



EL PASO BAR JOURNAL

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June 2016

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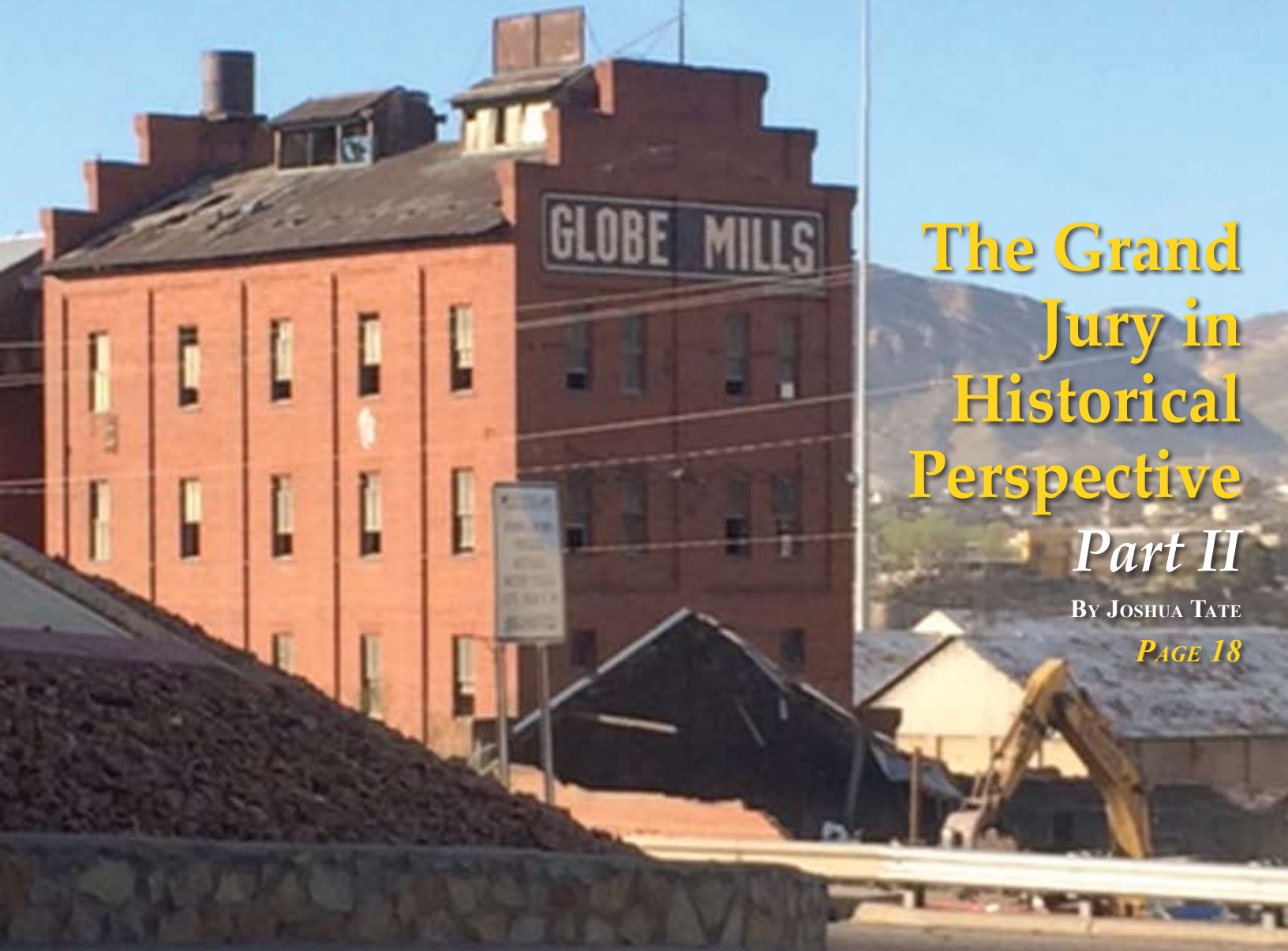
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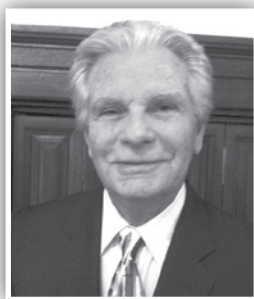
Nancy Gallego

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The El Paso Bar Journal is a bi-monthly publication of the El Paso Bar Association. Articles, notices, suggestions and/or comments should be sent to the attention of Nancy Gallego. All submissions must be received by the Bar office on or before the 10th day of the month preceding publication. Calendar listings, classified ads, display ads, and feature articles should not be considered an endorsement of any service, product, program, seminar or event. Please contact the Bar office for ad rates. Articles published in the Bar Journal do not necessarily reflect the opinions of the El Paso Bar Association, its Officers, or the Board of Directors. The El Paso Bar Association does not endorse candidates for political office. An article in the Bar Journal is not, and should never be construed to be, an endorsement of a person for political office.

PRESIDENT'S PAGE



Attorneys are Professionals

I have found that the most admired and successful lawyers in our community are those whose character and integrity are above reproach. These professionals, while making a living for their families, enhance the lives of their clients, community, and give back to their profession. As my last President's column, I am encouraging all of the members of the El Paso Bar Association to renew their commitment to the profession by continuing their membership and participation in

Bar activities, and at the same time I am encouraging lawyers who are not yet members of the El Paso Bar Association, to join us. As a member, you have the unique opportunity to participate in networking and social activities with other professionals, and give back to the community and our profession. I am particularly encouraging lawyers to take leadership roles in our Bar Association. Just this past year, the El Paso Bar Association provided:

Social/Networking Activities:

- EPBA hosted an extremely successful holiday party with great food, drinks, and a live band. The silent auction raised funds for the El Paso Bar Association Foundation. This event allowed, not only a lot of fun, but an opportunity for lawyers to network;
- During the month of April, the EPBA hosted over 150 of its members, their families, and staff at a Chihuahua baseball game, which by the way, the Chihuahuas won;
- Our annual Law Day banquet was a huge success. Not only were well deserved awards presented to our members, but everyone enjoyed our guest speaker, Mark Curriden, who spoke on habeas corpus.

Giving Back to the Community:

- *Access to Justice* – the EPBA conducted its annual legal clinic for low income members of our community. With the assistance of the El Paso Paralegal Association and El Paso Legal Secretary Association, the participating lawyers in our community helped more members of our community solve legal problems than ever before. This annual clinic always needs leaders and volunteers to make it successful. Thanks to our many volunteers, this last year's event saw more participants than in previous years.
- The EPBA through its committee "El Paso Lawyers for Patriots" holds two legal clinics for veterans, active duty personnel, and their families. The first clinic was held in November, 2015, which afforded our many patriots the opportunity to receive free legal services and advice. The next EP Lawyers for Patriots clinic will be held June 11, 2016, at the Transmountain campus of the Community College from 9:00am – 1:00pm. Volunteers are always needed for the event, and leadership opportunities are available for next years clinics.

Helping the Profession

- EPBA restarted a very successful mentoring program. This program affords the opportunity for young lawyers to receive guidance, advice, and mentoring from our successful professionals. This is a very worthwhile program, guiding young lawyers to become successful and committed professionals.
- The EPBA conducted its 20th Civil Trial Practice Seminar in Las Vegas over the Valentine's Day weekend. Not only did this seminar provide educational and practice skills to our many members who attended, but this event provides great social and networking opportunities for the many attendees. This last seminar was one of our most successful and highly attended seminars.

Cover: Photo taken 2/29/2016 by Ballard Shapleigh

Next year the EPBA is considering New Orleans as its host city.

• **New Committees** - This last year, the EPBA is proud to create two new committees helping our profession:

• **Bi-National Committee** – This committee is designed to interact with, provide social activities, and learning opportunities with our professional neighbors in Juarez, Mexico. Our Bi-National Committee has joined with bar associations, the law school, and general legal community in Juarez to begin active programming in both countries. Mexico is transitioning to a more transparent and oral trial advocacy process. This committee provides an opportunity for our members to become more involved with the many legal issues facing both of our countries.

• **Lawyers in Distress** – This new committee is groundbreaking. There are no similar programs in the State

of Texas, nor to our knowledge, in any other states. This committee has been working long hours creating formats to help lawyers and their families, in the event of a lawyers death or disability. Pleadings and procedures are being created to assist families and clients of deceased or disabled solo practitioners, with handling finances, caseloads, and files; so that families and clients are not damaged after a catastrophic event occurs. What happens to open and closed client's files, operating and trust accounts, and trial and other deadlines, when there is no successor attorney.

There are a multitude of areas to become involved. I have highlighted only a few. I am proud to be an attorney in a great profession. I am proud to be a member of the El Paso Bar Association. Professionalism is what lawyers do. We do great work and provide needed service to our

EL PASO BAR ASSOCIATION

June Bar Luncheon

Tuesday, June 14, 2016

El Paso Club • 201 E. Main, 18th Floor,
Chase Bank - cost \$20 per person, 12:00 Noon

Election and Swearing In of Officer and Directors:

Chris Antcliff – *President*
Mark Dore – *President-Elect*
Jennifer Vandenbosch – *Vice
President*
Dan Hernandez – *Treasurer*
Jeff Ray – *Secretary*

Board of Directors –
Three Year Term
Gary Aboud
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Judge Penny Hamilton
Monica Perez
Danny Razo

Door prizes will be given out

**Please make your reservations by
Monday, June 13, 2016 at 1:00 p.m. at nancy@elpasobar.com or ngallego.epba@sbcglobal.net**



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CALENDAR OF EVENTS

JUNE 2016

Tuesday, June 7*EPBA BOD Meeting***Wednesday, June 8***EPALP Monthly Meeting***Tuesday, June 14***Election and Swearing In of Officers/Directors
for 2016-2017 Bar Year***Thursday, June 16***EPPA Monthly Luncheon***Monday, June 20***EPBA Office Closed – Juneteenth Day*

UPCOMING EVENTS

Monday, July 4*EPBA Office Closed – Independence Day***Wednesday, July 13***EPALP Monthly Meeting***Thursday, July 21***EPPA Monthly Luncheon***Providing Valuation, Economic Consulting
And Litigation Support for El Paso****John R. Battle, CPA, CVA, MAFF, CM&AA****Business Valuations:**

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EL PASO PARALEGAL ASSOCIATION**General Membership Meetings**

All meeting are held at the

El Paso Club, 201 E. Main, 18th Floor

Thursday, June 16 @ 12:00 Noon

Thursday, July 21 @ 12:00 Noon

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SENIOR LAWYER INTERVIEW

MYER J. LIPSON

BY CLINTON F. CROSS

Cross: Tell me about your parents, your childhood?

Lipson: I was born on July 4, 1946 in Munich, Germany. My parents are Holocaust survivors. Both sets of my grandparents and my older brother and sister were murdered by the Nazis during the Holocaust. My parents' survived concentration camps, and my sister and I were born after they were liberated. We immigrated to El Paso, Texas in 1949. Unfortunately, my father died when I turned 13.

Cross: How did you end up in El Paso?

Lipson: My great uncles came to El Paso around 1900. When my parents were liberated from their respective concentration camps, my parents used the remaining money from a diamond sold on the black market, and with my uncles help, they came to El Paso looking for a new life.

Cross: You once told me you gave a speech at the opening of the El Paso Holocaust Museum about your family's experiences. I'd like to republish the speech in this issue of the journal. Is that ok?

Lipson: Sure.

Cross: Where did you get your formal education?

Lipson: I graduated from El Paso High School. I graduated from the University of Texas in Austin, in 1968, where I obtained a Bachelor in Business Administration. I graduated from the University of Texas Law School in 1972 with a Doctor of Jurisprudence.

Cross: Where did you start your law career?

Lipson: I returned to El Paso and went to work for District Attorney Steve Simmons. During my time in the District Attorney's office, I prosecuted murder and rape cases as a trial team chief.

The last case I tried made national news. Neighbors in Northeast El Paso began a feud by poisoning each other's dogs, and threatening to kill each other. One hot summer afternoon, five of the neighbors, three on one side and two on the other side walked out into the middle



Myer J. Lipson

of the street, drew guns on each other, and shot it out. Three of the five were killed in the street. I prosecuted and convicted the two surviving shooters for murder. The trial lasted well over a week. Perhaps this was evidence that the vestiges of the Wild, Wild West culture still existed in

El Paso. This case made national news, which included daily articles in the New York Times and Wall Street Journal.

Cross: What next?

Lipson: I resigned my position in the District Attorney's office and went into private practice with Jim Dallas. We formed Lipson & Dallas, P.C. in December 1974. For approximately the first 10 years of my private practice, I tried criminal defense cases and many civil cases. Jim and I tried the first post-traumatic stress disorder case in Texas for a client that went hunting with his best friend. During the trip, our client shot his best friend nine times in the back, stabbed him in the chest three times, and gutted his stomach. He was a Vietnam War veteran and had frequent flashbacks as a result of that experience. We hired several expert witnesses who were able to testify that our client had a flashback to Vietnam, had lost total control over his actions, and did not even have an awareness of what he was doing. We tried this case in the 205th District Court before Sam Callan, who frequently threatened to hold me in contempt during this trial. Our client was convicted of voluntary manslaughter. He spent a couple of years in prison, was released and owns a farm where he has successfully raised a family and become a model citizen. I occasionally receive thank you letters from him giving me updates on his life.

Gary Weiser joined our firm and we changed our name to Lipson, Dallas, & Weiser, P.C. Our firm grew with a number of other attorneys, and as result of the growth, I evolved into business, real estate, and transactional work, which comprises the bulk of my practice today. All of my former partners have retired, or gone into

other areas, except Gary Weiser. I am presently a solo practitioner.

Cross: Any community activities?

Lipson: I have been very involved with the El Paso Bar Association, which I presently serve as President. I have been involved in a number of non-profit organizations where I have served as President or Chairman. I have served on the board of the El Paso Bar Foundation, Advisory Board of Directors of the American Bar Association, Founding President of the El Paso Holocaust Museum, Vice-President of the El Paso Holocaust Museum Foundation, President of Congregation B'Nai Zion Synagogue, President of the El Paso Tennis Club, Advisory Board of Directors for the Alzheimer's Association and International Business College, Board of Directors of the El Paso Jewish Federation and many other non-profit organizations.

Cross: Have you received any honors or awards for your service?

Lipson: I have, but they're not really relevant to the reason that I participate in community activities.

Cross: As President of the El Paso Bar Association, what challenges have you addressed?

Lipson: With the influx of many new attorneys into the practice, many of them solos and other attorneys trying to make a living, and for many other reasons, I have seen an erosion of professionalism. My President's theme has been "Attorneys are Professionals". I firmly believe that attorneys are society's problem solvers. The practice of law is more than just a business; it is a profession that requires integrity, honesty, and ethics. We, as lawyers can practice with civility and still attain goals. Maxims such as "My word is my bond" should not be dismissed. I always talk about long range goals, because you are in a profession to make a living and help your clients for a thirty or forty year span. It takes a long time to develop a good reputation, but only an instant to destroy it. Once destroyed, a reputation is almost impossible to restore. Conduct that destroys a lawyer's reputation also demeans

our profession. I spent the last year with this theme in mind.

Cross: Have you instituted any new programs this year, in your Presidency?

Lipson: During my tenure on the Board, I received a number of requests for help from solo practitioners asking whether the EPBA can provide assistance with various problems facing solos and their families. We started the “Lawyers in Distress” Committee, which is ground breaking. After research, we have not found any similar programs in the United States. Our committee has been working long hours creating programs and processes to help lawyers and their families coping with catastrophic events, such as a solo lawyer’s death or disability. What happens to open and closed client files, operating and trust accounts, trial and other deadlines? What does the client and

family do? This committee has created a structure and process for handling these catastrophic events. I have frequently spoken about this committee, as well as written about this in my President’s Page.

We have formed the Bi-National Committee to interact with attorneys in Juarez, Mexico. This committee is functioning to provide social and educational opportunities for both sides of the border.

In an effort to help “Professionalism”, I re-instituted the Mentoring Program. Hopefully, mentors with integrity and character will mentor their respective mentees to become ethical active members of our profession, that give back to the community and our profession.

Cross: Tell me about your family?

Lipson: I have been happily married to Beth Rubin Lipson for 46 years. My son, Shane

Lipson, is married to Jeanne Levin and they have twin boys, Ross and Marshall. Shane is a partner with Bill Carvajal in Mt. Franklin Insurance Agency. My daughter Shelby is married to Greg Rubin. Shelby is a local tennis pro. Shelby and Greg have three children, Asher, Micah, and Audrey. Both of my children and all of my grandchildren live here.

Cross: Any final comments?

Lipson: The most successful and admired attorneys are those that zealously represent their clients while practicing with honesty, integrity, civility, and respect for others. Our profession needs to constantly embrace these concepts to instill these qualities in our daily lives. Respect for others, whether it is learned

CLINTON F. CROSS is a retired Assistant El Paso County Attorney.

Speech For Grand Opening Of The Holocaust Museum

BY MYER LIPSON

We republish here excerpts from Myer Lipson’s speech delivered in January, 2008 where he recalls some of his family history in Germany during the second world war. Ed.

Honored guests my name is Myer Lipson and I have worked on behalf of the El Paso Holocaust Museum and Study Center for over 20 years. I was in charge of building the first Holocaust Museum and I was chairman of the building committee for this museum. I am frequently asked why do I spend so much of my valuable time working for a Holocaust Museum out here in isolated El Paso, Texas. Why, after more than 60 years, is a holocaust museum relevant or even necessary in our day and age?

It has been over 70 years since the end of World War II and the Holocaust, the targeted destruction of over 6 million Jews and 4 million other people by the German Nazis. In today’s age, when leaders of countries such as Iran, Iraq, Syria, Venezuela, and other dictators and despots deny the existence of the Holocaust, the testimony of survivors and writings of scholars become even more important. Survivors of the Holocaust are dwindling. In El Paso, survivors and military liberators, which at one time numbered over 100, are now down to 10 known survivors and few liberators. The Holocaust

Museum and Study Center memorializes their story and provides needed history, so that we can all say “Never Again”.

My response to those people who question me and ask “why” centers on the dignity of life, the right to live freely and to celebrate the differences among us, not hate people who are different, especially in a world that has given us madmen such as Hitler, Mahmoud Ahmadinejad, Idi Amin, and others. A Holocaust Museum teaches us that the struggle for the sanctity of life is never over.

Imagine, if you will, one truly amazing and inspiring story of 2 survivors of the Holocaust, my parents. Let me take you back to just after the turn of the century.

A boy, Sundel, was born February 15, 1906, in Kovno, Lithuania, to Mayer and Gitel. Sundel had 5 brothers and 1 sister. Meanwhile, Rachel, from Shaudinia, Lithuania, was born in 1910, to Jacob and Chana and lived on her parents’ farm with her parents, 4 brothers and 2 sisters. As she grew, she helped run the farm, manufactured and bottled whiskey, and tended to her garden. Sundel and Rachel met, fell in love and were married in Shaudinia in 1931. Sundel and his brother, Lazar, opened a soap factory and prospered as successful businessmen, manufacturing soap and investing in real estate. Sundel and Rachel had 2 children,

Moshe, born in 1934, and Mina, born in 1937. They bought a home, had plenty of food, family, large automobiles, practiced Judaism, and had a governess to help care for their children. Life was good.

Rachel’s brothers and sisters decided to go to America, to make their fortune. When Nazi Germany started persecuting the Jews in the early and middle 1930’s, Rachel’s family begged Sundel and Rachel, to immigrate to America, but, like so many Jews, Sundel and Rachel refused to believe that people could be so inhumane to each other, merely because of their religion, or that they were different. They never believed the worst that their property would be confiscated, and they and their whole families might be murdered.

After Kristallnacht, and when the Nazi regime started in full force, the horrors of what was imminent became real. Sundel and Rachel tried to get papers, they tried to leave, but it was too late. America’s borders were closed. European borders were closing, and the European war was starting. It became too late to leave. Realizing what was coming, out of desperation, Sundel and his brother, Lazar, sold the soap factory and all of their real estate and investments for pennies on the dollar, and bought 2 large diamonds on the black market. The rest of their possessions were confiscated

by the Nazis, their farm, their home, and all their personal possessions.

In 1940, Sundel, Rachel, and their children, Moshe and Mina, Sundel's parents, Mayer and Gitel, and Rachel's parents, Chana and Jacob, were taken and interred in the Kovno ghetto, in Lithuania, along with Lazar and his wife Hannah and their 2 children. Sundel and Lazar split the diamonds, and each sewed a diamond into his ghetto clothing for safe-keeping. Whole families of 20 or more lived in one room with very little food. Survival was difficult. Each day was a struggle.

While living in the ghetto, Sundel's father, Mayer, was taken into the street and, as my parents watched, murdered by the Nazis in June, 1941. Shortly thereafter, Rachel's father, Jacob, was shot and killed in full view of my parents, by the Nazis on July 6, 1941. Chana, Rachel's mother, was taken into the street and murdered 3 months later on September 12, 1941. Six months later, Sundel's mother, Gitel, was killed.

On July 9, 1944, Sundel and Rachel's children, Moshe, 10 years old, and Mina, 7 years old, were literally ripped from their arms by the Nazis, never to be seen again and presumably killed. Sundel and his brother, Lazar, were transported by railroad car to the infamous concentration camp, Dachau, in the south of Germany. Rachel and Lazar's wife, Hannah, with Hannah's 2 young daughters, were transported to another concentration camp, Stutthof, in the north part of Poland. Before they were separated, Sundel and Rachel vowed to survive and reunite.

When Sundel and Lazar arrived at Dachau, they each swallowed their diamond, to hide it from the Nazis and with the hope of finding it later. Lazar found his diamond, and re-sewed it into his concentration camp uniform, but Sundel, under the ever watchful eyes of the Nazis, never found his.

Hannah's 2 daughters died of starvation in Stutthof concentration camp. Rachel and Hannah helped some of the younger women to survive, and Rachel helped to protect and save a young girl who today lives in Indianapolis, Indiana and has her own family.

To keep alive, Sundel and Lazar worked at hard labor 20 hours a day. Lazar became ill, so my father carried him to and from the work detail.

Sundel and Rachel, Lazar and Hannah, although losing the rest of their families, their parents and children, miraculously survived the beatings, starvation, degradation, gas chambers, and the daily atrocities of the concentration



Entrance to the El Paso Holocaust Museum

camp and were liberated in March, 1945.

After liberation, Lazar sold his diamond and split the money with Sundel. Sundel, in south Germany, began searching for Rachel, but the Jewish lists recorded Rachel as dying at Stutthof.

At the same time, although hearing that Sundel had died in Dachau, Rachel refused to believe Sundel died. She paid a black marketer, a former Nazi soldier, to obtain forged identity papers. She was in the northern part of Poland. All of the Polish and German borders were closed. Berlin was divided and people could not travel freely. The black marketer obtained train tickets and gave her a new name and identity to travel to the south of Germany, near Dachau. She boarded a train to the south, and the black marketer also boarded the train. Midway to the south of Germany, the conductor asked her for her papers and identity. Rachel, still suffering the effects of the concentration camp, became flustered, and forgot her false name. The conductor forced her off the train. The black marketer, in the next car, realized what happened, and also got off the train. Feeling sorry for Rachel, he helped her board the next train to the south of Germany. Rachel searched for Sundel for many months in the Dachau area.

Meanwhile, Sundel went north to search for Rachel. In Poland, hearing that a woman fitting the description of Rachel indeed survived Stutthof, and was searching for him in south Germany, Sundel raced to south Germany. Sundel and Rachel, after many months of searching for each other, each using what little money they had, obtaining forged passports, and with the help of other survivors, found each other.

All of their possessions were gone, their children, their family. They tried to go back to their original farm in Shaudinia, but it was

confiscated and given to their former caretakers, who threatened to have them arrested if they stepped onto the property. With nowhere to go, they went to Feldafing, Germany and tried to start a new life.

Two more children were born to them, a boy, Myer on July 4, 1946 and a girl Mima on October 3, 1948. In 1949, with the remaining money from 1/2 of the diamond sale, Lazar and Hannah emigrated to Israel and Sundel and Rachel, and their 2 young children, aged 3 and 11 months, with the help of El Paso relatives, emigrated to El Paso, Texas. Once again, Sundel and Rachel had to start over, and they did.

Why is the Holocaust Museum relevant today? Why is it necessary? Who knows what discoveries or innovations, in science, art, literature, or business would have been created by the men, women and the children lost in the Holocaust. Who knows or can understand the deep impact, anguish, and gut-wrenching sorrow visited upon innocent human beings such as Sundel and Rachel and their families from the Holocaust.

This museum is dedicated to memorialize and pay tribute to those who perished in the holocaust and to honor the struggle of the survivors. This museum is created to fight prejudice and bigotry and to remind the world of the value and dignity of human life.

This is one story of survivors told without embellishment, or full appreciation or understanding of the daily horrors of attempting to merely survive through starvation, beatings, gassing, tremendous hard labor, depravity, and the inhumanity to man.

This is the story of my parents, my grandparents, my brother and sister. And this is why the Holocaust Museum is necessary, so that this will never happen again.

Two Major Justice-Related Anniversaries In Texas

BY DEBORAH FOWLER

“You have the right to consult an attorney. If you cannot afford an attorney, one will be appointed for you....” Decades of police procedurals on film and television have ingrained these words into popular culture. In real life, however, the right of all defendants to the assistance of counsel is one that still needs to be safeguarded and championed by those who care about justice for all.

This year marks the 15th anniversary of Texas’ landmark Fair Defense Act, which has helped secure the Sixth Amendment rights of indigent defendants. The Act “fundamentally changed when and how lawyers are appointed to represent poor people accused of a crime in Texas,” said Allan Van Fleet, senior counsel at McDermott Will & Emery in Houston, who was instrumental in the adoption of the Act in 2001. Van Fleet is a longtime board member of Texas Appleseed, the public interest justice center whose research and advocacy established the need for the Fair Defense Act. Back in 2000, Texas Appleseed’s Fair Defense Project found a “complete absence of uniformity in standards and quality in representation” in indigent defense systems in different counties in Texas.

In practice, this meant that defendants in some counties could wait for months to be determined indigent, then could wait even longer to be appointed counsel. Those attorneys may or may not have been qualified, or appropriately compensated, or selected on an objective basis rather than through cronyism or favoritism; judges had almost complete control of the *ad hoc* process.

Across the state, Texas Appleseed found a substantial lack of funding needed to provide effective representation to indigent defendants.

For juvenile defendants, those living with mental illness, and those accused of capital crimes, the situation was even worse.

Armed with the information developed by Texas Appleseed, advocates worked with Sen. Rodney Ellis, D-Houston – a longtime champion of criminal justice reform – to rewrite Texas law to both establish and elevate the standards of indigent defense. The Fair Defense Act required each of Texas’ 254 counties to develop and implement plans to ensure fair and prompt appointment of counsel for the defendant. Counties now appoint attorneys based on standards, instead of at judges’ sole discretion, and follow established procedures for compensating attorneys, experts and investigators.

The Fair Defense Act is making a real difference, but there’s still more work to do to make progress on equal justice in Texas. Texas Appleseed, Sen. Ellis, and several other groups hosted a symposium in May to reflect on what the Act accomplished but also to highlight what challenges still lay ahead. Keynote speaker Lisa Foster, with the U.S. Department of Justice, discussed how gains in indigent defense were still uneven, citing that misdemeanors have low rates of counsel. Oftentimes defendants are being encouraged to waive their right to counsel and resolve their cases through a plea bargain.

A Proud 20 Years

Texas Appleseed celebrates its 20th anniversary this year. The nonprofit has tackled a number of issues over the years in addition to its work on indigent defense. Most recently, Texas Appleseed worked on Texas’ landmark reform of the state’s truancy laws, which eliminated the prospect of criminal charges, fines, and jail time

for youth who missed school days, typically for underlying issues such as chronic illness and homelessness. Texas Appleseed’s research found that African American, Hispanic and special education students disproportionately faced criminal truancy charges.

As part of our criminal justice work, all criminal defendants in Texas now have the right to see all of the evidence against them after the legislature passed the Michael Morton Act, influenced by Texas Appleseed and our partner’s report on the state’s criminal discovery practices.

Another major milestone includes helping protect nearly 9 million Texans from abusive payday and auto title lending practices via strong city ordinances, established in part through our nonprofit’s legal framework. More cities continue to adopt the unified ordinance, as we push for state and federal reform.

We continue to advocate for the youngest Texans through our work on foster care and our work to dismantle the school-to-prison pipeline. At its core, Texas Appleseed works to ensure Texas’ laws and policies are designed so that all Texans can reach their full potential.

The true intent of justice is that it reaches all people, regardless of income, your Zip code, or the color of your skin. From our early beginnings advocating for indigent defense to 20 years later doing that and so much more, Texas Appleseed looks forward to many more years of balancing the scales of justice.

DEBORAH FOWLER is executive director of Texas Appleseed, a public interest justice center. For more information, visit TexasAppleseed.org.

El Paso Association of Legal Professionals

The Elected Officers for the 2016-17 fiscal year:

President: Sandi Ramirez
 President-Elect: Rachel Scott
 Vice President: Mabel Arredondo
 Secretary: Thelma Martinez
 Treasurer: Guadalupe Herrera
 Director: Monica Acuna

June Education Meeting

Speaker: Mr. Eduardo Castillo of the U.S. Attorney’s Office
Topic: TBA
Location: El Paso Club, 18th Floor of the Chase Building
Date: June 8, 2016 **Time:** 12:00 pm

HOW CIVILIZATION CAME TO EL PASO

“The First Thing We Do, Let’s...”

The Assassination of Young Lawyers Oppenheimer and Lyons in 1929
Part III

BY BALLARD COLDWELL SHAPLEIGH

A brass placard fixed to the wall a few inches above and behind the office desk where attorney Herbert D. Oppenheimer was shot multiple times bore the following quotation:

For when the one great scorer comes to write against your name,
He writes not that you won or lost, but how you played the game.

José Marin, the shooter, lied to everyone about how he played his games. Though Shakespeare made a suggestion about killing lawyers, the Bard of Avon also proffered that time is the old justice that examines all offenders. In fact, the force of time not only examines offenders but it may also convince them of their culpability.

At first it was a mystery how two young lawyers were murdered in cold blood in their own offices around noon on Friday, May 31, 1929, or why. Conflicting reports emerged about who was shot first, and how many times. One account maintains that Marin fired five times, another that he shot four times. One account said Oppenheimer yelled twice. Another said it was only once. Police initially believed Marin’s statement that no one was in the office at the time of the shooting except the two lawyers and the killer.

Marin gave many statements to the press and police, all containing inconsistencies or impossibilities about important facts. In one of his first statements, Marin said, “I went to Lyon’s office to talk with him. I carried my revolver for protection. Lyons was not in, so I stepped into Oppenheimer’s office.” Marin said that when he spoke to Oppenheimer, who was sitting at his desk, he noticed Oppenheimer reach toward a drawer. “I saw a pistol in the drawer and drew my weapon and opened fire on Oppenheimer,” he continued. “I do not remember how many shots I fired. As I wheeled about, Lyons appeared in the door. Thinking he had come to kill me, I naturally fired at him once or twice. I do not remember distinctly,

*Newspaper clippings of Marin’s libel*

but I believe Lyons staggered into his office. It looked as if he was falling under the desk. I did not shoot him after that.”

Dr. H.P. Deady, one of the first to reach the offices after the shooting, said Lyons’s body was in a squatting position under the desk of his office. Oppenheimer’s body was on the office floor, his feet under his desk. Marin first said that Lyons did not have a gun but changed that and declared that both attorneys had pistols.

In covering their deaths, the *El Paso Herald* reported that “Lyons and Oppenheimer were considered the outstanding students of international law in El Paso. Their practice among the Spanish speaking element of the city was among the most extensive of the local bar.”

Another article echoed the sentiment with the comment that, “many members of the Mexican colony were in mourning Saturday for Mr. Lyons and Mr. Oppenheimer. The two attorneys were said to be exceedingly popular with the Mexican element of the city.”

But local newspapers also provided other disturbing details. Two weeks before his murder, Frank Lyons told Luis Alvarez, editor of the Spanish language newspaper *La Republica*, that he believed his life to be in danger and that

Marin would be his assailant. And six months earlier, Manuel Ayala, identified as the district attorney in Cd. Juárez, endeavored to get Lyons and Oppenheimer to file a complaint for libel against Marin promising to prosecute him to the fullest extent of the law in Chihuahua. Lyons and Oppenheimer reportedly replied that, “Oh, there is no harm in Marin. There is no danger in him. He will not do anything.”

As for the 1925 complaint charging Marin with unlawfully carrying a pistol, County Attorney D.E. Mulcahy told the press that the case had never been tried at the request of Mr. Lyons, stating, “Whenever the case was set down for trial, Mr. Lyons would come into our office and ask that it not be tried. He said he was in hopes that the trouble would die down and that trial of the case may cause a flair up.”

Immediately after the shooting it was believed, given Marin’s many statements to the press, that no other persons were present except the attorneys and their slayer. The offices were located on the fifth floor of the First National Bank Building, suite 515-519, at 109 N. Oregon. With the absence of eyewitnesses to the murders of Herbert Oppenheimer and Frank Lyons on May 31, 1929 — as Marin kept insisting was true in his many jailhouse confessions to the press — the El Paso criminal defense bar may have felt sympathy for the families of the lawyers but skeptical about how the State would identify Marin as the killer.

With no eyewitnesses, the *corpus delicti* corroboration rule, which guards against false confessions and ensures that a person cannot be convicted of a crime based solely upon that person’s extra-judicial confession alone, posed an obstacle to successful prosecution. In 1929, the science of fingerprint identification was still being developed. The potential of DNA would not be realized for another 60 years or more. With fingerprints and DNA unavailable to tie him to the crime, the case against Marin rested on the testimony of any witnesses that

1. *As You Like It, Act IV, Scene I.*

could be found.

Mayor R.E. Thomason, Tom Lea and Eugene Edwards were discussing business when they first heard the gunfire. The *El Paso Herald* reported that the three attorneys had offices on the same floor of the First National Bank Building as Lyons and Oppenheimer. "What is that?" Lea asked. "Probably some Shriners having a swell time," replied Edwards. "No, it wasn't. That was pistol shots and they were fired on this very floor," said Thomason. The three attorneys immediately stepped down the hallway of the fifth floor.

Newspapers described the law offices of Lyons and Oppenheimer as taking up three rooms on the fifth floor of the building. The center office was used as a reception room and stenographer's office. The office to the east was occupied by Mr. Lyons and the west office by Mr. Oppenheimer.

Marin had just entered the offices of Fruit Dispatch Company across the hall from the law firm, asking an employee, W. O. Smith, to call the sheriff. There he was confronted by the mayor, who asked, "Are you armed?" Marin nodded his head and patted his right trouser pocket. The mayor searched him, taking a .38 caliber automatic pistol from the right pant pocket.

On Saturday, June 1, the morning following the shootings, the District Attorney's office announced that a witness had been found in Cd. Juárez by DA investigator Frank Bailey. Bailey traced this witness through information provided by Isabel Perez, the secretary for Lyons and Oppenheimer, and a description of the witness given by a shoe store employee. The witness apparently purchased two pairs of shoes at the store after the murders.

She was Mrs. Leonora Rios, the wife of Rosendo Rios of Cd. Juárez. She told DA investigator Bailey that she had passed the attorneys' secretary, Isabel Perez, in the hallway before entering the law offices, and had asked the secretary if Mr. Lyons was in. She came to the law offices in connection with a federal liquor charge against her husband for the importation and transportation of 22 gallons and 90 pints of liquor seized at the Smelter in October 1928.

Her presence at the scene was confirmed by former mayor and attorney Tom Lea. Lea told assistant district attorney E.B. Elfers that he had seen Rios there. Rios appeared at the DA's office Saturday afternoon, and accompanied ADA Elfers and other authorities back to the scene of the crime to conduct a walk-through, reenacting the tragedy as she had witnessed it.

The accused, meanwhile, became practiced at giving interviews to the press. He had no attorney. He told reporters that he was waiting for the city's most preeminent criminal defense lawyer, W. H. Fryer, to return from New York City where, strangely enough, Fryer himself had been indicted on a white collar case. Upon his return, Fryer emphatically stated that he would not represent Marin. Finally, the defendant secured the services of attorney Milton Vaughn "Buddy" Ward, who had worked as an assistant prosecutor in the District Attorney's office from 1920 to 1928.

Buddy Ward would later become the judge of the first County Court. He was also the father of William E. Ward, who became judge of the 34th District Court and then an associate justice on the Eighth Court of Civil Appeals. Bill Ward was sitting on the appellate court when it acquired criminal jurisdiction in 1981. His son and Buddy's grandson, William E. "Bill" Ward, Jr. is an attorney in Midland, and a partner in the firm of Ward and Myers.

Buddy Ward was hamstrung by his client's many pronouncements about the case. Marin freely confessed his guilt to reporters, but insisted that there was no eyewitness to his gunplay. On Wednesday, June 5, 1929, for example, he told a reporter, "I admit I shot Mr. Lyons and Mr. Oppenheimer. There is no need of lying. I could have gotten away, but instead I went across the hall and telephoned the police myself. Do you think a man who would do that would not see a woman if she had been in the office?"

According to the *El Paso Evening Post*, Leonora Rios told Bailey, "I was standing beside Mr. Lyon's desk and he was writing me out a receipt for some money I had given him when a man came running in the door between the offices of Mr. Lyons and Mr. Oppenheimer. Without saying a word, he fired at Mr. Oppenheimer. He ran direct to his door. At the first shot, Mr. Oppenheimer yelled. It sounded like he said: "Amigo Mio." There were four more shots very fast. At the first shot, Mr. Lyons dived under his desk in his office. His back was sticking out. After shooting four times at Mr. Oppenheimer the man ran toward Mr. Lyons office I was starting to run out of the office when the man ran at me with the pistol pointed. I threw up my hands and backed into Mr. Lyon's room, screaming "My God, don't shoot me." The man ran in and fired a shot into Mr. Lyon's back as he crouched under the desk. Then he started to run around to the other side of the desk toward which Mr. Lyon's head was pointing. As he ran around the desk to get to the other side, I



Courtesy—34th District Attorney's Office

DA's file: witness statements, evidence envelopes and placeholders, clippings but no photographs

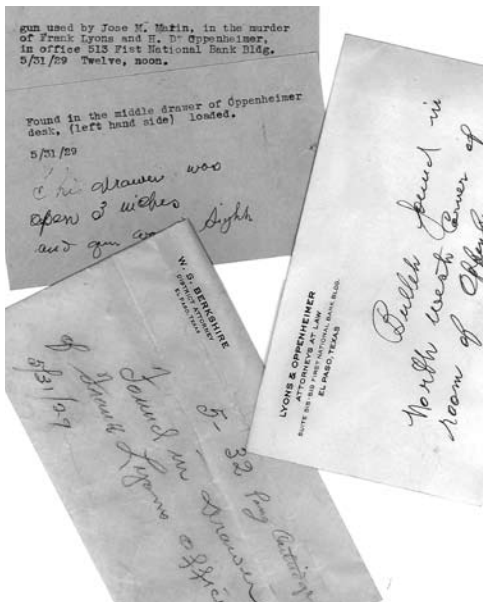
ran past him into the room between the offices and ran out of the door. Before I reached the door, I heard another shot."

District Attorney Stewart Berkshire confirmed that Lyons was shot in the back, with the bullet found to be protruding under the skin of the right breast. Lyons was also shot in the top of the head with the bullet exiting his chin. Berkshire told the press he was investigating whether Marin gave Lyons a "mercy shot" as the attorney lay under his desk, which would apparently be relevant on the issue of malice aforethought. According to ADA Elfers, the fact of Rios' presence during the murders was also corroborated by a receipt for payment found on Lyons' desk bearing her name, reading "Rosendo Rios, \$35."

The DA credited Isabel Perez, the lawyer's stenographer, with helping to find Rios. The theory that the lawyers were alone with their killer when the shooting started actually originated with her, and not Marin.

Perez said that no one except her employers were in the office when she left for lunch at noon. The *El Paso Herald* reports her as stating, "I put on my hat and told Mr. Lyons and Mr. Oppenheimer that I was going to lunch. They waved at me, each man sitting at the desk in his own office. I stepped to the elevator and pressed the button. As I waited for an elevator, I heard three shots."

But Perez' signed statement to investigators states otherwise. She said she had been



Indications of evidence

Courtesy: 34th District Attorney's Office

He then saw an old man walk into the Fruit Dispatch offices at 516-518, saying "Call the Police" in English, and offered to hand a gun to Smith who did not accept it. So, Sims stated, the old man laid it on top of a corrugated box and sat down in a chair next to the door. While Sims called the police, the man picked up the gun and put it in his right pants pocket. After calling the police, Sims said he walked over to the Lyons and Oppenheimer offices and saw both men in their respective offices apparently dead. He states that he believed that he was the first to go into their offices.

Sims then returned to his office and called the police department to send the coroner. Fred Miller's account bolsters and repeats the Sims' account, but he adds that the old man who entered the Fruit Dispatch offices "was at all times very cool and not the least bit excited."

W.O. Smith said his attention was first drawn "to a series of [gun] shots, at least four first, then a pause and at least four or five more." He thought it was a celebration of some kind, and "walked to the hall then up towards the elevator and got as far as Niemeier's office which is the door adjoining the door to the reception room of Lyons & Oppenheimer." Smith did not realize anything was wrong until he saw the man come out of the reception room of Lyons and Oppenheimer's offices with a gun in his hand. The man crossed the hall and came directly to the office into which Smith had returned and, according to Smith, "offered the gun to me with the barrel pointing toward me and said one word in Spanish, which I did not understand and do not remember." Smith refused to take the gun and the man then put the gun on a box, and then said in English "Call the Sheriff." The old man, Smith said, "was very cool and not excited in the least. Smith then walked "into the office of Mr. Lyons first and saw him sprawled underneath his desk apparently dead, and then went over to Mr. Oppenheimer's office and saw Mr. Oppenheimer lying on the floor to the left of his chair with his head pointing over to the window."

The DA's file also contains physical evidence collected at the scene including Marin's firearm, some bullets, as well as papers and documents from the offices of Oppenheimer and Lyons. Police located a loaded gun in the middle drawer of Oppenheimer's desk on the left hand side, and noted that the drawer was open three inches and the gun was in sight. Police also found a bullet in the northwest corner of his office. In Lyon's office, police found five .32 caliber cartridges. No firearm is mentioned as having been found there.

employed for eight months, and had "left for lunch at one minute till twelve, leaving Mr. Oppenheimer alone in the offices." As she approached the elevators, she encountered Lyons getting off another elevator and after a brief conversation, Lyons continued to his office. Just then, Mrs. Rios emerged from another elevator on the fifth floor and asked her if the lawyers were in. Perez stated that just as Rios was arriving at the offices, Perez heard two or three shots, a man yell and then more shots.

As these shots were being fired, Perez saw Mrs. Rios come running to the elevators, mumbling something. A scared Perez began descending the stairs, but returned to the law office with a friend named Maria Martinez where, Perez said, she saw both victims lying on the floor.

The District Attorney's file offers clues about the evidence to emerge at trial. The file contains two criminal complaints charging the offense of murder filed in the Justice of the Peace Court Precinct One. The file also contains typewritten statements dated June 1, 1929 by W.O. Smith, Fred Miller and S.C. Sims, all of whom worked across the hall from Lyons & Oppenheimer at the Fruit Dispatch Company, describing what they saw and heard, a typewritten statement by Isabel Perez, and pink-colored index cards serving as place holders for physical evidence, including Marin's gun, seized at the scene.

Fruit Dispatch Manager S.C. Sims said he first heard what sounded like four or five shots and, after a brief interval, four or five more. He said Smith initially walked out into the hall, and Sims summoned him back.

The DA's file contains various written complaints, now yellowed with age, in which Marin lodged complaints with the police and the Justice Court, and clippings of articles written by him appearing in Cd. Juárez newspapers detailing his complaints against them.

However, the DA's file contains no evidence about the most intriguing circumstance in this case. Prosecutors frequently argue that they are not required to prove the motive for the crime. But juries still want to know why the crime was committed. Marin's motive could be related to a trip Herbert Oppenheimer took to Chihuahua just days before he was murdered, returning on May 25, 1929. The reason for the trip was unknown to prosecutors, and it does not appear to have been investigated by police.

Courtesy: Jeanne Oppenheimer Moye and Family

Sr. <u>H. D. Oppenheimer</u>	
HOTEL PALACIO, S. A.	
1231 EXTRACTO DE CUENTA	
Chih., Méx., a <u>25</u> de <u>Mayo</u> de 192 <u>9</u>	
CUARTO } Núm. <u>211</u> CB	Renta \$ <u>6.00</u>
ROOM }	
Días—Days	<u>24</u> 00
Días—Days	
Caja—Cash	
Café	<u>875</u>
Buffet	
Tobaccos	<u>300</u>
Sastre—Tailor	<u>250</u>
Lavandería—Laundry	<u>370</u>
Automóviles	
Boletos—Tickets	<u>18 80</u>
Cama Dormitorio—Berth	<u>6 00</u>
Equipaje—Baggage	
Telegramas	<u>14 43</u>
Express	
Timbres—Stamps	
Mensajero—Messenger	
	<u>81.18</u>

Mystery surrounds trip to Chihuahua

Less than a month after committing capital murder José Marin also died in custody. A United Press report stated, "José Marin is credited with having closed the case, so far as he is concerned, by serving as his own executioner." He was found unresponsive in his El Paso County jail cell early on the morning of Sunday, June 23, 1929, prior to the first trial setting for the murder of Lyons. Oppenheimer's case would follow. According to reports, the state was asking for the death penalty.

In response to a request for information about Marin's demise from the Spanish Ambassador, communicated through Governor Dan Moody, assistant district attorney E.B. Elfers wrote:



Courtesy: Author's collection

The gravesite of Herbert D. Oppenheimer in Mount Sinai Cemetery

José María Marin was found dead on the floor of his cell in the county jail early on the morning of Sunday, June 23, 1929. Physicians were immediately called and an autopsy conducted by Dr. Willis W. Waite of this city resulted in the finding that death had been due to strychnine poisoning. A copy of Dr. Waite's report is attached hereto. The poison was apparently self-administered. A small tin box was found in the cell which was empty when found, but there were still traces of some white powder on the inside of the box. The seam on the inside of the cuff at the bottom of one of the trouser legs had been recently ripped open and we found by experiment that the tin box would have just fit this opening and the condition of the cuff at this point indicated that some object about the size of the this box had been concealed therein. We reached the conclusion that Marin had in this manner carried this poison into the cell with him, for unusual precautions had been taken following his arrest so that no opportunity had been afforded him to obtain anything of this kind while in jail. The statement in the communication from the Spanish Ambassador that the officers in charge of the jail had at first stated that Marin was found lying on his cot with no evidence of struggle is not correct. He was found on the floor of his cell and as indicated by Dr. Waite's report, showed every evidence of having died in convulsions.

... About 12:10 P.M. on May 31, 1929, he went to the offices of Frank J. Lyons and H.D. Oppenheimer... and shot and killed both of these men. The shooting was carefully timed and

planned so there would be no eye-witnesses, for the investigation showed that Marin had deliberately waited in the hallway until after it appeared everyone had left the offices except these two men, but it happened that a very intelligent Mexican woman was in the offices at the time and witnessed the shooting and by her we were prepared to show that Marin had assassinated these two men in cold blood. He was indicted a few days later and the first case was set for trial on Monday, June 24, 1929. When the jailer went to Marin's cell on the early morning of June 23rd he found him dead and immediately gave the alarm with the results hereinbefore stated.

We will not undertake to comment on the contention of the Spanish Ambassador that Marin had been driven to desperation through being robbed of a large amount of property and money by these attorneys. Marin had resided in his city for some ten years and during that time his claims had come to be a matter of common knowledge to the bar of this city, for he had gone to first one lawyer and then another in an effort to prosecute suits for what investigation had disclosed to be imaginary claims. The fact is that he never was a man of wealth and during his residence here had been a source of almost continuous trouble. He was not only claiming that Lyons and Oppenheimer had robbed him, but was making similar unfounded claims against other residents of this community

Courtesy: Author's collection



Lyons' gravesite in Concordia

and he had been guilty of a number of acts of violence prior to the shooting in this instance.

According to one press report, another theory was that a bottle of sal hepatica delivered to Marin on the Friday before trial by a friend was thought to have contained the poison. A thorough investigation was promised into all persons with whom Marin had been in contact. Dr. Willis Waite, M.D. was summoned at 6:00 a.m. Dr. Waite's post mortem examination found that Marin had been dead for several hours. Chemical analysis of the stomach and contents revealed strychnine present in considerable amounts, which Dr. Waite gave as a cause of death.

Thus, the force of time not only examined José Marin but it also convinced him of his culpability. In a 1913 speech to the Boston Bar Association, Oliver Wendell Holmes said that life is an end in itself, and the only question as to whether it is worth living is whether you have a enough of it. Herbert Oppenheimer and Francis Lyons were not granted enough of it, but they would have readily argued that it is worth living. Ω

The three-part series entitled *The First Thing We Do, Lets....The Assassination of Young Lawyers Oppenheimer and Lyons in 1929* was written to memorialize the 87th anniversary of the passing of Herbert D. Oppenheimer and Francis J. Lyons with particular support from Jeanne Oppenheimer Moye, the youngest child of Herbert D. Oppenheimer, for which the author is especially grateful. Also commemorated is the long, faithful service of Clinton Cross as editor. The following resources have been used: the papers, letters, photographs and other items contained in the family collection of Jeanne Oppenheimer Moye; the files of the 34th District Attorney's Office; Sonnichsen Special Collections Department, University of Texas at El Paso Library, with acknowledgement to Claudia Rivers; *The El Paso Morning Times* and *The El Paso Herald* archives of the El Paso Public Library; and personal interviews with Jeanne Oppenheimer Moye. This presentation includes the creative work of others. This property is being used by permission or under a claim of "fair use" pursuant to 17 U.S.C. §107, and was created pursuant to fair use guidelines and further use is prohibited.

BALLARD C. SHAPLEIGH is an Assistant District Attorney in the 34th Judicial District and a fifth generation El Paso lawyer.

My Story...everyone has one

PART III

BY CLINTON F. CROSS

In my previous article, I reviewed my career prior to my resignation as director of Texas Legal Services Center. After TLSC's board hired a replacement, I left the office and reassessed my options. I had not practiced law for many years. Austin's legal community was crowded. I decided to return to El Paso.

In 1985 I went to work for the El Paso County Attorney. My predecessor on the job, Joe Holland, had represented that I would be paid what he had been paid. I took the job trying to recover my "sea legs" but also believing I would get paid what Joe said I would get paid. With the first check I learned that I would be earning entry level wages. I was a bit disappointed but at that point had no other reasonable options so I stayed.

After one year on the job, I ran into an old acquaintance, Gerry Joe Smith, who asked me what I was "up to." I told him I was trying to decide whether or not to stay with the county attorney's office another year or explore other options. He said, "I'm swamped. You will learn more from me. Work for me." I agreed to do so.

I was still a relatively inexperienced lawyer when I went to work for Smith. For instance, I had never taken a deposition.

I worked for Smith for one year, but in that one year, I learned more about trying cases than I had learned in all my previous years of law practice.

Gerry explained to me that in the practice of law there were learning opportunities, earning opportunities, and *pro bono* opportunities. He kept the earning opportunities. He gave me the learning opportunities. I didn't see many *pro bono* opportunities.

I tried cases against good lawyers like Sam Sparks, Chip Cobb, Charlie High and others. I lost all but one case. I tried to look good losing.

I finally won a trial. Our client had a small grocery store and he was shoved by one of Frito Lay's managers who was attempting to recover a potato chip stand that my client claimed had been given to him by one of Frito Lay's route salesmen. Our client claimed he had suffered serious "pain and suffering" because of the shove. We sued. Because the defendant's employee was a manager, we sought exemplary damages. I



*County Attorney's Office
(it beats getting written up)*

tried the case and recovered compensatory and exemplary damages.

The opposing counsel appealed the case to the El Paso's Eighth Court of Appeals, paying for the trial record and all expenses of appeal. The appellate court held for the defendant, finding no liability because its employee had no authority to deviate from his employment and shove our client.

By this time, I had resigned from Gerry's employment and opened my own office. Gerry said I could keep my learning opportunity. I appealed to the Texas Supreme Court. I argued the case and I won. *Ramos v. Frito Lay, Inc.* 784 S.W. 667 (Tex. 1990). I later learned that the court's opinion had been included in a law school casebook. I also learned that arguing a case before an appellate court is a lot easier than answering questions in law school. There is more time to prepare.

The next year I argued an interesting family

law case in the El Paso Court of Appeals. The facts were somewhat unusual. When my client married her husband, she had a child by a previous relationship. When the couple divorced, the trial court found a child "of the marriage" even though the child had not been adopted by the couple. The husband was ordered to pay child support. The husband did not appeal.

When the husband remarried, he attempted to terminate his parental relationship to the child. In a default hearing, the trial court granted his request but failed to appoint an *ad litem* to represent the child. The trial court failed to grant my motion for new trial. I appealed to the Eighth Court of Appeals. In a case of first impression (the statutory law was clear), the court held that the trial court was required to appoint an *ad litem* for the child in the termination case. *Nichols v. Nichols*, 803 S.W. 2d 484 (Tex. App.--El Paso, 1991, no writ).

I struggled in solo practice for seven years. I could hardly afford to spend \$100 for a deposition and my clients either did not want to front the money or could not afford to do so. I wasn't successful in business, but no client ever filed a grievance against me.

My family could not help me as my uncle had lost the family fortune. In attempting to recoup his losses, he allegedly defrauded a number of banks. This upset the banks and the Federal Bureau of Investigation (FBI).

After my uncle moved with me to El Paso, Judge Herb Cooper ordered my uncle to submit to electroshock therapy.

My uncle was never indicted.

In 1993 I met Noel Gage, a new lawyer in town, and I mentioned that I planned to seek a job with a firm as I didn't think I could turn my solo practice into a profitable business. He offered me a job. I took it.

Three years later, Noel moved his firm to Las Vegas. I then went back to work for the El Paso County Attorney's office.

In 2002 my mother, destitute, depressed and with a failing heart, committed suicide. In 2004 my uncle died a natural death.

As an assistant county attorney, I first prosecuted child abuse and neglect cases. As a legal aid lawyer, I had met many poor people who were honorable but had limited skills. In my new job, I met many parents who abused drugs

and their children.

I'm afraid most middle class Americans who have never experienced poverty think most poor people are like the parents I met prosecuting child abuse and neglect cases--promiscuous, drug addicted, "immoral." The perception is misguided. The parents of abused and neglected children are usually (not always) "poor" and they do not fairly represent the vast majority of "poor" people.

At some point in time, I began to prosecute criminal deceptive business practice cases. Most of these cases involved claims against contractors or landscapers who had been paid money in advance for work they represented that they would do but then failed to do the work and kept the money. The El Paso County Attorney's office prosecutes these cases because many of the defendants are "judgment proof" and our civil law system fails to provide the victim with an effective remedy when promise breakers and thieves are "judgment proof." The wrongdoer can take the money and run.

The crime of Deceptive Business Practice, Art. 32.42, Tex. Penal Code, requires proof of criminal intent at the time the defendant has a duty to deliver the property or services "sold" to the buyer or return the money, not at the inception of the transaction. The crime is not committed until the duty arises to deliver the product or service arises. Bankruptcy is not a defense.

In the course of prosecuting these cases, I was sometimes confronted with situations where I thought the defendant should be held financially accountable for taking money and then failing to deliver but not labeled a thief for the rest of his or her life.

The criminal law system requires a determination of guilt or innocence prior to a restitu-



*Jo Anne Bernal, Clinton Cross,
and Margie Medina*

tion hearing (a determination of the amount of money owed to the victim). A conviction for a crime of moral turpitude is a permanent badge of dishonor, inhibiting for life future employment opportunities. A conviction can result in deportation. But as the cases are traditionally prosecuted, there can be no court ordered restitution without a prior conviction.

There are some situations where people should be held accountable but need a second chance. We don't all live perfect lives.

I tried to find a middle ground for resolving the goals and the tension between the civil and criminal law systems by "flipping" the restitution hearing before the guilt or innocence hearing and then by requiring the defendant to pay the restitution without being found guilty of the crime. The amount of restitution claimed by the victim was often disputed. I thought the defendants were entitled to "due process" regarding this portion of the case as well as in the guilt or innocence phase of the case.

I encouraged the El Paso Better Business Bureau to apply for a grant from the Texas Bar Foundation to train lawyers to arbitrate the restitution. The grant was awarded, the training was conducted, and the plan implemented.

An agreement to arbitrate the restitution was voluntary, part of the "plea bargaining" process. By "outsourcing" the restitution dispute, we saved court time and the taxpayer's money. A defendant had to agree to waive his or her Fifth Amendment rights and the State had to agree not to use any statements made in the arbitration against the defendant if there was a later trial.

After arbitrating and obtaining a determination regarding restitution, the defendants almost always paid the money and upon doing so obtained a dismissal or deferred adjudication. If the defendants did not pay, I set the case for trial.

I learned that it is sometimes difficult to balance the desires of victims who drive the criminal justice system and the desire to prosecute in a compassionate manner that sometimes gives defendants a second chance. Victims usually want both money and punishment. Prosecutors need convictions and restitution and they need both as soon as possible.

I retired from the El Paso County Attorney's office on March 31, 2015. With the publication of this issue the El Paso Bar Journal, I also retire as its editor.

The El Paso community has treated me well. County Attorney Jo Anne Bernal and her staff honored me in retirement more than I deserved. So did the El Paso Bar Association.

I have titled this article "My Story" rather than "My Life" because I still live. In due time I hope to continue to contribute to the El Paso community and hopefully repay it for the riches it has given me.



3 offices	2 large rooms
reception area	2 utility rooms
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My Trip to Costa Rica

(Continued from the April-May issue of the Bar Journal)

BY CLINTON F. CROSS

After passing the bar exam in 1968, I drove from Laredo, Texas to San Jose, Costa Rica with my roommate Phil Brigham to visit Dolly, Phil's former wife, whose mother was a Talamancan Indian who lived in a pre-Spanish style thatched roof hut in the jungles near the Panamanian border. By the time we arrived in Costa Rica, the car no longer had a front windshield (having hit and killed a cow in the road shortly after entering Costa Rica). The undercarriage of the vehicle was virtually destroyed by hitting potholes in the road the remaining hours of the night.

I view this trip as a metaphor of my own life, an interesting exploration but also one full of numerous obstacles and challenges.

After about a month and a half in Costa Rica, we began to plan our trip home. We invited Octavio Mayorga Mayorga, Dolly's half-brother, a 17 year old who had never left the jungles of eastern Costa Rica, to travel with us. Short of cash, we recruited a freelance photographer trying to get back to the States as cheaply as possible. He agreed to travel with us and share expenses.

We had problems trying to get back home. After entering Nicaragua, the fan belt that cooled the engine broke. An air cooled engine without a fan belt is like a water cooled engine without water. Since I did not have a spare fan belt, I took a bus down the Pan-American highway to see if I could find one. After stops at a number of gas stations, I found a fan belt that would fit my car but by that time it was midnight and there were no more buses going back down the road towards my disabled car until morning.

Unwilling to leave my friends by the roadside all night, I decided to hitch a ride back to my car. There was very little traffic on the road. The stars shown brightly in the sky. After a short time, a pickup truck with two large Nicaraguans in the front seat picked me up. Sitting between both of my hosts, they told me how Mexicans would kill someone for a few pesos and then asked me about my finances.

When we reached my car, the driver dropped me off. I fixed the fan belt and we proceeded on our way.

We had another problem on our way through



My 1962 Corvair

Honduras. Driving behind an 18 wheeler, I suddenly confronted a large rock in front of my car. Unable to swerve to the right or left, I drove straight ahead. The car, low on the ground, with no metal underpinning, hit the rock which then hit the cable between the gas pedal and engine and broke it apart.

Left with no control over the gas, I had to use the clutch to control the car's speed. Since the wheels were not properly aligned, the car wouldn't go very fast without getting the shakes. But the real problem was the clutch.

I fixed the clutch problem by finding a gas station with a hole in the ground for use working on the undersides of a vehicle. We drove over the hole in the ground and with some wire repaired the broken cable.

We slept in the car or on the nearby ground every night. When we entered Honduras, the government had imposed martial law. At night, we could hear the sounds of gunfire.

We were a colorful group of travelers when we approached San Salvador in a dilapidated 1962 Corvair, Ralph Nader's favorite car: a law school graduate, a practicing alcoholic, a wandering free lance photographer, and a seventeen year old Costa Rican who had prior to this trip never before left the jungles of eastern Costa Rica.

The car hugged the ground, its shock absorbers destroyed, its wheels no longer aligned. The car's floorboards, composed of plywood, kept our feet off the ground but it did not shield us from the road's dust. The cable controlling car's speed was broken, functioning only because the separate parts were connected by wire. The front seats, no longer attached to the sides of the car, were held upright by an oak limb placed

under the seats and on top of metal bars extending from the sides of the car. We drove into the wind and the rain, a front windshield no longer capable of protecting us from nature's fury.

As evening approached, we pulled into a drive-in restaurant to ask for directions. Phil went into the restaurant and met some Germans who were drinking beer. He joined them and after many drinks made a deal with the owner of the restaurant that allowed us to spend the night on the premises. When the restaurant closed, we camped out.

In the early morning, a stranger approached us with a gun and demanded payment for "rent." I pretended I did not understand Spanish. In a few minutes the a private guard, hired by the owner of the restaurant to protect his property, arrived and confronted the stranger and the stranger left. I asked the guard, "What's going on?" He explained that the man wanted to steal our money.

We lingered for awhile, deciding to have breakfast. Our traveling companion, the freelance photographer, excused himself and after finding someone who offered to give him a ride disappeared. When he returned he notified us that he had discovered a way to get home on a bus. He apologized for leaving us but said he thought the bus was more likely to get to the United States than we were. At that point, we were only one third of the way home.

What to do? I concluded that our departed companion had the right plan. I just had to modify it. We did not have enough money for bus tickets. I decided to sell the car and use the proceeds to go to the United States on the bus.

I looked for a buyer. My first stop was at a business that repaired cars and sold car parts. The owner offered to buy the car for a few hundred dollars. He told us to go to a nearby hotel, have a good dinner, and spend the night. He said he'd pay the bill. He told us to return the next morning at 10 am.

We returned to the business the next morning as directed, but the owner did not keep his appointment. We met his son who had studied at the University of California at Berkeley and spoke English and after about an hour he told us about a possible hitch to the deal. The government, he said, taxed cars when they were sold and the tax (called an *aduanas* tax) was set by statute. Since my Corvair was not worth the cost of the tax, he said his father would just strip the car and use or sell its parts without paying the tax. He said his father was not worried about any legal problems because he served in an army reserve unit with the nation's President. On the other hand, he said, we might end up in jail. He claimed the jail food

was bad. We'd probably all get sick. We might be in jail for a very long time. He recommended we pay the hotel for the overnight stay and forget about selling the car to his father.

I found someone who agreed to help me find a buyer for my car. We left my friends on a bench at the side of the road while we looked for prospective buyers. After several stops, we ended up at a roadside restaurant. The restaurant's owner did not want to buy the car.

Sitting at a table outside the restaurant, a customer called out to us, "*¿Quiere vender ese carro? ¿Quiero comprarlo!*" After an hour or two and many beers, we made a deal.

I first picked up my friends who I had left behind on a street corner, now hot, tired, and mad. I then slowly followed my new friend to his home. He directed his wife to get out all the spare cots, that his new friends would be staying a few weeks.

After one week in San Salvador, we decided to take a train trip to a lake in the interior of the country. On the sides of each passenger car, soldiers rode with bayonets fixed. It seemed to me as if someone from Hollywood was making a movie. At the end of the train trip we spent time mingling with natives who came to sell hammocks and other items beside the shores of a beautiful lake (probably lake Ipatongo).



Clinton Cross, rear left; Phil, middle; Octavio, far right; and our host and his family

When it came time to leave El Salvador, my host gave me some money and sealed documents evidencing sale of the car and payment of the *aduanas* taxes. We bought bus tickets to Mexico City, then got on the bus and relaxed. I thought this would be easier than driving a car to Texas with no windshield, floorboards, spare tire or properly aligned wheels. The customs officials who checked our passports and visas on the bus never asked me for my car papers.

When we reached Mexico's southern border, the Mexican authorities canceled Octavio Mayorga Mayorga's visa. He had to demonstrate financial responsibility by having at least \$200.00

on his person. Phil and I did not have two hundred dollars in our wallets but we were free to continue on our trip. The Mexican authorities did not believe that Octavio Mayorga Mayorga was in any way related to us. Upon reflection, I now suspect "racial profiling."

I was in a strange land, on Mexico's southern border, responsible for the care of a seventeen year old Costa Rican juvenile, my friend's wife's half brother, who no longer had a visa, and I did not have enough money to send him home or get him past the Mexican border patrol.

I sent Phil and Octavio back to Guatemala City to get a new visa. I took a bus to the Mexican border town of Tapachula, hoping to reach my uncle by phone and get financial help. I didn't want to call my mother because she I hadn't told her about traveling to Costa Rica in my old car.

Before I could find a phone, I saw two neatly dressed young Anglo males riding bicycles. In each bicycle basket there was a small black book. Mormon missionaries! I hailed them and explained my problem. They offered to loan me sufficient funds to satisfy the Mexican authorities. They went to their bank, got the money, and loaned it to me. With more money in my pocket, I took the bus back to the border.

Back at the border station in the middle of no-where, I met Octavio who by that time had acquired a new visa. I gave my borrowed money to Octavio. The Mexican authorities were skeptical. Where did the money come from?

We were finally allowed to proceed when an official from the Mexican Department of Tourism arrived and persuaded the border patrol officials to let us take the next bus to the United States.

We stopped in Tapachula and I repaid the Mormons.

Shortly after we got home, my former host from El Salvador traveled to the United States to visit his mother.

A few weeks later, the police in San Salvador impounded "my" old Corvair, which at the time was sitting peacefully outside my friend's home. The police claimed "my" car was illegal contraband because no-one had paid the *aduanas* taxes.

"My" Corvair then had its brief moment of fame. It was featured as an example of illegal trafficking on the front page of the local newspapers and the criminal activity was also reported on all the television stations. My friend blamed his wife for the problem. He said he could have fixed everything.

We were safely back home when my car made the news.

The Grand Jury in Historical Perspective *Part II*

BY JOSHUA TATE

The modern grand jury is directly descended from an institution known as the jury of presentment or accusation, created by the English king Henry II in 1166. Henry became king following a civil war, and his most important priority was to restore order. However, he could not afford to spend much in pursuit of this aim, as he needed to consolidate his military position throughout the lands he controlled, which included the western part of modern France as well as Ireland. Henry's solution, made at a royal assembly at his hunting lodge in Clarendon in 1166, was to summon jurors from the communities of England to "present" individuals who were suspected of being robbers, murderers, or thieves.

Criminal procedure before Henry II was limited. When a violent criminal was caught red-handed, the community could summarily try and execute the individual through a procedure known as the "hue and cry." However, this form of summary justice was limited in scope and could not address the broader public order problem Henry II faced. The alternative, called the appeal of felony, was a privately initiated procedure that was brought by the victim of the crime. This procedure was also inadequate to address Henry's concerns, because it depended on the victim taking the initiative, and in some cases victims might be reluctant to act out of fear of retaliation.

King Henry's new juries of presentment drew on local knowledge from the communities of England. In many parts of the country, villagers worked side by side in "open fields" and lived in close proximity to each other. In such a society, everyone could be expected to know everyone else's business. Thus, through the Assize of Clarendon, King Henry took advantage of local knowledge in the communities of England in an age before professional police.

Individuals presented by the juries under the

Assize of Clarendon did not receive a jury trial. Instead, guilt or innocence was resolved through the ordeal of water, a procedure that involved lowering the accused into a body of water to see if he would float, in which case he was deemed guilty. At the time of Henry's reign, the procedure was blessed by a priest, which was the key to popular acceptance of the result.

The ordeals lost their force after 1215 due to a papal decision. Canon 18 of the Fourth Lateran Council provided that, in the future, priests would not be allowed to participate in the ordeals. After 1215, the English courts were not sure how to handle the cases that were previously decided by the ordeals. A practice developed of asking the defendant how he wished to be tried. If he responded, "By God and the Country," he would be given a jury trial. Defendants who refused jury trial would be pressed with heavy weights until they relented or were killed. This was referred to as "*peine forte et dure*." Not surprisingly, the vast majority of defendants agreed to be tried by a jury.

In the mid-fourteenth century, a devastating plague known as the Black Death ravaged England, killing about 40 percent of the population. The Black Death caused an acute labor shortage and led to greater social and geographical mobility. Traditional open-field agriculture gave way to urbanization. By the end of the Middle Ages, these demographic changes meant that the grand jury would no longer be knowledgeable about suspected criminals in their locality. Prosecutions were initiated by complaints brought to a Justice of the Peace or directly to the grand jury. The grand jury came to serve a different role: screening out groundless or insubstantial prosecutions.

Beginning in the 1690s, Parliament responded to the growing problem of crime in an urbanizing England by passing a series of "reward" statutes. These statutes offered monetary incentives for

individuals to investigate and report cases of serious crime. A significant drawback of the reward statutes was that they created an incentive for perjury. Individuals known as "thieftakers" earned a living by reporting alleged criminals, some of whom may have been innocent. Because the thieftakers needed convictions to obtain their rewards, they were not likely to distinguish between the innocent and the guilty.

Beginning in the 1750s, a group of constables known as the "Bow Street runners" served as quasi-official detective police in England. In 1792, Parliament authorized a paid police force for the city of London. This was expanded in 1829 to create a single uniformed force for greater London ("the Bobbies"). Professional police departments were established in major U.S. cities beginning in the mid-nineteenth century. These new police departments were partly inspired by the London Metropolitan Police. In some cities, police departments were authorized in response to riots between nativists and Irish immigrants.

The grand jury became the subject of widespread criticism in England beginning in the mid-nineteenth century. Increasing reliance on legally trained magistrates to serve a pretrial screening function, along with the existence of a professional police force, rendered the grand jury's role superfluous in the view of many. In 1933, England abolished the grand jury.

In conclusion, the grand jury was created 850 years ago to gather information about suspected criminals in the absence of professional police. Whatever may be said about today's grand jury, it certainly does not serve its original purpose. It would be wise to consider the history of the institution in making arguments about its possible elimination or reform.

JOSHUA TATE is an Associate Professor, SMU Dedman School of Law

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and safe summer!!!*

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