABA mean to you and your newspaper?
This is a tremendous honor for me, for my newspaper, and for all those who fought with me to get open discovery in Ohio. The Silver Gavel will serve to remind me to never give up a fight when it is justice that is at stake.

EXCERPT

Open Discovery Is Way to Justice
Prosecutor Charles Coulson isn’t afraid of open discovery. He grants it in nearly every case. Coulson has been prosecuting cases for 30 years, the last 13 as a prosecutor for Lake County. If only he could persuade prosecutors across the state to share records in criminal cases.

The Sixth Amendment to the U.S. Constitution guarantees all citizens the right to effective counsel. How effective can that counsel be if defense attorneys aren’t even allowed to see a basic police report?

In Ohio, prosecutors don’t have to share records. In Cuyahoga County, a defense attorney won’t see witness statements until after the witness has testified. How can that attorney prepare an effective defense?

Anyone who believes defendants are no-good criminals who don’t deserve fair discovery is mistaken. This is America, where every defendant is supposed to be presumed innocent until proven guilty.

Prosecutors like Bill Mason in Cuyahoga County argue that they are protecting witnesses from retaliation and intimidation by not sharing records.

Coulson doesn’t buy that argument. He gives everything to the defense unless it would place a witness in jeopardy, which he says is rare. Nearly every defendant already knows who the witnesses will be, he said. Plus, even without open discovery, the defense gets a list of witnesses.

Also, judges can easily redact information. Simply put, that means using a thick black marker to cover all names, phone numbers, and addresses of anyone in danger. Open discovery would also speed up court cases. When defense attorneys are given all records, time in court isn’t wasted by prosecutors reading aloud from police reports they won’t let the defense see.

Also, when the defense gets all the information ahead of time and sees how good a case the prosecutor has, attorneys seek plea bargains instead of pursuing long trials they know they can’t win.

Attorneys in Cuyahoga County routinely complain about the long delays. In Lake County, out of 1,000 felony cases a year, only 30 to 40 go to jury trial.

Although Coulson knows that open discovery isn’t popular with some prosecutors, he doesn’t see any valid argument against it. Open discovery does mean a prosecutor has to work harder to prepare questions for witnesses, he said. “But that’s our job,” he added.

Coulson believes the job of a prosecutor is not to win cases, but to do justice. “I’m here to protect the innocent just as aggressively as I want to prosecute the guilty,” he said. “We have an ethical duty. We are ministers of justice. Our job is to do justice.”

Why do some prosecutors oppose it?

“I don’t know. You have to be afraid of something. I’m certainly never afraid of the truth,” he said. He brought up the Joe D’Ambrosio case. D’Ambrosio has been on death row for 20 years. Two appeals courts have ruled he should be set free or get a new trial.

Prosecutors in Cuyahoga County withheld 10 pieces of evidence that probably would have led to a different verdict.

“Why would you do that?” he asked. “What are they afraid of, the truth? If you’re afraid of the truth, get out of the prosecution business.”

Good advice for anyone afraid of open discovery.

To read the columns, go to www.cleveland.com/brett/ and click on the “Open Discovery” columns on the left navigation.
The 54-minute documentary film *Writ Writer* tells the little-known but remarkable story of Fred Cruz, a young Latino with an eighth-grade education who, in 1960, is convicted of robbery and begins serving time in the Texas state prison system. Appalled at the often barbaric treatment he and his fellow inmates must endure, he becomes a “writ writer,” a jailhouse lawyer. Filing his own legal challenges, Cruz uses his intellect and belief in the rule of law to help change a smothering penal system in which prisoners are denied basic constitutional rights. He becomes part of the vanguard of the prisoners’ rights movement in Texas in the transformative decade of the 1960s. Featuring marvelous production values, *Writ Writer* makes very effective use of archival footage to convey Fred Cruz’s life and times. Interviewed are former prison wardens, ex-convicts, and Cruz’s friends, as well as the family of Frances Jalet, the New York lawyer who comes to Texas to assist Cruz and his fellow writ writers. What especially personalizes the story, however, is that Fred Cruz’s own words, drawn from his prison journals, correspondence, and legal documents, are carefully used to form the first-person narration. Watching *Writ Writer*, viewers experience its seamless, methodical, gripping pace, which seems pitch perfect for the story it narrates—of human degradation, cunning and courage, triumph, and personal tragedy. The documentary should engage young people and adults alike. *Writ Writer* shows how one person can use the courage of his humanity and the resources of the law to make a difference.

**INTERVIEW with Susanne Mason**

*Documentarian Susanne Mason researched, produced, and directed Writ Writer. She lives in Austin, Texas.*

Where did the initial idea for *Writ Writer* come from? In 1991, while working toward my M.F.A. in Film at the University of Texas at Austin, I was given an opportunity to interview a longtime prisoner of the Texas prison system named Benny Clewis. He had served sentences in various penal institutions since his teens in the early 1950s and told a prisoners’ history of the Texas prison system like none I had ever heard. After film school, I worked as an associate producer with a local PBS producer and used my scarce free time researching Texas prison history with the intention, eventually, of producing a documentary. The dramatic transformation of Texas prisons between 1947 and 1981 fascinated me, but was too expansive for a low-budget independent production. When I came to understand the impact that a self-taught prisoner named Fred Cruz had on the history, I decided to tell his story with *Writ Writer*.

What resources did you need to produce *Writ Writer*? What did it take to get them committed to your project? *Writ Writer* was a difficult film to produce because it tells the story of two relatively unknown people, both deceased. Also, this was my first feature-length documentary as producer/director and can be seen as a controversial story about a convicted felon’s fight for prisoners’ rights. Funders may have had legitimate concerns about the project’s feasibility. Many people and funders made the film possible, from the ex-convicts, prisoners, former wardens, and family members of Cruz and Jalet who appear in it, to the funders and crew members who supported and executed the work.

How do you think *Writ Writer* offers insights or perspectives on legal issues and legal institutions, especially in ways not previously addressed? Ultimately, *Writ Writer* shows how even the most despised members of our society, criminals with no immediate credibility, have in fact done much to reform the institutions meant to reform them. To learn this particular history, one can comb through the state archives and news morgues, but the official records are often voiceless statements of suits and countersuits, of opinions rendered and fines assessed. They don’t show the pain that is visited on those who dare to challenge the status quo. By adapting the writings and testimony of Fred Cruz and his correspondence with attorney Frances Jalet into a first-person narrative, I was
able to give an immediacy and poignancy to their struggle, to shed light on an institution operating outside the law.

How does your documentary foster public understanding? What do you see as its public impact?

In this era of mass incarceration, I hope that in the face of such daunting prison populations, racial disparities, and long odds for improvement, that *Writ Writer* might offer some historic context and inspiration for contemporary reform. The social problems that the criminal justice system has not effectively addressed will only be solved through intense engagement by people with the kind of dedication that Cruz and Jalet had.

**EXCERPT**

CARLOS ALVA (EX-CONVICT): Fred felt that injustice was done in his case and that’s why he started learning about the law. … Cause just by talking to other people he could see the injustice that was done to them, but there was nobody to help them. ..

BILLY WAYNE MCCARTER (PRISONER): There were older men back then, they would tell you “the way to get at the system is to learn this law, boy, read this book.” Fred got off into all that you know.

ERASMO MERCADO (EX-CONVICT): Fred used to read day and night sometimes, studying the law. …

NARRATOR AS FRED CRUZ: I read fiction, philosophy, religion, poetry, but I subscribed to law journals and I started helping other prisoners. I wrote a complaint to the FBI on behalf of an inmate who didn’t read or write and was in the same segregation unit I was. Since prison regulations do not allow any inmate to assist another in bringing forth grievances, the warden charged me with violating the rules. I told him it was perfectly legal because all men are created equal —that because a man is illiterate doesn’t mean he doesn’t deserve to be heard in a court of law. The warden said that as long as I’m in the Texas Department of Corrections that I would be governed by its rules and regulations. … Dr. Beto [Director, Texas Department of Corrections, 1962–1972] told me he was transferring me to the Ellis prison unit for rehabilitative treatment. He wanted to cure me of my writ writing activity. Ellis was the end of the road. It was the highest security unit in Texas and it was reserved for the worst criminals. I was still appealing my case when I got there, and I had a deadline to file my brief, but McAdams, my new warden, had all my legal papers confiscated.

MCCARTER: When you came to this unit, the first thing that happened was they had what they called the Welcoming Committee. It was about six bosses and they’d come out to the back gate and they had pick handles and ax handles, some of ’em had baseball bats. Blam! They started right in beating that ass. Some of ’em would give you a real good whooping too. There wasn’t no doubt in your mind what was gonna happen to you if you done wrong.

NARRATOR AS FRED CRUZ: I got caught reading some books written by Supreme Court Justice William O. Douglas. As they searched my cell they also found my copy of the United States Constitution. So I was brought into warden McAdams’ office and he and the assistant warden subjected me to a long line of interrogation, which really was ‘what was I doing with the Constitution in my cell?’ I said I was reading it and I didn’t think there was anything subversive about that. They told me I wasn’t supposed to have it in my cell. I said I didn’t think there were rules and regulations that said that the Constitution was contraband. And they told me, “We make the rules.” I was sent to solitary as punishment. I went in and out of solitary. I learned that if I relied on myself I wouldn’t have to depend on anyone else. If I didn’t make it, it wouldn’t be because of them.
COMMITTEE COMMENTARY

This riveting 30-minute courtroom drama concisely illustrates the legal and ethical challenges of enemy detention in the war on terror. Based on the transcripts of Guantánamo military tribunals, The Response brings viewers inside an administrative hearing to determine whether a devout Muslim civil engineer from Pakistan (“Mr. Al-Aqar,” compellingly portrayed by Aasif Mandvi of The Daily Show with Jon Stewart) should continue to be designated as an unlawful enemy combatant and held without trial. The taut narrative depiction of Al-Aqar’s examination before a Combatant Status Review Tribunal (CSRT), and the difficult decision its three judges must make, provide the filmmakers with a vehicle to examine the most fundamental issues of due process, as they seek to balance individual liberties with national security interests. These liberties include the right to counsel, the efficacy and moral legitimacy of torture, and the use of hearsay and other evidence—the very substance of which is kept secret from the accused. With superb production values and excellent performances (including, in addition to Mandvi, those by veteran actors Kate Mulgrew of Star Trek: Voyager and Peter Riegert of Crossing Delancey and Traffic), The Response brings its legal and conceptual issues into crystalline focus, while engaging viewers every step of the way. That it pursues this examination without losing its ideologically neutral, balanced tone is yet another measure of its achievement. Thoroughly vetted by University of Maryland legal scholars, the program represents an ideal partnership of the legal academy and the arts.

Where did the initial idea for The Response come from? How did you get involved in the project?

SIG LIBOWITZ: This is a well-deserved plug for education. I got the idea to create The Response based on a Homeland Security class taught by Michael Greenberger at the University of Maryland School of Law. It was a great class and I love this area of the law because it’s literally being created while we’re living it. Anyway, we were reading cases coming out of the courts that were attempting to interpret the Bush administration’s detainee policy and how that was being played out in Guantánamo. The opinions are often highly contradictory, and there in one case, for the first time, I came across a page of the actual tribunal transcripts (officially known as the Combatant Status Review Tribunals or CSRTs). The judge in that case attempted to publish several pages of the transcripts, but the government had redacted all but one. That one page, however, literally stopped me in my tracks. Just off that page, and having learned how the CSRT process operates, I knew there was the potential for an amazing film. That led me on a legal and creative research trail to uncover more and more transcripts. And after a year or so, I had read hundreds and hundreds of pages and developed the script from that.

ADAM RODGERS: As the son of two career journalists, Sig’s initial pitch got my attention. I thought I was pretty knowledgeable about Guantánamo, but when I read the script I realized I had no real idea of what was happening. The screenplay’s great strength was its ability to humanize a situation that had become somewhat abstract. Guantánamo Bay had been reduced to nightly news stock footage of guys in jumpsuits and shackles shuffling behind chain-link fences and barbed wire. But the script had transformed the abstraction into drama.

What resources were required to develop your movie? What did it take to get them committed to your project?

KAREN ROTHENBERG: Even before there was a final script, the University of Maryland School of Law agreed to commit financial resources to the project through its Linking Law & Arts program. Through a generous grant from the France-Merrick Foundation, the School of Law was able to support costs associated with the film. In addition, 20 law school faculty and staff members provided hundreds of hours of in-kind services in support of the film, including technical advice on legal issues in the film, production management, media and public relations, and

SILVER GAVEL AWARD | DRAMA & LITERATURE

The Response

Look at the Moon Productions, Venable LLP, University of Maryland School of Law Baltimore, Maryland and Washington, D.C.
Sig Libowitz, Writer/Producer/Cast
Adam Rodgers, Director
Aasif Mandvi, Kate Mulgrew, and Peter Riegert, Cast
information technology support. The law school served as the location for three days of filming.

Why did you decide to make a drama? What advantages does it have to offer in treating legal issues and legal institutions? How does it do so?

LIBOWITZ: Film adds a perspective that you just can't create in another medium. At its core it is a courtroom drama. It's not a dry recitation of facts. It's not educational medicine. People really like courtroom dramas and I think the film works because the audience is very involved with the characters and what's transpiring before their eyes.

GEOFF GARINThER: To say the topic is timely would be an understatement. The movie treats this polarizing topic with fairness and diligence by presenting the audience, in the vein of Twelve Angry Men, multiple facets of the debate regarding the tribunal's process through the lens of a detainee and three tribunal judges. Instead of manipulating the audience toward a defined outcome, The Response compels the audience to make its own determination of guilt or innocence.

What does winning the Silver Gavel Award from the ABA mean to you?

RODGERS: Filmmakers first dream about getting their movies made, then about finding an audience, and, if they're truly fortunate, about making an impact. It's enormously validating to feel like we've made a contribution to the debate over an important legal issue of the times and, given the caliber of past Silver Gavel winners, a wonderful honor as well.

EXCERPT

Tribunal

COURT RECORDER: The allegations forming the basis of the detention: the detainee, while living in Pakistan and Afghanistan, associated with a known Al Qaeda cell and gave material support to an Al Qaeda operative.

COL. JEFFERSON: What have you to say to this allegation, Mr. Al-Aqar?

AL-AQAR: How can I answer it? For more than four years, I cannot answer this. Give me his name. The name of the person who says I helped Al Qaeda. How can I respond to this charge?…

JEFFERSON: Sir, we are asking the questions and we need you to respond to what we ask and only what we ask. Let's move on.

Judges' Deliberation

COL. SIMMS: (reviewing the court record) Bomb-making … explosives training leading to the deaths of over 40 U.S. soldiers. Plus, two attempted bombings of U.S. embassies. This is a hell of a report.

CAPTAIN MILLER: Question—the tribunal rules allow us to consider hearsay and even confessions that are the result of torture, correct?

COL. JEFFERSON: That’s correct, if you find that it’s reliable.

MILLER: Well, that’s my first question. Seeing as this is my first tribunal, how exactly do we determine the reliability of the evidence? On what basis?

JEFFERSON: This is my third tribunal, Captain. When I figure it out, you’ll be the first to know.

SIMMS: We look at the totality of the circumstances. Does the evidence match up with the other facts? Who is the witness? Was there really any torture, or is it all just a story—which happens. What did the detainee do or say that corresponds with the classified evidence? Use your common sense.

MILLER: So, in this case?

SIMMS: In this case, the captured informant knew our detainee’s name, address in Afghanistan, engineering background. Couple that with the declaration from our own intelligent services, and it’s a …

JEFFERSON: …All of which the detainee had no chance to respond to because, as an alleged enemy combatant, he’s not allowed to see or confront the classified evidence against him.

SIMMS: And those are the same rules that all detainees must

MILLER: — So, there’s this informant who is maybe being tortured, and he might be naming names to stop that. And we’re supposed to evaluate this tortured informant’s

SIMMS: — Allegedly tortured informant.

Miller is stopped cold. The three officers look at each other.

Go to www.theresponsemovie.com to find out about screenings, view clips, and learn more about the film and its subject matter, cast, and crew.
AMERICAN BAR ASSOCIATION

52nd Annual
Silver Gavel
Awards Program

Wednesday, July 1, 2009
5:00 P.M. – 6:30 P.M.
National Press Club
Washington, D.C.

PRESIDING
Alan S. Kopit
Chair
ABA Standing Committee on Gavel Awards

PRESENTATION OF
2009 SILVER GAVEL AWARDS
H. Thomas Wells Jr.
President
American Bar Association

FEATURED SPEAKER
Jeffrey Toobin
Staff Writer, *The New Yorker* and
Senior Analyst, CNN Worldwide
Jeffrey Toobin is staff writer at The New Yorker magazine and senior analyst for CNN Worldwide, based in the network’s New York bureau. He received the 2008 Silver Gavel Award in the Books category for The Nine: Inside the Secret World of the Supreme Court. Toobin’s mother, pathbreaking broadcast journalist Marlene Sanders, also won a Silver Gavel. They are likely the only mother-son team to have won the award. Mr. Toobin has covered legal affairs at The New Yorker since 1993. He has written articles on such subjects as U.S. Attorney General John Ashcroft, the 2001 dispute over Florida’s votes for president, the Paula Jones sexual harassment case, Supreme Court Justice Clarence Thomas, and the trial of Timothy McVeigh. Mr. Toobin joined CNN in April 2002. Previously, he served for six years as legal analyst for ABC News, where he covered the nation’s most provocative and high-profile cases. He received a 2001 Emmy Award for his coverage of the Elian Gonzales custody issue. After graduating from law school, Mr. Toobin clerked for Judge J. Edward Lumbard of the U.S. Court of Appeals for the Second Circuit. He also served as an assistant U.S. attorney in Brooklyn and as an associate counsel in the Office of Independent Counsel Lawrence Walsh. The latter experience provided the basis for Mr. Toobin’s first book, Opening Arguments: A Young Lawyer’s First Case—United States v. Oliver North. He also is the author of several other critically acclaimed, best-selling books: Too Close to Call: The 36-Day Battle to Decide the 2000 Election; A Vast Conspiracy: The Real Story of the Sex Scandal that Nearly Brought Down a President, and The Run of His Life: The People v. O.J. Simpson. He also has served on the ABA’s Commission on the American Jury. Mr. Toobin received a bachelor’s degree from Harvard College and J.D. from Harvard Law School, where he was an editor of the Harvard Law Review.
Broken Families, Broken Courts

San Jose Mercury News
Karen de Sá, Staff Writer
Fredric Tulsky, Investigations Editor
San Jose, California

COMMITTEE COMMENTARY

In the San Jose Mercury News series “Broken Families, Broken Courts,” staff writer Karen de Sá eloquently focuses public attention on the near collapse of California’s juvenile dependency courts under the combined weight of underfunding and massive caseloads. Dependency courts adjudicate parental rights in cases in which social workers have removed children from their homes. De Sá seamlessly weaves the stories of the key players involved into a poignant, powerful account. Parents describe speaking with their court-appointed lawyer for the very first time moments before presenting their cases to regain custody. Those lawyers discuss how the idealism they once had evaporates almost immediately when they realize the best they can do is triage the cases they are assigned, which often number three or even four times the recommended levels. Judges discuss having mere minutes in which to conduct hearings that may permanently sever the legal ties connecting parents with their children. Social workers describe cases in which prosecutors persuade courts to ignore recommendations to reunite families. Children relate that they were unaware they could attend hearings concerning their futures. Devoting substantial resources to the series during tough times for newspapers, the Mercury News was tireless in its efforts to expose the deep flaws within dependency courts. To do so, the newspaper had to overcome restrictions on access to court proceedings and contend with the threat of criminal sanctions looming over those who discussed proceedings with reporters. Integrating excellent graphics and compelling photos with its outstanding investigative reporting, “Broken Families, Broken Courts” spearheaded reforms in California’s dependency courts that will affect children and their parents in the state for many years to come.

INTERVIEW with Karen de Sá and Rick Tulsky
San Jose Mercury News staff writer Karen de Sá specializes in projects about social welfare and juvenile justice. Investigations editor Rick Tulsky is a lawyer and has spent 30 years undertaking newspaper projects concerning issues of justice and injustice.

How did the series come about?
KAREN DE SA and RICK TULSKY: In 2006, appellate lawyers approached us about their significant concerns about the California dependency courts, the nation’s largest system overseeing cases involving children removed from their homes after allegations of abuse or neglect. The lawyers were concerned that parents were facing the permanent loss of their children in proceedings that failed to protect their rights, having lawyers who failed to investigate, prepare cases, even talk to their clients before hearings.

What resources were required to write and publish the series? What did it take to get them?
DE SA: I worked full-time on the project for more than a year before it was published and continued reporting the story for almost a year after the first articles appeared—a remarkable commitment by the paper at a time of shrinking resources. But editors at the paper recognized the importance of this project and never flinched from devoting the time and space required, including two photographers, a graphic designer to prepare a full-page chart explaining how dependency court is supposed to work, and video clips for the website, in addition to the full-time efforts of Rick and me. Furthermore, even in these days of shrinking space and tightening wallets, the paper gave the articles tremendous space and play to raise attention to this important story.

How does the series treat or offer insights or perspectives on legal issues and legal institutions, especially in ways not addressed before?
DE SA and TULSKY: The series pulled back the curtain on an incredibly important, but little known, part of the court system, one whose decisions affected the lives and development of thousands of at-risk children throughout California. It was a system with tremendous problems: terrible, poorly funded representation of parents accused of abuse or neglect; terrible representation of the children themselves, who often were excluded from the courtrooms where their fates were decided, often unaware the hearings were even scheduled; and hearings presided over by too many referees, commissioners, and disfavored judges who often were given caseloads so large they had to hear and decide the fate of those children in moments.
What was the public impact of the series?
DE SA and TULSKY: This project has had tremendous impact, which even we could not have foreseen. It continues to be a reference point for reform, more than a year since publication. In Santa Clara County, the home of the Mercury News, a new nonprofit has taken over the representation of parents and the district attorney’s office has lost its contract to represent the children in these proceedings. Nonjudge commissioners have been removed from the courtroom and a new courtroom was added to reduce the backlog. A state law was passed making sure children have access to their hearings and are presumed to be entitled to be present. The state judicial council ordered statewide reforms that have reduced the backlogs, reduced the nonjudge officers, and improved the representation in counties around the state.

What does winning the Silver Gavel Award mean to you?
DE SA and TULSKY: For the newspaper, the award is of tremendous importance. It reaffirms the newspaper’s decision to devote extraordinary resources to doing the project thoroughly and serves as encouragement to continue to undertake such work even as resources dwindle.

A child’s death
Judge gets incomplete story leading to a tragic result.

Dependency court judges must promptly make the most critical of decisions. Err one way, and a child may be sent home to a dangerous situation. Err the other way, and children are separated from their families for a life just as chaotic and fearsome. Growing evidence shows disruption can be worse for many children than remaining in their homes with the appropriate support services.

Worse, sometimes judges do not get the information they need.

On Dec. 26, 2002, San Mateo County’s presiding juvenile judge, Marta Diaz, got a brutal reminder of that. A baby she had authorized to visit his home had been declared brain-dead. His father was accused of violently shaking him on Christmas day.

A distraught Diaz wanted to know how the system failed 8-month-old Angelo Marinda and how to prevent it from ever happening again. She ordered extraordinary open hearings in the case, where she discovered critical facts she was not told before she ruled Angelo should be permitted to visit home. Diaz never heard, for instance, that Angelo and his sister had been bruised and scratched during previous unsupervised visits with their parents. Nor did Diaz know that Angelo’s attorney had not talked to his temporary caregivers, who knew of previous harm to the children.

In her final report, Diaz concluded that the system had broken down, and not just in this case. Too many lawyers fail to meet personally with their clients; rather, they simply “submit” to the findings of the social workers in court, without adding information or correcting the record.

“An agency is not going to stay great without strong advocates challenging them, because that leads to complacency,” Diaz said. “The ‘submit culture’ should have bothered me more. It ultimately poses a threat to the health and safety of children.”

The Marinda case is the exception; most dependency cases do not involve physical or sexual abuse. Eighty percent of cases seek to protect the children from neglect, according to state child welfare data. Parents leave children home alone, or with inappropriate caregivers. Binging on drugs or just plain impoverished, they fail to stock the refrigerator. Others lose thier kids when police are called to break up violent domestic disputes.

Occasionally, cases land in dependency court that have no business there—an injured child turns out to have suffered because of “brittle bone disease,” not an abusive parent; a sexual molestation allegation is planted by a vindictive spouse. The system is expected to weed out such cases, and for those able to afford private lawyers, it often does. But that may not also be true for the poor.

High caseloads for court-appointed attorneys mean “justice can’t be done for cases that deserve it,” said Frank Dougherty, a respected Sacramento private attorney and licensed forensic psychologist. “The system as practiced is not designed to protect parents’ and children’s rights.

“It isn’t a matter of turning their backs on the shaken baby, it’s that they don’t have time to see.”

The articles in the “Broken Families, Broken Courts” series, along with related documents, interactive graphics and videos, are online at www.mercurynews.com/dependency.
“Beyond a reasonable doubt.” Anyone who has served on an American jury or even watched a police drama on television is familiar with this concept, under which a criminal defendant may be found guilty only if the prosecution meets this high legal standard of proof. In The Origins of Reasonable Doubt, author James Whitman, a lawyer and historian, upends what we think we know about the “reasonable doubt” standard by taking readers on a historical journey to its origins. Strikingly, Whitman locates those origins before the very birth of modern law—in Christian moral theology. The demand to prove guilt beyond a “reasonable doubt,” he argues, was driven originally by the goal not to protect the legal rights of defendants, but rather to assuage the powerful moral anxieties of jurors: “Judge not lest ye be judged!” in the words of the Bible. The Origins of Reasonable Doubt is an impressively erudite work of scholarship, yet it is written clearly and accessibly, and is worthy of attention by general educated readers interested in criminal law, the American jury, and the relation between law and our fundamental institutional and moral commitments as a nation. “If we do not grasp the depth of the theological problem that haunts the history of the reasonable doubt rule,” Whitman writes, “we will not understand how our law arrived at the unsettling state of confusion it is in today,” nor will we be able to appreciate fully the ethical values that should animate our criminal justice system. Whitman’s brilliantly illuminating history of the premodern origins of a modern legal concept aims ultimately to encourage us “to gaze into our own breasts and ask ourselves hard questions about when and how we have the right to punish others.”

INTERVIEW with James Whitman
James Whitman is Ford Foundation Professor of Comparative and Foreign Law at Yale Law School.

Where did the initial idea for your book come from?
The “beyond a reasonable doubt” standard of proof has always struck me as mysterious. One day it occurred to me to wonder whether it might not originally have been a rule of moral theology, rather than a rule of law. I consulted some of the literature of early modern theology and decided that I had guessed right.

How do you think The Origins of Reasonable Doubt treats or offers insights or perspectives on legal issues and legal institutions, especially in ways not previously addressed?
The reasonable doubt rule, the book aims to show, was originally a rule of Christian moral theology and its original purpose was not to protect the defendant, but to protect the souls of the jurors. Christian jurors risked damnation if they voted to convict an innocent person, and the reasonable doubt instruction was designed to encourage them to convict despite their fears for their own salvation. The rule was originally intended, that is, not to serve as a barrier against conviction, but to facilitate conviction. And while the reasonable doubt instruction was well designed to serve its original purpose of allaying the anxieties of Christian jurors, it is poorly designed to serve the current purpose to which we put it, since it offers little meaningful guidance when it comes to modern fact-finding.

How does your book foster public understanding?
My hope is to shed some needed light on the history and structure of jury trial for both jurors and legal professionals.

EXCERPT

The legitimacy of our common law system depends on its fierce attachment to its traditions, and no quantity of historical learning will change that. So what can we do? At the very least, we can overcome some of our occasionally credulous, indeed superstitious, attachment to traditional formulas like “reasonable doubt.” We can make an effort to understand this ancient phrase (and other ancient phrases like it that haunt our law) in a more historically informed, open-minded, and morally humane spirit. First, there is no point in trying to be faithful to the original intent of a phrase like “reasonable doubt.” This is in part because the phrase has no original drafter: not only does the phrase not appear in the Constitution, it was never crafted by anybody in particular. It emerged in a process of collective European rehashing of the precepts of Christian moral theology that date back to Gregory the Great and beyond. It was created not only by English jurists but also by English moralists—and by Italian and Spanish and French moralists and lawyers as well. There is no original intent to interpret. All that we can do is try to understand the rule in its original context, which is something quite different. … We can also try to relearn the old lesson of reasonable doubt in conducting jury trial. After all lay jurors can still find something shocking and fearful in what they do, especially in capital cases, but perhaps in others as well. … Instructing jurors forcefully that their decision is “a moral one,” about the fate of fellow human being, is, in the last analysis, the only meaningful modern way to be faithful to the original spirit of reasonable doubt.
The radio program “American Purgatory” presents a comprehensive and revealing look at the political asylum system in the United States. It skillfully combines the start-to-finish story of an individual asylum applicant, “H,” who came here from a country in the former Soviet Union, with personal accounts from other applicants and insights and analysis from a diverse number of knowledgeable commentators. Given immediacy by the human drama of H’s journey, “American Purgatory” provides a vivid portrayal of the entire political asylum system in its legal and historical context. Without sacrificing accuracy, all this is accomplished in 53 minutes. The producers show great dedication in following H from the outset through the conclusion of his proceedings. The program demonstrates, both by illustration and through supporting statistics, the critical role that lawyers, including those providing service pro bono, play in helping those who seek asylum. Applicants without counsel, even those with heart-rending stories, face great difficulties in achieving favorable outcomes. At the same time, asylum officers must address concerns about fraudulent applications, including the possibility of terrorists seeking and obtaining asylum. Unfailingly thorough, “American Purgatory” examines this as well, discussing how post-September 11 changes in immigration law have reduced the chances of fraud, but also how applicants now generally face increased obstacles to being granted asylum. The program’s presentation of the applicable law, and sometimes competing policy concerns, is both very accessible to a public audience and very even-handed. “American Purgatory” is a valuable contribution to public understanding of an important process in the administration of justice likely unfamiliar to most Americans.

INTERVIEW with Olivia Bueno and Sarah Elzas (photos left to right)

Olivia Bueno is a human- and refugee-rights advocate at the International Refugee Rights Initiative. Sarah Elzas is a radio journalist, previously New York-based, but now living and working in France.

Where did the initial idea for your radio program come from?

SARAH ELZAS: The idea came out of conversations I had with a lawyer friend who was working on a pro bono asylum case in New York. I was struck by the contrasts between her life as a New York City corporate lawyer and the people she was representing—and the events that made their paths intersect. Through this initial introduction, I started talking with Olivia about political asylum in general, and came to realize it was a very under-reported topic.

How does “American Purgatory” foster public understanding about legal issues and legal institutions?

ELZAS and BUENO: Political asylum is a term a lot of people hear, but many don’t really understand what it is—or how complex the process is. On the one hand it’s about immigration, but it’s also about human rights. And of course, it’s tied up in all kinds of laws, both national and international. We hoped to show that it is not a black-and-white issue and that the legal issues, while complex, affect people on a very human level. We hoped the relationship that develops between lawyers and their asylum-seeker clients would help listeners relate to what is really a long, tedious, and frustrating process. At the same time, we wanted to give an overview of the process, to show what asylum seekers and the people who work with them go through. By adding interviews with officials and policy experts, we tried to put the personal experiences into a broader context of a system that needs to balance domestic security considerations with the need to help those most in need of international protection.

EXCERPT

H: To be honest, I was scared myself to tell someone what happened to me. I was in depression, you know. I realized that I should do something to help myself.

What he needed was a lawyer. …Laura Wytsma is a lawyer in Los Angeles who takes on asylum cases pro bono; free of charge. She used to represent the government in immigration court.

WYTSMA: The law is such that you need to be able to present some sort of documentary corroboration, which is very hard to get. …

Several studies have shown that you are much more likely to be granted asylum if you have a lawyer than if you go through the process on your own. One big reason is because they have access to supporting material, like expert witnesses and country information.

PASTOR EDWARD NEEPAYE: Self-representation is tantamount to legal suicide. Now that I looked at it and the time and hours that I spent with my lawyer, I realize no, I could not have done this by self-representation.
SELECTION CRITERIA FOR THE GAVEL AWARDS

- educational value of legal information or issues treated
- impact on, or outreach to, the public
- creativity and originality in approach to subject matter and effectiveness of presentation; demonstrated technical skill
- thoroughness and accuracy in presentation of issues
- extent to which entries foster the American public’s understanding of the law, the legal system, and the operation of legal institutions
- extent to which entries encourage public support for improvements in the American justice system by informing the public about current practices, policies, and issues

To learn more about the Silver Gavel Awards, go to www.abanet.org/publiced/gavel

2010 Silver Gavel Awards Competition

The deadline for the 2010 Silver Gavel Awards Competition is January 7, 2010. Entries must have been originally published, produced, or presented during 2009. To obtain the entry form and guidelines, go to www.abanet.org/publiced/gavel (available October 1, 2009).
The American Bar Association’s Silver Gavel Awards are judged by the Standing Committee on Gavel Awards. It is assisted by a Screening Committee.

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