

“The Scales of Justice”

By Robert W. Olson

Presented to the Literary Club of Cincinnati on March 21, 2016

When I attended law school almost five decades ago, many students in the third and final year—myself included—would pore over the curriculum in search of courses that were—let’s face it—not very demanding. Hard work and stress lay ahead after graduation. Why not have some fun? The key to finding such a course was that its title would begin with the words “Law and.” This phrase invariably signaled an interdisciplinary approach that took form as a general survey of loose connections between the law and some other body of knowledge. These courses generally presented an opportunity for a good grade without much work or intellectual challenge.

Even today, the typical law school course catalogue offers such gems as Law and the Humanities, Law and Literature, Law and Public Service, Law and Psychiatry, Law and Game Theory, Law and This and Law and That, but curiously never Law and Order. I recently discovered a publication called the Columbia Journal of Law and the Arts, which prompted me to ask: Why not a course that I might title “Law and Opera, or the Scales of Justice”? Tonight I present an introductory lecture in this very course. You may call me Professor Ampersand. The course won’t be rigorous but I hope it will be entertaining.

The connection between law and opera is perhaps not so obvious to those who are neither lawyers nor opera enthusiasts. Certainly, it starts with lawyers who love opera. Doris Kearns Goodwin wrote in *The Bully Pulpit*, her dual biography of Theodore Roosevelt and William Howard Taft, that “when the Opera Festival Came to Cincinnati in 1883, the young lawyer Will Taft reported to his mother that he was planning to take a different girl to the Opera each evening: Nellie Herron on Monday night,

Edith Harrison on Tuesday, Miss Lawson on Wednesday, Miss Tomlin on Thursday, Alice Keys on Saturday afternoon and Agnes Davis on Saturday night.” Brave man, that Taft.

Today, we know that the recently departed Antonin Scalia and Ruth Bader Ginsburg, two United States Supreme Court Justices with polar opposite views of the Constitution, buried their intellectual hatchets to attend the opera together. Opera was probably the only thing they had in common. More about them later.

This lecture will be divided into three parts. Part I will survey some of the great opera stories that revolve around principles of law. Part II will examine a brand new opera that is about law and opera and nothing else. Part III will conclude with a contemporary story of high drama and legal conundrum that could be turned into a really cool modern opera.

Part I—The Past

The hallmark of great opera is of course great music and great singing. But there is much more to an outstanding operatic experience than the notes and voices. Acting, staging, sets, lighting, costumes and, most importantly, the words of the libretto. The libretto should tell a dramatic or comic story that, even if improbable, is compelling and/or entertaining.

It is surprising how many great opera stories raise, and sometimes turn on, questions of law. Take, for example, The Marriage of Figaro by Mozart. One wonders in this opera whether Figaro consulted a lawyer before entering into his loan agreement with Marcellina. Under the terms of this agreement, if Figaro defaulted on the loan he would have to marry this woman who was twice his age. And when Figaro did indeed default, the judge ruled that Figaro must honor his commitment. Nevertheless, Figaro was saved by a higher law that trumped the contract. And that is the law that a son really should not marry his mother—which Marcellina turned out to be.

A contract also plays a major role in Pirates of Penzance by Gilbert and Sullivan. This operetta illustrates the importance of precision when drafting a contract. In this story, Frederic has been apprenticed from early youth to a band of pirates, but looks forward the day he will turn 21 and be free of servitude. Unfortunately, Frederic falls victim to what the libretto terms “a paradox, a paradox, a most ingenious paradox.” It turns out that the apprenticeship agreement was worded so as to bind him until his 21st birthday—and because his birthday happens to fall on February 29 and occurs only in a leap year, it means that technically only five birthdays have passed and Frederic will not reach his 21st birthday until he is in his 80’s.

Another persistent theme in opera is respect or, conversely, disrespect for the law. Take Madama Butterfly by Puccini. Pinkerton, a US naval officer on temporary assignment in Japan, hires a marriage broker to find him a local wife. As a consequence, he weds a 15-year old girl called Butterfly, but returns to America shortly after the wedding. Apparently, Pinkerton did not take the marriage to Butterfly very seriously, as he marries Kate, an American girl, after returning home. Unfortunately, Butterfly did take her marriage seriously—especially since the wedding night produced a baby boy—and she patiently awaits Pinkerton’s return to Japan. Three years later, Pinkerton does return—not to resume a life of wedded bliss with Butterfly—but to take Butterfly’s son away from her. Butterfly can’t bear the loss and shame and kills herself. So the legal question here is: Why was Pinkerton not a bigamist? Hadn’t he has broken the law by marrying Kate in the US when he had already married Butterfly in Japan? Pinkerton, as well as his mother country, were exhibiting a serious lack of respect for Japanese law. In legal terms, we would call this a lack of comity, which is the courtesy one jurisdiction gives by enforcing the laws of another.

Obedience to law is a major theme in Die Walkure by Wagner. Wotan, who is numero uno among the gods, has been fooling around with mortal women and fathers Siegmund and his twin sister,

Sieglinde, who were separated when very young. Years later, Siegmund, who has been wandering around aimlessly, seeks refuge from a storm at the home of Hunding, who by now is the husband of Siegmund's sister Sieglinde. Sieglinde happens to be very unhappy in this forced marriage. As Siegmund tells his tale, Hunding realizes that Siegmund is his enemy and challenges him to a duel in the morning. By then, Siegmund and Sieglinde have put two and two together and realize they are brother and sister. They fall in love [Siegmund sings to her: "you are my bride and my sister"] and together procreate a baby who eventually turns out to be the greatest of Wagnerian heroes, Siegfried. [Believe it or not, the legal and moral issue in this part of the opera is not incest—that issue is completely glossed over.] Back to Wotan, whose philanderings are responsible for this mess in the first place. Wotan is married to Fricka. Fricka is the protectress of the sanctity of the marriage vow and she therefore demands that Wotan exact vengeance against his son Siegmund for breaking up his daughter Sieglinde's marriage to Hunding. Realizing that his own status as the god of all gods will be held up to scorn if Fricka's authority in the matter is not upheld, Wotan relents and breaks his son Siegmund's magic sword before he can use it in the duel. The defenseless Siegmund is then killed by Hunding. The moral of this story is that even if you are a god, you must obey the law—and your wife.

Another example is Billy Budd by Benjamin Britten. Billy is a seaman on the Indomitable. The ship's evil Master of Arms, John Claggart, feels threatened by Billy's admirable qualities. Eventually, Claggart falsely accuses Billy of organizing a mutiny. Though he does not believe Claggart, the ship's Captain Vere summons Billy for interrogation. When confronted with the allegation, Billy is so shocked that he is unable to speak in his defense and instead delivers Claggart a blow to the head, which kills him. An on-board court marshal tribunal convicts Billy and sentences him to hang. In his aria "I accept their verdict," Captain Vere is anguished because he feels he must allow Billy to hang even though he knows Billy was a good man and Claggart a bad one. In its essence, this opera illustrates how fidelity to the rule of law can conflict with one's own values and feelings about right and wrong.

Part II—The Present

Against this rich heritage, are there new operas being written that hinge on legal principles? The answer is yes. A prime example that is about the law and nothing else is called “Scalia/Ginsburg,” which premiered in the summer of 2015. The composer and librettist is Derrick Wang, who has degrees in music and law. The libretto was published in the previously mentioned Columbia Journal of Law and the Arts, with 248 legal footnotes, no less. It purports to be inspired by the opinions of the also previously mentioned Justices Ginsburg and Scalia and by the operatic precedent of the great masters.

“Scalia/Ginsburg” is essentially a non-stop series of inside law jokes and inside opera jokes, with several aria tunes being lifted from various grand operas. It begins with Justice Scalia’s rage aria, in which he rails against other Justices, including Ginsberg, who are able to find Constitutional rights that are not expressly written into the text of the document. He sings:

“This court’s so changeable—

As if it’s never, ever known the law!

The Justices are blind!

How can they possibly spout this--?

The Constitution says nothing about this,

This right that they’ve enshrined—When did the document sprout this?

The Framers wrote and signed

Words that endured without this

The Constitution says absolutely nothing about this!

The action continues with a statue springing to life. It is the Commentator, a celestial bureaucrat, who has arrived to examine whether Scalia's insistence in dissenting in so many Supreme Court cases is excessive and decrees that Scalia must prove his merit in three trials. He asks Scalia to dinner, but is refused. [Opera buffs at this point will recognize the reference to the Commendatore in Mozart's "Don Giovanni."] The Commentator then gestures, the chamber quakes and all exits are sealed. But suddenly, the floor bursts open and Justice Ginsburg rises into the chamber. The Commentator says: "How did you get in?" Ginsburg replies: "It's not the first time I've had to break through a ceiling." To Scalia, her improbable friend, she sings:

"You are in a tricky spot.

Then again, if you consider the circumstances in their totality,

Unimaginable evil this is not.

If you might be a bit more flexible."

To which the tenor Scalia cries in high C: "Flexible? Just another word for liberal."

There follows a debate between Ruth and Nino about race-based university admissions and other contentious issues. She sings:

"You are searching in vain for a bright-line solution

To a problem that isn't so easy to solve—

But the beautiful thing about our Constitution

Is that, like our society, it can evolve."

His final take is:

“I have had more than I can swallow

(Or even gargle)

Of this impossible-to-follow

Legalistic argle-bargle!”

Somehow Scalia passes the first test. The Commentator tries to expel Ginsburg from staying for the second trial because “this is no place for a lady,” but she insists on staying to help Scalia because “women belong in all places where decisions are made.”

The Commentator relents but on the condition that both of them must stand trial. The second trial is one of silence. No matter what the Commentator says to torment them, they may not speak lest they be punished. As the trial proceeds, the Commentator accuses Scalia of using originalism to advance his conservative political bent. Nino starts to answer but with Ruth’s help, restrains himself. The Commentator then charges Ginsburg with “going on record looking for flaws in Roe v. Wade.” Here, Nino helps Ruth restrain herself. Finally, the Commentator chants six times the name of the case he says belies Scalia’s commitment to principled decision-making: Bush v. Gore. Nino explodes: “Oh. Get over it!”

The penalty for this outburst, says the Commentator, is banishment:

“Behold your eternal destination!

Flaming,

Formless

Anarchy—

Where rules have no teeth,

Where men have no shame,

Where words have no meaning.

This is your fate—

Unless you recant your originalist creed.”

But Ginsburg steps in: “That won’t do. If you banish him, then banish me as well.” She sings:

“We serve justice together,

And that means we can speak with one voice.

And here, I choose to join him.”

And Scalia and Ginsburg in a duet proclaim:

“We are different.

We are one.

The U.S. contradiction—

Separate strands unite in friction

To protect our country’s core.

This, the strength of our nation,

Thus is our Court’s design:

We are kindred,

We are nine.”

Astonishingly, in my view, the Commentator says they passed and that this was, in fact, the third and final trial. And they get a prize.

“This room is a secret gateway

To a world of perpetual spring,

Where life is transformed into opera,

Which you are now able to sing”

And magically, Scalia is transformed and sings “Che gelida manina” from Puccini’s La Boheme in a beautiful lyric tenor voice. Ginsburg follows with a touching soprano rendition of the “Marchallin’s Song” from Strauss’s Der Rosenkavalier and they both live happily ever after.

While “Scalia/Ginsburg” is not a masterpiece and the notion that the Supreme Court speaks with one voice does not square with the fractious discord displayed in the Court’s numerous 5 to 4 decisions in recent years, it still is an impressive work. It is at times hilarious and the 248 footnotes to the libretto, while not sung, demonstrate the depth of its scholarly underpinnings-- both legal and musical. To many vocal phrases there are appended citations to Supreme Court opinions—yes, “legalistic argle-bargle” is a direct quote from one by Scalia—or to famous operatic arias or lines of recitative. And the music is rather good as well.

Part III—The Future

Modern opera composers maintain that one of their biggest challenges is finding a story upon which to base a new work. Great opera requires a great story and is often derived from great source material. Verdi looked to Shakespeare for inspiration, Wagner to Nordic myths. For the “Figaro” operas

of Mozart and Rossini, it was the 18th century plays of Beaumarchais. Contemporary composers and librettists will also turn to works of fiction and film. Sometimes the creative team will base an opera on an original story, but this is not the norm.

My own search for a legal saga that is opera-worthy led me to real people and real events. My candidate comes from the world of business and law. It has many of the hallmarks of great opera—a tragic hero and his unyielding adversary, suspenseful drama, comic interludes and even a little sex. This is the story of the Bendix/Martin Marietta takeover battle of 1982, which was one of the most famous, and certainly the most bizarre, in U.S. corporate history.

Prologue—What Were They Thinking?

In 1982, Bendix Corporation and Martin Marietta Corporation were two of the largest companies in America. The core of this story's weirdness was a takeover defense named after the video game, "Pacman." Simply stated, the idea was: "I will try to eat you before you can eat me." And yet when the dust settled, Bendix and Martin had simultaneously eaten each other.

Each company had bought a majority of the other's shares in competing hostile tender offers. The result: stalemate. Neither company was able exercise control over the other because each of them was a subsidiary of the other. Gilbert & Sullivan would certainly have called this dilemma "a most ingenious paradox."

How did these companies find themselves in this mess? And how did they get out of it? Or did they?

The cast of players in this drama included two iron-willed CEO's and a slew of the most famous deal lawyers and investment bankers in America. In a series of interlocking parallel universes, there were simultaneously being waged two reciprocal unfriendly tender offers, a proxy fight and hotly

contested nail-biting litigation in four states. At one point, Martin counted up some 140 lawyers on its team alone. And yet the whole story unfolded in just 31 days.

Act 1—Attack and Counter-Attack

In 1982, Bendix Corporation was a major manufacturing company headquartered in Southfield, Michigan. It relied on the American auto industry for almost all its profits. It needed to diversify. Bendix's CEO was 44-year old William Agee, who had risen rapidly in the corporate world after growing up on a farm in Idaho. Considered a boy wonder, he had been elected CEO at age 39, the youngest to ever head a top 100 American company. However, in 1980, his reputation had taken a big hit. The national press carried front-page stories about the rapid promotion of his 29-year old executive assistant, Mary Cunningham, to Vice President for Strategic Planning amidst widespread rumors that they were having an affair despite them both being married to other people. They vehemently, and probably truthfully, denied the affair. But Mary's effectiveness was compromised by the scandal and she had to take a bullet for Bill by resigning, although she did in relatively short order land an executive position at Seagram's Corporation. Naturally enough, 18 months later, they had divorced their respective spouses and were themselves married.

A few months after Bill and Mary tied the knot, Agee's team identified several acquisition targets in pursuit of its diversification strategy. In March 1982, Bendix made a pass at RCA Corporation. RCA crafted a brilliant defense--a public statement by RCA's chairman that "Mr. Agee has not demonstrated the ability to manage his own affairs, let alone someone else's." Bendix backed down.

After that, Bendix turned its attention to Martin Marietta Corporation, based in Bethesda, Maryland. Martin was a giant aerospace company with a booming defense business. However, its smaller aluminum and cement operations had dragged its stock price down by 50% in the last year. It seemed ripe for a takeover.

So, on August 25, 1982, Day 1 in our tale, Bendix announced an unsolicited tender offer to buy Martin common stock at a premium to market of more than 70%. On Day 25, Bendix would be able to buy all shares tendered by Martin shareholders. Bendix recognized that Martin would probably say the price was too low and would fight back. But Agee thought that if he could sit down with Thomas Pownall, Martin's CEO, they could come up with a friendly deal at a somewhat higher price. His judgment on this was dead wrong.

Tom Pownall was a hard-nosed WWII veteran who had worked his way up the ranks at Martin Marietta for 19 years until becoming CEO at age 60 earlier in the year. He had known that his company was vulnerable to a takeover and had previously hired Martin Siegel, a brilliant 33-year old takeover defense specialist from the investment banking firm of Kidder Peabody. Siegel kept a tarantula inside a paperweight on his desk for inspiration.

The Bendix offer was not considered attractive, especially since Martin Marietta had traded at a much higher level only a year before. Pownall was in fact offended by this sneak attack, would not take Agee's calls and asked Marty Siegel and his lawyers for hard-hitting options. Siegel and his team reviewed the standard takeover defenses, but came up instead with the "Pacman Defense."

Under the Pacman strategy, Martin would make a counter tender offer for a majority of Bendix's shares. What made this workable were the differences between the laws of Maryland, where Martin was incorporated, and Delaware, where Bendix was incorporated. Under the applicable rules, even if Bendix bought tendered Martin shares as soon as it could, that is, on Day 25, Bendix would have to wait 10 days before it could replace Martin's directors. By contrast, if Martin could start a tender offer for Bendix right away, it could buy the Bendix stock on Day 30 and in theory replace Bendix's directors the same day. It had a 5-day advantage. But the Martin team recognized it wasn't that easy. If Bendix bought Martin shares first, then Martin would be a subsidiary of Bendix and as a subsidiary it would be

prohibited by law from voting the shares of Bendix when it bought them. However, Bendix would encounter the same problem in trying to vote Martin shares if Martin bought Bendix shares before Bendix could replace the Martin directors. Under this scenario, each company would be a subsidiary of the other, and who knew what that meant? This was uncharted territory, but Pownall and his board decided to go ahead with Pacman anyway.

All well and good, but a lot of cash would be needed for Martin to buy Bendix, and all of it would have to be borrowed. Somehow, against all odds, Martin arranged for a huge new bank financing in just three days, even though a full draw down would raise Martin's debt-to-capitalization ratio from 30% to a mind-numbing 80%.

And so on Day 6, Martin announced its tender offer for a majority of Bendix's common stock at a premium to market of more than 40%. Martin's public rationale for this move was that if Bendix's and Martin's businesses were going to be combined, Martin's management was better equipped to run the show.

Bendix's response was to call Martin's offer grossly inadequate and to raise its tender offer price for Martin. Bendix also called a shareholders meeting asking for approval of so-called shark repellents that would have eliminated Martin's 5-day timing advantage. For its part, Martin said it would solicit proxies in opposition. So now you had a proxy fight in the middle of two hostile tender offers.

By Day 17, a majority of the shares of each company had been tendered into the other companies' offers. By this time, the shareholders of Bendix and Martin consisted primarily of voracious risk arbitrageurs who had bought shares in anticipation of receiving the handsome premiums being offered. All that remained was for the conditions of the respective tender offers to be satisfied.

During this period, Bill Agee was in agony. He foresaw both companies lurching toward the brink of a legal hellhole and yet he still pushed forward. He tried over and over to reach out to Pownall, but was ignored or rebuffed each time. Bill was afraid to go to sleep at night lest he not be on his game if awakened by a call. For his part, Tom Pownall's military mindset kept him true to the mission he never questioned.

On Day 21, the investment banker Marty Siegel, who I think was really Mephistopheles in disguise, suggested to Pownall and his board that if they dropped the conditions in the tender offer for Bendix, Martin would be legally obligated to buy Bendix shares even if Bendix had previously bought Martin shares. Doing this would take the ultimate decision out of the Martin Board's hands and put it squarely on Agee and the Bendix Board. It would be Agee who would have to decide whether to take action that would inexorably result in each company owning a majority of the other and billions of cash being hemorrhaged from both of them. So the Martin board dropped all but two of the conditions to its offer. In doing so, Martin had deliberately made itself obliged to buy Bendix shares unless Bendix withdrew its offer for Martin or the Bendix shareholders adopted the shark repellents. The arbitrage community giddily dubbed this maneuver the Deadman's Trigger or the Doomsday Machine.

Act II—The Die is Cast--Far Across the Rubicon

So now we come to Day 24. Bendix will be able to buy the tendered Martin shares after midnight.

The point of no return was here. Agee and his board had to decide whether to go forward. The issue was who could take control first. Would Bendix would be able to replace the Martin board because it bought first? Or would Marietta Marietta be able to act before Bendix because of its 5-day statutory timing advantage? Or was the most likely scenario that each company would buy a majority of the other and yet neither company would be able to control the other? In the midst of this legal

uncertainty, the Bendix board, at Agee's urging, nevertheless voted to plunge forward with the purchase of Martin shares and incur a pile of debt to pay for them.

And so Bendix bought a majority of Martin's shares in the early morning of Day 25 and sent a letter to the Martin Board instructing it to resign.

The Martin Board rejected the letter. So much for the advantage of buying first.

A couple of days later, word came to Bendix that Pownall had finally agreed to meet with Agee, and on Day 28, the Bendix team travelled to Bethesda, Maryland with hopes of making a deal. Incredibly, one of the key investment bankers for Bendix had lost his seat on the private aircraft from New York to, none other than, Mary Cunningham. If the Bendix team was astonished that Agee had brought his highly publicized wife to the most important meeting of the entire takeover war, the Martin team was incredulous. At the meeting, Agee offered to increase his bid for Martin. But Pownall said that the Martin Board was unwilling to stop its offer for Bendix because of its fear of lawsuits from Bendix shareholders for the lost premium if the deal didn't go forward. Martin would proceed to buy Bendix in two days unless Bendix shareholders adopted the shark repellents the next day. Mary Cunningham reportedly sat silent at the meeting other than for introductory pleasantries. Why was she there? The most likely answer is that—behind the scenes—she was in fact Bill's most trusted advisor and he needed her there for support.

Day 29 was the day of the Bendix Shareholders Meeting in Southfield, Michigan. A Bendix executive took the podium as appointed chairman of the meeting, declared it adjourned and left. Sensing that Bendix didn't have the votes, a Martin Marietta executive, a wolf in sheep's clothing who was able to attend because he conveniently owned Bendix stock, hijacked the podium and the microphone and declared that the meeting had not been properly adjourned and should continue. He called for a vote electing himself as chairman of the meeting. After much shouting, someone cut the

lights and chaos ensued. The Martin executive who was chair of the Bendix shareholder meeting [how bizarre is that?] announced that the meeting would move to a local hotel. There, five boxes of proxies were counted, and this Martin chair of the Bendix meeting announced that the shark repellents had been defeated. Martin would be able to buy Bendix shares shortly after midnight.

Act III—Enter Another Wolf in Sheep’s Clothing

With the last barrier to the Martin purchase of Bendix removed, Agee was desperate. He decided he needed a “white knight.” Immediately following the shareholders meeting, his advisors renewed prior conversations with Allied Corporation, a major industrial company whose CEO was Edward Hennessey. Hennessey agreed that Allied would offer to buy a majority of Bendix at a higher price than Martin was offering. Allied would announce and file with the Securities and Exchange Commission its tender offer for Bendix by the end of the business day. Under SEC rules, this filing would postpone for 10 days Martin’s ability to buy Bendix shares under its tender offer.

Agee assembled his Board that same afternoon and said there were only two options: let Martin buy Bendix or agree to sell to Allied. He said that the Martin offer, in addition to presenting a lower price, would be a catastrophe, leaving both companies in a checkmate where neither could vote the shares of the other. He foresaw the two companies foundering in endless legal purgatory while the courts tried to sort things out. Agee recommended the deal with Allied. His directors were furious, as all the discussion to this point was about Bendix buying another company rather than itself being sold. The first vote was 5 for and 5 against. Time was running out. In order to postpone Martin’s ability to buy, Allied had to file tender offer papers with the SEC by 5:30 pm. Finally, the Bendix Board approved the Allied deal at 4:43 pm (7 for and 3 against), and at 4:45 pm Allied announced it would commence its tender offer the next day. The 3 dissenting Bendix directors, including Donald Rumsfeld, resigned on the spot.

Funny thing, though. 5:30 pm came and went without Allied filing its papers with the SEC, so there was no automatic postponement of Martin's tender offer. Why? Did Allied run out of time? Perhaps. But to me, the most plausible explanation is simply that Hennessy and his advisors had come up with a better, much less expensive plan. After all, why buy two companies when you really only want Bendix? And why risk a bidding war for Bendix if you can get Martin to back off? And perhaps, Hennessy smelled blood.

What Hennessy had decided was to go around Agee and negotiate directly with Pownall himself. He flew to Bethesda that night. He knew Pownall would not agree to sell his company, so Hennessy proposed a stock swap architected by his renowned lawyer, Joseph Flom. Under this plan, Allied would abandon its tender offer for Bendix. Instead, Martin would go ahead with the purchase of Bendix shares under its tender offer and transfer them to Allied. In exchange, Allied would return to Martin most of the shares Bendix had previously bought. As a result, Martin would remain independent and Bendix would be a subsidiary of Allied. Pownall agreed to all this. After he learned about it, so did Agee, as he really had no choice but to fall on his sword.

As so it came to pass that on Day 30, Martin announced that it had purchased a majority of Bendix and Allied called off the tender offer it had never really started. On Day 31, the three companies announced a peace treaty to be implemented by the swap between Allied and Martin.

And that is in fact what happened. It was a brilliant piece of deal making. Spectacularly, Allied had acquired a majority of Bendix without spending any of its cash. It did assume the debt Bendix had incurred to buy Martin stock, but it was still the deal of the century. Was it also a double cross of Agee by Hennessy? Maybe so and maybe not, but it is ironic that Agee's white knight had become his black swan, and that Hennessy had instead become Pownall's savior who gave him a way to preserve Martin's independence.

Epilogue—A Parable of Assured Mutual Destruction

Agee left Bendix a few months later—it was not a happy exit. He and Mary Cunningham both retired to a new home in Cape Cod that they bought with the proceeds of Bill’s humongous “golden parachute” severance payment. Curiously, People magazine named Bill and Mary the “Most Intriguing Couple” of 1982. Agee later had a seven-year stint as CEO of Morrison Knudsen Corporation that ended badly, but Mary has won acclaim over the years for founding and running The Nurturing Network for women and has received several honorary university degrees.

Allied did well with Bendix. Years later, Allied merged with Honeywell Inc.

Martin emerged from the swap as an independent, but crippled company with a staggering debt load, and its stock price dropped sharply upon the announcement of the deal. However, the defense business did well and eventually Martin paid down much of that debt. Pownall retired as CEO in 1987. Martin continued as an independent company until it merged with Lockheed in 1996 and is known today as Lockheed Martin.

Marty Siegel, the svengali investment banker who lured Pownall to the “dark side,” first with Pacman and then with the Doomsday Machine, didn’t fare so well in later years. In 1987, he was sentenced to time in prison after pleading guilty to illegal insider trading.

At the end of the day, the final result of the Pacman defense was gigantic stock buybacks by both Bendix and Martin that burdened each of them with huge debt the proceeds of which were used to pay big premiums to an opportunistic arbitrage community. Why did it happen? It was because Agee and Pownall each thought that, when faced with Armageddon, the other guy would back down. No one backed down, and as a consequence the battlefield was littered with casualties. If Allied hadn’t broken the log jam, they would have been much, much worse.

And with that, the tale of law and business conflict that could be an opera ends. I have already condensed it considerably, but will admit that the librettist and composer will have to work very hard to distill it into a drama that will appeal to an opera audience. But lest we forget, War and Peace and Moby Dick have been turned into operas and they weren't exactly short stories. And the bones are there. The core of the story is one man's legal hubris. Agee thought he could win the prize despite fundamental legal obstacles that stared him in the face. Agee's final aria could begin: "Why did I heed my lawyers not?" And mid-story, he could have lamented: "Help me, I'm living inside a video game." Ironically, Agee's nemesis Tom Pownall achieved victory--albeit a Pyrrhic one--by defending his independence at the cost of all else and in the process disregarding his legal duty to act in the best interests of his shareholders. In today's world of enhanced fiduciary duties in contests for corporate control, Pownall wouldn't have been able to "save" his company by destroying it, but back then he could. In a possible early aria Pownall might boldly cry: "Just shoot and let someone else pick up the pieces." I can even imagine a Greek chorus of greedy arbitrageurs chanting alternately to Agee and Pownall: "Be a Man. Don't back down. Go for it." And the title of this opera? With a nod to Milton and the Old Testament, it could be Agee Agonistes.

So there you have it. The stage is set for an opera about corporate law. All we need is someone to write the words and music.

This concludes my first lecture in "Law and Opera." If you stayed awake from beginning to end, you get an "A." If you did not, you get an "A minus" for being in the room. Class dismissed.

Principal Sources:

1. Derrick Wang's libretto for Scalia/Ginsberg: A (Gentle) Parody of Operatic Proportions can be found at 38 Columbia Journal of Law and the Arts 237 (2015).

2. Most of the historical account of the Bendix/Martin story in this paper is derived from the book Merger, by Peter Hartz (1985). Mr. Hartz should not be blamed for the judgmental assertions in this paper, which are mine and not his.

3. Some tidbits came from the book Powerplay: What Really Happened at Bendix, by Mary Cunningham with Fran Schumer (1984)